

VI. CRANES & DERRICKS: THE PROLONGED CREATION OF A KEY PUBLIC SAFETY RULE

Taylor Lincoln and Negah Mouzoon¹

(originally published April 2011)²

The authors of public safety rules have long been characterized by certain political actors as unelected, unaccountable autocrats who act with little regard for businesses.

But the process of writing these rules—which serve to put the laws that Congress passes into practice—is usually long, complicated, and informed by significant input from affected industries and other stakeholders. Additionally, agencies need to be meticulous in fulfilling myriad arcane requirements or risk having their work overturned by court challenges. The federal agencies that are charged with protecting public health and safety may be some of the most tightly regulated entities in the United States.³

This chapter recounts the steps in the creation of a rule that was badly needed to protect workers—and, sometimes, passersby—from the dangers posed by cranes at construction sites. The final rule, published in August 2010, enhanced worker training and certification requirements, and added requirements for job-site analyses before putting cranes into use. But the rule was a long time in the making.

By 1998, federal construction safety standards for the operation of cranes and derricks were way out of date. Most of the standards

were from 1971, when hydraulic cranes, which are now prevalent, were still rare. Meanwhile, many industry associations’ protocols were out of sync with federal rules.⁴

Construction accidents have historically been the leading cause of workplace injuries and fatalities, and cranes have been implicated in a quarter to a third of those accidents.⁵ In the late 1990s, construction accidents involving cranes were killing 80 to 100 workers a year. OSHA later estimated that a modernized rule would prevent about 20 to 40 of those annual tragedies.

In the late 1990s, industry joined worker-safety advocates in asking for an updated cranes and derricks rule. Industry officials, OSHA later recounted, “were concerned that accidents involving cranes and derricks continued to be a significant cause of fatal and other serious injuries on construction sites and believed that an updated standard was needed to address the causes of these accidents and to reduce the number of accidents.”⁶

If ever there were a rule that should have breezed to adoption, this was it. The urgency of preventing avoidable deaths and injuries was clear, the regulated industries wanted a new standard, and a large committee of business and labor representatives would reach near unanimous consensus on a draft rule very early in the process.

But a revised cranes and derricks rule did not breeze through. A dozen years, spanning three presidential administrations, would pass between OSHA’s initial action on industry’s request for a new rule and completion of the revised standard. More than 750 construction workers died from crane-related incidents during this time. [See Figure 1] By OSHA’s most conservative estimate, the new rule would have saved about 220 of those lives if it took effect in 2000 instead of 2010.⁷

Figure 1: Occupational Crane-Related Fatalities, 1997-2009

1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
97	93	80	90	72	80	62	87	85	72	67	93	53

Source: U.S. Department of Labor, Bureau of Labor Statistics

During the dozen years it took to finalize the cranes rule, OSHA and other federal agencies held at least 18 meetings about it. At least 40 notices were published in the Federal Register. OSHA was required by a hodgepodge of federal laws, regulations and executive orders to produce several comprehensive reports—and revisions to such reports—on matters such as the composition of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that no alternative could work, and that it had done everything it could to minimize the potential effects on small businesses. The regulatory process afforded businesses at least six opportunities to weigh in with concerns that the agency was required to address.

1998 to 2004: A ‘Negotiated Rulemaking’ Committee Is Formed and Reaches Consensus

The process of updating the cranes and derricks standard began in 1998, when OSHA’s Advisory Committee for Construction Safety and Health (abbreviated in this chapter as the “advisory committee”) established a workgroup to recommend changes to the rule. The advisory committee recommended to OSHA in late 1999 that the agency update the cranes rule through “negotiated rulemaking.” Under this rarely used process, OSHA would form a negotiation committee—made up primarily of manufacturers, other business interests and labor representatives—that would seek to develop a draft rule by consensus.⁸

The dangers of crane operations received national attention in July 1999, when a 567-foot crane being used in the construction of a new baseball stadium for the Milwaukee Brewers tipped over as it was lifting a section of a retractable roof. The crane’s collapse sent more than a million pounds of concrete and debris crashing to the ground and killed three workers.⁹

