

**BRITISH COLUMBIA REGIONAL OFFICE**

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October 28, 2019

Sent Via Email: [policy@worksafebc.com](mailto:policy@worksafebc.com)

Ms. Willa Duplantis, Senior Policy and Legal Advisor  
Policy and Regulation Division  
WorkSafeBC  
P.O. Box 5350, Stn. Terminal  
Vancouver, BC. V6B 5L5

Dear Ms. Duplantis:

Re: **WorkSafeBC (“WCB”) Consultation  
G19.25-Assurance in Writing-Assurance in Writing-Minimum separation distance to be  
maintained from energized high voltage electrical equipment and conductors  
Worker Position – Canadian Union of Public Employees (BC)(“CUPE”)**

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**I. INTRODUCTION:**

This worker stakeholder submission is being remitted for the Consultation on the WCB Guidelines for the G19.25-Assurance in Writing-Minimum separation distance to be maintained from energized high voltage electrical equipment and conductors.<sup>1</sup> Thank you for requesting feedback on this Consultation.

CUPE is Canada’s largest Union with over 700,000 members across the country and more than 70 offices.<sup>2</sup> CUPE represents workers in many sectors including health care, emergency services, education, early learning and childcare, municipalities, social services, libraries, utilities, transportation, airlines and more. There are nearly 97,000 members in over 160 Locals in BC.<sup>3</sup>

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<sup>1</sup> WorkSafeBC. Consultations. See <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-guidelines/guidelines-part-19#SectionNumber:G19.25>

<sup>2</sup> See <https://cupe.ca/>

<sup>3</sup> See <https://www.cupe.bc.ca/>

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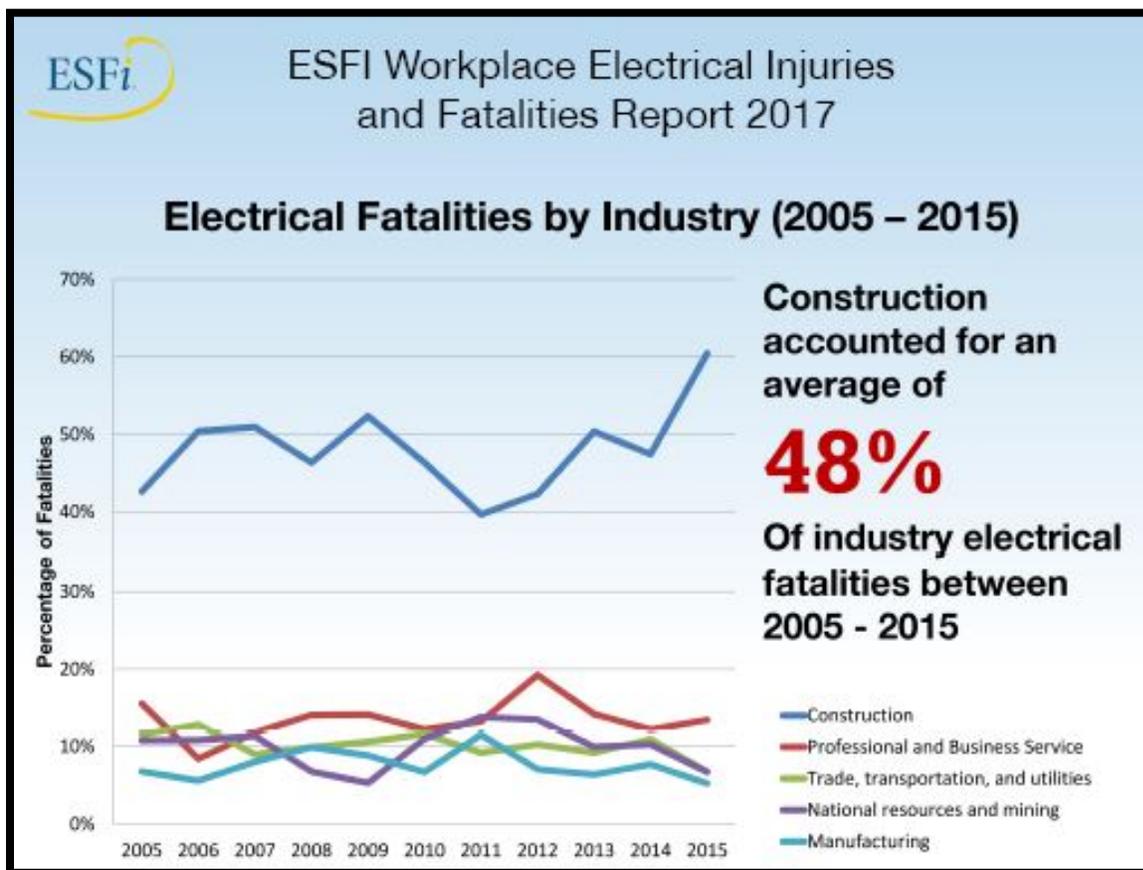
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## II. OVERVIEW OF CUPE’S POSITION AND PRELIMINARY CONCERNS:

CUPE is unable to comment on the Guideline because we are uncertain what the changes are and the rationale for the changes. There are general comments with respect to parts of the Guideline that need to be amended.

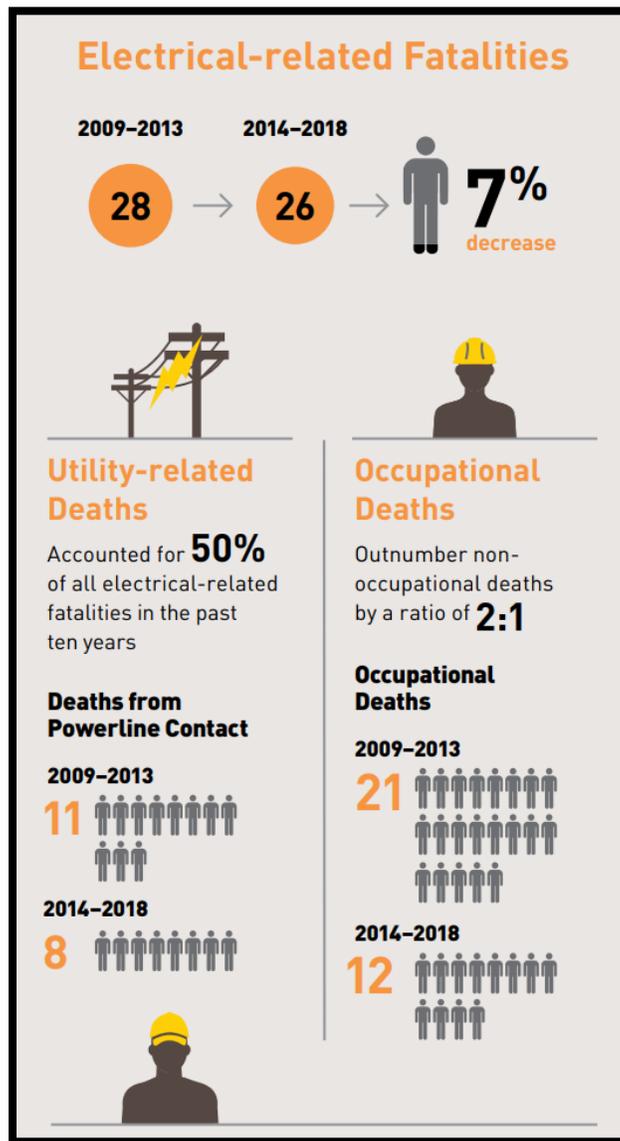
While fatalities due to electrical equipment have decreased, injuries have increased.<sup>4</sup>

Figure 1:



<sup>4</sup> Electrical Industry News Week. June 19, 2017. (US Statistics although similar patterns were seen in Ontario and BC up to 2018 as per the Ontario Electrical Safety Report 2018 at [https://www.esasafe.com/assets/files/esasafe/pdf/Safety\\_Reports/ESA\\_OESR\\_2018\\_Final.pdf](https://www.esasafe.com/assets/files/esasafe/pdf/Safety_Reports/ESA_OESR_2018_Final.pdf)). See <https://electricalindustry.ca/latest-news/3205-electrical-fatalities-go-down-nonfatal-injuries-go-up>

Figure 2:<sup>5</sup>



The age group with the highest number of fatalities, in Ontario, was age 20-39.<sup>6</sup> Over 80% of these were male.

