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Occupational Safety and Health Administration

29 CFR Part 1903

Abatement Verifcation; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1903

[Docket No. C–03]

RIN 1218–AB40

Abatement Verification

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Final rule.

SUMMARY: OSHA is issuing a final regulation requiring those employers who have received a citation(s) for violation(s) of the Occupational Safety and Health Act (OSH Act or Act) to certify that they have abated the hazardous condition for which they were cited and to inform affected employees of their abatement actions. The abatement procedures a specific employer must follow depend on the nature of the violation(s) identified and the employer's abatement actions. If abatement occurs during or immediately after the inspection that identified the violation(s), the employer is not required to submit an abatement certification letter to OSHA. If the violation(s) is an other-than-serious violation, or a serious violation that does not require additional documentation, the employer is required to certify abatement using a simple one-page form or equivalent. In cases involving the most serious violations, additional documentation is required. The final regulation being published today codifies, simplifies, and streamlines the abatement certification procedures that OSHA has previously enforced administratively. OSHA has determined that this abatement verification regulation will reduce employers' paperwork, enhance employee participation in the abatement process, increase the number of cited hazards that are quickly abated, and streamline and standardize OSHA's abatement procedures.

DATES: This final rule is effective on May 30, 1997.

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SUPPLEMENTARY INFORMATION: A Table of Contents identifying the various portions of this regulatory package follows.

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I. Background

Under the OSH Act, 29 U.S.C. 651 *et seq.*, OSHA inspects workplaces to determine whether employers are complying with OSHA standards and other statutory and regulatory requirements. The purpose of OSHA inspections is to identify violative conditions that pose safety and health hazards to employees and to ensure that these conditions are abated. If OSHA determines that a given employer has committed a violation, a citation is issued. The citation references the alleged violation, notes the proposed penalties, and indicates the date by which the violation is to be corrected, i.e., the abatement date (see Section 9(a) of the OSH Act and 29 U.S.C. 658(a)). For each inspection, OSHA opens an employer-specific case file; this case file remains open throughout the inspection process and is not closed until the Agency is satisfied that abatement has occurred.

OSHA has followed a variety of administrative procedures in the past to ensure that employers abate cited hazards, and has modified these procedures a number of times in the years since the Agency was established. Currently, the cover letter to the employer that accompanies all OSHA citations states that the cited employer must notify the Area Director promptly by letter of completed abatements, as well as provide documentation, such as a photograph or description of the method of abatement, that abatement has occurred. OSHA also frequently conducts follow-up-inspections to verify that abatement has in fact occurred.

In May 1991, the General Accounting Office (GAO) issued a report (GAO/HRD–91–35) to Congress in which the GAO assessed the adequacy of OSHA's policies and procedures for ensuring the abatement of cited hazards. This report found that OSHA's abatement policies and procedures had limitations that interfered with the Agency's ability to identify those employers who have failed to abate the safety and health hazards for which they had been cited. The GAO also was concerned about hazard abatement problems in the construction industry (e.g., that some construction employers, to avoid abatement, moved cited hazardous equipment to another location, where the uncorrected hazard could continue to pose a risk to unsuspecting employees). The GAO report concluded that OSHA should correct these deficiencies by issuing a regulation that requires employers to provide specific documentation that they have abated cited hazards, including detailed evidence of the corrective actions they have taken to abate such hazards, and prevents employers from circumventing abatement by removing cited movable equipment from the worksite and using it at another worksite.

Prior to the GAO report, the Agency had made several efforts to strengthen OSHA's abatement verification policies by revising the OSHA *Field Operations Manual* (FOM) (superseded by the Agency's *Field Inspection Reference Manual);* the most recent of these revisions was made in 1989. These revisions strengthened OSHA's abatement verification procedures but did little to ensure that these procedures were being applied uniformly across the regulated community.

The regulation being issued today will address the GAO's concerns while at the same time streamlining and codifying OSHA's procedures for abatement verification. Once this regulation is effective, these procedures will be enforced in a consistent way by all OSHA Area Offices, eliminating inconsistencies and reducing the amount of paperwork employers who receive citations must complete to notify OSHA of their abatement actions. In cases where abatement action can be taken immediately or be completed within 24 hours of the time the Compliance Officer has identified the violation, employers will not be required to certify abatement. In other cases, i.e., those involving other-than-serious and some serious violations, employers are required only to provide OSHA with the information shown in Appendix A or its equivalent. Additional documentation is required only for the most serious violations (e.g., serious violations that the Agency has specifically identified in the citation as requiring documentation and repeat or willful violations.

Many employers have not been aware that the abatement verification procedures employed by OSHA in the past have been administrative, rather than regulatory, in nature. For example, several commenters in this rulemaking (Exs. 4–22, 4–23, 4–28, and 4–61) were of the opinion that no abatement verification regulation was required because OSHA already has the legal means to verify abatement. These commenters were apparently unaware that, because the Agency's procedures had not been codified, they did not have the force of law.

OSHA finds that establishing effective abatement verification procedures by regulation will have a number of benefits for employers, employees, and OSHA. This abatement verification regulation will strengthen employee protection by increasing the number of cited hazards abated by employers, reduce employers' paperwork and associated costs, increase employee involvement in the abatement process, streamline the process, and increase the consistency of OSHA's abatement procedures in all areas of the country.

II. Summary and Explanation of the Regulation

This section of the preamble discusses the requirements of the final regulation, describes changes made to the regulation in response to comments received on the proposal, and summarizes the comments received.

Purpose

A paragraph clearly stating the purpose of this regulation has been added to the final rule. This new paragraph describes the intent of OSHA's inspection process and stresses that abatement of violative conditions identified during an OSHA inspection is the overriding goal of that process. The abatement verification regulation establishes the procedures OSHA will follow to ensure that individual employers who have been cited for workplace-specific hazards have abated those hazards. The actions cited employers are required to take to verify abatement, which are set forth in this regulation, are tailored specifically to the nature of the hazard cited and to the employer's abatement actions. That is, the extent of the abatement verification required by OSHA is commensurate with the seriousness of the violation and the actions the employer takes to abate the cited hazard.

Paragraph (a). Scope and Application

The scope of the final regulation has been revised since the proposal to make clear that this section applies only to those individual employers who have received an OSHA citation for a workplace-specific violation of the Occupational Safety and Health Act. Employers who have not been cited are not subject to this regulation. Thus, only those employers for whom OSHA has opened a specific case file are covered by this regulation.

Paragraph (b). Definitions

Paragraph (b) includes definitions for terms used in the final rule. Two proposed definitions have been modified minimally in the final rule to enhance clarity and are not further discussed here. These terms are ''Abatement date'' and ''Final order date.'' In addition, several terms that were defined in the proposal have been deleted from the Definitions paragraph of the final rule because OSHA believes they are self-explanatory. These terms include ''Area Director,'' ''Assistant Secretary,'' and ''Citation item.'' Further, OSHA believes that the meaning of several terms that were defined in the proposal is now clear from the context in which they are used in the regulatory text. These terms include ''Abatement plan,'' ''Commission,'' ''Petition for modification of abatement date (PMA),'' ''PMA final order,'' and ''Progress report.'' However, in response to comments, OSHA has altered some definitions from those proposed and has added others. These changes are discussed further in the following paragraphs.

Abatement

OSHA has added ''Abatement'' to the list of definitions included in the final regulation. Abatement is defined as ''action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by OSHA during an inspection.'' This definition makes clear that OSHA issues citations both for violations of particular standards and for violations of the General Duty Clause (Sec. 5(a)(1) of the Act, 29 USC 654(a)(1)), which requires employers to provide their employees with ''employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm,'' and that the abatement procedures prescribed by this regulation apply to both types of violations. This definition of abatement is consistent with that used in Chapter IV of OSHA's compliance instruction, CPL 2.103, the *Field Inspection Reference Manual* (*FIRM*). Examples of methods commonly used to abate cited hazards include the use of engineering controls (such as local exhaust ventilation) to reduce the exposure of employees to a toxic substance to the levels prescribed by an OSHA standard; correction of a deficiency in a program, such as the respiratory protection program required by 29 CFR 1910.134; or the use of permissible electrical equipment to eliminate a fire hazard.

Abatement Date

The final rule defines the abatement date for an uncontested citation as the later of the following dates: the abatement date identified in the citation; the date approved by OSHA or established in litigation as a result of a PMA; or the date established in a citation by an informal settlement agreement. For contested citation items for which the Occupational Safety and Health Review Commission has issued a final order, the abatement date is the later of the following dates: the date identified in the final order for abatement; the date computed by adding the period allowed in the citation for abatement to the final order date; or the date established by a formal settlement agreement. OSHA has added this definition to the final rule to provide cited employers with specific information on the meaning of this term as it is used in the final regulation.

Affected Employees

''Affected employees'' is defined to mean ''those employees who are exposed to the hazard(s) identified as violation(s) in a citation.'' This definition has been added to clarify that the term, as used in this regulation, applies specifically to those employees who are put at risk by the safety or health hazard cited by the OSHA Compliance Officer.

OSHA received one comment (Ex. 4–31) asking that the word ''worksite'' be defined because, according to this commenter, it was used ambiguously in the proposal. Instead of defining this term, however, OSHA has responded to this comment by ensuring that the word ''worksite'' is used unambiguously in the final rule.

Final Order Date

The final regulation defines the final order date for uncontested citation items as the 15th working day after the employer receives an OSHA citation. For a contested citation item, the final order date is (A) the 30th day after the date on which a decision or order of a Commission (OSHRC) administrative law judge has been docketed with the Commission unless a member has directed review; or (B) if review has been directed, the 30th day after the

date on which the Commission decided or issued an order on all or the pertinent part(s) of the case; or (C) the date on which a Federal appeals court issues a decision in a case in which a final order of OSHRC has been stayed. OSHA has added a definition of this term to the final regulation to provide employers with specific information on the meaning of this term in the context of the final rule.

Movable Equipment

The final rule defines movable equipment as any hand-held or non-hand-held machine or device, whether powered or unpowered, that is used to do work and is moved within or between worksites. This definition has been added to the final rule to clarify the types of equipment to which the requirements of paragraph (i) of the final rule apply.

Paragraph (c). Abatement Certification

Paragraph (c) of the final rule sets forth the requirements employers must follow to certify that they have abated a workplace-specific safety or health hazard cited by OSHA. The title of paragraph (c) has been revised from that used in the proposed rule, ''abatement certificate,'' to ''abatement certification'' to emphasize that the requirements of this paragraph relate to the process of abatement certification, rather than to a particular document.

