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Increasing Burden of Regulations

As you know, California is no stranger to regulations. In fact, California is the most regulated state in the nation, exacerbated by the legislature’s ability and propensity to create numerous laws and regulations. An increasing focus of AGC has been to aide regulators in writing regulations in a fashion that mitigates the burden on business.

Our regulations not only come from state laws but also from federal laws. Among the more onerous regulations pending will be those promulgated by the Financial Accounting Standards Board (FASB). Over the course of several years, FASB has discussed many regulations intended to promote transparency in accounting procedures of publicly traded firms. Their focus increased following the Enron and the Worldcom debacles, among others.

Following on the heels of the Sarbanes-Oxley Act of 2002, FASB began discussion in earnest on accounting procedures that would require disclosure by any business contributing to pension plans which have become under-funded. FASB has reported they will promulgate regulations that will require businesses, both public and private, to record in their annual financial report the financial status of any pension plan into which the firm contributes. Perhaps by the time this article appears the draft regulations will be available for comment. The limited release of these draft regulations will include a review by AGC of America’s Tax & Fiscal Affairs Committee. It is important to note that during my attendance in a meeting with the FASB representative charged with drafting the proposed regulations, significant discussion and advocacy was shown by the AGC of America committee members in an attempt to mitigate the potential onerous regulations. I cite this as but one example of how some regulations begin with good intentions and then become a hindrance to business and contrary to logic.

As we look at the proposed FASB regulation, we can point to several others that have had or are having significant impact on business practices of companies throughout the state of California. Among some of the more significant recent regulations are: Stormwater Pollution Prevention Plans (SWPPP), California Air Resources Board (CARB) on road and off road regulations, Heat Illness, and Meal & Rest Periods. All of these regulations began with good intentions; however they were “over built,” with business now burdened with implementation or threatened with significant penalties. Even more confounding is the lack of clarity and consistency in regards to enforcement once the regulations are in effect. By way of an update, AGC is fully engaged in each of the above-mentioned regulations with the responsible agencies. We work closely with legislators that look to AGC in an effort to understand how these regulations impact California businesses.

As we move through this summer, the good news is that we don’t have a budget. As bad as that sounds, the fact that our legislators are focused on passing a new budget means they are less likely to pass new laws, which in turn generate more regulations. One of the more important lessons AGC has learned over the years is that staying on top of new laws and fighting for logic in the new regulations is not enough. Success comes through forming broad coalitions with business groups, labor and others that have similar interests. It is through this united effort that we continue to work to combat the predisposition of many of our legislators and regulators to increase and proliferate new regulations and red-tape, all of which have contributed to California’s reputation as a “non-business friendly” state.

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Biggest Threat on November Ballot

By Loren Kaye

An initiative sponsored by government worker unions has qualified for the November ballot — and it may well be the most threatening issue facing businesses and taxpayers in 2010.

So what does it do? According to sponsors, Proposition 25, the “On Time Budget Act,” merely reduces the legislative vote requirement to pass the state budget from two-thirds to a simple majority, and stops paying legislators if the budget is late.

But when you think about it, why would the California Federation of Teachers, California Faculty Association, California School Employees Association, California Professional Firefighters, Professional Engineers in California Government, American Federation of State, County and Municipal Employees, and California Nurses Association invest millions of dollars in a measure simply to reduce the vote on the state budget? What else does it do that its measure simply to reduce the vote on the state budget? What else does it do that its sponsors are not talking about?

A more accurate title would be the Majority Vote for Everything and Bye-Bye Referendum Act.

First, the measure eliminates — yes, eliminates — the ability to subject certain bills to voter referendum. That is, bills “providing for appropriations related to the budget bill” that would otherwise require a two-thirds vote to take effect would no longer be subject to that vote threshold (see the first clause of new paragraph (e)(1) in Section 12 of the measure).

Imagine the implications of this measure. Substantive changes in statutes that have in the past been subject to voter referendum could be passed by a majority vote, as long as they include an appropriation that is related to the budget — certainly a minimally attainable threshold. For example, in 2004 employers beat back a “pay or play” employer health care mandate with a voter referendum, Proposition 72. In 2000 employers rolled back the Legislature’s major expansion of tort liability with Propositions 30 and 31. It is highly likely that the measures repealed by these referenda would never have been subject to this important voter accountability tool in the first place had the “On Time Budget Act” been in effect.

These are just the real world examples; many other measures devastating to various industries have been halted in the Legislature because of the legitimate threat of referendum. Top of the list would be new fees on products or business activities, which could be enacted by a majority vote of the Legislature and take effect immediately without the threat of a referendum.

Even more insidious is the measure’s deft attempt to repeal important taxpayer procedural protections that are enshrined in the Constitution. The initiative states that “notwithstanding any other provision of law or of this Constitution” — bills providing for appropriations related to the budget bill” may be passed by a majority vote of the Legislature. Consider these existing Constitutional protections that currently require a two-thirds vote of the Legislature:

- If a tax measure also includes an appropriation related to the budget, it could be approved by a majority vote of the Legislature.
- If a bill to change the travel and per diem expenses of the Legislature also includes an appropriation related to the budget, it could be approved by a majority vote of the Legislature.
- If a bill suspending the transfer of gasoline sales tax revenues to the Transportation Investment Fund, or modified the percentage shares for allocating those funds, and also includes an appropriation related to the budget, it could be approved by a majority vote of the Legislature.
- If a bill to suspend a portion of Proposition 98 school funding guarantee also includes an appropriation related to the budget, it could be approved by a majority vote of the Legislature.
- If a bill to suspend a portion of Proposition 98 school funding guarantee also includes an appropriation related to the budget, it could be approved by a majority vote of the Legislature.

The majority vote for the budget is the tip of the iceberg — hidden just below the surface are higher taxes, the elimination of voters’ rights and even more spending by Legislators. You can be sure that proponents of Prop 25 are holding their breaths and hoping that California voters crash head-on into this iceberg.

