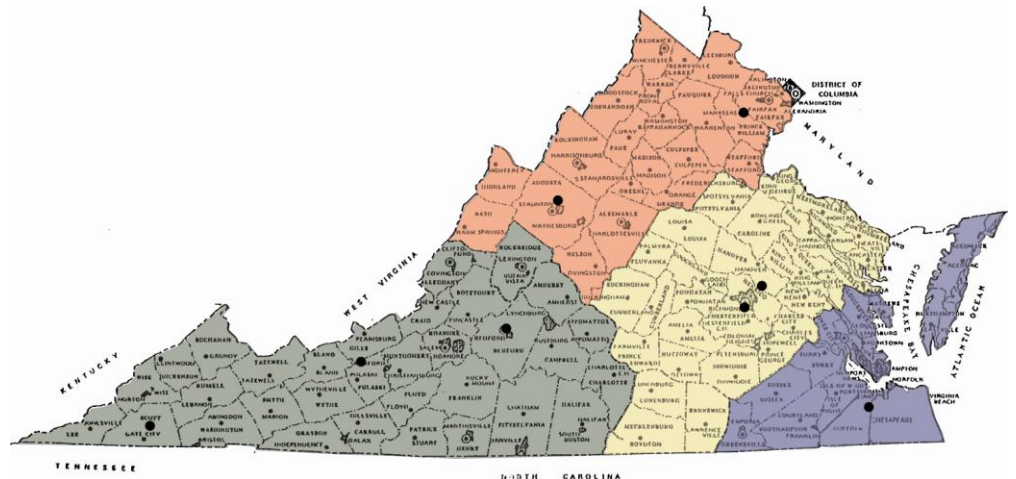


Virginia Occupational Safety and Health

VOSH Field Operations Manual

*Version 3.0
October 2013*



Provided by:
Office of Policy & Planning

VOSH PROGRAM DIRECTIVE: 02-001G

ISSUED: 01 October 2013

Subject: VOSH Field Operations Manual (FOM) - Revision 3.0

Purpose: This Directive officially issues revision 3.0 of VOSH Field Operations Manual (FOM) which was last revised in June 2011 into the Program Directive System and establishes the effective date for its usage.

This Program Directive is an internal guideline, not a statutory or regulatory rule, and is intended to provide instructions to VOSH Personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application and is not being enforced as having the force of law.

Scope: This Directive applies VOSH-wide.

References: OSHA Instruction CPL 02-00-150, Field Operations Manual (22 April 2011)
OSHA Instruction CPL 02-00-148, Field Operations Manual (09 November 2009)

Cancellation: VOSH Program Directive 02-001F (01 June 2011)

Effective Date: 01 October 2013

Action: The Directors and Managers shall assure that the change contained in this revision to the VOSH FOM is adhered to by VOSH personnel.

Expiration Date: Not Applicable

Courtney M. Malveaux
Commissioner

Distribution: Commissioner of Labor and Industry
Assistant Commissioner
VOSH Directors & Managers
Legal Support & IMIS Support Staff
Cooperative Programs Director & Manager
VOSH Compliance Staff
Cooperative Programs Staff
OSHA Region III & Norfolk Area Offices

Attachment: Manuals will be directly distributed to VOSH Regional (Safety/ Health) Directors for distribution to staff.

Document Background:

On 2 August 1977, VOSH submitted a compliance manual for safety and health compliance officers. By letters dated 20 November 1978 and 2 August 1979, VOSH informed federal OSHA that it would adopt and implement federal OSHA's Field Operations Manual and Industrial Hygiene Field Operations Manual. VOSH adopted subsequent federal changes to these manuals by letters dated 26 August 1981, 9 February 1984, and 18 June 1984.

On 30 July 1984, VOSH submitted to federal OSHA a completely revised FOM reflecting changes to the federal manual through 1 June 1984, with only minor changes being made to accommodate Virginia procedures and terminology. The VOSH FOM was revised on 20 May 1986 and incorporated administrative and procedural changes which resulted from the merging of the Bureau of Occupational Health of the Virginia Department of Health into the Department of Labor and Industry. Subsequently the FOM was updated on March 1, 1991 and again on 1 July 1997. On 1 January 2002, VOSH completed and issued a comprehensive redrafting of the FOM to generally conform to the then existing federal FIRM, CPL 2.103. The FOM issued 1 June 2011, (*Version 2.0*), reflects the substantial rewrite and reintroduction of the federal FOM as reflected in CPL 02-00-148 (09 November 2009).

This most recent change embodies the federal changes in CPL 02-00-150 (22 April 2011) as well as various VOSH specific policy changes and document cleanup. As per the previous versions, this revised FOM documents VOSH internal operating procedures. It contains guidelines for scheduling inspections, conducting inspections, case file development and the writing of case narratives, preparing citations, assessing penalties and other matters primarily related to the Compliance Officer for the operation of the VOSH program.

Summary of Change:

Substantive revisions are highlighted throughout the document for ease of use and include the following major changes:

- ❖ Substantive updates from OSHA Instruction CPL 02-00-150 (22 April 2011).

Note: The new federal maritime sector guidance has not been included in the FOM and will be issued separately as a VOSH 02 series Program Directive.

- ❖ Substantive additions or changes of VOSH origin include:

- Regional Director and Compliance Manager positions are eliminated;
- Regional Safety Director and Regional Health Director positions are added;
- Seizure of Evidence to include Chain of Custody procedures and related form;
- Copying of Compliance Officer credentials by the employer;
- Use of VOSH-170;
- Considerations when classifying violations as "Serious";
- Penalty issuance minimum and maximum amounts;
- Penalty Table revision; and,
- Calculation of final order dates and use of partial workdays.

- ❖ Typographical, housekeeping, formatting, relocation and certain continuity corrections. These revisions are non-substantive and not highlighted.

DOCUMENT REVISION LOG

Chap.	Page	Subject	Date	Initials
All	All	Initial document issuance - Ver. 2.0	01 June 2011	JJC
1	1-2	General Responsibilities	01 Oct 2013	JJC
1	3	Receipt of subpoenas	01 Oct 2013	JJC
1	5-7	Chain of custody	01 Oct 2013	JJC
2	1	Complaint/Referral inspections & inspection priority criteria	01 Oct 2013	JJC
3	11	Scheduling Construction Inspections / Ref. on Maritime insp.	01 Oct 2013	JJC
3	20	Follow-up & monitoring inspections	01 Oct 2013	JJC
5	1	Inspection scope - partial	01 Oct 2013	JJC
5	3	Copying of VOSH credentials	01 Oct 2013	JJC
5	13	Variances	01 Oct 2013	JJC
5	18 & 34	Photo/Video/Audio program directive reference	01 Oct 2013	JJC
5	23	Posting requirements	01 Oct 2013	JJC
5	33	Summaries of Sampling provided to employers/employees	01 Oct 2013	JJC
5	36	Chain of custody reference	01 Oct 2013	JJC
5	50	Term update: "sandblasting to "abrasive blasting"	01 Oct 2013	JJC
6	2	Public sector workplace entry	01 Oct 2013	JJC
6	5	Informal settlement agreement language	01 Oct 2013	JJC
7	1	Employer reporting	01 Oct 2013	JJC
7	12	Individual listed as "Next of Kin" to be the sole family contact	01 Oct 2013	JJC
7	14	Subparagraph title update- Criminal Penalties	01 Oct 2013	JJC
7	15	VOSH-1, VOSH-170, VOSH -IW1C	01 Oct 2013	JJC
8	2	Imminent danger	01 Oct 2013	JJC
8	4 & 5	Public information policy & releasable information	01 Oct 2013	JJC
8	7	Code citation correction	01 Oct 2013	JJC
9	10	Location of photos/videos/CDs in significant casefile	01 Oct 2013	JJC
9	22	Summaries of Sampling provided to employers/employees	01 Oct 2013	JJC
9	25 & 26	Sample narrative classification/Inclusion of videos & CDs w/photos	01 Oct 2013	JJC
10	14	Other classification issues- serious	01 Oct 2013	JJC
10	16 & 17	Hazard citation in accident/incident	01 Oct 2013	JJC
10	23 25 26	General duty citations; code citation correction	01 Oct 2013	JJC
10	28,29,31,32	Language clarification	01 Oct 2013	JJC
10	36	Def. of second instance repeat corrected by deletion of error.	01 Oct 2013	JJC
11	1 & 2	Penalty issuance-maximum & minimum amounts	01 Oct 2013	JJC
11	10 15 16	Penalty adjustment(s) & option of no penalty adjustment	01 Oct 2013	JJC
11	17	Correction of citation error	01 Oct 2013	JJC
11	18 & 21	Willful violation penalties	01 Oct 2013	JJC
11	27	Penalty amounts	01 Oct 2013	JJC
13	3	Counting partial workdays	01 Oct 2013	JJC
15	20	Div. of Legal Support (DLS) support memorandum	01 Oct 2013	JJC
A	38 & 40	Prisoner Letter/Notif. to corrections personnel (warden letter)	01 Oct 2013	JJC
B	CoC	Chain of Custody Form	01 Oct 2013	JJC
B	IW-1	Inspection Worksheet	01 Oct 2013	JJC

OUTLINE

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CHAPTER 1

GENERAL RESPONSIBILITIES AND ADMINISTRATIVE PROCEDURES

I. Mission Statement

VOSH's mission is to assure the safety and health of the Commonwealth's working men and women by the promulgation and enforcement of standards and regulations; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health as well as the development of comprehensive safety and health management systems. Effective and efficient use of sources requires careful, flexible planning. In this way, the overall goal of hazard abatement and employee protection is best served.

II. Order of Priority

If any policy, procedure or other instruction covered in this VOSH *Field Operations Manual* (FOM) is found to be in conflict with the VOSH *Administrative Regulations Manual* (ARM), the ARM shall take precedence.

III. General Responsibilities

The following positions within the Department of Labor and Industry (DOLI) have designated authority and responsibility for ensuring compliance with the Virginia State Plan for the enforcement of occupational safety and health in accordance with the Federal Occupational Safety and Health Act of 1970 (P. L. 91-596) and Title 40.1 of the *Code of Virginia*. The VOSH *Administrative Regulations Manual* contains detailed information on the rules, regulations and procedures under which the Department carries out this mandate. This document empowers DOLI personnel to make decisions as situations warrant with the ability to act efficiently to enforce the Occupational Safety and Health Act. Employees should refer to their employee work profile for individual job responsibilities. Employee work profiles may be obtained through the employee's supervisor or from the Office of Human Resources.

A. **Assistant Commissioner**

It is the duty or mission of the Assistant Commissioner to provide strategic program guidance and management decision making, direct overall operational policies and procedures, approve program-wide strategies, goals, and objectives; establish performance standards for all VOSH operations, and to monitor VOSH program activity and performance as reviewed by federal OSHA. The Assistant Commissioner reports to the Commissioner.

B. **Director of VOSH Programs**

It is the duty or mission of the Director of VOSH Programs to implement and direct overall operational policies and procedures, to develop goals, objectives, and establish performance standards for all VOSH field operations, and to monitor VOSH program activity and performance.

C. Director of Occupational Health Compliance Program

It is the duty or mission of the Director of Occupational Health Compliance to implement and direct operational policies and procedures for health compliance activities, to develop goals, objectives, and establish performance standards for VOSH health related field operations, and to monitor program activity and performance. The Director also provides overall direction and guidance regarding all program and technical matters relating to health to the Regional Health Director. The Director of Occupational Health Compliance reports to the Director of VOSH Programs.

D. VOSH Regional Safety Director

It is the duty or mission of the VOSH Regional Safety Directors to:

1. Implement VOSH's field programs within their delegated area of responsibility of the Regional Office and within the policy and procedure parameters established the Program Directors for the VOSH Program.
2. Have first level supervisory responsibility over the safety Compliance Officers in the discharge of their duties and to review their cases. They may also conduct compliance inspections as needed. They also ensure technical and programmatic adequacy in applying the policies and procedures in effect in the Department for the compliance programs. They also have responsibility for implementation of a quality assurance system suitable to their individual work group. VOSH Regional Safety Directors are supervised by and report directly to the Director of VOSH Programs. They also receive direct guidance and support as needed from the Director of Occupational Health on all health technical, programmatic and non-administrative issues.

E. VOSH Regional Health Director

It is the duty or mission of the VOSH Regional Health Directors to:

1. Implement VOSH's field programs within their delegated area of responsibility of the Regional Office and within the policy and procedure parameters established the Program Directors for the VOSH Program.
2. Have first level supervisory responsibility over the health Compliance Officers in the discharge of their duties and to review their cases. They may also conduct compliance inspections as needed. They also ensure technical and programmatic adequacy in applying the policies and procedures in effect in the Department for the compliance programs. They also have responsibility for implementation of a quality assurance system suitable to their individual work group. VOSH Regional Health Directors are supervised by and report directly to the Director of the Occupational Health Compliance Program. They also receive direct guidance and support as needed from the Director of VOSH Programs.

F. Compliance Safety and Health Officer

The primary responsibility of the Compliance Safety and Health Officer (Compliance Officer or CSHO) is to carry out the mandate of the Commissioner and the Department of Labor and Industry “to assure so far as possible every working man and woman in the Commonwealth have safe and healthful working conditions....” To accomplish this mandate the VOSH program uses a wide variety of programs and initiatives, one of which is enforcement of regulatory standards through effective workplace inspections to determine whether, as required by § 40.1-51.1.A. of the *Code of Virginia*, employers are:

1. Furnishing places of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees, and
2. Complying with all safety and health requirements, standards, and other related regulations promulgated under the law.

Through inspections and other employee/employer contact, the Compliance Officer can help ensure that hazards are identified and abated to protect workers.

During these processes, the Compliance Officer must use professional judgment to adequately document hazards in the case file as required by the policies and procedures in effect for VOSH. The Compliance Officer will be responsible for the technical adequacy of each case file. Individual inspections may vary considerably in scope and detail, depending upon the circumstances in each case.

IV. Administrative Procedures**A. Subpoena Served on Compliance Officer or other VOSH Personnel****1. General**

Subpoenas, which require appearance in court, are occasionally received by Compliance Officers. Failure to comply with subpoenas may result in contempt of court. However, requests to appear which are outside the normal course of the Compliance Officer’s work may be appropriately voided so that Compliance Officer does not have to appear.

2. Receipt of Subpoenas

No employee shall accept service of process or a subpoena for any other employee, except as specified below:

- a. Subpoenas addressed to the Commissioner or the Department may only be accepted by the Commissioner or the **Director of Human Resources**. The Assistant Attorney General and Division of Legal Support shall be immediately notified by the Commissioner’s private secretary about the subpoena;

- b. Subpoenas addressed to any other employee which initiates a lawsuit against the individual in his capacity as an employee of the Department may only be accepted by the employee named on the subpoena;
- c. All other subpoenas concerning VOSH business for the appearance as a witness or for production of documents may only be accepted by the employee named on the subpoena, the employee's immediate supervisor, or a supervisor higher in the employee's chain of command;
- d. The employee receiving a subpoena shall immediately notify the Division of Legal Support about the proper course of action.

B. Subpoena Procedures

If the subpoena concerns a VOSH case in which the Compliance Officer was involved and in which the Department is a party, it must be complied with after contact with the Division of Legal Support.

The Department shall attempt to quash (void) all other subpoenas dealing with cases in which VOSH is not a party. Early contact with the Division of Legal Support is essential to ensure that the subpoena can be avoided so the VOSH employee does not have to testify.

C. Testifying in Court

Compliance Officers may be called upon to testify in a variety of situations. They may have to testify in a court proceeding in defense of a citation that they issued. The Compliance Officer shall be mindful of this fact when recording observations during inspections. The case file shall reflect conditions observed in the workplace as accurately as possible. If the Compliance Officer is called upon to testify, the case file will be invaluable as a means of recalling actual conditions. This type of testimony is a logical extension of the compliance process, and is necessary. However, Compliance Officers may also be called upon to testify in what are known as "third party" cases. These will involve situations in which the Compliance Officer performed an inspection or investigation, and attorneys for either the employee or another entity such as the manufacturer or general contractor want the Compliance Officer to testify regarding the citation. Compliance Officers may also be asked by attorneys for either side to spend time explaining the case, or what their testimony will be.

It is the policy of the Department that unnecessary involvement in third-party cases is not an effective use of employee resources, and unnecessarily takes Compliance Officers away from their primary duties. Further, the Division of Legal Support will seek to limit Compliance Officer involvement in third party litigation.

Therefore, Compliance Officers are directed to only participate in third party cases to the extent required by a subpoena for either a "Notice of Oral Examination" (deposition), or for testimony in a court trial.

D. Type of Testimony Given

If a Compliance Officer has been subpoenaed to testify as described above, an issue often arises as to what type of testimony will be given. There are two types of testimony: “expert testimony” and “factual testimony.” Expert testimony involves giving one’s opinion as to certain issues. For example, expert testimony could involve stating that you believe a certain practice to be unsafe. Factual testimony, on the other hand, is limited to explaining facts without embellishing these facts with any opinions. For example, a Compliance Officer could explain that certain documents appear to be accurate photocopies of their work notes or the Citation and Notice issued following their inspection. Other examples of factual testimony would include stating “yes, these are the photographs that I took” or “yes, I recommended citing a violation of (*standard number*).”

Compliance Officers shall provide only factual testimony, not expert testimony, in cases where the Department is not a party to the action.

Neither side in a lawsuit should be provided free expert testimony by the State. Again, this is not an efficient use of state resources. The Division of Legal Support will coordinate with the Office of the Attorney General, as the circumstances dictate.

E. Disposition of Inspection Records

“Inspection Records” are any records made by a Compliance Officer that concern, relate to, or are part of any inspection or that concern, relate to, or are part of the performance of any official duty. Such original material and all copies shall be included in the case file. These records are the property of the Commonwealth and a part of the case file. Inspection records are not the property of the Compliance Officer and are not to be retained or used for any private purpose under any circumstances.

NOTE: Copies of photos from the case file may be used by staff during safety and health training sessions.

F. Release of Inspection Information

The information obtained during inspections is confidential, but is to be determined as disclosable or non-disclosable on the basis of criteria established in the Virginia Freedom of Information Act (FOIA).

G. Freedom of Information Act (FOIA) Request

All FOIA requests concerning case files or program statistics are to be processed by the Division of Legal Support. With the exception of media requests, all such requests should be referred to the Director of the Division of Legal Support, in accordance with Chapter 8, Rescue Operations, Emergency Response and Public Information Policy.

H. Seizure of Evidence and Chain of Custody

Occasionally, VOSH will seek to obtain, or otherwise preserve, evidence during an investigation. This may range from documentary evidence such as drawings or pictures taken by the employer, digital data and other e-

documents, to physical evidence such as extension cords or compressors. Our need for such items ranges from testing to preservation of the items for trial.

Evidence is considered to be in VOSH custody when it is in the Compliance Officer's physical custody and no longer that of the employer. The chain of custody begins at this time, i.e., when an item is collected by VOSH, and the chain is maintained until the evidence is returned to the employer. VOSH must be able to prove the legal integrity and continuity of possession of all physical items, data, or samples to be tested, which are used in VOSH's investigation, or in the case of subsequent litigation, introduced into evidence in court.

The chain of custody tracks the possession, handling, and location of such items from the time of collection, assures this continuous accountability, and acts as a guard against unauthorized removal or tampering. This means it is also necessary to have an accurate written chronological record of those individuals who have had custody of the evidence from its initial acquisition, through the closing of the casefile, and its ultimate return to the employer. (*Use form VOSH-CoC/2012 in Appendix "B" of this FOM*). Once it is collected, such evidence shall be kept in a secured area, with access restricted to one authorized individual, i.e., the Compliance Officer who obtained it, or if custody is turned over, to the regional office staff person functioning as the office evidence custodian.

While industrial hygiene samples for lab testing have other existing procedures (*see Section II, Chapter 1 Appendix II: 1-6 through 1-9 of the OSHA Technical Manual*) for this purpose, in the case of documents, digital data or e-documents, and physical items, these chain of custody procedures provide the required security and verification of possession. This is necessary as there is no absolute way to know in advance all the items or data that may be involved in the issuance of violations or subsequent litigation.

For all cases except industrial hygiene test sample evidence, to prove the chain of custody for documents, digital data and e-documents, or physical objects, use VOSH form, VOSH-CofC/2012, which details how items are to be handled such as:

- ✓ Who is collecting the evidence?
- ✓ What is the evidence? (*include a description*)
- ✓ When was it collected by VOSH?
- ✓ Where was it when it was collected by VOSH?
- ✓ How and/or from whom did you get it?
- ✓ Who has handled it other than the person who collected it?
- ✓ Why did that person handle it?
- ✓ When did they handle it?
- ✓ Where has it traveled? and,
- ✓ Where was it stored and secured?

The following procedures will govern the handling of such items:

1. Documentary Evidence

Documentary evidence will be kept by VOSH until the case file is closed. If the employer makes a written request for return of the evidence, VOSH will return the evidence after making a copy for the file.

2. Physical and Digital Evidence

Physical and digital evidence will be kept by VOSH while the case is open. When the case is closed, VOSH shall return the item and obtain a written receipt from the individual receiving the item. The receipt shall contain the following minimum information: (1) a description of the item returned, (2) the signature of the person receiving the item, (3) the date, (4) the signature of the VOSH employee returning the item, and (5) the inspection name and inspection number.

a. Refusal of Access to Physical Evidence. If an employer refuses to provide or give access to items needed as physical or digital evidence, the Compliance Officer shall follow the refusal of entry procedures contained in of this FOM. If local or State Police are on site, the Compliance Officer may request their assistance in obtaining physical evidence. If an employer refuses to provide or give access to items needed as physical evidence, the Compliance Officer shall follow the refusal of entry procedures.

b. Testing of Physical or Digital Evidence. When some pieces of physical digital evidence require testing or evaluation, the Regional Safety or Health Director shall contact the appropriate Program Director who, in consultation with the Director of the Division of Legal Support, shall select the appropriate testing facility to assure proper testing procedures and chain of custody.

c. Return of Physical Evidence. If the employer requests the return of the physical or digital evidence before the case file is closed, the Regional Safety or Health Director may seek authorization from the Program Manager in consultation with the Director of the Division of Legal Support to return the item if it is deemed not significant to the case.

V. Regional Office Responsibilities

A. Regional Office Outreach Program

The Regional Safety or Health Director or designee will ensure that the Regional Office maintains an outreach program appropriate to local conditions and the needs of the service area. The plan may include, but is not limited to support services, compliance assistance services including assistance in developing compliance safety and health management systems, training and

education services, referral services, cooperative programs, abatement assistance, and technical services.

B. Responding to Requests for Assistance

All requests from employers or employees for compliance information or assistance shall receive timely, accurate, and helpful responses from VOSH. See Chapter 8, Rescue Operations, Emergency Response and Public Information Policy, for additional information.

VI. VOSH Cooperative Programs Overview

VOSH offers a number of avenues for businesses and organizations to work cooperatively with the Agency. Compliance Officers should discuss the various cooperative programs with employers.

A. Voluntary Protection Program (VPP)

The Voluntary Protection Program (VPP) is designed to recognize and promote effective safety and health management. A hallmark of VPP is the principle that management, labor, and VOSH can work together in pursuit of a safe and healthy workplace. A VPP participant is an employer that has successfully designed and implemented a health and safety management system at its worksite and has undergone an onsite audit by a VPP audit team. Successful VPP programs are designated STAR worksites and are exempted from VOSH General Schedule inspections.

B. Onsite Consultation Programs

VOSH onsite consultation programs are available in the Commonwealth under §§ 21(d) and 23(g) agreements for the operation of State plans approved by OSHA.

1. The VOSH Onsite Consultation Program offers a variety of services at no cost to employers. These services include assisting in the development and implementation of an effective safety and health management system, and offering training and education to the employer and employees at the worksite. Smaller businesses in high hazard industries or those involved in hazardous operations receive priority.
2. As per federal requirement, the VOSH Onsite Consultation Program is separate from VOSH's enforcement efforts. Under onsite consultation programs, no citations are issued, nor are penalties proposed. Employers are required to abate all hazards at their worksites.

C. Safety and Health Achievement Recognition Program (SHARP)

Another program that recognizes employers' efforts to create a safe workplace and exempts them from inspection is the Safety and Health Achievement Recognition Program (SHARP). This program is administered by the Commonwealth's State Onsite Consultation Program but is funded under §21(d) of the federal Occupational Safety and Health Act.

SHARP is designed to provide incentives and support those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from VOSH programmed inspections for a specific period of time.

NOTE: See VOSH Program Directive 03-001B, CSP 02-00-001, Consultation Policies and Procedures Manual, for additional information.

D. Strategic Partnerships

Organizations can enter into Strategic Partnerships with VOSH to address specific safety and health issues. In these partnerships, VOSH enters into extended, voluntary, cooperative relationships with groups of employers, employees, and employee representatives (sometimes including other stakeholders, and sometimes involving only one employer) in order to encourage, assist, and recognize efforts to eliminate serious hazards and to achieve a high level of employee safety and health.

NOTE: See VOSH PD 01-021 (upon issuance), VOSH Strategic Partnership Program for Worker Safety and Health for additional information.

E. Alliance or Partnership Programs

Through an alliance or partnership, VOSH may work with groups committed to safety and health, including businesses, trade or professional organizations, unions and educational institutions, to leverage resources and expertise to develop compliance assistance tools and resources and share information with employers and employees to help prevent injuries, illnesses and fatalities in the workplace. VOSH and the organization sign a formal agreement with goals that address training and education, outreach and communication, and promote the national dialogue on workplace safety and health. See 13-xxx series VOSH Program Directives for all such alliance or partnership agreements.

NOTE: See Chapter 3, Program Planning for Enforcement Scheduling and Interface with Cooperative Program Participants, for additional information.

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CHAPTER 2

COMPLAINT AND REFERRAL PROCESSING

I. Complaints and Other Unprogrammed Inspections

A. **General**

The procedures in this section apply to complaints or referrals received and processed at the Regional Office before an inspection is initiated rather than to complaints received by the Compliance Officer during an inspection. Complaints and referrals shall be evaluated by the Regional Safety or Health Director according to the criteria established in Chapter 10, Violations, for classifying the alleged violations.

The program's response to a complaint **or referral** will take a variety of forms, ranging from an inspection to a response by letter, depending upon the complaint, the nature of the hazard and the abatement response of the employer. Complaints or referrals meeting the criteria in section I.H., i.e., imminent danger, serious hazards alleged, etc. shall be scheduled for inspection. Complaints or referrals which do not meet the criteria in section I.H. shall be investigated by telephone and fax contact with the employer as per section I.I.

NOTE: *VOSH no longer classifies complaints as formal or non-formal.*

When essential information is not provided by the complainant or the complaint is too vague to evaluate, an attempt shall be made to clarify or supplement available information. *(See Chapter 12, Citation and Case Review Procedures, for procedures to follow when information is received alleging a violation which last occurred six months or more prior to the complaint.)*

NOTE: *If a complaint **or referral** is received about a worksite, **a resulting inspection will normally be partial in scope.** However, if the employer is on a target list, a comprehensive inspection should be performed whenever possible. When the scope of a complaint inspection is converted **from partial** to comprehensive, the Compliance Officer should inform the employer that they are targeted for an inspection, and that there is also a complaint.*

B. **Definitions**

1. **Complaint**

Notice of an alleged hazard over which VOSH has jurisdiction, or a violation, alleged by a past or present employee, *(as defined in subparagraph a., below)*, a representative of employees *(as defined in b., below)*, or any other individual knowledgeable of the alleged hazardous condition.

- a. Employee. For purposes of submitting a complaint, an "employee" is either of the following:

- (1) A present employee of the employer about whose establishment the complaint is being made; or
 - (2) A present employee of another employer if that employee is working at or near some other employer's workplace and is exposed to hazards of that workplace.
- b. Representative of Employees. For purposes of submitting a complaint, a representative of employees is any of the following:
- (1) An authorized representative of the employee bargaining unit, such as a certified or recognized labor organization;
 - (2) Any member of the employee's immediate family acting on behalf of the employee;
 - (3) A lawyer or physician retained by the employee.
- NOTE: If the Compliance Officer obtains information that the complaint was not submitted with the knowledge of, or on behalf of, the employee, he shall bring this to the attention of the Regional Safety or Health Director.*
- c. A complaint submitted via OSHA's public website. All complaints submitted via OSHA's public website are considered non-formal and will be addressed by a phone/fax investigation.

2. Referral

Notice of an alleged hazard or violation given by any source not listed in "Complaints" above, including Compliance Officer referrals and media reports. See section I.M. of this Chapter for procedures to be followed for referrals.

Safety and Health Agency Referral – from sources including, but not limited to: NIOSH, state programs, consultation, and state or local health departments, as well as safety and/or health professionals in other Federal agencies. (As appropriate, code 14A – B. Federal OSHA; C. State OSH; F. Consultation; G. State/Local Government; or I. Other.)

Other Government Agency Referral– made by other Federal, State, or local government agencies or their employees, including local police and fire departments. (As appropriate, code 14 A–E. Other Federal Agency, or G. State/Local Government.)

Media Report – either news items reported in the media or information reported directly to OSHA or VOSH by a media source. (Code 14A – H. Media.)

Employer Report – Report of accidents other than fatalities and catastrophes. (Code 14A – *I. Other.*)

3. Permanently Disabling Injuries or Illnesses

Injuries or illnesses which may result in permanent disabilities or illnesses that are chronic or irreversible are examples of permanently disabling injuries or illnesses. These include but are not limited to: amputation, blindness, standard threshold shift in hearing, lead or mercury poisoning, or third-degree burns.

4. Complaint Inspection

A complaint inspection is an inspection that is initiated primarily as a result of a complaint that is conducted by a VOSH compliance officer at the employer's worksite, and that meets at least one of the criteria listed below:

- a. The complaint was reduced to writing, is signed by a current employee or employee representative, and states the reason for the inspection request with reasonable particularity. In addition, there are reasonable grounds to believe that a violation of a safety or health standard has occurred.
- b. Imminent danger hazard.
- c. Serious hazard, which in the discretion of the commissioner requires an onsite inspection.
- d. Permanently disabling injury or illness related to a hazard potentially still in existence.
- e. The establishment has a significant history of non-compliance with VOSH laws and standards, e.g., willful, repeat, failure-to-abate, egregious violations within the last three years.
- f. The complaint identifies an establishment or an alleged hazard covered by a local or national emphasis program.
- g. The employer fails to provide an adequate response to a VOSH investigation contact, or the complainant provides evidence that the employer's response is false or does not adequately address the hazard.

5. Companion Complaint

If an inspection is scheduled or has begun at an establishment and a complaint that would generally be investigated by telephone/fax is received, that complaint may, at the Regional Safety or Health Director's discretion, be scheduled for inspection as a companion complaint.

6. Complaint Investigation

A complaint investigation is conducted for complaints that do not meet one of the above complaint inspection criteria, e.g., phone, fax, e-mail or any other UNSIGNED complaint.

An “investigation” differs from an “inspection” in that an investigation does not include an on-site inspection of the workplace. VOSH advises the employer of the alleged hazards by phone, fax, email (**keep a hard copy of complaint and response**), or by letter if necessary. The employer is required to provide a written response. VOSH shall provide the results of the investigation to the complainant.

C. Identity of Complainant

The identity of the complainants will be kept confidential, pursuant to § 40.1-51.2(b) of the *Code of Virginia*. No information shall be given to employers which would allow them to identify the complainant. This shall require typing and/or rewording of complaints. In addition, correspondence must not be sent to the complainant’s work address unless permission has been given by the complainant to use the work address.

D. Response Time to Signed Complaints

Signed written complaints received from current employees or employee representatives, as defined in the *VOSH Administrative Regulations Manual* and the FOM, shall be evaluated promptly to determine whether an inspection or investigation will be conducted. If a decision is made to inspect, the inspection shall take place as soon as possible, but no later than within five (5) working days for serious complaints. If a signed written complaint was received from a current employee or employee representative and a decision is made not to inspect, a letter shall be sent to the complainant advising of the decision and its reasons. This letter shall include an explanation of the employee’s appeal rights.

NOTE: *VOSH’s goal is a rapid response to complaints, and rapid abatement of any hazards. These are the **maximum** time frames allowed for complaint response. ALL complaints which meet the definition in I.B.1. require a letter to be sent to the complainant. (Refer to section I.J.)*

E. Information Needed for Complaint Evaluation

The Regional Safety or Health Director may use the following questions as a guideline in determining whether additional information is needed in order to evaluate the complaint.

1. For All Complaints Including Phone or Fax Complaints

- a. What is the exact nature of the alleged hazard? What is the basis of the complainant’s knowledge? How are workers exposed to this hazard? Describe the unsafe or unhealthy conditions; identify the location.

- b. What work is done in the unsafe/unhealthy area? Identify, as well as possible, the type and condition of equipment in use, the materials, i.e. chemicals) being used, the process and/or operation involved, and the kinds of work being done near the hazardous area. Have there been any recent chemical spills, releases, or accidents?
- c. With what frequency are workers doing the task which leads to the exposure? Continuously? Every day? Every week? Rarely? For how long at one time? How long has the condition existed as far as can be determined? Has it been brought to the employer's attention? Have any attempts been made to correct the condition, and if so, who took these actions? What were the results?
- d. How many shifts are there? What time do they start? On which shift does the hazardous condition exist?
- e. What personal protective equipment (i.e., hearing protection or respirators) is required by the company relevant to the alleged exposure? Is it used by employees? Include all PPE and describe it as specifically as possible. Include the manufacturer's name and any identifying numbers.
- f. How many people work in the establishment? How many are exposed to the hazardous conditions? How near do they get to the hazard?
- g. Determine if the complainant is a current employee or an employee representative.
- h. Is there an employee representative (union or safety committee) in the establishment? Include the name, address, and telephone number of the union and/or of the employee representative(s).
- i. Explain the complaint process and if appropriate, the concepts of "investigation" and "inspection," as well as the relative advantages of each.
- j. Inform the complainant(s) of their rights to confidentiality in accordance with § 40.1-49.8 of the *Code of Virginia*, and ask whether they wish to exercise that right.
- k. Explain employee rights regarding occupational safety and health discrimination, discharge or retaliation, as set out in § 110 of the *VOSH Administrative Regulations Manual*.

2. Evaluating Health Hazards

- a. Has the employer administered any tests to determine employee exposure levels to the hazardous conditions or substance? Describe these tests. What were the results?
- b. What engineering controls are in place in the area(s) in which the exposed employees work? For instance, are there any fans or is there any acoustical insulation in the area which may reduce exposure to the hazard?
- c. What administrative or work practice controls has the employer put into effect?
- d. Do any employees have any symptoms which may have been caused by exposure to hazardous substances? Have any employees ever been treated by a doctor for a work-related disease or condition? What was it?
- e. Are respirators worn to protect against health hazards, and if so, what kinds? What exposures are they protecting against?
- f. If the complaint is related to noise, what, if any, hearing protection is provided to and worn by the employees?

3. Evaluating Safety Hazards

- a. Under what adverse or hazardous conditions are employees required to work? (This should include conditions contributing to stress and "other" probability factors.)
- b. Have any employees been injured as a result of this hazardous condition?
- c. Have there been any "near-miss" incidents?

F. Both Safety and Health Hazards Alleged

When a complaint alleges both safety and health hazards, the evaluation by the Regional Safety or Health Director shall address any unusual circumstances in the handling of the complaint.

G. Responding to Complaints Alleging Imminent Danger Conditions

Any allegation of "imminent danger," as defined in the *VOSH Administrative Regulations Manual* received by a Department office, shall be handled in accordance with the following procedures:

1. The Regional Safety or Health Director shall immediately determine whether there is a reasonable basis for the allegation.
2. If there is a reasonable basis for the allegation, imminent danger inspections shall be scheduled with the highest priority and the procedures in Chapter 7, Fatality, Catastrophe and Imminent Danger are to be used.

3. The Regional Safety or Health Director or Compliance Officer shall contact the employer immediately (and when known, the employee representative), obtain as many pertinent details as possible concerning the situation and attempt to have any employees affected by imminent danger voluntarily removed. Such notification shall be considered advance notice and shall be handled in accordance with the procedures given in Chapter 4, Inspection Preparation.

H. Complaint Inspections

Under certain circumstances such as those described below, an *on-site inspection* shall be performed. When an *inspection* is performed, the general or special inspection procedures in Chapters 5, Inspection Procedures and and 7, Fatality, Catastrophe and Imminent Danger shall be followed as appropriate based on the nature of the complaint. (see: VOSH ARM §100.F.1)

1. Basis for an Inspection

- a. Written, signed complaint from a current employee or employee representative demonstrating reasonable grounds to believe that a violation of a safety or health standard has occurred.
- b. Allegations of imminent danger situations;
- c. Allegations of serious hazards which in the judgment of the Regional Safety or Health Director require an on-site inspection. The Regional Safety or Health Director shall give appropriate consideration to the wishes of the complainant.
- d. Permanently disabling injuries or illnesses, related to hazards apparently still in existence, have occurred.
- e. Significant history of non-compliance.
- f. Establishment covered by local or national emphasis program.
- g. Employer response to a complaint investigation (described in section I., below) is determined by VOSH to be inadequate, or disputed by a complainant.

2. Scheduling an Inspection of an Employer in an Exempt Industry

In order to schedule an inspection of an employer in an exempt industry classification as specified by Appropriations Act provisions:

- a. The information must come directly from a current employee;

OR

- b. It must be determined and documented in the case file that the information came from a representative of the employee, with the employee's knowledge of the representative's intended action.

3. Procedures for an Inspection

- a. The Regional Safety or Health Director shall evaluate each complaint and other available information, and exercise professional judgment to decide whether or not there are reasonable grounds to believe that a violation or hazard exists. If there are not reasonable grounds to believe that a violation or hazards exist, an inspection shall not be conducted. The Regional Safety or Health Director may also decide not to inspect a facility if there is evidence that the condition complained of is being abated.
- b. If the complaint meets at least one of the inspection criteria listed in “Complaint Inspections” above, the complainant or employee representative shall be informed that an inspection will be scheduled and that he/she will be advised of the results. After an inspection, the Regional Office shall send the complainant a letter addressing each complaint item with reference to the citation(s), if any, or a sufficiently detailed description of why the findings did not result in a violation.
- c. If the employee or employee representative requests an on-site inspection, but has not submitted a signed complaint or one which meets any of the other inspection criteria, he/she shall be advised that VOSH will hold the complaint for five working days so that he/she can either come into the office and sign the complaint or mail/fax a signed complaint letter detailing the type and location of the alleged hazards to VOSH. If a signed complaint is not then received after five working days, or if the complainant does not initially request an on-site inspection, VOSH will proceed with the investigation process. VOSH will no longer be required to mail VOSH-7 complaint forms to the complainant for signature.
- d. When a written complaint signed by a current employee or employee representative is received, and there are reasonable grounds to believe that a violation or hazard exists, an inspection shall be conducted. The complainant may be contacted for clarification of issues raised in the complaint, as necessary. Where a written, signed complaint has been submitted, but, in the professional judgment of the Regional Safety or Health Director, there are no reasonable grounds to believe that a violation or danger exists, no inspection or investigation shall be made. In such situations, the complainant shall be notified in writing of VOSH’s intent not to conduct an investigation or inspection, the reasoning behind such a determination, and the appeal rights provided under the *VOSH Administrative Regulations Manual*.

I. **Complaint Investigations/Procedures**

When complaints do not meet the above criteria for inspection but otherwise provide reasonable grounds to believe that a violation or hazard complained of exists, the complaint shall be *investigated* by telephone and fax.

In the event that the Regional Safety or Health Director determines that there are no reasonable grounds to believe that a violation or hazard exists, the employer and the complainant shall be notified in writing in accordance with VOSH Administrative Regulations Manual §100.E.1.

The Regional Safety or Health Director shall use discretion, based on the nature of the alleged hazard, in assigning a deadline for the employer's response. The deadline should generally be five (5) working days and under no circumstances shall it exceed 30 calendar days. When VOSH receives an adequate response from the employer and the complainant does not dispute the response, an *on-site inspection* generally will not be conducted, and no citation shall be issued.

1. **Electronic Complaints Received via the OSHA Public Website**

- a. Electronic complaints submitted via the OSHA public website are automatically forwarded via email to a designated Area Office in the appropriate state. That Office then forwards the electronic complaints to the appropriate Regional Office in Virginia.
- b. Information received electronically from a current employee is considered a non-formal complaint until that individual provides a signed copy of the information. The employee can send or fax a signed copy of the information, request that an OSHA-7 form be sent, or sign the information in person at the Regional Office. Normally, a complainant has five working days to formalize an electronic complaint. The Regional Office must actively follow up on information received electronically in order to provide the employee with the opportunity to formalize the complaint.
- c. All complaint-related material received electronically should be printed and date stamped with the date the material was submitted and received. When these dates are not the same, the Area Director will determine the appropriate date for the incoming material.

2. **Contact Employer by Telephone**

If the complaint requires an investigation, VOSH shall contact the employer by telephone and notify him/her of the complaint and its allegation(s). All employers shall be advised that they themselves must investigate and determine whether the complaint is valid. The employer shall be advised that a response is due within five (5) working days and that VOSH requests the posting/sharing of information with employees, employee representative and/or the safety

committee. Although the employer must respond within the above time frame, he/she may not be able to complete abatement action, but is encouraged to do so. See the letter to employers in the Appendix for what is required in their response.

3. Request a Contact Person for the Investigation

VOSH shall ask for the name, and appropriate contact information, such as telephone number and e-mail of the contact person at the employer's worksite and may also request the name, address, telephone number, and e-mail of the union and/or employee representative, if any. The company fax number is also requested. The employer is advised of the information needed to answer the complaint. The employer is encouraged to respond by fax and/or e-mail.

In addition, DOCUMENTATION SHALL BE REQUIRED, such as invoices, sampling results, photos, videotape, etc., and provided by the employer as evidence of abatement, to ensure that the complaint hazard(s) has been eliminated.

4. Send Notification Letter/Reduce Hazard Abatement Time

The goal of this procedure is to reduce the time it takes to abate the hazard. The notification letter should be faxed to the employer as soon as possible after the telephone call, or mailed the same day if no fax is available. It is not necessary to use certified mail.

5. Results of Inspection or Investigation to Complainant

After an inspection or investigation, the complainant shall be sent a letter with the results of the inspection or investigation. The letter shall *address each item* in the complaint, and shall include a copy of any response from the employer, a copy of any citation and notice issued, or a sufficiently detailed description of the findings and why they did not result in a violation. This letter should be sent within 15 calendar days following the inspection or investigation, or within 15 calendar days of the issuance of any citation, whichever is later. Refer to the Appendix for letter format.

The complainant shall be advised of his/her rights to dispute the employer's response, and of the right to request an inspection if the alleged hazard persists. The complainant need not put his/her dispute with the employer's response in writing. Disputed issues may be clarified by telephone, and some discretion is allowed in situations where, in the professional judgement of the Regional Safety or Health Director, the complaint does not warrant an on-site inspection. In such situations, the complainant shall be notified of VOSH's intent not to conduct an inspection, and the reasoning behind such a determination. If the employee disagreement takes the form of written complaint, refer to procedures above.

6. Informing Complainant of Citation Modification

Except for cases involving changes of a penalty only, the complainant shall be informed of any subsequent modification of a citation due to an informal conference, a settlement agreement or a decision of a court together with the reasons for the modification. Refer to the Appendix for letter format.

7. Signed Complaint Is Received

If a signed complaint is received after the complaint investigation process has begun (for example, the signed complaint is received on the 8th day), VOSH shall make a determination as to whether the alleged hazard is still likely to exist based on the employer's response and by contacting the complainant. The complainant shall be informed that the complaint investigation has begun and he/she still retains the right to request an on-site inspection if he/she disputes the results and believes the hazard still exists.

8. Adequate Employer Response

When VOSH receives an adequate response from the employer and the complainant does not dispute or object to the response, an on-site inspection generally will not be conducted.

9. Inadequate or No Employer Response

If no employer or an inadequate employer response is received after the allotted five (5) working days, an additional contact with the employer may be made before an inspection is scheduled. Ultimately, if the employer provides no response or an inadequate response or VOSH determines from other information that the condition is not being corrected, an inspection will be scheduled.

10. Duration of Case

The complaint shall not be closed until VOSH is certain that the hazard has been eliminated or abated.

11. Sample Letters for Complaint Procedures

The Appendix contains samples of notification letters to the employer and complainant and a complaint form letter to an employer closing the complaint.

12. Recording in IMIS

Information about complaint inspections or investigations shall be recorded in IMIS following current instructions given in the IMIS manual.

J. Discrimination Complaints

The complainant shall be advised of the protection against discrimination afforded by § 40.1-51.2:1 of the *Code of Virginia*. The complainant shall be informed of the procedure for filing a complaint, and shall also be advised that discrimination complaints must be filed within sixty (60) days of the alleged discrimination violation. The complainant shall be given the telephone number and address of the Discrimination Investigator.

1. Complaint Filed by Former Employee

Safety and/or health complaints filed by former employees who allege that they were fired for exercising their rights under Title 40.1 of the *Code of Virginia* will be scheduled for an inspection if the criteria in section I.H., Complaint Inspections, above, are met. Such complaints shall be forwarded to the Discrimination Investigator.

2. Complaint Handled as a Referral

In those instances where the Discrimination Investigator determines that the existence or nature of the alleged hazard is likely to be relevant to the resolution of the discrimination complaint, the complaint shall be sent to the Regional Safety or Health Director for a VOSH inspection to be handled as a referral.

3. No Inspection Necessary

When the decision is that no inspection is necessary, the Regional Safety or Health Director shall assign the complaint for investigation in accordance with the procedures in section C.9., above.

4. Imminent Danger Alleged

Any discrimination complaint alleging an imminent danger shall be handled in accordance with the instructions in Section I.G.

5. Additional Information

Additional information on discrimination complaints can be found in § 110 of the *VOSH Administrative Regulations Manual* and in VOSH Program Directives 04-001A and 04-002 (or their successors).

K. Referrals

Referrals will be handled in a manner similar to that of complaints. For purposes of this chapter, a referral is generally distinguished from a complaint by the source providing information on the alleged hazard. Referral inspections are unprogrammed inspections and, except for complaints received from discrimination personnel, shall be recorded in the Regional Office using the VOSH-90 Form.

1. Sources

Notices of hazards or alleged violations originated by the sources listed below shall be considered as referrals except as noted. All other notices of hazards shall be considered as complaints, including employee complaints transmitted to VOSH by federal OSHA. Complaints received by other government agencies and simply forwarded to VOSH for action are complaints since they do not originate with the agency or its employees.

a. Referrals may originate from the following sources:

- (1) CSHO referrals.
- (2) Safety and Health Agency referrals.
- (3) Discrimination complaint referrals.

- (4) Other Government agency referrals.
- (5) Media reports.

b. Letter, Fax or Telephone Response. Referrals not meeting the criteria for Complaint Inspections in section I.H. shall generally be handled by letter, fax or telephone. For those referrals handled by letter, complaint letters can be revised to fit the particular circumstances of the referral.

2. Inspection Response

Referrals meeting the criteria for Complaint Inspections in section I.H. (or similar criteria) will generally be handled by inspection. A letter transmitting the results of the inspection will be sent to any referring agency/department, if so requested. This letter should be sent within 15 calendar days following the inspection or investigation, or within 15 calendar days of the issuance of any citation, whichever is later.