Many commenters favored changing the Agency's current administratively imposed abatement verification procedures or suggested modifications to the abatement certification paragraph of the proposed rule (Exs. 4–18, 4–32, 4–53, 4–55, and 4–57). These participants recommended that OSHA adopt a ''tiered'' approach to abatement, i.e., one that tailors the extent of the abatement verification required to the seriousness of the hazardous condition cited and the employer's abatement response. The final regulation reflects this approach, and the following paragraphs describe the comments received on the various provisions of paragraph (c) and OSHA's reasoning for including the requirements that appear in the final regulation.

Paragraph (c)(1) of the final regulation states the obligation of employers who have received a citation to certify to OSHA that they have abated the cited hazardous condition. Certification of abatement must occur within 10 calendar days of the completion of the abatement action, except in those situations addressed by paragraph (c)(2) of the final regulation. The proposed regulation would have allowed employers 30 calendar days between the time they abated a cited violation and the time they submitted an abatement certificate to this effect to OSHA. Several commenters (Exs. 4–26, 4–30, 4–50, and 4–72) stated that 30 days was too long an interval between completion of abatement and certification of abatement to OSHA. Some of these commenters argued that this interval would delay the OSHA abatement certification review process, while others stated that allowing such a lengthy period of time would mean that exposed employees would not receive timely notification that the hazardous condition to which they had been exposed had been abated. One commenter (Ex. 4–50) stated:

> The employer should be required to submit the abatement certificate on, or within a few days after, the abatement date. In this way, employees, who by virtue of the nature of the hazard may not otherwise be privy to knowledge regarding the employer's abatement action, will not be forced to wait thirty days beyond the abatement date to know whether the hazard has been removed and their workplace is safe.

Other commenters (Exs. 4–28 and 4–42), however, argued that 30 days was insufficient time for employers to process certification documents through multiple levels of legal and administrative review.

In the final regulation, the period between the abatement date and submission of the required abatement information is 10 calendar days, which will ensure that abatement verification is completed in an expeditious manner. OSHA believes that a 10 calendar day period is adequate because the Agency has simplified the abatement process by providing an example of a non-mandatory abatement certification letter in Appendix A. Use of this simplified form, or an equivalent form chosen by the employer that contains the same information, will also facilitate corporate review of the required abatement information.

Paragraph (c)(2) specifies that employers who abate a hazard identified by an OSHA Compliance Officer immediately, i.e., either during the inspection or within 24 hours of the time the hazard was identified, are not required to certify abatement to OSHA in a separate certification letter. In such cases, however, the Compliance Officer must note in the citation that such immediate abatement has occurred. Paragraph (c)(2) has been added to the final rule in response to comments from rulemaking participants who urged the Agency to eliminate unnecessary paperwork and streamline the process for those employers who choose to abate a cited hazard immediately (defined as during the on-site portion of the inspection, within 24 hours after the violation was identified).

In the preamble to the proposal, OSHA raised a number of questions, including one (Question 8) that asked for comment on the need for written abatement certification procedures in cases where employers abate hazards immediately. This question elicited more comments than any other. Commenters (Exs. 4–7, 4–9 to 4–23, 4–28, 4–31 to 4–35, 4–39, 4–42, 4–47, 4–48, 4–54 to 4–57, 4–59, 4–61, 4–62, 4–64, 4–65, 4–67, 4–69, 4–75, 4–77, 4–79, 4–83, 4–84, and 4–85) were unanimous in the opinion that abatement certification and documentation should not be required if immediate abatement of the violation is observed by the OSHA Compliance Officer or occurs shortly thereafter. These participants also stated that the proposed certification requirements, which contained no such exception for immediate abatement, would impose a substantial and unnecessary regulatory burden on employers choosing the immediate abatement approach.

At the time of the proposal, it was OSHA's practice to require and maintain an extensive abatement ''paper trail'' to ensure that cited violations had been abated. In the meantime, however, in keeping with OSHA's efforts to reduce paperwork, encourage compliance, enhance employee protections, and streamline the process both for OSHA and employers, the Agency has developed a software program to print citations that allows Compliance Officers to record their observation of immediate abatement directly on the citation form. This means that citations now provide a means for OSHA to audit immediate abatements, which makes employer certification of such abatement unnecessary. To ensure that immediate abatements are properly documented, which will also avoid unnecessary follow-up inspections, the Compliance Officer will simply record the immediate abatement on Form OSHA–1B (i.e., will enter the specific citation item and the phrase ''corrected during inspection'' on this form) or its equivalent.

Paragraph (c)(3) identifies the minimum abatement-related information that employers must include in the abatement certification they submit to the OSHA Area Director. (Additional information, such as the employer's name and address, that must be included is specified in paragraph (h) of this section, along with other details pertaining to the transmittal of abatement information.) The

information required by paragraph (c)(3) includes, for each cited violation, the date and method of abatement used, and a statement that affected employees and their representatives have been informed of the abatement.

The abatement certification information required by OSHA is similar to that contained in the corresponding paragraph of the proposal, although the language has been simplified in the final rule. OSHA believes that, in most cases, a brief one-sentence statement describing the action taken to abate a violation (e.g., ''replaced guard on saw'') will be all that is needed in the certification letter.

The proposal would have required the employer to specify in the abatement certification letter those instances where an abatement had not been completed as planned. The proposal would also have required the employer to submit a subsequent abatement certification letter to OSHA when such a delayed abatement had actually been completed. These requirements do not appear in the final regulation, however, because existing OSHA regulations provide for the employer to file a petition for modification of abatement (PMA) date in cases of delayed abatement. In other words, for cases in which an employer has not abated a violation as planned, the employer's filing of a PMA under 29 CFR 1903.14(a) reinitiates the abatement certification process.

The proposed requirement to include the date on which the employer signed the abatement certification letter is also not included in the final regulation, in response to a recommendation made by a commenter (Ex. 4–61). OSHA determined that this requirement served no useful purpose because the abatement date is already provided in the abatement certification letter, which is signed by the employer.

One of the questions raised in the preamble to the proposed rule (Question 9) asked whether an Agency-developed sample abatement certification form for employers to use would be useful and specifically asked about the information such a form should contain. Several commenters (Exs. 4–28, 4–39, 4–42, and 4–67) stated that such a form would reduce the compliance burden on employers. The sample abatement certification letter, which is included as non-mandatory Appendix A to the final regulation, was developed in response to these comments. Appendix A is a sample abatement certification letter that is appropriate for certifying both individual or multiple citation items (in the latter case, employers can simply add lines as required). OSHA has developed this abatement certification form, which is non-mandatory, specifically to reduce the time and resource burdens for cited employers, which were of concern to several commenters (Exs. 4–9, 4–18, 4–19, and 4–48).

Paragraph (d), Abatement Documentation

Paragraph (d), Abatement documentation, specifies the requirements employers must follow to document the completion of abatement for willful or repeat violations and for any serious violation for which the citation indicates that such documentation is required.

Requiring additional abatement documentation for these more serious violations reflects the tailored approach that many commenters (Exs. 4–18, 4–20, 4–24, 4–32, 4–40, 4–43, 4–44, 4–53, 4–55, and 4–57) urged the Agency to take. Such a tiered approach would require only a simple letter certifying abatement for other-than-serious violations and for many serious violations but would require both a certification letter and more extensive documentation for the most serious violations, i.e., willful or repeat violations and those serious violations determined by OSHA on the citation to warrant such documentation.

Some commenters (Exs. 4–49 and 4–50) recommended that certification and documentation be required for *all* violations, including other-than-serious violations, as has been OSHA's practice in the past. These commenters argued that full certification and documentation were needed in every case to ensure protection to employees exposed to the cited hazards. In contrast, one commenter (Ex. 4–61) stated that abatement documentation should not be required for *any* violation because requiring employers merely to certify abatement was sufficient.

In the final regulation, OSHA has adopted a tiered abatement certification approach that is based on the type of violation for which the citation was issued and the employer's abatement actions in response to the citation. The abatement certification process for other-than-serious violations has been streamlined in the final rule as much as possible, while the process for ensuring the abatement of more serious violations is more extensive, as befits the greater complexity and degree of hazard posed to workers by such violations. OSHA's reasoning is discussed below.

Other-than-serious violations do not expose employees to life threatening or permanently injurious conditions, because they are defined by OSHA as violations that ''cannot reasonably be predicted to cause death or serious physical harm to exposed employees, but [that do] have a direct and immediate relationship to their health and safety.'' (See OSHA Instruction CPL 2.103, Chapter III, p. III–6, September 26, 1994.)

Although other-than-serious violations are of concern to OSHA, abatement of these violations warrants a lesser commitment of Agency resources than does the abatement of more serious violations. This is particularly the case since other provisions of the final regulation will act to provide additional protections for employees throughout the abatement process. For example, paragraph (g) requires that employers inform affected employees (i.e., those directly affected by the cited hazard) and their representatives of the employer's abatement activities; employees and their representatives must also be given the opportunity to examine and copy all abatement materials prepared by the employer in response to this regulation. These notification requirements will ensure that affected employees are aware of the employer's abatement activities and will also increase the incentives for employers to provide accurate and timely information about their abatement activities. Thus, in adopting a tiered approach to abatement verification, OSHA is making effective use of both Agency and employer resources by placing an appropriate emphasis on the more serious violations. This approach also is consistent with the GAO's recommendations regarding abatement verification for such violations.

As required by paragraphs (c) and (d), those employers who have received citations for willful or repeat violations, or for specifically identified serious violations, must certify and provide documentary evidence of their abatement actions. Although OSHA retains the discretion to identify any serious cited hazard as one requiring abatement documentation as well as certification, OSHA will generally require such documentation only for ''high-gravity'' serious violations. High-gravity serious violations are those violations that relate to hazards that have a higher level of severity and a higher probability of resulting in employee injury, illness, or death than other serious violations. Examples of high-gravity serious violations are: (1) A storage loft located 10 feet above the work floor is accessed and worked in by employees daily, and the open side of the loft does not have a guard rail. A fall would result in a severe employee injury, and the probability of a fall occurring is great because of the

frequency of exposure. (2) An electrically powered miter saw is being used daily with the lower blade guard secured in the retracted position. The probability of injury is great due to the frequency of use and the proximity of the employee's hand to the rotating blade. The severity of the resulting injury would undoubtedly be high.

After a careful review both of the comments received and OSHA's own enforcement experience, OSHA has determined that it is appropriate to require abatement certification for all cited hazardous conditions but to reserve submission of full documentary evidence of abatement for the most serious violations only. Comments (Exs. 4–12 through 4–16, 4–23, 4–55) submitted to the record also suggest that a number of other Federal agencies have adopted abatement documentation procedures similar to those being promulgated by OSHA, which increases the Agency's confidence in adopting this approach.