Loren Kaye was appointed president of the California Foundation on Commerce and Education in January 2006. He has devoted his career to developing, analyzing and implementing public policy issues in California, with a special emphasis on improving the state’s business and economic climate. Kaye served in senior policy positions for Governors Pete Wilson and George Deukmejian, including Cabinet secretary to the Governor and undersecretary of the California Trade and Commerce Agency. He has also represented numerous private sector interests, managing issues that affect specific business sectors to promote an improved business climate or to resist further regulation or costs on business.
EPA’s New Layer of Lead-Paint Rules

By Leah Pilconis

EPA’s Lead Renovation, Repair, and Painting Program (RRP) rule was fully implemented on April 22, 2010. Under the current rules, contractors who perform renovations, repairs and/or painting projects in most pre-1978 housing, child-care facilities and schools (i.e., that have, or are assumed to have, lead-based paint) must comply with federal accreditation, training, certification, and recordkeeping requirements, or risk fines of up to $37,500 per day per violation.

Note: EPA can authorize states to administer and enforce their own RRP programs. Several states have already done so (e.g., Kansas, Rhode Island, Utah, Mississippi, Wisconsin, Iowa and North Carolina), and several more have introduced legislation to take over the RRP rule.

Adding to the already complex regulatory regime, EPA has just taken three new actions that widen the rule’s potential impact on the construction industry.

1. Most notably, in an advance notice of proposed rulemaking (ANPR), EPA announced its intention to apply lead-safe work practices and other requirements to renovations on the exteriors of public and commercial buildings. The advance notice also announces EPA’s investigation into whether lead-based paint hazards are created by interior renovation, repair and painting projects in public and commercial buildings. If EPA determines that lead-based paint hazards are created by interior renovations, EPA will propose regulations at a later date to address the hazards.

2. EPA also has eliminated the so-called “opt-out” provision. (The RRP rule originally provided an exemption from the training and work requirements if the property owner certifies that no child under six and no pregnant woman resides in the subject premises.) This final rule also requires renovation firms to provide a copy of the records demonstrating compliance with the training and work practice requirements of the RRP rule to the owner (and to the occupant of the building being renovated or the operator of the child-occupied facility, if different).

3. In addition, EPA made a separate rulemaking proposal that would require contractors to perform “dust-wipe testing” after most renovation, repair, and painting activities covered by the RRP rule to show that dust-lead levels comply with EPA’s regulatory standards. Regulated contractors would also need to provide the results of the testing to the owners and occupants of the building. For some of these renovations, the proposal would require that lead dust levels after the renovation be below the regulatory dust-lead hazard standards.

In related news, in response to an August 2009 petition submitted to EPA by the National Center for Healthy Housing, the Alliance for Healthy Homes and the Sierra Club, EPA has agreed to issue a proposal to (1) modify the regulatory definition of “lead-based paint” and (2) lower the regulatory dust-lead hazard standards. The Agency has not, however, committed to either a specific rulemaking outcome or a certain date for promulgation of a final rule.

Leah F. Pilconis is Consultant on Environmental Law & Policy and Senior Environmental Advisor to AGC of America. She can be reached at (703) 837-5332, by email at pilconisl@agc.org, or on the web at http://www.agc.org/environment.
California Contractors and CARB: Light At The End Of The Tunnel?

By Mike Lewis

There is finally a glimmer of hope for California contractors who are laboring under the dual burden of an unremitting economic downturn and the onerous provisions of the California Air Resources Board's (CARB) off-road equipment regulations.

The Construction Industry Air Quality Coalition (CIAQC) was able to get legislative direction last year for CARB to grant some regulatory relief for contractors who could demonstrate that their activity was reduced as a result of the recession as well as extra credit for reductions in their fleet size during the recession. Those amendments were adopted by CARB and should have enabled most contractors to get to 2012 without having to comply with the fleet averages contained in the rule.

In addition, because CARB has not received a “wavier” from USEPA, to implement a “California Only” regulation, the only provisions of the off-road rule that CARB has the authority to implement are the reporting requirements, sales notification, installation of CARB’s randomly assigned EIN number, written idling policy and the five-minute idling limitation. Every contractor should have entered their fleet information into the DOORS (Diesel Every contractor should have entered their fleet information into the DOORS (Diesel Every fleet should examine the rule to understand the idling limits and the exceptions to that limit. The fines for violations could exceed tens of thousands of dollars a day. At least one contractor has already been fined for a heavy equipment operator’s extra long potty break.

Now as the result of some extensive and expensive independent research done by Sierra Research and funded by AGC America, additional amendments are on the way for both the off-road rule and the on-road truck rule. Those amendments to further delay the implementation of the rule and slide the fleet averages out a few more years are currently being work-shopped by CARB and are tentatively scheduled to go to the Board in September.

The work done by Sierra Research identified some very significant and interesting flaws in the modeling and emission estimates used by the CARB staff to justify the rule that was adopted in July of 2007. Significant because emissions were so grossly overestimated, and interesting because it’s hard to imagine that all those CARB PhD’s could have missed some obvious errors in their assumptions. One mistake could have been accidental, but not all three.

First, it appears that the size of the California fleet is about 160,000 pieces of off-road equipment, not the 200,000 that CARB estimated it would be this year. Forty thousand fewer pieces of equipment means a lot fewer emissions. Further, about 15,000 of those machines are identified as “low use” which means only 100 hours a year of emissions, not the 1400 to 1600 hours assumed for most other pieces of equipment.

Second, the assumptions that CARB used for fuel consumption by that fleet turned out to be high by a significant factor, perhaps as much as 200%. The higher the fuel usage, the higher the emissions, the greater the justification for engine replacements and particulate traps.

Finally, CARB also assumed that the engines in this equipment were under “load” much more than is actually the case. Engines generate much higher emissions when running under full load than they do while idling. Even the hardest working piece of equipment is under load only 60-70% of the time. Many machines work even less.

All of these miscalculations lead CARB to assume that the emissions from off-road equipment were high by as much as 350% according to Sierra Research. CARB staff has admitted that their estimates may be off by as much as 140% to 200% but they have produced no documentation to support that admission.

Not included in any of these assumptions or in the model, were the effects of the recession. If one were to look at operating engineer’s hours as a measure of equipment operations and emissions, it is clear that those hours are down by more than 40% statewide. If that were to be added to the equation, it’s possible there would be no need for the off-road rule at all.

When the new emission levels were calculated by Sierra Research, based on the fleet size, fuel consumption and load factor, it revealed some very interesting information. It demonstrated that there may be no need whatsoever for the NOx provisions of the rule, because the fleet will get to the 2020 NOx goal with natural turnover, without the need for repowering or early replacement of machines. And, it was clear that the PM (particulate matter) portion of the rule could still be achieved with a later start date (2015) and a much less aggressive retrofit requirement.