3. Procedures

Each referral shall be evaluated as thoroughly as possible in accordance with the guidelines for evaluating complaints to determine whether there are reasonable grounds to believe that a safety or health hazard exists. If so, the hazard shall be classified and prioritized for inspection by the Regional Safety or Health Director.

4. Reports of Accidents

Accidents involving significant injury, or any other accident *not involving a fatality or a catastrophe*, however reported, may be evaluated as a complaint or a referral, depending on the source of the report. If an inspection is performed, it shall be handled according to the directions given in Chapter 5, *Inspection Procedures*.

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CHAPTER 3

PROGRAM PLANNING

I. Enforcement Program Scheduling

A. Overview

VOSH's priority system for conducting inspections is designed to allocate available VOSH resources as effectively as possible to ensure that maximum feasible protection is provided to working men and women. The Regional Safety or Health Director or designee will ensure that inspections are scheduled within the framework of this chapter that they are consistent with the objectives of the Agency, and that appropriate documentation of scheduling practices is maintained.

The Regional Safety or Health Director or designee will also ensure that VOSH's resources are effectively distributed during inspection activities. If an inspection is of a complex nature, the Regional Safety or Health Director or designee may consider utilizing additional VOSH resources. In other circumstances, the use of outside resources may aid the Regional Office to deploy available resources more effectively. The Regional Office will retain control of the inspection.

B. Inspection Priority Criteria

Generally, priority of accomplishment and of assigning staff resources for inspection categories is as shown in Table 3-1 below:

Table 3-1

<u>Priority</u>	<u>Category</u>
First	Imminent Danger (as defined in the VOSH <i>Administrative Regulations Manual</i>).
Second	Fatality/Catastrophe Inspections (regardless of whether our inspection is in response to specific evidence of hazardous conditions or not).
Third	Complaints / Referrals.
Fourth	Accident / First Report of Accident Inspections.
Fifth	Follow-up / Monitoring.
Sixth	Programmed Inspections (General Schedule, Construction Schedule, National & Local Emphasis Programs) AND unprogrammed inspections in response to alleged hazardous working conditions that would normally be classified as Other-Than-Serious.

1. Efficient Use of Resources

Deviations from this priority list are allowed so long as they are justifiable, lead to the efficient use of resources, and promote effective employee protection. An example of such a deviation would be when the Agency or Regional Safety or Health Director commits a certain percentage of resources to programmed Special Emphasis Program (SEP) inspections, such as a National Emphasis Program (NEP), or a Local Emphasis Program (LEP). Inspection scheduling deviations must be documented in the case file.

2. Follow-up Inspections

In cases where follow-up inspections are necessary, they shall be conducted as promptly as resources permit. In general, follow-up inspections shall take priority over all programmed inspections and any unprogrammed inspection in which the hazards are anticipated to be other-than-serious. Generally, follow-up inspections should not be conducted within the 15 working day contest period.

3. Monitoring Inspections

When a monitoring inspection is necessary, the priority is the same as for a follow-up inspection.

4. Employer Information Requests

Contacts for technical information initiated by employers or their representatives will not trigger an inspection, nor will such employer inquiries protect the requesting employer against inspections conducted pursuant to existing policy, scheduling guidelines and inspection programs established by the Agency.

5. Reporting of Imminent Danger, Catastrophe, Fatality, Amputations, Accidents, Referrals or Complaints

The Regional Safety or Health Director or designee will act in accordance with established inspection priority procedures.

NOTE: See Section V. of this chapter, Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling, for additional information.

C. Effect of Contest

If an employer has contested a citation and/or a penalty from a previous inspection at a specific worksite, and the case is still pending, the following guidelines apply to additional inspections of the employer at that worksite:

1. Penalty Only

If the employer has contested the penalty only, the inspection will be scheduled as if there were no contest;

2. Citation

If the employer has contested the citation itself or any items thereon, then the following apply:

- a. Unprogrammed Inspections. Inspections conducted in response to alleged hazardous conditions at a worksite are considered unprogrammed inspections. Unprogrammed inspections shall be scheduled in accordance with the guidelines in section I.H. of this chapter. The scope of such an inspection in most cases shall be partial. All areas related to items under contest shall be excluded from the inspection unless a potential imminent danger is involved.
- b. Programmed Inspections. Programmed inspections may be carried over to the next register in accordance with the guidelines in Program Directive 02-051B, or its successor. Such inspections may continue to be carried over until the case is no longer before the courts. If the inspection is done, all items under contest shall be excluded from inspection unless a potential imminent danger is involved.
- c. Programmed Inspections vs. Issued Citations. On rare occasions, when warranted by the particular circumstances involved, programmed safety inspections may be carried over to the next register when the employer has contested a previously issued health citation. The same is true for programmed health inspections when the employer has contested a previously issued safety citation. The decision to carry such an inspection over shall be made by the Regional Safety or Health Director.

D. Enforcement Exemptions and Limitations

1. Federal Mandated Restrictions Exist

In providing funding for OSHA and VOSH, Congress has consistently placed restrictions on enforcement activities for two categories of employers: small farming operations and small employers in low-hazard industries. Congress may place exemptions and limitations on VOSH activities through the annual Appropriations Act. Congressional exemptions do not apply to VOSH expenditures of 100% state funds.

2. Prior to Inspection Determine If Prohibition Applies

Before initiating an inspection of an employer in these categories, the Regional Office will evaluate whether the Appropriations Act for the fiscal year would prohibit the inspection. *Refer to the latest annual version of VOSH Program Directive 02-003.* Where this determination cannot be made beforehand, the Compliance Officer will determine the status of the small farming operation or a small employer in a low-hazard industry upon arrival at the workplace. If the prohibition applies, the inspection shall immediately be discontinued, unless

approval is received from the respective enforcement director (e.g., VOSH investigates occupationally-related farm fatalities, regardless of the size of the farm).

E. Determination of Preemption by a Federal Agency or Other State Agency

1. Preemption or Jurisdiction by Another Agency – Generally

The Regional Safety or Health Director shall be alert to potential jurisdictional conflicts with other agencies at all times. The determination of preemption is, in many cases, a highly complex matter. To preclude as much as possible any misunderstanding with other agencies and to avoid any consequent adverse actions by employers (or agencies), the Regional Safety or Health Director shall observe the following guidelines whenever a situation arises involving a possible preemption of jurisdiction question:

- a. The VOSH Program does not have jurisdiction over working conditions over which federal agencies or another state agency exercises statutory responsibility to prescribe standards for safety and health.
- b. If a question arises, usually upon receipt of a complaint, referral, or other inquiry, the Regional Safety or Health Director shall consult the list of Memorandums of Understanding (MOUs) or Memoranda of Agreements (MOAs) in section 13 of the VOSH Program Directive system to determine if the jurisdictional issue has been previously addressed with the other agency involved. A MOU or MOA is an agreement created to address/resolve coverage issues and to improve the working relationships between DOLI (VOSH and federal or other state agencies and organizations regarding employee safety and health).
- c. At times an inspection may have already begun when the jurisdictional question arises. In such cases, the Compliance Officer shall interrupt the inspection and contact the Regional Safety or Health Director for guidance or designee as soon as they arise, and dealt with on a case-by-case basis. If the Regional Office is unable to clarify the issue, it shall be referred to the applicable Program Director who shall contact the Division of Legal Support.

2. Determining Jurisdiction in Regard to Federal Lands

The issue of when VOSH has jurisdiction for inspection purposes over private employers and civilian contractors working on federally owned land within the Commonwealth of Virginia is complex, and raises difficult legal jurisdictional issues.

The courts have generally concluded that if the State of Virginia has ceded exclusive jurisdiction to the United States over a parcel of land, then there is no VOSH jurisdiction on that land. If the State has only granted the U.S. partial or concurrent jurisdiction, then there may be VOSH jurisdiction.

Because it will often be unclear before starting an inspection whether the State has ceded exclusive jurisdiction or has concurrent jurisdiction, it is recommended that the Regional Safety or Health Director contact the applicable Program Director who shall contact DLS for advice regarding the status of the federal lands in question.

3. VOSH Does Have Jurisdiction - Inspection Procedures

Once a determination is made that VOSH does indeed have jurisdiction, the policies and procedures for inspection of private employers and civilian contractors working on federally owned land are the same as those followed in the private sector. When an inspection is scheduled for a federal facility, the Compliance Officer shall first contact the government person in charge to inform her or him of VOSH's presence at the facility, to request permission to inspect a contractor, and to invite appropriate participation.

4. VOSH Does Not Have Jurisdiction-Referral to Appropriate Agency

If it is determined that VOSH does not have jurisdiction, the case shall be referred to the appropriate agency, if any, where VOSH has reason to believe that violations of such agency's laws and regulations may exist.

F. United States Postal Service

1. Federal Jurisdiction

Federal OSHA retains authority to cover the U.S. Postal Service nationwide. Federal coverage in State Plan States encompasses U.S. Postal Service employees and contract employees engaged in U.S. Postal Service mail operations. Coverage includes contractor-operated facilities engaged in mail operations and postal stations in public or commercial facilities.

2. VOSH Jurisdiction on Non-Federal Property

Where the U.S. Postal Service rents or leases space for its operations in a privately owned building or facility (i.e., the building is not owned by United States Government, the U.S. Postal Service, or other federal agency, authority or instrumentality), VOSH shall exercise jurisdiction over all other private sector contractors working on such U.S. Postal Service sites who are not engaged in U.S. Postal Service mail operations, such as building maintenance and construction employees.

See the Final Rule on State Plans Coverage of the U.S. Postal Service (Federal Register, June 9, 2000 (65 FR 36618))

3. Citation and Penalty under VOSH Jurisdiction

Violations documented by VOSH during inspections on private sector contractors who are not engaged in U.S. Postal Service mail operations, such as building maintenance and construction employees, working at a U.S. Postal Service site will be cited with penalties in accordance with the FOM and other applicable VOSH policies for the private sector.

G. Home-Based Worksites

1. The VOSH Program will not perform any inspections of employees' home offices. A home office is defined as office work activities in a home-based setting/worksites (e.g., filing, keyboarding, computer research, reading, and/or writing) and may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, and/or file cabinet).
2. VOSH will only conduct inspections of other home-based worksites, such as home manufacturing operations, when it receives a complaint or referral alleging that a violation of a safety or health standard exists that threatens physical harm, that an imminent danger is present, or that there was a work-related fatality. (*See VOSH PD 02-214, Home-Based Worksites, dated 01 October 2000, for additional information.*)

H. Inspection/Investigation Types

1. Unprogrammed

All public sector unprogrammed inspections are processed and conducted in the same manner as for the private sector. This category includes all employers/employees directly affected by the subject of the unprogrammed inspection activity, and is especially applicable on multi-employer worksites.

- a. Inspections scheduled in response to alleged hazardous working conditions identified at a specific worksite are classified as unprogrammed. This type of inspection responds to:
 - (1) Imminent Dangers;
 - (2) Fatalities/Catastrophes (*where the alleged hazardous working conditions have been identified*);
 - (3) Complaints and Referrals (*Not all complaints and referrals qualify for an inspection.- See Chap.2, Complaint and Referral Processing, for additional information.*); and,
 - (4) Accidents

- b. Also included as unprogrammed are follow-up and monitoring inspections scheduled by the Regional Office. (See VOSH ARM §260 F. for additional information.)

2. Unprogrammed Related

Inspections of employers at multi-employer worksites whose operations are not directly addressed by the subject of the conditions identified in a complaint, accident, or referral are designated as unprogrammed related.

Example: A trenching inspection opened at the unprogrammed worksite where the trenching hazard was not mentioned in the complaint, accident report, or referral.

3. Programmed

Inspections of worksites which have been scheduled based upon objective or neutral selection criteria are programmed inspections. The worksites are selected according to VOSH's General Schedule for Safety and Health in General Industry; the Construction Schedule for safety in the Construction Industry; or under local (LEP), regional (REP), and national (NEP) special emphasis programs.

4. Program Related

Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment, such as a low injury rate employer at a worksite where programmed inspections are being conducted for all high rate employers.

II. Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling

Enforcement procedures relating to unprogrammed activity are located in subject specific chapters of this manual:

- Imminent Danger, see Chapter 7, Fatality, Catastrophe and Imminent Danger.
- Fatality/Catastrophe, see Chapter 7, Fatality, Catastrophe and Imminent Danger.
- Emergency Response, see Chapter 8, Rescue Operations, Emergency Response and Public Information Policy.
- Complaint/Referral Processing, see Chapter 2, Complaint and Referral Processing.
- Whistleblower Complaints, see Chapter 2, Complaint and Referral Processing.
- Follow-ups and Monitoring, see Chapter 3, Program Planning.

III. Programmed Inspections

A. **General Schedule Inspections**

Programmed inspections in the VOSH Program are primarily inspections of high hazard worksites which have been scheduled based upon objective or random selection criteria. These worksites are selected according to their respective General Schedules for safety or health in General Industry, the Construction Industry, or under national, special or local emphasis programs. A programmed inspection, generally, is a comprehensive inspection of the worksite. However, it may be limited as necessary in view of resource availability and other enforcement priorities such as focused inspections. Low hazard areas, such as office space, may be excluded from inspection without affecting the comprehensiveness of the inspection.

B. **Programmed Inspections**

1. **Comprehensive Inspection**

A programmed inspection generally is a comprehensive inspection of the worksite but may be limited as necessary in view of resource availability and other compliance priorities.

Low-hazard areas, such as office space, may be excluded from inspection without affecting the comprehensiveness of the inspection.

a. General Policy. There are certain fundamental general policy considerations specific to private sector and public sector inspections in regard to the implementation of VOSH's targeting system:

(1) Private Sector. It is VOSH policy that programmed private sector inspections should primarily come from "high hazard" sectors of employment.

(a) In the area of safety, the agency considers a "high hazard" industry to be one within a North American Industry Classification System (NAICS) code with a an excessive lost workday injury rate.

(b) In the area of health, the agency considers a "high hazard" NAICS code to be one with a previous history of serious VOSH or OSHA health citations.

(c) Where site specific injury and/or illness data is available in the area of safety or health, the agency considers a high hazard work site to be one with an excessive lost workday injury and/or illness rate.

- (d) For the purpose of scheduling programmed inspections, all construction is considered to be a category of high hazard employment.
 - (e) Other specific industries, such as logging and work around overhead high voltage lines, are also high hazard industries and are frequently scheduled for inspection as national or local emphasis programs.
 - (f) Fatality/catastrophe inspections where it cannot initially be determined whether hazardous working conditions exist, shall be classified as programmed inspections. (See order of priorities for compliance inspections.)
- (2) Public Sector. Public sector programmed safety and health inspections are scheduled using the following guidelines and procedures. The scheduling system is based upon a multi-step process. Public sector programmed safety and health inspections for IMIS purposes, are classified as a "Local Emphasis Program."
- (a) The annual field operations program plan projections are made at the VOSH Division Office level. These projections control the initial amount of public sector programmed inspections selected.
 - (b) Four categories of employment activities will be considered for public sector programmed inspections: construction, manufacturing, non-manufacturing, and agriculture operations. Within the categories of manufacturing, non-manufacturing, and agriculture, Local Emphasis Programs are developed using the procedures contained in this Chapter.
- b. Description. Both programmed safety inspections and programmed health inspections are scheduled based upon a multiple-step process:
- (1) The initial selection of a particular programmed inspection (e.g., high hazard general industry, construction, high hazard health) is made in accordance with the annual projections which are made by the Directors of Occupational Safety and Health Compliance.
 - (2) Within a category, establishments are selected for inspection from the inspection list for that category and placed in an inspection register and inspection cycles established; or in the case of an inspection schedule established by a VOSH Program Directive (e.g., local emphasis programs), selection and assignment of

worksites shall be made in accordance with procedures contained in the VOSH Directive.

- (3) Where no establishment list is provided by the Directors of Occupational Safety and Health Compliance, (e.g., construction), the Regional Safety or Health Director shall coordinate with the Program Director on how to establish a list locally, if appropriate.
- (4) Within an inspection register, establishments shall be inspected in descending order of sequence number; however, establishments may be inspected out of sequence (i.e., moved up the list only) to promote efficient use of resources. All establishments in a cycle must be inspected, with only limited exceptions, before a new register is begun.

2. Guidelines and Procedures

Establishments which appear on both the safety and health inspection registers shall be scheduled for a joint safety/health inspection whenever possible. Programmed inspections may also be conducted jointly by both safety and health personnel whenever resources are available and it is likely, based on experience in inspecting similar workplaces, both safety and health hazards exist to a significant degree. If an inspection is begun as safety only or as health only but the Compliance Officer determines during the course of the inspection that it should be expanded, the Compliance Officer shall contact the Regional Safety or Health Director. A decision will then be made as to whether the inspection should be expanded and, if so, to what extent. The decision may also be, based on resource availability, to handle the information as a Compliance Officer referral for inspection at a later time.

- a. Inspection Scheduling for General Industry (Safety and Health)
Safety and health programmed inspections of private and public sector establishments shall be selected and assigned in accordance with the appropriate VOSH Directive (e.g., VOSH Directive 02-051 (or its successor), for private sector safety and health General Schedule inspections; VOSH Program Directive 09-004, or its successor, for private sector safety Construction Schedule inspections).

NOTE: Public Sector Program targeted inspections, targeted assistance visits, and on-site evaluations have a priority at least equal to that of private sector general industry programmed inspections.

- (1) Establishment Lists. The Directors of Occupational Safety and Health Compliance will provide a series of establishment lists for use by VOSH in programming inspections.

NOTE: Establishments which are NOT in the current year's annual top 200 High Hazard NAICS codes which are listed as having ten or fewer employees (unless they are part of a larger employer) will be deleted from establishment lists provided by the IT Database Administrator.

- (2) Adjustments to Establishment Lists. Prior to use of the establishment lists provided by the Directors of Occupational Safety and Health Compliance for scheduling purposes, the Regional Safety or Health Director shall make appropriate additions and deletions as administrative guidelines permit.
- (3) Review of Federal Appropriations Act Exemptions and Limitation. Compliance Officers shall determine if the employer is covered by any exemptions or limitations noted in the latest version of VOSH PD 02-003 which updates the Directive to the latest federal Appropriations Act changes.

3. **Scheduling for Construction Inspections**

Due to the mobility of the construction industry, the transitory nature of construction worksites and the fact that construction worksites frequently involve more than one employer, inspections are scheduled from a list of construction worksites rather than construction employers. OSHA will provide to VOSH, either directly or through a third party, a randomly selected list of construction projects for each region from identified or known covered active projects. This list will contain the projected number of sites which the field office has reported it plans on inspecting during the next month. Projects are selected in accordance with the inspection schedule for construction.

NOTE: See VOSH PD 02-105A (or successor) - Inspection Scheduling for Construction, (01 July 2013).

C. **Shipyard, Maritime, Marine Cargo, and Shipbreaking Inspections**

Federal OSHA exercises jurisdiction over such private sector maritime related inspections. VOSH retains jurisdiction over public sector maritime inspections for which no such activity currently exists. Should public sector maritime inspection activity become necessary, a specific VOSH Program Directive will be issued. *See Chap. 6, Section III for additional information.*

D. Special Emphasis Programs

Special Emphasis Programs which VOSH chooses to implement are of two types:

- National Emphasis Programs (NEPs)
- Local Emphasis Programs (LEPs)

Their purpose is to provide for programmed inspections of establishments in industries or other worksites with potentially high injury or illness rates that are not covered by other programmed inspection scheduling systems or, if covered, where the potentially high injury or illness rates are not addressed to the extent considered adequate under the specific circumstances. Special Emphasis Programs are also based on potential exposure to health hazards. Special emphasis programs may also be used to develop and implement alternative scheduling procedures or other departures from national procedures.

1. Identification of a Special Emphasis Program

The description of the particular Special Emphasis Program shall be identified by one or more of the following characteristics:

- Specific industry;
- Trade/craft;
- Substance or other hazard;
- Type of workplace operation;
- Type/kind of equipment; and
- Other identifying characteristic.

Note: See VOSH Program Directive 01-022 (upon issuance) for procedures for approval of Local Emphasis Programs

2. Special Emphasis Program Scope

The reasons for and the scope of a Special Emphasis Program shall be described; and may be limited by geographic boundaries, size of worksite, or similar considerations as listed in Section 1 above.

E. National (NEPs) & Regional Emphasis Programs

These programs are developed by National OSHA for nationwide implementation in the case of NEPs, or by the Region III OSHA Office in Philadelphia when the need is to focus outreach efforts and inspections on specific workplace hazards in Region III that the Region has determined require special attention. Such federal regional emphasis programs which VOSH chooses to adopt are developed as VOSH Local Emphasis Programs.

F. Local Emphasis Programs (LEPs)

1. LEPs are types of special emphasis program in which one or more VOSH Regions participate. LEPs are generally based on knowledge of local industry hazards or local industry injury/illness experience. VOSH originated LEPs and those based on Region III OSHA regional programs must be developed and approved when one or more of the four VOSH Regions targets inspections to specific industries, hazards, or other workplace characteristics, e.g., as part of, or in conjunction with, a local initiative or problem-solving project.
2. A list of all current NEPs and LEPs used by VOSH may be found in the 14-xxx series of VOSH Program Directives as well as on the last page of the VOSH Program Directives Table of Contents. The 14-xxx series of VOSH Program directives include topic specific scheduling procedures in addition to the general information provided in this section.

G. Pilot Programs and Other Special Programs

National, Region III, or local VOSH pilot programs may also be established under Special Emphasis Programs. Such programs may be conducted for the purpose of assessing the actual extent of suspected or potential hazards, determining the feasibility of new or experimental compliance procedures, or for any other legitimate reason. VOSH may develop other special programs to cover certain categories of inspections which are not covered under the regular planned inspection programs or under a specific LEP.

H. Inspection Scheduling and Interface with Cooperative Program Participants**1. Determination of Cooperative Program Participation**

The Compliance Officer shall determine whether an onsite consultation visit has recently been conducted or is in progress. An on-site consultative visit is considered "in progress" in relation to working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions.

Employers who participate in voluntary compliance programs and have received a comprehensive onsite consultation may be exempt from programmed inspections and eligible for inspection deferrals or other enforcement incentives for the twelve month period following the consultation visit. The Regional Safety or Health Director or designee will determine whether the employer is actively participating in a Cooperative Program that would impact inspection and enforcement activity at the worksite being considered for inspection. Where possible, this determination should be made prior to scheduling the inspection.

- a. Abatement Coordination with VOSH Consultant
If the employer has received a limited service onsite consultation visit, or if an unprogrammed compliance inspection will be conducted, the Compliance Officer shall determine whether the VOSH Consultant has established any abatement date(s) which has not yet expired for any serious hazard(s). The compliance inspection may not include any item covered by the VOSH Consultant's abatement plan.

- b. Scheduling Coordination with VOSH Consultant
Consultants will confer with the Regional Safety or Health Director to check the general schedule and mark "CS" and the date for scheduled Consultation Survey next to the name of any employer that has a consultation visit scheduled within 45 days. However, may be deferred for no greater than 90 calendar days (one 45 day period and extension of an additional 45 days) from request to visit. Should the employer cancel the appointment, the consultant will mark through the initials on the general schedule. Only general schedule inspections should be deferred if consultation visits are scheduled. It is the responsibility of the consultant to confer with the Regional Safety or Health Director to check the general schedule listing. All such establishments selected for a Consultation Survey shall be moved to the bottom of the current inspection cycle.

- c. Sharp Worksites
Newly certified SHARP worksites will be exempt from Programmed Inspections for one (1) year. Recertified SHARP worksites will be exempt from Programmed Inspections for two (2) years. The Consultation Program Manager will notify Regional Safety or Health Directors of SHARP worksites.

- d. STAR Worksites
Virginia Voluntary Protection Program (VPP) Star worksites are exempt from Programmed Inspections as long as they maintain their VVPP status. The VVPP Coordinator is responsible for notifying Regional Safety or Health Directors by forwarding a copy of the letter scheduling the pre-evaluation on-site review. Should a site not be recommended for VVPP status, or should it be removed or withdraw from the program, the VVPP Coordinator will inform appropriate Regional Safety or Health Directors in writing.

Employers who meet all Consultation Program requirements for recognition and exemption will have the names of their establishments removed from VOSH's Programmed Inspection Schedule.

NOTE: The Consultation Program Manager will notify Regional Safety or Health Directors of businesses that qualify for 12 month deferral of general schedule inspections.

2. Information Availability

Information regarding a facility's participation in the following programs should be made available to the Regional Safety or Health Director prior to scheduling inspection activity:

- VPP Program;
- Pre-SHARP and SHARP Participants;
- OSHA VOSH Strategic Partnerships; and
- Consultation 90-Day Deferrals.

3. Voluntary Protection Program

a. VPP Coordinator Manager Responsibilities

The VPP Coordinator must keep the Regional Safety or Health Director or his/her designee informed regarding VPP applicants and the status of participants in the VPP. This will prevent unnecessary scheduling of programmed inspections at VPP sites and ensure efficient use of resources. The Regional Safety or Health Director or his/her designee should be informed:

- (1) That the site can be removed from the programmed inspection list.
- (2) Such removal may occur no more than 75 days prior to the onsite evaluation;
- (3) Of the site's approval for the VPP program;
- (4) Of the site's withdrawal or termination from the VPP program; and
- (5) If the VPP Coordinator is the first person notified by the site of an event requiring enforcement, the VPP Coordinator must instruct the site to contact the appropriate Regional Office.

b. Programmed Inspections and VPP Participation

(1) Inspection Deferral

Approved sites must be removed from any programmed inspection lists for the duration of participation, unless a site chooses otherwise. The applicant worksite will be deferred starting no more than 75 calendar days prior to the commencement of its scheduled pre-approval onsite review.

(2) Inspection Exemption

The exemption from programmed inspections for approved VPP sites will continue for as long as they continue to meet VPP requirements. Sites that have withdrawn or have been terminated from VPP will be returned to the programmed inspection list, if applicable, at the time of the next inspection cycle.

c. Unprogrammed Enforcement Activities at VPP Sites

When Regional Office receives a complaint, or a referral other than from the VOSH VPP onsite team, or is notified of a fatality, catastrophe, or other event requiring an enforcement inspection at a VPP site, the Regional Safety or Health Director or designee must initiate the inspection following normal VOSH enforcement procedures.

(1) The Regional Office must immediately notify the VPP Coordinator Manager of any fatalities, catastrophes or other accidents or incidents occurring at a VPP worksite that require an enforcement inspection; as well as of a referral or complaint that concerns a VPP worksite, including complaint inquiries that would receive a letter response. If the VPP is a national VPP worksite, the OSHA Region III Office should be notified.

(2) If the VPP Coordinator is the first person notified by the site of an event requiring an enforcement inspection, the VPP Coordinator must instruct the site to contact the appropriate Regional Office, the appropriate VOSH Program Director and the National Office if the fatality is on a National VPP site.

(3) The inspection will be limited to the specific issue of the unprogrammed activity. If citations are issued as a result of the inspection, a copy of the citation will be sent to the VPP Coordinator. *See OSHA CSP 03-01-003 Voluntary Protection Programs (VPP): Consultation Policies and Procedures Manual, (18 April 2008) to be superceded by VOSH PD 03-020, when issued.*

(4) The Regional Safety or Health Director or designee will send the VPP Coordinator Manager a copy of any report resulting from an enforcement case.

4. Consultation

a. Consultation Visit in Progress

(1) If an onsite consultation visit is in progress, it will take priority over VOSH programmed inspections. An onsite consultation visit will be considered "in progress" in relation to the working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions thereof. If an onsite consultation visit is already in progress it will terminate when the following kind of VOSH compliance inspection is about to take place:

- Imminent danger inspection;
- Fatality/catastrophe inspection;
- Complaint inspections; and/or
- Other critical inspections, as determined by the Commissioner.

NOTE: Other "such critical inspections" may include, but are not limited to, referrals as defined in Chapter 2, Complaint and Referral Processing. Following an evaluation of the hazards alleged in a referral, if the Commissioner determines that enforcement action is required prior to the end of an abatement period established by the state consultation project, the consultation visit in progress shall be immediately terminated to allow for an enforcement inspection.

(2) For purposes of efficiency and expediency, an employer's worksite shall not be subject to concurrent consultation and enforcement-related visits. Refer to the following excerpts from CSP 02-00-002 (01/18/08), VOSH Program Directives 03-001B, Consultation Policies and Procedures Manual (10/01/08) and 03-007, Consultation Policies and Procedures, Chapter 7: Relationship to Enforcement, Hazard Correction and Verification (05/15/07), to clarify the interface between enforcement and consultation activity at the worksite:

(a) Full Service On-Site Consultation Visits

While a worksite is undergoing a full service onsite consultation visit for safety and health, programmed enforcement activity may not occur until after the end of the worksite's visit "In progress" status.

(b) Full Service Safety or Health On-Site Consultation Visits

An onsite consultation visit "in Progress" is discipline-related, whether for safety or health; programmed enforcement activity may not proceed until after the

end of the worksite's visit "in Progress" status, and is limited to the discipline examined, safety or health.

(c) Limited Service On-Site Consultation Visits

If a worksite is undergoing a limited service onsite consultation visit, whether focused on a particular type of work process or a hazard, programmed enforcement activity may not proceed while the consultant is at the worksite. The re-scheduled enforcement activity must be limited only to those areas that were not addressed by the scope of the consultative visit (posted List of Hazards).

(d) Enforcement Follow-Up and Monitoring Inspections

If an enforcement follow-up or monitoring inspection is scheduled while a worksite is undergoing an onsite consultation visit, the inspection shall not be deferred; however, its scope shall be limited only to those areas required to be covered by the follow-up or monitoring inspection. In such instances, the consultant must halt the onsite visit until the enforcement inspection is completed. In the event VOSH issues a citation(s) as a result of the follow-up or monitoring inspection, an onsite consultation visit may not proceed until the citation(s) becomes a final order(s).

b. On-Site Consultation and 90-Day Deferral

- (1) If an establishment has requested an initial full-service comprehensive consultation visit for safety or health from the Consultation Program, and that visit has been scheduled, a general schedule inspection may be deferred for no greater than 90 calendar days (one 45 day period and extension of an additional 45 days) from the date of the notification by the Consultation Program to the Regional Office. No extension of the deferral beyond the 90 calendar days is possible, unless the consultation visit is "in progress."
- (2) VOSH may, however, in exercising its authority to schedule inspections, assign a lower priority to worksites where consultation visits are scheduled.

NOTE: Refer to VOSH Program Directives 03-001B, Consultation Policies and Procedures Manual (10/01/08) and 03-007, Consultation Policies and Procedures, Chapter 7: Relationship to Enforcement, Hazard Correction and Verification (05/15/07), for additional information.

5. Pre-Safety and Health Achievement Recognition Program (Pre-SHARP) Status

- a. Those employers who do not meet the SHARP requirements, but who exhibit a reasonable promise of achieving agreed-upon milestones and time frames for SHARP participation, may be granted Pre-SHARP status. Pre-SHARP participants receive a full service, comprehensive consultation visit that involves a complete safety and health hazard identification survey, including a comprehensive assessment of the worksite's safety and health management system.
- b. The deferral time frame recommended by the Consultation Project Manager must not exceed a total of 18 months from the expiration of the latest hazard correction due date(s), including extensions. Upon achieving Pre-SHARP status, employers may be granted a deferral from VOSH programmed inspections. The following types of incidents can trigger a VOSH enforcement inspection at Pre-SHARP sites:
 - Imminent danger;
 - Fatality/catastrophe; and
 - Formal complaints.

6. Safety and Health Achievement Recognition Program (SHARP)

SHARP is designed to provide support and incentives to those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from VOSH programmed inspections, see §1908.7(b) (4).

- a. Duration of SHARP Status

All initial approvals of SHARP status will be for a period of one year, commencing with the date the commissioner approves an employer's SHARP application. After the initial approval, all SHARP renewals will be for a period of two (2) years.
- b. VOSH Inspection(s) at SHARP Worksites

As noted above, employers that meet all the requirements for SHARP status will have the names of their establishments deleted from VOSH's Programmed Inspection Schedule. However, pursuant to §1908.7(b)(4)(ii), the following types of incidents can trigger a VOSH enforcement inspection at SHARP sites: imminent danger; fatality/catastrophe; or formal complaints.

NOTE: See VOSH PD 03-001B, Consultation Policies and Procedures Manual, Chapter 8: OSHA's Safety and

Health Achievement Recognition Program (SHARP) and Pre-SHARP, dated 05 April 2008, for additional information.

7. Strategic Partnership Programs

VOSH has no strategic partnership programs at this time thus there is no impact on inspection scheduling and/or interface with Cooperative Program Participants.

8. Alliances

Unlike VOSH's VPP and SHARP programs, Alliances do not require applications, data collection, verification, or evaluation. Alliances also do not offer incentives, such as focused inspections or inspection deferral, to their signatories.

IV. Inspection Procedures for Follow-up and Monitoring Inspections

Follow-up inspections are conducted primarily to determine if previously cited violations have been corrected.

Monitoring inspections may be conducted when hazard correction takes place over a lengthy period of time. The purpose of monitoring inspections is to make sure the process of hazard correction is taking place and that employees are protected during this process.

Follow-up inspections or monitoring inspections may be conducted when there has been an issuance of Willful or Repeated violations. Follow-up or monitoring inspections would not generally be conducted when evidence of abatement is provided by the employer or employee representatives. However, when, for example, failure to abate notifications and/or citations related to imminent danger situations are issued, follow-up or monitoring inspections are appropriate.

If deemed necessary, follow-up inspections may be conducted within 30 days following the latest abatement date and shall take priority over (1) programmed inspections and (2) unprogrammed inspections classified as Other-than-Serious. Follow-up inspections should not be conducted within the 15-working day contest period unless high gravity Serious violations are involved.

A. When a Follow-up Inspection is Required

A follow-up inspection may be required when any of the following exist:

1. Willful violations;
2. Fatalities;
3. When the employer fails to respond to a request for notification of abatement action by letter or other means after having been contacted several times; and

4. Whenever the Regional Safety or Health Director believes that particular circumstances, e.g., the number or the type of violations, past history of the employer, complex engineering controls, etc., indicate the need for a follow-up.

There shall be no additional inspection activity unless, in the judgment of the Compliance Officer, there have been significant changes in the workplace. These changes, in addition to inspection modifications, must be fully documented.

B. Initial Follow-up

The initial follow-up is the first follow-up inspection after issuance of the citation.

1. If a violation is found not to have been abated, the Compliance Officer shall inform the employer that the employer is subject to both a Notification of Failure to Abate Alleged Violation and to additional daily penalties that are proposed as long as such failure or violation continues.
2. Failure to comply with enforceable interim abatement dates involving multi-step abatement shall be subject to a Notification of Failure to Abate Alleged Violation.
3. Where the employer has implemented some controls, but other technology was available which would have brought the levels of airborne concentrations or noise to within the regulatory requirements, a Notification of Failure to Abate Alleged Violation shall generally be issued. If the employer has exhibited good faith, a late request for extension of abatement date for extenuating circumstances may be considered.
4. Where an apparent failure to abate by means of engineering controls is found to be due to technical infeasibility, no Failure to Abate notice shall be issued; however, if proper administrative controls, work practices or personal protective equipment are not utilized, a Notification of Failure to Abate Alleged Violation shall be issued.
5. There may be times during the initial follow-up when, because of an employer's flagrant disregard of a citation, an item on a citation, or other factors, it would be appropriate to bring action for an injunction under § 40.1-49.4.F. of the *Code of Virginia*. The Regional Safety or Health Director shall notify the Division of Legal Support Director of all the particular circumstances of the case for referral to the Assistant Attorney General and appropriate Commonwealth's Attorney.

C. Second Follow-up

Any subsequent follow-up after the initial follow-up dealing with the same violations is a second follow-up.

1. **After the Notification of Failure to Abate** Alleged Violation has been issued, the Regional Safety or Health Director shall allow a reasonable time for abatement of the violation before conducting a second follow-up. If the employer contests the proposed additional daily penalties, a follow-up inspection shall still be scheduled to ensure correction of the original violation.
2. **If a second follow-up** inspection reveals that the employer still has not corrected the original violations, the Regional Safety or Health Director shall immediately contact the Director of the Division of Legal Support in writing, detailing the circumstances so that the matter can be referred to the Assistant Attorney General and to the appropriate Commonwealth's Attorney for action in accordance with § 40.1-49.4.F. of the *Code of Virginia*.
3. **Violation Recurs After Abatement** If it is determined that the originally cited violation was abated but then recurred, a citation for a Repeated violation may be appropriate. A "Repeated violation" means that the violation has recurred after a successful abatement. See Chapter 10, Violations, for more information on Repeated Violation versus Failure to Abate.

D. Follow-up and Monitoring Reports

A photo copy of the original VOSH-1B form shall be used for documenting correction of Willful, Repeated and Serious violations and failure-to-correct items during the follow-up inspections. If violation items were appropriately grouped in the VOSH-1B in the original case file, they may be grouped for the follow-up inspection; if not, individual copies of the original VOSH-1B forms shall be used for each item. The correction of other-than-serious violations may be documented in the narrative portion of the case file.

1. **Proper Documentation**

The correction circumstances observed by the Compliance Officer shall be specifically described in the VOSH-1B, including any applicable dimensions, materials, specifications, personal protective equipment, engineering controls, measurements or readings, or other conditions. Brief summations such as "corrected" or "in compliance" will not be accepted as proper documentation for violations which are corrected. When appropriate, this written description shall be supplemented by a videotape or a photograph to illustrate correction circumstances.
2. **Sampling**

The Compliance Officer conducting a follow-up inspection to determine compliance with violations of air contaminants and noise standards shall decide whether sampling is necessary, and if so, what kind; i.e., spot sampling, short-term sampling, or full-shift sampling. If there is reasonable probability of an issuance of a Notification of Failure to Abate Alleged Violation, full-shift sampling is required.

3. Narrative

The Compliance Officer shall include in the narrative the findings of the inspection, along with recommendations for action. In order to reach a valid conclusion when recommending action, it is important to have all the pertinent factors available in an organized manner.

4. Failure to Abate

In the event that any item has not been abated, complete documentation shall be included on a VOSH-1B.

E. Follow-up Files

A copy of the follow-up inspection reports shall be included with the original (parent) case file.

F. Conduct of Monitoring Inspection (Extensions of Abatement and Long-term Abatement)**1. General**

An inspection shall be classified as a monitoring inspection when a safety and health inspection is conducted for one or more of the following purposes:

- a. To determine the progress an employer is making toward final abatement;
- b. To ensure that the target dates of a multi-step abatement plan are being met;
- c. To ensure that an employer's petition for the modification of abatement dates is made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible;
- d. To ensure that the employees are being properly protected until final controls are implemented;
- e. To ensure that the terms of a permanent variance are being met;
- f. To provide abatement assistance for items under citation;
- g. To ensure that the terms of a corporate-wide settlement agreement are being carried out;

2. Specifics

- a. Monitoring visits shall be conducted for requests for modification of abatement dates on Serious, Willful and Repeated violations which would extend the final abatement date by more than one year from the citation issuance date.
 - (1) These inspections shall be conducted as soon as possible after first contact with the employer but no later than 15 working days following the receipt of certification of posting, unless an extension is requested from and granted by the Commissioner.
 - (2) Such inspections shall have a priority equal to that of serious complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.
- b. Monitoring visits in response to requests for modifications of abatement date for Other-than-Serious violations or for Serious, Willful or Repeated violations which would result in a final abatement date of one year or less from the citation issuance date shall be scheduled at the discretion of the Regional Safety or Health Director, based on the gravity of the violation and on resource availability.
 - (1) These inspections shall be conducted as soon as possible after first contact with the employer, but no later than 15 working days following the receipt of certification of posting, unless an extension is requested from and granted by the Commissioner.
 - (2) Such inspections shall have a priority equal to that of Serious complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.
- c. Monitoring visits shall be scheduled to check on progress made on long-term or multi-step abatement plans whenever abatement dates extend beyond one year from the issuance date of the citation.
 - (1) These inspections shall be scheduled every six months, counted from the citation date until final abatement has been achieved for all cited violations. If the case has been contested, the final order date, rather than the citation date, shall be used as a starting point. A settlement agreement may specify an alternative monitoring schedule.

- (2) If the employer is submitting satisfactory quarterly progress reports and if, after careful review, that these reports reflect adequate progress on implementation of control measures and adequate interim protection for employees, a monitoring inspection may be conducted every 12 months counted from the date of the final order.
 - (3) Such inspections shall have a priority equal to that of serious complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.
 - d. Monitoring visits shall be scheduled to verify compliance with the terms of granted variances.
 - (1) The Regional Safety or Health Director shall review each variance annually to determine if an inspection is warranted based on:
 - (a) Significant differences from standards;
 - (b) No monitoring for current and two previous fiscal years; or
 - (c) Employer not in compliance with terms on previous inspections.
 - (2) Such inspections shall have a priority equal to that of a serious complaint.
 - (3) A report on the results of these monitoring visits shall be sent by the Regional Safety or Health Director to the Division of Legal Support through the Program Director.
 - e. Monitoring visits shall be scheduled to verify compliance with the terms of corporate-wide settlement agreements.
 - f. Monitoring visits may also be made for other reasons, as outlined elsewhere in this chapter.
3. **Procedures**

Monitoring inspections shall be conducted in the same manner as follow-up inspections described above.

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CHAPTER 4

INSPECTION PROCEDURES

I. Inspection Preparation - General

The conduct of effective inspections requires professional judgment by the Compliance Officer in the identification, evaluation and accurate reporting of the safety and health conditions and practices in the workplace.

A programmed inspection is generally a comprehensive inspection of the worksite, but may be limited as necessary in view of resource availability and other compliance priorities. Therefore, inspections may vary considerably in scope and detail, depending upon the circumstances in each case. For example, low-hazard areas, such as office space, may be excluded from inspection without affecting the comprehensiveness of the inspection.

II. Inspection Planning

It is important that the Compliance Officer adequately prepare for each inspection. Due to the wide variety of industries and associated hazards likely to be encountered, pre-inspection preparation is essential to the conduct of a quality inspection. Compliance Officers shall plan individual schedules in advance in coordination with their Regional Safety or Health Director, reflecting inspection priorities.

A. **Background Review**

Due to the wide variety of industries and associated hazards likely to be encountered, to ensure the conduct of a quality inspection, the Compliance Officer, together with the Regional Safety or Health Director, if appropriate, shall carefully review:

1. **Specific Information**

All pertinent information contained in the establishment file and appropriate reference sources to become knowledgeable in the potential hazards and industrial processes that may be encountered and shall identify the personal protective equipment necessary for protection against these anticipated hazards.

2. **Appropriate Standards and Sampling Methods**

Based on experience and information on file concerning the establishment, select the instruments that will be needed for the inspection and prepare them according to the standard methods of sampling and calibration.

3. **Review of Previous Citations**

During review of previous inspection case files, Compliance Officers shall note those citations that were issued and their abatement status as documented in the case file, especially those deemed high gravity serious and willful.

B. Review of Inspection History

1. Pre-inspection Data Review

Compliance Officers will carefully review data available at the Regional Office for information relevant to the establishment scheduled for inspection. This may include inspection files and source reference material relevant to the industry. Compliance Officers will also conduct an establishment search by accessing the IMIS database. Compliance Officers should use name variations and address-matching in their establishment search to maximize their efforts due to possible prior incorrect IMIS entry, company name changes, and corporate status (e.g., LLC, Inc.).

2. Previous Federal or Other State Plan State Citations

If an establishment has an inspection history that includes citations received while performing work in a state under direct federal OSHA enforcement or another State Plan State, Compliance Officers should be aware of this information. This inspection history may be used to document an employer's heightened awareness of a hazard and/or standard in order to support the development of a willful citation and may be considered in determining eligibility for the history penalty reduction. However, while a federal OSHA direct enforcement citation, a citation by a state plan program of another state, or a VOSH citation from a different VOSH region may not be used to support a repeat violation; it may be used as proof of prior knowledge to support issuance of a willful violation.

C. Review of Cooperative Program Participation

Refer to Chapter 3, Program Planning, for Review of Voluntary Compliance Programs.

D. Coordination with VOSH Consultant

The Compliance Officer shall determine whether an onsite consultation visit has recently been conducted or is in progress. If the employer has received a limited service onsite consultation visit, or if an unprogrammed compliance inspection will be conducted, the Compliance Officer shall determine whether the VOSH Consultant has established any abatement date(s) which has not yet expired for any serious hazard(s). The compliance inspection may not include any item covered by the VOSH Consultant's abatement plan. *(Refer to Chapter 3, Program Planning.)*

NOTE: An employer who has received a comprehensive onsite consultation visit MAY BE EXEMPT from programmed inspections for the twelve month period following the consultation visit.

E. Safety and Health Issues Relating to Compliance Officers**1. Hazard Assessment**

If the employer has a written certification that a hazard assessment has been performed pursuant to §1910.132(d), the Compliance Officer shall request a copy. If the hazard assessment itself is not in writing, the Compliance Officer shall ask the person who signed the certification to describe all potential workplace hazards and then select appropriate protective equipment. If there is no hazard assessment, the Compliance Officer will determine potential hazards from sources such as the OSHA 300 Log of injuries and illnesses and shall select personal protective equipment accordingly.

2. Inspection Materials and Equipment

The Compliance Officer shall have all report forms in sufficient quantity to conduct the inspection, all assigned personal protective equipment available for use in serviceable condition, and appropriate handouts, if available.

- a. Unassigned PPE. If, based on the pre-inspection review or upon facts discovered at the worksite, the need for unassigned personal protective equipment (PPE) is identified, the Regional Safety or Health Director shall ensure that any required equipment is provided. Prior to the inspection, the Regional Safety or Health Director shall ensure that the Compliance Officer has been trained in the uses and limitations of such equipment.
- b. Hard Hats, Safety Glasses and Safety Shoes. The Regional Safety or Health Director shall assure that appropriate PPE is provided to and used by Compliance Officers. This includes training on the proper use and limitations of the equipment. Approved hard hats, approved safety glasses with permanently or rigidly attached side shields, and approved safety shoes shall be worn by Compliance Officers on the walkaround phase of the onsite visit, unless the visit is being conducted at a worksite where no overhead hazards, eye hazards, and/or foot hazards are likely to be present. This will set an example for industry and provide minimum acceptable protection for the Compliance Officer. The Regional Safety or Health Director may consult with the appropriate Health or Safety Program Director as necessary.
- c. Special or Additional Equipment. If there is a need for special or additional equipment, the Regional Safety or Health Director shall be consulted to ensure that training in the use, and limitation, of such equipment has been accomplished prior to the inspection. The Regional Safety or Health Director shall ensure that a review or recheck in the use of all equipment is given to the Compliance Officer at least once a year.

3. Respiratory Protection

Inspections involving the use of negative pressure respirators shall not be assigned without a determination, using guidelines established by a physician, that the Compliance Officer may use a respirator. Also, the Compliance Officer has to have had an adequate quantitative fit test within the last year. Since respirators with tight-fitting face pieces require the skin to be clean shaven at the points where sealing occurs, Compliance Officers assigned to conduct inspections which involve the use of such respirators shall not have facial hair which interferes with the face to facepiece seal or function of the respirator valve(s).

Compliance Officers must wear respirators when and where required, and must care for and maintain respirators in accordance with the Compliance Officer training provided.

- a. Pre-inspection Evaluation. Compliance Officers should conduct a pre-inspection evaluation for potential exposure to chemicals. Prior to entering any hazardous areas, the Compliance Officer should identify those work areas, processes, or tasks that require respiratory protection.