<sup>5</sup> Ontario Electrical Safety Report 2018. See [https://www.esasafe.com/assets/files/esasafe/pdf/Safety\\_Reports/ESA\\_OESR\\_2018\\_Final.pdf](https://www.esasafe.com/assets/files/esasafe/pdf/Safety_Reports/ESA_OESR_2018_Final.pdf)

<sup>6</sup> Ontario Electrical Safety Report 2018. See [https://www.esasafe.com/assets/files/esasafe/pdf/Safety\\_Reports/ESA\\_OESR\\_2018\\_Final.pdf](https://www.esasafe.com/assets/files/esasafe/pdf/Safety_Reports/ESA_OESR_2018_Final.pdf)

### **III. BACKGROUND TO CONSULTATION:**

As per Appendix A, CUPE was unable to discern what specific changes were being proposed, nor was there any rationale for the changes (if any) contained in the current Consultation.

### **IV. PROPOSED CHANGES TO REGULATION LANGUAGE:**

CUPE was unable to discern what specific changes were being proposed, nor was there any rationale for the changes contained in the current Consultation.

### **V. ORGANIZATION POSITION:**

CUPE is unable to comment on the Guideline because it is uncertain what the changes are and what the rationale for the changes is. There are general comments with respect to parts of the Guideline that need to be amended.

### **VI. REASONS FOR ORGANIZATION POSITION:**

In the interim, CUPE has a number of concerns with respect to the language in the Guidelines and OHS Regulations. For example:

“Note:

Under Sections 19.25(4) and (5) of the *Regulation*, the electrical hazard must be controlled by one of the previously listed methods before any workers commence performing tasks that could place workers or their tools within the limits of approach specified in Table 19-1A. Work performed according to the requirements of Section 19.29 is not subject to the requirements of Section 19.25.

The selection above depends on what is practicable, the circumstances of each workplace, and is a matter of assessment and judgment. Employers are expected to identify the potential risk and do everything that is reasonably practicable to prevent contact with the high voltage electrical equipment. This includes making a risk-based decision that includes the location of the high voltage electrical equipment, duration of the job, number of workers exposed, type and amount of equipment being used, collision avoidance device(s) installed on equipment, and worker training.” (Emphasis added)

The issue is the terms “practicable”, “reasonably”, and “do everything that is reasonably practicable.” These dilute the responsibility of employers under Section 115 of the *Workers Compensation Act*.<sup>7</sup>

CUPE refers to the current law on due diligence and the wording of due diligence by the WCB. The WCB states that:

“Due diligence

Due diligence requires taking all reasonable steps to protect workers from harm. "All reasonable steps" is based on the level of judgment and care that a person would reasonably be expected to do under the circumstances. An organization that actively manages health and safety and takes all reasonable steps to protect workers from harm is being duly diligent.

Due diligence requires that you:

- Identify all workplace hazards
- Implement all necessary preventive measures
- Communicate appropriately to all necessary personnel”<sup>8</sup>

Where is the reference to “practicable”?<sup>9</sup> Even in the WCB Due Diligence Checklist, there is no reference to “practicable” (CUPE also disagrees with the use and application of the term “reasonable” as well):

Figure 3 (see next page):

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<sup>7</sup> See [http://www.bclaws.ca/civix/document/id/complete/statreg/96492\\_00](http://www.bclaws.ca/civix/document/id/complete/statreg/96492_00)

<sup>8</sup> WorkSafeBC. Due Diligence. See <https://www.worksafebc.com/en/health-safety/create-manage/enhancing-culture-performance/due-diligence>

<sup>9</sup> WorkSafeBC. Due Diligence Checklist. Note CUPE disagrees with any references to discipline in this document. See <https://www.worksafebc.com/en/resources/health-safety/checklist/due-diligence-checklist?lang=en>

## DUE DILIGENCE CHECKLIST

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### What is the *standard* of due diligence?

Taking all reasonable care to protect the well-being of employees or co-workers.

### What is the *defense* of due diligence?

All reasonable precautions to comply were taken in the circumstances.