It was the presentation of these findings to the CARB Executive Officer in March by AGC of America that lead the Board to direct that staff “get the numbers right” and return with appropriate amendments to the regulation.

The amendments currently being offered by the CARB staff do not fully recognize the updated emission numbers developed by AGC America and Sierra Research. And, CARB staff have yet to present their own updated numbers despite the fact that they are proceeding with amendments. CIAQC and AGC are pushing hard for updated numbers before there is any agreement on amend-
ments. In the real world, the numbers should drive the amendments, not the other way around.

CARB staff is clinging desperately to the framework of their original rule even though it is becoming painfully obvious that their original assumptions were so far off that the original rule is simply not justified by the new, more accurate data.

At a minimum it appears that there will be at least another two year delay in the rule. It also appears that there will be more relief from the fleet percentages for turnover and retrofits. CARB has already put those changes on the table. The only remaining question is how much further we can go when CARB finally produces the real numbers. The industry should get more good news on this regulation before September.

Stay tuned.

Backed by 40 years of experience in local government and land use, transportation and air and water quality issues, Mike Lewis is the Senior Vice President of the CIAQC as well as CICWQ. For more information visit the website www.CIAQC.com.

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A Closer Look at the Impacts of the New Permit

By Marvin H. Sachse

The terrible reality that the new Permit (Construction General Permit 2009-009) (CGP) that is now upon the construction industry is just beginning to sink in. It became effective July 1, 2010. For those in the industry brave enough, the 285 page Permit written in “governmentese” can be downloaded from the internet at: http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wgp_2009_0009_complete.pdf for free. A couple of cans of Monster and Red Bull energy drinks are highly recommended for consumption before opening the document.

Do you need to read it? Nope! But that does not mean you should not become familiar with its contents. The reason document familiarity is encouraged is, in the most simple terms, this Permit will change the way future construction is performed and will have cost impacts—none of which represent a cost savings. As a survivor of numerous Permit reads and rereads, it is suggested to at least read the front portion of the Permit document entitled “Fact Sheet.” Although not officially the Permit’s “Order” (the legal portion of the Permit), it does provide an excellent overview, as does an undated letter from the State Water Resources’ Control Board, Stormwater staff member, Bruce Fujimoto, addressed to, “Interested Party.”

How does one become familiar with the Permit’s impacts on the construction industry without reading it? Attend workshops by trade associations, regional and state water Boards, and visit the SWRCB and California Stormwater Quality Association (CASQA) websites for updates. The Permit, although already enacted, is continuing to be changed, interpreted, and updated.

Listed below are some of the more significant Permit changes and references to repercussions.

**Linear Underground/Overhead Utility Projects (Lups)**

The former LUP permit has now been folded into the CGP in Attachment A and B.

**Risk Level**

Three levels of risk are established, each carrying different regulatory requirements, and are based upon a mathematical equation that estimates the amount of soil that is annually eroded from a construction site. The equation is called “the Revised Universal Soil Loss Equation (RUSLE),” which includes the following site specific characteristics: erosivity (the nature of rainfall at the construction site); erodibility (the soil erosion characteristics); length and steepness of the site’s slopes; the time of year of construction; and the amount of time the site will be under construction.

The risk factor is a function of the amount of soil calculated to be eroded from the construction site by the RUSLE equation in tons per acre and whether the receiving water is at risk for turbidity impairment.

The importance of the risk level is that the greater the risk level, the more restrictive the Permit becomes, and construction costs increase. Most construction sites presently open will be grandfathered in at risk level one, the least restrictive level.

**Mandatory BMPS**

Previously BMPs were established through trial and error by evaluating the quality of the water discharged from the construction site. If the storm water discharged from a construction site was not up to standard, then improved BMPs were to be implemented, but a Permit violation was not incurred. Under the new Permit, specific BMPs are to be deployed which are defined for different risk levels and for site activities, including; housekeeping, waste management, vehicle storage and maintenance, landscape materials, and erosion and sediment controls. Mandatory BMPs carry the additional complexity that if they are not installed according to the Permit, a Permit violation has occurred.

**Effluent Limits**

Previous permits were based upon an iterative process to improve BMP installations until the storm water quality discharged offsite was below the U.S. EPA Benchmarks. The new Permit establishes that Risk Level 3 dischargers would be in violation of the Permit if specific values of pH and turbidity are exceeded. A Permit violation can bring forth fines, penalties, and the possibility of litigation.

**Increased Sampling**

The amount of sampling required by the new Permit is significantly increased. Risk level 2 or 3 sites are required to test storm water discharge water for turbidity and pH at least three times a day during a storm of greater than a ½ inch of precipitation, and electronically submit the test results to the State Water Board. Quarterly non storm water visual observations and discharge sampling is also to be conducted. Non visible pollutant discharges are to be conducted whenever there is a chance for a release of a contaminated off site discharge. Additional tests could be required, depending on the wishes of the Regional Water Quality Control Board, the size of the construction site, and the site’s history of sampling data. Permit requirements exist that could cause suspended sediment sampling, and bioassessment sampling of receiving waters, upstream and downstream of the construction site.

**Electronic Reporting**

A State Water Board Database, SMARTS, has been established to store all pertinent site information including: the SWPPP, NOI, site maps, construction site monitoring program, trade lists and hazardous materials inventories, and all inspection and sampling data. The information can be viewed by anybody with a computer and internet access. Permit violations are also to be entered into the SMARTS database for public viewing. Only the site owner or his appointed company employee can officially enter the data in the SMARTS database. Other, non company, people can load the information into the SMARTS database file queue, but only the property owner or
someone employed by the property-owning entity can officially “submit” the data.

**Rain Event Action Plan - REAP**

A Rain Event Action Plan is to be prepared 48 hours in advance of any rain event with a 50% chance of precipitation. The REAP is to be site specific, storm specific, and correspond with each phase of construction. The forecast is to be based upon the forecast information derived from the NOAA website.

**Training Certification**

Key personnel are to receive either of two types of training: Qualified SWPPP Developer (QSD) or Qualified SWPPP Practitioner (QSP). The QSD is responsible for the SWPPP preparation and subsequent amendments. The QSP is responsible for implementation of the BMPs at the construction site. The QSD requirements include a state licensed professional engineer, or other related state certifications, CPSWQ/CPESC certification, and the successful completion of a state administered class and exam. The QSP requirements also include the successful completion of a similar state class and exam and proof of training as a CISEC or CESSWI, along with site compliance experience.