The hazard assessment requirement in §1910.132(d) does not apply to respirators; see VOSH PD 02-435, Respiratory Protection Manual, dated 15 February 2000. Compliance Officers should review all pertinent information contained in the establishment file and appropriate reference sources to become knowledgeable about the industrial processes and potential respiratory hazards that may be encountered.

During the opening conference, a list of hazardous substances should be obtained or identified, along with any air monitoring results. Compliance Officers should determine if they have the appropriate respirator to protect against chemicals present at the work site.

- b. Notification. Compliance Officers must notify their supervisor or the respiratory protection program administrator if:
- (1) A respirator no longer fits well (*Compliance Officers should request a replacement that fits properly*);
 - (2) Compliance Officers encounter any respiratory hazards during inspections or on-site visits that they believe have not been previously or adequately addressed during the site visit; or
 - (3) There are any other concerns regarding the program.

4. Safety and Health Rules and Practices

Compliance Officers must comply with all appropriate safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by VOSH standards or by the employer for the protection of employees.

5. Restrictions

Compliance Officers will not enter any area where special entrance restrictions apply until the required precautions have been taken.

It shall be the Regional Safety or Health Director's responsibility to determine that an inspection may be conducted without exposing the Compliance Officer to hazardous situations and to procure whatever materials and equipment are needed for the safe conduct of the inspection.

F. Advance Notice**1. Policy**

- a. General Prohibition. Section 40.1-51.3:1 of the *Code of Virginia* and §230 of the *VOSH Administrative Regulations Manual* contain a general prohibition against the giving of advance notice of inspections. The VOSH Program regulates many conditions that are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, unauthorized advance notice is prohibited unless specifically exempted in each case by the applicable VOSH Program Director. The penalty for giving unauthorized advanced notice ranges between \$100 and \$1,000 and/or imprisonment for not more than six months. (See § 40.1-51.3:1 of the *Code of Virginia*.)
- b. Exceptions to Advance Notice. There may be occasions when advance notice is necessary to conduct an effective investigation. These occasions are narrow exceptions to the statutory prohibition against advance notice. As per § 230 of the *VOSH Administrative Regulations Manual*, advance notice of inspections may be given only with the authorization of the applicable VOSH Program Manager or designee and only in the following situations:
 - (1) In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible;
 - (2) When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary;
 - (3) To ensure the presence of employer and employee representatives or other appropriate personnel who are needed to aid in the inspection; and

- (4) When giving advance notice would enhance the probability of an effective and thorough inspection; e.g., in complex fatality investigations.

NOTE: In cases of apparent imminent danger, advance notice may be given by the Compliance Officer without such authorization if the VOSH Program Manager or designee is not immediately available.

- c. Delays. Advance notice exists whenever the Regional Office sets up a specific date or time with the employer for the Compliance Officer to begin an inspection. Any delays in the conduct of the inspection shall be kept to an absolute minimum. Lengthy or unreasonable delays shall be brought to the attention of the Regional Safety or Health Director or designee. Advance notice generally does not include non-specific indications of potential future inspections.

In unusual circumstances, the Regional Safety or Health Director or designee may decide that a delay is necessary. In those cases the employer or the Compliance Officer shall notify affected employee representatives, if any, of the delay and shall keep them informed of the status of the inspection.

- (1) Delay Approved. Although advance notice generally does not exist after the Compliance Officer has arrived at the worksite, presented credentials and announced the inspection, many causes can serve to delay or interrupt the continued conduct of the inspection. For example, the employer representative on site may request a delay of entry pending the return of the president or some other higher ranking official.
 - (a) Such delays shall be as short as possible. If an employer's (or an employee representative's) request for delay appears reasonable, the Compliance Officer may delay or interrupt the inspection for up to an hour. The Regional Safety or Health Director shall be contacted if the delay lasts or is anticipated to last longer than one hour.
 - (b) The Regional Safety or Health Director shall decide whether the circumstances justify a delay of more than one hour and, if so, for how long. If the delay appears reasonable, the inspection may be delayed or interrupted for the time judged necessary, but in no case for longer than five (5) working days.

- (c) The inspection shall be resumed as soon as reasonably possible. Delays or interruptions of less than five (5) working days shall not require implementation of advance notice procedures.
- (2) Delay Not Approved. If the employer or the employee representative requests a delay which the Regional Safety or Health Director believes is unreasonable or without sufficient justification (e.g., too long, not good faith), the Compliance Officer shall inform the requester that agency policy does not allow for such a delay. If the employer representative continues to insist on the delay, the situation shall be treated as a refusal of entry.
- (3) Other Circumstances. In unusual circumstances, the Regional Safety or Health Director, in consultation with the appropriate program director may decide that a delay of more than five (5) working days is necessary; e.g., compliance personnel may not be available in the Regional or Branch Office because of higher priority demands. Any situation, except a delay after the initial walkaround is completed, involving a delay of more than five (5) working days, whatever the justification, shall be handled as advance notice and must be approved by the appropriate program director.

2. Documentation and Procedures for Advance Notice

- a. Case File Documentation. The conditions requiring advance notice shall be specified and the procedures followed shall be detailed in the case file.
- b. Lead Time. If it is decided that advance notice will be given, the Compliance Officer shall do so by telephone or in person. No advance notice may be given more than 24 hours before the inspection except in unusual circumstances that justify such notice. Documentation of the conditions requiring advance notice and the procedures followed shall be included in the case file.
- c. Construction or Multi-Employer Worksites. If advance notice is to be given at a construction or other multi-employer worksite, the Compliance Officer shall contact the general contractor. If there are two or more general contractors, all shall be contacted. The general contractor shall be instructed to advise all subcontractors on the site of the inspections.
- d. Initial Employer Contact. During telephone contact with the employer, the Compliance Officer shall identify himself, explain the purpose of the inspection, state when the inspection is

expected to be conducted, find out the employer's normal business hours and whether special protective equipment or precautions are required. If security clearances or immunizations are necessary, the Regional Safety or Health Director shall be notified.

- e. Employer and Employee Representatives. An important purpose of advance notice is to make arrangements for the presence of employer and employee representatives to aid in conducting an effective and thorough inspection. A responsible management official shall be requested to assist in the inspection.

The Compliance Officer shall advise the employer that § 40.1-51.2(d) of the *Code of Virginia* and § 230 of the *VOSH Administrative Regulations Manual* require that an employee representative be given an opportunity to participate in the inspection.

- f. Determination of Employee Labor Organizations. The Compliance Officer shall determine if employees at the establishment are represented by a labor organization(s) and if there is a safety committee with employee representatives. The Compliance Officer shall advise the employer, when advance notice is given, to notify the authorized employee representative(s) of the inspection, promptly.
- g. Subcontractor Notification by the General Contractor. If a general contractor is contacted, the Compliance Officer will tell the contractor to instruct each subcontractor to notify employee representatives of the inspection promptly.
- h. Compliance Officer Notification to Employee Representative. When requested by an employer who furnishes the identity of the representative, the Compliance Officer shall promptly inform the employee representative of the inspection and shall provide any other information necessary in accordance with § 230 of the *VOSH Administrative Regulations Manual*.
- i. Employee Notification - Other. The advance notice requirement for employees applies only if there is a known representative authorized by employees, such as a labor organization or a safety committee with employee representatives. If there is no authorized employee representative or if it cannot be determined with reasonable certainty who the representative is, the Compliance Officer shall consult with a reasonable number of employees during the inspection to determine the impact or possible adverse effects of the advance notice.

G. Pre-Inspection Compulsory Process

1. Inspection Warrants

Generally, warrants are sought if there is evidence that: 1) an employer is likely to refuse entry, i.e., a history of denied entry in previous inspections; or 2) that a job will only last a short time; or 3) that job processes will be changing rapidly.

- a. Authorization. Virginia Code §§ 40.1-49.9, *et seq.*, authorizes the agency to seek a warrant in advance of an attempted inspection if circumstances are such that “pre-inspection process (is) desirable or necessary.”
- b. Procedure. The Regional Safety or Health Director or designee may, after consultation with the Director of the Division of Legal Support, authorize the Division of Legal Support to seek an inspection warrant in advance of an attempt to inspect or investigate whenever circumstances indicate the desirability of such warrants.

NOTE: Examples of such circumstances would be denial of entry in previous inspections, knowledge that a job will only last a short time or that job processes will be changing rapidly.

2. Pre-Inspection Interrogatories

- a. Authorization. Section 40.1-6 of the *Code of Virginia* authorizes the Commissioner to issue interrogatories and to require records and information necessary for inspections be made available to the Compliance Officer.
- b. Timing of Issuance. Interrogatories may also be issued prior to any attempt to contact the employer or other person for evidence related to a VOSH inspection or investigation.

H. Security Clearance

1. Personal Security Clearance

Some establishments have areas which contain material or processes which are classified by the U. S. Government in the interest of national security. If VOSH has difficulty obtaining entry into a classified area, the Compliance Officer shall thoroughly document the facts - including the type of security clearance necessary, the areas that are classified, the controlling employer representative and, if possible, the type of work being performed. The inspection shall be continued in all other areas not classified.

The information concerning the classified areas shall be called in to the Regional Safety or Health Director as soon as possible, either during or at the conclusion of the walk around, and the telephoned information shall be recorded in the case diary log of the case file. If the Regional Safety or Health Director determines that further action must be taken regarding the classified areas he shall consult with the appropriate Program Director and the Director of VOSH Programs who may, if he deems it necessary, refer that part of the inspection to the OSHA Regional Office for possible federal action. The Regional Safety or Health Director shall be informed of this action.

2. Classified and Trade Secret Information

Any classified or trade secret information and/or personal knowledge of such information by VOSH personnel shall be handled in accordance with the regulations of § 40.1-51.4:1 of the *Code of Virginia* which protects the confidentiality of trade secret information during the course of a VOSH inspection.

The collection of such information, and the number of personnel with access to it, shall be limited to the minimum necessary for the conduct of compliance activities. The Compliance Officer shall identify classified and trade secret information as such in the case file. (See also *Chapter 5, V. E.*) If trade secrets are identified, the Compliance Officer will explain that VOSH is required by law to preserve the confidentiality of all information which might reveal a trade secret in accordance with § 40.1-51.4:1 of the *Code of Virginia* and § 250 of the *VOSH Administrative Regulations Manual*.

I. Expert Assistance

1. Determination of Need

The decision about the need for expert assistance to aid in the conduct of the investigation shall be made as soon as possible after the Compliance Officer has arrived at the site. That decision shall be made by the Regional Safety or Health Director in consultation with the Program Director upon the recommendation of the Compliance Officer. The appropriate program director shall arrange for a specialist from within VOSH or a qualified outside consultant to assist in an inspection or investigation when the need for such expertise is identified by the Regional Safety or Health Director, or the Compliance Officer.

2. Expert Selection

a. Choice of Experts. **The following list of experts is listed in priority order for selection:**

- (1) VOSH Personnel. VOSH personnel shall generally be the first choice as experts, rather than “outside” experts.

Any available VOSH 21(d) consultation personnel shall be called upon as experts whenever appropriate.

- (2) OSHA / NIOSH. If no VOSH experts are available, then, federal OSHA Regional/National Office personnel or NIOSH personnel, in that order, are next in order of preference.
 - (a) If OSHA personnel are to be used, the Program Director shall contact the OSHA Region III Administrator, who will make the arrangements.
 - (b) Arrangements for NIOSH experts shall be made through the OSHA Region III Administrator with the NIOSH Regional or National Office, as appropriate.
- (3) Other Virginia State Agency. If the required expertise is unavailable internally from VOSH, OSHA, or NIOSH but is available through an expert from another Virginia state agency, the Program Director or the Division of Legal Support Director shall contact the appropriate office of the other agency to request and coordinate such assistance. If necessary, a letter to the appropriate state agency requesting such assistance shall be prepared for the signature of the Commissioner to confirm the interagency staff discussions regarding the request for such assistance. The letter shall be forwarded to the other agency following the Commissioner's signature.
- (4) External Consultants. In general, a consultant or "outside expert" is a person from the private sector or academia who is paid a fee for their special expertise. A consultant or outside experts will normally be selected only when no other qualified individual is available from the above listed (1-3) sources. Use of a consultant or an outside expert shall be approved by the Program Director prior to contacting the individual. Contractual arrangements shall be coordinated through the Program Director.

3. Implementation

Expert assistance may be necessary during inspections for the implementation of engineering or administrative controls involving, but not limited to, noise, air contaminants, complicated machine guarding and construction.

4. Performance

VOSH, or OSHA personnel acting as specialists or experts may accompany the Compliance Officer or they may perform their tasks

separately. NIOSH personnel or external consultants must be accompanied by the Compliance Officer. All specialists and outside consultants shall be briefed on the purpose of the inspection and the personal protective equipment to be utilized. Outside consultants must be accompanied by a Compliance Officer. Outside consultants will work within the specifications of the contract developed by the Division of Legal Support and approved by the Office of the Attorney General, when required.

5. Reporting

All data, conclusions, findings, and/or recommendations from the assigned specialists or experts defined in subsections 1- 4 above shall be made part of the inspection report, including information on any actions taken by the employer in response to any such recommendations.

CHAPTER 5

INSPECTION PROCEDURES

I. Inspection Scope

A. **Categories**

Inspections, either programmed or unprogrammed, fall into one of two categories depending on the scope of the inspection:

1. **Comprehensive**

A comprehensive inspection is a substantially complete and thorough inspection of all potentially hazardous areas of the establishment. A programmed public sector inspection is generally a comprehensive inspection of the worksite but may be limited, as necessary, in view of resource availability and other compliance priorities.

An inspection may be deemed comprehensive even though, as a result of professional judgment, not all potentially hazardous conditions or practices within those areas are inspected. (Low-hazard areas, such as office space, may be excluded from inspection without affecting the comprehensiveness of the inspection.)

2. **Partial**

A partial inspection, **as would normally result from a complaint or referral**, is one whose focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment.

The Compliance Officer shall recommend whether the scope of the inspection should be expanded based on the investigation to their Regional Safety or Health Director who shall make the decision on expanding the scope of an inspection in accordance with the guidelines. Every partial inspection, whether programmed or unprogrammed, shall include:

- a. The principal focus (e.g., imminent danger or complaint investigation);
- b. A review of injury and illness records;
- c. An assessment of the employer's hazard communication, § 1910.1200, lockout/tagout programs, § 1910.147, confined space, § 1910.146, and bloodborne pathogens, § 1910.1030; and
- d. An evaluation of the employer's safety and health management program. Follow-up inspections may be exempt from this rule.

B. Expanding the Scope of an Inspection

The method of expanding the scope detailed below does not entail expansion of the scope to comprehensive. This type of expansion is only to cover certain limited additional areas of the worksite which were identified as having hazardous conditions or potential violations in plain view. Programmed and unprogrammed inspections which were initiated as partial scope inspections may be expanded under any of the following circumstances which shall be documented in the case file:

1. **Listed on the Current Inspection Schedule.** The establishment is listed on the current regional office safety or health inspection schedule and the deletion criteria here or in the Planning Guide for Programmed Inspections do not apply;
2. **No Complete Construction Inspection in Last Three Months.** A substantially complete inspection of a construction establishment has not been conducted within the preceding three (3) months;
3. **Documentation of a History of Significant Violation.** VOSH or OSHA inspection records or injury and illness records for the establishment or for the employer in the case of a mobile worksite, indicate a history of significant violation;
4. **Allegations Indicate Potential Hazards.** The allegations providing the basis for the unprogrammed inspection indicate the existence of potential hazards which can be identified by expanding the inspection;
5. **High Hazard Establishment Not on Current Inspection Schedule.** For good cause, as is determined by the Regional Safety or Health Director (e.g., the establishment is not on the current regional office safety or health inspection schedule but the establishment or its NAICS code is on the regional office safety or health high hazard establishment list or high hazard NAICS code list);
6. **Expansion of Partial Inspection.** Partial inspections may be further expanded to cover serious hazardous conditions or potential violations observed in plain view and which were not part of the original inspection;
7. **Expansion Due to Violations Found.** Inspections may be expanded if serious violations are found within the original scope of the inspection.

II. Conduct of Inspection

The Compliance Officer shall enter the establishment to be inspected with an attitude reflecting a professional, balanced, and thorough concern for the safety and health of employees and employers. The conduct of effective workplace inspections requires professional judgment by the Compliance Officer in the identification, evaluation and accurate reporting of safety and health conditions and practices. Inspections may vary considerably in scope and detail depending on the circumstances of each case.

NOTE: Compliance Officers should be prepared to take photographs or to videotape, prior to entry on site, of any violations they see in plain view. See applicable sections for more information.

A. Time of Inspection

1. Regular Working Hours

Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise.

2. Necessity of Alternate Work Schedules for Special Circumstances

The Regional Safety or Health Director or designee and the Compliance Officer shall determine if alternate work schedules are necessary regarding entry into an inspection site during other than normal working hours. Permission for entry during non-working hours should be sought from the Regional Safety or Health Director.

B. Presenting Credentials

1. Locate Who Is in Charge

At the beginning of the inspection, the Compliance Officer shall locate the owner representative, operator or agent in charge at the workplace and present credentials. On construction sites this will most often be the representative of the general contractor.

2. Copying Credentials

Compliance Officers shall not allow their credentials to be copied, digitized, scanned, or to otherwise have the images or text captured or otherwise reprographically reproduced. In such circumstances where this is requested by the employer or other person in charge, the Compliance Officer shall advise them that they may look and review the credentials and write down any information from the credentials, but that the credentials may not be electronically or photographically recorded or reproduced.

3. Request for Employer Representative

When neither the person in charge nor a management official is present, contact may be made with the employer to request the presence of the owner, operator or management official. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. Generally, this delay should not exceed one hour. On occasions when the Compliance Officer is waiting for the employer representative, the workforce may begin to leave the jobsite. In this situation the Compliance Officer should contact the Regional Safety or Health Director or designee for guidance. If the person in charge at the workplace cannot be determined, record the extent of the inquiry in the case file and proceed with the physical inspection.

On multi-employer sites, the superintendent, project manager or other representative of the general or prime contractor shall be asked to identify the subcontractors or other contractors on the site, together with the names of the individuals in charge of their operations.

- a. Assemble subcontractors. The Compliance Officer shall then request that these individuals be contacted and asked to assemble in the general contractor's office or other suitable location, together with their employee representatives, if any.
- b. No Postponement. The inspection shall not be postponed or unreasonably delayed because of the unavailability of one or more representatives.
- c. Contact Any Federal Onsite Representative. If a Federal contracting agency representative is onsite, the general contractor shall be asked to contact the representative, advising him of the inspection and extending an invitation to attend the opening conference and to participate in the inspection.

C. Employer Interference or Refusal to Permit Inspection

Section 40.1-49.8 of the *Code of Virginia* provides that Compliance Officers may enter without delay and at reasonable times any establishment covered under the law for the purpose of conducting an inspection with the consent of the owner, operator, or agent in charge of such workplace or with an appropriate order or warrant if no consent is provided.

Unless the circumstances constitute a recognized exception to the warrant requirement (i.e., consent, third party consent, plain view, open field, or exigent circumstances) an employer has the constitutional right to require that the Compliance Officer seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.

NOTE: It should be noted that on multi-employer worksites, valid consent can be granted by the owner, or another employer with employees at the worksite, for site entry.

1. Refusal of Entry or Inspection

- a. Do Not Argue. The Compliance Officer shall not engage in argument concerning refusal. When the employer refuses to permit entry upon being presented proper credentials or allows entry but then refuses to permit or hinders the inspection in some way, a tactful attempt shall be made to obtain as much information as possible about the establishment. (See *appendix.*).

- b. Leave and Report. If the employer refuses to allow an inspection of the establishment to proceed, the Compliance Officer shall leave the premises and immediately report the refusal to the Regional Safety or Health Director who shall notify the Division of Legal Support Director.
- c. Inspect Where Able and Report Partial Refusal. If the employer raises no objection to the inspection of certain portions of the workplace, but objects to inspection of other portions, the Compliance Officer, after informing the Regional Safety or Health Director of the partial refusal, shall continue the inspection avoiding the portions of the workplace about which the employer has raised objections.
- d. Advise The Employer That Refusal Will Be Reported. In either case the Compliance Officer shall advise the employer that the refusal will be reported to the Regional Safety or Health Director and that the agency may take further action, including obtaining an administrative search warrant.
- e. Answer Reasonable Questions. The Compliance Officer may answer reasonable questions presented by the employer; e.g., the scope of the inspection, purpose, anticipated length. The Compliance Officer shall avoid giving any impression of unyielding insistence or intimidation concerning the right to inspect.
- f. State Property and Private Contractor. If the refusal of entry is made by a private contractor working on state property the Compliance Officer shall immediately report the refusal to the Regional Safety or Health Director. The Compliance Officer shall remain in the area of the site while the Regional Safety or Health Director contacts the Division of Legal Support Director to determine if consent to inspect the premises can be obtained within a reasonable length of time from the State as owner of the property. The Regional Safety or Health Director shall inform the Compliance Officer as soon as possible whether or not permission may be received within a reasonable period of time.
- g. Report Refusal on Private Property. If the refusal of entry is made by a private contractor working on private property, the Compliance Officer shall immediately report the refusal to the Regional Safety or Health Director. If the Regional Safety or Health Director believes the private owner may give permission to enter, he will inform the Regional Safety or Health Director, contact the Division of Legal Support Director, and then attempt to get the owner's consent to inspect.

2. Questionable Refusal

When permission to enter or inspect is not clearly given, the Compliance Officer shall make an effort to clarify the employer's intent.

- a. Report Any Questionable Permission. If there is doubt as to whether the employer intends to permit an inspection, the Compliance Officer shall not proceed but shall contact the Regional Safety or Health Director immediately.
- b. Regional Safety or Health Director to Determine Status of Permission. When the employer hesitates or leaves for a period of time so that permission is not clearly given within one hour of initial entry, the Compliance Officer shall contact the Regional Safety or Health Director, who shall decide whether or not permission is being refused.
- c. Clarification of Employer Intent. When the employer's intent is clarified the Compliance Officer shall either conduct the inspection or proceed as outlined.

3. Employer Interference with Conduct of Inspection or Other Official Duties

Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the Compliance Officer shall immediately contact the Regional Safety or Health Director for instructions on whether to consider this action as a refusal. Examples of interference are refusals to permit the walkaround, the examination of records essential to the inspection, the taking of essential photographs and/or videotapes, the inspection of a particular part of the premises, private employee interviews, or the refusal to allow attachment of sampling devices. (See §40.1-49.8 of the Code of Virginia).

In cases of partial interference, the Regional Safety or Health Director may permit the inspection to continue without resorting to a warrant, if the refusal does not interfere with essential portions of the inspection.

4. Forcible Interference Against the Compliance Officer

Although the employer is legally entitled to refuse permission to conduct an inspection without a warrant, the law does not permit forcible conduct against the Compliance Officer. Section 40.1-10, *Code of Virginia*, makes it a criminal offense to obstruct, in any manner, a Compliance Officer while engaged in the performance of his official duties.

- a. Types of Forcible Interference. The following illustrates the type of forcible conduct or interference which shall be reported to the Regional Safety or Health Director immediately:
 - (1) Anyone physically holding, grabbing, pushing, shoving, or in any way limiting the Compliance Officer's or other

VOSH employee's freedom of action or choice of action. The threat of any action which limits freedom of action or choice of action is included.

- (2) Anyone striking, kicking, or in any way inflicting or attempting to inflict injury, pain or shock on the Compliance Officer or other VOSH employee. The threat of such actions is included as is oral abuse which menaces or causes concern for the official's or employee's personal safety.
- (3) Anyone assaulting or threatening the Compliance Officer or other VOSH employee with a weapon of any kind. The handling or display of weapons in a menacing manner is included.

b. Response to Forcible Interference. Whenever a Compliance Officer or other VOSH employee encounters forcible resistance, opposition, interference, etc., or is assaulted or threatened with assault while engaged in the performance of official duties, all investigation activity shall cease. The Regional Safety or Health Director shall be advised as soon as possible and shall consult with the Program Director, and the Division of Legal Support Director to determine an appropriate course of action.

c. Applicable Statutes

Va. Code §40.1-10. "...if any person in charge of any business establishment...obstructs in any manner the inspection or investigation of such establishment or the proper performance of the authorized duties of the Commissioner or any of his representatives, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days, or both."

Va. Code §18.2-416. "If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person...under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a Class 3 misdemeanor."

Va. Code §18.2-57. "Any person who shall commit a simple assault or assault and battery shall be guilty of a Class 1 misdemeanor."

Va. Code §18.2-460. **A.** "If any person without just cause knowingly obstructs a ... attorney for the Commonwealth, witness or any law-enforcement officer in the performance of his duties ... shall be guilty of a Class 2 misdemeanor." **B.** "In any person, by threats or force, knowingly attempts to

intimidate or impede a ... attorney for the Commonwealth, witness, or any law enforcement officer ... shall be ... guilty of a Class 1 misdemeanor.”

5. Employer Failure to Produce Records, Documents, or Other Evidence and the Use of Interrogatories

Whenever there is a reasonable need for records, documents, testimony or other supporting evidence necessary for completing an inspection scheduled in accordance with any current and approved inspection scheduling system or an investigation of any matter properly falling within the statutory authority of the Department, the following procedures apply:

- a. Proceed Without Records. If a Compliance Officer seeking access to injury or illness records to review them for sufficiency is denied access to those records, the Compliance Officer shall proceed as for any other case of refused entry.

NOTE: An employer is required to keep illness and injury records by §40.1-6, Code of Virginia, as well as 16VAC25-60-60, (otherwise referred to as §60 of the VOSH Administrative Regulations Manual.)

- b. Notify Division of Legal Support. Upon receipt of notification of an employer’s refusal to produce injury or illness records required by VOSH, the Regional Safety or Health Director shall notify the Division of Legal Support Director as soon as possible.
- c. Division of Legal Support to Notify OAG. The Division of Legal Support Director shall consult with the Office of the Attorney General to determine an appropriate course of action. Should the determination be to seek an inspection warrant under § 40.1-49.8 or to initiate legal proceedings under § 40.1-10, the Division of Legal Support Director shall request the Assistant Attorney General and the appropriate Commonwealth’s Attorney to take steps to obtain the appropriate action through the circuit court.
- d. Interrogatories Served. Should the determination be to seek action under § 40.1-6(4), the Division of Legal Support Director shall contact the Director of VOSH Programs and the Commissioner to begin the process of serving interrogatories.
- e. Method of Delivery. When proceeding under § 40.1-6(4) interrogatories may be served personally, certified mail with return receipt requested, or professional courier/parcel delivery service.

- f. The Person Who is Served. The person served may comply with the interrogatories by making his answers available immediately to the Compliance Officer upon service. He may also comply by contacting the Regional Safety or Health Director and arranging for an acceptable method of delivery of the required information or by mailing the answers to the interrogatories to the Regional or Branch Office.
- g. Timeliness. Compliance with the interrogatories must be within 30 days of the receipt of the interrogatories.
- h. Interrogatories Answered by Person Served. If the person who has been served answers the interrogatories, the inspection or other investigation shall proceed as usual.
- i. Refusal to Answer Interrogatories. If the person who has been served refuses to answer the interrogatories, the Regional Safety or Health Director shall proceed as usual for cases involving a refusal of entry and shall refer the matter to the Division of Legal Support Director for appropriate action.

6. Getting an Inspection Warrant

An inspection warrant will be obtained where a refusal of entry is total or partial.

- a. Procedure. If it is determined that a warrant will be sought, the Division of Legal Support Director shall proceed for warrant applications, according to guidelines and procedures established in §§ 40.1-49.9 through 40.1-49.12 of the *Code of Virginia*.
- b. Time Frame. Within one working day after the determination is made that an inspection warrant is necessary, the Compliance Officer shall complete the Refusal of Entry Form, and send it to the Regional Safety or Health Director who shall transmit it to the Division of Legal Support.

7. Compulsory Process

When a warrant is obtained requiring an employer to allow an inspection, the Compliance Officer is authorized to conduct the inspection in accordance with the provisions of the warrant. All questions from the employer concerning reasonableness of any aspect of an inspection conducted pursuant to an inspection warrant shall be referred to the Regional Safety or Health Director.

8. Action to Be Taken upon Receipt of an Inspection Warrant

The inspection shall normally begin within 24 hours of receipt of an inspection warrant or of the date authorized by the inspection warrant for the beginning of the inspection. Section 40.1-49.10, *Code of Virginia*, requires that warrants be executed within 15 days of their issuance.

- a. Employer To Be Served. The Compliance Officer shall serve a copy of the inspection warrant on the employer and make a separate notation as to the time, place, name, and job title of the individual served.
- b. Enter the Date of Inspection. The date of entry to inspect using the warrant shall be entered in the appropriate space on the inspection warrant. Upon completion of the inspection, the Compliance Officer will complete the return of service on the original inspection warrant, sign and return it to the court.
- c. Physical Resistance Anticipated. To determine an appropriate course of action if physical resistance or interference by the employer is anticipated, the Regional Safety or Health Director shall consult with the Program Director who shall inform the Compliance Director and the Division of Legal Support Director.

9. Refused Entry or Interference With an Inspection Warrant

When an apparent refusal to permit entry or inspection is encountered upon presenting the inspection warrant, the Compliance Officer shall specifically inquire whether the employer is refusing to comply with the inspection warrant.

- a. Compliance Officer Procedure. If the employer refuses to comply or if consent is not clearly given (e.g., the employer expresses an objection to the inspection), the Compliance Officer shall not attempt to conduct the inspection but shall leave the premises and contact the Regional Safety or Health Director concerning further action. The Compliance Officer shall make notations (including all possible witnesses to the refusal or interference) and fully report all relevant facts.
- b. DLS Consulted By Regional Safety or Health Director. The Regional Safety or Health Director shall consult with the Division of Legal Support Director about procedures to be followed in obtaining forcible entry in accordance with Va. Code §40.1-49.11, including returning to the worksite with a Sheriff's Deputy or other law enforcement official, as directed by the Court.
- c. Va. Code §40.1-49.11. No warrant shall be executed in the absence of the owner, operator or agent in charge of the particular place, things or persons unless specifically authorized by the issuing judicial officer upon showing that such authority is reasonably necessary to effect the purposes of a law or regulation being enforced.

An entry pursuant to this warrant shall not be made forcibly, except that the issuing officer may expressly authorize a

forcible entry (i) where facts are shown sufficient to create a reasonable suspicion of an immediate threat to an employee's health or safety, or (ii) where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. If forcible entry is authorized, the warrant shall be issued jointly to the Commissioner and to a law-enforcement officer who shall accompany the Commissioner's representative during the execution.

D. Employee Participation

Compliance Officers shall advise employers that § 40.1-51.2(d) of the *Code of Virginia* and §240.3 of the VOSH *ARM* require that an employee representative be given an opportunity to participate in the inspection.

1. Determine Worker Representation

Compliance Officers shall determine as soon as possible after arrival whether the employees at the inspected worksite are represented and, if so, shall ensure that employee representatives are afforded the opportunity to participate in all phases of the inspection.

2. Employer Interference

If an employer resists or interferes with participation by employee representatives in an inspection and the interference cannot be resolved by the Compliance Officer, the resistance shall be construed as a refusal to permit the inspection and the Regional Safety or Health Director or designee shall be contacted.

NOTE: For the purpose of this manual, the term "employee representative" refers to:

- *A representative of the certified or recognized bargaining agent, or, if none;*
- *An employee member of a safety and health committee who has been chosen by the employees (employee committee members or employees at large) as their VOSH representative; or,*
- *An individual employee who has been selected as the walkaround representative by the employees of the establishment. Refer to the VOSH Administrative Regulations Manual.*

E. Release for Entry

1. Compliance Officer Not to Sign Waivers

Compliance Officers shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information. If the employer requires that a form or release be signed

or that the Compliance Officer agree to a waiver before entering the establishment, the Compliance Officer shall inform the employer of the Commissioner's authority under § 40.1-49.8, *Code of Virginia*. If the employer still insists on the signing of a form or release, the Compliance Officer shall suspend the inspection and report the matter promptly to the Regional Safety or Health Director who shall decide if the situation is to be treated as a refusal of entry.

2. Allowable Authorizations

Compliance Officers may obtain a pass or sign a visitor's register, or any other book or form used by the establishment to control the entry and movement of persons upon its premises. Such signature shall not constitute any form of a release or waiver of prosecution for liability under Title 40.1 of the *Code of Virginia*.

F. Bankrupt or Out of Business

1. Out of Business

If the establishment scheduled for inspection is found to have ceased business and there is no known successor, the Compliance Officer shall report the facts to the Regional Safety or Health Director or designee.

2. Operating in Bankruptcy

If an employer, although bankrupt, is continuing to operate on the date of the scheduled inspection, the inspection shall proceed.

3. Requirement to Comply

An employer must comply with Title 40.1 of the *Code of Virginia* until the day the business actually ceases to operate.

G. Employee Responsibilities

1. Employee Code Requirements

Section 40.1-51.2(a) of the *Code of Virginia* states: "It shall be the duty of each employee to comply with all occupational safety and health rules and regulations issued pursuant to this chapter and any orders issued thereunder which are applicable to his own action and conduct." It does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

2. Employee Refusal

In cases where Compliance Officers determine that employees are systematically refusing to comply with a standard applicable to their own action and conduct, the matter shall be referred to the Regional Safety or Health Director who shall consult with the applicable VOSH Safety or Health Program Director.

3. Compliance Officer to Avoid Labor-management Disputes

Under no circumstances are Compliance Officers to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. Compliance Officers are expected to obtain sufficient information to assess whether the employer is using its authority to ensure employee compliance with §40.1-51.2(a) of the *Code of Virginia*. Concerted refusals to comply by employees will not bar the issuance of a citation if the employer has failed to exercise its control to the maximum extent reasonable, including discipline and discharge.

H. Strike or Labor Dispute

Plants or establishments may be inspected regardless of the existence of labor disputes, such as work stoppages, strikes or picketing. If the Compliance Officer identifies an unanticipated labor dispute at a proposed inspection site, the Regional Safety or Health Director or designee shall be consulted before any contact is made.

1. Programmed Inspections

Programmed inspections may be deferred during a strike or labor dispute, either between a recognized union and the employer or between two unions competing for bargaining rights in the establishment.

2. Unprogrammed Inspections

- a. Assessment. Unprogrammed inspections (complaints, fatalities, referrals, etc.) will be performed during strikes or labor disputes. However, the credibility and veracity of any complaint shall be thoroughly assessed by the Regional Safety or Health Director or designee prior to scheduling an inspection.
- b. Picket Line. If there is a picket line at the establishment, Compliance Officers shall attempt to locate and inform the appropriate union official of the reason for the inspection prior to initiating the inspection.
- c. Nonpartisan. During the inspection, Compliance Officers will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute.

I. Variances

The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in §190 of the VOSH ARM. *The Compliance Officer shall inform the Regional Safety or Health Director who shall contact the Director of DLS if there is a need to determine the validity of an employer's claim of having a VOSH variance to a particular standard.*

1. No Citation Issued If in Compliance

An employer will not be subject to citation if the observed condition is in compliance with an existing variance issued to that employer.

2. Citation Issued If Not in Compliance

In the event that an employer is not in compliance with the requirement(s) of the issued variance, a violation of the applicable standard shall be cited with a reference in the citation to the variance provision that has not been met.

J. Severe Weather Conditions

If severe weather conditions encountered during an inspection cause workplace activities to shut down, the inspection shall be continued at a later time as soon as weather permits.

1. Inspection Terminated

If work continues during adverse conditions but the Compliance Officer decides that the weather interferes with the effectiveness of the inspection or personal safety, it shall be terminated and continued when conditions improve.

2. Inspection Not Terminated

If work continues and the Compliance Officer decides to continue the inspection in spite of bad weather, hazardous conditions created by the weather shall be noted since they may be the subject of later citation.

K. No Inspection

If a scheduled inspection cannot be conducted, the Compliance Officer shall document the reasons for not conducting the inspection. The case file shall include the names of persons contacted, if any.

III. Opening Conference

A. General

Compliance Officers shall attempt to inform all affected employers of the purpose of the inspection, provide a copy of the complaint if applicable, and include any employee representatives, unless the employer objects. The Compliance Officers shall obtain the employer's consent to include participation of an employee representative, as defined, when appropriate.

The Compliance Officer shall briefly indicate that VOSH shares the employer's and employee's common goal of reducing workplace injuries and illnesses; that the agency is developing a variety of different cooperative approaches which are designed to assist the employer in achieving this goal; and that a more detailed discussion will take place during the closing conference.

1. Attendance at Opening Conference

- a. Joint. Compliance Officers shall conduct a joint opening conference with employer and employee representatives unless either party objects.
- b. Separate. If there is objection to a joint conference, the Compliance Officer shall conduct separate conferences with employer and employee representatives.

2. Brevity

The opening conference shall be kept as brief as possible, generally no longer than one hour so that the compliance officer may quickly proceed to the walkaround.

NOTE: An abbreviated opening conference shall be conducted whenever the Compliance Officer believes that the circumstances at the worksite dictate that the walkaround begin as promptly as possible. In such cases the opening conference shall be limited to the bare essentials; identification, purpose of visit, and a request for employer and employee representatives. The other elements shall be fully addressed after completion of the walkaround or in the closing conference.

3. Notification of Rights and Opportunity to Participate

At the start of the opening conference, Compliance Officers will provide both the employer and the employee representative(s) copies of their rights during the inspection, including the opportunity to participate in the physical inspection of the workplace. Pursuant to § 240 of the VOSH *Administrative Regulations Manual*, the employer and the employee representatives shall be informed of the opportunity to participate in the physical inspection of the workplace.

4. Handouts and Additional Items

During the opening conference of every inspection, the Compliance Officer, if needed, may provide the employer and employee representatives with copies of the VOSH poster and with blank OSHA-300 Forms, a copy of the standards as well as other applicable laws and regulations, and informational handouts and materials. The Compliance Officer shall also inform the employer and employee representatives of procedures for obtaining additional copies of any materials of which the Compliance Officer may not have a sufficient quantity on hand. The employee representatives shall be given an opportunity to read the brief introductory material before the inspection begins.

5. Hazard Assessment Certification

Conditions of the worksite shall be noted upon arrival, as well as any changes that may occur during the opening conference. Compliance Officers shall request a copy of the written certification that a hazard assessment has been performed by the employer in accordance with

§1910.132(d). Compliance Officers should then ask the person who signed the certification about any potential worksite exposures and select appropriate personal protective equipment.

6. Purpose of Inspection

Compliance Officers shall outline in general terms the scope of the inspection, including the need for private employee interviews, physical inspection of the workplace and records, possible referrals, rights during an inspection, discrimination complaints, and the closing conference(s). The Compliance Officer shall inform the employer of the purpose of the inspection as follows:

- a. Imminent Danger Situations. When responding to an alleged imminent danger situation, the Compliance Officer is required to get to the location of the alleged hazard(s) as quickly as possible. Under these circumstances, an expedited opening conference shall be conducted by limiting activities to presenting credentials and explaining the nature, scope, and purpose of the inspection.
 - (1) Potential safety and health hazards that may be encountered during the inspection shall be identified and appropriate steps shall be taken to provide for personal protection.
 - (2) The presence of employer and employee representatives shall be requested; however, the inspection shall not be unreasonably delayed to await their arrival.
 - (3) The employer shall be told that, because of the shortened nature of the opening conference, there will be a more extensive discussion either after the walkaround or at the closing conference.
 - (4) Unreasonable delays shall be reported immediately to the Regional Safety or Health Director.

- b. Fatality/Catastrophe Inspections. The employer shall be informed that an investigation will be conducted and extensive interviews with witnesses will be necessary. The Compliance Officer shall explain that the purpose of an accident investigation is to determine:
 - (1) The cause of the accident.
 - (2) Whether a violation of VOSH safety or health standards related to the accident occurred.
 - (3) What effect the standard violation had on the occurrence of the accident.

- c. Complaint Inspections. For a complaint inspection, the Compliance Officer shall provide a copy of the complaint(s) to the employer and the employee representative at the beginning of the opening conference.

NOTE: The Compliance Officer shall insure that the employer does not discover the identity of the complainant. The Regional Safety or Health Director shall delete complainant's name before giving the complaint to the Compliance Officer. In conversations with the employer, the Compliance Officer shall be careful not to reveal any information which could lead to the identity of the complainant.

- d. Referral Inspections. During the opening conference of a referral inspection, the Compliance Officer shall inform the employer that the inspection is a result of a referral (e.g., from another agency, from a previous VOSH inspection or in response to specific evidence of probable violations at a worksite).
- e. Follow-up Inspections. The Compliance Officer shall explain that any item that had been previously cited will be evaluated for complete abatement of the hazard.
- f. Monitoring Inspections. The Compliance Officer shall review the cited items with the employer to determine the progress of abatement and explain to the employer the reason for the monitoring visit; e.g., request for modification of abatement date, corporate-wide settlement agreement, variance and multi-step abatement.
- g. Programmed Inspections. The Compliance Officer shall briefly explain the scheduling system used to select the establishment for inspection (e.g., Safety or Health General Schedule, Local Emphasis Program, etc.).
- h. Inspections with Potential Health/Chemical Hazards. During a health inspection or, as appropriate, during a safety inspection when evaluating potential health/chemical hazards, the Compliance Officer should use the following procedures in the opening conference:
- (1) Request process flow charts and plant layouts relevant to the inspection. If the plant layout process flow charts are not available, sketch a plant layout as necessary during the course of the initial walkaround, identifying the operations and the approximate dimensions of the work area. Distribution of major process equipment, including engineering controls in use, shall also be included on the sketch.

- (2) Make a brief examination of all workplace records pertinent to the inspection.
 - (a) If detailed review is necessary, the Compliance Officer may wish to proceed with the initial walkaround and return later to examine the records more thoroughly.
 - (b) An examination of records, those required and other types, can provide many valuable insights (e.g., symptomatology which may relate to workplace exposure, frequency of injuries of illnesses, dermatitis, monitoring data, audiometric test results, ventilation tests, process flow charts and a list of hazardous raw, intermediate, and final product materials) to ensure a more effective inspection.
 - (c) In some plants, sampling for obvious health hazards can be initiated soon after the opening conference. Details of the walkaround can be accomplished while collecting the samples.

7. **Video/Audio Recording**

Compliance Officers shall inform participants that a video camera and/or an audio recorder may be used to provide a visual and/or audio record, and that the videotape and audiotape may be used in the same manner as handwritten notes and photographs in VOSH inspections. ***(See also VOSH Program Directive 02-053C or successor.)***

NOTE: If an employer clearly refuses to allow video recording during an inspection, Compliance Officers shall contact the Regional Safety or Health Director to determine if video recording is critical to documenting the case. If it is, this may be treated as a denial of entry.

8. **Employees of Other Employers**

During the opening conference, the Compliance Officer shall determine whether the employees of any other employers are working at the establishment.

a. Inclusion of Other Employers. If there are such employees and any questions arise as to whether their employers should be included in the inspection, the Compliance Officer shall contact the Regional Safety or Health Director to determine whether additional inspections shall be conducted and what limitations there may be to such inspection activity.

- (1) All high hazard employers potentially present at any scheduled worksite shall be included within the scope of

the inspection, except as indicated in (2) and (3) below. For example, all construction contractors scheduled for inspection are to be included in the inspection assignment.

(2) When the referral criteria are met, a Compliance Officer referral may be made and an inspection conducted under the guidelines for referrals.

(3) When a construction operation is too large to be efficiently handled during the inspection of the programmed manufacturing establishment, the operation shall be treated as a referral for inspection at a later time, in accordance with referral inspections.

b. Additional Inspection Opening Conference Invitation. If additional inspections are authorized, both employer and employee representatives of the other employers shall be invited to the opening conference. The inspection shall not be delayed to wait for these employer and employee representatives longer than would be reasonably necessary for either to arrive.

c. Multi-Employer Worksite Provider of Common Services. If the site is a multi-employer site such as a construction site, the Compliance Officer shall determine during the opening conference who is responsible for providing common services available to all employees on site; e.g., sanitation, temporary electricity, first aid, handrails, etc.

(1) It shall be pointed out to all contractors that, apart from any arrangements that may have been made, each employer remains responsible for his or her own employees. The Compliance Officer should request copies of any contractual arrangements concerning common services.

(2) If it cannot be established which contractor is responsible for common services, the Compliance Officer will determine which employer is the exposing, creating, or enforcing employer, whenever violations are noted.

9. Immediate Abatement

Compliance Officers should explain to employers the advantages of immediate abatement, including that there are no certification requirements for violations quickly corrected during the inspection. See Chapter 13, Abatement Verification.

B. Review Screening for Process Safety Management Coverage

Compliance Officers shall request a list of the chemicals on site and their respective maximum intended inventories. Compliance Officers shall review the list of chemicals and quantities, and determine if there are highly hazardous chemicals (HHCs) listed in §1910.119, Appendix A or flammable liquids or gases at or above the specified threshold quantity. Compliance Officers may ask questions, conduct interviews, or a walkaround to confirm the information on the list of chemicals and maximum intended inventories.

1. Highly Hazardous Chemicals

If there is an HHC present at or above threshold quantities, Compliance Officers shall use the following criteria to determine if any exemptions apply:

- a. Determine Exemption. Compliance Officers shall confirm that the facility is not a retail facility, oil or gas well drilling or servicing operation, or normally unoccupied remote facility (§1910.119(a)(2)). If the facility is one of these types of establishments, PSM does not apply.
- b. Documentation of Exemption. If management believes that the process is exempt, Compliance Officers shall ask the employer to provide documentation or other information to support that claim.

2. Exempt Process

According to §1910.119 (a)(1)(ii), a process could be exempt if the employer can demonstrate that the covered chemical(s) are:

- a. Hydrocarbon fuels used solely for workplace consumption as a fuel (e.g., propane used for comfort heating, gasoline for vehicle refueling), if such fuels are not a part of a process containing another highly hazardous chemical covered by the standard, or
- b. Flammable liquids stored in atmospheric tanks or transferred, which are kept below their normal boiling point without the benefit of chilling or refrigeration.

C. Review of Voluntary Compliance Programs

Employers who participate in selected voluntary compliance programs (VPP and SHARP) may be exempted from programmed inspections. Compliance Officers shall determine whether the employer falls under such an exemption during the opening conference. *(Refer to Chapter 3, Program Planning, for a detailed discussion of Cooperative Program exemptions.)*

1. VOSH On-Site Consultation Visits

- a. Consultation Visit in Progress. In accordance with §1908.7 and the Consultation Policies and Procedures Manual, Compliance Officers shall ask the employer at the opening conference whether a VOSH funded consultation visit is in progress. A consultation “visit in progress” extends from the beginning of the opening conference to the end of the correction due dates (including extensions).
- b. An on-site consultation “visit in progress” has priority over programmed inspections except for imminent danger investigations, fatality/catastrophe investigations, complaint investigations, and other critical inspections as determined by the Assistant Commissioner.

2. Safety and Health Achievement Recognition Program (SHARP)

- a. Removal From Inspection Schedule. Upon verifying that the employer is a current participant, the Compliance Officer shall notify the Regional Safety or Health Director or designee so that the company can be removed from the VOSH General Programmed Inspection Schedule for the approved exemption period, which begins on the date the Commissioner approves the employer’s participation in SHARP.
- b. Exemption Period. The initial exemption period is one year. The renewal exemption period is two (2) years, based on the recommendation of the Consultation Program Manager.