It took OSHA two-and-a-half years to accept the advisory committee’s recommendation to go forward with developing a new cranes standard.¹⁰ In a 2011 interview with Public Citizen, an OSHA official who was involved in the creation of the revised

crane standard said the time was necessary to accommodate extensive deliberations on whether to pursue a new rule.¹¹

In July 2002, OSHA published a notice in the Federal Register, listing about 15 “interests”—such as crane manufacturers, construction companies, labor groups, insurance companies, public interest groups, and government entities—that it proposed for inclusion on the negotiation committee. The agency sought public comment on the proposed committee’s composition and asked for nominees to serve. One year later, OSHA announced that it had formed a committee consisting of 18 business representatives, four labor representatives and an OSHA employee.¹²

The negotiation committee convened for the first time at the end of July 2003. It established ground rules that no decision could be reached without the agreement of at least 21 of the 23 members, including OSHA’s lone representative. The committee deemed that OSHA could not alter its recommendations without seeking the committee’s input. Additionally, committee members agreed not to criticize the rule during the public comment period.¹³

The negotiation committee met 11 times between July 2003 and July 2004. On July 30, 2004, the committee reached consensus (meaning that at least 21 members agreed) and sent a draft standard to OSHA for review.¹⁴

2004-2008: Regulatory Red Tape

But work on the rule had just begun. For the next five years, OSHA would toil to satisfy a potpourri of prerequisites for formally proposing a rule.

For example, the 1996 Small Business Regulatory Enforcement Fairness Act, or SBREFA, required OSHA to evaluate and address the concerns of “small entities,” defined as small businesses, small governmental units, and small nonprofit organizations. This general mandate involves several component parts.

First, SBREFA required OSHA to engage in extensive fact-finding merely to determine which special requirements it needed to fulfill. For instance, OSHA was required to produce an Initial Regulatory Flexibility Analysis, including a Preliminary Economic

Analysis, to determine whether the proposed rule could pose a “significant economic impact” on a substantial number of small entities. If it did, OSHA would have to convene a special “SBREFA” panel to advocate for small entities.

The requirements of an Initial Regulatory Flexibility Analysis required OSHA to document that it had considered all reasonable regulatory options to minimize the rule’s economic effects on small entities and explain why it chose the approach in its proposal over the alternatives. Additionally, OSHA was required to: enumerate the types and number of small entities that would be affected by the rule; document the projected reporting and recordkeeping requirements relating to the proposed rule; and list all federal rules that may duplicate, overlap or conflict with the proposed rule.¹⁵

OSHA also was required to produce several other reports and determinations to move forward:

- OSHA needed to demonstrate, pursuant to its authorizing legislation, that the proposed rule would address a significant risk, and that the proposed standard would substantially reduce the risk. OSHA determined that the rule would prevent 53 fatalities annually, confirming both that a risk existed and that the rule would help fix it. Additionally, OSHA was required to evaluate whether the market was capable of fixing the safety hazards instead of a new rule. The agency determined that the problems were beyond the curative powers of the market. As such, the agency determined that a rule was required.¹⁶
- To meet the requirements of Executive Order 12866, OSHA was required to estimate costs, benefits, and net benefits of the proposed standard.
- Under the Regulatory Flexibility Act, OSHA was required to determine the number of small entities (such as general contractors with revenue of less than \$31 million) that would be affected. The agency found 204,000.¹⁷

- OSHA was required by Executive Order 13132 to ensure that the rule did not restrict state or local policy any more than necessary, that it only took actions for which it had clear constitutional authority, and that the rule addressed a national problem. The agency made each determination.¹⁸

Fulfilling these tasks took a long time. In December 2005, an agency official apologized to members of the advisory committee for its failure to make a determination on whether the regulation posed a “significant impact” on small businesses.¹⁹ OSHA had expected to make this ruling much earlier in the year.