**The Good Things**

Two good Permit elements evolved.

1. **Rainfall Erosivity Waiver:** If a site is less than five acres in size, (no permit required for sites disturbing less than one acre) and construction starts and finishes during the dry season, a Permit exemption is possible. This is determined by utilizing the EPA Erosivity Waiver located at: http://cfpub.epa.gov/npdes/stormwater/lew/lewcalculator.cfm

2. **Design Storm Event:** BMPs are to be designed for the amount of rainfall that is discharged from a five-year, 24 hour storm event. Polluted discharges occurring from a rain fall greater than a five-year, 24 hour storm event do not constitute a permit violation. Documentation of the rainfall is required. Also, if pollutants run-on to a construction site from a recent forest fire, the excess discharge water will not be considered a Permit violation.

The foregoing is a very brief description of the new Permit’s changes that will have significant impacts on construction. Stay informed. Ask questions. Even the state and regional water quality control boards, along with the municipal inspectors, are trying to interpret this 285 page document.

Marvin H. Sachse, P.E., CPSWQ, CPESC, CESSWI, QSD, provides employee BMP/SWPPP certification programs for numerous developers, superintendents and their trade partners, as well as providing on-site storm water sample collection training, storm water permit compliance training, storm water compliance audits for the construction industry, and preparing and reviews SWPPPs and Storm Water Management Plans. He is a frequent presenter at various association and industry storm water workshops including AGC’s. Sachse is the program manager for one of the largest California State-approved storm water group monitoring programs, SoCal GMP.
For a state that is suffering through its 4th year of drought, it’s hard to imagine that controlling storm water could be such a pressing issue. But, the regulators know no season, and throughout the state of California, the Regional Water Quality Control Boards and the State Board have been busy writing a new statewide General Construction Permit and adopting new MS4 (Municipal Separate Storm Sewer System) regional permits.

The Construction Industry Coalition on Water Quality (CICWQ) has been working with a broad coalition of stakeholders, including builders, city officials, consulting engineers, water districts and large land owners to bring as much reality to the decision making as possible in the face of some often hysterical claims by the environmental community.

Unfortunately, rather than proceed cautiously and take a long term view of the policy for managing storm water, some Regional Boards have opted for a Band-Aid approach that basically assumes “it only rains on new construction.” These Boards believe that by tightly controlling rain water, significant gains can be made in reducing the pollution loads at storm drain outfalls. Of course, this completely ignores the fact that there are no controls for the rest of the developed community, which is 99% of the balance, and that run-off proceeds to the ocean without any treatment or control.

The most egregious of these local MS4 permits is the recently adopted Ventura County permit which requires nearly all post-construction rain water to be retained on site. For a typical single family home that means a pit six feet square and six feet deep. For a 10-acre commercial project, it means a pit the size of an Olympic swimming pool. It’s probably hopeless to assume that the property owner will properly maintain or know how to properly dispose of the dangerous flotsam of debris, oil, litter, doggy droppings, copper from brake linings and bacteria that will collect in this pit every year. Further, imagine the long term impact of that rain water infiltrating into the groundwater and leaching much of that poison into the soil along the way.

It’s a short sighted solution that follows the 1950’s policy of septic tanks and backyard incinerators that was wisely abandoned for regional collection, treatment and disposal systems. It makes no sense to head down that road again for storm water. The danger is that this policy will now be replicated in MS4 permits around the state and set us on a dangerous course that will take decades to reverse.

CICWQ has long advocated for a regional watershed-based storm water policy that would enable the treatment of runoff from existing development as well. It is only way that the goal of reducing measurable rain-induced pollution can be realized in any reasonable period of time. It also spreads the costs and assures proper handling and disposal of the resulting gloop that is washed from rooftops, yards and gutters. It’s a far better solution than the parcel-by-parcel program that results in 1000’s and 1000’s of poison filled puddles that the current policy will create.

In 2003, CICWQ contracted with Brown and Caldwell to evaluate the effectiveness of on-site vs. regional watershed approaches to managing rain water. They concluded that on-site controls are not uniformly effective, are problematic in addressing toxic pollutants and are not cost effective for most projects. That research is as valuable today as it was then. Some public agencies have begun to embrace the idea of modifying existing local facilities (retention and recharge basins, school yards, parks and open space areas) for short-term storm water collection and treatment. Such a system will also allow upgrades over time to treat a wide variety of pollution that cannot be captured with today’s technology. Although the Building Industry Association and CICWQ were able to get on-site bio-filtration added back to the tool box of options, the Ventura County approach will never be able to keep up with changing technology and conditions.

The statewide General Construction Permit also contains some problematic language for the construction industry. This new regulation applies to all construction projects in California, one acre and larger, and sets numeric limits and action levels on the sediment loads that can be discharged from a construction site during a rain storm. CICWQ was able to get removed from the draft permit requirements for Advanced Treatment Systems, (portable water treatment plants), which would have dramatically increased the cost of site preparation.

In addition, CICWQ has contracted with San Diego State University to undertake a multi-phased study of the performance of a wide variety of commonly used erosion and sediment controls. The purpose of this study is to demonstrate that numeric limits are not necessary or feasible to comply with water quality standards, and very effective control can be achieved with properly used BMPs (Best Management Practices). The information will also be helpful in demonstrating which controls are most effective in trapping heavy metals, which is the next priority on the agenda for storm water regulators.

It is not an easy task to shape these regulations and permits to recognize the realities of a construction site. Nor is it simple to demonstrate the effectiveness of some common and practical erosion control methods. CICWQ has engaged in developing a broad coalition of stakeholders to advocate for realistic policies for the control of storm water during construction. The work by San Diego State University and Brown and Caldwell is important and groundbreaking. With the continued support and funding from the construction industry we will pursue our fight for practical regulations for the construction industry.

Mike Lewis is the Senior Vice President of the CICWQ. For more information visit the website www.CICWQ.com.
Traffic congestion and the delays it causes are costing the nation’s construction firms an estimated $23 billion each year, according to a new analysis released recently by the AGC of America. There is no relief from traffic in sight, association officials warn however, as Congress is months late in passing six–year federal transportation legislation, prompting more pain for the hard–hit construction industry.