3. Voluntary Protection Program (VPP)

Inspections at a VPP site may be conducted in response to referrals, formal complaints, fatalities, and catastrophes.

NOTE: A Compliance Officer who was previously a VPP on-site team member cannot conduct an enforcement inspection at that VPP site for the following 2 years or until the site is no longer a VPP participant, whichever occurs first.

D. Disruptive Conduct

Compliance Officers may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection. See §240.7 of the *VOSH Administrative Regulations Manual*. The employee representative shall be advised that during the inspection matters unrelated to the inspection shall not be discussed with employees. Supporting documentation should be included in the inspection narrative and the Regional Safety or Health Director should be made aware of the dismissal and the justification thereof.

E. Classified Areas

During any inspection of a private sector employer or non-federal public sector employer, where the Compliance Officer encounters any areas containing information classified by an agency of the U.S. Government, the inspection should be discontinued and the Compliance Officer shall contact the Regional Safety or Health Director and the inspection referred to federal OSHA.

F. Employees of Other Employers

During the opening conference, the Compliance Officer shall determine whether the employees of any other employers are working at the establishment.

1. If there are such employees and any questions arise as to whether their employers should be included in the inspection, the Compliance Officer shall contact the Regional Safety or Health Director to determine whether additional inspections shall be conducted and what limitations there may be to such inspection activity.
 - a. All high hazard employers potentially present at any scheduled worksite normally shall be included within the scope of the inspection, except as indicated in Subsections 2. and 3. below. For example, all construction contractors scheduled for inspection are to be included in the inspection assignment.
 - b. When the referral criteria are met, a Compliance Officer referral may be made and an inspection conducted under the guidelines for referrals.
2. When a construction operation is too large to be efficiently handled during the inspection of the programmed manufacturing establishment, the operation shall be treated as a referral for inspection at a later time, in accordance with referral inspections.
3. If additional inspections are authorized, both employer and employee representatives of the other employers shall be invited to the opening conference. The inspection shall not be delayed to wait for these employer and employee representatives longer than would be reasonably necessary for either to arrive.
4. If the site is a multi-employer site such as a construction site, the Compliance Officer shall determine during the opening conference who is responsible for providing common services available to all employees on site; e.g., sanitation, temporary electricity, first aid, handrails, etc.
 - a. It shall be pointed out to all contractors that, apart from any arrangements that may have been made, each employer remains responsible for his or her own employees. The

Compliance Officer should request copies of any contractual arrangements concerning common services.

- b. If it cannot be established which contractor is responsible for common services, the Compliance Officer will determine which employer is the exposing, creating, or enforcing employer, whenever violations are noted.

G. Forms Completion

The Compliance Officer shall obtain available information for the VOSH-1 and other appropriate forms (and complete applicable sections during the opening conference). Forms processed by IMIS are to be completed in accordance with the IMIS Forms Manual. Other forms related to VOSH inspection procedures shall be completed in accordance with specific instructions given in this FOM.

H. Posting

The Compliance Officer shall determine if posting requirements are met in accordance with Part 1904, (16VAC25-85-1904). These include, but are not limited to:

1. VOSH Occupational Safety and Health Poster informing employees of their rights and obligations under the law;
2. Log and summary of Occupational Injuries and Illnesses during the period 01 February through 30 April.
3. Current citations, if any;
4. Requests for Modification of Abatement Date;
5. Variances.

IV. Review of Records

A. Injury and Illness Records

1. Collection of Data

At the start of each inspection, the Compliance Officer shall review the employer's injury and illness records for three prior calendar years. This shall be done for all general industry, construction, public sector maritime, and agriculture inspections and investigations.

The Compliance Officer shall comply with the records review procedures that follow for all inspections, programmed or unprogrammed, of employers required to keep the records in question. Findings shall be documented in the case file.

2. Information To Be Obtained

- a. OSHA-300 Logs. Compliance Officers shall request copies of the OSHA-300 Logs, the total hours worked and the average number of employees for each year, and a roster of current employees.

NOTE: The Compliance Officer shall not request access to the Bureau of Labor Statistics survey questionnaire or even ask if the employer has participated in the survey.

- b. OSHA-301 Forms. If Compliance Officers have questions regarding a specific case on the log, they shall request the OSHA-301s or equivalent form for that case.
- c. Check For Medical Treatment Locations. Compliance Officers shall check if the establishment has an on-site medical facility and/or the location of the nearest emergency room where employees may be treated.

NOTE: The total hours worked and the average number of employees for each year can be found on the OSHA-300A for all past years.

3. Construction

For construction inspections/investigations, only the OSHA-300 information for the prime/general contractor need be recorded where such records exist and are maintained. It will be left to the discretion of the Regional Safety or Health Director or the Compliance Officer as to whether OSHA-300 data should also be recorded for any of the subcontractors.

B. Recording Criteria

Employers must record new work-related injuries and illnesses that meet one or more of the general recording criteria or meet the recording criteria for specific types of conditions:

1. Death;
2. Days Away from Work;
3. Restricted Work;
4. Transfer to another job;
5. Medical treatment beyond first aid;
6. Loss of consciousness;
7. Diagnosis of a significant injury or illness; or
8. Meet the recording criteria for Specific Cases noted in §1904.8 through §1904.11.

C. Recordkeeping Deficiencies

All injury and illness records required by law shall be examined.

1. Deficiencies Suspected

If recordkeeping deficiencies are suspected, the Compliance Officer and the Regional Safety or Health Director or designee may request assistance from the Regional Recordkeeping Coordinator. If there is evidence that the deficiencies or inaccuracies in the employer's records impairs the ability to assess hazards, injuries and/or illnesses at the workplace, a comprehensive records review shall be performed.

2. Other Records to Be Reviewed

Other information related to this topic:

- a. Medical Records. See VOSH PD 02-104A, Recordkeeping Policies and Procedures Manual, dated 15 Dec 2005 (*or successor*), and VOSH PD 02-022A, Rules of Agency Practice and Procedure concerning VOSH Access to Employee Medical Records for Policy Regarding Review of Medical and Exposure Records, dated 15 Aug 2008 (*or successor*).
- b. Specific Standard or Specific Program Requirements. For all safety and health inspections the Compliance Officer shall determine if the employer is covered by other VOSH programs and/or required records. This will review will include hazard communication, lockout/tagout, emergency evacuation and personal protective equipment. Additional programs will be reviewed as necessary. The Compliance Officer shall ensure that the applicable requirements of the specific standards or programs have been met and that the program is effective.
- c. Any Other Records Relating to the Scope of the Inspection. Any other records which fall within the scope of the inspection and which are related directly to the purpose of the inspection shall be examined. These may include, but are not limited to:
 - (1) Required certification records properly completed and any available equipment inspection and maintenance records;
 - (2) Medical surveillance or monitoring records, employee exposure records and other medical records not falling under any of these items above.
 - (3) Safety committee minutes, checklists, records of inspection conducted by plant safety and health committees, insurance companies, or consultants, if voluntarily supplied by the employer.

- (4) Documentation for any variances granted by VOSH or by federal OSHA which may be applicable in VOSH jurisdiction.
- d. Additional Specific Instructions. Many standard-specific directives provide additional instruction to Compliance Officers requesting certain records and/or documents at the opening conference.

V. Walkaround Inspection

The main purpose of the walkaround inspection is to identify potential safety and/or health hazards in the workplace. Compliance Officers shall conduct the inspection in such a manner as to avoid unnecessary personal exposure to hazards and to minimize unavoidable personal exposure to the extent possible.

When an apparent violation is observed by the Compliance Officer prior to the walkaround, it shall be noted and photographed or videotaped, if possible. All such apparent violations shall be checked during the walkaround and cited, if appropriate. When possible, serious violations shall be checked and documented immediately at the commencement of the walkaround.

A. Walkaround Evaluation and General Procedures

It is essential during the walkaround portion of every inspection for the Compliance Officer to:

1. On the Initial Walkaround

Become familiar with site processes, collect information on hazards, observe employees' activities and interview them as appropriate. The initial walkaround shall survey existing engineering controls and, when appropriate, collect screening samples to determine the need for full-scale sampling.

- a. Full Shift Sampling. If screening reveals potentially high exposure levels, a full shift sampling shall be conducted.
- b. Inform Employer of Lab Analysis. If screening samples must be sent to the laboratory for analysis, the employer shall be so informed.
- c. Full Scale Sampling. If the laboratory results show that potentially high employee exposure levels exist, full-scale sampling of the potentially hazardous areas will be conducted.
- d. Negative Results. If the results are negative, no full-scale sampling will be conducted.

2. Follow-up of Previous Citations

Identify locations and conditions that received citations during a previous inspection to ensure proper abatement or to determine abatement progress, if the citations are a final, unstayed order of the Commissioner.

Follow-up and monitoring activities do not constitute a separate inspection when they are conducted as part of another investigation. No separate VOSH-1 should be submitted. Follow-ups will generally be conducted within three years.

- a. Record all facts pertinent to an apparent failure to abate, or repeated or willful violation on the appropriate compliance worksheets.
- b. Determine if a letter of abatement previously received from the employer accurately described the correction of a previously cited violation.
- c. Apparent violations shall be brought to the attention of employer and employee representatives at the time they are documented.

B. Walkaround Representatives

Persons designated to accompany Compliance Officers during the walkaround are considered walkaround representatives, and will generally include those designated by the employer and employee. At establishments where more than one employer is present or in situations where groups of employees have different representatives, it is acceptable to have a different employer/employee representative for different phases of the inspection.

More than one employer and/or employee representative may accompany the Compliance Officer throughout or during any phase of an inspection if the Compliance Officer determines that such additional representatives will aid, and not interfere with, the inspection. (See *VOSH Administrative Regulations Manual §240*).

1. Limited Number of Employers

Whenever appropriate, in order to avoid a large group, the Compliance Officer shall encourage multiple employers to agree upon and choose a limited number of representatives for walkaround accompaniment purposes. If necessary, during the inspection, employer representatives not on the walkaround shall be contacted to participate in different phases, as appropriate.

As an alternative, the Compliance Officer shall divide a multi-employer inspection into separate phases; e.g., excavation, steel erection, mechanical, electrical, etc., and encourage different employer representatives to participate in different phases, as appropriate.

2. Disruptive Conduct or Interference

The Compliance Officer may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection, in accordance with § 240 of the *VOSH Administrative Regulations Manual*. If disruption or interference occurs, the Compliance Officer shall use professional judgment as to whether to suspend the walkaround or take other action. The Regional Safety or Health Director shall be consulted if the walkaround is suspended. The employee representative shall be advised that, during the inspection, matters unrelated to the inspection shall not be discussed with employees.

3. Employees Represented by a Certified or Recognized Bargaining Agent

During the opening conference, the highest ranking union official or union employee representative onsite shall designate who will participate in the walkaround. *VOSH Administrative Regulations Manual* §240.3 and §240.7 give the Compliance Officer the authority to resolve all disputes as to whom is the representative authorized by the employer and employees. Section §240.3 states that the representative authorized by the employees shall be an employee of the employer. If in the judgment of the Compliance Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany Compliance Officers during the inspection.

4. No Certified or Recognized Bargaining Agent

Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for VOSH inspection purposes (regardless of the existence of a safety committee), Compliance Officers shall determine if other employees would suitably represent the interests of employees on the walkaround. If selection of such an employee is impractical, Compliance Officers shall conduct interviews with a reasonable number of employees during the walkaround.

5. Labor Relations Disputes

The Compliance Officer shall not become involved in labor relations disputes either between a recognized union and the employer or between two or more unions competing for bargaining rights. However, if there is a recognized union, the highest ranking official available will designate the authorized walkaround representative despite the fact that another union may be seeking recognition.

6. Expired Collective Bargaining Agreement

When a union contract has expired, the Compliance Officer shall assume that the incumbent union remains as the bargaining agent

unless that union is decertified, officially replaced, or has given up bargaining agent status.

7. Safety Committee

Employee members of an established plant safety committee or employees at large may designate an employee representative for VOSH inspection purposes.

C. Evaluation of Employer's Safety and Health System

The employer's safety and health system shall be evaluated to determine its good faith for the purposes of penalty calculation. *(See Chapter 11, Penalties.)* The effectiveness of the employer's safety and health program (whether written or not) shall be determined as follows:

1. Employer Awareness of Potential Hazards

By finding out the degree to which the employer is aware of potential hazards present in the workplace and what methods he uses to control them;

- a. What plans and schedules does the employer have to institute, upgrade and maintain engineering and administrative controls?
- b. What is the employer's work practices program?

2. Employer Safety and Health System Effectiveness

By determining employee knowledge of any hazards which exist in the establishment and the extent to which the employer's program covers the precautions to be taken by:

- a. Exposure. Employees actually or potentially exposed to plant hazards;
- b. Emergency Plans. Emergency procedures and inspection schedules for emergency personal protective equipment;
- c. PPE Program. The program for the selection, use and maintenance of routine personal protective equipment; and
- d. Education and Training. The overall quality and extent of the educational and training program and the degree of employee participation.

3. Specific Program Elements to Evaluate

The following specific elements of the establishment safety and health program shall be evaluated in the detail appropriate to the circumstances of the inspection:

- a. Comprehensiveness. Evaluate the degree to which the employer's safety and health program addresses the full range of hazards ordinarily encountered in the employer's operations.

This is an overall evaluation and shall take into account the evaluations of the remaining categories. Indicate whether the program is written.

- b. Communication. Evaluate the employees' awareness of and access to the safety and health program, taking into account the principal means by which the program is communicated to them (e.g., oral instructions, booklets, memorandums, posters, etc.). Consider whether safety meetings are held by the employer, their frequency and the persons conducting them (e.g., crew foreman, intermediate level supervisors, safety director, etc.). The effectiveness of these means shall be considered in the evaluation.
- c. Compliance. Compliance with the training requirements of any applicable safety or health standard shall be determined. Evaluate the degree to which safety and health rules are actually enforced, taking into account the principal methods used (e.g., warnings, written reprimands, disciplinary action, discharge, etc.), and the effectiveness of these methods. Determine whether there is a staff (or one specific person) with assigned safety and health responsibilities and consider effectiveness of the staff's performance.
- d. Safety/Health Training Program. Evaluate separately any safety and health training programs the employer has. Factors to be considered include the need for special training in view of the hazards likely to be encountered or of specific requirements for such training and the need for ongoing or periodic training or retraining of employees. Determine how training and preparation is handled for non-routine tasks.
- e. Investigations. Evaluate the employer's efforts to investigate accidents, injuries, and illnesses; and indicate whether adequate corrective and preventive actions are taken as a result.

NOTE: Review of this evaluation of employer' efforts is done prior to citation issuance.

D. Record All Facts Pertinent to a Violation

Apparent violations shall be brought to the attention of the employer and employee representatives at the time they are documented.

1. Establish the Violation

To establish the existence of a VOSH violation, a Compliance Officer must document four elements during an investigation. These elements are:

- a. Applicable standard. A standard, regulation, or statute applies to the hazard in question;
- b. Violation. The employer has violated the standard, statute, or regulation in question;
- c. Knowledge. The employer has actual knowledge or should have known of the violative condition;
- d. Exposure. An employee of the cited employer is exposed to the violative condition.

2. Use of the Worksheet

All notes, observations, analyses, and other information shall be either be recorded on the worksheet or attached to it.

- a. Required for Each Instance. This document is required for each instance of an alleged violation. The Compliance Officer shall use one worksheet to describe each instance as it is noted.
- b. Treatment as a Single Instance. If identical violations of the same standard or of several related standards are noted in one general location in the establishment and if the documentation is essentially the same, all of those violations may be treated as a single instance description and only one worksheet need be completed for that instance.
- c. Attachments to Be Referenced. Photographs, video, audio, sketches, and descriptions that are attached to the worksheet are part of the inspection record and shall be noted on the form. The original field notes, as basic documentation of the violation, shall be attached to the worksheet and retained in the case file.

3. Record Violation Facts on VOSH-1B

As detailed in Chapter 9, Case File Documentation, record all facts pertinent to an apparent violation on the VOSH-1B or VOSH-1B(1H) compliance worksheets which are specifically designed to document each of the four elements.

- a. Notification Upon Documentation. Safety and health violations shall be brought to the attention of employer and employee representatives at the time they are documented.
- b. Recording Requirements. Compliance Officers shall record, at a minimum, the identity of the exposed employee(s), the hazard to which the employee(s) was exposed, the employee's proximity to the hazard, the employer's knowledge of the

condition, and the manner in which important measurements were obtained and how long the condition has existed.

- c. Documenting of Interview Statements. Compliance Officers will document interview statements in a thorough and accurate manner; including names, dates, times, locations, type of materials, positions of pertinent articles, witnesses, etc.

NOTE: If employee exposure to hazards is not observed, the Compliance Officer shall document facts on which the determination is made that an employee has been or could be exposed. See Chapter 10, Violations, and Chapter 9, Case File Documentation.

E. Testifying in Hearings

Compliance Officers may be required to testify in hearings on VOSH's behalf, and shall be mindful of this fact when recording observations during inspections. The case file shall reflect conditions observed in the workplace as accurately and detailed as possible.

F. Trade Secrets

A trade secret, as referenced in Section 40.1-51.4.4:1 of the *Code of Virginia* and §250 of the *VOSH Administrative Regulations Manual* includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. See §40.1-6 (10) of the *Code of Virginia*. If trade secrets are identified, the Compliance Officer will explain that VOSH is required by law to preserve the confidentiality of all information which might reveal a trade secret, in accordance with the above *Code of Virginia* and *VOSH Administrative Regulations Manual* sections.

1. Policy

It is essential to effective VOSH enforcement that Compliance Officers and DOLI personnel preserve the confidentiality of all information and investigations which might reveal a trade secret.

2. Restriction and Controls

When the employer identifies an operation or condition as a trade secret, it shall be treated as such. Information obtained in such areas, including all negatives, photographs, video, and VOSH documentation forms, shall be labeled:

"ADMINISTRATIVELY CONTROLLED INFORMATION"
"RESTRICTED TRADE INFORMATION"

Trade secret information shall be kept in a separate envelope and placed in a locked file cabinet. The Compliance Officer or other VOSH

employee shall only remove the trade secret envelope from the locked file cabinet when actually working on the file. Trade secret information shall in no event be left unattended. The envelope must be in the VOSH employee's possession or in the locked cabinet or a locked office. Once the case is closed the information may be returned to the company and a note put in the file where the trade secret information is located.

- a. Confidentiality. Under § 40.1-51.4.4:1 of the *Code of Virginia*, all information reported to or obtained by Compliance Officers in connection with any inspection or other activity which contains or which might reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other VOSH officials concerned with the enforcement of the VOSH Program or, when relevant, in any proceeding under Title 40.1. This statutory mandate applies to all State employees. Disclosure of such information violates State Employees Standards of Conduct.
- b. Criminal Penalties for Disclosure. Section 40.1-6 (10) of the *Code of Virginia* provides criminal penalties for VOSH employees who disclose such information. Such violations shall be punishable as civil contempt upon application to the Circuit Court.
- c. U.S. Government Related Trade Secrets. An employer's trade secret materials shall not be labeled as "Top Secret," "Secret," or "Confidential," nor shall these security classification designations be used in conjunction with other words unless these trade secrets are also classified by an agency of the U.S. Government in the interest of national security in which case, i.e., U.S. Government involvement, the Compliance Officer should stop the inspection, inform the Regional Safety or Health Director who will advise the applicable VOSH Program Director who upon concurrence by the Assistant Commissioner shall refer it to federal OSHA for inspection.

3. **Employer Objection**

If the employer objects to the taking of photographs and/or video because trade secrets would or may be disclosed, Compliance Officers should advise the employer of the protection against such disclosure afforded by §40.1-51.4.1 of the *Code of Virginia* and §250 of the *VOSH Administrative Regulations Manual*. If the employer still objects, Compliance Officers shall contact the Regional Safety or Health Director or designee.

G. **Collecting Samples**

1. **Determination of Need for Sampling**

Compliance Officers shall determine early in the inspection whether sampling such as, but not limited to, air sampling and surface sampling is required, by utilizing the information collected during the walk around and from the pre-inspection review.

2. Summary of Sampling to Be Provided

After first consulting with the Regional Health Director, summaries of sampling results shall be provided as soon as possible upon request from any of the following:

- the employer,
- the employee representative, or
- the employees exposed, likely to have been exposed, or likely to be exposed to the hazard.

H. Photographs, Video and Audio Recording

1. Photos/Video Recording

Photographs and/or video recordings shall be taken to document safety and health violations and other unsafe physical conditions on all inspections, and both methods shall be used in fatality/catastrophe inspections. *(See also VOSH Prog. Directive 02-053C or successor.)*

- a. Compliance Officers should take video or photographs of any violations they see in plain view prior to entry on site.
- b. Hard copies of photographs and video still image captures which also specifically support cited violations shall be printed and included as part of the case file. *(See also Chapter 9, Case File Documentation)*
- c. Panoramic videos should be taken in certain situations, such as on construction sites (for example, exterior shots of the lack of perimeter guarding) and general industry settings when a large operation or piece of machinery is involved. The Compliance Officer should be careful to assure that the proper camera angle is being used to document the specific hazard (e.g., to document an excavation violation for no shoring or sloping, a video of an excavation taken at right angles to the line of the trench would document the absence of shoring but would not provide a clear picture of the failure to slope. A picture should be taken down the line of the trench to document the failure to trench).

NOTE: The Compliance Officer shall ensure that using flash or spark-producing equipment will not be hazardous and that employees are not unexpectedly startled by the

use of flash equipment. Any individual whose words may be recorded shall be advised of the fact that video recordings also capture sound.

2. Audio Recording

Audio recordings may also be made during any inspection at the discretion of the Compliance Officer. However, the use of an audio recorder during an inspection may inhibit discussion and the free exchange of information between employer or employee and the Compliance Officer. Therefore, the Compliance Officer shall exercise prudent and sound judgement in the decision to make such recordings.

- a. Audio recorders may be used by the Compliance Officer during an inspection to preserve employer and employee statements during the conferences and interviews and as a note taking device during the walkaround.
- b. The Compliance Officer shall explain that the audio recorder is being used to speed up the inspection process by eliminating much of the required note taking and that the audio recording will better preserve what actually occurred during the inspection. If the employer, employer representative, affected employees, or any other witnesses object to recording their statements during any part of the investigation, that part of the inspection shall be continued without the use of the audio recorder.
- c. The use of an audio recorder(s) by the employer is at the discretion of the employer.

3. Use in Case File

- a. All photograph, video, or audio files that support cited violations or other unsafe physical conditions and are not classified as confidential or trade secret shall be included on a compact disc (CD) that becomes part of the case file.
- b. Labeling of video, still photographs, or audio files once transferred to the compact disc (CD) shall be labeled with the Inspection Number and CSHO ID Number. Hard copies of photographs or video captures that support cited violations shall be properly labeled, and may be attached to the appropriate VOSH-1B. Video shall be used during case file review and informal conferences without the need for video prints to be included in the case file.
- c. The Compliance Officer shall ensure that any photographs, video, or audio relating to confidential or trade secret information are identified as such, and are kept separate from other evidence

in accordance with the procedures in Section V.E. of this FOM chapter.

- d. All video, still photograph, and audio digital files created during the inspection shall be transferred to a compact disc (CD-1). This CD-1 shall permanently become part of the case file and shall be shredded with the case file after the normal scheduled three year period following the final order date for the case.
- e. Upon completion of the preparation of the case file, no video, still photograph, or audio digital files created as part of a VOSH inspection shall be digitally transferred elsewhere or remain on any computer, network server, or other external method of media storage except for those files resident on CD-1 and CD-2 as discussed herein.
- f. Upon completion of the preparation of the case file, no hard copy captures shall exist of the digital material created as part of a VOSH inspection except for what is contained in the case file to support cited violations.

For more information regarding guidelines for case file documentation with video, audio, and other digital media, refer to VOSH PD 02-053C (*or its successor*), and any other VOSH directives, instructions, or memos related to photographs, digital image, video and audio retention.

I. Immunization

1. Areas Requiring Immunization

If a non-immunized Compliance Officer encounters an area requiring immunization, the Compliance Officer shall not enter that area but shall note a description of the area, the immunization required, the employees exposed, the location and other pertinent information in the case file.

2. Non-immunized Compliance Officer

The Compliance Officer shall consult with the Regional Safety or Health Director about scheduling a properly immunized Compliance Officer for an immediate or later inspection, as applicable. The Compliance Officer shall then complete the inspection of all other areas of the establishment.

3. Non-immunized Walkaround Representative

If, during an inspection, a properly immunized Compliance Officer finds that walkaround representatives of employers and employees are not properly immunized and, therefore, not authorized in the area, a reasonable number of employees and the supervisor of that area shall be consulted concerning workplace health and safety.

J. Seizure of Evidence and Chain of Custody

Refer to Chapter 1, Page 5 of this FOM.

K. Violation of Other Laws

If a Compliance Officer observes apparent violations of laws enforced by other government agencies, such cases shall be referred to the appropriate agency. Referrals shall be made using appropriate VOSH procedures.

L. Interview of Non-Managerial Employees

A free and open exchange of information between Compliance Officers and employees is essential to an effective inspection. Interviews provide an opportunity for employees to supply valuable factual information concerning hazardous conditions, including information on how long workplace conditions have existed, the number and extent of employee exposure(s) to a hazardous condition, and the actions of management regarding correction of a hazardous condition.

1. Background

- a. Section 40.1-49.8(2) of the *Code of Virginia* authorizes Compliance Officers to question any employee privately during regular working hours or at other reasonable times during the course of a VOSH inspection. The purpose of such interviews is to obtain whatever information Compliance Officers deem necessary or useful in carrying out inspections effectively. The mandate to interview employees in private is VOSH's right.
- b. Employee interviews are an effective means to determine if an advance notice of inspection has adversely affected the inspection conditions, as well as to obtain information regarding the employer's knowledge of the workplace conditions or work practices in effect prior to, and at the time of, the inspection. During interviews with employees, Compliance Officers should ask about these matters.
- c. Compliance Officers should also obtain information concerning the presence and/or implementation of a safety and health system to prevent or control workplace hazards, and the employer's training program, or lack thereof.
- d. If an employee refuses to be interviewed, the Compliance Officer shall use professional judgment, in consultation with the Regional Safety or Health Director or designee, in determining the need for the statement. (See Chapter 15, Legal Issues [Take and Preserve Testimony], for procedures obtaining statements from unwilling individuals).

2. Employee Right of Complaint

Compliance Officers may consult with any employee who desires to discuss a potential violation. Upon receipt of such information, Compliance Officers shall investigate the alleged hazard, where possible, and record the findings.

3. Time and Location of Interview

Compliance Officers are authorized to conduct interviews during regular working hours and at other reasonable times, and in a reasonable manner at the workplace. Interviews often occur during the walkaround, but may be conducted at any time during an inspection. If necessary, interviews may be conducted at locations other than the workplace. Compliance Officers should consult with the Regional Safety or Health Director if an interview is to be conducted someplace other than the workplace.

If requested by the employee and considered necessary by the Compliance Officer, a continued interview shall be scheduled at a mutually convenient time with preference being given to employee breaks or off-time. In retail or service establishments, or in continuous production operations (e.g., assembly line), interviews shall be scheduled, when possible, to afford minimum interference with the employee's duties and the employer's business operation.

4. Conducting Interviews of Non-Managerial Employees in Private

Compliance Officers shall inform employers that interviews of non-managerial employees will be conducted in private. Compliance Officers are entitled to question such employees in private regardless of employer preference. If an employer or an employer's attorney interferes with a Compliance Officers ability to do so, the Compliance Officer should request that the Regional Safety or Health Director consult with the Director of the Division of Legal Support or designee to determine appropriate legal action. Interference with a Compliance Officer's ability to conduct private interviews with non-managerial employees includes, but is not limited to, attempts by management officials, attorneys or other employer representatives to be present during interviews.

5. Minimum Requirements

Interview statements of employees or other individuals shall be obtained to adequately document a potential violation. With rare exception, statements shall be in writing and the individual shall be encouraged to sign and date the statement. During managerial interviews, Compliance Officers are encouraged to take verbatim, contemporaneous quotes whenever possible as these tend to be more credible than later general recollections. **The VOSH IW-1/Employer Interview Sheet can be used by the Compliance Officer to take verbatim quotes of the management representative during the opening conference, walkaround and closing conference.**

Written and signed interview statements of at least one non-managerial employee and one supervisor/manager shall be obtained. In the rare situation that written and signed statements are not obtained, the Compliance Officer shall document in the case file the reason written statements are not included (e.g., witness refused to sign the statement). If written and signed statements are not obtained, the Compliance Officer shall note in quotation marks verbal statements made by employees or supervisors which support one or more of the four elements of proving a violation (e.g., regulation or law applies to the hazard, violation of law or regulation, employee exposure and employer knowledge).

Compliance Officers shall always obtain written statements when:

- a. There is an actual or potential controversy as to any material facts concerning a violation.
- b. A conflict or difference among employee statements as to the facts arises.
- c. There is a potential willful, repeated or failure-to-abate violation.
- d. The inspection concerns a fatal accident or imminent danger situation (*See Chapter 7, Fatality, Catastrophe and Imminent Danger, for further guidance on written interview statements in fatality inspections*).
- e. In non-fatal accident inspections, when attempting to determine if potential violations existed at the time of the accident.

6. **Conducting Employee Interviews**

Employees selected for interviewing shall include individuals judged knowledgeable about the area or process being inspected.

a. General Protocols

- (1) At the beginning of the interview Compliance Officers should identify themselves to the employee by showing their credentials, and provide the employee with a business card. This allows employees to contact Compliance Officers if they have further information at a later time.
- (2) Compliance Officers should explain to employees that the reason for the interview is to gather factual information relevant to a safety and health inspection. It is not appropriate to assume that employees already know or understand the agency's purpose. Particular sensitivity is required when interviewing a non-English speaking employee. In such instances, Compliance Officers should initially determine whether the

employee's comprehension of English is sufficient to permit conducting an effective interview. If the Compliance Officer determines that an interpreter is needed, the Compliance Officers should contact the Regional Safety or Health Director to attempt to arrange for an interpreter.

- (3) Every employee should be asked to provide his or her name, home address and phone number. Compliance Officers should request identification and make clear the reason for asking for this information.
 - (4) Compliance Officers shall inform employees that VOSH has the right to interview them in private and of the protections afforded under § 40.1-51.2:1 of the *Code of Virginia*.
 - (5) In the event an employee requests that a representative of the union be present, Compliance Officers shall make a reasonable effort to honor the request.
 - (6) If an employee requests that his/her personal attorney be present during the interview, Compliance Officers should honor the request and, before continuing with the interview, consult with the Regional Safety or Health Director for guidance.
 - (7) Rarely, an attorney for the employer may claim that individual employees have also authorized the attorney to represent them. Such a situation creates a potential conflict of interest. Compliance Officers should consult with the Regional Safety or Health Director, who will contact the Division of Legal Support for guidance.
- b. Conducting the Interview. The Compliance Officer shall assure the employee that the Commissioner will not release the statement to anyone unless VOSH is compelled by a court to do so. Following are some examples of situations to address during interviews:
- (1) When there is an actual or potential controversy between the employer and employee regarding a material fact concerning a violation;
 - (2) When there is a conflict or difference among employee or supervisory statements regarding the facts;
 - (3) In accident investigations, when attempting to determine if apparent violation(s) existed at the time of the accident.

- (4) To document employer knowledge of the violation.
- (5) To document whether training requirements under a specific standard have been met.
- (6) When the Compliance Officer suspects the employer may raise an affirmative defense to the violation, such as employee misconduct.
- (7) When there is a multi-employer question as to which employer created the hazard and which employer had control of the workplace.

c. Other Interview Issues

- (1) Any changes or corrections to the statement shall be initialed by the individual. Statements shall not otherwise be changed or altered in any manner.
- (2) Statements shall include the words, "I request that my statement be held confidential to the extent allowed by law" and end with the following; "I have read the above, and it is true to the best of my knowledge." The individual, however, may waive confidentiality.
- (3) If the person making the declaration refuses to sign, the Compliance Officer shall note the refusal on the statement. The statement shall, nevertheless, be read back to the person in an attempt to obtain agreement and noted in the case file.
- (4) Any necessary changes should then be made and initialed by the Compliance Officer to ensure accuracy. If, after that, the individual still will not sign, a note should then be added to the statement that the individual refused to sign but indicated the statement was accurate.
- (5) A transcription of any recorded statement shall be made when necessary to the case.

d. The Informer's Privilege

- (1) The informer's privilege allows the government to withhold the identity of individuals who provide information about the violation of laws, including VOSH rules and regulations. Compliance Officers shall inform employees that their statements will remain confidential to the extent permitted by law. However, each employee giving a statement should be informed that

disclosure of his or her identity may be necessary in connection with enforcement or court actions.

NOTE: Whenever Compliance Officers make an assurance of confidentiality as part of an investigation (i.e. informs the person giving the statement that their identity will be protected), the pledge shall be reduced to writing and included in the case file.

- (2) The privilege also protects the contents of statements to the extent that disclosure may reveal the witness's identity.
- (3) Where the contents of a statement will not disclose the identity of the informant (i.e., does not reveal the witness' job title, work area, job duties, or other information that would tend to reveal the individual's identity), the privilege does not apply. Interviewed employees shall be told that they are under no legal obligation to inform anyone, including employers, that they provided information to VOSH.

Interviewed employees shall also be informed that if they voluntarily disclose such information to others, it may impair the agency's ability to invoke the privilege.

M. Other Issues

1. Multi-Employer Worksites

On multi-employer worksites, in all industry sectors, both construction and non-construction, more than one employer may be cited for a hazardous condition that violates a VOSH standard. Citations generally shall be issued to employers whose employees are exposed to hazards (the **exposing employer**). An exposing employer has an affirmative defense to a citation discussed below in B.7.c. (see VOSH *Administrative Regulations Manual* §260.G).

a. Additional Categories of Employers. Additionally, the following construction and non-construction employers normally shall be cited, whether or not their own employees are exposed (see VOSH *Administrative Regulations Manual* §260.F.):

- (1) The employer who actually creates the hazard (**creating employer**);
- (2) The employer who is either:
 - (a) responsible contractually, or through actual practice, for safety and health conditions on the

entire worksite, and has the authority for ensuring that the hazardous condition is corrected (**general contractor controlling employer**); or

- (b) responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected (**prime sub-contractor controlling employer**);
 - (3) The employer who has the responsibility for actually correcting the hazard (**correcting employer**).
- b. Knowledge of Hazardous Condition. It must be shown that each employer to be cited has knowledge of the hazardous condition or could have had such knowledge with the exercise of reasonable diligence.
- c. Legitimate Defense to Citation. The multi-employer worksite defense is now codified in *VOSH Administrative Regulations Manual* §260.G. and it provides as follows:

“A citation issued under § 260.F, to an exposing employer who violates any VOSH law, standard, rule or regulation, shall be vacated if such employer demonstrates that:

- (1) The employer did not create the hazard;
- (2) The employer did not have the responsibility or the authority to have the hazard corrected;
- (3) The employer did not have the ability to correct or remove the hazard;
- (4) The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees were exposed;
- (5) The employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;
- (6) Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; and

- (7) When extreme circumstances justify it, the exposing employer shall have removed his employees from the job.”

NOTE: All of these items must be documented in the case file.

- d. Determination of Which Employer(s) to Cite. On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates a VOSH standard. A two-step process must be followed in determining whether more than one employer is to be cited.

Step One: The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs (1) - (4) below explain and give examples of each. Remember that an employer may have multiple roles. Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate.

NOTE: Only exposing employers can be cited for General Duty Clause violations.

Step Two: If the employer falls into one of these categories, it has obligations with respect to VOSH requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies.

Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.

- (1) Creating Employer

Step 1: Definition - The employer that caused a hazardous condition that violates a VOSH standard.

Step 2: Actions Taken: Employers must not create violative conditions. An employer that does so is citable even if the only employees exposed are those of other employers at the site.

Example 1: The owner/operator of a factory contracts with Employer S to service machinery. The owner fails to cover drums of a chemical despite Employer S's repeated requests that it do so. This results in airborne levels of the chemical that exceed the permissible exposure limit (PEL).

Analysis

Step 1: The owner is a creating employer because it caused employees of Employer S to be exposed to the air contaminant above the PEL.

Step 2: The owner failed to implement measures to prevent the accumulation of the air contaminant. It could have met its obligation by implementing the simple engineering control of covering the drums. Having failed to implement a feasible engineering control to meet the PEL, the owner is citable for the hazard.

Example 2: On a construction site, Employer M hoists materials onto the 8th floor, damaging perimeter guardrails. Neither its own employees nor employees of other employers are exposed to the hazard. It takes effective steps to keep all employees, including those of other employers, away from the unprotected edge (e.g., warning lines and warning signs cordoning off the area of damaged guard rails) and informs the controlling employer of the problem. Employer M lacks authority to fix the guardrails itself.

Analysis

Step 1: Employer M is a creating employer because it caused a hazardous condition by damaging the guardrails.

Step 2: While it lacked the authority to fix the guardrails, it took immediate and effective steps to keep all employees away from the hazard and notified the controlling employer of the hazard. Employer M is not citable since it took effective measures to prevent employee exposure to the fall hazard.

(2) **Exposing Employer**

Step 1: Definition - An employer whose own employees are exposed to the hazard. *Refer to applicable VOSH FOM section for a discussion of what constitutes exposure.*

Step 2: Actions taken. If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it:

- (a) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition; and,
- (b) failed to take steps consistent with its authority to protect its employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following:
 - (1) ask the creating and/or controlling employer to correct the hazard;
 - (2) inform its employees of the hazard; and
 - (3) take reasonable alternative protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

Example 3: Subcontractor “S” is responsible for inspecting and cleaning a work area in a factory around a large, permanent hole at the end of each day. A VOSH standard requires guardrails. There are no guardrails around the hole and Subcontractor “S” employees do not use personal fall protection, although it would be feasible to do so. Subcontractor “S” has no authority to install guardrails. However, it did ask the owner/operator of the plant to install them. The owner refused to install guardrails.

Analysis

Step 1: Subcontractor “S” is an exposing employer because its employees are exposed to the fall hazard.

Step 2: While Subcontractor “S” has no authority to install guardrails, it is required to comply with VOSH requirements to the extent feasible. It must take steps to protect its employees and ask the employer that controls the hazard - the owner/operator of the factory - to correct it. Although Subcontractor “S” asked for guardrails, since the hazard was not corrected,

Subcontractor “S” was responsible for taking reasonable alternative protective steps, such as providing personal fall protection. Because that was not done, Subcontractor “S” is citable for the violation.

Example 4: On a construction site, unprotected rebar on either side of an access ramp presents an impalement hazard. Subcontractor “E”, an electrical subcontractor, does not have the authority to cover the rebar. However, several times Subcontractor “E” asked the general contractor to cover the rebar. In the meantime, Subcontractor “E” instructed its employees to use a different access route that avoided most of the uncovered rebar and required them to keep as far from the rebar as possible.

Analysis

Step 1: Since Subcontractor “E” employees were still exposed to some unprotected rebar, Subcontractor “E” is an exposing employer.

Step 2: Subcontractor “E” made a good faith effort to get the general contractor to correct the hazard and took feasible measures within its control to protect its employees. Subcontractor “E” is not citable for the rebar hazard.

(3) Correcting Employer

Step 1: Definition - An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. **This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.**

Step 2: Actions taken: The correcting employer must exercise reasonable care in preventing and discovering violations and meet its obligations of correcting the hazard.

Example 5: Subcontractor C, a carpentry contractor, is hired to erect and maintain guardrails throughout a large, 15-story project. Work is proceeding on all floors. Subcontractor C inspects all floors in the morning and again in the afternoon each day. It also inspects areas where material is delivered to the perimeter once the material vendor is finished delivering material to that area. Other subcontractors are required to report

damaged/missing guardrails to the general contractor, who forwards those reports to Subcontractor C, who regularly repairs any damaged guardrails immediately after finding them and immediately after they are reported.

On this project, few instances of damaged guardrails have occurred other than where material has been delivered. Shortly after the afternoon inspection of the 6th floor, workers moving equipment accidentally damage a guardrail in one area. No one tells Subcontractor C of the damage and Subcontractor C has not seen it. A VOSH inspection occurs at the beginning of the next day, prior to the morning inspection of the 6th floor.

None of Subcontractor C's own employees are exposed to the hazard, but employees of other subcontractors are exposed.

Analysis

Step 1: Subcontractor C is a correcting employer since it is responsible for erecting and maintaining fall protection equipment.

Step 2: The steps Subcontractor C implemented to discover and correct damaged guardrails were reasonable in light of the amount of activity and size of the project. It exercised reasonable care in preventing and discovering violations; therefore, it is not citable for the damaged guardrail since it could not reasonably have known of the violation.

(4) **Controlling Employer**

(a) VOSH *Administrative Regulations Manual* §260.F.2. provides that citations can issue against a general contractor as a controlling employer, as well as a prime subcontractor in its role as a controlling employer, when their own employees are not exposed to the hazardous condition:

(1) **General Contractor.** Responsible, by contract or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected; or

- (2) Prime Subcontractor. Responsible, by contractor through actual practice for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected.

Step 1: Definition - An employer who has **general supervisory authority** over the worksite, including the power to correct safety and health violations itself or require others to correct them; **or** who has responsibility, by contract or through actual practice for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. Descriptions and examples of different kinds of controlling employers are given below.

Step 2: Actions Taken: A **general contractor controlling employer** must exercise reasonable care to prevent and detect violations on the entire site. A prime subcontractor controlling employer must exercise reasonable care to prevent and detect violations for the specific area, specific work practice or specific phase of the project for which it is responsible. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. In the case of a general contractor controlling employer, this means that it is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired. In the case of a prime subcontractor controlling employer, this

means that it is not normally required to inspect for hazards as frequently as the employer it has hired.

- (b) Factors Relating to Reasonable Care Standard Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:
- (1) The scale of the project;
 - (2) The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;
 - (3) How much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise.
 - (4) More frequent inspections are generally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer had never before worked with this other employer and does not know its compliance history.
 - (5) Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.
- (c) Evaluating Reasonable Care In evaluating whether a controlling employer has exercised

reasonable care in preventing and discovering violations, consider questions such as whether the controlling employer:

- (1) Conducted periodic inspections of appropriate frequency (frequency should be based on the factors listed above);
- (2) Implemented an effective system for promptly correcting hazards;
- (3) Enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.

(d) Types of General Contractor Controlling Employers

- (1) **Control Established by Contract**
In this case, the employer has a specific contract right to control safety. To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

Example 6: An owner/operator of a plant contracts with Employer "S" to do **abrasive blasting** at the plant. Some of the work is regularly scheduled maintenance and so is general industry work; other parts of the project involve new work and are considered construction. Respiratory protection is required. Further, the contract explicitly requires Employer "S" to comply with safety and health requirements.

Under the contract, the owner has the right to take various actions against Employer "S" for failing to meet contract requirements, including the right to have

non-compliance corrected by using other workers and back-charging for that work.

Employer "S" is one of two employers under contract with the owner at the work site, where a total of five employees work. All work is done within an existing building.

The number and types of hazards involved in Employer "S"'s work do not significantly change as the work progresses. Further, the owner has worked with Employer "S" over the course of several years. Employer "S" provides periodic and other safety and health training and uses a graduated system of enforcement of safety and health rules. Employer "S" has consistently had a high level of compliance at its previous jobs and at this site.

The owner monitors Employer "S" by a combination of weekly inspections, telephone discussions and a weekly review of Employer "S"'s own inspection reports. The owner has a system of graduated enforcement that it has applied to Employer "S" for the few safety and health violations that had been committed by Employer "S" in the past few years. Further, due to respirator equipment problems Employer "S" violates respiratory protection requirements two days before the owner's next scheduled inspection of Employer "S". The next day there is a VOSH inspection. There is no notation of the equipment problems in Employer "S"'s inspection reports to the owner and Employer "S" made no mention of it in its telephone discussions.

Analysis

Step 1: The owner/operator is a controlling employer because it has general supervisory authority over the

worksite, including contractual authority to correct safety and health violations.

Step 2: The owner has taken reasonable steps to try to make sure that Employer “S” meets safety and health requirements.

Its inspection frequency is appropriate in light of the low number of workers at the site, lack of significant changes in the nature of the work and types of hazards involved, the owner's knowledge of Employer “S”'s history of compliance and its effective safety and health efforts on this job. The owner has exercised reasonable care and is not citable for this condition.

Example 7: On a construction site, the general contractor contracts with Employer “P” to do painting work. The general contractor has the same contract authority over Employer “P” as the owner/operator had in Example 6. The general contractor has never before worked with Employer “P”. The general contractor conducts inspections that are sufficiently frequent in light of the factors listed above. Further, during a number of its inspections, the general contractor finds that Employer “P” has violated fall protection requirements. It points the violations out to Employer “P” during each inspection but takes no further actions.

Analysis

Step 1: The general contractor is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over Employer “P”.

Step 2: The general contractor took adequate steps to meet its obligation to discover violations. However, it failed to take reasonable steps to require Employer “P” to correct hazards since it lacked a graduated system of

enforcement. A citation to the general contractor for the fall protection violations is appropriate.

Example 8: On a construction site, the general contractor contracts with Subcontractor “E”, an electrical subcontractor.

The general contractor has full contract authority over Subcontractor “E”, as in Example 6. Subcontractor “E” installs an electric panel box exposed to the weather and implements an assured equipment grounding conductor program, as required under the contract. It fails to connect a grounding wire inside the box to one of the outlets.

This incomplete ground is not apparent from a visual inspection. Further, the general contractor inspects the site with a frequency appropriate for the site in light of the factors discussed above. It saw the panel box but did not test the outlets to determine if they were all grounded because Subcontractor “E” represents that it is doing all of the required tests on all receptacles. The general contractor knows that Subcontractor “E” has implemented an effective safety and health program. From previous experience, it also knows Subcontractor “E” is familiar with the applicable safety requirements and is technically competent.

The general contractor had asked Subcontractor “E” if the electrical equipment is OK for use and was assured that it was.

Analysis

Step 1: The general contractor is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over Subcontractor “E”.

Step 2: The general contractor exercised reasonable care. It had determined that Subcontractor “E” had technical expertise, safety knowledge and had implemented safe work practices. It conducted inspections with appropriate frequency. It also made some basic inquiries into the safety of the electrical equipment.

Under these circumstances, the general contractor was not obligated to test the outlets itself to determine if they were all grounded. It is not citable for the grounding violation.

(2) Control Established by a Combination of Other Contract Rights.

Where there is no explicit contract provision granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be a controlling employer. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job. Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety.

NOTE: Citations should only be issued in this type of case after consulting with the Division of Legal Support.

Example 9: Construction Management Firms - Construction Manager “M” is contractually obligated to: set schedules and construction sequencing, require subcontractors to meet contract specifications, negotiate with trades, resolve disputes between subcontractors, direct work and make purchasing decisions which affect safety. However, the contract states that

Construction Manager “M” does not have a right to require compliance with safety and health requirements.

Further, Subcontractor “S” asks Construction Manager “M” to alter the schedule so that Subcontractor “S” would not have to start work until Subcontractor “G” has completed installing guardrails. Construction Manager “M” is contractually responsible for deciding whether to approve Subcontractor “S”’s request.