### What is the *test* of due diligence?

Documentation of an effective OH&S program; an effective OH&S program includes:

- A written OHS program that has been implemented.
- An employer who takes steps to control or eliminate specific hazards.
- Written safe work procedures that are understood and followed by workers.
- Workers who are provided with adequate instruction, training, supervision and discipline to work safely.

This is supported by jurisprudence. In Lancaster House, eAlert August 22, 2018, it stated that:<sup>10</sup>

“The Court of Appeal’s decision in this case clarifies that the "general duty" requirement under s. 25(2)(h) may, in some cases, impose higher and differing obligations than those set out in the regulations. In reaching this conclusion, the Court emphasized that the regulations cannot reasonably anticipate and provide for all of the needs and circumstances of all workplaces across the province, stating:

[P]rescriptive certainty is not required in the context of regulatory offences such as s. 25(2)(h). That section establishes a standard, rather than a rule, the requirements of which are tailored to suit particular circumstances. Employers must take every precaution reasonable in the circumstances in order to protect workers. Reasonableness is a well-known legal concept that is interpreted and applied in a wide variety of legal contexts. Its use in s. 25(2)(h) does not give rise to intolerable uncertainty. [emphasis in original]

It may not be possible for all risk to be eliminated from a workplace, ... but it does not follow that employers need do only as little as is specifically prescribed in the regulations. There may be cases in which more is required – in which additional safety precautions tailored to fit the distinctive nature of a workplace are reasonably required by s. 25(2)(h) in order to protect workers. The trial justice’s erroneous conception of the relationship between s. 25(2)(h) and the regulations resulted in his failure to adjudicate the s. 25(2)(h) charge as laid.” (Emphasis added)

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<sup>10</sup> Also, on September 28, 2018, Justice Solomon convicted Coco Paving Inc. of two counts of contravening the *Occupational Health and Safety Act* (“OHS”) and the Regulations for Construction Projects, O. Reg. 213/91 (the Regulations). While this was in Ontario, the principles and the relevant OHS Regulations are largely the same. Also see *Ontario (Ministry of Labour) v. Cobra Float Service Inc.*, 2017 ONCJ 763.

The WCB Review Division has made numerous decisions in October 2019 on the issue of what due diligence means and how it is applied. For example, in Review Division decision R0250091, October 22, 2019, the WCB stated that:<sup>11</sup>

“Due diligence is defined in the Board’s policy D12-196-10 as follows:

The Board will consider that the employer exercised due diligence if the evidence shows on a balance of probabilities that the employer took all reasonable care. This involves consideration of what a reasonable person would have done in the circumstances. Due diligence will be found if the employer reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if the employer took all reasonable steps to avoid the particular event.”

In R0243261, dated October 22, 2019, the Review Division stated that:<sup>12</sup>

“The representative submits that due diligence is a high threshold. However, it is not a standard of perfection. The representative submits that the employer, while not perfect, acted with due diligence to prevent the incident from occurring and states that there was not a particular high-risk violation on the part of the employer that could support the grounds for a penalty.

After considering all of the evidence on file, including the submissions provided by the employer’s and worker’s representatives on this review, I am not satisfied that the employer was duly diligent in ensuring its workers were able to carry out their work safely. In this case, I find it significant that the employer was aware that its north and south gates surrounding the dry line were regularly left unlocked and did not take reasonable steps to prevent this from occurring.”

Most of the decisions reviewed upheld penalties against employers for a lack of due diligence. Clearly there is an issue and any Guideline that continues to encourage a lack of due diligence via wording such as “practicable” must be amended.

With respect to the reference to work training, CUPE refers to *Ontario (Ministry of Labour) v. Cobra Float Service Inc.*, 2017 ONCJ 763:<sup>13</sup>

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<sup>11</sup> WorkSafeBC. Review Division decisions. See <https://www.worksafebc.com/en/resources/decisions/review-decisions/2019/prevention-decisions/review-reference-0250091?lang=en>

<sup>12</sup> WorkSafeBC. Review Division decisions. See <https://www.worksafebc.com/en/resources/decisions/review-decisions/2019/prevention-decisions/review-reference-0250091?lang=en>

<sup>13</sup> <https://www.canlii.org/en/on/oncj/doc/2017/2017oncj763/2017oncj763.pdf>

“(231) Due diligence must relate to the particular breach of the legislation. General health and safety training does not establish due diligence regarding the specific hazard in issue.