“Traffic tie ups nationwide are sapping productivity, delaying construction projects and raising costs for construction firms of all types,” said Stephen E. Sandherr, AGC of America’s chief executive officer. “Given the hardships they are facing, the last thing contractors need is to burn time, fuel and money stuck in traffic.”

Sandherr said the new analysis was based on responses from nearly 1,200 construction firms the association surveyed in late April and May. He noted that a “staggering” 93 percent of firms reported that traffic and congestion were affecting their operations. Meanwhile, nearly two–thirds of firms lose at least one day of productivity per worker per year due to traffic congestion, equaling 3.7 million days of lost productivity industry–wide each year.

Construction firms also reported that traffic tie–ups delay the average construction project at least one day, while one in three firms report traffic adds a minimum of three days to the length of the average project. As a result, Sandherr said that three–quarters of contractors say congestion adds more than one percent to their total costs, and one in 10 report that traffic adds eleven percent or more to their cost of doing business.

Given current construction spending levels, that amounts to $23 billion lost to traffic each year, Sandherr said, equal to Google’s total revenue in 2009.

The construction industry, and the rest of the economy, is unlikely to get any relief from traffic until Congress acts on long–delayed legislation that sets national surface transportation policy and funding levels over the next six years. That legislation is crucial for allowing states to plan complex, long–term highway and transit projects designed to cut congestion.

“As larger projects get put on the back–burner, traffic stagnates, construction firms have less work and equipment plants see orders drop,” Sandherr said. “It is hard to think of a better way to undermine the stimulus than failing to pass a surface transportation bill.”

According to the association’s industry survey, two–thirds of transportation contractors report states are issuing an average of 17 fewer bid lettings this year worth 30 percent less than last year because of the lack of the transportation bill. As a result, 60 percent of those firms report they are buying an average of $2.95 million less in equipment this year. Meanwhile, 70 percent of firms are making an average of 26 percent less in revenue, and 63 percent of transportation construction firms report they are hiring an average of 77 fewer workers this year because of the lack of a six–year bill.

Sandherr said the solution to the nation’s costly traffic woes was for Congress and the Administration to act quickly to pass new surface transportation legislation this summer. Noting that the program relies on self–funding user–fees, he said Washington officials could cut traffic and boost economic activity without adding to the deficit.

“In today’s political environment where voters are worried about jobs and the deficit, passing legislation that creates construction jobs, boosts our economy and doesn’t add one cent to the deficit ought to be a no–brainer,” Sandherr added.

For more on the AGC survey and state by state data, visit www.agc.com.
Tightening the Loophole in Fall Protection Standards

By Keith Henderson, Joshua Casey

Falls are the leading cause of fatalities in the construction industry. As a matter of fact, did you know that falls from elevation account for one third of all deaths in construction? According to the U.S. Bureau of Labor Statistics, falls are still a major concern for U.S. workers. Latest yearly statistics show injuries involving falls in private industry totaled an astounding 255,750. Sadly, these incidents have resulted in 735 deaths. The ANSI/ASSE Z359-2007 Fall Protection Code introduced in 2007 was approved by the American National Standards Institute (ANSI) to address fall protection requirements for general industry. The new code includes 17 fall protection-related standards. The standards offer employers tools and resources on how to prevent fall related injuries and deaths.

The Cost of Falls

Fall accidents are the most frequent and most costly across the construction sector. Falls represent one quarter of all claim volumes and 44 percent of all claim costs. The other dominant accident categories in construction are overexertion and “struck by”. These three mechanisms of injury account for about 70 percent of all claim volumes and 76 percent of all costs. From 2006 – 2008, more than $243,000 was spent on worker injury claims alone, according to WorkSafeBC Data Warehouse for 2006-2008 (as of April 30, 2009).

The original standards (ANSI Z359.1) published in 1992 and later revised in 1999 were always intended to be the first in a series of standards to address a full, comprehensive fall protection program. The original standards only addressed fall arrest systems and equipment used for positioning. Travel restraint and rescue, which is quite different, was to be addressed later.

Now as we pass the three-year anniversary of the standard’s implementation, Z359 ASC Chair Randall Wingfield reminds us why the revision is essential. “There had been little change to the Z359 consensus standard over the first 15 years, even though falls are still one of the top four causes of on-the-job fatalities. These new standards were developed (so that) Z359 no longer applies only to manufacturers; they are a comprehensive resource for anyone with workers at height.”

Scope of ANSI/ASSE Z359-2007 Fall Protection Code

It is important to recognize there are notable differences between this code and previous ANSI/ASSE fall protection standards, both in general and specific terms. The terminology has been changed in an effort to plainly set minimum standards while addressing very specific issues that may have previously been ignored due the ambiguity of past rules and standards.

Information in the new standard is provided in specific language to generate a greater understanding by the employer, employees, owners, consultants and vendors of their fall protection roles and responsibilities. Indeed the standard sets strict parameters that make mandatory the employers’ responsibility to be aware of the work-at-height activities. In addition, the code requires that employees are given the opportunity to perform and recognize their responsibility to verify if their current competencies have common goals and conclusions. The fall protection participant must fully understand his role and responsibilities in his own fall protection, including: preplanning, fall protection equipment, anchorages, clear height, swing fall, rescue, buddy system and working with the competent person. In the new code, the employer now is aware that when an authorized person if required to work-at-height, training must be provided to give the employee the knowledge and skill sets required to safely perform his or her work.

An Overview of The Standard

The first eight standards of ANSI Z359.0-2007 Fall Arrest establish viable criteria for companies to use in developing sustainable safety programs. Following through with Z359-2007 can seem to be an overwhelming undertaking. Changing workplace habits, attitudes and behaviors will be a challenge, as is redesigning work practices and areas.

ANSI/ASSE Z359: A Family of Standards

The standards included in the code provide organizations with a comprehensive resource for protecting workers at height. The scope has expanded beyond fall but continue to adhere to the “systems approach” of the original 1992 edition:

1-ANSI/ASSE Z359.0-2007: Definitions and Nomenclature Used for Fall Protection and Fall Arrest
   • A dictionary of specialized terms compiled from the other four standards.

2-ANSI/ASSE Z359.1-2007: Safety Requirements for PFASs, Subsystems and Components
   • Gate strength requirements have increased for snaphooks and carabiners.
   • Includes a front attachment element for fall arrest.
   • Includes additional testing and warnings for twin-leg shock-absorbing lanyards.