Analysis

Step 1: Even though its contract states that Construction Manager “M” does not have authority over safety, the combination of rights actually given in the contract provides broad responsibility over the site and results in the ability of Construction Manager “M” to direct actions that necessarily affect safety.

For example, Construction Manager “M”’s contractual obligation to determine whether to approve Subcontractor “S”’s request to alter the schedule has direct safety implications. Construction Manager “M”’s decision relates directly to whether Subcontractor “S”’s employees will be protected from a fall hazard. Construction Manager “M” is a controlling employer.

Step 2: In this example, if Construction Manager “M” refused to alter the schedule, it would be citable for the fall hazard violation.

Example 10: Employer “ML”’s contractual authority is limited to reporting on subcontractors’ contract compliance to the owner/developer and making contract payments. Although it reports on the extent to which the subcontractors are complying with safety and health infractions to the owner,

Employer “ML” does not exercise any control over safety at the site.

Analysis

Step 1: Employer “ML” is not a controlling employer because these contractual rights are insufficient to confer control over the subcontractors and Employer “ML” did not exercise control over safety. Reporting safety and health infractions to another entity does not, by itself (or in combination with these very limited contract rights), constitute an exercise of control over safety.

Step 2: Since it is not a controlling employer, it had no duty under VOSH laws and regulations to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is, therefore, no need to go to Step 2.

(3) **Architects and Engineers**

Architects, engineers, and other entities are controlling employers only if the breadth of their involvement in a construction project is sufficient to bring them within the parameters discussed above.

Example 11: Architect “A” contracts with the owner to prepare contract drawings and specifications, inspect the work, report to the owner on contract compliance, and to certify completion of work. Architect “A” has no authority or means to enforce compliance, no authority to approve/reject work and does not exercise any other authority at the site, although it does call the general contractor's attention to observed hazards noted during its inspections.

Analysis

Step 1: Architect “A”'s responsibilities are very limited in light of the numerous

other administrative responsibilities necessary to complete the project. It is little more than a supplier of architectural services and conduit of information to the owner. Its responsibilities are insufficient to confer control over the subcontractors and it did not exercise control over safety. The responsibilities it does have are insufficient to make it a controlling employer. Merely pointing out safety violations did not make it a controlling employer.

NOTE: In a circumstance such as this, it is likely that broad control over the project rests with another entity.

Step 2: Since Architect “A” is not a controlling employer, it had no duty under VOSH laws and regulations to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is, therefore, no need to go to Step 2.

Example 12: Engineering Firm “E” has the same contract authority and functions as in Example 9.

Analysis

Step 1. Under the facts in Example 9, Engineering Firm “E” would be considered a controlling employer.

Step 2. The same type of analysis described in Example 9 for Step 2 would apply here to determine if Engineering Firm “E” should be cited.

- (4) Control Without Explicit Contractual Authority. Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site (*refer to Example 9*).

NOTE: Citations should only be issued in this type of case after consulting with the Division of Legal Support.

Example 13: Construction Manager “M” does not have explicit contractual authority to require subcontractors to comply with safety requirements, nor does it explicitly have broad contractual authority at the site. However, it exercises control over most aspects of the subcontractors’ work anyway, including aspects that relate to safety.

Analysis

Step 1: Construction Manager “M” would be considered a controlling employer since it exercises control over most aspects of the subcontractor’s work, including safety aspects.

Step 2: The same type of analysis on reasonable care described in Examples #6, #7, and #8 of would apply to determine if a citation should be issued to this type of controlling employer.

(5) **Multiple Roles**

a. **Creating, Correcting or Controlling Employers.** These employers will often also be an exposing employer. Consider whether the employer is an exposing employer before evaluating its status with respect to these other roles.

b. **Exposing, Creating & Controlling Employers.** These employers can also be correcting employers if they are authorized to correct the hazard.

(e) **Prime Subcontractor Controlling Employers**
VOSH *Administrative Regulations Manual* § 260.F.2.B. provides that citations may be issued to an employer who is not a general contractor, but is:

“responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected **(the prime contractor controlling employer)**;

NOTE: An example of a prime subcontractor controlling employer would be where the main framing contractor has subcontracted framing work out to another subcontractor who creates a hazard, and the main framing subcontractor knew or should have known of the hazard and was responsible by contract or through actual practice for that area of the worksite.

There will be instances where the individual facts of a case warrant citing both a general contractor and a prime subcontractor as *controlling* employers, but in many cases, due to recent changes in construction industry business practices, it will be more appropriate to cite a prime subcontractor in lieu of the general contractor as the *controlling* employer on the site (e.g., recent VOSH inspections have found instances where an accident was caused by a “sub of a sub of a sub” where the general contractor had not even been made aware of the subcontractor’s presence on the worksite by their initial subcontractor).

The following facts are from an actual VOSH accident inspection involving such a business arrangement:

The accident involved a truss collapse during the construction of an 8 unit townhouse, and the general contractor had hired a reputable framing subcontractor, who then subcontracted the truss installation to a second subcontractor who was not experienced in the particular type of truss system being used. The trusses were not braced in accordance with the manufacturer’s instructions and they collapsed. After reviewing the specific facts of the case, the VOSH program issued citations related to the accident

to the framing subcontractor and its subcontractor, but not to the general contractor.

Facts that are looked at in such a case to determine which companies will receive citations include, but are not limited to:

- contractual rights & responsibilities,
- actual work practices on the site,
- whether the individual employers knew or should have known of the hazard (i.e., employer knowledge),
- whether employers had provided adequate safety and health programs and trained their employees,
- whether employers had complied with VOSH standards requiring frequent and regular inspections of the job site;
- what was the level of technical expertise and experience of the employers involved,
- how long the hazard was in existence before the accident occurred, etc.

2. Employees vs. Independent Contractors

Determining whether a worker is an employee or an independent contractor is often important, especially when that person is the only one exposed to the hazard. When an employer asserts that the worker is not an employee, but an independent contractor, the Compliance Officer should determine the answers to the following questions:

- (1) Who has the responsibility to control the workers?
- (2) Does the alleged employer have power to control the workers?
- (3) Who pays the workers' wages?
- (4) Whom do the workers consider their employer?
- (5) Does the alleged employer have the power to hire, fire or modify the employment condition of the workers?

- (6) Does the ability of the workers to increase their income depend on efficiency rather than on initiative, judgment or foresight?
- (7) How are the workers' wages established?

NOTE: The existence of signed releases, tax forms, or other documents does not necessarily determine workers' status under the VOSH program. The key is examining the workers' relationship to the employer, using the questions above. Consult with the Division of Legal Support in all cases when questions arise regarding who is an employee and who is an independent contractor.

3. Employer/Employee Responsibilities

- a. Employee Duty. Section 40.1-51.2(a), *Code of Virginia*: "It shall be the duty of each employee to comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this chapter which are applicable to his own actions and conduct."
 - (1) The law does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
 - (2) Although the employer is not the absolute guarantor or insurer of all employee actions, reasonable steps must be taken by the employer to protect employees from hazards that may result from failure to comply with the standards; e.g., informing employees of hazards and how to protect themselves, enforcing safety and health rules, and the like.
- b. Employee Refusal to Comply. In cases where the Compliance Officer determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Regional Safety or Health Director, who shall consult with the Program Director, for discussion and advice. Under no circumstances is the Compliance Officer to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. The Compliance Officer is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with VOSH laws, standards and regulations. However, concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has

failed to exercise full authority to the maximum extent reasonable, including discipline and discharge, to ensure compliance with the law.

- c. Employer Exercise of Authority. Under no circumstances is the Compliance Officer to become involved in an *on-site* dispute involving labor/management issues or interpretation of collective-bargaining agreements. The Compliance Officer is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with VOSH laws, standards and regulations. Concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge.

4. Affirmative Defenses

- a. Definition. An affirmative defense is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proven by VOSH.
- b. Burden of Proof. Although affirmative defenses must be proven by the employer at the time of the hearing, VOSH must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. The Compliance Officer shall keep in mind the potential affirmative defenses that the employer may make and, during the inspection, shall attempt to gather contrary evidence.
- c. Common Affirmative Defenses. The following are explanations of the more common affirmative defenses with which the Compliance Officer shall become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.
 - (1) Unpreventable Employee Misconduct or "Isolated Event."
 - (a) The employer has established work rules designed to prevent the violation;
 - (b) It has adequately communicated these rules which were effectively communicated and uniformly enforced;
 - (c) It has taken steps to discover the violation; and
 - (d) It has effectively enforced the work rules when violations have been discovered.

- (2) Investigation of Employee Misconduct. The following example illustrates the questions to be asked about employee misconduct situations.

Example: An unguarded table saw is observed. The saw, however, has a guard which is reattached while the Compliance Officer watches. Facts which the Compliance Officer shall document may include:

- (a) Who removed the guard and why?
 - (b) Did employer know guard had been removed?
 - (c) How long or how often had the saw been used without guards?
 - (d) Did the employer have a work rule that the saw guards not be removed?
 - (e) How was the work rule communicated?
 - (f) Was the work rule enforced?
 - (g) Were there written training procedures?
 - (h) Were there training records?
 - (i) Were there disciplinary policies?
 - (j) Was the disciplinary policy enforced?
- (3) Impossibility. In some instances, compliance is impossible. In this case, compliance with the requirements of a standard would:
- (a) be functionally impossible or would prevent performances of required work; and
 - (b) necessitate that there are no alternative means of employee protection.

EXAMPLE: During the course of the inspection an unguarded table saw is observed. The employer states that the nature of its work makes a guard unworkable. Facts which the Compliance Officer shall document may include: Would a guard make performance of the work impossible or merely more difficult? Could a guard be used part of the time? Has the employer attempted to use guards? Has the

employer considered alternative means or methods of avoiding or reducing the hazard?

- (4) Greater Hazard. Compliance with a standard would result in greater hazards to employees than non-compliance and:
- (a) There are no alternative means of employee protection; and
 - (b) An application of a variance would be inappropriate.

EXAMPLE: The employer indicates that a saw guard had been removed because it caused particles to be thrown into the operator's face. Facts which the Compliance Officer shall consider may include: Was the guard used properly? Would a different type of guard eliminate the problem? How often was the operator struck by particles and what kind of injuries resulted? Would safety glasses, a face mask, or a transparent shelf attached to the saw prevent injury? Was operator technique at fault and did the employer attempt to correct it? Was a variance sought?

NOTE: The Division of Legal Support (DLS) is responsible for processing all variance requests.

- (5) Documentation Requirements. When it is reasonable to assume an affirmative defense may be an issue, the Compliance Officer shall make efforts to gather and record facts relevant to the defense. Closing conferences are often a good opportunity to examine employee misconduct questions. The Compliance Officer shall bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the Regional Safety or Health Director. Where it appears that every element of an affirmative defense is present, the Regional Safety or Health Director may decide, after consultation with the Program Manager and the Division of Legal Support Director, that a citation shall not be issued.

N. Employer Abatement Assistance

1. Policy

Compliance Officers shall offer appropriate abatement assistance during the walkaround as to how workplace hazards might be

eliminated. The information shall provide guidance to the employer in developing acceptable abatement methods or in seeking appropriate professional assistance. Compliance Officers shall not imply VOSH endorsement of any product through use of specific product names when recommending abatement measures. The issuance of citations shall not be delayed.

2. Disclaimers

The employer shall be informed that:

- a. The employer is not limited to the abatement methods suggested by VOSH;
- b. The methods explained are general and may not be effective in all cases; and
- c. The employer is responsible for selecting and carrying out an effective abatement method, and maintaining the appropriate documentation.

3. Type of Assistance

The type of abatement assistance provided will depend on the needs of the employer and the complexity of the hazard. Where standards specify abatement methods such as guarding of belts and pulleys, the Compliance Officer shall, at a minimum, ensure that the employer is aware of the specifications. For more complex problems, the Compliance Officer shall offer general information on types of controls or procedures commonly used to abate the hazard. Alternative methods shall be provided whenever possible.

4. Procedures

Information provided by VOSH to assist the employer in identifying possible methods of abatement for alleged violations shall be provided to the employer as it becomes available or necessary. The issuance of citations shall not be delayed.

- a. Assistance Provided During An Inspection. Compliance Officers shall utilize their knowledge and professional experience in providing the employer with abatement assistance during the inspection.
 - (1) Before leaving an inspection site and, preferably, during the walkaround when an apparent violation is noted, Compliance Officers shall determine whether the employer wishes to discuss possible means of abating apparent violations. The discussion may continue at the closing conference.
 - (2) Compliance Officers shall briefly document abatement information provided to the employer or the employer's

negative response to the offer of assistance on the appropriate VOSH-1B Form.

- b. Assistance Provided After An Inspection. If a Compliance Officer cannot provide assistance during an inspection or if the employer has abatement questions after the inspection, the Regional Safety or Health Director shall ensure that additional information, if available, is obtained and provided to the employer as soon as possible. Any communications with the employer shall be documented in the case file and the case diary log.

VI. Closing Conference

A. **Participants**

At the conclusion of an inspection, Compliance Officers shall conduct a closing conference with the employer and the employee representatives, jointly or separately, as circumstances dictate. The closing conference may be conducted on-site or by telephone as Compliance Officers deem appropriate. If the employer refuses to allow a closing conference, the circumstances of the refusal shall be documented in the VOSH-1A narrative and the case shall be processed as if a closing conference had been held.

NOTE: When conducting separate closing conferences for employers and labor representatives, where the employer has declined to have a joint closing conference with employee representatives, Compliance Officers shall normally hold the conference with employee representatives first, unless the employee representative requests otherwise. This procedure will ensure that worker input is received before employers are informed of violations and proposed citations.

B. **Discussion Items**

1. **Apparent Violations**

Compliance Officers shall discuss the apparent violations and indicate the applicable section(s) of standards which may have been violated, and other pertinent issues found during the inspection and note relevant comments on the VOSH-1B, including input for establishing correction dates. When describing the apparent violation, no mention shall be made of the potential classification or penalty.

2. **Closing Conference Guide Content**

Compliance Officers shall give employers the publication, VOSH Closing Conference Guide. They shall then briefly discuss the information in the booklet and answer any questions. All matters discussed during the closing conference shall be documented in the case file, including a note describing printed materials distributed.

3. Employer's Safety and Health Program

Compliance Officers shall discuss the strengths and weaknesses of the employer's occupational safety and health system and any other applicable programs, and advise the employer of the benefits of an effective program(s) and provide information, such as, federal OSHA's website, describing program elements.

4. Representatives Rights to Participate

Both the employer and employee representatives shall be advised of their rights to participate in any subsequent conferences, meeting or discussions, and their contest rights. Any unusual circumstances noted during the closing conference shall be documented in the case file.

5. Second Conference

Since Compliance Officers may not have all pertinent information at the time of the first closing conference, a second closing conference may be held by telephone or in person. For example, if the Compliance Officer does not have sampling results prior to the first closing conference, a second closing conference shall be held by telephone or in person to inform the employer and the employee representatives whether the establishment is in compliance.

- a. If the results indicate noncompliance, then apparent violations, correction procedures, and interim methods of control shall be discussed.
- b. Even if the employer is in compliance, sample results which equal or exceed 50 per cent of the permissible exposure limit and any recommendations of the Compliance Officer on good safety and health practices shall be discussed with the employer and the employee representatives.
- c. When closing conferences are delayed pending receipt of sampling data or for any other reason, the employee representative shall be afforded an opportunity to participate in such delayed conferences.

6. Additional Issues

The Compliance Officer shall advise the employee representatives that:

- a. Under § 40.1-49.4.E, *Code of Virginia*, if the employer contests, the employees have a right to elect "party status" before the Court.
- b. They must be notified by the employer if a notice of contest is filed.
- c. They have rights under § 40.1-51.2:2, *Code of Virginia*, dealing with discrimination.

- d. They have a right to contest the abatement date. Such contest must be in writing and must be filed within 15 working days after receipt of the citation.

C. Advice to Attendees

1. The Compliance Officer shall advise those attending the closing conference that a request for an informal conference with the Regional Safety or Health Director is encouraged as it provides an opportunity to:
 - a. Resolve disputed citations and penalties without the need for litigation which can be time consuming and costly;
 - b. Obtain a more complete understanding of the specific safety or health standards which apply;
 - c. Discuss ways to correct the violations;
 - d. Discuss issues concerning proposed penalties;
 - e. Discuss proposed abatement dates;
 - f. Discuss issues regarding employee safety and health practices; and
 - g. Learn more of other VOSH programs and services available.
2. If a citation is issued, an informal conference or the request for one does not extend the 15 working-day period in which the employer or employee representatives may contest.
3. Verbal disagreement with, or intent to, contest a citation, penalty or abatement date during an informal conference does not replace the required written Notice of Intent to Contest.
4. Employee representatives have the right to participate in informal conferences or negotiations between the Regional Safety or Health Director and the employer in accordance with the guidelines given in the subsection on Informal Conferences.

D. Penalties

Compliance Officers shall explain that penalties must be paid within 15 working days after the employer receives a citation and notification of penalty. If, however, an employer contests the citation and/or the penalty, penalties need not be paid for the contested items until the final order date.

E. Feasible Administrative, Work Practice and Engineering Controls

Where applicable, the Compliance Officer shall discuss control methodology with the employer during the closing conference.

1. Definitions

- a. Engineering Controls. Engineering controls consist of substitution, isolation, ventilation, and equipment modification.
 - (1) Substitution may involve process change, equipment replacement or material substitution.
 - (2) Isolation results in the reduction of the hazard by providing a barrier around the material, equipment, process or employee. This barrier may consist of a physical separation or isolation by distance.
 - (3) Ventilation controls are more fully discussed in the OSHA Technical Manual.
 - (4) Equipment modification will result in increased performance or change in character, such as the application of sound absorbent material.
- b. Administrative Controls. Any procedure which significantly limits daily exposure by control or manipulation of the work schedule or manner in which work is performed is considered a means of administrative control. The use of personal protective equipment is *not* considered a means of administrative control. Employee rotation as an administrative control shall not be used as a method of complying with the permissible exposure limits of carcinogens.
- c. Work Practice Controls. Work practice controls are a type of administrative control by which the employer modifies the manner in which the employee performs assigned work. Such modification may result in a reduction of exposure through such methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job.
- d. Feasibility. Abatement measures required to correct a citation item are feasible when they can be accomplished by the employer. The Compliance Officer, following current directions and guidelines, shall inform the employer, where appropriate, that a determination will be made as to whether engineering or administrative controls are feasible.
 - (1) Technical Feasibility. Technical feasibility is the existence of technical know-how as to materials and

methods available or adaptable to specific circumstances which can be applied to cited violations with a reasonable possibility that employee exposure to occupational hazards will be reduced. The Regional Safety or Health Director is responsible for making determinations that engineering or administrative controls are feasible.

(a) Sources which can provide information useful in making this determination are the following:

- 1 Similar situations where adequate engineering controls do, in fact, reduce employee exposure.
- 2 Written source materials or conference presentations that indicate that equipment and designs are available to reduce employee exposure in similar situations.
- 3 Studies by a qualified consulting firm, professional engineer, industrial hygienist, or insurance carrier that show engineering controls are technically feasible.
- 4 Studies and materials collected and prepared by VOSH or OSHA's Directorate of Compliance Programs, the Directorate of Technical Support or the Assistant Regional Administrator for Technical Support.
- 5 Equipment catalogs and suppliers that indicate engineering controls are technically feasible and are available.
- 6 Information provided by other government agencies when their regulations apply to the operations involved and which may affect or limit the design or type of controls that may be used for abatement.

(b) VOSH's experience indicates that feasible engineering or administrative controls exist for most hazardous exposures.

(2) Economic Feasibility. Economic feasibility means that the employer is financially able to undertake the

measures necessary to abate the citations received. The Compliance Officer shall inform the employer that, although the cost of corrective measures to be taken will not usually be considered as a factor in the issuance of a citation, it will be considered during an informal conference or during settlement negotiations.

- (a) If the cost of implementing effective engineering, administrative, or work practice controls or some combination of such controls, would seriously endanger the employer's financial condition so as to result in the probable shut down of the establishment or a substantial part of it, an extended abatement date shall be set when postponement of the capital expenditures would have a beneficial effect on the financial performance of the employer.
- (b) If the employer raises the issue that the company has other establishments or other locations within the same establishment with equipment or processes which, although not cited as a result of the present inspection, nevertheless would require the same abatement measures as those under citation, the economic feasibility determination shall not be limited to the cited items above. In such cases, although the employer will be required to abate the cited items within the time allowed for abatement, the opportunity to include both the cited and the additional items in a long range abatement plan shall be offered. This can be accomplished by a corporate wide settlement agreement. *Contact the Division of Legal Support for information on settlement agreements.*
- (c) When additional time cannot be expected to solve the employer's financial infeasibility problem, the Program Director shall refer the problem to the Commissioner for a decision in accordance with the guidelines.
- (d) Requirements that would threaten the economic viability of an entire industry cannot be considered economically feasible.

NOTE: If an employer's level of compliance lags significantly behind that of their industry, allegations of economic infeasibility will not be accepted.

F. Long-Term Abatement Date for Implementation of Feasible Engineering Controls

Long-term abatement is abatement which will be completed more than one year from the citation issuance date.

1. Discussion of Issues With Employer

In situations where it is difficult to set a specific abatement date when the citation is originally issued; e.g., because of extensive redesign requirements consequent upon the employer's decision to implement feasible engineering controls and uncertainty as to when the job can be finished, the Compliance Officer shall discuss the problem with the employer at the closing conference and consult with the Regional Safety or Health Director following the inspection.

2. VOSH Determination of Abatement Date

The Compliance Officer and the Regional Safety or Health Director shall use their best judgment as to a reasonable abatement date. A specific date for final abatement shall, in all cases, be included in the citation. The employer shall not be permitted to propose their own abatement date in the abatement plan. (See Chapter 13, Abatement Verification for more information on abatement plans.) If necessary, an appropriate application may be submitted later by the employer to modify the abatement date. (*Refer to Chapter 14, Post Citation Procedures for more information on Petitions for Modification of Abatement [PMA]*).

3. Employer Abatement Plan Submission

The employer is required to submit an abatement plan outlining the anticipated long-term abatement procedures.

a. Such a plan may be submitted for consideration by the Regional Safety or Health Director before setting the citation abatement date.

(1) In that case, the citation may be delayed for a brief period with a notation explaining the delay placed in the case file.

(2) If it appears that the citation might be delayed beyond 6 months from the date of the alleged violation, the citation shall be issued prior to full consideration of the plan; but the employer shall be given the opportunity to provide as much input as possible in the setting of the abatement period.

b. Whether or not a plan is submitted before issuing a citation, an abatement plan shall be provided for in the citation in addition to a final abatement date.

- c. When the plan is submitted, if the engineering or administrative corrections proposed by the employer appear to be all that are feasible based on the current technology, this fact may be agreed to between VOSH and the employer.
 - (1) Such an agreement shall permit assurances in advance to the employer that the establishment will be in compliance where the provisions of the plan are fully implemented.
 - (2) It shall be made clear in the agreement that the employer is not relieved from instituting further engineering (or administrative) controls as they become technically feasible, if it is likely that such further controls will lower employee exposure in such instances where without personal protective equipment (PPE) employee exposure remains over the PEL.
 - (3) In all situations where an agreement is proposed, the advice of the Division of Legal Support shall be sought on the legal implications.
 - (4) If the agreement is acceptable, the Division of Legal Support shall be requested to draft the agreement.
- d. A statement agreeing to provide the affected Regional Office with written periodic progress reports shall be part of the long-term abatement plan.

G. Reducing Employee Exposure

Employers shall be advised that, whenever feasible, engineering, administrative or work practice controls must be instituted, even if they are not sufficient to eliminate the hazard (or to reduce exposure to or below the permissible exposure limit). They are required in conjunction with personal protective equipment to further reduce exposure to the lowest practical level.

H. Abatement Verification

During the closing conference the Compliance Officer should thoroughly explain to the employer the abatement verification requirements (certification plus documentation). See Chapter 13, Abatement Verification.

1. Abatement Certification

Abatement certification is required for all citation item(s) which the employer received except for those citation items which are identified as "Corrected During Inspection."

2. Corrected During Inspection (CDI)

The violation(s) that will reflect on-site abatement and will be identified in the citations as “Corrected During Inspection” shall be reviewed at the closing conference. Compliance Officer's shall document on-site abatement action in the case file narrative and/or the appropriate VOSH 1-B form.

3. Abatement Documentation

Abatement documentation, the employer's physical proof of abatement, is required to be submitted along with each willful, repeat and designated serious violation. To minimize confusion, the distinction between abatement certification and abatement documentation should be discussed.

4. Placement of Abatement Verification Tags

The required placement of abatement verification tags or the citation must also be discussed at the closing conference, if it has not been discussed during the walkaround portion of the inspection. Refer to § 307 of the VOSH *Administrative Regulations Manual*.

5. Requirements for Extended Abatement Periods

Where extended abatement periods are involved, the requirements for abatement plans and progress reports shall be discussed.

I. De Minimis Violations

The Compliance Officer shall discuss all conditions noted during the walkaround considered to be *de minimis*, indicating that such conditions are subject to review by the Regional Safety or Health Director in the same manner as apparent violations but, if finally classified as *de minimis*, will not be included on the citation.

In addition, the Compliance Officer shall explain to the employer and the employee representatives that a condition is considered to be *de minimis* when:

- * It has no direct or immediate relationship to employee safety and health;
- * It is apparent that the employer is complying with the clear intent of the standard but deviates in a minor, technical or trivial way; or
- * An employer's workplace is “state of the art” which is technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

Employer comments shall be noted in the Narrative.

J. Prohibition Against Employee Discrimination

The Compliance Officer shall emphasize that the Act prohibits employers from discharging or discriminating in any way against an employee who has exercised any right under Title 40.1 of the *Code of Virginia*, including the right to make safety or health complaints or to request a VOSH inspection.

VII. Special Inspection Procedures

A. Follow-up and Monitoring Inspections

1. Purpose

The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected. Monitoring inspections are conducted to ensure that hazards are being abated and employees protected, whenever a long period of time is needed for an establishment to come into compliance (or to verify compliance with the terms of granted variances). Issuance of willful, repeated and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations are examples of prime candidates for follow-up or monitoring inspections. These types of inspections will not generally be conducted when evidence of abatement is provided by the employer or employee representatives.

Refer to Chapter 3, Program Planning, for inspection procedures for follow-up and monitoring inspections.

2. Failure to Abate

A failure to abate exists when a previously cited violation continues unabated and the abatement date has passed or the abatement date is covered under a settlement agreement, or the employer has not complied with interim measures within the allotted time specified in a long-term abatement plan.

- a. A Follow-up Inspection must be conducted before a Failure to Abate Citation can be issued.
- b. If previously cited items have not been corrected, a Notice of Failure to Abate Alleged Violation shall generally be issued. If a subsequent inspection indicates the condition has still not been abated, the Division of Legal Support (DLS) shall be consulted for further guidance.

NOTE: If the employer has demonstrated a good faith effort to comply, a late Petition for Modification of Abatement (PMA) may be considered in accordance with Chapter 14, Post-Citation Procedures.

- c. If an originally cited violation has at one point been abated but subsequently recurs, a citation for a repeated violation may be appropriate.

3. Reports

- a. For any items found to be abated, a copy of the previous VOSH-1B, VOSH-1B-IH, or citation can be notated with "corrected" written on it, along with a brief explanation of the abatement measures taken. This information may alternately be included in the narrative of the investigative file.
- b. In the event that any item has not been abated, complete documentation shall be included on a VOSH-1B.

4. Follow-up Files

Follow-up inspection reports shall be included with the original (parent) case file.

B. Construction Inspections

1. Standards Applicability

The federal identical OSHA standards for Construction which are used by VOSH are found at 16VAC25-175-1926 as they have been adopted as state regulations. These occupational safety and health standards are authorized under Title 40.1 of the *Code of Virginia*. In addition, a number of Virginia unique standards exist for Construction. These are also regulations and are listed as various other chapters under 16VAC25. All such standards shall apply to every employment and place of employment of every employee engaged in construction work, including non-contract construction under VOSH's jurisdiction.

2. Definition

Construction work is defined in §16VAC25-60-130 of the VOSH *Administrative Regulations Manual*:

"For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation, grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure."

If any question arises as to whether an activity is deemed to be construction for purposes of law, the Program Director shall be consulted.

3. Inspection Procedures

Refer to Chapter 6, Industry Sectors, for inspection procedures in Construction.

C. Agricultural Inspections

1. Standards Applicability

The standards at §16VAC25-190-1928 have been adopted as occupational safety and health standards under Title 40.1 of the *Code of Virginia*. They shall apply to every employment and place of employment of every employee engaged in agricultural operations, including non-contract construction under VOSH's jurisdiction.

2. Definition

Agricultural Operations is defined in §16VAC25-60-140 of the *VOSH Administrative Regulations Manual*:

“Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in § 130.A. of this regulation; nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.”

If any question arises as to whether an activity is deemed to be part of an agricultural operation for purposes of law, the Program Director shall be consulted.

3. Inspection Procedures

Refer to Chapter 6, Industry Sectors, for inspection procedures in Agriculture.

D. Public Sector Inspections

Policies and procedures for public sector employers are, with some exceptions, similar to those followed in the private sector. *Refer to §§ 30, 280, 290, and 300 of the VOSH Administrative Regulations Manual for additional guidance.*

CHAPTER 6

INDUSTRY SECTORS

I. Construction Industry Inspections

Compliance Officer responsibilities for construction inspections are the same as for general industry inspections (Chapter 5, Inspection Procedures). Special situations arising in the construction industry are discussed in this section.

A. **Standards Applicability**

With the exception of the Virginia unique standards which take precedence, the federal OSHA standards published as 29 C.F.R. Part 1926 have been adopted as Virginia Occupational Safety and Health standards by the Safety and Health Codes Board. They shall apply to every employment and place of employment of every employee engaged in construction work, including non-contract construction work.

B. **Definition**

The term "construction work" means and includes all or any part of excavation, construction, erection, alteration, repair, demolition, and dismantling of buildings or other structures and all operations connected to the above. In addition, "construction" also means the excavation, construction, alteration and repair of sewers, trenches, caissons, conduits, pipe lines, roads, and all pertinent operations.

The term also includes the moving of buildings and other structures, and the construction, alteration, repair, or removal of wharves, docks, bridges, culverts, trestles, piers, abutments or any other construction, alteration, repair or removal work related to these. These terms are discussed in § 130 of the *VOSH Administrative Regulations Manual*. If any question arises as to whether an activity is deemed to be construction for purposes of law, the Program Director shall be consulted.

C. **Employer Worksite**

1. **General**

Inspections of employers in the construction industry are not easily separable into distinct worksites. The worksite is generally the site where the construction is being performed (e.g., the building site, the dam site). Where the construction site extends over a large geographical area (e.g., road building), the entire job will be considered a single worksite. In cases where such large geographical areas overlap between regional offices, generally only operations of the employer within the jurisdiction of any regional office will be considered to be the worksite of the employer.

2. Beyond Single Regional Office

When a construction worksite extends beyond a single regional office and the Compliance Officer wants to extend the inspection, the Regional Safety or Health Director shall consult with the Regional Safety or Health Director for approval of such an extension.

3. Administrative Convenience

The definition of worksite in this chapter is only for administrative convenience and has no effect upon the issuance of failure to abate notifications or repeat citations which are governed by other chapters. For instructions regarding multi-employer worksites, see the guidelines regarding multi-employer worksites.

D. Entry of the Workplace

1. Other Agency

The Compliance Officer shall determine whether there is a representative of a state or local government, e.g., VDOT, Henrico County Public Works, etc., contracting agency at the worksite. If one is on site, the Compliance Officer shall contact the government agency representative, advise him of the inspection, and request that he attend the opening conference.

2. Opening Conference

In conducting the opening conference, the Compliance Officer shall follow the procedures regarding opening conferences. Upon arrival at the construction site, the Compliance Officer shall contact the "prime" or general contractor's representative in charge of the job; usually this will be the superintendent or project manager. The Compliance Officer shall tell this individual that the purpose of this visit is to make an inspection of the worksite in order to determine compliance with VOSH requirements.

In addition, authorized representatives of employees for each contractor and subcontractor, if any, shall be informed of the inspection and invited to the opening conference. Please note that such a conference shall be a joint conference with employers unless either party requests a separate conference. Please see section I.D.6., below, for details regarding selection of representatives.

3. Common Services

At the opening conference or at some other suitable time during the inspection, the Compliance Officer shall ascertain who is responsible for providing such common services as sanitation, eating facilities, first-aid, etc., and where these services have been made available to all employees on the worksite. Although arrangements may have been made for one subcontractor or for the general contractor to provide common services, each employer is responsible for his own employees in this regard. Any or all of the employers can be cited for lack of such services.

4. Referral Inspection

The Compliance Officer shall, during the opening conference, inform the employer(s) that the inspection is the result of a referral.

5. Complaints

If the inspection is being conducted as a result of a complaint, a copy of the complaint is to be furnished as follows:

- a. A copy of every complaint, including complaints against subcontractors, shall be provided to the general contractor.
- b. A copy of every complaint against the general contractor shall, if possible, be provided to every subcontractor whose employees may be exposed to the alleged hazard.
- c. A copy of every complaint against a subcontractor shall be provided to that subcontractor, and, if possible, to others whose employees may be exposed to the alleged hazard.
- d. Care shall be taken to protect the identity of the complainant, including the typing of handwritten complaints and the covering of all signatures.

6. Selecting Employer and Employee Representatives

The Compliance Officer shall conduct a walkaround inspection in accordance with the provisions of other walkaround procedures.

- a. Authorized Representative. Each employer is entitled to select an authorized representative to accompany the Compliance Officer during the inspection. Similarly, the employees of each employer have the right to select an authorized representative for this purpose. If the job is unionized, then the labor organization representing the employees shall select the authorized employee representative. If there is no representative, the Compliance Officer shall interview a reasonable number of employees to determine whether hazards exist. A reasonable number of employees shall include at least some employees of each employer and of each craft on the job.
- b. Too Many Representatives. The Compliance Officer shall conduct the inspection accompanied by the representatives designated by the employers and employees. However, if during the course of the inspection, the Compliance Officer determines that, because of the large number of persons involved, the inspection is not being conducted in an effective manner or that work is being unduly disrupted, the participants shall be advised that walkaround representation will be discontinued. Instead, a reasonable number of employees will be interviewed.

If the participants then agree to a limited number of representatives for accompaniment purposes, the Compliance Officer shall resume the inspection with such representatives.

- c. Employee Interviews. Pursuant to § 240 of the VOSH *Administrative Regulations Manual*, during the walkaround, the Compliance Officer shall consult with individual employees as well as the employee representative concerning working conditions, as judged appropriate by the Compliance Officer.
- d. Walkaround Provisions. The main difficulty in implementing the walkaround provisions on construction sites derives from the fact that in the usual situations, there will be numerous employers on the job. If all employers and groups of employees selected a different representative to accompany the Compliance Officer on the inspection, the group participating in the inspection could be so large that work on the worksite might be disrupted and the effectiveness of the inspection would be diminished.
 1. An attempt to encourage employer and employees to select a limited number of representatives for the walkaround shall be made. It shall be pointed out by the Compliance Officer that this arrangement makes an effective inspection possible without diminishing the accompaniment rights. If any matter comes up during the course of the inspection that requires special knowledge, the representative of the appropriate employer or employees shall be called in to participate in that phase of the inspection.
 2. The Compliance Officer may also divide the inspection into separate phases; e.g., excavation work followed by electrical work, and so forth. If this procedure is followed, the number of employer/employee representatives for each phase of the inspection can be limited to those immediately involved. The Compliance Officer shall avoid inspecting the same areas of the worksite more than once.

7. Special Walkaround Provisions for Accident Prevention Programs

- a. An evaluation of each employer's accident prevention program shall be conducted during every construction inspection.
- b. The two key factors in evaluating an effective program are:
 - (1) Safety and health conditions found on the jobsite; and
 - (2) The degree of knowledge which the designated

competent person has of site specific safety and health hazards.

- c. Effective evaluation of accident prevention programs requires solid investigatory techniques. The Compliance Officer shall ask well directed, open ended questions which require more than a yes or no answer.
- d. The fact that there were other violations shall not be used as the sole justification for citing an employer for a deficient accident program. However, if a Compliance Officer finds violations but no deficiencies in the accident prevention program, a detailed explanation shall be placed in the case file.
- e. Programs shall be evaluated using the outline contained in Appendix "A" as a guide. Questions set out in the Appendix and the answers to them shall be incorporated into the narrative. Employee awareness, acceptance and participation in the program shall also be evaluated.
- f. Compliance Officers should encourage employers to implement a formal safety and health program. The employer should be advised to incorporate their accident prevention directly into the overall management of the worksite.
- g. Employers who fail to meet all requirements of §§1926.20, 1926.21 and 1926.23 shall be issued citations. Violations of these sections shall normally be grouped. In most cases, violations of §§1926.20 and 1926.21 should also be grouped with the most significant serious violation.
- h. Violations of §1926.20(b)(2) often occur because employers do not understand the meaning of the term "competent person." Compliance Officers should advise employers that "competent person," as set forth in §1926.23, means:

"...one capable of identifying existing and predictable hazards in the surrounding or working conditions which are unsanitary, hazardous or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

On a multi-employer worksite, a single competent person may be designated for the entire worksite.

- i. Employers with deficient accident prevention programs shall be offered abatement assistance. Model language for informal settlement agreements is contained in VOSH-ISA form in Appendix B. Particular emphasis should be placed on assisting small employers. A checklist for this purpose has been included.

E. Closing Conference

1. General

Upon completion of the inspection, the Compliance Officer shall confer with the general contractors and all appropriate subcontractors or their representatives, together or separately, at their option, and advise each one of all the apparent violations disclosed by the inspection to which each one's employees were exposed, or violations which the employer created or controlled. The closing conference with each general contractor and subcontractor may be a joint conference with the employer and employee representatives.

2. Contractor Names and Addresses

Before leaving the worksite, the Compliance Officer shall be sure to get the names and addresses of the general contractor and all other employers at the worksite who may be cited for violations.

F. Citations and Penalties

NOTE: Refer to VOSH Program Directive 02-102, or its successor, for additional information citing multi-employer worksites.

1. Mailing

Upon the completion of citations and notifications of penalties, the original VOSH-2 for each employer shall be sent to the employer's permanent address.

2. Where to Post Citations

At many construction sites, the employer (whether prime contractor or subcontractor) provides a trailer or other worksite office. Where such a facility is provided and employees are likely to be in the vicinity of the facility on a daily basis, the citation shall be posted at that location.

a. Other Locations. A copy of the citation shall also be posted at any other location of the employer where employees are required to report on a daily basis. In some situations, such a location would be the employer's main or branch office; in other situations such as highway construction, the location would be the place where the employees actually work.

b. No Place to Post Citation. When no obvious place for posting the citations exists (such as, in highway construction where the trailer may be a considerable distance away and employees do not report to the trailer), the employer shall be required to furnish a suitable object on which to post the citation in a conspicuous location or immediately adjacent to the worksite. In any case, when the citation will be exposed to rain or snow, the citation shall be protected from the elements.

II. Agriculture Inspections

A. “Agricultural Operations” Defined

Current VOSH standards for Agriculture use the term “agricultural operations” but do not specifically define the term. The VOSH *Administrative Regulations Manual*, §16 VAC 25-60-140, Agricultural standards, adopted by the Virginia Safety and Health Codes Board in 2006, clarifies the meaning of “Agricultural Operations.” Paragraph 2 of 16 VAC 25-60-140, provides that:

“Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in § 130.A. of this regulation; nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.”

The new language provides further guidance to VOSH personnel, employers and employees concerning the applicability, and in certain cases the non-applicability, of the Agricultural Standards contained in Part 1928. The new language reflects longstanding VOSH and OSHA enforcement policy and is based in part on the definition of "farming operation" contained in Federal OSHA Instruction CPL 2-0.51J updated to include NAICS:

A “farming operation” means any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations. These are employers engaged in businesses that have the following NAICS Codes:

111110-111998	Agricultural Production - Crops;
112111-112990	Agricultural Production - Livestock & Animal Specialties;
115112	Soil Preparation, Planting, & Cultivating;
115113	Crop Harvesting, Primarily by Machine;
115115	Farm Labor Contractors and Crew Leaders; and
115116	Farm Management Services.

Based on OSHA interpretations, both the following industries are considered agricultural operations:

- Aquaculture (reference: 28 Sept. 1982 OSHA letter of Interpretation), &
- Reforestation (reference: 06 Nov. 1989 OSHA letter of Interpretation)

B. Public Sector Employees

State and local government employees who may be present on agricultural work sites for purposes of conducting inspections or providing assistance to farmers (e.g., Department of Agriculture and Consumer Services), are covered by the General Industry Standards in Part 1910.

C. Exemptions and Limitations on Agricultural Enforcement Inspections under the Federal Appropriations Act - Restrictions on Using Federal Matching Funds.

Note: However, the Appropriations Act limitations do not apply where VOSH chooses to use to 100% state funds for the enforcement activity. Refer to VOSH Program Directive 02-003J, or its successor and OSHA Instruction CPL 02-00-051.

1. Enforcement Guidance for Small Farming Operations

In providing funding for OSHA and the state plans, Congress has placed significant restrictions on enforcement activities regarding two categories of employers: small farming operations and small employers in low-hazard industries.

The federal Appropriations Act prohibits the use of federal funds for any enforcement activities in small farming operations under the Occupational Safety and Health Act. Since these federal 23g grant funds are passed through from OSHA to the State Program, VOSH is held to the same restrictions and limits imposed on federal OSHA for use of federal funds.

A farming operation is generally exempt from all VOSH activities if it:

a. Employs ten (10) or fewer employees currently and at all times during the last 12 months (*Family members of farm employers are not counted when determining the number of employees*);

AND

b. Has not had an active temporary labor camp during the preceding 12 months.

2. Ten or Fewer Employees With a Temporary Labor Camp

A farming operation with ten (10) or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months is NOT EXEMPT from inspection.

3. Use of 100% State Funding

VOSH reserves the right to conduct activities limited or prohibited under the directive by paying for those activities with 100% 23g grant state matching funds. Approval to conduct and pay for such activities must be received IN ADVANCE from the VOSH program director. VOSH will conduct and pay for with 100% state funds, fatal accident investigations on farms with 10 or fewer employees and no temporary labor camp activity within the previous 12 months.

On a case-by-case basis, VOSH may decide to use 100% state funds to conduct certain non-fatal inspections on small farming operations (e.g., a field sanitation complaint inspection could be authorized if the complaint concerns lack of adequate drinking water - see below discussion of the unique Virginia Standard on Field Sanitation).

Compliance Officers who are approved to perform such 100% state funded inspections shall keep a record of their time spent on such activities which must be entered as a separate line entry on the Compliance Officer's FLSA Individual Time Sheet. The entry for this separate line under the column labeled "Category" or "Organization/Activity" shall be "23g exempt -100%". In the adjoining column labeled "Cost Code" enter "State funds". A sample FLSA Individual Time Sheet is provided in the directive.

D. Federal Identical Standards

1. In accordance with Part 1928.21(a), the following standards in part 1910 shall apply to agricultural operations:
 - 1910.142 - Temporary labor camps
 - 1910.111(a)&(b) - Storage and Handling of Anhydrous Ammonia
 - 1910.266 - Logging Operations
 - 1910.145 - Slow-moving vehicles
 - 1910.1027 - Cadmium
 - 1910.1200 - Hazard communication
 - 1910.1201 - Retention of DOT markings, placards and labels
2. In accordance with Part 1928.21(b), except to the extent specified in paragraph 1928.21(a), the standards contained in Subparts B through T and Subpart Z of part 1910 of this title do not apply to agricultural operations.
3. The following standards in Part 1928 apply to agricultural operations:
 - 1928.51 - Roll-over protective structures (ROPS) for tractors used in agricultural operations,
 - 1928.52 - Protective frames for wheel-type agricultural tractors,
 - 1928.53 - Protective enclosures for wheel-type agricultural tractors,
 - 1928.57 - Guarding of farm field equipment, farmstead equipment and cotton gins,
 - 1928.1027 - Cadmium (*refer to 1910.1027 Cadmium*)
 - 1926 Subpart C, Appendix A - Employee operating instructions
 - 1926 Subpart C, Appendix B - Figures C-1 through C-16

E. Unique Virginia Field Sanitation Standard, §1928.110

The Virginia Field Sanitation Standard identical to the federal standard with the exception that the potable drinking water requirement in §1928.110(c)(1) applies to all agricultural establishments regardless of the number of employees.

The federal standard is not used by VOSH and only applies to agricultural establishments where 11 or more employees are engaged on any given day in hand-labor operations in the field.

F. Training Issues

From OSHA Training Policy Statement, April 17, 2007:

“Many OSHA standards require that employees receive training so that work will be performed in a safe and healthful manner. Some of these standards require "training" or "instruction," others require "adequate" or "effective" training or instruction, and still others require training "in a manner" or "in language" that is understandable to employees. It is the Agency's position that, regardless of the precise regulatory language, the terms "train" and "instruct," as well as other synonyms, mean to present information in a manner that employees receiving it are capable of understanding...

...OSHA has a long and consistent history of interpreting its standards and other requirements to require employers to present information in a manner that their employees can understand. See, e.g., CPL 2-2.38(D)(1998) (“[i]f the employees receive job instructions in a language other than English, then training and information to be conveyed under the [hazard communication standard] will also need to be conducted in a foreign language”); letter from Russell B. Swanson to Chip MacDonald (1999) (“instruction that employers must provide under §1926.21 must be tailored to the employees' language and education....”). And courts and the Commission have agreed with OSHA that an employer may not take advantage of “an adequately communicated work rule” when it did not communicate that rule to a non-English speaking employee in a language that employee could understand.” (See, e.g., *Modern Continental Construction Company, Inc. v. OSHRC*, 305 F.3d 43, 52 (1st Cir. 2002)); (*Star Brite Construction Co.*, 19 (BNA) OSHC 1687, 1695 n.12 (N.95-0343,2001)).

In practical terms, the above referenced material means that an employer must instruct its employees using both a language and vocabulary that the employees can understand.

For example, if an employee does not speak or comprehend English, instruction must be provided in a language the employee can understand. Similarly, if the employee's vocabulary is limited, the training must account for that limitation. By the same token, if employees are not literate, telling them to read training materials will not satisfy the employer's training obligation. As a general matter, employers are expected to realize that if they customarily need to communicate work instructions or other workplace information to employees at a certain vocabulary level or in a language other than English, they will also need to provide safety and health training to employees in the same manner. Of course, employers may also provide instruction in learning the English language to non-English speaking employees. Over time, this may lessen the need to provide OSH Act training in other languages.”

(Refer to 17 April 2007 Memorandum to OSHA Regional Administrators from Edwin G. Foulke, Jr. regarding OSHA Training Standards Policy Statement).

G. Manufacturer's Specifications and Limitations for the Operation, Training, Use, Installation, Inspection, Testing, Repair and Maintenance of all Machinery, Vehicles, Tools, Materials and Equipment

1. Enactment

Adopted by the Virginia Safety and Health Codes Board in 2006, paragraph 3 of the VOSH *Administrative Regulations Manual*, §16 VAC 25-60-140, provides:

"The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment; unless specifically superseded by a more stringent corresponding requirement in Part 1928 or Part 1910. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation."