OSHA retains the discretion, under paragraph (d)(1), to require documentation of abatement for any serious violation that warrants this extra measure of assurance. OSHA must specifically identify in the citation those citation items for which such documentation is required. However, OSHA generally intends to require abatement documentation in low-or medium-gravity serious violation situations only where, in the past 10 years, an employer has received a citation either for a willful or failure-to-abate violation or has a history of compliance violations that resulted in a fatality or in serious physical harm to an employee. OSHA believes that the abatement activities of these employers deserve closer scrutiny and more careful documentation, to ensure that cited hazardous conditions are appropriately abated and to prevent similar occurrences in the future. Before the effective date of this regulation, OSHA will issue a directive to the field specifying the conditions under which the Agency will exercise its discretionary authority to require abatement documentation for serious violations that are not classified as high-gravity.

Paragraph (d)(2) of the final regulation specifies the types of documentary evidence needed to fulfill the abatement documentation requirements set forth in paragraph (d)(1). Examples of acceptable documentation may include invoices for the purchase of control equipment, bills from repair services, photographs or video evidence of the abated hazard, or other written records. Additional examples of documentary evidence are discussed below.

In the preamble to the proposal, OSHA asked for comment on the type, sufficiency, and quality of abatement document-ation that should be required. One commenter, the United Steelworkers of America (Ex. 4–72), stated that pre-and post-abatement photographs, in addition to other forms of abatement documentation, should be provided by employers to assist the Agency in evaluating abatement. Other commenters (Exs. 4–26, 4–47, and 4–53) recommended that the text of the final rule include examples of the types of abatement documentation that would be acceptable.

In response to these comments, OSHA has included some examples of appropriate abatement documentation in the final regulatory text and has expanded this section of the preamble to provide additional detail. Examples of acceptable documentation could include: photographs of the abated condition (e.g., a machine's point of operation guard in place); an invoice or sales receipt from a manufacturer or supplier of the equipment used to achieve abatement; reports or evaluations by safety and health professionals describing the actions taken to abate the hazard or a report of results of analytical testing; documentation from the manufacturer that the article repaired is within the manufacturer's specifications; a copy of a signed contract for goods and services (e.g., for needed protective equipment, an evaluation by a safety engineer, etc.); records of training completed by employees (if the citation is related to inadequate employee training); a photograph or videotape of the abated condition that identifies the citation number and item number; or a copy of program documents (if the citation relates to a missing or inadequate program, such as a deficiency in the employer's respirator program or hazard communication program).

As these examples demonstrate, abatement documentation must be objective and describe or portray the abated condition adequately. However, the final regulation does not mandate a particular type of documentary evidence for any specific cited condition; this determination remains the responsibility of the employer, who OSHA believes is in the best position to make this judgment. The acceptability of the abatement documentation will be assessed by OSHA, either during abatement negotiations with the employer or after receipt of the abatement documentation as part of the employer's abatement certification submission. For example, although photographs are listed in the final regulation as an example of abatement documentation, OSHA will not require that photographs, including photographs of pre-and post-abatement conditions, always be used to satisfy this requirement. Whether photographs are appropriate, and the best kinds of photographs, is best determined through discussions between the employer and OSHA, using the information available in the citation and the Agency's knowledge of the employer's workplace and history.

In summary, OSHA finds that the abatement verification procedures being put in place by this final regulation have several components that will interact to ensure employees a high level of protection from exposure to cited hazards while simultaneously minimizing the amount of paperwork and resources employers (and OSHA) will be required to expend. These components include a tiered system of abatement verification that requires increasing levels of documentation as the seriousness of the violation increases; meaningful employee involvement in all aspects of the abatement process, which will increase the reliability of employer reporting and provide employees with the information they need to protect themselves and their co-workers from exposure to cited hazards; and a simplified and standardized reporting process that allows employers to use various means of submitting abatement information to OSHA.

Paragraph (e). Abatement Plans

Paragraph (e)(1) of the final regulation specifies that OSHA may require employers to submit abatement plans for abatements having dates of 90 days or greater (except for other-than-serious violations). OSHA may require such plans for each cited violation falling in this category and must indicate in the citation which citation items require such plans. These provisions have been changed somewhat since the proposal. For example, the proposed rule would have permitted OSHA to require in the citation that an employer submit a formal plan for the abatement of *any* safety and health violation for which ''multiple-step'' or ''long-term'' abatement was necessary. In the final regulation, the abatement plan requirement applies only to the more serious violations (serious, willful, or repeat violations), and then only to those abatements that have been assigned dates of 90 days or more.

Paragraph (e)(2) stipulates that employers must submit any abatement

plan required by OSHA within 25 calendar days of the final order date. Abatement plans must identify the violations and the steps the employer is taking to abate the violation, a schedule for achieving abatement, and, where required by OSHA, the interim measures the employer is taking to protect employees from the hazard represented by the violation until abatement is complete. The requirement to provide interim protections if directed by OSHA to do so has been added to the final rule to be consistent with current Agency practice and to provide employees with appropriate protection in those situations warranting it.

Several commenters (Exs. 4–28, 4–53, 4–68, 4–77, and 4–79) acknowledged OSHA's need for information on the employer's abatement program in complex and lengthy abatements but were concerned about the administrative burden and cost of formal plans. For example, the Chemical Manufacturers Association (Ex. 4–28) stated:

> OSHA accomplishes nothing by requiring detailed abatement plans. The only information OSHA needs in this situation is the actions the employer will take and the dates the actions will be completed. This provides OSHA with the ability to measure whether abatement is being achieved and by the date specified.

Another commenter, United Technologies (Ex. 4–53), interpreted the term ''formal,'' as used in the proposed regulation, to mean ''detailed,'' and recommended that this ''formal/detailed'' requirement be deleted and replaced with a ''written plan outlining the schedule for the implementation of measures to achieve abatement.'' Noting that an abbreviated abatement plan would reduce the paperwork burden on employers, United Technologies stated that ''[t]he 2 hour preparation time in the Proposed Rule's economic modeling [to develop an abatement plan] may underestimate the amount of time necessary to prepare a detailed plan. * * *'' The American Society of Safety Engineers (ASSE)(Ex. 4–68) recommended that an abatement plan consist simply of ''a written outline setting forth an implementation schedule for measures to achieve abatement.'' ASSE stated further that ''[t]he plan need not be 'detailed' as long as a schedule exists against which abatement can be measured.''

Several commenters (Exs. 4–8, 4–22, and 4–79) interpreted the proposed requirement for abatement plans as applying to *all* violations and indicated their concern with the scope of this requirement. Two commenters (Exs. 4–42 and 4–43) argued that this proposed requirement allowed OSHA too much discretion and would therefore result in inconsistent application of the abatement plan requirement.

In response to these comments, OSHA has made two important revisions that are reflected in paragraph (e)(1) of the final regulation. First, the requirement now limits the applicability of this provision to abatements of more serious violations that require longer than 90 days to complete. In contrast, the proposed regulation limited abatement plans to multiple-step or long-term abatement situations but did not specify what ''long-term'' meant. In place of the proposed terms ''multi-step'' and ''long-term,'' the final regulation specifies that abatement plans are not required unless the abatement period is longer than 90 calendar days, and then only if required by OSHA.

OSHA chose 90 days as the appropriate trigger for abatement plans because the Agency's analysis of recent inspection data demonstrated that more than 90 percent of abatements were completed within a 90-day period. After that period, the rate at which abatements were completed slowed significantly, indicating that the types of activities necessary for abatements taking longer than 90 calendar days differed substantially from those needed for abatements of shorter duration (i.e., abatements taking more than 90 calendar days appear to be extremely complex, and may require complicated funding arrangements as well as detailed design and fabrication efforts).

Even for abatement periods that exceed 90 calendar days, the final regulation provides OSHA with the discretion to decide whether an abatement plan is or is not needed. The Agency believes that Area Directors are in the best position to determine whether such plans are needed because they are most familiar with the employer and the violations described in a citation. The flexibility granted by this requirement will substantially reduce the regulatory burden that would be imposed both on OSHA and employers by a blanket provision requiring plans for all lengthy abatements. At the same time, allowing OSHA discretion to require an abatement plan will ensure that employees are protected in those complex and lengthy abatements where additional information is necessary to ensure satisfactory abatement progress and, if deemed necessary by OSHA, interim employee protection.

The requirement for abatement plans for complex abatements is consistent with the way OSHA has done business for several years. For example, these plans often are developed jointly by OSHA and the employer, either during an inspection or prior to the time the employer receives a citation; the resulting plans are then incorporated into the citation narrative. Thus, the 90-day requirement will not in any way affect the current negotiation process that occurs between employers and OSHA with regard to abatement plans. This final regulation only specifies the conditions under which abatement plans may be required by OSHA.

The second important revision made to paragraph (e)(1) since the proposal is the elimination of other-than-serious violations from the requirement for abatement plans. OSHA's analysis of recent inspection data showed that only a few other-than-serious violations required more than 90 calendar days to abate. In view of the small number of other-than-serious violations that would be subject to this 90-day requirement and to be consistent with the ''new OSHA'' philosophy of focusing on the more serious hazards, the final regulation applies the abatement plan requirements only to violations classified as serious or above. (See the discussion under ''Abatement certification'' in this preamble.)

Paragraph (e)(1) also explicitly states that OSHA is responsible for identifying and communicating to the employer which citation items need abatement plans. This provision has been revised only minimally from the parallel requirement in the proposal. Appendix B, which is non-mandatory, is a sample abatement plan that employers may use to report their abatement plans to OSHA. This form also allows several citation items to be combined into a single abatement plan. Employers are free to use any other form to report their abatement progress, providing that the form used contains the same information as that shown in Appendix B.

Final rule paragraph (e)(2) retains the proposed requirement that any required abatement plan be submitted to OSHA within 25 calendar days after the date of the final order. Several commenters (Exs. 4–10, 4–42, and 4–67) stated that the 25-day period was too brief for employers to devise, compile, and obtain managerial approval of abatement plans, especially if they have many violations to correct. On the other hand, one commenter (Ex. 4–72) found the 25-day submission period to be excessive and recommended a 10-day submission period instead.

OSHA believes that a 10-day submission period would not allow sufficient time for employers to

investigate abatement methods, develop abatement plan(s), and transmit them (often through corporate channels) to OSHA. However, OSHA believes that the abbreviated format specified for abatement plans in the final regulation makes the 25-day submission period reasonable.

In the proposal, abatement plans were required to be signed and dated by the employer. However, in the final regulation, OSHA has decided to allow abatement plans to be signed by the employer or the employer's representative and not to require that abatement plans be dated. These revisions make the signature and dating requirements for abatement plans consistent with those for all of the abatement documents required by this regulation (see paragraph (h)).