3-ANSI/ASSE Z359.2-2007: Minimum Requirements for a Comprehensive Managed Fall Protection Program
   • Directed at employers rather than product manufacturers.
   • Training & Evaluations for administrators, safety engineers and supervisors to at-risk workers and rescue personnel.
   • General and specific requirements for fall protection procedures.
   • Anchor Systems divided into two categories-certified and noncertified.

4-ANSI/ASSE Z359.3-2007: Safety Requirements for Positioning and Travel Restraint Systems Establishing minimum design and test requirements for Harnesses and Lanyards used in work positioning and travel restraint.
   • Work positioning: Supporting a worker on a vertical surface while working with hands free.
   • Travel restraint: Limiting a worker’s travel in such a manner that they cannot reach a fall hazard zone.

Provisions for prompt rescue after a worker has fallen and remains suspended, unable to evacuate him/herself to a safe working level.

Rescue subject within six minutes.

Advance planning is needed for professional rescue services.

Documented plan and written confirmation.

In-house rescue team members must be trained and equipped for the task, including regularly scheduled simulations and documented plans and instructions for their use.

An additional three Standards were approved and effective November 16, 2009:

6- ANSI Z359.6 – 2009: Specifications and Design Requirements for Active Fall Protection Systems

• Design and performance of complete active fall protection systems, including travel restraint and vertical and horizontal fall arrest systems.

7- ANSI Z359.12 – 2009: Connecting Components for PFASs

• Performance, design, marking, qualification, test methods and removal from service connectors.

8- ANSI Z359.13 – 2009: Personal Energy Absorbers and Energy Absorbing Lanyards

• All energy absorbing lanyards and personal energy absorbers to reduce the forces implied on the user to less than 10 times the normal gravitational pull of the earth. In addition, users of energy absorbing lanyards must weigh within the range of 130 to 310 lbs.

ANSI intends to create nine additional Standards dealing with a variety of other areas. Work continues on these Standards by various ANSI committees. No effective completion dates have been announced.

Summary

The standards contained in ANSI/ASSE Z359-2007 will generate proven and repeatable problem-solving protocol that businesses can use to achieve life-saving results. Elements that were missing from the original ANSI Z359 guidelines now are included. Companies that experienced difficulty in establishing and maintaining a complete program now have definitions, tools, procedures and policies to implement. It is a standard that can fortify the safety relationship among the end user, owner, consultant and equipment manufacturer; promote safety as a competitive edge in a global market place; and begin to eliminate workplace hazards so employees can focus on doing their jobs and experience the benefits of working safe. An effective safety program no longer is just a moral issue; it is a deciding factor in surviving economic conditions and a contributing element to a healthy bottom line.

In an increasingly competitive market place, the company with fewer worker turnovers, injuries, citations and downtime WINS!

Keith Henderson is Vice President of Joshua Casey Safety Supply. Joshua Casey Corporate Training, has conducted seminars on the standard in an effort to assist employers and those at height to better understand the changes and requirements. A comprehensive review of the standard can be provided upon request at JoshuaCasey.com, or by calling the authors at 714.240.9440.
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Fred Parker Launches Swinerton Government Services

Fred Parker has joined Swinerton Incorporated to launch their new Swinerton Government Services division, which will be based out of Colorado and operate nationally.

In his new role as Vice President & Division Manager of Swinerton Government Services, Parker will lead efforts to successfully deliver sustainable, large-scale complex design and construction projects and professional services to a diversified base of government agencies nationally.

Parker brings over 26 years of construction experience with extensive success in design-build construction management. Before joining Swinerton, Parker was President of Tetra Tech Facilities Construction in Arlington, VA, and prior to that was responsible for leading Turner Construction's Government Services group in their Washington, D.C. office. He was appointed by the AGC to the National Army Corps of Engineers Committee.

Parker has structured Swinerton Government Services to have the flexibility and resources to respond to the government's military infrastructure needs by providing streamlined processes and integrated solutions to the design and construction of a wide range of military facilities in support of the U.S. defense capabilities. Swinerton Government Services combines innovative solutions and strategic capabilities, effective communications and intelligence, national resources and ingenuity to deliver projects safer, faster and within budget.

JoshuaCasey Announces New Division

JoshuaCasey, a leading provider of construction industry training services in California for more than a dozen years, announced the recent launch of its new division, JoshuaCasey Safety Supply. The division will offer a full line of safety products, from safety glasses and fall protection equipment to gas monitors, respirators and more, at competitive prices.

The new division is headed by Keith Henderson, who will serve as Vice President of JoshuaCasey Safety Supply. Henderson has been in the safety supply industry for over 20 years. He can be reached at (714) 245-944 ext. 108, or khenderson@joshuacasey.com.

Although a completely separate division from JoshuaCasey Corporate Training, the company notes that customers can expect the same friendly, strong customer service and team support that JoshuaCasey has provided its customers in other areas. An open house will be scheduled in the near future. For more on the new division, visit the website: http://www.joshuacasey.com//SafetySupplies.html.

Andrew Ausonio Named Construction Person of the Year

On June 5, the Salinas Valley Builder's Exchange honored Andrew Ausonio with its Construction person of the Year award. The award was presented at its annual Construction Gala.

Andrew Ausonio carries on a family legacy of being heavily involved in the community, making his own personal mark since purchasing the family business in 1994 where he holds the title of Chief Executive Officer. He and his company Ausonio Incorporated have won many awards over the years both for his work and for his community service.

Top 10 Projects Awards

Following are the top 10 public project awards California last month, compliments of McGraw-Hill Construction.