R. v. Prince Metal Products Ltd., supra at para. 41, 63, 64.

Ontario (Ministry of Labour) v. Cox Construction Ltd., supra at para. 61.

R. v. Rio Algom Ltd., [1988] OJ No. 1810 (CA) at para. 31”

(Emphasis added)

According to the Canadian Centre for Occupational Health and Safety (“CCOHS”), an employer establishes a due diligence program by establishing the following:<sup>14</sup>

1. The employer must have written OH&S policies, practices and procedures. These policies, etc. demonstrate and document that the employer carried out workplace safety audits, identified hazardous practices and hazardous conditions and made necessary changes to correct these conditions, and provided employees with information to enable them to work safely.
2. The employer must provide the appropriate training and education to the employees to ensure workers understand and carry out their work according to the established policies, practices and procedures.
3. The employer must train supervisors to ensure supervisors are competent persons.
4. The employer must monitor the workplace and ensure employees are following the policies, practices and procedures. Workers have a legal duty to take reasonable care to ensure the safety of themselves and their co-workers. This includes following safe work practices and complying with regulations. Written documentation of progressive discipline for breaches of safety rules is considered evidence of due diligence.
5. The employer must have an accident investigation and reporting system in place. Employees should be encouraged to report “near misses” and these should also be investigated. Incorporating lessons learned from these investigations into revised, improved policies, practices and procedures will help prove the employer’s due diligence.

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<sup>14</sup> CCOHS. See <https://www.ccohs.ca/legisl/diligence.html>

6. The employer should document, in writing, all of the above. The documentation provides a history of how the company's occupational health and safety program has progressed over time (continuous improvement), and provides up-to-date documentation of the employer's due diligence efforts.

All of the elements of a due diligence program must be in effect before any accident or injury occurs. Due diligence is demonstrated by actions before an event occurs, not after.<sup>15</sup>

Employers do not have to be perfect, however, there are a number of factors the WCB and employers should consider. These include (not an exhaustive list):<sup>16</sup>

- Diligent and proactive management
- The presence of a comprehensive, OHS Regulation compliant health and safety policies and procedures
- Competent, well trained supervisory staff
- Use of a certified third-party health and safety specialists, if and as applicable
- Presence of trained Joint Health and Safety Committees and/or Health and Safety Representatives
- Full participation of trained Joint Health and Safety Committees and/or Health and Safety Representatives in inspections and investigations
- Proper, documented, regular site inspections by trained Joint Health and Safety Committees and/or Health and Safety Representatives
- Up to date, regular training of all workers
- Compliance with all OHS Regulations applicable to the employer's specific industry sector and generally
- Ensuring up to date, regular training on all equipment

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<sup>15</sup> OHS Insider. Due Diligence: 8 Arguments that Don't Work. March 2019.

<sup>16</sup> Also see the WorkSafeBC Task Hazard Analysis Workbook.

[https://safetyresourcesblog.files.wordpress.com/2014/09/jhsc\\_hazard\\_analysis\\_workbook.pdf](https://safetyresourcesblog.files.wordpress.com/2014/09/jhsc_hazard_analysis_workbook.pdf)

## VII. CONCLUSION:

“Due diligence requires that employers take active steps to protect the safety of their workers by creating procedures and systems to implement the requirements [of the OHS Regulations]” and “by ensuring the effective operation of those procedures and systems through their supervisors and managers.”<sup>17</sup> Regulations and Guidelines should not dilute this responsibility by the use of words such as “practicable”, “reasonable practicable” etc. These terms increase hazards, risks and the potential for injuries and fatalities, especially in high risk areas such as high voltage electrical equipment.

CUPE reserves the right to comment on the Guideline once the changes, if any, have been identified and the rationale for these changes is provided.

CUPE reserves the right to comment on how these changes apply to the OHS Regulations, related Policies, the Act, Policy (RSCM), Guidelines and the Practice Directives.