“We have limited resources, and competing priorities were the reasons for [the delay], particularly the hexavalent chromium rule,” said Keith Goddard, the director of OSHA’s Evaluation and Analysis Directorate. “We have also diverted a considerable amount of resources to meet our commitments on the preliminary regulatory analysis on [the proposed] beryllium [standard], as well.”²⁰

In about June 2006, OSHA determined that the cranes and derricks rule would, in fact, have a potentially “significant” economic impact on a substantial number of small entities. That determination triggered a requirement that OSHA convene a SBREFA panel. Such panels consist of small businesses, small governments, and small nonprofits that are provided with the draft rule and are offered an opportunity to comment.

In October 2006, the SBREFA panel sent OSHA about 40 recommendations. These included requests that OSHA reexamine several cost estimates, study the potential effects of the proposed rule’s certification requirements (and the potential loss of jobs that the requirement might cause), and ensure that OSHA’s estimates of the benefits of the rule could be independently verified. The panel also requested that OSHA seek public comment on many of its suggestions. The Small Business Administration’s Office of Advocacy provided a separate set of recommendations, including a request that OSHA “consider and document any ‘significant alternatives’ to the proposed rule.”²¹

Significant additional time passed. At a January 2008 meeting of the advisory committee, some members expressed frustration at delay in issuing a proposed rule. The director of OSHA's Office of Construction Standards and Guidance said that the proposal put forth by the negotiation committee was extremely detailed, making the process of writing an explanation and justification for the rule very time-consuming. The director also said that other standards moving through the agency's rulemaking process were consuming limited resources.²² Notably, however, OSHA completed only one major rule from 2001 to 2006, and that rule (on hexavalent chromium) was completed to comply with a court order.²³

While OSHA struggled to fulfill its obligations, several tragedies focused attention on the dangers of crane operations—and on the agency's lagging effort to produce a new rule. Six construction workers and a bystander died and 24 people suffered injuries when a crane collapsed in New York City on March 15, 2008. Ten days later, a 20-foot crane section in Miami fell 30 stories, killing two construction workers and injuring five. On May 30, another crane fell in New York City, killing two construction workers and injuring a worker and a bystander.²⁴

In May 2008, Senator Hillary Clinton (D-N.Y.) sent a letter to OSHA Administrator Edwin G. Foulke demanding an explanation for why the new rule was not finished. Clinton noted that the negotiation committee had reached consensus on a proposed rule almost four years earlier.²⁵

"This delay is inexplicable and inexcusable," Clinton wrote. "Casualties due to crane accidents are occurring at an alarming rate."²⁶

About then, progress on the rule appeared to quicken:

- In May 2008, the director of OSHA's Office of Construction Standards and Guidance informed members of the negotiation committee that it had completed its Final Economic Analysis. The report estimated that the standard would prevent 22 fatalities and 175 non-fatal injuries per year.²⁷

This estimate represented a significant reduction from the initial estimate that the rule would prevent 53 fatalities a year. The discrepancy was due to a shift in methodology. The agency determined that the costs of compliance would be \$154.1 million, and that annual benefits would be \$209.3 million, resulting in net benefits of \$55.2 million. OSHA also determined that compliance costs would be “effectively negligible,” at only about 0.2 percent of affected businesses’ annual revenue.²⁸

- Also at that time, pursuant to the Paperwork Reduction Act, the agency submitted to the Office of Management and Budget an analysis of the rule’s paperwork requirements for affected businesses. OMB held four meetings on the proposed standard in the summer of 2008. Attendees included representatives of businesses that operate cranes, the builders’ insurance industry, the crane operator certification organization, and labor.²⁹
- In late August 2008, OMB completed its review of the draft proposed standard.³⁰

2008-2010: The Rule Is Completed

The proposed rule was published in the Federal Register on October 8, 2008. It largely reflected the language approved in 2004 by the negotiation committee and responses to the comments sent to OSHA by the SBREFA panel.³¹

Publication of the proposed rule initiated a public comment period that was initially slated to run through early December, but was extended until late January in response to stakeholders’ requests.

In the public comments, several industries asked to be exempted from the rule. These included railroads, shipbuilders, electric utilities, the propane gas industry, and companies that install signs. OSHA eventually rejected most of these requests.