Paragraph (f). Progress Reports

Paragraph (f) of the final regulation states that employers are required to submit periodic progress reports, in addition to abatement plans, for those more serious hazards requiring long-term abatement (i.e., greater than 90 days) and that OSHA has identified as requiring such a report in the citation. The corresponding provision of the proposal would have allowed OSHA to require progress reports for *all* ''multi-step'' abatements. This term has been defined in the final regulation to mean abatements requiring 90 calendar days or more to abate. Progress reports are required only for certain abatement plans, and paragraph (f)(1) has been revised to be consistent with paragraph (e)(1), which addresses those plans.

Paragraph (f)(1) of the final regulation indicates that OSHA must specify in the citation each of the citation items for which a progress report is required and the dates for submission of the initial progress report, which may not be sooner than 30 calendar days after the submission of an abatement plan. These requirements are unchanged from the proposal except that the requirement for OSHA to specify which abatement measures are to be reported has been removed from the final regulation as unnecessary.

Final rule paragraph (f)(2) requires employers who submit progress reports to include in such reports a brief description (generally only a single-sentence summary) of the action being taken to abate each cited violation and the date the abatement activity was conducted.

One commenter (Ex. 4–3) stated that OSHA should not require progress reports if an employer abates a cited violation in fewer than 30 calendar days after the date of the final order or the date of the PMA final order. This interpretation reflects confusion over the meaning of the requirement for progress reports, and OSHA has responded by clarifying paragraph (f)(1) of the final regulation. The submission date for the first progress report is clearly specified in paragraph (f)(1) in the final regulation as a minimum of 30 or more calendar days after the date on which an abatement plan was submitted to OSHA. If a violation requiring a progress report (or an abatement plan) is abated prior to the submission date, the employer would be required only to submit the abatement certification and abatement documentation information required by the final regulation.

Citation items may be combined within a single progress report if the citation items being combined have the same abatement actions, proposed completion dates, and actual completion dates, as permitted by the sample progress report form provided in Appendix B to the final regulation. This form, which is non-mandatory, can be used either for individual citation items or for multiple citation items meeting the limitations of the form.

Like all abatement documents (see paragraph (h) of this section), progress reports must be signed by the employer or his/her authorized representative and include the company name and address, the OSHA inspection number, the citation and citation item numbers, and a statement that the information provided is accurate. The citation and item numbers are needed by OSHA to efficiently collate progress reports with other abatement information sent to OSHA by the employer.

Paragraph (g). Employee Notification

In the proposal, this paragraph was titled ''Posting requirements.'' In the final regulation, it has been designated paragraph (g), ''Employee notification,'' to clarify its purpose, which is to strengthen the abatement verification process by involving employees in all stages of that process. Paragraph (g)(1) requires employers to provide those employees affected by the cited hazardous condition, and their representatives, with information about abatement activities by posting a copy or summary of each document submitted to OSHA near the place where the violation occurred.

Paragraph (g)(2) specifically recognizes that posting abatement documents or summaries of these documents may not always be an effective way to inform affected employees and their representatives of the employer's abatement activities due to the characteristics of the workplace or the nature of particular jobs. For example, it may be difficult for an employer whose employees work out of their trucks or do not routinely assemble at a central location to communicate the necessary abatement information to these employees by posting. OSHA believes that employers who employ such mobile workers, e.g., arborists, telephone repair personnel, landscape company personnel, salespeople, are in the best position to determine how most effectively to communicate with these employees and their representatives about those abatement activities that affect them. For example, such employers may choose to convey this information in the employee's pay envelope, inside the lid of the work crew's tool box, or in a visible location inside the compartment that contains the cited equipment. Other possible ways of providing employees and their representatives with the required information include discussing the abatement documents with these individuals at a training or tool box session or publishing the information in an employee newsletter or other general communication medium that reaches affected employees and their representatives.

Affected employees and their representatives also may request copies of all abatement documents for examination and copying. Employers are required by paragraph (g)(3) to inform such employees of this right.

Paragraph (g)(3)(i) indicates that employees and employee representatives must submit requests to examine and copy abatement documents to the employer within three working days of the time they are notified by the employer that such documents have been submitted to OSHA. The time period permitted for requesting abatement documents is consistent with the citation posting period required in 29 CFR 1903.16. OSHA believes that, since affected employees and their representatives are aware of the cited condition because it directly affects them, 3 working days will provide sufficient time for such employees to request abatement documents.

Paragraph (g)(3)(ii) requires employers to respond to such requests for abatement materials within 5 working days of the receipt of such requests. One commenter (Ex. 4–39) recommended that the regulation be revised to specify the period during which employers must make abatement documents available for examination and copying by employees and their representatives, and the final rule is responsive to this comment. The posting requirement of

paragraph (g)(1) is also responsive to comments (Exs. 4–19 and 4–21) stating that the proposed requirement, which would have required documents to remain posted until the violation was corrected or for 6 days, whichever was later, was too burdensome. As these commenters noted, during extended abatement periods, the documents are likely to deteriorate or to be removed. This would place employers in violation of this paragraph of the final regulation, which requires them to ensure that posted documents will not be altered, defaced, or obstructed.

Paragraph (g)(4) requires employers to ensure that notice of the availability of abatement documents is provided to employees and their representatives at the same time or before the required abatement information is transmitted to OSHA; that the posted documents are not defaced, covered, or altered so as to be illegible; and that the documents remain posted for three working days after being submitted to OSHA.

This paragraph of the final rule has been revised in response to comments received on the parallel provisions of the proposal. These changes include revising the language of this requirement to conform as closely as possible with OSHA's existing posting requirements, which are codified at 29 CFR 1903.16, to respond to a comment (Ex. 4–33) about the need to ensure consistency between the requirements of paragraph (g) and those of 29 CFR 1903.16.

OSHA received one comment on the mobile work operation issue addressed by paragraph (g)(2) of the final regulation. The National Arborist Association (Ex. 4–8) asked OSHA to include examples of alternative posting locations that would satisfy the posting requirement for employers with highly mobile work operations. As the discussion above indicates, OSHA intends to provide employers with a mobile work force with the flexibility to use a wide range of methods to inform employees about abatement activities. Whatever method is chosen, however, must be effective in communicating the required information to employees and their representatives.

One proposed requirement has not been carried forward in the final regulation. Paragraph (i)(2) of the proposal would have permitted employers to post a notice describing the location at which abatement plans and progress reports could be reviewed if posting these documents was made impractical by their size or magnitude. OSHA believes that this requirement is unnecessary, because the proposed provision would only have referred employees to the location of the required information instead of providing them with the information directly. Additionally, the abatement certification, abatement plan, and progress report provisions of the final regulation have substantially reduced the size and magnitude of these documents, which will make employee notification easier.

OSHA received two comments (Exs. 4–49 and 4–50) urging the Agency to require employers to distribute abatement documents directly to employee representatives as a means of enhancing the completeness and accuracy of these documents. OSHA is concerned that the voluminous nature of some abatement documentation, e.g., documentary proof of abatement, would make such a requirement unnecessarily burdensome for employers. The approach adopted in the final rule affords the same access, examination, and copying rights to employee representatives as to the affected employees themselves. OSHA believes that requiring employers to post copies of all abatement documents in a readily accessible place, coupled with the final rule's requirement that employers provide employees and their representatives with notice of their right to examine and copy all abatement-related documents, will provide both employees and their representatives with the information they need to keep them fully informed of the employer's abatement activities, as requested by these commenters.

The proposal specifically identified the Assistant Secretary as a person authorized to examine and copy abatement documents. However, this provision does not appear in the final regulation because, under Section 8 of the OSH Act, the Assistant Secretary already has the authority to review these materials.

Paragraph (h). Transmitting Abatement Documents

Paragraph (g) in the proposal, which specified requirements for transmitting abatement information to OSHA, has been moved to paragraph (h) in the final regulation. This paragraph contains requirements that employers include the following information in all abatement materials submitted to OSHA: The employer's name and address; the inspection number; the citation number and citation item number(s); a statement to the effect that the information provided by the employer is accurate; and the employer's signature or that of his/her authorized representative. These requirements apply to abatement certification letters, abatement documentation, abatement plans, and progress reports, i.e., to all of the abatement verification materials addressed by this regulation. Paragraph (h)(2) specifies that the date of postmark is the date of submission for mailed abatement verification documents. OSHA expects that other means of transmission, such as facsimile transmission, will also be used, if approved by the Area Director in a given case. One commenter (Ex. 4–84) urged OSHA to specifically identify electronic transmission as an approved method in the regulatory text. However, although many methods of transmission are routinely used to provide the Agency with abatement materials, e.g., overnight courier, hand delivery, OSHA does not believe it necessary to specifically list these methods in the regulatory text.

The proposed rule contained a note to the effect that Agency receipt of documents should not be interpreted as compliance with the regulation's transmittal requirements. Two commenters (Exs. 4–10 and 4–69) stated that this note was unnecessary because it merely reminded employers to retain proof that they had submitted abatement certifications and/or documentation, especially in the case of facsimile transmissions. According to these commenters, this is already industry practice. OSHA agrees that the provisions of the final regulation are adequate to notify employers that they are responsible for ensuring that OSHA has received the required abatement information. This note therefore does not appear in the final regulation.

The proposal contained a paragraph entitled Accuracy of documentation. In the final regulation, OSHA has eliminated this paragraph and simply requires that employers attest to the accuracy of any abatement-related information they submit to OSHA at the time of transmittal. Accurate information is essential to the working of the streamlined abatement process OSHA is putting into place with this final regulation. Based on the Agency's past experience, OSHA believes that the overwhelming majority of employers recognize the importance of accurate abatement information, and that the incentives provided under this final regulation (streamlined process, availability of easy-to-use abatement forms, employee involvement) will encourage full compliance with the regulation's provisions.

Paragraph (h)(1) of the final regulation requires employers to provide some information that was not specified in the proposal. This information includes the inspection, citation, and citation item numbers. OSHA currently assigns

each violation a citation and item number that serves as a unique identifier for that inspection. This additional information will benefit both the Agency and employers because it will enable OSHA to distinguish readily between abated and unabated violations, enhance OSHA's ability to retrieve and review abatement materials, and expedite approval of abatement activities. This information will also allow OSHA to determine the appropriateness and completeness of the materials submitted by employers and to identify those needing additional attention.

In the proposal, abatement certificates were required to be signed by the employer or the employer's duly authorized representative. In the preamble to the proposal, OSHA asked for comments on the appropriate level of management needed to serve as an employer's duly authorized representative in abatement matters. Commenters responding to this question had a wide range of opinions on this issue. Some argued that employers should have complete discretion in this matter (e.g., ''OSHA should leave to each employer's discretion the decision regarding what is the appropriate level of personnel authorized to bind the company by signing the abatement certification'' (Ex. 4–83)), while others recommended that specific personnel be designated for this function (e.g., a corporate officer (Ex. 4–28) or the owner or general manager (Ex. 4–48)). Many commenters recommended that signatory authority be limited to managers who have knowledge of the employer's abatement activities and the authority to commit the employer's resources to these activities (Exs. 4–6, 4–7, 4–23, 4–33, 4–34, 4–54, 4–55, 4–56, 4–64, and 4–77). Two commenters supported the language of the proposed requirement, which allowed employers flexibility in designating their representatives (Exs. 4–47 and 4–67).