2. Purpose of the Provision

The purpose of VOSH *Administrative Regulations Manual* §16 VAC 25-60-140 is to clarify an employer's current responsibility under the "general duty clause" to comply with manufacturer's specifications and limitations, as well as allow the use of the new provision to address "other-than-serious" hazards before they can become serious in nature. The provision can also be used to address training issues, provided that the manufacturer requires training in its specifications and limitations.

The above provision adds regulatory authority for the VOSH Program to issue citations and penalties for an employer's failure to comply with the applicable manufacturer's specifications and limitations for the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment. Use of any non-compliant item is prohibited. This new provision applies unless specifically superseded by a more stringent corresponding requirement in Parts 1928 or 1910.

As with the general duty clause, §16 VAC 25-60-140 of the VOSH *Administrative Regulations Manual* cannot be used to enforce manufacturer's recommendations which use non-mandatory wording such as "should" or "may."

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CHAPTER 7

FATALITY, CATASTROPHE AND IMMINENT DANGER

I. Fatality/Catastrophe Investigations

A. General

1. Policy

All job-related fatalities and catastrophes, however reported to the Department, shall be investigated as thoroughly and promptly as possible, including during times that are normally non-working hours for Department staff, such as evenings, weekends, and holidays. Procedures to follow when reports are received during non-working hours, and procedures to follow when a fatality or catastrophe is *potentially* job-related, are explained in sections I.B.3. and I.E.

2. Definitions

The following definitions apply for purposes of this chapter:

- a. Fatality. An employee death resulting from a work related incident or exposure; in general, from an accident or illness caused by or related to a workplace hazard.
- b. Catastrophe. The hospitalization of three (3) or more employees resulting from a work related incident; in general, from an accident or illness caused by a workplace hazard.
- c. Hospitalization. To be admitted as an *inpatient* to a hospital or equivalent medical facility for examination or treatment.

3. Reporting by Employers

Under § 40.1-51.1 of the *Code of Virginia* and 1904.39(a), employers are required to orally report to the nearest Department Office within eight hours, any occurrence of an employment accident which is fatal to one or more employees or which results in the hospitalization of three (3) or more employees. A citation of 1904.39(a) shall be issued for failure to report such an occurrence. If the Regional Office becomes aware of an incident required to be reported through some means other than an employer report, prior to the elapse of the eight-hour reporting period, a citable violation for failure to report does not exist.

4. Reporting by Law Enforcement Agencies

- a. During regular working hours, law enforcement agencies will be requested to inform the Regional Office of any workplace fatality which occurs within their jurisdictions.
- b. After regular work hours and on weekends and holidays, law enforcement agencies will be requested to notify the Regional Safety or Health Director of any workplace fatality.

Each Regional Safety or Health Director shall be issued a pager so that the State Police Dispatcher may contact them after hours. Pagers may be rotated among Regional Safety or Health Directors and Compliance Officers in a region in order to more equitably distribute the non-work hour coverage.

5. Reporting Within the Department

The Regional Safety or Health Director shall inform the Program Director of all job-related fatalities and catastrophes as soon as they become aware of them in accordance with the instructions given in I.A.5.a. Other regional staff who receive reports of job-related fatalities and catastrophes which may result in high media attention or have statewide implications (and that appear to be within VOSH's jurisdiction), shall immediately notify the Regional Safety or Health Director and the Program Director of all job-related fatalities and catastrophes as soon as they become aware of them in accordance with the instructions given in section I.G.1.

- a. Informing Central Office Personnel. The Program Director shall inform the Commissioner of the fatality or catastrophe and provide all pertinent information. Such notification shall be immediate in any case where significant publicity or atypical circumstances may be present. In the case where initial notification is to the Central Office, the Program Director shall notify the affected Regional Safety or Health Director and the VOSH Media Contact Person in the Department. The Commissioner, or designee, shall notify the Communications Director for Media Affairs in the Office of the Secretary of Commerce and Trade in accordance with any procedures set forth by that office. All inquiries by the press shall be referred to and responded to by the VOSH Media Contact Person.

B. Pre-investigation

1. Gathering Information

In cases where the employer's physical location is in a region different from the one where the accident occurs, the Regional Safety or Health Director in the region where the accident occurs will be contacted to coordinate the inspection. The Regional Safety or Health Director, upon notification of an accident involving a fatality or catastrophe, shall gather as much information as is available prior to scheduling an inspection. If possible, this shall be done immediately through discussion with the person reporting the accident. If knowledge of the accident is received through the media or sources other than an employer representative, the employer shall be contacted as soon as possible to obtain additional information whenever the Regional Safety or Health Director believes that such contact will result in a more effective inspection. Such contact shall be considered advance notice and the procedures for advance notice shall be followed (*see Chapter 3, Program Planning*).

For special information needed when a fatality or catastrophe is potentially job-related, see section I.E. of this Chapter.

First reports by telephone to the Regional Safety or Health Director and/or the Program Director shall provide as much of the following information as possible. Subsequent follow-up reports to the Program Director shall be made in the form of a memorandum or a copy of the VOSH-36(S) Accident Report:

- (1) Name of company, location, and type of business.
- (2) Time of accident.
- (3) Type of accident (fire, explosion, building collapse, etc.).
- (4) Number of fatalities.
- (5) Number of persons hospitalized.
- (6) Number of persons unaccounted for.
- (7) When VOSH personnel are expected to arrive at the scene.
- (8) Identification of who is in charge at the scene (if known).

2. Working Hour Notification and Forms

If the fatality or catastrophe appears to require a VOSH investigation (i.e., it is or may be occupationally related and VOSH's jurisdiction is not pre-empted), the Compliance Officer shall report the event to the Regional Safety or Health Director, who shall inform the Program Director and Central Office, in accordance with section I.B. of this chapter, as soon as it is verified that the fatality/catastrophe has occurred. The Compliance Officer or Regional Safety or Health Director shall ensure that the required IMIS forms and the accident narrative are completed (see section I.F.).

NOTE: The VOSH 36(S) is a pre-inspection document and shall be completed for every fatality the Department is notified of and for every catastrophe investigated.

3. Reports Received During Non-working Hours

When notification of a workplace fatality or catastrophe is received during what are normally non-working hours, such as evenings, weekends, or holidays, the Regional Safety or Health Director shall obtain as much information as possible regarding the incident. The Regional Safety or Health Director shall then carefully and thoroughly evaluate the information to determine whether the investigation should begin immediately.

In situations where a delay could adversely affect the accident investigation, or other cases where the Regional Safety or Health Director has determined that an investigation should begin promptly, a Compliance Officer(s) shall be assigned and sent to the incident scene

as soon as possible, without regard for the time of day or day of the week. Examples of situations where the investigation should not be delayed until normal working hours resume, include but are not limited to, an explosion or fire where the scene could change quickly, or a case where an employer with continuous operations has ceased operations until a VOSH investigation is conducted. In cases where the Regional Safety or Health Director has decided to delay the investigation, a Compliance Officer shall be assigned no later than the next regular workday.

NOTE: In cases where the Compliance Officer arrives at an active crime, fire or fatality/catastrophe scene, it is imperative to minimize interference and to avoid unsafe conditions for the Compliance Officer. Compliance Officers shall not enter a crime or fire scene until the law enforcement officer, fire control officer, or other incident commander with active control over the scene indicates they can do so. The Compliance Officer may conduct interviews or use other methods that do not require immediate entry to the site provided they do not interfere with activities at the scene.

4. Contact with the Employer

Upon initial contact the employer shall be informed that an investigation will be conducted and extensive interviews with witnesses will be necessary. The purpose of an accident investigation shall be explained; namely, to determine:

- a. The cause of the accident.
- b. Whether the accident was related to a violation of VOSH safety or health standards.
- c. What effect the violation (if any) of a standard had on the occurrence of the accident.
- d. If VOSH standards should be revised or promulgated to address the type of hazardous working condition that led to the accident.

5. Careful Preparations

The primary objective of a fatality or catastrophic investigation is to determine the cause of the event. Given the severity of a fatality or catastrophic event, proper pre-investigation preparation is essential to the conduct of a complete and professionally conducted investigation. Future lives and safety may depend on how effectively the VOSH investigation is performed. For this reason, and also because it is likely that the VOSH investigation will be the object of external review and public scrutiny during this time of emergency, it is imperative that the investigation be handled properly and professionally from the beginning.

Upon determination of the cause of the events, it is imperative to determine whether a violation(s) of VOSH safety or health standards related to the accident has occurred and how this may, or may not, have contributed to the accident. The following procedures will ensure the quality and effectiveness of the investigation.

6. Selection of Compliance Officer

The Regional Safety or Health Director shall exercise his discretion in dispatching the most appropriately trained Compliance Officer or Compliance Officers to respond as soon as possible to the fatality or catastrophe site. Should the Compliance Officer(s) not be immediately available, the first available Compliance Officer(s) with the most appropriate experience will be sent without delay to begin the investigation, regardless of the time of day or day of week.

7. Need for Additional Resources

If resources beyond those available within the Regional Office or within VOSH, are deemed to be necessary for a proper or expeditious investigation, such external resources or experts will be required for the investigation, the Program Director and the Regional Safety or Health Director shall make the necessary arrangements to obtain such resources.

NOTE: Refer to Chapter 4, Inspection Preparation, regarding selection and use of expert assistance.

8. Equipment

Prior to leaving for the accident scene the team or Compliance Officer, as applicable, shall select the test equipment and the personal protective equipment necessary to support the investigation.

NOTE: Emergency testing equipment or special accident investigation instruments or protective clothing need not be set aside in Regional Offices for emergency or accident investigation use only. All equipment shall be available for regular use at any time provided it is available if needed for fatality/catastrophe investigations.

9. Other Agency

If another Federal or State agency is responsible for or participating in the investigation, the Regional Safety or Health Director shall ensure that the Compliance Officer(s) are fully instructed in VOSH's relationship with the other agency and each agency's areas of responsibility.

NOTE: Also refer to Section I.H., Special Situations, regarding preemption and cooperation.

C. Investigation Procedures

Every reasonable effort shall be made to determine the cause of the accident. The same general policies and inspection procedures contained in Chapter 5, Inspection Procedures, are applicable for the investigation of fatalities and catastrophes, except as otherwise provided in this chapter.

1. Scope

Fatality/catastrophe investigations shall include a complete investigation of the circumstances of the accident, consistent with the purposes outlined in section I.B.4., above. During investigations which involve potential for criminal violations, emphasis must be placed on the “willfulness” of the violation. These investigations may be expanded at the discretion of the Regional Safety or Health Director.

2. Inspection Strategy When a Comprehensive Inspection Is To Be Performed

Depending on the circumstances surrounding the accident, it may be necessary to conduct a comprehensive inspection of the workplace, before, concurrently with, or after the accident investigation. Other areas or operations in the establishment may have hazards similar to those that caused the accident; if so, they shall be brought to the employer’s attention immediately.

NOTE: If the employer is on a target list, a comprehensive inspection shall be conducted concurrently with or immediately after the accident investigation.

3. Abbreviated Opening Conference

In most cases, investigations of fatalities and catastrophes require that the Compliance Officer get to the location of the accident as promptly as possible. Therefore, the Compliance Officer shall reduce the time spent in the opening conference by limiting remarks to the bare essentials of identification, the purpose of the visit, and the request for an escort by employee and employer representatives. In addition, a more extensive discussion of other opening conference topics will be conducted at the closing conference.

4. Investigation Documentation

All fatality and catastrophe investigations shall be documented and, where applicable, shall include:

a. Personal Data of Victim:

- (1) Name
- (2) Address
- (3) Telephone number
- (4) Age
- (5) Sex
- (6) Job title
- (7) Date of employment

- (8) Time in position
- (9) Training for job being performed at time of accident
- (10) Employee deceased/injured
- (11) Nature of injury -- fracture, amputation, etc
- (12) Prognosis of injured employee.

b. Accident Data:

- (1) How and why did the accident occur?
- (2) Physical layout
- (3) Sketches/drawings
- (4) Measurements
- (5) Video/photos - identifying sources.

c. Equipment Involved or Process:

- (1) Machine type
- (2) Manufacturer
- (3) Model
- (4) Manufacturer's instructions
- (5) Kind of process
- (6) Condition
- (7) Misuse
- (8) Maintenance program
- (9) Equipment inspection (logs, reports, etc.)
- (10) Warning devices (detectors)
- (11) Tasks performed
- (12) Energy sources and disconnecting means identified
- (13) Supervision or instruction provided to employees involved in accident.

d. Witnesses:

- (1) Public
- (2) Fellow employees
- (3) Management
- (4) Employees and management officials from other contractors on site in a multi-employer situation.

e. Safety and Health Program:

- (1) Does employer have a safety or health program?

- (2) Does the program address the type of hazard which resulted in the fatality/catastrophe?

NOTE: If the fatality/catastrophe involves a trench, a soil sample shall be taken.

f. Behavioral Aspects Related to FAT/CAT:

- (1) The extent of safety training provided to the employee prior to the accident.
- (2) The exact instructions provided to the employee concerning the task to be performed.
- (3) The degree of emphasis placed on occupational safety and health by the employer.
- (4) Events prior to the accident that contributed to the accident or document an employer's disregard for the safety and health of employees.
- (5) The contractual arrangements concerning safety responsibility between a prime and subcontractor.
- (6) The competence of foremen or supervisors and the scope of authority they exercised on behalf of an employer.
- (7) Project completion status.
- (8) Any decisions that contributed to the accident; who made them, and why.
- (9) Negligence on the part of the employer (including supervisory personnel) that contributed to or caused the accident.
- (10) Employer and supervisor knowledge of a hazard, of the requirements of applicable standards, and of standard operating procedures in the industry.
- (11) The PPE provided or not provided to the employee.
- (12) Misconduct by an employee that contributed to the accident (including evidence of misconduct).

g. Records Request:

Potential records to include in a records request include:

- (1) Disciplinary records.
- (2) Training records.
- (3) Injury and illness records.
- (4) Safety committee minutes.
- (5) Operator's manuals for machinery, vehicles, tools, materials and equipment.

- (6) Inspection and maintenance records.
- (7) Security video tapes.
- (8) E-mails, documents, receipts, etc., concerning employer attempts to maintain, repair, fix, etc., machinery, vehicles, tools, materials and equipment.
- (9) Bulk and personal sampling results.
- (10) MSDS

h. Interview Procedures:

Identify and interview all persons with firsthand knowledge of the incident, including first responders, police officers, medical responders, and management, as early as possible in the investigation. The sooner a witness is interviewed, the more accurate and candid the witness statement will be.

- (1) If an employee representative is actively involved in the inspection, he or she can serve as a valuable resource by assisting in identifying employees who might have information relevant to the investigation.
- (2) Conduct employee interviews privately, outside the presence of the employer. Employees are not required to inform their employer that they provided a statement to VOSH.
- (3) When interviewing:
 - Properly document the contact information of all parties because follow-up interviews with a witness are some-times necessary.
 - Whenever possible, reduce interviews to writing and have the witness sign the document. If a written statement of a particular witness is not obtained, the CSHO shall document in the case file the reason that person's written statement is not included in the file (e.g., witness refused to sign the statement).
 - If a written statement is not obtained of a particular witness, the CSHO shall make every effort to note in quotation marks verbal statements made by that person which support one or more of the four elements of proving a violation (e.g., employee exposure, employer knowledge).

- Read the statement to the witness and attempt to obtain agreement. Note any witnesses' refusal to sign or initial his/her statement.
 - Ask the interviewee to initial any changes or corrections made to his/her statement.
 - Advise interviewee of VOSH Discrimination protections.
- (4) See Chapter 5, Inspection Procedures, for additional information on conducting interviews.
- (5) Confidentiality of Witness Statements. Section 90.E of the *VOSH Administrative Regulations Manual* provides that the identity of and statements of an employee or employee representative are protected from disclosure under the Virginia Freedom of Information Act. Va. Code, § 40.1-49.8(2) provides that the commissioner can "question privately any such employer, owner, operator, agent or employee."

5. Victim's Next of Kin

The next of kin of employees involved in fatal occupational accidents or illnesses shall be contacted at an early point in the investigation by the Regional Safety or Health Director, given an opportunity to discuss the circumstances of the accident or illness, and shall be kept apprised of the general course of the investigation. In contacting the next of kin, the Regional Safety or Health Director shall take into account the family's need to make funeral and other related arrangements (allow approximately 10 working days).

NOTE: Consistent with § 90 of the VOSH Administrative Regulations Manual and Department Policy, there shall be no release of facts or findings to any non-VOSH personnel before the investigation and subsequent litigation is completed.

NOTE: All of the following (subparagraphs a.through f.) require special tact and good judgment on the part of the Compliance Officer. In some situations, these procedures should not be followed to the letter; e.g., in some small businesses, the employer, owner, or supervisor may be a relative of the victim.

In certain circumstances, such steps as issuance of a form letter may not be appropriate without some editing.

- a. List of Victims and Next of Kin. As soon as practicable after initiating the investigation, the Compliance Officer shall attempt to compile a list of all of the accident victims and their current addresses, along with the name of the **single individual** listed in the employer's records, **(or by other means if necessary)**, as next of kin, i.e., the single individual listed as closest family member, or the person listed to contact in the event of an emergency.

If a next of kin cannot be determined through the employer's records or employee interviews, the Regional Safety or Health Director shall be informed. The Regional Safety or Health Director shall then make a reasonable effort to identify the next of kin by searching police reports, hospital admission records, coroner's records, and newspapers.

When an additional search does not identify next of kin, the extent of the search shall be documented in the case file.

- b. **Information Letter to Next of Kin.** The VOSH family information letter, located in the Appendix shall be **sent to the one individual listed as next of kin** within ten (10) working days of the time their identities have been established.

NOTE: It is IMPERATIVE that the personal information, (i.e., full legal name, relationship, and address) regarding the family member and the deceased be ACCURATE and be reflected in all correspondence.

- (1) The issuance of the family information letter to the next of kin shall be documented in the case file diary and a copy of the letter shall be included in the case file and an additional copy sent to the Division of Legal Support.
- (2) If the family information letter is returned as undeliverable, the letter and envelope shall be put in the case file and the date of the return entered in the case file.
- c. Interviews. The Compliance Officer, when taking a statement from a victim's family, shall explain that the interview will be kept confidential to the extent allowed by law (see Chapter 5, Inspection Procedures). The greatest sensitivity and professionalism is required for such an interview. The information received must be carefully evaluated and corroborated during the investigation.

- d. Follow-up Contact. **Follow-up contact, when requested, shall be maintained with the single individual listed as next of kin,** so that the family of the victim can be kept up-to-date on the status of the investigation. Such contact can be by personal visit, telephone or letter, as requested by the next of kin. These contacts shall be made at appropriate times; e.g., after citation issuance, after an informal conference, after a contest, or closing of the case.
- e. Copy of Citations. When a decision is made to issue citations, a letter shall be sent to the next of kin by the Regional Safety or Health Director informing them of the fact of citation issuance. The letter shall provide the name, address, phone number and email address of the VOSH FOIA Coordinator for the family member to contact to request a copy of the citation. If as a result of the citation letter, the next of kin requests copies of the citations issued, that request shall be considered to be under the provisions of the Virginia Freedom of Information Act (FOIA) and handled according to the Department's FOIA policy.

If requested, the victim's next of kin shall be provided a FOIA copy of all citations issued as a result of the accident investigation within five (5) working days of verification of receipt of the citation(s) by the employer.

To facilitate handling such a FOIA request within five (5) working days, on the SAME DAY that the certified mail receipt (green card) is received by the regional office, the Regional Safety or Health Director shall forward a copy of the citation(s) to the Division of Legal Support in Richmond.

NOTE: As per Department policy, all FOIA requests must be handled through the Division of Legal Support within the above time frame. Therefore, it is imperative that the Regional Safety or Health Director or his designee, be responsible for forwarding a copy of the citation(s) to the Division of Legal Support on the same day that the receipt is received.

- f. Release of Information to Next of Kin.
- (1) All VOSH staff are cautioned, not to mislead the family about the speed with which the next of kin can obtain a copy of the disclosable information prior to closing the case file. Staff are further cautioned that the employer's rights must be protected. There should be no premature release of facts or findings during any meeting with non-VOSH personnel, before the investigation and any subsequent litigation are completed.

- (2) When a decision is made to not issue citations and close the case; or in the case where citations have been issued and the case is later settled prior to litigation, a letter shall be sent to the next of kin by the Regional Safety or Health Director informing them of the closure of the case. The letter shall provide the name, address, phone number and email address of the VOSH FOIA Coordinator for the next of kin to request a copy of the case file. If as a result of the case closed letter, the next of kin requests copies of the citations issued, that request shall be considered to be under the provisions of the Virginia Freedom of Information Act (FOIA) and handled according to the Department's FOIA policy.
- (3) If at any time during the inspection or post inspection process, the next of kin indicates that they don't wish any further contact from the Department concerning the outcome of the inspection, the next of kin's wishes will be noted in the case file and respected by the Department.
- (4) Once a case enters litigation, the next of kin will be entitled to a redacted version of the case file if during the course of litigation legal counsel for the employer is provided a copy of the file in response to a request for discovery, or to a third party in response to a subpoena duces tecum, in accordance with §90.D. of the VOSH *Administrative Regulations Manual*. In such cases, the Division of Legal Support will notify the next of kin by letter that the case file is available and provide the name, address, phone number and email address of the VOSH FOIA Coordinator for the next of kin to contact to request a copy of the case file. If as a result of the litigation letter, the next of kin requests copies of the case file, that request shall be considered to be under the provisions of the Virginia Freedom of Information Act (FOIA) and handled according to the Department's FOIA policy.
- (5) If during litigation the case file is not released to the employer's attorney or a third party as the result of a subpoena duces tecum, and the case is settled or resolved at trial, the Division of Legal Support will notify the next of kin by letter that the case file is available and follow the procedures in (4) above.

6. **Criminal Penalties**

Section 40.1-49.4.K., *Code of Virginia*, provides criminal penalties for an employer who is convicted of having willfully violated the law when that violation caused the death of an employee.

In an investigation of this type, therefore, the nature of the evidence available is of paramount importance. There shall be early and close liaison between the Regional Safety or Health Director, the Program Director, and the Division of Legal Support Director in developing any finding which might involve a violation of § 40.1-49.4.K., *Code of Virginia*. Compliance Officers with criminal investigation training shall be assigned at an early stage to assist in developing the case.

D. Abatement Verification

Because of the transient nature of many of the worksites where fatalities occur and because worksites may be destroyed by the catastrophic event, it is frequently impossible to conduct follow-up inspections. Therefore, the Regional Safety or Health Director shall obtain abatement information from the employer, along with assurance that appropriate safety and health programs have been put in place, to prevent the hazards from recurring. In addition, abatement language and safety and health program implementation language shall be included in the settlement agreement. Where the worksite continues to exist, a follow-up inspection shall be conducted, if serious citations have been issued. If a follow-up inspection is not conducted, the CSHO shall document in the case file the reason why. A follow-up inspection need not be conducted if the Regional Safety or Health Director has verified abatement during the inspection or if the employer has provided other proof of abatement. Refer to Chapter 13, Abatement Verification, and § 307 of the *VOSH Administrative Regulations Manual*, regarding abatement verification.

E. Fatalities Potentially Work-Related

- 1. Traffic Accidents, Homicides, and Airplane Crashes.** In some circumstances, such as traffic accidents which occur during the course of employment on public roadways, or homicides at a work site, a law enforcement agency is the primary investigator. The Federal Aviation Administration (FAA) is the primary investigator of airplane crashes. When these occur during the course of employment, the Regional Safety or Health Director should obtain information about the circumstances of the fatality from the investigating agency (i.e., through contact with the State Police or other investigating officer, or a copy of the appropriate law enforcement or FAA report), and use professional judgment to decide whether an inspection is necessary. If an inspection is conducted, it shall include a determination of whether the employer has an effective accident prevention program addressing hazards relative to the type of employment in which the fatality occurred.

NOTE: Vehicle accidents which occur at an employer's worksite would not be considered "traffic accidents" and shall be investigated (e.g., employee at logging worksite run over by skidder; employee in construction work zone run over by dump truck).

2. **Heart Attacks/Natural Causes.** Deaths which occur in the workplace and allegedly are due to heart attacks or other natural causes will be investigated to search for additional contributing factors, such as electrical shock, falling objects, hazardous atmospheres, poison, victim's location prior to death, victim's activities prior to death, etc. If the death certificate, autopsy report, or pathologist later states that the death was due to natural causes and was not work-related, the fatality investigation may be concluded provided that the search for contributing factors has been performed. However, hazards discovered during the investigation will still be cited.

F. Forms

The Compliance Officer shall complete the following forms using the applicable instructions.

1. VOSH-1, Inspection Report

NOTE: When contact with employers is made on traffic accidents and homicides (for accident prevention program verification, etc.) and heart attacks (with no contributing factors), the information shall be entered into the system database as a partial inspection.

2. VOSH-170 - Investigation Summary (For fatality and catastrophe inspections)

- A VOSH-170 shall be completed and entered into the information system database **as soon as possible following the opening conference** for all fatalities and catastrophes resulting in an inspection. The VOSH-170 can be later modified to reflect any new information.
- **If it determined BEFORE conducting an investigation** that the accident involved a fatality, or catastrophe which was a result of natural causes, e.g., a heart attack, stroke, brain hemorrhage, or other medical disorder, and not caused by, or related to, a workplace condition, it is not necessary to conduct an inspection nor to complete a VOSH-170.
- **If it determined AFTER conducting an investigation** that the accident involved a fatality, or catastrophe and was not caused by, or related to, a workplace condition, then compliance personnel must complete a VOSH-170 to comply with OSHA database requirements.

3. VOSH - IW1, Inspection Worksheet (when applicable) and Accident Narrative.

4. VOSH - IW1C, Construction Inspection Worksheet (when issued) and (when applicable) and Accident Narrative.

5. Immigrant Language Questionnaire (IMMLANG)

The IMMLANG Questionnaire is designed to allow the Department to track fatalities among Hispanic and immigrant employees and to assess the impact of potential language barriers and training deficiencies on fatal accidents. Information for this questionnaire should be collected as early in the investigation as possible, as the availability of immigrants for questioning later in the process is often uncertain.

The IMMLANG Questionnaire shall be completed before the conclusion of a fatality investigation. It should be completed only if "IMMLANG-Y" is indicated on the VOSH-1 (N-10 Optional Information Code). The Questionnaire is not to be completed if "IMMLANG-N" is indicated on the VOSH-1. A copy of the completed questionnaire should be printed and placed in the case file.

G. Reports

1. Notification of Central Office

The Regional Office shall notify the Central Office Directors of all workplace fatalities, whether an inspection is conducted or not.

2. Pertinent Information

It is important that the Central Office Program Directors receive, as soon as possible, all pertinent information that can be obtained from newspapers or other sources. All the pertinent facts may not be available at the time of the initial notification. As more facts become available, they can be relayed in subsequent communications.

3. Information to Be Provided

First reports and subsequent follow-up calls shall provide as much of the following information as possible (VOSH 36 form to be provided as soon as complete information becomes available):

- a. Name of company, location and type of business;
- b. Time of accident;
- c. Type of accident (fire, explosion, building collapse, etc.);
- d. Number of fatalities;
- e. Number of persons hospitalized;
- f. Names of victims and Social Security numbers (if available);
- g. Number of persons unaccounted for;
- h. When VOSH is expected to arrive at the scene; and,
- i. Identify who is in charge at scene (if immediately known).

H. Special Situations

1. Preemption

There may be situations where it is not clear whether VOSH's authority to investigate fatalities or catastrophes has been preempted. In such cases the guidelines given in Chapter 4, Inspection Preparation, shall be observed with the following special considerations:

- a. General. If it is reasonably certain that VOSH coverage has not been preempted, the Regional Safety or Health Director shall start the investigation at once and not let potential jurisdictional problems interfere with either notification or investigation.
 - (1) If the Regional Safety or Health Director cannot resolve a preemption problem at the local level, all pertinent information shall be relayed to the Program Director and the Director of the Division of Legal Support, along with additional facts as they become available. A clear interpretation will be provided as soon as possible.
 - (2) If VOSH jurisdiction has been preempted only partially, the investigation shall be conducted as usual and all apparent violations shall be noted, including those for which jurisdiction has been preempted. A referral shall be made to the local office of the appropriate agency for such violations as soon as practicable.
 - (3) Where prior determinations have been made that VOSH authority is preempted, such as coal mine accidents, no investigation shall be conducted.
- b. Agency Cooperation. If other state or federal agencies will be involved and are on site, the Compliance Officer(s) team shall work with the other agencies as closely as possible to:
 - (1) Obtain all available information concerning the fatality or catastrophe.
 - (2) Assist each other in inspection of the accident site.

2. **Use of Expert Assistance**

The decision about the need for expert assistance to aid in the conduct of the investigation shall be made as soon as possible after the CSHO has arrived at the site. That decision shall be made by the Regional Safety or Health Director in consultation with the Program Director upon the recommendation of the CSHO. The Program Director shall arrange for a specialist from within VOSH or a qualified outside consultant (as detailed in Chapter 4 and below) to assist in an inspection or investigation when the need for such expertise has been identified. **In determining the choice of expert(s), the following list of experts is listed in priority order for selection:**

- a. VOSH Personnel. VOSH personnel shall generally be the first choice as experts, rather than “outside” experts. Any available VOSH 21(d) consultation personnel shall be called upon as experts whenever appropriate.
 - b. OSHA / NIOSH. If no VOSH experts are available, then, federal OSHA Regional/National Office personnel or NIOSH personnel, in that order, are next in order of preference.
 - (1) If OSHA personnel are to be used, the Program Director shall contact the OSHA Region III Administrator, who will make the arrangements.
 - (2) Arrangements for NIOSH experts shall be made through the OSHA Region III Administrator with the NIOSH Regional or National Office, as appropriate.
 - c. Other Virginia State Agency. If the required expertise is unavailable internally from VOSH, OSHA, or NIOSH but is available through an expert from another Virginia state agency, the Program Director or the Division of Legal Support Director shall contact the appropriate office of the other agency to request and coordinate such assistance. If necessary, a letter to the appropriate state agency requesting such assistance shall be prepared for the signature of the Commissioner to confirm the interagency staff discussions regarding the request for such assistance. The letter shall be forwarded to the other agency following the Commissioner’s signature.
 - d. External Consultants. In general, a consultant or “outside expert” is a person from the private sector or academia who is paid a fee for their special expertise. A consultant or outside expert shall be selected only when no other qualified individual is available from sources H2a., H2b., or H2c. above. Use of a consultant or an outside expert shall be approved by the Commissioner prior to contacting the individual. Contractual arrangements shall be coordinated through the Program Director.
 - e. Legal Advice. The advice of an attorney may be necessary at a very early stage of the investigation. The Regional Safety or Health Director shall contact the Assistant Attorney General through the Director of the Division of Legal Support, if assistance is required.
3. **Implementation**

Expert assistance may be necessary during inspections for the implementation of engineering or administrative controls involving, but not limited to, noise, air contaminants, complicated machine guarding and construction.
 4. **Performance**

VOSH, or OSHA personnel acting as specialists or experts may accompany the CSHO or they may perform their tasks separately. NIOSH personnel or external consultants must be accompanied by the CSHO. All specialists and outside consultants shall be briefed on the purpose of the inspection and the personal protective equipment to be utilized. Outside consultants will work within the specifications of the contract developed by the Division of Legal Support and approved by the Office of the Attorney General when required.

5. Reporting

All data, conclusions, findings, and/or recommendations from the assigned specialists or experts defined in subsections 1- 4 above shall be made part of the inspection report, including information on any actions taken by the employer in response to any such recommendations.

II. Imminent Danger

A. General

1. Definition

Section 10 of the VOSH *Administrative Regulations Manual* defines imminent danger as “...any condition or practice in any place of employment such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the standard enforcement procedures,” provided by Title 40.1 of the *Code of Virginia*.

2. Immediate Correction to Address Imminent Danger

If, during an inspection, the Compliance Officer believes that an employer has violated any safety or health standard or any conditions of an order granting a variance, and which violation is such that a danger exists from which there is a substantial probability that death or serious physical harm could result to any employee, the Compliance Officer will post a notice of imminent danger restraining any such condition, practice, method, process, or means in the workplace.

3. Imminent Danger Conditions

The following conditions must be met before a hazard becomes an imminent danger and necessitates posting a notice of imminent danger:

- a. Death or serious physical harm must be threatened. Serious physical harm is impairment of the body which renders the affected part of the body functionally useless or substantially less efficient.
- b. For health hazards, there must be a reasonable expectation that:

- (1) Toxic or other health hazards are present; and,
- (2) Exposure to toxic substances will cause harm which shortens life or causes substantial reduction in physical or mental efficiency even though the resulting harm may not show itself immediately.
- (3) The threat must be immediate or imminent. The required threat would be present where it is reasonable to believe that there is employee exposure and that death or serious physical harm could occur within a short time if the employer fails or refuses to abate the hazard. A notice of imminent danger will be posted.

B. Pre-inspection Procedures

1. When an Imminent Danger Report Is Received

Any allegation of imminent danger received by a Department office, whether written or oral, shall be handled on a highest priority basis. Other commitments, weekends, holidays, leave, and other considerations cannot interfere with the expedited and thorough handling of these cases. Any inspection that involves an imminent danger situation shall be conducted as expeditiously as possible.

- a. Reasonable Basis. The Regional Safety or Health Director shall immediately determine whether there is a reasonable basis for the allegation.
- b. Selection of Compliance Officer. If the imminent danger allegation appears to have merit, the Regional Safety or Health Director shall make an evaluation of the inspection requirements and select a Compliance Officer to conduct the inspection.
- c. Highest Priority. Imminent danger reports have the highest inspection priority and should be investigated immediately.
- d. Advance Notice When Immediate Inspection Cannot Be Made. When an immediate inspection cannot be made, the Regional Safety or Health Director, or the Compliance Officer shall contact the employer immediately; obtain as many pertinent details as possible concerning the situation and attempt to have any employees affected by imminent danger voluntarily removed. A record of what steps, if any, the employer intends to initiate in order to eliminate the danger shall be attached to the case file. Such notification shall be considered advance notice and the inspection shall be handled in accordance with the procedures given in this Chapter and in Chapter 4, Inspection Preparation.

2. Technical Considerations

The Regional Safety or Health Director and the Compliance Officer selected to perform the inspection shall review the known facts and decide what technical equipment and personnel may be necessary to conduct the inspection. When the time necessary to obtain special equipment or technical personnel for inspection would unduly delay the inspection, it may nevertheless be advisable to schedule and conduct a preliminary inspection as expeditiously as possible. The required equipment and/or personnel can be brought in later.

- a. Use of Specialists or Expert Assistance. In highly complex situations, consideration shall be given to use of specialists from Safety or Health staff, staff from other regions, Central Office staff, and other governmental agencies, or, if the situation warrants their use, specialists from outside government. Should the decision be made to use experts, the procedures given in Chapter 4, Inspection Preparation, shall be followed.
- b. Equipment. Calibration and testing of equipment to be used shall be currently valid.
- c. Advance Arrangements for Sample Analysis. If samples are required to determine whether there is an imminent danger situation, rapid analysis is essential. The Regional Safety or Health Director shall contact the Director of Occupational Health to implement the required administrative procedures necessary to contract for provision of laboratory services to do the sample analysis.

C. Inspection

1. Scope

Any alleged imminent danger situation brought to the attention of or discovered by the Compliance Officer shall be inspected immediately, whether or not the inspection was initiated in response to an allegation of imminent danger. Additional inspection activity should take place only after resolution of the imminent danger situation. After the imminent danger situation has been resolved, the Compliance Officer may consider expanding the scope of the inspection, based on the information available during the inspection process.

2. Special Circumstances

Because an imminent danger situation is a special circumstance, its inspection shall take place as expeditiously as possible taking priority over other inspections. The following guidelines will facilitate immediate action:

- a. Walkaround Representatives. The opportunity to accompany the Compliance Officer shall be offered to employer and employee representatives unless the nature of the hazard

makes it impractical to delay inspection before such representatives can reach the area.

- b. Advance Notice. Section 230 of the VOSH *Administrative Regulations Manual* authorizes advance notice of an inspection of an apparent imminent danger situation to enable the employer to eliminate the dangerous condition as quickly as possible, and to remove any exposed employees. If advance notice is given to the employer, it shall also be given to the authorized employee representative.
If the inspection is in response to a complaint, advance notice shall also be given to the complainant unless such a procedure will cause a delay in speeding the elimination of the hazard.
- c. Refusal to Permit Inspection. If a Compliance Officer is refused entry while attempting to investigate an alleged imminent danger complaint, a warrant shall be obtained as quickly as possible.
- d. Preemption Question. If the report of imminent danger involves a potential jurisdictional dispute with another agency, the guidelines given in Chapter 3, Program Planning, shall be followed.

3. **Elimination of the Imminent Danger**

As soon as it is concluded that conditions or practices exist which constitute an imminent danger, the employer shall be advised immediately. The employer shall be requested to notify his employees of the danger and to remove them from the area of imminent danger. The employer should be encouraged to do whatever is possible to eliminate the danger promptly on a voluntary basis. However, § 40.1-49.4.F. of the *Code of Virginia* gives the Commissioner or the Commissioner's authorized representative the authority to seek an injunction from the Circuit Court of the jurisdiction of the employer to restrain any condition or practice which is an imminent danger to employees.

- a. Voluntary Elimination of the Imminent Danger. The employer may voluntarily and permanently eliminate the imminent danger as soon as it is pointed out. In such cases, no imminent danger proceeding shall be instituted and therefore no Notice Of Alleged Imminent Danger shall be completed, although an appropriate citation and notification of penalty shall be issued.
- b. What Constitutes Voluntary Elimination of Imminent Danger. Voluntary elimination of the danger has been accomplished when the employer has removed employees from the danger area; has immediately corrected the dangerous condition, practice, means or method of operation or process to permanently eliminate the dangerous condition; and gives satisfactory assurance that the dangerous condition will remain abated before permitting employees to work in the area.

- c. Anticipated Elimination of Imminent Danger. There may be instances in which the employer will not be able to eliminate the danger permanently as soon as it is pointed out. In such a case, the Compliance Officer shall consider that elimination of the danger will be accomplished when the employer has removed employees from the danger area and has taken immediate corrective action or has taken steps to ensure permanent elimination.

If the employer cannot do this, then he must give an acceptable promise that permanent corrective action will be taken as soon as possible. In addition to this, the employees will not be permitted in the area until the danger is corrected, or they will be permitted only to enter into or to work in the area if they are wearing personal protective equipment (PPE) sufficient to eliminate the danger.

NOTE: Through onsite observations, Compliance Officers shall ensure that any/all representations from the employer that an imminent danger has been abated are accurate.

- d. Action Where Voluntary Elimination Is Accomplished. If the employer agrees and proceeds to eliminate the imminent danger immediately and permanently as outlined above, the Compliance Officer and any other technical support staff present shall advise the employer to the maximum extent possible as to the possible means or methods to eliminate the imminent danger. However, the employer is ultimately responsible for determining the manner in which the hazardous condition is to be eliminated.

(1) Citation and Notice. If elimination of the imminent danger is achieved voluntarily, the Compliance Officer shall make the appropriate notation on the VOSH-1B form. Appropriate citation(s) and notice(s) of proposed penalties shall be issued regarding the hazard.

(2) Informing Employees. The Compliance Officer shall inform affected employees or their authorized representative(s) that, although an imminent danger had existed, the Compliance Officer has determined that such danger no longer exists. They shall also be informed of the steps to be taken by the employer to eliminate the dangerous condition.

(3) No Notice of Alleged Imminent Danger. No Notice of Alleged Imminent Danger shall be prepared, and no imminent danger proceedings instituted when voluntary

elimination of the imminent danger as outlined is accomplished.

- e. Action Where Voluntary Elimination is Anticipated. If the employer agrees to eliminate the imminent danger permanently, the Compliance Officer and any other technical support staff present shall provide as much advice regarding methods to eliminate the imminent danger to the employer as possible. However, as stated previously, the employer is ultimately responsible for determining the manner in which the hazardous condition is to be eliminated.
- (1) VOSH-1B Form. If elimination of the imminent danger is anticipated, the Compliance Officer shall make the appropriate notation on the VOSH-1B Form. Appropriate citation(s) and notice(s) of proposed penalties shall be issued regarding the hazard.
 - (2) VOSH-8 Form. The VOSH-8 Form, or Notice of Alleged Imminent Danger (VOSH-NID), shall be prepared and posted following the procedures set forth.
 - (3) Follow-up Inspection. A follow-up inspection will be done within 24 hours to ensure that the necessary elimination has been accomplished. If the anticipated date of elimination is more than 24 hours after the imminent danger inspection, the Regional Safety or Health Director will set an appropriate time for the follow-up inspection.
 - (4) Failure to Eliminate Danger by the Scheduled Elimination Date. If the elimination has not been accomplished by the scheduled elimination date, the Compliance Officer will contact the Regional Safety or Health Director who will initiate the process to seek an injunction from a court to stop the dangerous condition or activity.
- f. When Voluntary Elimination Is Not Accomplished. If the employer either cannot or does not voluntarily eliminate the hazard as discussed above, the following procedures shall be observed:
- (1) The Compliance Officer shall call the Regional Safety or Health Director and report the following information:
 - (a) Name and address of establishment;
 - (b) Number of employees affected; and
 - (c) Violative condition.
 - (2) The Regional Safety or Health Director shall consult with the Director of the Division of Legal Support.

- (3) The Regional Safety or Health Director and the Division of Legal Support Director shall contact the Assistant Attorney General and the Commissioner who will decide if an injunction is needed from a court to stop the dangerous condition or activity.

NOTE: The Compliance Officer has no authority either to order the closing down of the operation or to direct employees to leave the area of the imminent danger or the workplace.

- (4) When the decision to seek an injunction is made, the Director of the Division of Legal Support and the Assistant Attorney General shall make immediate arrangements with the appropriate Commonwealth's Attorney for the initiation of court action.
- (5) The Compliance Officer shall give first priority in scheduling activities to preparing for litigation in imminent danger matters.

4. Issuing Notice of Alleged Imminent Danger

If the employer does not immediately eliminate the danger in the Compliance Officer's presence, the Compliance Officer shall contact the Regional Safety or Health Director for approval to complete and post the VOSH-NID Form, Notice of Alleged Imminent Danger, as soon as possible. If the Compliance Officer has to leave the site of the inspection or go a significant distance away to make the phone call, he may issue the notice without prior approval. The Compliance Officer shall contact the Regional Safety or Health Director as soon as possible after leaving the site. The Regional Safety or Health Director shall contact the Regional Safety or Health Director to begin the injunction process.

- a. Not a Citation. The Notice of Alleged Imminent Danger does not constitute a citation of alleged violations or a notice of proposed penalty. It is only a notice that an imminent danger is believed to exist and that the Commissioner may be seeking a court order to restrain the employer from permitting employees to work in the area of the danger until it is eliminated.

- (1) The original VOSH-NID Form shall be signed and posted at or near the area in which the exposed employees are working. A copy shall be signed and attached to the inspection report, VOSH-1 Form.
- (2) Where there is not a suitable place for posting the VOSH-NID Form, the employer(s) shall be requested to provide a means for posting.

- (3) If there is reason to believe that the employees may not see the notice, the Compliance Officer shall tell the affected employees of the location of the Notice of Alleged Imminent Danger, after taking adequate precautions not to be exposed to the danger.
- b. Authority of Department. The employer shall be advised that § 40.1-49.4.F. of the *Code of Virginia* gives the Commissioner or the Commissioner's authorized representative the authority to seek an injunction from the Circuit Court of the jurisdiction of the employer to restrain any condition or practice which is an imminent danger to employees.

D. Citations and Assessed Penalties

1. Citations and Penalties

After an imminent danger has been found, appropriate citations and penalties shall be completed following all procedures. All violations discovered during the inspection shall be cited and penalties assessed, if appropriate, whether or not they relate to the imminent danger situation.

2. Effect of Court Action

Without prior clearance from the Regional Safety or Health Director, no citation shall be issued when an injunction is being sought against an imminent danger when court action is being or will be pursued relative to the issuance of an Order and Notice of Immediate Restraint.

E. Follow-up Inspection

1. Court Action

Where a court has issued an injunction in an imminent danger situation, the follow-up inspection shall take place immediately after the court order has been issued to determine if the employer is complying with the terms of the order. (Other guidelines pertaining to follow-up inspections are set forth in Chapter 3, Program Planning.)

2. No Court Action

Where no court proceeding has been initiated because the imminence of the danger has been voluntarily eliminated in accordance with the provisions, above, but permanent correction of the condition has not been achieved at the time of the inspection, appropriate citations shall be issued promptly and a follow-up inspection conducted on the date set for abatement.

3. Immediate Correction

Where the dangerous condition has been permanently corrected at the time of the inspection, the Regional Safety or Health Director shall

determine whether a follow-up inspection is necessary in accordance with the guidelines given in Chapter 3, Program Planning.

4. Removal of Imminent Danger Notice

If a VOSH-NID form has been posted at the worksite in accordance with the procedures, the Compliance Officer shall remove the notice as soon as the imminent danger situation has been eliminated or it has been determined that a temporary restraining order will not be sought.

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CHAPTER 8

RESCUE OPERATIONS, EMERGENCY RESPONSE, AND PUBLIC INFORMATION POLICY

I. Rescue Operations

A. VOSH Program Role in Rescue Operations

1. **No Authority to Direct Rescue Operations**

The VOSH Program has no authority to direct rescue operations. Direction of rescue operations is the responsibility of the employer and/or local political subdivisions or state agencies. The employer shall be encouraged to use the personnel and facilities of local fire and police departments for their specialized knowledge and training in rescue operations.

2. **Monitoring and Inspecting Working Conditions of Rescue Operations**

VOSH may monitor and inspect working conditions of covered employees engaged in rescue operations to ensure compliance with standards that protect rescuers, and to provide technical assistance where appropriate.

3. **Consultation**

VOSH shall be available for consultation to the responsible parties for directing rescue operations on the safest or most effective way to conduct such operations. This information, based on technical knowledge of competent VOSH personnel at the scene, shall be given freely, if requested.

4. **Operations**

If the Compliance Officer is aware that the employer intends to use some rescue procedure that may be in violation of a standard or the general duty clause and the Compliance Officer believes other, less hazardous procedures are more feasible, the employer shall be advised of this belief. The employer shall be advised and encouraged to use the personnel and facilities of local fire and police departments for their specialized knowledge and training in rescue operations.

5. **Application of Standards**

If rescue work is performed by the employer, VOSH standards are applicable. The employer is required to take such steps as are necessary to eliminate, if at all possible, or to minimize recognized hazards likely to cause death or serious physical harm, considering the urgency in a particular rescue operation.

6. Emergency Situations

Emergencies created by fatalities or catastrophes generally necessitate immediate rescue work, firefighting, etc., and any loss of time may increase the number of injuries and/or fatalities. Therefore, when nonstandard equipment; e.g., tractors, bulldozers, etc., without rollover protection, is available for use in an emergency situation, VOSH shall permit its use without citing the employer, rather than cause a delay in emergency operations waiting for equipment which meets VOSH standards. The use of such equipment by private employers shall be limited to the actual emergency situation of fighting fire, rescue work, etc. It should also be noted that the use of such nonstandard equipment in cleanup or reconstruction work (i.e., non-emergency situations), shall warrant the issuance of citations when appropriate.