Respectfully submitted,



**Tom McKenna,  
CUPE National Health & Safety Representative and WCB Advocacy**

cc: Paul Faoro, President, CUPE BC Division  
Trevor Davies, Secretary-Treasurer, CUPE BC Division  
Meena Brisard, B.C. Regional Director  
Archana Rampure, CUPE National Director, Research, Job Evaluation and Health and Safety  
Rob Jandric, B.C. Assistant Regional Director  
Troy Winters, CUPE National Senior Officer, Health and Safety Representative

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<sup>17</sup> OSG. See <https://osg.ca/proving-due-diligence-in-cases-involving-fatalities/>

## **Appendix A WorkSafeBC Guidelines**

### ***G19.25 Assurance in writing***

Issued August 1999; Revised June 29, 2005; Editorial Revision to include February 1, 2011 Regulatory Amendment; Editorial Revision consequential to February 1, 2012 Regulatory Amendments; Editorial Revision November 21, 2017; Preliminary Revision September 25, 2019

#### **Regulatory excerpt**

Section 19.25 of the *OHS Regulation* ("*Regulation*") states:

- (1) If the minimum distance in Table 19-1A cannot be maintained because of the circumstances of work or the inadvertent movement of persons or equipment, an assurance in writing on a form acceptable to the Board and signed by a representative of the owner of the power system, must be obtained.
- (2) The assurance must state that while the work is being done the electrical equipment and conductors will be displaced or rerouted from the work area, if practicable.
- (3) If compliance with subsection (2) is not practicable the assurance must state that the electrical equipment will be isolated and grounded, but if isolation and grounding is not practicable the assurance must state that the electrical equipment will be visually identified and guarded.
- (4) The safeguards specified in the assurance must be in place before work commences and effectively maintained while work is taking place.
- (5) If guarding is used,
  - (a) neither equipment nor unqualified persons may touch the guarding, and
  - (b) a safety watcher must be designated, or range limiting or field detection devices acceptable to the Board must be used.
- (6) The assurance must be available for inspection at the workplace, as close as practicable to the area of work, and must be known to all persons with access to the area.

#### **Purpose of guideline**

This guideline provides information regarding the assurance in writing form; and, the hierarchy of protective measures intended by section 19.25 of the *Regulation*.

## Assurance in writing form

The "assurance in writing" form is generally referred to as a WorkSafeBC 30M33 form. 30M33 form is provided to and used by all power system owners in B.C. It is currently the only assurance in writing form that is acceptable to WorkSafeBC.

Generally, the 30M33 form is needed to obtain information about high voltage electrical equipment and used when the requirements of section 19.25 of the *Regulation* apply to the work being performed. Generally the 30M33 form does not need to be used when the work is being performed in compliance with the *Regulation* sections 19.26, 19.27, 19.28, or 19.29.

Section 19.25(1) of the *Regulation* requires that the 30M33 form be signed by the representative of the owner of the power system. The signature is an assurance that the safety precautions required by section 19.25 of the *Regulation* have been performed by the utility company. The signature of the representative of the utility owner is only an assurance that the work planned to be performed by the utility company has been performed by the utility company. The 30M33 form is not an assurance by the utility company that the safety procedures performed by the contractor are safe. A mechanically reproduced "approval," such as a rubber stamp, in lieu of a signature, is not acceptable. Contractors have sole responsibility for their systems and procedures that are intended to allow the work to be performed safely.

The 30M33 form may also be used as a record of decisions between the utility owner and the contractor indicating what work will, or will not, be performed by the utility owner in advance of the work to be performed by the contractor.

Section 19.25 of the *Regulation* applies to all workers who are not specially trained. Therefore, whenever the limits of approach contained in Table 19-1A cannot be maintained from the original or new location of the conductors, and any workers present do not meet the qualifications of sections 19.27, 19.28, or 19.29, then a 30M33 form must be completed according to the instructions contained on the form.

Section 19.25 of the *Regulation* does not apply merely when it is theoretically possible that a person or piece of equipment could enter within the limits of approach of Table 19-1A. Rather, it applies where the following situation exists:

- It is possible for a person or piece of equipment to enter within the limits of approach. This includes the potential for inadvertent movement of the machine, load, rigging, or any other factor(s) that could allow contact with high voltage electrical equipment and no systems are in place to ensure that this access does not happen.