The Agency has decided that it would be inappropriate to identify particular management positions or job titles in this requirement because positions and titles vary widely among organizations. Accordingly, the final regulation has made only minor revisions to the proposed language. For example, the word ''duly'' has been removed from the phrase ''authorized representative'' to remove any suggestion that a formal process of designating an authorized representative is required. The language of this provision in the final regulation thus allows employers additional discretion and flexibility in assigning signatory authority for the purpose of abatement certification, which will further expedite the process.

Paragraph (i). Movable Equipment

Paragraph (i) of the final regulation requires employers to alert employees to the presence of cited movable equipment on the worksite either by tagging the equipment's operating controls or the equipment's hazardous components, or affixing a copy of the citation itself to the controls or hazardous components of the cited equipment. In the proposal, this paragraph was designated as paragraph (f), ''Tagging cited equipment.'' This title has been revised in the final regulation to better indicate that this paragraph applies only to movable equipment, as defined in paragraph (b) of this regulation.

OSHA has included this requirement in the final regulation at least partly in response to the GAO's findings (discussed further in the Background section of this preamble) that, in the past, employers may have been able to circumvent abatement by removing hazardous equipment from the site after it had been cited and then subsequently returning this equipment—without repair—to the site or moving it to another site. Two commenters (Exs. 4–9 and 4–57) stated that the tagging requirements specified in the proposal were unnecessary because these requirements duplicated the provisions of 29 CFR 1910.147 (i.e., OSHA's ''lockout-tagout'' standard). OSHA believes that these commenters have misconstrued the intent of 29 CFR 1910.147's lockout/tagout requirements. The tags of the lockout/tagout standard are intended to alert employees that measures have been taken to control hazardous energy before service or maintenance is performed on the equipment. In contrast, the warning tags required by this regulation are intended to provide warning to employees that a piece of equipment needs to be repaired and poses a serious risk to employees, and to provide such warning even in cases where that equipment is moved to another location, either on or off the worksite where it was first cited.

The preamble of the proposal asked for comment on the proposed tagging provision. These comments, and OSHA's responses to them, are discussed below. The proposal would have required employers to affix a warning tag to cited equipment on receipt of the citation. OSHA received a number of comments regarding this paragraph. One commenter, the American Feed Industry Association (Ex. 4–19), was concerned about the proposed requirement's lack of specificity. This commenter stated:

> The use of warning tags would be inconsistent and confusing. For example, a violation could be cited for not having wheel chocks in place under a parked semi trailer at a loading dock. What should be tagged, the chocks or the trailer? Would the employer keep the chocks tagged until another trailer was parked at the dock? Would an employee not use the chocks on that trailer assuming the chocks themselves may be defective?

Another commenter, the Synthetic Organic Chemical Manufacturers Association, Inc. (Ex. 4–22), argued that the proposed provision was duplicative of OSHA's existing citation posting requirement:

> [T]his requirement is superfluous and a paperwork burden. In most cases posting of the citation would alert affected employees that a hazard exists. An additional punitive piece of paper, such as tagging, would not increase employee safety, it would only add to the requirements for abatement.

Two other commenters (Exs. 4–25 and 4–72) expressed support for the provision. The Food & Allied Service Trades (Ex. 4–25) commented, ''To strengthen the intent of this provision, we believe the cited equipment should be incapacitated until the hazard has been abated.'' The United Steelworkers of America (Ex. 4–72) strongly endorsed the tagging provision, noting that:

> This [requirement] will help to ensure that workers are fully informed as to [the] hazard[s] they may be exposed to. The posting requirements related to posting the *citations* at or near where the violations exist have been diluted over the years. It is the exception rather than the rule when citations are posted at or near the violation. Posting these types [of] tags on cited equipment will finally achieve what the drafters of the OSH Act intended, namely to advise workers of unsafe conditions in their work area. (Emphasis in original.)

One commenter, the National Arborist Association (Ex. 4–8), argued that tagging a single piece of equipment that allegedly violates an OSHA safety standard would send a very negative message to users of similar equipment in a firm even if the similar equipment is not cited and is indeed safe to operate. However, OSHA believes that the information presented on the tag (e.g., hazard cited) is sufficient to identify why a given piece of equipment has been cited and to keep employees from generalizing to other equipment.

In response to these comments, the Agency has made three major revisions to the proposed posting requirements to reduce the regulatory burden associated with compliance, while preserving the protection afforded to employees by these provisions. The first major

revision made to this paragraph in the final regulation is to state more specifically when the tagging actions by the employer are to occur and to limit the requirement for immediate tagging to hand-held equipment only. A tag must be affixed to other (i.e., non-hand-held) cited movable equipment only if the equipment is actually moved within the worksite at which the equipment was cited, or is moved from that worksite to another worksite before the cited hazards are abated.

Employers must ensure, in accordance with paragraph (i)(5), that the tag or copy of the citation is not covered by other material and is not altered or defaced so as to be illegible. Paragraph (i)(6) indicates when the warning tag or copy of the citation may be removed; the conditions under which removal may occur include: when abatement has taken place and any abatement documents required by this regulation have been submitted to OSHA, when the cited equipment has been removed permanently from the worksite or is no longer in the employer's control, or when the Commission has vacated the citation.

The second of these revisions is to except other-than-serious violations from the tagging requirements of the final regulation. As noted above in the discussion of paragraph (c), Abatement certification, violations are characterized as other-than-serious if they do not expose employees to the risk of life-threatening or permanently injurious conditions. Other-than-serious violations also usually require only simple, straightforward corrections that can be accomplished on-site or during short abatement periods. Limiting the applicability of the tagging provision to serious, willful, and repeat violations, and to violative conditions for which the employer has received a failure-to-abate notice, is consistent both with paragraph (c) of the final regulation, which requires abatement documentation only for this group of more serious violations, and with OSHA's emphasis on the most serious hazards.

OSHA believes that hand-held equipment that has been cited must be tagged promptly because this equipment is easily moved within and between worksites and is frequently used by employees who may not have notice of the cited hazard. In addition, the record did not indicate that there was another reliable and practical method that would meet the employee notification requirement of this provision under these workplace conditions.

Other equipment (i.e., equipment that is not hand-held) is less readily moved than hand-held equipment and thus is more likely than hand-held equipment to remain at the location described and/or documented in the citation. OSHA believes that, under these conditions (i.e., as long as the cited equipment remains at the location described and/or documented in the citation), the posting requirements of 29 CFR 1903.16 will provide employees with adequate notification of the cited hazard. If this equipment is moved within or between worksites, however, employees who have not seen the posted citation in the old location could unknowingly be exposed to the cited hazard in the new location. Affixing a warning tag to the operating controls or the hazardous component(s) of this equipment will ensure that such employees in the new location are properly notified of the violation. Paragraph (i)(3)(ii) of the final regulation requires employers to affix a warning tag to this equipment before it is moved.

OSHA will be providing non-mandatory warning tags for employers to use to meet the requirements of this paragraph. The Agency believes that doing so will encourage compliance with the tagging requirement and reduce the regulatory burden of this requirement on employers. A note to paragraph (i)(2) of the final regulation specifies that employers may use tags supplied by OSHA for this purpose (see Appendix C). This provision also permits employers to use their own tags to meet this requirement, provided that these tags conform to the design and information specifications of the sample tag displayed in Appendix C; this provision ensures employees that employer-designed tags will protect them at least as effectively as the warning tags supplied by OSHA.

The last major revision to proposed paragraph (i) permits employers the choice of either posting a copy of the citation or affixing a warning tag directly on the operating controls or the hazardous component of the cited equipment. This change will allow employers additional flexibility and will also satisfy the requirements of 29 CFR 1903.16, OSHA's existing posting requirement. The proposal would have required employers both to affix a warning tag to the operating controls or the hazardous component of the cited equipment and to post a copy of the citation ''at or near each place an alleged violation referred to in the citation occurred,'' as required by 29 CFR 1903.16. There are situations, however, where affixing a copy of the citation to hand-held equipment may be difficult or impractical, and in such cases tagging is the only feasible method of providing employees with notice of the violation.

OSHA received one comment indicating concern about the applicability of the tagging requirements to the construction industry. This commenter (Ex. 4–38) stated that ''[t]he construction industry should not be forced to comply with 29 CFR 1910.145(f)(4) which is not applicable to the construction industry.'' The concerns of this commenter are addressed in paragraph (i)(4) of the final regulation, which states that employers in the construction industry who comply with the design and use requirements for tags specified in paragraphs 29 CFR 1926.20(b)(3) and 29 CFR 1926.200(h) of the construction industry standards will be deemed to be in compliance with paragraph (i) of this section if the tag used contains the information required by paragraph (i)(2) of the final regulation. OSHA believes that the addition of paragraph (i)(4) to the final regulation will improve compliance with the requirement among employers in the construction industry because they have extensive experience and familiarity with the design and use requirements for tags that were developed for their industry.

Paragraph (i)(2) of the final regulation requires tags that are used to comply with the abatement verification regulation's tagging requirements to warn employees about the nature of the violation and identify where the citation has been posted for affected employees to review.

OSHA received several comments on this provision of the proposal. These commenters (Exs. 4–12, 4–13, 4–14, 4–15, and 4–16) stated that including any information on the warning tag was too burdensome, would endanger employees who read the tag by bringing them within the ambit of the cited hazard, or would discourage employees from operating cited equipment that could be used safely under specific conditions. For example, one commenter (Ex. 4–12) made the following observation:

> If OSHA develops a tag (i.e., a ''red'' danger tag) that complies with 29 CFR § 1910.145, which employees understand to mean that equipment to which it was attached is the subject of a violation, the tag need only be recognized for that purpose. The tag should not contain any information, it should merely be identifiable by employees, who can then read the citation on the bulletin board, where citations are generally posted. If employees have to read a tag, which may be attached to moving equipment or equipment being used, employees could be endangered.

However, OSHA does not share this view, because for employees to have the

information they need to protect themselves and their co-workers from cited equipment hazards, the warning tag must identify the specific equipment cited, state that a citation has been issued by OSHA, and specify where the citation is posted for employee review. This minimal amount of information will alert employees to the hazard and allow them to confirm which equipment (or component) has been cited. Identifying the location of the posted citation will permit employees to find and review the citation for more specific and detailed information about the violation. The Agency does believe, however, that a brief description of the violation is all that is needed on the tag (e.g., ''no guard for blade'').