<table>
<thead>
<tr>
<th>Project Title</th>
<th>Project City</th>
<th>Reported Low</th>
<th>Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>SMUD East Campus Operations Center (DESIGN/BUILD) 100001JS</td>
<td>Sacramento</td>
<td>$103,740,273</td>
<td>Turner Construction Co</td>
</tr>
<tr>
<td>CA/DOT Widen Highway To 4-lanes Expressway &amp; Construct A 05330724</td>
<td>Paso Robles</td>
<td>$46,614,551</td>
<td>Papich Construction</td>
</tr>
<tr>
<td>New Gregg Anderson School - Phased Multiple Bid Pkgs</td>
<td>Palmdale</td>
<td>$2,895,000</td>
<td>Mountain Movers Engineering</td>
</tr>
<tr>
<td>Mitchell Park Library and Community Center PE09006</td>
<td>Palo Alto</td>
<td>$24,369,000</td>
<td>Flintco Inc</td>
</tr>
<tr>
<td>Susanville Superior Courthouse OCCM201016GS</td>
<td>Susanville</td>
<td>$24,130,000</td>
<td>Clark &amp; Sullivan (Sparks)</td>
</tr>
<tr>
<td>Capuchino HS Additions / Modernizations Bldg F - G - H</td>
<td>San Bruno</td>
<td>$21,997,000</td>
<td>Roebbeben Contracting Inc (Bid line)</td>
</tr>
<tr>
<td>LATTC Learning Assistance Center / Library Renovation 17777020301</td>
<td>Los Angeles</td>
<td>$21,514,634</td>
<td>Suffolk Construction</td>
</tr>
<tr>
<td>Pt Loma Wastewater Treatment Plant Grit Processing K104733C</td>
<td>San Diego</td>
<td>$21,218,500</td>
<td>Archer Western Contractors, LTD</td>
</tr>
<tr>
<td>CA/DOT Bridge Replacement &amp; Widen Roadway 103A66U4</td>
<td>Merced</td>
<td>$19,870,913</td>
<td>RGW Construction</td>
</tr>
<tr>
<td>Yards &amp; Shops - Structural Modifications 15PL110</td>
<td>Alameda</td>
<td>$16,692,497</td>
<td>West Bay Builders Construction</td>
</tr>
</tbody>
</table>
The ‘Just Cause’ Standard in Discharge Grievances

By Mark Reynosa, Field Services Manager – Industrial Relations Northern California

With the close of negotiations for expiring agreements and summer’s busy schedule, we have seen an increase in activity in discharge grievances filed by the Unions. As a reminder, below is a just cause standard outline to take into consideration for your evaluations of terminations.

In the adjudication of discharge grievances, the burden of proof always lies solely on the employer. Both labor agreements and public policy apply similar standards with these grievances. By far the most prevalent standard is “just cause.” Understanding this standard is essential in determining your defensible position and minimizing the risk associated with an adverse decision by the arbitrator. As a practical matter, when deciding a discharge grievance, arbitrators use six separate tests to determine if the “just cause” standard had been satisfied.

The first test of the “just cause” standard is written notice. An employer must give a discharged employee written notice that he/she has been discharged as required by most labor agreements. Written notices are often lost because project managers/superintendents are not aware of the requirements; therefore, policies are often erratically or selectively enforced. In addition, from the date of hire, an employee is entitled to knowledge of what standards are expected and what the punishments will be if these expectations are not satisfied. Updated employment policies and procedures, complete with a list of consequences for non-performance, and a signature page, will assist your defensible position and establish preliminary notice.

The second test is relatively self-explanatory: a rule must be reasonable. In other words, does a direct linkage exist between the rule and the effective operation of the business? As a rule, policies and procedures driven by health and safety concerns, industry standards or a business necessity, are reasonable, and therefore defensible.

Because employment decisions should be based on fact, arbitrators tend to examine the third and fourth tests collectively. The third test is that investigations must be thorough and timely. A case may easily be lost because an investigator missed a relevant fact entirely, or the facts they presented were dated (i.e. disciplining an employee for a problem a month after the incident). The fourth test is that investigations must be fair and impartial. Both sides of the issue need investigation and always allow the accused to present their side. To create a defensible position, the investigation process, and subsequently any decisions made, must be free from bias or pretext and consideration must be given to mitigating circumstances.

Finally, the sixth test for the “just cause” standard is an employer’s even policy of treatment and punishment. Historically, arbitrators in the construction industry will evaluate the employer’s past application of policies and punishment to determine if they are consistent. Any punishment imposed must suit the offense and can not be arbitrary or capricious. With this in mind, arbitrators view harsh and disparate treatment as a serious issue and are more willing to rule against an employer in a case where they believe the discharge was unjustified.

To create a defensible position, the investigation process, and subsequently any decisions made, must be free from bias or pretext and consideration must be given to mitigating circumstances.

Attention AGC Members:
Do you have noteworthy projects that your firm is building, milestones your company has reached, personnel changes or other news of interest to the industry? The California Constructor spotlights projects and other AGC of California member news throughout the year. Please email your news to the Constructor Editor, eatonc@comcast.net, fax to (707) 789-9519 or call (707) 789-9520.
We want to hear from you!
Past Presidents of AGC Meet

AGC of California’s Past Presidents and their First Ladies gathered in Hawaii in late April for the 31st annual Past Presidents’ meeting.

Past President Chuck Fletcher planned and coordinated the two-and-a-half day event, which was held at the Sheraton Maui at Kaanapali Beach.

The gathering included a business meeting of the Past Presidents as well as current chapter President, Bob Christenson, and Sr. Vice President, Gerry DiIoli. During this meeting, the “state of the chapter” and its activities are examined and discussed. The Past Presidents also holds an election to vote the most recent past president into the organization.

The long-standing tradition of the AGC of California Past Presidents’ meeting began in 1979, which was the 10 year anniversary of the merger of California’s North, Central and Southern chapters. That initial meeting was hosted by Bill Campbell, who was the first “combined” chapter president in 1969. Since that time each Past President is responsible for setting up and coordinating the activities of this annual meeting eight years out of office (originally 10 yrs out).

There are currently 25 surviving AGC of California Past Presidents. Also in attendance was Jim Waltze, who is a Past President of the national AGC of America as well as long being an active member of the AGC of California chapter.

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COMING IN THE CONSTRUCTOR

The September 2010 issue of the California Constructor magazine will focus on New Technology in the Construction industry. The issue will also include special coverage on the upcoming 2010 AGC Fall Conference and Meetings slated for early November at the Hyatt Grand Champions in Indian Wells, including the complete list of sponsors and events planned to date.

Also look for the following editorial coverage in the follow-on months:

- **October:** Construction Education and Workforce Development
- **November:** Infrastructure / Transportation Construction
- **December:** Year in Review / Forecast for 2011

For future editorial contributions or suggestions, please email editor Carol Eaton at eatonc@comcast.net or call (707) 789-9520.

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THE VOICE OF THE CONSTRUCTION INDUSTRY
Associated General Contractors of California 17
Changes at OSHA, Cal/OSHA Means Burden of Proof is on Employers

By Fred Walter

Accident rates continue to trend down. Fewer and fewer Americans die on the job. In light of this good news, what are Fed/OSHA and Cal/OSHA doing? They’re tightening the screws on employers.