B. Voluntary Rescue Operations Performed by Employees

VOSH recognizes that employees may choose to place themselves at risk to save the life of another person or persons. The following provides guidance on VOSH citation policy toward employers whose employees perform, or attempt to perform, rescues of individuals in life-threatening danger.

1. Imminent Danger

Citations will not be issued to an employer because of a rescue activity undertaken by an employee of that employer with respect to an individual in imminent danger (i.e., the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated) unless **a. or b. or c. below applies:**

<p>a. Such employee is designated or assigned by the employer to have responsibility to perform or assist in rescue operations, <u>and</u> the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment;</p>
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OR

<p>b. Such employee is directed by the employer to perform rescue activities in the course of carrying out the employee's job duties, <u>and</u> the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment;</p>
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OR

- c. Such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as operations where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water;
and
such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual;
and
the employer has failed to instruct employees not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, not to attempt rescue, and of the hazards of attempting rescue without adequate training or equipment.

2. Citation for Voluntary Actions

If an employer has not provided appropriate training and rescue equipment to its employees in accordance with applicable regulations, a citation will be issued for an employee's voluntary rescue actions, regardless of whether they are successful.

II. Emergency Response

A. No Authority to Direct Emergency Operations

The VOSH Program has no authority to direct emergency operations. However, VOSH policy is to respond as quickly as possible to significant events that may affect the health or safety of employees engaged in emergency operations to ensure compliance with standards, and to provide technical assistance where appropriate.

B. Catastrophic Events

VOSH responds to catastrophic events promptly maintaining a visible but limited role during the initial response phase. It acts as an active and forceful protector of employee safety and health during the response, cleanup, removal, storage, and investigation phases of these incidents, while

C. VOSH Program Role for Emergency Response

1. For inspections of an ongoing emergency response or post-emergency response operation where there has been a catastrophic event, or where VOSH and OSHA are acting under the National Emergency Management Plan (NEMP), the appropriate Program Manager in consultation with the Regional Administrator will determine the overall role that VOSH will play. See CPL 02-02-073, Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases, dated August 27, 2007.

2. During an event that is covered by the NEMP, VOSH has a responsibility and authority to both enforce its regulations and, along with OSHA, provide technical advice and assistance to the federal on-scene coordinator.
3. For details on VOSH's response to occupationally-related incidents involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or potential employee injury that generates widespread media interest. See VOSH Directive 02-020, VOSH Response to Significant Events of Potentially Catastrophic Consequences, dated 15 January 1994 (*or its successor*).

D. Incidents of National Significance

For detailed procedures on how to proceed during incidents of national significance when federal OSHA has been designated as the primary federal agency for the coordination of technical assistance and consultation for emergency response and recovery worker health and safety, and the Assistant Secretary has activated the National Emergency Response Plan, see HSO 01-00-001 National Emergency Management Plan, (*dated December 18, 2003, and the National Response Framework*) (*Worker Safety and Health Support Annex*). *Note: These documents apply when activated.*

III. Public Information Policy

The VOSH public information policy regarding response to fatalities and catastrophes is to explain VOSH's presence and role to the news media. It, (the purpose of the public information policy), is not to provide a continuing flow of facts nor to issue periodic updates on the progress of the investigation.

A. Regional Safety or Health Director

The Regional Safety or Health Director shall refer all inquiries to the designated VOSH Media Contact Person. Where possible, the VOSH Media Contact Person may go to the scene to handle publicity. The investigation is not to be delayed to await the arrival of the VOSH Media Contact Person.

B. VOSH Media Contact Person

The principal role of the VOSH Media Contact Person is to brief reporters there that VOSH has responded and is investigating. If a rescue operation is required, the information officer shall state, "VOSH policy is to cooperate and assist wherever possible, but the direction of such operations will be left to those experienced in such matters."

NOTE: In order to fulfill this role, the Regional Safety or Health Director shall provide information updates periodically to ensure that any information provided by VOSH is correct and up to date. This will also include the signing of settlement agreements.

C. Other Officials

The VOSH Media Contact Person shall inform the news media that the Commissioner of Labor and Industry and other appropriate officials are continually informed of developments.

D. Releasable Information

If a Compliance Officer is faced with media at an investigation, the Inspector should immediately refer the reporter to the VOSH Media Contact person at 804.786.6359 or 804.786.9931. Before advising the Regional Safety or Health Director of the referral, the Compliance Officer should first contact the VOSH Media Contact person to alert them that the media was referred to them, and to provide the VOSH Media Contact person the following information:

1. Compliance Officer's name, cell phone or pager number.
2. Situation – complaint, fatality, catastrophe, etc.
3. Employer's name.
4. The reporter's name and media outlet.

The VOSH Media Contact person will confirm to the media that VOSH is investigating, but details about the accident will have to be provided by another entity, such as the coroner's office or fire department. Information such as the identity of the victims will not be provided by the Department of Labor and Industry. If, for some reason, the Media Contact Person is unreachable and the Compliance Officer must provide the media with initial information, such information shall be limited to:

1. Confirming that VOSH has initiated an investigation, and
2. Providing an explanation of VOSH's role in workplace safety and health, and if necessary, the general or common steps taken in a VOSH investigation including: interviewing management and workers, reviewing documents, training plans, accident prevention plans, etc.

During or following this provision of information, the Compliance Officer should always, again refer the reporter to the VOSH Media Contact person at some point during the initial contact because the VOSH Media Contact person will track the investigation and provide the media with the final report.

IV. Virginia Freedom of Information Act (FOIA) Issues**A. General Policy for Releasing Information**

In general, records from files that are part of an active Department inspection or investigation will not be released until the inspection or investigation is resolved.

However, as required by "Virginia Freedom of Information Act," Virginia Code §2.2-3700, et seq., any public records in our possession at the time of the request may be subject to being inspected by or disclosed to members of the

public. In such circumstances, all identifiable exempted/privileged information will be removed in accordance with applicable laws and regulations prior to releasing the information (see *Va. Freedom of Information Act; Government Data Collection and Dissemination Practices Act; Virginia Code §40.1-11; and 16 VAC 25-60-90 of the VOSH Administrative Regulations Manual*).

Requests for public records or questions regarding obtaining records from the Department of Labor and Industry should be sent to:

Virginia Department of Labor and Industry
Division of Legal Support - Attn: FOIA Request
Main Street Centre
600 East Main Street, Suite 207
Richmond, VA 23219-2430

Telephone: 804.786.9933
Fax: 804.786.8418
E-mail: FOIACoordinator@doli.virginia.gov

In addition, the Freedom of Information Advisory Council is available to answer questions about FOIA. The Council may be contacted by e-mail at foiacouncil@leg.state.va.us, or by phone at 804.225.3056 or toll free at 1.866.448.4100.

B. Procedures Regarding FOIA Requests

1. FOIA requests need not be in writing, and do not have to mention the FOI Act to qualify as an FOIA request.
2. A "Public Record" is defined as:

"all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business."
3. Within five working days of receiving a request, VOSH must provide the requested records to the requester or make one of the following responses in writing:
 - a. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with this chapter. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

- b. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.
 - c. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.
 - d. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.
4. VOSH may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, VOSH will make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

C. Reasonable Charges

VOSH is allowed under the FOIA law to make reasonable charges up to, but not to exceed, its actual costs incurred in searching, accessing, duplicating, supplying and/or otherwise providing the requested records or information.

D. Other Legal Authority

1. Code of Virginia - Title 40.1

In regard to using or revealing information gathered, Section 40.1-11 of the *Code of Virginia* states that: "Neither the Commissioner nor any employee of the Department shall make use of or reveal any information or statistics gathered from any person, company or corporation for any purposes other than those of this title."

2. VOSH Administrative Regulations Manual

Under Section 90 of the VOSH ARM, (16VAC25-60-90), Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas:

- a. Pursuant to the Virginia Freedom of Information Act (FOIA) and with the exceptions stated in subsections B through H of this section, employers, employees and their representatives shall have access to information gathered in the course of an inspection.
- b. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to §40.1-49.8 of the *Code of Virginia* shall not be disclosed for any purpose, except to the individual giving the statement.
- c. All file documents contained in case files which are under investigation, and where a citation has not been issued, are not disclosable until such time as:
 1. The decision has been made not to issue citations; or,
 2. Six months has lapsed following the occurrence of an alleged violation.
- d. Issued citations, orders of abatement and proposed penalties are public documents and are releasable upon a written request. All other file documents in cases where a citation has been issued are not disclosable until the case is a final order of the commissioner or the court; except that once a copy of file documents in a contested case has been provided to legal counsel for the employer in response to a request for discovery, or to a third party in response to a subpoena duces tecum, such documents shall be releasable upon a written request, subject to the exclusions in this regulation and the Virginia Freedom of Information Act.

Information required to be kept confidential by law shall not be disclosed by the commissioner or by any employee of the Department. In particular, the following specific information is deemed to be non-disclosable:

1. The identity of and statements of an employee or employee representative who has complained of hazardous conditions to the commissioner;
2. The identities of employers, owners, operators, agents or employees interviewed during inspections and their interview statements;

3. Employee medical and personnel records obtained during VOSH inspections. Such records may be released to the employee or his duly authorized representative upon a written, and endorsed request; and,
 4. Employer trade secrets, commercial, and financial data.
- e. The commissioner may decline to disclose a document that is excluded from the disclosure requirements of the Virginia FOIA, particularly documents and evidence related to criminal investigations, writings protected by the attorney-client privilege, documents compiled for use in litigation, and personnel records.
 - f. An effective program of investigation and conciliation of complaints of discrimination requires confidentiality. Accordingly, disclosure of records of such complaints, investigations, and conciliations will be presumed to not serve the purposes of Title 40.1 of the *Code of Virginia*, except for statistical and other general information that does not reveal the identities of particular employers or employees.
 - g. All information gathered through participation in Consultation Services or Training Programs of the Department shall be withheld from disclosure except for statistical data which does not identify individual employers.
 - h. The commissioner, in response to a subpoena, order, or other demand of a court or other authority in connection with a proceeding to which the Department is not a party, shall not disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the approval of the Commissioner of Labor and Industry.
 - i. The commissioner shall disclose information and statistics gathered pursuant to the enforcement of Virginia's occupational safety and health laws, standards, and regulations where it has been determined that such a disclosure will serve to promote the safety, health, and welfare of employees. Any person requesting disclosure of such information and statistics should include in his written request any information that will aid the commissioner in this determination."

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CHAPTER 9

CASE FILE DOCUMENTATION

I. Case File Documentation

A. Guidelines/ File Set-up

Detailed, complete and accurate case files are essential to effective enforcement of VOSH laws, standards, and regulations. Uniform case file and procedures assure that the establishment, content, organization and processing of all VOSH Enforcement files are consistent across all regions and that all violations are properly documented. All necessary information relative to violations shall be obtained during the inspection, using means deemed appropriate by the Compliance Officer (i.e., notes, audio/videotapes, photographs, and employer records). The following case files procedures shall be followed by all VOSH enforcement and administrative staff.

1. Types of Files

All safety and health inspections and investigations conducted as a result of a programmed inspection, referral, complaint, accident, or fatality will be properly and completely documented and filed in the prescribed manner.

2. Location of Files

Official case files containing all original documents including any follow-up and failure to abate inspection results (with the exception of original IMIS data entry forms) will be filed and maintained in the appropriate field office.

When a case file is forwarded to the Regional or Central Office for significant case or other review, the “official,” or original, case file will be forwarded for review. When forwarding by mail, the case file will be sent in a separate package via the specific professional courier/parcel service **used by the Department**. The date the file was sent will be logged for tracing purposes in case of delivery service loss or error.

3. Case File Folder Usage and Supply Maintenance

All VOSH non-significant case files will be filed in letter-sized case file folders. All documents will be affixed to the folder with standard fasteners. All significant case files shall be filed in four-part folders. The office services supervisor in each region is responsible for assuring that a sufficient supply of letter-sized and four-part folders are provided to each office in that region.

4. Filing Responsibilities

The office services supervisor in each region shall assign a primary clerical person to set up and maintain all established VOSH Enforcement case files in each field office. The assigned clerical staff will type labels, type documents, file and maintain all case files in assigned file cabinets in accordance with these procedures.

The Compliance Officer is responsible for each case file generation and set up and will assure the accuracy and completeness of the documents; and will establish the file and label, tab, and affix the documents in accordance with these procedures.

5. Labeling of Files

All case files will have a tab to which a label will be affixed. All labels shall be typed, and shall contain the following information:

EMPLOYER/COMPANY NAME (*typed as filed in all CAPS*)

INSPECTION NUMBER - CSHO/ID NUMBER

LOCATION (*City/County*)

The inspection date for the purpose of labeling files will be one of the following:

- a. “No Inspection” case - the date the case was closed;
- b. “In Compliance” case (no citations issued) - the date the case was closed;
- c. “Cases where Citations were Issued”- the citation issuance date; or
- d. “Non-formal Complaints Handled by Letter” - the date the complaint was closed. *This date may be handwritten on the label at the time the case is closed.*

Color-coded labels may be used to denote different calendar years. This will assist the clerical staff when purging the files as per this Chapter.

6. Filing Sequence

All case files will be filed in alphabetical order, by employer/company name.

7. Completion of Establishment Name

Proper format of the establishment name, in compliance with OMDS guidelines, is important to ensure that citations and other legal documents reference the correct establishment and also to ensure the proper establishment history linkages.

If an inspection is scheduled for a site and **no establishment name** can be given because the site is not found, work has not started, work has been finished, etc, enter “UNKNOWN” in establishment name to indicate no establishment name is available.

Enter the legal name of the establishment, if known. For a sole proprietorship, or a partnership, this is the trading name of the establishment. For a corporation, **enter the name of the corporation UNLESS a subsidiary of the corporation controls** the establishment inspected. In that case, enter the name of the subsidiary.

If an employer is **doing business under a name other than the legal name** of the establishment, both names may be entered, using the “**d.b.a.**” (doing business as) or “**aka**” (also known as) acronym. Enter the legal name FIRST, for example:

Pioneer Steel, **d.b.a.** Jackson Steel Works.

If abbreviations are part of the legal name, **use the legal abbreviations**. If abbreviations are necessary because the name would otherwise be longer than 50 characters, abbreviate words at the end of the name. Where a state name is part of a company name, either abbreviate all the time using the U.S. Postal Service alphabetic abbreviation or never abbreviate it. Be consistent.

For names that include an individual’s first name or initials, the first name or initials should precede the last name. For **multiple inspections** at an establishment, where the cases are concurrently open, include the inspection number after the name.

CORRECT

E W Barnes Masonry

Joe Jones Construction

J C Penney Co Inc

J R Johnson Inc #123450001

J R Johnson Inc #123450002

INCORRECT

Barnes EW Masonry

Jones Joe Construction

Penney J C Co Inc

Case File 1: Johnson J R Inc

Johnson Inc, Case File 2

If “**The**” is the first word in a company name, put it first, do not omit it or put it at the end:

CORRECT

INCORRECT

The General Store

General Store

The Only Tire Store

Only Tire Store, The

For **local jurisdictions** and all other non-state agencies, the jurisdictional name should precede the specific “Office of” or “Dept. of”. For **state agencies**, the name (or acronym or abbreviation if it is in common usage) should precede the geographic location followed by the inspection number.

CORRECT

INCORRECT

City of Norfolk, Dept. of Sanitation,

Norfolk, Sanitation,
City of, Department of

VA, Dept. of Ag., Danville # 987654321

Danville, Dept. of
Agriculture, State,

VDOT, Franklin Co., # 123456789

VA. Dept. of Health, Franklin City,
000123456

Corporate tracking is essential for establishment history linkage of the company or division. Where an activity pertains to a particular division or section of a company and that fact is to be reflected on the form, but the establishment linkage is to be maintained on the whole establishment, put the company name first , followed by the division:

CORRECT

INCORRECT

St Regis Paper Co Kraft Div

Kraft Div - St Regis Paper Co

St Regis Paper Co Paper Mill

Paper Mill - St Regis Paper Co

Where a **subsidiary is inspected** and the name of the parent company is to be reflected on the form, but the establishment linkage is to be maintained on the corporate subsidiary level, put the subsidiary name first, followed by the parent corporation name:

CORRECT

Buffalo Tank Div of Bethlehem Steel

(This links “Buffalo Tank Division”)

Maxwell House Division of General Foods

(This links “Maxwell House Division”)

INCORRECT

Bethlehem Steel Buffalo Tank Div

General Foods - Maxwell House Division

Place **punctuation** (apostrophes, hyphens, etc. where they belong in the name. Use an ampersand (&) not the word “and” where applicable.

CORRECT

Jenkins & Sons

INCORRECT

Jenkins and Sons

When **numbers are a part of an establishment name**, write them the way the trading name of the establishment is written. If the trading name uses numerals, don’t spell out the number. In the case of **store numbers** use numerals preceded by a pound sign (#) to indicate a particular store.

CORRECT

4 H Steel Products Co

A 1 Used Cars

5000 Club

Great Atlantic & Pacific Tea Co # 102

INCORRECT

Four H Steel Products Co

A One Used Cars

Five Thousand Club

Great Atlantic & Pacific Tea Co No. 102

8. Completion of Site Address

The site address specifies the location where the inspection was conducted. It **may** also be the mailing address of the establishment. The site address consists of street address, city name, state, abbreviation and zip code. It cannot be a post office box (P.O. Box). If no street address can be determined, but a commonly recognized project name will locate the site, the project name may be entered.

If more than one set of numbers is applicable put the street address first:

3811 Peachtree Street, Suite 120

123 Merritt Parkway, Box 24*

** Note that in this example above the box number is part of the mailing address. It is not a post office box.*

Numbered Streets may be spelled out or written with numbers

3815 First Street **OR** 291 16th Street

Numbered Highways should be written with numbers.

Hwy 41 North **OR** Interstate 95

9. Segregation and Layout of Files

All “Closed” safety and health case files will be filed together according to the parameters of this chapter in a separate location from “Open” files. There will be no grouping, arrangement, or segregation of closed files by Safety, Health, Compliance Officer, or any other criterion.

All “Open” case files, both significant and non-significant cases, will be filed together. All “Open” inspection case files, regardless of how they originated, (general inspection, referral, complaint, accident/fatality) will be filed together. There will be no grouping, arrangement, or segregation of closed files by Safety, Health, Compliance Officer, or any other criterion.

VOSH Enforcement files will be filed in the same manner throughout all regions of the State.

10. Records Retention

All VOSH enforcement case files shall be retained for three calendar years after the year in which the case is closed.

All administrative correspondence and data files shall be retained for three calendar years after created. Complaint files shall be retained for three calendar years after the complaint file is closed.

All cases with written-off penalties shall be forwarded to the Agency Accounts Receivable Coordinator three calendar years after final action other, than penalty collection, is completed.

Files shall be purged and destroyed on an annual basis by burning, shredding or pulping.

Records disposition concerning retention, purging and destruction shall be the responsibility of the office services supervisor and shall be in accordance with the Agency Policy Statement as promulgated by the Agency Records Manager.

11. **Case File Development**

Upon initiation of an investigation, the working case file will be immediately established.

A **case diary log** will be maintained **for all investigations**. It shall record a concise, chronological account of all actions taken from the beginning of the investigation to the closing of the case. It will include, but not be limited to, all material contacts with the inspected company, the date, person contacted, and synopsis of the topic discussed or a reference to an exhibit elsewhere in the case file especially where it supports findings in the narrative. This log will be maintained on the appropriate VOSH form and will be used to prepare the narrative and other related documents.

As **evidence and documentation** are gathered in support of investigative findings; these items will be tabbed, referenced in the case diary log, and filed in the case file folder. Required forms such as the VOSH-1, IW-1/EMPLOYER INTERVIEW SHEET, Sampling Forms, etc. will be included as they are completed.

The **narrative** will be written upon completion of the investigation sufficient documentation has been gathered to finalize findings and conclusion. Once the narrative is written, the case file folder will be officially organized with all documents properly affixed in the prescribed order. The case diary log and narrative must be complete but may be handwritten legibly if the case is not significant.

Significant cases (or cases which become significant during the supervisory review), will be filed in a properly labeled **four-part folder**.

12. **Specifics of Case File Documentation**

The case file shall consist of all required IMIS forms, checklists, case diary log, narrative, citations, penalty assessment documents, court documents and all evidence and documentation gathered during the investigation in support of the findings and conclusions.

Documentation and collection/preservation of evidence is critical for all inspections/investigations. Every finding or fact must be supported by documentation. This documentation is vital to the defense of any actions taken by the Commissioner as a result of the Compliance Officer's findings. "Documentation" includes an inspector's first hand observation as an eyewitness at the inspected site.

The nature and type of evidence/documentation needed varies with each case. Those reviewing the case file will want to picture exactly what the Compliance Officer saw and did at the time of the

inspections/investigation. Therefore, documented evidence must be contained in the **case** file to allow the reviewer (whether it is the Regional Safety or Health Director, Commissioner, Commonwealth's Attorney, or Judge) to be aware of the situation that existed at the time of the Compliance Officer's inspection.

AT A MINIMUM, **CASE FILES WILL ANSWER THE QUESTIONS: Who, What, When, Where, Why and How.**

If VOSH violations are determined and citations are issued, the case file must contain evidence that:

- a. A standard, regulation, or statute applies to the hazard in question;
- b. The employer has violated the standard, statute or regulation in question;
- c. The employer has actual or constructive knowledge of the violative condition;
- d. An employee of the employer is exposed to the violative condition. Each cited standard is applicable to the employer.

The following represents examples of the types of documentation/evidence needed, if available and germane to the case:

- names, addresses, telephone numbers of all witnesses
- witness statements
- employee statements
- employer statements
- company investigative reports
- photographs
- sketches, diagrams of accident scene
- measurements
- sampling/test results
- medical reports
- autopsy reports
- police reports
- EMT reports
- involved personnel job descriptions
- personnel training records
- employer training or safety manuals
- pertinent management policies and procedures
- equipment specifications, identification numbers
- equipment parts
- equipment maintenance records or operating log

- equipment purchase or repair records
- manufacturer's operator manuals for machinery, vehicles, tools, materials and equipment
- checklists, worksheets completed by the Compliance Officer
- applicable standards.

Certain evidence must be properly protected once collected to ensure that it is not damaged, altered, or lost. Proper tagging must be done; “**chain of custody**” procedures must be followed. *This is especially important with certain physical evidence such as samples or damaged machine parts or safety equipment.*

Employee complaints and signed statements are confidential and will be withheld from disclosure. Because of this, it is absolutely necessary that employee statements are limited to actual statements.

If the employee has nothing relevant to the subject matter to add, then the information should be incorporated into the narrative but not set aside on a signed witness statement.

As documents are gathered, they should be tagged, referenced in the diary log and filed. If evidence collected does not “fit” in the case file—such as a broken part, it should be kept in a separate, properly tagged and labeled container and referenced or described in the file.

13. Content, Order and Organization - Significant Cases

- a. The case file for significant cases will contain six (6) sections: Those sections will contain the following:

SECTION 1 - Case diary log; narrative; and citations

SECTION 2 - Exhibits (grouped and tabbed)

SECTION 3 - Post citation documents and correspondence

SECTION 4 - All legal/court documents

SECTION 5 - Freedom of Information documents

SECTION 6 - Other exhibits and documents

b. The following describes in detail the content and order of each section:

(1) SECTION 1 of the file folder will contain in order:

- (a) Diary Log;
- (b) Narrative;
- (c) Justification for willful citation(s) (if applicable);
- (d) Citation(s) in draft form.

(2) SECTION 2 of the file folder will contain the following documents, in order:

- (a) Case review sheet;
- (b) Routing sheet;
- (c) List of exhibits (*lists in order all documents in Section 2*);
- (d) Behind the list of exhibits, also in Section 2 of the file, the exhibits will be grouped and filed in the following order. These groupings shall be tabbed. Individual documents will be numbered in the bottom right hand corner of the page and referenced by tab number in the case diary log, when used, and also by the narrative report. For example, interview statements would be numbered 1a, 1b, 1c, etc.

- 1 Interview Statements;
- 2 VOSH-1B Forms with Pictures;
- 3 Sketches, Diagrams, etc.;
- 4 Medical/Police reports;
- 5 VOSH Forms;
- 6 Pre-Citation Correspondence;
- 7 Inspection History;
- 8 Inspector notes
- 9 Photos/Videos/CDs/DVDs

(3) SECTION 3 of the file folder will contain all post-citation forms, documents, and correspondence associated with the citation and the penalty assessment. The most recent documents will be filed on top; all will be filed chronologically. All mailing certification cards will be filed with the appropriate letter.

The following documents shall be filed in SECTION 3:

- (a) Post-Citation Forms, etc.;
 - (b) Penalty Payment Report;
 - (c) Failure to Abate;
 - (d) Amended Citations;
 - (e) Settlement Agreement;
 - (f) Abatement Letters;
 - (g) Notification to Commonwealth's Atty. of Contest;
 - (h) Notice of Contest;
 - (i) Informal Conference Report;
 - (j) Informal Conference Notice.
- (4) SECTION 4 of the file folder will contain all documents associated with civil or criminal court action. The most recent documents will be filed on top; all will be filed chronologically.

The following documents will be filed in SECTION 4 when applicable:

- (a) Summons
 - (b) Subpoena
 - (c) Final Order
 - (d) Other Contest Documents
- (5) SECTION 5 of the file folder will contain all documents and correspondence related to Freedom of Information Requests.
- (6) SECTION 6 of the file folder will contain documents, exhibits or other correspondence related to the case and not filed in other sections of the file folder the following documents will be filed in section 6, when applicable:
- (a) Company Policies, Procedures, Equipment Manuals, Equipment Specifications, Contracts, etc.
 - (b) All other material (letters, etc.) related to the case and not filed in other sections.

All significant cases will be filed in four-part file folders with the exhibits in Section 2 tabbed using prepared legal file dividers.

Non-significant cases will be filed in letter sized file folders with Sections 1, 3 and 5 attached to the left side of the folder, and Sections 2, 4 and 6 filed on the right side.

- (c) For non-significant cases, Section 1 will be on the left side of the folder. Section 2 will be on the right side of the folder.

B. Guidelines/Filling Out Forms

1. Record All Facts - Documentation of Safety and Health Violations

To establish the existence of a VOSH violation, a CSHO must document four elements during an investigation. These elements are:

- a. A standard, regulation, or statute applies to the hazard in question;
- b. The employer has violated the standard, statute, or regulation in question;
- c. The employer has actual knowledge or should have known of the violative condition;
- d. An employee of the cited employer is exposed to the violative condition.

Once the existence of an apparent violation is established, record all facts pertinent to an apparent violation on the VOSH-1B or VOSH-1B(IH) compliance worksheets which are specifically designed to document each of the above four elements. The apparent violations shall be brought to the attention of the employer and employee representatives at the time they are documented.

- a. All notes, observations, analyses, and other information shall be either be recorded on the worksheet or attached to it.
 - (1) Because this document is required for each instance of an alleged violation, the CSHO shall use one worksheet to describe each instance as it is noted.
 - (2) If identical violations of the same standard or of several related standards are noted in one general location in the establishment and if the documentation is essentially the same, all of those violations may be treated as a single instance description and only one worksheet need be completed for that instance.
 - (3) Photographs, videotape, sketches, and descriptions that are attached to the compliance worksheet are part of the inspection record and shall be noted on the form. The original field notes, as basic documentation of the violation, shall be attached to the worksheet and retained in the case file.

- b. The CSHO shall provide as much detailed information as practical to establish the specific characteristics of each violation as follows:
- (1) Describe the observed hazardous conditions or practices to which employees have been exposed (i.e., the facts which constitute the hazardous condition, operation or practice and the essential facts as to how or why a standard is allegedly violated). Description of the type of accident which the violated standard was designed to prevent in this situation, or note the name and exposure level of any contaminant or harmful physical agent to which employees are, have been, or could be exposed. If more than one type of accident or exposure could reasonably be predicted to occur, describe the one which would result in the most serious injury or illness. The description of the type of accident shall include:
 - (a) Severity of Hazard. All factors about the violative condition which could significantly affect the nature and severity of the resulting injuries (e.g., “fall of 20 feet onto protruding rebar”; or “fall into water-filled excavation”).
 - (b) Probability of Injury or Illness. Other factors playing a role in the probability that an injury could occur, such as:
 - Proximity of the workers to the point of danger of the operation.
 - Stress-producing characteristics of the operation (e.g., speed, heat, repetitiveness, noise, position of employee).
 - (c) Identification Information. The identification of the equipment and process which pose the hazards, *i.e., serial numbers, equipment types, trade names, manufacturers, etc.* Include a sketch, when appropriate.
 - (d) Location of Hazard. The specific location of the violation; e.g.:
 - Building # 3, second floor, column # 6.
 - Machine Shop, NE corner, Department 12.
 - Foundry, NW corner, in the stakeout area.

- (e) Injury or Illness That Could Result From the Hazard. State the nature of the more serious types of injury or illness which it is reasonably predictable and could result from the accident or health exposure.
- Thus, the entry for the “fall from 20 feet (6 meters) onto protruding rebar” might read: “death from multiple lacerations, puncture wounds and crushing injuries.” For exposure to asbestos, the entry might read “asbestosis, cancer, and death.”
 - Broad categories of injuries and health effects (such as “electric shock,” “burns,” or “lacerations”) shall be qualified to indicate whether the injuries or health effects are major or minor.
 - In identifying the illnesses which a standard regulating exposure to an air contaminant or harmful physical agent is designed to prevent in a particular worksite, it may be necessary to consider not only the level of exposure but also the frequency and duration of exposure to the contaminant or agent.
- (f) Probability and Severity Factors. Evaluate the probability of the injury and explain the selection of probability and severity factors.
- (g) Measurements and Sampling. Any specific measurements taken during the inspection (e.g., “20 ft. (6 meters) distance from top of scaffold platform to ground level,” or “employee seated 2 ft. (60cm) from source of metal fumes”) which will further document the nature of the hazardous conditions and operations.
- Describe how measurements were taken during the inspection.
 - Identify the measuring techniques and equipment used and those who were present; i.e., employee or employer representative who observed the measurements being taken.
 - Include calibration dates and description of calibration procedures used, if applicable.

(h) Employee Exposure. Exposure facts so as to present a picture of employee exposure to the hazard for each particular occupation, including:

- 1 The occupation and the employer of the exposed employees.
- 2 The number of exposed employees in that occupation.
- 3 The length of time (*duration*) that the alleged violation has existed (e.g., no guard rails in place for 1 month).
- 4 The frequency that the employees are exposed, (e.g., 2 hrs./day).
- 5 For contaminants and physical agents, any additional facts which clarify the nature of employee exposure.
- 6 The name, address (*with zip code*) and telephone number of at least one exposed employee in each (occupations). If photographs were not taken, signed and dated witness statements documenting the employee's exposure to the cited hazard shall be obtained.

NOTE: If the employees are unwilling to sign the witness statement request them to listen while you read it back to them, and ask them if the statement is accurate. Make any changes to assure accuracy, and then make a note that they refused to sign but indicated that the statement was accurate.

EXAMPLE: A radial arm saw has been on a construction site for 3 months and has never been guarded during that time. All of the employer's 14 carpenters on the job used the saw. One of the carpenters is John Doe. Total use of the saw on a daily basis is approximately 4 hours.

Answer: Duration = 3 months
Frequency = 4 hours / day

- (i) Employer Knowledge. Any facts which establish that the employer knew of the hazardous condition or could have known of that condition with the exercise of reasonable diligence. Enter any facts which show that:

- 1 **The employer actually knew** of the hazardous condition which constitutes the violation. In this regard, a supervisor's supervisory knowledge amounts to employer knowledge. The CSHO shall obtain signed and dated witness statements from supervisory personnel to document employer knowledge of employee exposure to the hazard.

NOTE: Every effort should be made to document actual employer knowledge of the hazard because a court of law may be reluctant to find employer knowledge from only a showing of reasonable diligence by VOSH.

- 2 **The employer could have known** of the hazardous condition if all reasonable steps had been taken to identify hazards to which employees may have been exposed. As a general rule, the CSHO can presume that the employer could have discovered the condition through the exercise of reasonable diligence. *Using reasonable diligence to show employer knowledge should be a last resort.* Obtaining statements from supervisory personnel is the preferred method of documenting employer knowledge.

NOTE: If the CSHO has reason to believe that the violation may be a willful violation, facts shall be included to show that the employer knew that, by law, he had to do something to abate the hazard (e.g., the employer was previously cited for some condition; a CSHO had already told the employer about the requirement; knowledge of the requirement was brought to the employer's attention by an employee safety committee, etc.). Facts shall be included showing that, even if

there was no conscious violation of the law, the employer was aware that the condition existed and made no reasonable effort to eliminate it.

3 Any facts or employer statements which show the **employer had knowledge of the standard** or regulation shall also be documented.

(j) Any pertinent employer or employee remarks made during the walkaround or the closing conference, especially comments directly related to the instance described shall be documented.

1 Employer or supervisory personnel comments which may be characterized as admissions of the specific violations described are to be included.

NOTE: Every attempt should be made to document such comments through witness statements, signed and dated by the employer/supervisor.

2 Any other facts which may assist in evaluating the situation or in reconstructing the total picture in preparation for testimony in possible legal actions shall be included.

3 Any additional comments (*by the CSHO*), particularly any explanation of abatement dates when necessary shall be included (*e.g., when longer than five (5) days for a serious violation or when an abatement period exceeding 30 days is recommended for an item*).

(2) If an employee exposure to either to safety or health hazards is not observed facts on which the determination is made that an employee has been or could be exposed must be stated. To document past exposure, a signed and dated employee or employer/supervisor witness statement shall be obtained which documents the exposure.

(3) Where applicable, what the employer could have or should have done to be in compliance shall be stated.

- (4) When violations are grouped, the reason for grouping is to be described.
 - (5) When a specific type of hazard exposure is caused by the combination of violations, sufficient detail should be used to describe it.
 - (6) If the exposing employer neither created nor controlled the violative condition, the name and relationship of the responsible party shall be stated; e.g., prime contractor, electrical subcontractor, building owner or equipment lessor. Any steps taken by the exposing employer to correct the condition are to be described.
- c. Health Inspections. There are special documentation requirements for health inspections. During such inspections, the CSHO shall:
- (1) Relevant Information. All relevant information must be recorded concerning potential exposure to chemical substances or physical hazards such as symptomatology, duration and frequency of the hazard, pertinent employee comments, sources of potential health hazards, locations of employees pertinent to the inspection, types of engineering controls, use of personal protective devices including respirators, ear and eye protection, clothing, etc. Material Safety Data Sheets where available and relevant must be collected.
 - (2) Employee activities. Employee activities throughout the establishment should be observed, concentrating particularly on potentially hazardous areas, and
 - (a) Numbers of employees shall be estimated at each operation to be evaluated, indicating whether they are engaged in stationary or transient activities.
 - (b) Employees shall be interviewed.
 - (c) Supervisory personnel shall be interviewed.
 - (d) The duration and frequency of cyclic work processes shall be recorded, describing potential exposures during each phase of the cycle.
 - (3) Information shall be requested and evaluated on the following aspects of the employer's occupational safety and health program Findings shall be discussed in detail at the closing conference.

- (a) Monitoring. The employer's program for monitoring safety and health hazards in the establishment should include a program for self-inspection. The CSHO shall discuss the employer's maintenance schedules and inspection records. Additional information shall be obtained concerning employer activities, such as sampling and calibration procedures, ventilation measurements, preventive maintenance programs for engineering controls, laboratory services, use of industrial hygienists, and accredited laboratories. Compliance with monitoring requirements of any applicable standard shall be determined.
- (b) Medical. The CSHO shall determine whether the employer provides the employees with pre-placement and periodic medical examinations
- (c) Recordkeeping. The CSHO shall determine the extent of the employer's recordkeeping program. This is not to be limited to VOSH-required records, but shall be extended to information falling within the scope of the inspection such as:
- 1 If records pertaining to employee exposure and medical records are being preserved in accordance with § 1910.20, and
 - 2 Where a specific standard has provisions for employee access to the records, whether the results of environmental measurements and medical examinations are accessible to the affected employees.
- (d) Compliance. The employer's compliance program may include engineering, work practice and administrative controls and the use of personal protective equipment. The CSHO shall identify as follows:
- 1 Engineering Controls Pertinent engineering controls consist of substitution, isolation, ventilation and equipment modification.

- 2 Work Practice & Administrative Controls. Such control techniques include personal hygiene, housekeeping practices and rotation of employees.

 - a There should be a program of employee training and education to utilize work practice controls effectively. Where pertinent, the CSHO shall obtain a detailed description of such controls.
 - b The CSHO shall evaluate the overall effect of such practices and programs, considering the employees' knowledge of their exposure.
 - c Rotation of employees as an administrative control requires employer knowledge of the extent and duration of exposure.

- 3 Personal Protective Equipment. An effective personal protective equipment program should exist in the plant. A detailed evaluation of the program shall be made to determine compliance with the specific standards which require the use of protective equipment (e.g., §§ 1910.95, 1910.132, 1910.134).

- (e) Regulated Areas. The CSHO shall investigate compliance with the requirements for regulated areas as specified by certain standards.

 - 1 Regulated areas must be clearly identified and known to all appropriate employees.
 - 2 The regulated area designations must be maintained according to the prescribed criteria of the applicable standard.

- (f) Emergency Procedures. The CSHO shall evaluate the employer's emergency program.

 - 1 When standards provide that specific emergency procedures be developed where certain hazardous substances are handled, for example, § 1910.120, the evaluation shall determine if:

a Potential emergency conditions are included in the written plan;

b Emergency conditions have been explained to employees;

c There is a training scheme for the protection of affected employees including use and maintenance of personal protective equipment.

2 Where hazardous substances are handled for which there are no standards requiring emergency procedures, the CSHO shall, nevertheless, determine whether such procedures have been established.

2. **Collecting Samples**

The CSHO shall determine as soon as possible after the start of the inspection whether sampling is required by utilizing the information collected during the walkaround and from the pre-inspection review.

a. Sampling Strategy

(1) If sampling is necessary, a sampling strategy shall be developed by considering potential chemical and physical hazards, number of samples to be taken, and the operations and locations to be sampled.

(2) There shall be no undue delay between development of the sampling strategy and the actual sampling or between receipt of the results of spot or screen sampling and full-shift sampling, when the results indicate it is necessary.

b. Sampling on Non-Standard Work Schedules

When work schedules other than the usual 8-hour day are encountered (e.g., four 10-hour days per week), the following procedures shall be used when the standard itself does not cover such exposures:

(1) Sampling for 8-hour exposure levels shall be performed as usual; separate sampling shall be conducted to determine any additional exposure beyond the 8 hours.

(2) The results from the 8-hour sampling shall be compared to the Permissible Exposure Level (PEL) to determine whether an overexposure exists.

- (3) If it appears that the 8-hour exposure limits do not provide adequate protection from health hazards when longer workday schedules are used, the CSHO shall notify the Regional Safety or Health Director. In such cases, Regional Safety or Health Director shall contact the Health Program Director for assistance in determining appropriate sampling procedures and in evaluating the resulting data.
 - (4) No citation shall be issued for exposures over 8 hours when the 8-hour exposure level is below the PEL without explicit approval of the Regional Safety or Health Director.
- c. After first consulting with the Regional Health Director, summaries of sampling results shall be provided as soon as possible upon request from any of the following:
- the employer,
 - the employee representative, or
 - the employees exposed, likely to have been exposed, or likely to be exposed to the hazard.

3. Case File Narrative - Non-Significant Cases

The ability to communicate accurate and complete information in writing is one of the single most important tools that the Compliance Officer uses. Conducting a thorough investigation by utilizing good interview techniques, gathering all pertinent facts and data, and properly analyzing the data is only as good as the Compliance Officer's ability to relate that information to others in writing.

The report and case file will be used by many others in making final decisions regarding the case. A clear and complete report will pass through the chain of command swiftly since valuable time will not be wasted attempting to find answers to questions not answered in the written report. It is also important to remember that in the event of litigation, all written materials related to the written report and case file are "discoverable" and must be provided to the employer's attorney or any interested party to the case. Failure to include only factual and documented evidence in the file could result in loss of the court case.

Finally, the case may be the subject of an FOIA request to public disclosure.

4. Preparation

During the Inspection/ Investigation, the Compliance Officer is continuously gathering evidence and documents that will be incorporated in the case file, including:

- a. Photographs
- b. Sketches/diagrams of accident scene
- c. Witness statements
- d. Employee statements
- e. Autopsy reports
- f. Sampling/test results
- g. Involved personnel job descriptions
- h. Employer training or safety manual
- i. Pertinent management policies and procedures
- j. Equipment specifications
- k. Equipment purchase, repair or maintenance records
- l. Checklists/worksheets completed by Compliance Officer
- m. Other pertinent documents.

(Refer to Chapter 5, Inspection Procedures).

As this documentation is collected, it should be assembled for easy access and future use. The case diary log will provide a concise and chronological account of all contacts and actions taken from the beginning to the end of the Inspection/ Investigation.

Prior to writing the narrative, the Compliance Officer should review all the documents and evidence gathered to ensure that there are no “holes” or unanswered questions concerning the findings and conclusions of the investigation, or any material aspect of it.

The written narrative report is then prepared to present a brief written summary of the purpose of the inspection and case findings. As such, it should contain complete thoughts and complete descriptions of events.

When writing the report, the Compliance Officer should assume that the reader knows absolutely nothing about the incident, the people involved, or the investigation.

5. Content and Style of Narrative

The written narrative report is not an essay. Only relevant, pertinent and essential information should be included in the narrative report. A non-significant case narrative, with the exception of an accident which may call for more detail than a normal case, should be concise and brief.

The narrative will not duplicate the detailed information contained in witness statements or other auxiliary reports, but will serve to summarize the pertinent findings from these documents. The narrative will be:

FACTUAL - documented, true information; not opinion;

ACCURATE - exact and correct;

LOGICAL - sensible, chronological and in sequential order;

CLEAR - easy to understand; no jargon or slang;

CONCISE - as few words as possible; brief and to the point;

COMPLETE - who, what, when, where, why and how addressed;

STRUCTURED PROPERLY - proper grammar, sentence structure, paragraphing and punctuation.

6. Format

To ensure that all narratives are written in a consistent, complete and accurate manner, the following format will be utilized by all staff. All narratives will consist of two (2) sections: **PURPOSE & FINDINGS**.

a. The **PURPOSE** section will contain the following information:

- (1) A brief description of the worksite inspected (e.g., a multi-story apartment building under construction).
- (2) A statement of why the inspection or investigation was initiated. Initiation may have resulted from a complaint, a referral, an accident, a Local Emphasis Program or a programmed inspection. If an accident occurred, this section should state the time and date of the accident and should include the name of the person who reported the accident, and the time the report was received. If a complaint or referral was involved, the Compliance Officer shall provide a short summary of the complaint and state the date the complaint was received.
- (3) For multi-employer worksite inspections, the narrative should list the general contractor and subcontractors, including the inspection number for each employer.

b. The **FINDINGS** section should contain all relevant facts and findings of the inspection/investigation and include the following information:

- (1) This section of the narrative should identify the documented findings that support the Compliance

Officer's recommendation to issue or not issue citations. This section will summarize the evidence that will be used by the Commissioner in issuing a final order and may later be used by the Commonwealth's Attorney in trial if the Commissioner's Order is contested.

- (2) If the purpose of the inspection was to investigate a complaint or referral, the findings for each complaint/referral item are to be listed, and if a citation is to be issued, a reference to what is being cited
 - (3) If the purpose of the inspection was to investigate an accident, the findings should be divided into those related to the accident and those unrelated to the accident.
 - (4) Data should not be repeated; unnecessary adjectives should not be used. Never make assumptions. Opinions should be omitted. The facts should be stated simply and clearly. The facts should be arranged in a logical order, explaining the findings of the investigation from beginning to end.
 - (5) If citations are being recommended, the Compliance Officer should refer the reader to the VOSH 1Bs. If no citations are recommended, the Compliance Officer should note that at the end of the narrative.
- c. Sample Narrative. Examples of proper VOSH Inspection/ Investigation Narratives for significant cases are located in the Appendix "A" Section III.

7. **Content, Order and Organization of Case File - Non-Significant Cases**

- a. The case file for non-significant cases contains two (2) sections:
 - (1) **SECTION 1** of the file folder will contain in order:
 - (a) Diary Log
 - (b) Post Citation Correspondence & Documentation in reverse chronological order, i.e. most recent documents on top.
 - (c) Citation(s) and the postal "green card" which is confirmation of citation delivery and receipt.
 - (d) Narrative

(2) **SECTION 2** of the file folder will contain in order:

- (a) Routing Sheet
- (b) List of Exhibits
- (c) Interview Statements
- (d) VOSH 1Bs with photographs
- (e) Sketches, Diagrams, etc
- (f) Sampling/Medical/Police Reports
- (g) VOSH Forms
- (h) Pre-Citation Correspondence
- (i) Inspection History
- (j) Inspection Notes
- (k) Photographs/Videos/CD's
- (l) Equipment/Program
- (m) Information/Company Information

C. Case File Review and Processing

The Regional Safety or Health Director is responsible for assigning and monitoring all case inspection/investigations. The Regional Safety or Health Director shall review the work of all assigned Compliance Officers to ensure that proper investigative techniques are being utilized, that proper evidence and documentation are gathered, that all findings and conclusions are substantiated, that the narratives are properly written, and that the case files are finalized in a timely manner to avoid a conflict with the statute of limitations. The Regional Safety or Health Director will review the report of all active case files on a weekly basis.

Significant and contested cases shall be thoroughly reviewed by the appropriate Program Director.

The Regional Safety or Health Director will ensure that all deficiencies are corrected by the Compliance Officer before forwarding the case file to the Director of the Division of Legal Support and then to the Program Director for review.

If at any point in the significant case review process in the central office it is determined that additional investigation or documentation is needed to substantiate the case findings or conclusions, the file will be sent back at that time to the Regional Safety or Health Director for action.

If a change in wording or organization of the case file is recommended by a reviewer, the case file will continue to go forward in the significant case review process. The reviewer will note the recommendations for change on the routing/review sheet. The Regional Safety or Health Director or Lead Inspector in his absence will implement all changes after the review is completed.

All significant cases will be tracked by the Division of Legal Support and Regional Offices.

(See information concerning the significant case review process and procedures including VOSH Program Directive 01-004, or its successor.)

D. Media Contacts

All media requests shall be referred to the VOSH Media Contact Person. See also Chapter 8, Rescue Operations, Emergency Response and Public Information Policy.

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CHAPTER 10

VIOLATIONS

I. Basis of Violations

A. Standards and Regulations

1. Employer Responsibility for Compliance

Section 40.1-51.1 of the *Code of Virginia* that each employer has a responsibility to comply with occupational safety and health standards promulgated under Title 40.1, which includes standards incorporated by reference. For example, the American National Standard Institute (ANSI) standard A92.2–1969, “Vehicle Mounted Elevating and Rotating Work Platforms,” including appendix, is incorporated by reference as specified in §1910.67. Only the mandatory provisions, i.e., those containing the word “shall” or other mandatory language of standards incorporated by reference, are adopted as standards under Title 40.1 of the *Code of Virginia*.