The proposed rule contained a paragraph stating that employers who fail to comply with the requirements of this abatement verification regulation will be subject to citation and penalties under the OSH Act. This provision has not been included in the final regulation, in response to comments on this issue (Exs. 4–6, 4–25, 4–29, 4–33, 4–63). For example, the American Forest & Paper Association (Ex. 4–29) recommended that this paragraph not be included in the final regulation because this information was communicated adequately in the preamble. Another commenter (Ex. 4–33) stated that this paragraph should not be included in the final regulation because the regulated community already understands that OSHA has statutory authority to impose penalties on employers who violate OSHA standards and regulations and thus that describing this authority was unnecessary. OSHA agrees with these commenters, and this provision is not included in the final regulation.

As previously described, OSHA has included in the final regulation three non-mandatory appendices (A, B, and C) to assist employers in complying with this regulation. These appendices were the direct result of numerous favorable comments received to a question raised in the proposal asking whether or not OSHA should develop sample abatement certification forms. By supplying employers with samples of most of the documents this regulation requires, OSHA is reducing burdens on employers, facilitating compliance, and, in turn, enhancing employee protection.

III. References

Government Accounting Office (1991). OSHA Policy Changes Needed to Confirm That Employers Abate Serious Hazards. GAO/HRD–91–35, Report to Congressional Requesters, May 1991.

OSHA Instruction CPL 2.45B, June 15, 1989, and associated revisions (CH–1 through CH–5 dated March 3, 1995), Field Operations Manual (FOM).

OSHA Instruction CPL 2.103, September 26, 1994, Field Inspection Reference Manual (FIRM).

IV. Pertinent Legal Authority

This final regulation is authorized by Sections 8(c)(1), 8(g)(2), and 9(b) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. 657 and 658. Under Section 8(c)(1) ''[e]ach employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health [and Human Services] * * *, such records regarding his activities relating to this Act as the Secretary, in cooperation with the Secretary of Health [and Human Services] * * *, may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses.'' Additionally, pursuant to Section 8(c)(1), the Secretary has authority to issue regulations requiring employers to keep their employees informed of the employers' responsibilities under the Act. Section 8(g)(2) empowers the Secretary of Labor to ''prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under this Act.'' Section 9(b) authorizes the Secretary to promulgate regulations associated with the posting of citations.

The Agency's responsibilities under the Act are defined largely by the enumerated purposes, including: Providing for appropriate reporting procedures that will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem (29 U.S.C. 651(b)(12)); developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems (29 U.S.C. 651(b)(5)); and providing an effective enforcement program (29 U.S.C. 651(b)(10)).

For the reasons set forth in the preamble, the Assistant Secretary asserts that this final regulation is necessary and appropriate to conduct enforcement responsibilities under the Act, to develop information about the prevention of occupational accidents and illnesses, and to inform employees of their protections and obligations under the Act.

V. Paperwork Reduction Act of 1995

The final rule does not contain a collection of information within the meaning of the Paperwork Reduction Act (''PRA''). The PRA applies to collections of information that establish ''identical'' recordkeeping or reporting requirements applicable to ten or more persons. The Act exempts information obtained ''during the conduct of * * * an administrative action or investigation involving an agency against specific individuals or entities * * *'' 44 U.S.C. 3518(c)(1)(B)(ii). In addition, ''information'' does not include simple certifications.

The final rule addresses OSHA's investigation procedures for assuring abatement in specific cases, i.e., those where a case file is open for the conduct of an inspection of safety and health conditions in the particular employer's workplace and where specific violations are found. The purpose of an OSHA inspection or administrative action is to protect employees by achieving abatement of the hazards identified at the workplace. This purpose is not fulfilled, and the case file is not closed, until OSHA is satisfied that abatement has in fact occurred. The hazards cited and the abatement measures undertaken are specific to the equipment, workplace configuration, and other characteristics of a given workplace and the work operations conducted at that site.

OSHA has tailored the requirements of the final rule to the seriousness of the particular cited hazard, the time that will be needed for abatement, and the response the employer has taken toward abating the hazard. If the employer abates the hazard during inspection or within 24 hours thereafter, no abatement certification is required. Further, if the cited condition involves an other-than-serious violation or where the circumstances otherwise make it appropriate, only a certification of abatement is required. Only in individual cases where more serious hazards are encountered (e.g., violative conditions resulting in a willful or repeat citation or in a serious citation which the Agency specifically identifies as requiring additional evidence) does the final rule require a cited employer to submit additional proof of abatement. The documentation submitted will vary with the individual circumstances of the case.

The determination that this final rule is not within the coverage of the Paperwork Reduction Act has been made by OSHA after careful review of the Act, its legislative history, the implementing regulations (5 CFR Part 1320), and OMB's 1989 ''Information Collection Handbook.'' This determination is consistent with OSHA's traditional practice. As discussed above, OSHA's field offices have traditionally collected from employers evidence that cited violations have been abated, and these

submissions have not been treated as subject to the Paperwork Reduction Act. OSHA notes, however, that at the time the proposed rule was published in 1994, the Agency submitted a request for clearance of the rule under the PRA to OMB and invited public comment on the request. OSHA has now determined that the final rule does not contain a collection of information within the meaning and scope of the Paperwork Reduction Act of 1995.

VI. Summary of the Economic Analysis of the Final Abatement Verification Rule

Under Executive Order (EO) 12866, OSHA is required to conduct an economic analysis of the costs, benefits, and economic impacts of major rules promulgated by the Agency. There are several criteria for determining which rules are major, as defined by the EO. The final abatement verification rule does not meet any of the criteria for a major rule. However, to provide employers, employees, and other interested parties with information on the data and reasoning relied on by the Agency, OSHA has analyzed the economic impacts of this rule. The complete Final Economic Analysis is available in the docket for this rulemaking [Docket C–03].

The final abatement verification regulation requires employers who have been cited for violations of the Occupational Safety and Health Act to certify that they have abated the hazardous condition for which they were cited, to document the methods they have used to abate the hazard, and to notify those employees who were exposed to the hazard of the abatement actions they have taken. In most cases, employers will be able to certify abatement using a simple one-page form letter supplied by OSHA. In cases involving more serious violations, additional abatement documentation is required.

OSHA has required employers to provide evidence of abatement for cited hazardous conditions for more than 20 years, following the procedures for abatement verification set forth in the *Field Operations Manual* and its successor publication, the *Field Inspection Reference Manual.* When employers did not provide the requested information, or provided insufficient information, the Agency wrote or phoned employers to prompt them to supply the requested information. If necessary, the Agency contacted employers repeatedly or made follow-up inspections to ensure that the cited violations had been abated. These dunning efforts are unnecessarily resource-intensive for both the Agency and cited employers. Employers who have in the past ignored Federal and State-plan agency requests for verification that abatement has taken place will now be required to provide these materials or risk being cited by OSHA.

The final regulation reduces the burden on cited employers by generally requiring less abatement information than before and by providing simple forms to assist employers to comply. (Employers may also use forms of their own design that contain the same information.)

Several significant revisions made to the regulation since the proposal have reduced the costs employers will incur to comply. For example, under the final regulation:

- Violations that are immediately abated require no abatement certification.
- For other-than-serious violations, and for most serious violations, only a simple abatement letter is required to verify abatement (a sample format for this letter is provided by OSHA). Overall, OSHA estimates that 90 percent of all violations will require only a simple letter certifying that abatement has occurred.
- Employers are required to provide additional documentation (proof) of abatement only for the more serious violations. The Agency estimates that no more than sixteen percent of all serious violations will require such additional documentation.
- Abatement plans, when required, will generally be simple, one-page documents (see Appendix B).
- Progress reports, when required, have been simplified to require only a single-sentence description of the interim actions taken. OSHA is also providing a sample form for abatement plans and progress reports.
- For employers who have movable equipment that has been cited as a serious hazard by OSHA, the final regulation allows employers either to post a copy of the citation on the cited equipment or to attach a warning tag, supplied by OSHA or devised by the employer, to this equipment to alert affected employees to the presence of the hazard.

Summary of the Costs and Benefits of the Final Regulation

In most cases, OSHA estimates that the final regulation will reduce the costs that cited employers currently incur to verify abatement. This conclusion is based primarily on the fact that the final regulation will only affect those employers who are actually cited for violations (i.e., about two-thirds of inspected employers currently) and on evidence that most of these cited employers already supply Federal and State-plan enforcement agencies with more information on abatement than will be required under the final regulation. Overall, the cost of compliance for employers to verify abatement is estimated to be $2 million less per year than employers are currently incurring (estimated to be $4.4 million) to comply with OSHA's administrative procedures for abatement verification.

The Agency estimates that the final abatement verification regulation will save employers an additional $4 million annually because they will no longer expend their time and money to respond to dunning efforts to ensure that abatement has taken place. The final rule's net benefits, or cost savings, for employers are estimated to be $6 million annually: a $2 million savings in reduced paperwork to complete abatement verification forms and a $4 million savings in reduced personnel time and effort to respond to OSHA phone and mail inquiries about the status of abatement. In addition, the Agency estimates that Federal and State-plan agencies will experience resource savings of $4.5 million annually under the final regulation (i.e., will save this amount in personnel costs formerly expended in dunning activity and follow-up inspections). Other benefits of the final regulation include enhanced worker protection because hazards will be abated more quickly, and greater employee awareness of, and participation in, the employer's abatement activities.

For a complete discussion of the methodology used to develop the costs of compliance, cost savings, and net benefits of the final abatement verification regulation, see the Final Economic Analysis in the docket for this rulemaking.

VII. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, OSHA has performed a screening analysis to identify any significant economic impacts of the final regulation on a substantial number of small businesses. At the time of the proposal, OSHA's Preliminary Regulatory Impact Assessment specifically stated that the regulation would not have such impacts. OSHA received no comments on this conclusion or the methodology used to reach that determination. Accordingly, the Agency certifies that the final regulation will not have a significant impact on a substantial

number of small businesses, defined for the purpose of this regulation as those with fewer than 20 employees.

As discussed in Section VI of this preamble, the final regulation will reduce the costs small establishments currently incur to comply with OSHA's procedural requirements for abatement verification. The cost of the final regulation for employers in those small establishments that receive OSHA citations, including those for small governmental entities regulated under State-plan programs, is well below any measure of significant economic impact. The Agency therefore concludes that this regulation will not have a significant impact on a substantial number of small entities.

VIII. Environmental Impact Assessment

Finding of No Significant Impact

This final regulation has been reviewed in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (CEQ) (40 CFR Part 1500), and the Department of Labor's NEPA procedures (29 CFR Part 11). Because the regulation exclusively addresses reporting requirements, it will not have an impact on the environment or result in the release of materials that contaminate natural resources or the environment.