Note that on construction sites, the electrical utility company in the area (for instance, BC Hydro), is generally responsible for overhead conductors to the electrical service; contractors are generally responsible for electrical wiring and equipment at the electrical service throughout the jobsite. Electrical contractors

are responsible to the electrical inspection authority having jurisdiction for the proper installation of the power distribution system on the jobsite as well as compliance with the *Regulation*. In all cases, however, the owner of the power system is the electrical utility company.

Section 19.25(6) of the *Regulation* does not specifically require that the 30M33 form be faxed to WorkSafeBC. However, any party may send a copy of the 30M33 form to WorkSafeBC.

### **Hierarchy of requirements defined in Sections 19.25(2) and 19.25(3) of the *Regulation***

#### **Option 1**

Section 19.25(2) - Electrical equipment and conductors must be displaced or rerouted if practicable

#### **Option 2 (only if option 1 is not practicable)**

Section 19.25(3) - Electrical equipment must be isolated and grounded if practicable

#### **Option 3 (only if option 1 or option 2 are not practicable)**

Section 19.25(3) - Electrical equipment will be visually identified and guarded. Note for this option merely visually identifying the conductors is not sufficient: electrically insulating or physical barrier guards must also be installed.

For conductors that are visually identified and electrically guarded, section 19.25(5) also applies.

#### **Note:**

Under sections 19.25(4) and (5) of the *Regulation*, the electrical hazard must be controlled by one of the previously listed methods before any workers commence performing tasks that could place workers or their tools within the limits of approach specified in Table 19-1A. Work performed according to the requirements of section 19.29 is not subject to the requirements of section 19.25.

**The selection above depends on what is practicable, the circumstances of each workplace, and is a matter of assessment and judgment. Employers are expected to identify the potential risk and do everything that is reasonably practicable to prevent contact with the high voltage electrical equipment. This includes making a risk-based decision that includes the location of the high voltage electrical equipment, duration of the job, number of workers exposed, type and amount of equipment being used, collision avoidance device(s) installed on equipment, and worker training.**

## Guarding Standards

Where conductors must be guarded, the following guarding practices are expected:

(a) Up to 25 kV

- Highly visible coloured, such as orange or yellow, polyethylene covers 1/8" thick or ABS non-conducting covers positioned such that contact with the conductor is restricted
- Fluorescent-coloured flag line (the fluorescent-coloured flag line is usually added to the guard wire)

(b) From 25 kV to 60 kV

- Guard wire, marked by bright-coloured flag line, and suspended between a supplementary set of cross arms on the poles

(c) Over 60 kV

- No guarding option available

The above practices are intended to be "visible" guarding to create awareness of overhead lines. No contact with the guarding is permitted. The cover guarding is not to be considered electrically insulated. Wires with integral insulation but not otherwise protected are not considered as guarded.

The visual identification flag line should be sufficient to keep workers and equipment a minimum safe distance away from the hazardous contact point. The requirement to prevent workers or equipment from entering this safe distance from any area in which the worker is likely to pass or work, applies to general workers covered by the *Regulation* section 19.24 but not, for example, to qualified workers under the *Regulation* section 19.29.

### Safety watcher

If the option of visual identification and electrical guarding is used, neither the limits of approach in [Table 19-1A](#) nor [Table 19-2](#) apply. The limit of approach is that neither the equipment nor unqualified persons may touch the guarding or flag line (visual identification). Section 19.25(5) requires that a safety watcher or acceptable device must be designated to ensure that the guarding is not touched. Electrical guarding may provide some protection from electric shock in the event of brush contact but, because of site conditions, absolute assurance that no injury will occur cannot be given.

The safety watcher must be given authority to stop the movement of the equipment when circumstances are warranted. An effective means of communication must be

established between the safety watcher and the equipment operator prior to commencement of work such that the stop signal is unambiguous.

When equipment is operated or intended to be operated in proximity to energized conductors or equipment, the hazard due to contact is prevalent while the equipment is in motion. Therefore, the safety watcher should focus on that motion. The safety watcher may perform other duties while the equipment is not moving. It is essential that the safety watcher is somebody other than the person(s) controlling the movement of the equipment.

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tm/jd

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