The National Association of Homebuilders, which had participated on the negotiation committee, also submitted comments. Although the committee’s members had agreed not to

submit “negative comments” during the comment period, NAHB sent in 45 pages that criticized the rule for being “too complex,” “unduly onerous,” and imposing “disproportionate burdens.”³²

The SBA’s Office of Competitiveness requested that the agency consider and document any “significant alternatives” to the proposed rule. An agency official familiar with the proceedings later disputed the Competitiveness office’s contention that OSHA had failed to document the alternatives it had considered.³³

In March 2009, four days of hearings were held to discuss the rule, after which the agency accepted post-hearing comments and briefs. In June 2009, the record was closed. OSHA was then left with the task of addressing the contents of more than 200 prehearing comments, more than 1,500 pages of transcribed text from the four days of hearings, and post-hearing submissions.

An OSHA official estimated to Public Citizen that 30 to 40 percent of the final rule’s sections include substantial alterations that were prompted by the comments the agency received. But OSHA’s summary of its responses to the comments indicates that most concerns were subtle, such as improving the clarity of some of the rule’s language and addressing relatively rare hypothetical scenarios.

On August 9, 2010, the final rule was published. In October 2010, the Edison Electric Institute, which represents publicly traded electric utilities, and the Association of American Railroads filed federal lawsuits challenging the rule.

Discussion

A dozen years passed between the first meeting of the advisory committee and the completion of an updated cranes standard. By the government’s measure, in which the clock starts ticking only after the agency publishes a notice of its intent to pursue a new or revised rule, the cranes rule took eight years to complete. While slightly longer than average, this timespan was fairly typical. The average length of time for OSHA to complete a major rule since 1990 has been 6.5 years.³⁴

The use of the negotiated rulemaking process was intended to accelerate the creation of the cranes rule, but there is little evidence that it did. Susan Podziba, who moderated the negotiation committee's work, complained in a 2008 *New York Times* op-ed that she had expected the rule to be finished within three years of the negotiation committee finishing its work. It took six.³⁵

The creation of the cranes and derricks standard illustrates that tremendous redundancy exists in the rulemaking process. In addition to their participation in the negotiation committee, stakeholders in the cranes rule had at least five opportunities to have their voices heard: at the SBREFA stage; to the Office of Management and Budget before it signed off on the proposed rule; during the conventional comment period after the proposed rule was published; during hearings on the proposed rule; and in post-hearing comments and briefs. [See Figure 2] Then, if still unsatisfied, stakeholders retained the right to seek redress in court—which two trade associations did.

An OSHA official who spoke with Public Citizen on background estimated that about 50 percent of the work involved in creating a new rule goes toward satisfying bureaucratic requirements that have nothing to do with making a good rule—in other words, waste.³⁶

OSHA estimates that the final cranes and derricks rule will save \$55.2 million a year, a benefit largely stemming from value the agency places on the lives the rule will save. By that standard, if the agency were able to complete the rule in half the time, six years instead of 12, it would have saved more than 100 lives and more than \$330 million.

Policymakers who wish to eliminate waste should seek to improve the speed and efficiency with which agencies can write needed rules instead of seeking to saddle agencies with additional burdens.

Figure 2: Stages in Development of Cranes and Derricks Rule

Stage	Description
Negotiated Rulemaking	18 of 23 members represented business interests. The committee agreed that the rule could not go forward without the consent of 21 members, including the lone OSHA representative.
Small Business Regulatory Enforcement Fairness Act (SBREFA)	Small entities (small businesses, small governmental units, and small nonprofit organizations) were given a chance to review the draft rule and offer comments. The panel made about 40 recommendations to OSHA.
Review by the Office of Management and Budget	Businesses and other organizations were afforded the chance to express their concerns to OMB before it signed off on the proposed rule.
Comments on Proposed Rule	All members of the public, including businesses, were allowed to submit formal comments on the proposed rule.
Hearings on Proposed Rule	Members of the public, including businesses, had an opportunity to testify during four days of hearings on the proposed rule.
Post Hearing Comments and Briefs	Parties were allowed to enter comments and briefs into the public record after the hearings.

Source: Analysis of Congressional Record