IX. Federalism

The final regulation has been reviewed in accordance with Executive Order 12612 (52 FR 41685), regarding Federalism. This Order requires that agencies, to the extent possible, refrain from limiting state policy options, consult with States prior to taking any actions that would restrict state policy options, and take such actions only if clear constitutional authority exists and the problem is of national scope. The Order provides for preemption of State law only if a clear Congressional intent has been expressed for the Agency to do so. Any such preemption is to be limited to the extent possible.

With respect to states that do not have OSHA-approved occupational safety and health State plans, the final regulation conforms to the preemption provisions of Section 18 of the OSH Act (29 U.S.C. 667); this section preempts State promulgation and enforcement of requirements dealing with occupational safety and health issues covered by Federal OSHA standards unless the state has an OSHA-approved Sate plan. (*See Gade* v. *National Solid Wastes Management Association,* 112 S.Ct. 2374 (1992).) Since states without State plans are prohibited already from issuing citations for violations of requirements covered by Federal OSHA standards, this final regulation does not expand this limitation.

The Agency certifies that this final regulation has been assessed in accordance with the principles, criteria, and requirements set forth under Sections 2 through 5 of Executive Order 12612. Section 18(c)(2) of the OSH Act (29 U.S.C. 667(c)((2)) provides that an OSHA-approved State plan must provide for the development and enforcement of safety and health standards that are, or will be, at least as effective as the Federal program. In implementing this requirement, 29 CFR 1902.3(d)(1) requires a State plan to establish a program for the enforcement of state standards that is, or will be, at least as effective as the standard provided under the OSH Act, and provide assurances that the State plan enforcement program will continue to be at least as effective as the Federal program. Furthermore, 29 CFR 1902.4(a) requires state plans to establish the same procedures and rules that are established by Federal OSHA, or alternative procedures and rules as effective as the Federal procedures and rules. In particular, a State plan must provide that employees be informed of their protections and obligations under the Act. (See 29 CFR 1902.4(c)(2)(iv).) The plan also must provide for prompt notice to employers and employees when an alleged violation of standards has occurred, including the proposed abatement requirements, by such means as the issuance and posting of citations. (See 29 CFR 1902.4(c)(2)(x).) Since this final regulation will improve Federal OSHA's enforcement of the OSH Act and, in particular, will foster the abatement of violations and communication to employees about their protections under the Act, State plans will be required to adopt an identical regulation, or an equivalent regulation that is at least as effective as the Federal regulation, within six months of Federal promulgation. Thus, the final regulation complies with Executive Order 12612 with respect to State Plan States because (1) the final regulation deals with a problem of national scope, and (2) the OSH Act requires that State Plan States adopt the OSHA regulation or an equally-effective regulation. Since a number of State Plan States already have abatement-verification and employee-notification procedures similar to the requirements specified under this regulation, they will only need to reissue the requirement as an enforceable regulation.

State comments were invited on prepublication drafts of both the proposed and final regulation, and these comments were fully considered before a final regulation was promulgated. Two State Plan States, Michigan and Minnesota, commented (Exs. 4–86 and 4–87, respectively) on the draft proposed regulation. Michigan and Minnesota again submitted comments on the draft final regulation, along with Maryland (Exs. 4–89, 4–90, and 4–91, respectively). These states expressed concern about the tagging and posting requirements, the paperwork burden these requirements impose on employers, and the use of additional state resources to implement the regulation. Minnesota also wanted a number of items clarified in the compliance guidance that OSHA will issue with this regulation (e.g., the application of the tagging and reporting requirements in contested cases). The final regulation has addressed the States' concerns regarding the tagging and posting requirements, and lessened the paperwork burden for both employers and the enforcement agencies (i.e., OSHA and State Plan States). This reduced paperwork burden, the compliance guidance that will accompany this final regulation, and the economic benefits that will accrue to enforcement agencies under the final regulation (see ''Economic Analysis'' above) will reduce the burden to, and enhance the economic resources of, the Federal and State agencies responsible for enforcing the final regulation.

OSHA also sought information from the State Plan States that require abatement documents on their experience with employers providing false information on the documents. On average, these states reported a false-information rate of five per cent or less.

X. State Plans

Currently, 25 states and other jurisdictions have OSHA-approved occupational safety and health plans. These 25 jurisdictions are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming; Connecticut and New York have State Plan jurisdiction for state and local government employees only.

The 25 jurisdictions with their own OSHA-approved occupational safety and health plans are required to adopt a regulation on abatement verification

and employee notification that is at least as effective as this Federal regulation within six months of the publication date of the final regulation.

Current State abatement-verification and employee-notification procedures are described in State field operations manuals and/or directives. Although these state procedures may differ from the federal procedures, the State Plan States, like Federal OSHA, generally lack regulations or statutory provisions specifically addressing this issue, and thus do not by regulation compel employers to submit abatement-certification letters or other documents to them; the exceptions are Wyoming and California, which have a regulation and legislation, respectively, that require employers to submit abatement-certification documents be submitted to the state occupational safety and health agencies.

Existing State abatement-certification procedures are identical to the current Federal practices except as described below:

(1) The following nine States have abatement-certification forms: Alaska, California, Kentucky, Michigan, North Carolina, Oregon, South Carolina, Washington, and Wyoming. On these forms, employers describe the specific actions taken to correct each alleged violation. Alaska, Oregon, Washington, Michigan, and Kentucky also ask for documentary evidence of abatement. Alaska requires employers to certify, under penalty of perjury, that the violations were abated by the dates specified.

(2) For serious violations, California has adopted legislation that requires an abatement statement to be signed under penalty of perjury.

(3) Minnesota requests a progress report for all serious, and most other, violations of the State's general industry and construction standards.

(4) Washington schedules follow-up inspections every six months to assess progress made on lengthy or multi-step abatement plans.

(5) Some states (e.g., South Carolina and California) send a reminder letter to employers just before the abatement-certification form is due. Washington reminds employers of this event by letter or telephone. Kentucky and California also send follow-up letters if the form is overdue.

(6) Maryland tracks informal conference settlements to determine if the abatement documentation is adequate.

(7) Wyoming has an enforcement regulation requiring submission of written documents stating the date abatement was accomplished. Failure to do so can result in a civil penalty. Wyoming also can take legal action to enforce submission of abatement letters.

(8) New York, which covers only state and local government employees, conducts follow-up inspections to validate abatement of every violation; employers are not asked to send abatement-certification information to the state agency.

A number of states have ''red-tag'' authority, which allows them to issue a restraining order in an immediate-danger situation involving hazardous equipment (or other condition or practice). This red tag authority is different from the orange warning tag required by the abatement verification and employee notification regulation; use of orange warning tags does not prohibit operation of cited equipment, while use of red tags does prohibit such operation.

List of Subjects in 29 CFR Part 1903

Abatement; Abatement certification; Abatement plan; Progress reports; Abatement verification; Employee notification; Movable equipment; Occupational safety and health; Posting; Tags.

Authority

This document was prepared under the direction of Gregory R. Watchman, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, D.C. 20210. The final regulation is issued pursuant to Sections 8(c)(1), 8(g), and 9(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657, 658).

Signed in Washington, D.C., this 19th day of March 1997.

Gregory R. Watchman,

Acting Assistant Secretary of Labor.

Part 1903 of CFR 29 is hereby amended as set forth below.

Regulatory Text

PART 1903—[AMENDED]

1. The authority citation for Part 1903 of Title 29 of the Code of Federal Regulations is revised to read as follows:

Authority: Sections 8 and 9 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657, 658); 5 U.S.C. 553; Secretary of Labor's Order No. 1–90 (55 FR 9033) or 6–96 (62 FR 111), as applicable.

2. 29 CFR Part 1903 is amended by redesignating §§ 1903.19, 1903.20, and 1903.21 as §§ 1903.20, 1903.21, and 1903.22, respectively, and by adding a new § 1903.19, to read as follows:

§ 1903.19 Abatement verification.

Purpose. OSHA's inspections are intended to result in the abatement of violations of the Occupational Safety and Health Act of 1970 (the OSH Act). This section sets forth the procedures OSHA will use to ensure abatement. These procedures are tailored to the nature of the violation and the employer's abatement actions.

(a) *Scope and application.* This section applies to employers who receive a citation for a violation of the Occupational Safety and Health Act.

(b) *Definitions.* (1) *Abatement* means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by OSHA during an inspection.

(2) *Abatement date* means:

(i) For an uncontested citation item, the later of:

(A) The date in the citation for abatement of the violation;

(B) The date approved by OSHA or established in litigation as a result of a petition for modification of the abatement date (PMA); or

(C) The date established in a citation by an informal settlement agreement.

(ii) For a contested citation item for which the Occupational Safety and Health Review Commission (OSHRC) has issued a final order affirming the violation, the later of:

(A) The date identified in the final order for abatement; or

(B) The date computed by adding the period allowed in the citation for abatement to the final order date;

(C) The date established by a formal settlement agreement.

(3) *Affected employees* means those employees who are exposed to the hazard(s) identified as violation(s) in a citation.

(4) *Final order date* means:

(i) For an uncontested citation item, the fifteenth working day after the employer's receipt of the citation;

(ii) For a contested citation item:

(A) The thirtieth day after the date on which a decision or order of a commission administrative law judge has been docketed with the commission, unless a member of the commission has directed review; or

(B) Where review has been directed, the thirtieth day after the date on which the Commission issues its decision or order disposing of all or pertinent part of a case; or

(C) The date on which a federal appeals court issues a decision affirming the violation in a case in which a final order of OSHRC has been stayed.

(5) *Movable equipment* means a hand-held or non-hand-held machine or device, powered or unpowered, that is

used to do work and is moved within or between worksites.

(c) *Abatement certification.* (1) Within 10 calendar days after the abatement date, the employer must certify to OSHA (the Agency) that each cited violation has been abated, except as provided in paragraph (c)(2) of this section.

(2) The employer is not required to certify abatement if the OSHA Compliance Officer, during the on-site portion of the inspection:

(i) Observes, within 24 hours after a violation is identified, that abatement has occurred; and

(ii) Notes in the citation that abatement has occurred.

(3) The employer's certification that abatement is complete must include, for each cited violation, in addition to the information required by paragraph (h) of this section, the date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement.

Note to paragraph (c): Appendix A contains a sample Abatement Certification Letter.

(d) *Abatement documentation.* (1) The employer must submit to the Agency, along with the information on abatement certification required by paragraph (c)(3) of this section, documents demonstrating that abatement is complete for each willful or repeat violation and for any serious violation for which the Agency indicates in the citation that such abatement documentation is required.