“New Sheriff in Town”

Secretary of Labor Hilda Solis made good on her brash announcement that “there’s a new sheriff in town” by choosing David Michaels as her Assistant Secretary for OSHA, and Jordan Barab as his Deputy Assistant. Both are mounting a national posse to round up and hang employers. Michaels hit the ground running, calling for – among other things – increased penalties and more aggressive enforcement of safety rules. At the federal level he is moving bodies from Consultation to Enforcement and shifting funds from federal cooperative programs, most notably VPP, to pay for increased inspections.

Cal/OSHA Struggles to Keep Up

At the state level, Michaels ordered reviews of enforcement efforts by all of the state-run OSHAs, including Cal/OSHA. Now, for the first time in its history, Cal/OSHA is scrambling to keep its reputation as tougher than Fed/OSHA. Len Welsh, Chief of Cal/OSHA, has gone Michaels one better by “borrowing” Fed/OSHA’s western states Director of Analysis and Evaluation Alan Traenkner for a two-year stint as his Special Assistant. The shouting at the federal level has echoes here. Our clients tell us that Cal/OSHA’s people are more aggressive and more confrontational while at the same time less knowledgeable, less professional and, finally, less credible.

With a few laudable exceptions, inspectors terminate their investigations once they find one employee whose account terminates their investigations once they find one employee whose account. The purpose was to have employers voice their commitment to workplace safety and to provide a framework for safety programs. John Howard, then Chief of Cal/OSHA and now head of NIOSH, promised California’s employers that section 3203 would not become California’s General Duty Clause. But it is today.

Today we also see 3203 citations tacked onto practically every accident-related citation as a “gotcha” on the theory, often freely stated, that accidents don’t happen without a failure to identify a hazard or to train, or both. We have even had to defend a “willful serious” citation for an employer who made the mistake of adding details to its IIPP which 3203 doesn’t require.

As to “willfuls,” the current trend within seems to be to issue “willful” citations more freely where “serious” citations used to be appropriate.

Part of these changes stems from a decision to merge safety engineers and industrial hygienists into one classification. From an enforcement standpoint, this one-size-fits-all approach does not work. Now we see, for example, a well-trained industrial hygienist stand staring at a large machine trying to understand a guarding problem.

Part of it is probably due to the Governor’s enforced furloughs which shortened inspector’s work weeks without lengthening the deadline to issue citations. Both together can create frustration which is taken out on the regulated community.

Part of it is a loss of institutional memory. Cal/OSHA’s Chief Counsel, with 30 years’ experience, retired this year, as did its senior industrial hygienist. The long-time head of policy development, a guru with a phenomenal memory and – as important – experience in the private sector, retired last year. We don’t know for certain, but our sense is that Cal/OSHA is managed today by people who have spent little or no time on the other side of the fence, who have only academic and little “real world” experience in either safety or health.

In the face of uncertain knowledge and unstable jobs, Cal/OSHA’s people retreat more and more into what they know: Title 8’s mandates. As one disillusioned safety professional puts it, Cal/OSHA is all about enforcing safety regulations, not promoting workplace safety.

This shift in attitude is also seen at a higher level. Cal/OSHA is frustrated with the “unfair” impediment of actually having to prove their cases. A major effort is underway to shift burdens of proof from Cal/OSHA to employers. An example: When the Appeals Board required that Cal/OSHA prove more than mere presence on a job site to characterize a general contractor as a “controlling employer,” the union was the first to file a writ challenging the decision. But Cal/OSHA was right behind, arguing that it, not the Appeals Board, should have last say as to what a safety and health statute means.

And in keeping with that “last say” approach, we frequently face Cal/OSHA lawyers who attempt to prove their cases by arguing what the regulation ought to prohibit, not its actual language.

No Good Deed Goes Unpunished

At the Cal/OSHA Appeals Board, this has been a rough decade. When Candice Traeger was appointed Chair in 2005 the Board had a backlog of over 4,000 cases. It took two years to get from filing to hearing. That led to a mandate from Fed/OSHA that the backlog be chopped or else. In 2009, at her re-confirmation hearing before the Senate Labor and Industrial Relations Committee, Traeger was able to report that the current backlog was 87 cases and the time from filing to hearing averaged nine months.

How did the Board do it? By actually enforcing the Board’s late appeal rules. By pushing judges to promote settlements. And, recognizing that most appeals settle when the heat’s on, by setting more than one case for hearing at a time, a tactic used by California’s Superior Courts since they faced a similar backlog in the ‘80’s.
What did the Board get? An open letter of protest from 46 inspectors and one staff attorney decrying her tactics as jeopardizing the safety of California’s workers.

When the Board opened its doors to the first advisory meetings in its history, did it get applause? No. It received heavy criticism for, among other things, following the law instead of doing “justice” for California's workers.

**What’s An Employer To Do?**

Keep your head down, and keep working. It may seem counter-intuitive, but think safety, not just compliance. Emphasize training. Walk those jobs.

Follow Davey Crockett’s advice: Be sure you’re right and then go ahead. True, Davey died by following that wisdom but, whatever happens, you’ll sleep better knowing that you did your best to keep your workers safe.

(Note: The opinions expressed here are of those of the author. Fred Walter is a partner with Walter & Prince, LLP, Healdsburg, CA. This article is excerpted from the original article located at www.walterprincelaw.com.)

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**Calendar of Events**

**August 19**
- Fall Protection Competent Person Level I in San Bernardino
- Project Manager 3: Winning Cash Flow Strategies on Change Orders & Claims, at AGC’s West Covina office
- STP Boot Camp at the AGC Concord office

**August 20**
- Project Manager 4: Scheduling For Management, at AGC’s West Covina office

**August 23-25**
- OSHA 30-Hour Construction Safety Course at Global Environmental Network

**August 26**
- OSHA 10 - Hour Construction Safety Course in Sacramento
- BIM Education Program - BIM 101 at AGC West Sacramento office

**September 9**
- SWPPP - Understanding the New General Permit at the AGC West Sacramento office

**September 13**
- Orange County District 2010 Golf Classic at the Yorba Linda Country Club

**September 14**
- Aerial Lift/Fall Protection Awareness in Sacramento
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