(2) Documents demonstrating that abatement is complete may include, but are not limited to, evidence of the purchase or repair of equipment, photographic or video evidence of abatement, or other written records.

(e) *Abatement plans.* (1) The Agency may require an employer to submit an abatement plan for each cited violation (except an other-than-serious violation) when the time permitted for abatement is more than 90 calendar days. If an abatement plan is required, the citation must so indicate.

(2) The employer must submit an abatement plan for each cited violation within 25 calendar days from the final order date when the citation indicates that such a plan is required. The abatement plan must identify the violation and the steps to be taken to achieve abatement, including a schedule for completing abatement and, where necessary, how employees will be protected from exposure to the violative condition in the interim until abatement is complete.

Note to paragraph (e): Appendix B contains a Sample Abatement Plan form.

(f) *Progress reports.* (1) An employer who is required to submit an abatement plan may also be required to submit periodic progress reports for each cited violation. The citation must indicate:

(i) That periodic progress reports are required and the citation items for which they are required;

(ii) The date on which an initial progress report must be submitted, which may be no sooner than 30 calendar days after submission of an abatement plan;

(iii) Whether additional progress reports are required; and

(iv) The date(s) on which additional progress reports must be submitted.

(2) For each violation, the progress report must identify, in a single sentence if possible, the action taken to achieve abatement and the date the action was taken.

Note to paragraph (f): Appendix B contains a Sample Progress Report Form.

(g) *Employee notification.* (1) The employer must inform affected employees and their representative(s) about abatement activities covered by this section by posting a copy of each document submitted to the Agency or a summary of the document near the place where the violation occurred.

(2) Where such posting does not effectively inform employees and their representatives about abatement activities (for example, for employers who have mobile work operations), the employer must:

(i) Post each document or a summary of the document in a location where it will be readily observable by affected employees and their representatives; or

(ii) Take other steps to communicate fully to affected employees and their representatives about abatement activities.

(3) The employer must inform employees and their representatives of their right to examine and copy all abatement documents submitted to the Agency.

(i) An employee or an employee representative must submit a request to examine and copy abatement documents within 3 working days of receiving notice that the documents have been submitted.

(ii) The employer must comply with an employee's or employee representative's request to examine and copy abatement documents within 5 working days of receiving the request.

(4) The employer must ensure that notice to employees and employee representatives is provided at the same time or before the information is provided to the Agency and that abatement documents are:

(i) Not altered, defaced, or covered by other material; and

(ii) Remain posted for three working days after submission to the Agency.

(h) *Transmitting abatement documents.* (1) The employer must include, in each submission required by this section, the following information:

(i) The employer's name and address;

(ii) The inspection number to which the submission relates;

(iii) The citation and item numbers to which the submission relates;

(iv) A statement that the information submitted is accurate; and

(v) The signature of the employer or the employer's authorized representative.

(2) The date of postmark is the date of submission for mailed documents. For documents transmitted by other means, the date the Agency receives the document is the date of submission.

(i) *Movable equipment.* (1) For serious, repeat, and willful violations involving movable equipment, the employer must attach a warning tag or a copy of the citation to the operating controls or to the cited component of equipment that is moved within the worksite or between worksites.

Note to paragraph (i)(1): Attaching a copy of the citation to the equipment is deemed by OSHA to meet the tagging requirement of paragraph (i)(1) of this section as well as the posting requirement of 29 CFR 1903.16.

(2) The employer must use a warning tag that properly warns employees about the nature of the violation involving the equipment and identifies the location of the citation issued.

Note to paragraph (i)(2): Non-Mandatory Appendix C contains a sample tag that employers may use to meet this requirement.

(3) If the violation has not already been abated, a warning tag or copy of the citation must be attached to the equipment:

(i) For hand-held equipment, immediately after the employer receives the citation; or

(ii) For non-hand-held equipment, prior to moving the equipment within or between worksites.

(4) For the construction industry, a tag that is designed and used in accordance with 29 CFR 1926.20(b)(3) and 29 CFR 1926.200(h) is deemed by OSHA to meet the requirements of this section when the information required by paragraph (i)(2) is included on the tag.

(5) The employer must assure that the tag or copy of the citation attached to movable equipment is not altered, defaced, or covered by other material.

(6) The employer must assure that the tag or copy of the citation attached to

movable equipment remains attached until:

(i) The violation has been abated and all abatement verification documents required by this regulation have been submitted to the Agency;

(ii) The cited equipment has been permanently removed from service or is no longer within the employer's control; or

(iii) The Commission issues a final order vacating the citation.

Appendices to § 1903.19—Abatement Verification

Note: Appendices A through C provide information and nonmandatory guidelines to assist employers and employees in complying with the appropriate requirements of this section.

Appendix A to Section 1903.19—Sample Abatement–Certification Letter (Nonmandatory)

(Name), Area Director
U. S. Department of Labor—OSHA
Address of the Area Office (on the citation)

[Company's Name]
[Company's Address]

The hazard referenced in Inspection Number [insert 9-digit #] for violation identified as:

Citation [insert #] and item [insert #] was corrected on [insert date] by:

_____
_____.

Citation [insert #] and item [insert #] was corrected on [insert date] by:

_____
_____.

Citation [insert #] and item [insert #] was corrected on [insert date] by:

_____
_____.

Citation [insert #] and item [insert #] was corrected on [insert date] by:

_____
_____.

Citation [insert #] and item [insert #] was corrected on insert date by:

_____
_____.

Citation [insert #] and item [insert #] was corrected on [insert date] by:

_____
_____.

I attest that the information contained in this document is accurate.

_____
Signature

_____
Typed or Printed Name

Appendix B to Section 1903.19—Sample Abatement Plan or Progress Report (Nonmandatory)

(Name), Area Director
U. S. Department of Labor—OSHA
Address of Area Office (on the citation)

[Company's Name]
[Company's Address]

Check one:
Abatement Plan [ ]
Progress Report [ ]

Inspection Number _____

Page _____ of _____
Citation Number(s)* _____
Item Number(s)* _____

Action	Proposed Completion Date (for abatement plans only)	Completion Date (for progress reports only)
1.	.....	.....
.....		
.....		
2.	.....	.....
.....		
.....		
3.	.....	.....
.....		
.....		
4.	.....	.....
.....		
.....	.....	.....
5.	.....	.....
.....		
.....	.....	.....
6.	.....	.....
.....		
.....	.....	.....
7.	.....	.....
.....		

Date required for final abatement: _____
I attest that the information contained in this document is accurate.

_____
Signature

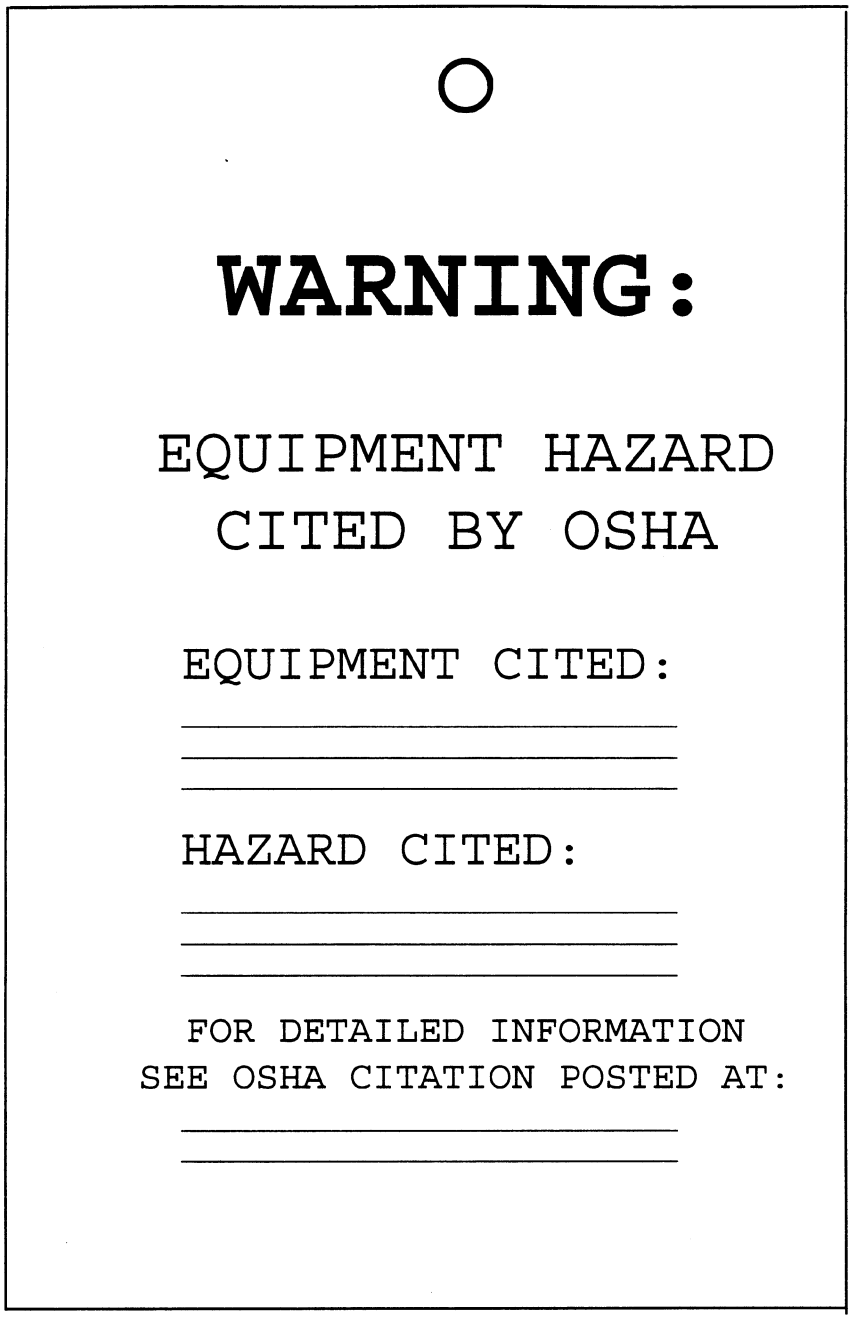
_____
Typed or Printed Name

Name of primary point of contact for questions: [optional]
Telephone number: _____

*Abatement plans or progress reports for more than one citation item may be combined in a single abatement plan or progress report if the abatement actions, proposed completion dates, and actual completion dates (for progress reports only) are the same for each of the citation items.

BILLING CODE 4510–26–P

Appendix C to Section 1903.19--Sample Warning Tag (Nonmandatory)



BACKGROUND COLOR—ORANGE
MESSAGE COLOR—BLACK

[FR Doc. 97–7959 Filed 3–28–97; 8:45 am]
BILLING CODE 4510–26–C