The standards which are the basis of violations are subdivided as follows:

- a. Part 1910 Standards for General Industry
- b. Part 1915 Shipyard Employment (*Public Sector only*)
- c. Part 1917 Maritime Standards (*Public Sector only*)
- d. Part 1918 Longshoring (*Public Sector only*)
- e. Part 1926 Standards for Construction
- f. Part 1928 Standards for Agriculture

2. Source and Naming Conventions

The specific standards and regulations which serve as the basis of violations are found in 16VAC25 series regulations under the Virginia Administrative Code. **The most specific provision of a standard shall be used for citing violations.**

Standards are subdivided as per the following nomenclature:

- a. Virginia Unique Standards (*not federal identical*)

Subdivision Naming Convention	Example
Title	16
Name (<i>Virginia Administrative Code</i>)	16VAC
Agency Code (<i>Safety & Health Codes Board</i>)	16VAC25
Chapter	16VAC25-60

Section	16VAC25-60-120
Paragraph	16VAC25-60-120.A.
Sub-paragraph	16VAC25-60-120.A.1.
Sub-sub-paragraph	16VAC25-60-120.A.1.a.

b. Federal Identical Standards

Subdivision Naming Convention	Example
Part	1910
Section	1910.23 or 1910.0023
Paragraph	1910.23(c)
Sub-paragraph	1910.23(c)(1)
Sub-sub-paragraph	1910.23(c)(1)(I)

3. **Definition and Application of Vertical and Horizontal Standards**

- a. Vertical standards are standards that apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment, or installations.
- b. Horizontal standards are other (more general) standards applicable to multiple industries. See §1910.5(c).

4. **Application of Horizontal and Vertical Standards**

If a Compliance Officer is uncertain whether to cite under a horizontal or a vertical standard when both may be applicable, the Regional Safety or Health Director shall be consulted. The following guidelines shall be considered:

a. General Guidelines

- (1) Use Horizontal Standard If No Vertical Standard. If the particular industry does not have a vertical standard that covers the hazard, then the Compliance Officer shall use the applicable horizontal standard.
- (2) Vertical Standard to Normally Take Precedence. When a hazard in a particular industry is covered by both a vertical (e.g., Part 1915) and a horizontal (e.g., Part 1910) standard, the vertical standard shall normally take precedence. However, if the horizontal standard is more stringent, the region should consult with the VOSH Director and Director of the Division of Legal Support for clarification and citation assistance.

- (3) Horizontal Has Greater Protection With No Conflict to Vertical. In situations covered by both a horizontal (general) and a vertical (specific) standard where the horizontal standard appears to offer greater protection, the horizontal (general) standard may be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical (specific) standard.
- (4) Analysis of Intent. To determine whether there is a conflict or inconsistency between the standards, an analysis of the intent of the two standards must be performed. For the horizontal standard to take precedence and apply, the analysis must show that the vertical standard does not address the precise hazard involved, even though it may address related or similar.

b. Exemptions to General Guidelines

- (1) Agriculture Exception. Only those parts of § 1910 which are *specifically referenced* in § 1928 (Safety Standards for Agriculture) apply to agriculture.
- (2) Cite the Activity Not the Industry. When determining whether a horizontal or a vertical standard is applicable to a work situation, the Compliance Officer shall **focus attention on the particular activity an employer is engaged in rather than on the nature of the employer's general business.**

EXAMPLE: A road construction contractor operates his own vehicle repair shop to keep his heavy equipment, such as dump trucks, backhoes, graders, etc., in operational order. Violations found while inspecting this shop would come under the general industry standards, as would any other vehicle repair facility; because that is the activity performed by the shop. The fact that the firm's business is actually construction does not matter.

- (3) Only Certain 1910 Standards Apply to Construction. Hazards found in construction work that are not covered by a specific Part 1926 standard shall not normally be cited under Part 1910 unless that standard has been identified as being applicable to construction. See *Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, VOSH PD 12-151A (15 May 1997).*

Note: If a question arises as to whether an activity is deemed construction for purposes of the Title 40.1, contact the VOSH Director. (See also VOSH Administrative Regulations Manual 16VAC25-60-130).

5. Violation of Variances

The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in Part IV of the *VOSH Administrative Regulations Manual* §§190-220. An employer will not be subject to citation if the observed condition is in compliance with either the granted variance or the controlling standard.

- a. Not in Compliance With Variance. In the event that the employer is not in compliance with the requirements of the variance, a violation of the controlling standard shall be cited with a reference in the citation to the variance provision that has not been met.
- b. Variance Application Filed. If, during the course of a compliance inspection, the Compliance Officer discovers that the employer has filed an application for variance regarding a condition which is determined to be an apparent violation of the standard, this fact shall be reported to the Regional Safety or Health Director who shall obtain information concerning the status of the variance request.
- c. Variance Granted by Federal OSHA. If a variance was granted to the employer by Federal OSHA, the Regional Safety or Health Director will consult with the VOSH Director and Division of Legal Support Director to determine if the variance has been honored by VOSH. If the variance has not been honored and the observed condition is not in compliance with the controlling standard, a violation will be issued.

6. Interpretation of Standards

Employers, employees and their representatives may request standards interpretations from VOSH.

- a. All requests for interpretations of standards shall be referred to the appropriate Program Director depending upon the standard. Draft interpretations will be developed by the Program Director and circulated for concurrence to the other division directors, as appropriate.
- b. The Program Director shall e-mail a copy of the interpretation to each Regional Safety or Health Director to be filed with the appropriate program directive or standard.

B. Employee Exposure

A hazardous condition that violates a VOSH standard or the general duty clause shall be cited only when employee exposure can be documented. No citation may be issued after the expiration of six months following the occurrence of any alleged violation. In cases involving VOSH receipt of a complaint, referral or an incident report from the Workers' Compensation Commission (WCC), the six months time frame does not begin to run until

VOSH receives the complaint/referral or WCC incident report. Any alleged violation is deemed to have “occurred” on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected. If an employer fails to notify the commissioner of any work-related fatality or catastrophe (in-patient hospitalization of three or more), the six month time frame does not commence until the commissioner receives actual notice of the incident. See *VOSH Administrative Regulations Manual* 16VAC25-60-260. The VOSH Division of Legal Support (DLS) should be consulted in such cases.

1. Determination of Employer/Employee Relationship

Whether or not exposed persons are employees of a particular employer depends on several factors, the most important of which is who controls the manner in which employees perform their assigned work. The question of who pays these employees may not be the key factor. Determining the employer of exposed employees may be a complex issue, in which case the Regional Safety or Health Director shall seek the advice of the Division of Legal Support (DLS). (See also *Chapter 15, Legal Issues*).

2. Proximity to the Hazard

The actual and/or potential proximity of the employees to a hazard shall be thoroughly documented (i.e., photos, measurements, employee interviews).

3. Observed Exposure

- a. Employee exposure is established if the Compliance Officer witnesses, observes, or monitors the proximity or access of an employee to the hazard or potentially hazardous condition.
- b. The use of personal protective equipment may not, in itself, adequately prevent employee exposures to a hazardous condition. Such exposures may be cited where the applicable standard requires the additional use of engineering and/or administrative (including work practice) controls, or where the personal protective equipment used is inadequate.

4. Unobserved Exposure

Where employee exposure is not observed, witnessed, or monitored by Compliance Officers, employee exposure may be established through witness statements or other evidence that exposure to a hazardous condition has occurred or may continue to occur.

- a. Past Exposure. In a fatality/catastrophe or other “accident/incident” investigation, prior employee exposure(s) may be established if the Compliance Officer determines, through written statements or other evidence, that exposure(s) to a hazardous condition occurred at the time of the accident/incident. In addition, prior exposures may serve as the basis for a violation when:

- (1) The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur;
 - (2) It is reasonably predictable that employee exposure to a hazardous condition could recur when:
 - (a) The employee exposure has occurred in the previous six months;
 - (b) The hazardous condition is an integral part of an employer's normal operations; and
 - (c) The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.
- b. Potential Exposure. Potential exposure to a hazardous condition may be established if there is evidence that employees have access to the hazard, and may include one or more of the following:
- (1) When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements;
 - (2) When a hazard would pose a danger to employees simply by their presence in an area and it is reasonably predictable that they could come into that area during the course of the work, to rest or to eat, or to enter or exit from an assigned work area;
 - (3) When a hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is reasonably predictable that an employee could again use the equipment or be exposed to the materials in the course of work; However, if the inspection reveals an adequately communicated and effectively enforced safety policy or program that would prevent or minimize employee exposure, including accidental exposure to the hazardous condition, it would not be reasonably predictable that employee exposure could occur. In such circumstances, no citation should be issued in relation to the condition.
- c. Documenting Employee Exposure. Compliance Officers shall thoroughly document exposure, both observed and unobserved, for each potential violation. This includes:
- (1) Statements by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (other employees who have observed exposure to the hazardous condition), union

representatives, engineering personnel, management, or members of the exposed employee's family;

- (2) Recorded statements or signed written statements;
- (3) Photographs, video, and/or measurements;
- (4) All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, OSHA-300/301, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies and records, company e-mails and correspondence, etc.) ; and
- (5) Diagrams and graphic representations.

C. Regulatory Requirements

Violations of the VOSH *Administrative Regulations Manual* (16VAC25-60) and Part 1904 shall be documented and cited when an employer does not comply with posting, recordkeeping, and reporting requirements of the regulations contained in these parts as provided by agency policy. See also VOSH PD 01-009A, Citation Policy for Paperwork and Written Program Violations, (*or its successor*).

NOTE: If prior to the lapse of the 8-hour reporting period, VOSH becomes aware of an incident required to be reported under §1904.39 through means other than an employer report, there is no violation for failure to report.

D. Hazard Communication

Section 1910.1200 requires chemical manufacturers and importers to assess the hazards of chemicals they produce or import, and applies to these employers even though they may not have their own employees exposed. Violations of this standard by manufacturers or importers shall be documented and cited, irrespective of any employee exposure at the manufacturing or importing location. See VOSH PD 02-060A, Inspection Procedures for the Hazard Communication Standard, dated 15 September 1999.

E. Employer/Employee Responsibilities

1. Employer Responsibilities

Section 40.1-51.1A of the *Code of Virginia* states: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." This section also states that employers shall "comply with all applicable occupational safety and health rules and regulations promulgated under this title."

2. Employee Responsibilities

- a. Section 40.1-51.2 of the *Code of Virginia* states: "It shall be the duty of each employee to comply with all occupational safety and health rules and regulations issued pursuant to this chapter and any orders issued thereunder which are applicable to his own action and conduct." The Title does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
- b. In cases where the Compliance Officer determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Regional Safety or Health Director who shall consult with the applicable VOSH Director
- c. The Compliance Officer is expected to obtain information to ascertain whether the employer is exercising appropriate oversight of the workplace to ensure compliance with the Title. Concerted refusals by employees to comply will not ordinarily bar the issuance of a citation where the employer has failed to exercise its authority to adequately supervise employees, including taking appropriate disciplinary action.

3. Affirmative Defenses

An affirmative defense is a claim which, if established by the employer, will excuse it from a violation which has otherwise been documented by the Compliance Officer. Although affirmative defenses must be proved by the employer at the time of the hearing, Compliance Officers should preliminarily gather evidence that supports/rebutts an employer's potential defenses. See *Chapter 5, Inspection Procedures, and Chapter 15, Legal Issues, for additional information.*

4. Multi-Employer Worksites

On multi-employer worksites in all industry sectors, more than one employer may be cited for a hazardous condition that violates a VOSH standard. (*For specific and detailed guidance, refer to the multi-employer citation issuance requirements detailed in Chapter 5, Inspection Procedures, and VOSH Administrative Regulations Manual, §260 subsections F and G.*)

II. Types of Violations

A. Other-than-Serious Violations

This type of violation, defined in regulation as "Other Violation" in §10 of the *VOSH Administrative Regulations Manual*, shall be cited in situations where the most serious injury or illness that would be likely to result from the hazardous condition cannot reasonably be expected to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health.

B. Serious Violations

1. Statutory Provision

Section 40.1-49.3., of the *Code of Virginia*, provides that “. . . a serious violation shall be deemed to exist in a workplace if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.”

2. The Four Elements of Serious Violation

The Compliance Officer shall consider four elements to determine if a violation is serious. The four-step analysis below is necessary to make the determination that an apparent violation is properly classified as “serious”, that is, whether there is a substantial probability that death or serious physical harm could result from an accident or exposure relating to the violative condition.

If more than one type of accident or health hazard exposure exists which the standard is designed to prevent, the Compliance Officer shall determine which type could reasonably be expected to result in the most severe injury or illness and shall base the classification of the violation on that determination.

- a. **Step 1 - Type of Accident or Exposure.** The Compliance Officer shall consider the types of accident or health hazard exposure which the violated standard or the general duty provision is designed to prevent. The Compliance Officer need not establish the exact way in which an accident, or health hazard exposure would occur. The exposure or potential exposure of an employee is sufficient to establish that an accident or health hazard exposure could occur. However, the Compliance Officer shall note the facts which could affect the severity of the injury or illness resulting from the accident or health hazard exposure.

EXAMPLE: Employees are observed working at the unguarded edge of an open-sided floor 30 feet above the ground in apparent violation of §1926.501(b)(1). The regulation requires that the edge of the open-sided floor be guarded by standard guardrail systems. The type of hazard the standard is designed to prevent is a fall from the edge of the floor to the ground below.

EXAMPLE: Employees are observed working in an area in which debris is located in apparent violation of §1915.91(b). The type of hazard the standard is designed to prevent here is employees tripping on debris.

EXAMPLE: An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to methylene chloride at 100 ppm in apparent violation of §1910.1052. This is 75 ppm above the PEL mandated by the standard.

- b. **Step 2 - Most Serious Injury or Illness.** The Compliance Officer shall determine the most serious injury or illness which could reasonably be expected to result from the type of accident or health hazard exposure identified in Step 1. The Compliance Officer shall not give consideration at this point to factors which relate to the probability that an injury or illness will occur.

EXAMPLE: If an employee falls from the edge of an open-sided floor 30 feet to the ground below, the employee could die, break bones, suffer a concussion, or experience other serious injuries that would substantially impair a body function.

EXAMPLE: If an employee trips on debris, the trip may cause abrasions or bruises, but it is only marginally predictable that the employee could suffer a substantial impairment of a bodily function. If, however, the area is littered with broken glass or other sharp objects, it is reasonably predictable that an employee who tripped on debris could suffer deep cuts which could require suturing. If the area contains possible impalement hazards, serious injury to internal organs or broken bones could result.

For conditions involving exposure to air contaminants or harmful physical agents, the Compliance Officer shall consider the concentration levels of the contaminant or physical agent in determining the types of illness which could reasonably result from the condition. The Chemical Information table found in Appendix A of the IH Technical Manual shall be used to determine toxicological properties of substances listed as well as a Health Code Number. A preliminary violation classification shall be assigned in accordance with the instructions given in sections on violations.

In order to support a preliminary classification of serious, VOSH must establish a *prima facie* case that exposure at the sampled level would, if representative of conditions to which employees are normally exposed, lead to illness.

The Compliance Officer must make every reasonable attempt to show that the sampled exposure is in fact representative of employee exposure under normal working conditions.

The Compliance Officer shall, therefore, identify and record all available evidence which indicates the frequency and duration of employee exposure. Such evidence would include:

- (1) The nature of the operation from which the exposure results;
- (2) Whether the exposure is regular and on-going or of limited frequency and duration;
- (3) How long employees have worked at the operation in the past;
- (4) Whether employees are performing functions which are expected to continue;
- (5) Whether work practices, engineering controls, production levels and other operating parameters are typical or normal operations;

Where such evidence is difficult to obtain or where it is inconclusive, the Compliance Officer shall estimate the frequency and duration from the evidence available. If the evidence indicates that it is reasonable to predict that regular, ongoing exposure could occur, the Compliance Officer shall presume such exposure in determining the types of illnesses which could result from the violating condition.

EXAMPLE: If an employee is exposed regularly to methylene chloride at 100 ppm, it is reasonable to predict that cancer could result.

EXAMPLE: If an employee is exposed regularly to acetic acid at 20 ppm, it is reasonable that the resulting illnesses would be irritation to eyes, nose and throat, or occupational asthma with chronic rhinitis and sinusitis.

- c. **Step 3 - Death or Serious Physical Harm.** The Compliance Officer shall determine whether the results of the injury or illness identified in Step 2 could include death or serious physical harm.

- (1) **Serious physical harm is defined as impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency** on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional.
- (2) Serious physical harm can also be an illness that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body.

- (a) Injuries that constitute serious physical harm include, but are not limited to:
- Amputation (loss of all or part of an appendage);
 - Concussion;
 - Crushing (internal, even if skin surface is intact);
 - Fractures (simple or compound);
 - Burns or scalds, including electric & chemical burns;
 - Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing;
 - Sprains and strains
 - Musculoskeletal disorders.
- (b) Illnesses that constitute serious physical harm include, but are not limited, to:
- Cancer;
 - Respiratory illness (silicosis, asbestosis, byssinosis, etc.);
 - Hearing impairment;
 - Central nervous system impairment;
 - Visual impairment; and
 - Poisoning.

EXAMPLE: If an employee falls 15 feet to the ground, suffers broken bones or a concussion, and experiences substantial impairment of a part of the body requiring treatment by a medical doctor, the injury would constitute serious physical harm.

EXAMPLE: If an employee trips on debris and because of the presence of sharp debris or equipment suffers a deep cut to the hand requiring suturing, the use of the hand could be substantially reduced. This injury would be classified as serious.

EXAMPLE: An employee develops chronic beryllium disease after long-term exposure to beryllium at a concentration in air of 0.004 mg/m³, and his or her breathing capacity is significantly reduced. This illness would constitute serious physical harm.

*NOTE: The key determination is the likelihood that death or serious harm will result IF an accident or exposure occurs. **The likelihood of an accident occurring is addressed in penalty assessments and not by the classification.***

- d. **Step 4 - Employer Knowledge.** The Compliance Officer shall determine whether the employer knew, or with the exercise of reasonable diligence, could have known, of the presence of the hazardous condition.
- (1) The knowledge requirement is met if it is determined that the employer actually knew of the hazardous condition which constituted the apparent violation. In this regard, a supervisor represents the employer and a supervisor's knowledge of the hazardous condition amounts to employer knowledge. Examples include situations where the employer or his representative saw the condition, an employee or employee representative reported it to the employer, or an employee was previously injured by the condition and the employer knew about the injury.
 - (2) In cases where the employer may contend that a supervisor's own conduct constitutes an isolated event of employee misconduct, the Compliance Officer shall attempt to determine the extent to which a supervisor was trained and supervised so as to prevent such conduct, and how the employer enforces the rule.
 - (3) If, after reasonable attempts to do so, it cannot be determined that the employer has actual knowledge of the hazardous condition, the knowledge requirement is met if the Compliance Officer is satisfied that the employer could have known through the exercise of reasonable diligence.

Examples of such evidence include:

- The violation/hazard was in plain view and obvious.
- The duration of the hazard was not brief.
- The employer failed to regularly inspect the workplace for readily identifiable hazards.
- The employer failed to train and supervise employees regarding the particular hazard.

3. Other Issues When Classifying a Violation as Serious

Additional considerations for when to cite a violation as serious include:

- All General Duty Clause violations shall be classified as serious violations.
- Probability is not to be considered in determining whether a violation is serious, i.e., that death or serious physical harm could result from an accident or illness will occur.
- The violation classification need not be completed for each instance; only once for each full item, or, if items are grouped, once for the group.
- If the full item consists of multiple instances or grouped items, the classification shall be based on the most serious item.

C. General Duty Requirements

Section 40.1-51.1.A, *Code of Virginia*, requires that: "It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are likely to cause death or serious physical harm to his employees..." This shall only be used when there is no specific standard which is applicable to the recognized hazard.

1. Evaluation of Potential General Duty (§ 40.1-51.1.A.) Situations

Legal precedent has established that the following elements are necessary to prove a violation of the general duty clause:

- a. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
- b. The hazard was recognized;
- c. The hazard was causing or was likely to cause death or serious physical harm; and
- d. There was a feasible and useful method to correct the hazard.

2. Discussion of General Duty Elements (§ 40.1-51.1.A.)

The above four elements of a general duty standard violation are discussed in greater detail as follows:

- a. A Hazard to Which Employees Were Exposed. A general duty citation must involve both a serious hazard and exposure of employees.
 - (1) Hazard. A hazard is a danger which threatens physical harm to employees.

- (a) Not the Lack of a Particular Abatement Method. In the past, some general duty (§ 40.1-51.1.A.) citations have incorrectly alleged that the violation is the failure to implement certain precautions, corrective measures or other abatement steps rather than the failure to prevent or remove the particular hazard. It must be emphasized that general duty violations do not mandate a particular abatement measure but only require an employer to render the work place free of certain hazards by any feasible and effective means which the employer wishes to utilize. In situations where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the Compliance Officer shall consult with the Regional Safety or Health Director for assistance in articulating the hazard properly.

Where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the Regional Safety or Health Director shall consult with the Program Director for assistance in describing the hazard properly.

EXAMPLE. Employees that are doing sanding operations may be exposed to the hazard of fire caused by sparking in the presence of magnesium dust.

One of the abatement methods may be engineering controls, such as adequate ventilation. The “hazard” is the exposure to the potential of a fire; it is not the lack of adequate ventilation.

EXAMPLE. A danger of explosion due to the presence of certain gases could be abated by the use of non-sparking tools. The hazard is the explosion danger due to the presence of the gases; it is not the lack of non-sparking tools.

EXAMPLE. In a hazardous situation involving high pressure gas where the employer does not have adequate work rules addressing the hazard, has not trained his employees properly, has not installed the proper high pressure equipment, or has improperly installed the equipment that is in place, there are three

abatement measures which the employer failed to take; there is only one hazard (for example, exposure to the hazard of explosion due to the presence of high pressure gas) and hence, only one general duty clause citation. Where necessary, the Program Director shall consult with the Division of Legal Support Director.

- (b) The Hazard Is Not a Particular Accident. The occurrence of an accident does not necessarily mean that the employer has violated the general duty clause although the accident may be evidence of a hazard. In some cases, a general duty violation may be unrelated to the accident. Although the accident facts may be relevant and shall be gathered, the citation shall only address the hazard in the workplace. **The facts of the accident shall be included only if they are relevant to the hazard.**

EXAMPLE. A fire occurred in a workplace where flammable materials were present. No one was injured by the fire but an employee, disregarding the clear instructions of his supervisor to use an available exit, jumped out of a window and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard causing or likely to cause death or serious physical harm, but the action of the employee may be an instance of unpreventable employee misconduct. The citation must address the underlying workplace fire hazard, and **only include the accident/incident involving the employee if relevant to the hazard cited.**

- (c) The Hazard Must Be Reasonably Foreseeable. The hazard for which a citation is issued must be reasonably foreseeable.

- (1) All the factors which could cause a hazard need not be present in the same place at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.

EXAMPLE: If a danger of explosion due to the presence of certain gases exists in one area of a plant, but non-sparking tools are used in that area so that there is no ignition source, no § 40.1-51.1.A. violation would exist. If sparking tools are used in other areas of the plant and the employer has not taken sufficient safety precautions to preclude their use in the area in which non-sparking tools should be used, then a foreseeable hazard may exist.

- (2) It is necessary to establish the reasonable foreseeability of the general workplace hazard, rather than the particular hazard which led to the accident.

EXAMPLE: A titanium dust fire may have spread from one room to another only because an open can of gasoline was in the second room. An employee who usually worked in both rooms was burned in the second room from the gasoline. The presence of gasoline in the second room may be a rare occurrence. It is not necessary to prove that a fire in both rooms was reasonably foreseeable. It is necessary only to prove that the fire hazard, in this case, due to the presence of titanium dust, was reasonably foreseeable.

- (d) The Hazard Must Affect the Cited Employer's Employees. The employees exposed to the hazard for which a general duty violation is cited (§ 40.1-51.1.A. hazard) must be the employees of the cited employer.
- (1) An employer, under the General Duty Clause, is only cited for hazard exposure of his own employees. Therefore, an employer who may have created and/or controlled the hazard shall not be cited for a violation of § 40.1-51.1(2), unless its own employees are exposed to the hazard.
 - (2) In complex situations such as multi-employer worksites where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the Regional Manager shall consult with the Division of Legal Support to determine the sufficiency of the evidence regarding the employment relationship.
 - (3) Whether exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays these employees may not be the determining factor. The fact that an employer denies that exposed employees are his employees does not necessarily decide the legal issue involved.
- (e) The Hazard Must Be Recognized. Recognition of a hazard can be established on the basis of industry recognition, employer recognition, or "common-sense" recognition. The use of common-sense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by satisfactory evidence and adequate documentation in the file as follows:
- (1) Industry Recognition. A hazard is recognized if the employer's industry recognizes it. Recognition by an industry other than the industry to which the employer

belongs is generally insufficient to prove this element of a general duty standard violation. Although evidence of recognition by the employer's specific branch within an industry is preferred, evidence that the employer's industry recognizes the hazard may be sufficient. The Compliance Officer shall consult with the Regional Safety or Health Director on this issue. Industry recognition of a particular hazard can be established in several ways:

- (a) Statements by industry safety or health experts which are relevant to the hazard.
- (b) Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry.
- (c) Manufacturer's warnings on equipment which are relevant to the hazard.
- (d) Statistical or empirical studies conducted by the employer's industry which demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees should also be considered if the employer or the industry has been made aware of them.
- (e) Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity.
- (f) State and local laws or regulations which apply in the jurisdiction in which the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended.

Regulations of Federal agencies other than OSHA or of State atomic energy agencies generally shall not be used. They raise substantial difficulties under Section 4(b)(1) of the OSH Act, which provides that VOSH is preempted when such an agency has statutory authority to deal with the working condition in question.

In cases where state and local government agencies have codes or regulations covering hazards not addressed by VOSH standards, the Division of Legal Support Director shall

determine whether the hazard is to be cited under a § 40.1-51.1.A general duty violation or referred to the appropriate local agency for enforcement.

EXAMPLE: A safety hazard on a personnel elevator in a factory may be documented during an inspection. It is determined that the hazard is not clearly covered under § 40.1-51.1.A., but there is a local code which addresses this hazard and a local agency actively enforces the code. The situation shall normally be referred to the local enforcement agency in lieu of citing § 40.1-51.1.A.

- (g) Standards issued by the American National Standards Institute (ANSI), the National Fire Protection Agency (NFPA), and other private standard-setting organizations, if the relevant industry participated on the committee drafting the standards. Otherwise, such private standards shall normally be used only as corroborating evidence of recognition. Preambles to these standards which discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. It must be emphasized, however, that these private standards cannot be enforced like VOSH standards. They are simply evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.
 - (h) NIOSH criteria documents; the publications of EPA, the National Cancer Institute, and other agencies; OSHA hazard alerts; the IHFOM; and articles in medical or scientific journals by persons other than those in the industry, if used only to supplement other evidence which more clearly establishes recognition. Such publications can be relied upon only if it is established that they have been widely distributed in general, or in the relevant industry.
- (2) Employer Recognition. A recognized hazard can be established by evidence of actual employer knowledge. Evidence of such recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the VOSH inspection, or instances where employees have clearly called the hazard to the employer's attention.

- (a) Company memoranda, safety rules, operating manuals or operating procedures and collective bargaining agreements may reveal the employer's awareness of the hazard. In addition, accident, injury and illness reports prepared for VOSH or OSHA, Worker's Compensation, or other purposes, Industrial Insurance, or other purposes, may show this knowledge.
 - (b) Employee complaints or grievances to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.
 - (c) Employer awareness may be demonstrated by prior Virginia, federal OSHA or other State Plan inspection history which involved the same hazard.
 - (d) The employer's own corrective action may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford any significant protection to the employees.
- (3) Common-Sense Recognition. If industry or employer recognition of the hazard cannot be established in accordance with (1) and (2), recognition can still be established if it is concluded that any reasonable person would have recognized the hazard. This theory of recognition shall be used only in flagrant cases.
- EXAMPLE:** In a general industry situation, a court has held that any reasonable person would recognize that it is hazardous to dump bricks from an unenclosed chute into an alleyway between buildings which is 26 feet below and in which unwarned employees work. (In construction, the general duty violation could not be cited in this situation because § 1926.252 or § 1926.852 applies.)
- (f) The Hazard Was Causing or Was Likely to Cause Death or Serious Physical Harm. This element of a general duty standard violation is identical to the elements of a serious violation. Serious physical harm is defined in this chapter. This element of a general duty standard violation (§ 40.1-51.1.A. hazard) can be established by showing that:

- (1) An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or
- (2) If an accident occurred, the likely result would be death or serious physical harm.

EXAMPLE. An employee is standing at the edge of an unguarded piece of equipment 25 feet above ground. Under these circumstances, if the falling incident occurs, death or serious physical harm (i.e., broken bones), is likely.

- (3) In a health context, establishing serious physical harm at the cited levels may be particularly difficult if the illness will require the passage of a substantial period of time to occur. Expert testimony is crucial to establish that serious physical harm will occur for such illnesses. It will generally be easier to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. To establish that the hazard causes or is likely to cause death or serious physical harm when such illness or death will occur only after the passage of a substantial period of time, the following must be shown:

- (a) Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels reasonably could occur;
- (b) Illness reasonably could result from such regular and continuing employee exposure; and
- (c) If illness does occur, its likely result is death or serious physical harm.

(g) The Hazard Can Be Corrected by a Feasible and Useful Method.

- (1) To establish a general duty violation the Department must identify a method which is feasible, available and likely to correct the hazard. The information shall indicate that the recognized hazard, rather than a particular accident, is preventable.
- (2) If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a duty general citation may be issued. A citation shall not be issued merely because the Department knows of an abatement

method different from that of the employer, if the Department's method would not reduce the hazard significantly more than the employer's method. It must also be noted that in some cases only a series of abatement methods will alleviate a hazard. In such a case all the abatement methods shall be mentioned.

- (3) Feasible and useful abatement methods can be established by reference to:
 - (a) The employer's own abatement method which existed prior to the inspection but was not implemented;
 - (b) The implementation of feasible abatement measures by the employer after the accident or inspection;
 - (c) The implementation of abatement measures by other companies;
 - (d) The recommendations by the manufacturer of the hazardous equipment involved in the case; and
 - (e) Suggested abatement methods contained in trade journals, private standards and individual employer standards. Private standards shall not be relied on in a general duty citation as mandating specific abatement methods.

EXAMPLE: If an ANSI standard deals with the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the buildup of materials which create the gas and the provision of ventilation, the ANSI standard may be used as evidence of the existence of feasible abatement measures.

The citation for the example given shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a feasible and useful abatement method existed; e.g., preventing the buildup of gas by providing an adequate ventilation system. It would not be correct to issue a citation alleging that the employer failed to prevent the buildup of materials which could create the gas and failed to provide a ventilation system as both of these are abatement methods, not hazards.

- (f) Evidence provided by expert witnesses which demonstrates the feasibility of the abatement methods. Although it is not necessary to establish that the industry recognizes a particular abatement method, such evidence shall be used if available.

3. Limitations on Use of a General Duty Clause

The General Duty Clause may be applied in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard.

All General Duty Clause violations shall be cited as serious.

The General Duty Clause may be applicable to some types of employment which are inherently dangerous (fire brigades, emergency rescue operations, etc.). Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards which are likely to cause death or serious physical harm. These steps include anticipating hazards which may be encountered, providing appropriate protective equipment, and providing training, instruction, and necessary equipment. An employer who has not taken appropriate steps on any of these or similar items and has allowed the hazard to continue to exist may be cited under the general duty clause (if not covered under a standard).

- a. General Duty Clause, § 40.1-51.1.A., Shall Not Be Used When an Alternate Standard Applies. Legal precedent establishes that general duty violations may not be used if a VOSH standard applies to the hazardous working condition.

EXAMPLE. A hazard covered only partially by a standard would be construction employees exposed to a collapse hazard because of a failure to properly install reinforcing steel. Construction standards contain requirements for reinforcing steel in wall, piers, columns, and similar vertical structures, but do not contain requirements for steel placement in horizontal planes, e.g., a concrete floor. A failure to properly install reinforcing steel in a floor in accordance with industry standards and/or structural drawings could be cited under the general duty clause.

EXAMPLE. General Duty shall not be cited for electrical hazards as § 1910.303(b) and § 1926.403(b) require that electrical equipment is to be kept free from recognized hazards that are likely to cause death or serious physical hard to employees.

- (1) Review of Existing Standards. Prior to issuing a general duty citation, VOSH standards must be reviewed carefully to determine whether an existing

VOSH standard applies to the hazard. If a standard applies, the standard shall be cited rather than general duty. Prior to the issuance of a general duty standard citation, a notation shall be made in the file to indicate that the standards were reviewed and no other standard applies.

- (2) Consultation. If there is a question as to whether another standard applies, the Compliance Officer shall consult with the Regional Safety or Health Director.
 - (3) When to Cite General Duty, in the Alternative. General duty may be cited in the alternative when a standard is also cited to cover a situation where there is doubt as to whether the standard applies to the hazard. Before citing in the alternative, the Regional Safety or Health Director shall consult with the appropriate Program Director and the Division of Legal Support.
 - (a) If, in a subsequent informal conference or notice of contest proceeding, an employer questions whether the specific standard, cited in the alternative, applies to the situation, the Regional Safety or Health Director. The Director shall refer the matter to the Division of Legal Support Director and the Assistant Attorney General for appropriate legal advice.
 - (b) When the employer raises the issue of the preemption of the general duty clause by the cited standard in a subsequent informal conference or notice of contest proceeding, the Regional Safety or Health Director shall follow the same procedure as above.
- b. Grouping. General duty standard violations shall **not** generally be grouped together, but **may** be grouped with a related violation of a specific standard.
 - c. Strictness of Standard. General duty § 40.1-51.1.A. **of the Code of Virginia** shall not normally be used to impose a stricter requirement than that required by the other standard.

EXAMPLE. If the standard provides for a permissible exposure limit (PEL) of 5 ppm, even if data establishes that a 3 ppm level is a recognized hazard, general duty violation shall not be cited to require that the 3 ppm level be achieved unless the limits are based on different health effects. If the standard has only a time-weighted average permissible exposure level and the hazard involves exposure above a recognized ceiling level, the Compliance Officer shall consult with the Regional Safety or Health Director, who shall discuss any proposed citation with

the Regional Safety or Health Director, Program Director and the Division of Legal Support.

Note: An exception to this rule may apply if it can be documented that “an employer knows a particular safety or health standard is inadequate to protect his workers against the specific hazard it is intended to address.” International Union, U.A.W. v. General Dynamics Land Systems Div., 815 F.2d 1570 (D.C. Cir. 1987). Such cases shall be subject to pre-citation review.

- d. Abatement Methods. General duty violations shall normally not be used to require an abatement method not set forth in a specific standard. If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, general duty, or § 40.1-51.1.A. of the Code of Virginia shall not be cited to require medical surveillance.
- e. “Should” Standards. General duty violations § 40.1-51.1.A. of the Code of Virginia shall not be used to enforce “should” standards. If a reference standard or its predecessor, such as an ANSI standard, uses the word “should,” neither the standard nor safe place shall ordinarily be cited with respect to the hazard addressed by the “should” portion of the standard.
- f. Hazards Exempted by a Standard. Section 40.1-51.1.A. shall not normally be used to cover categories of hazards exempted by a standard. If, however, the exemption is in place because the drafters of the standard (or source document) declined to deal with the exempt category for reasons other than the lack of a hazard, a general duty standard may be cited if all the necessary elements for such a citation are present.
- g. Citing a General Standard, or alternative standard. There are a number of general standards which shall be considered for citation rather than the General Duty clause, or § 40.1-51.1.A., in certain situations which initially may not appear to be governed by a standard.
 - (1) If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard shall be cited. In general industry, § 1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE. In construction, § 1926.28(a) may be applicable.
 - (2) For a health hazard, the particular toxic substance standards, such as asbestos and coke oven emission, shall be cited where appropriate. If those particular

standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in §1910.1000 may apply in general industry and § 1926.55 may apply in construction.

- (3) Another standard which may possibly be cited is §1910.134(a) which deals with the hazards of breathing harmful air contaminants not covered under §1910.1000 or another specific standard.
 - (4) In addition, § 1910.141(g)(2) may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and § 1910.132(a) may be cited when toxic materials are absorbed through the skin.
 - (5) The foregoing standards as well as others which may be applicable shall be considered carefully before issuing a general § 40.1-51.1.A. citation for a health hazard.
- h. Pre-Citation Review. The Regional Safety or Health Director shall ensure that all proposed § 40.1-51.1.A. citations undergo pre-citation review as follows:
- (1) The Regional Safety or Health Director shall review the case file prior to the issuance of all § 40.1-51.1.A. citations to ensure that all elements required in this chapter are included and that the case file is complete. The Regional Safety or Health Director shall also review the file and forward it to the Program Director for a decision on whether to issue the citation. The Division of Legal Support will review the case to ensure that it is legally supportable.
 - (2) If a standard does not apply and all criteria for issuing a § 40.1-51.1.A. citation are not met but the Regional Safety or Health Director determines that the hazard justifies some type of notification, a letter describing the hazard and suggesting corrective action shall be sent to the employer and the employee representative.
- i. Classification of General Duty, Violations. Only those hazards alleging *serious* violations may be cited under a general duty standard (including willful and/or repeated violations which would otherwise qualify as serious violations, except for their willful or repeated nature).
- j. Justification of General Duty Citations. To ensure that all citations of a general duty standard are fully justified, the evidence necessary to establish each element of a general duty violation shall be documented in the file. This includes all

photographs, videotapes, sampling data, witness statements and other documentary and physical evidence necessary to establish the violation. Additional documentation includes why it was common knowledge, why it was detectable, why it was recognized practice and supporting statements or reference materials.

- (1) If copies of documents relied on to establish the various general duty elements cannot be obtained before issuing the citation, these documents shall be accurately quoted and identified in the file so they can be obtained later, if necessary.
- (2) If experts are needed to establish any elements of the violation, the experts shall be consulted before the citation is issued and their opinions noted in the file. The file shall also contain their addresses and telephone numbers.
- (3) The file shall contain a statement that a search has been made of the standards and that no standard applies to the cited condition.
- (4) Reporting General Duty Violations Not Covered by a Standard. The Regional Safety or Health Director shall evaluate all alleged general duty clause violations to determine whether they should be referred to the Virginia Safety and Health Codes Board or federal OSHA for the development of new or revised standards. Those violations considered candidates for development or revision of a standard shall be forwarded through the Program Director to the Commissioner.

D. Willful Violations

The Compliance Officer should look carefully at all violations for elements of willfulness. The following definitions and procedures apply whenever the Compliance Officer suspects that a willful violation may exist:

1. Intentional Violation or Plain Indifference

A willful violation exists under the Labor Laws of Virginia where the evidence shows either an intentional violation of the Labor Laws of Virginia or plain indifference to its requirements.

- a. Intentional and Knowing. The employer committed an intentional and knowing violation **if at least one of the following occurs**:

(1) An employer representative was aware of the requirements of the Labor Laws of Virginia, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements, and did not abate the hazard.

OR

(2) An employer representative was not aware of the requirements of the Labor Laws of Virginia or standards, but was aware of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement, and did not abate the hazard.

NOTE: *Good faith efforts made by the employer to minimize or abate a hazard may sometimes preclude the issuance of a willful violation, although a serious, repeat or other-than-serious violation may still issue. In such cases, Compliance Officers should consult with the Regional Safety or Health Director and the Division of Legal Support.*

OR

(3) A willful citation may be issued where an employer knows the specific steps that must be taken to address a hazard, but substitutes its own judgment for the requirements of the standard.

EXAMPLE: Repeated issuance of citations that address the same or similar conditions.

- b. Plain Indifference. The employer committed a violation with plain indifference to the law where **at least one of the following occurs:**

(1) Management officials were aware of a VOSH requirement applicable to the company's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

OR

- (2) Company officials were aware of a continuing compliance problem but made little or no effort to avoid violations.

EXAMPLE. The employer is aware of the existence of unguarded power presses that have caused near misses, lacerations and/or amputations in the past and does nothing to abate the hazard.

OR

- (3) An employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives.

OR

- (4) In particularly flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if he or she had possessed it.

EXAMPLE. An employer sends employees into a deep unprotected excavation containing a hazardous atmosphere without ever inspecting for potential hazards.

2. Evil or Malicious Intent Is Not Necessary

It is not necessary that the violation be committed with a malicious purpose or an evil intent to be deemed “willful.” It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.

3. Evidence Indicating Willfulness

The Compliance Officer shall carefully develop and record in the file during the inspection, all evidence available that indicates employer awareness of and the disregard for statutory obligations or of the hazardous conditions. Willfulness could exist if an employer is advised by employees or employee representatives of an alleged hazardous condition and the employer makes no reasonable effort to verify and correct the condition. Additional factors which can influence a decision as to whether violations are willful include:

- a. The nature of the employer's business and the knowledge regarding safety and health matters which could reasonably be expected in the industry.
- b. The precautions taken by the employer to limit the hazardous conditions.
- c. The employer's awareness of the Labor Laws of Virginia and of the responsibility to provide safe and healthful working conditions.
- d. Whether similar violations and/or hazardous conditions have been brought to the attention of the employer.
- e. Whether the nature and extent of the violations disclose a *purposeful disregard* of the employer's responsibility under the Act.

Note: It is important to distinguish between the type of "knowledge" required to prove a serious violation, and the "knowledge" required for a willful violation.

For a **serious violation**, it is **only necessary to prove that the employer knew, or reasonably should have known of the hazard and employee exposure to the hazard.** For example, in a typical trenching case, this would merely involve knowledge by the employer that they were engaged in the type of work which would require a certain type of trench to be dug, and knowledge that employees would at some point have to enter that trench.

On the other hand, the "knowledge" factor to prove a **willful violation requires proof that the employer knew or reasonably should have known that violations of the rules would be taking place, or acted in reckless disregard to whether violations of the rules would be taking place.** Using the above example of a trenching case, this would involve not only knowledge that a trench was being dug, and that employees would be entering the trench, but also knowledge that there was either inadequate shoring or lack of a trench box, etc. as required by the standard.

E. Criminal/Willful Violations

Section 40.1-49.4.K, *Code of Virginia*, provides that, “Any employer who willfully violates any safety or health provisions of this title or standard, rules or regulations adopted pursuant thereto, and that violation causes death to any employee, shall, upon conviction, be punished by a fine of not more than \$70,000 or by imprisonment for not more than six months, or by both such fine and imprisonment. If the conviction is for a violation committed after a first conviction or such person, punishment shall be a fine of not more than \$140,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.”

1. Evaluation of All Willful, Potentially Criminal Cases

The Regional Safety or Health Director shall carefully evaluate all willful cases involving worker deaths to determine whether they may involve criminal violations. Because the nature of the evidence available is of paramount importance in an investigation of this type, there shall be **early and close liaison** between the Compliance Officer, the Regional Safety or Health Director, the Program Director and the Division of Legal Support in developing any finding which might involve a Criminal/Willful violation.

2. Establishment of Criminal/Willful

The following criteria shall be considered in investigating possible criminal/willful violations:

- a. Required Elements. To establish a criminal/willful violation, the Compliance Officer **must prove all three elements**:

(1) The employer violated a VOSH standard and/or §40.1-51.1.A. **of the Code of Virginia**;

and

(2) The violation was willful in nature;

and

(3) The violation of the standard caused the death of an employee. In order to prove that the violation of the standard caused the death of an employee, there must be evidence in the file which clearly demonstrates that the violation of the standard was the cause of or a contributing factor to an employee's death.

3. Investigation of Criminal Willful Situations

The difficulty of prosecuting a criminal willful violation, because of the higher burden of proof, requires special investigative techniques. To identify the persons involved who may be subject to prosecution, the Compliance Officer shall determine who had control over the worksite and over the employees.

- a. Questions which should be asked to determine who had control over the worksite include:
 - (1) Who had power to stop work on the site or in a particular area of the site?
 - (2) Who had power to correct safety violations?
 - (3) Who had the power to sign company checks to purchase goods, services or equipment to be used on the site?
 - (4) Who could direct the work of subcontractors?
 - (5) Who was responsible for assuring safe work practices by subcontractors?
 - (6) Did any of the persons involved hold corporate level positions?

- b. Questions which should be asked in order to determine who had control over the employees on the site include:
 - (1) Who had power to hire workers for the worksite?
 - (2) Who had power to fire workers on the worksite?
 - (3) Who could change terms of employment for workers (i.e., move them to different jobs, increase or decrease their pay, promote or demote the workers, etc.)?
 - (4) Who had power to direct work on the site?
 - (5) Who had power to approve time sheets approve pay and sign the workers' checks?
 - (6) Who was responsible for assuring safe work practices on the site for company employees?
 - (7) Who had the authority to discipline employees for safety or other work rule violations?

4. Evaluation

The Regional Safety or Health Director, in coordination with the Director of VOSH Programs, the Division of Legal Support Director and the Assistant Attorney General shall carefully evaluate all cases involving workers' deaths to determine whether they involve a criminal violation of § 40.1-49.4.K, *Code of Virginia*.

Note: For all fatalities, the possibility of a manslaughter prosecution exists. See definitions and procedures involved in manslaughter investigations.

5. Regional Safety or Health Director Responsibilities

Although it is generally not necessary to issue “Miranda” warnings to an employer when a Criminal/Willful investigation is in progress, the Regional Safety or Health Director shall seek the advice of the Division of Legal Support on this question who shall consult with the Assistant Attorney General.

- a. When a jobsite fatality occurs, the Compliance Officer and Regional Safety or Health Director shall follow the procedures for fatalities and significant case review.
- b. The Regional Safety or Health Director shall immediately telephone local law enforcement officials and the Program Director to inform them of the fatality and VOSH’s ongoing investigation. The Division of Legal Support will contact the Commonwealth’s Attorney.
- c. If the Regional Safety or Health Director determines that expert assistance is needed to provide the causal connection between an apparent violation of the standard and the death of an employee, such assistance shall be obtained in accordance with instructions.

6. Procedures

- a. If the Compliance Officer determines that a willful violation of VOSH law and regulations has resulted in a fatality, he shall immediately notify the Compliance Manger. The Regional Safety or Health Director shall notify the Program Director, the Director of the Division of Legal Support and the Commissioner.
- b. If the evidence supports a criminal violation of VOSH laws and regulations under the definitions set out, the Program Director shall consult with the Division of Legal Support Director, the Assistant Attorney General and the Commissioner to determine whether a criminal investigation is appropriate. At the direction of the Commissioner, the Regional Safety or Health Director or the Legal Support staff shall immediately consult with the Commonwealth’s Attorney.
- c. After this determination is made, all further investigation shall be coordinated with local law enforcement officials. The Commonwealth’s Attorney may determine the type and scope of investigatory procedures. Once the Commonwealth’s Attorney is involved in the investigation, the Compliance Officer shall not conduct any further questioning of the principals without prior consultation with the Commonwealth’s Attorney and the Legal Support staff.

- d. When the investigation is completed, the Director of the Division of Legal Support and the Director of VOSH Programs shall review the case and suggest an appropriate course of action to the Commissioner. The Commissioner, on review of the case file, shall recommend a course of action to the Commonwealth's Attorney.
- e. If the Commonwealth's Attorney determines that prosecution is warranted, the Compliance Officer and the Division of Legal Support staff, at the direction of the Attorney General's Office and the Commissioner, shall provide the Commonwealth's Attorney with all requested support.
- f. When a willful violation is related to a fatality, the Regional Safety or Health Director shall ensure that the case file contains documentation regarding the decision **NOT** to make a criminal referral. The documentation should indicate which elements of a criminal violation make the case unsuitable for criminal referral.

For example, the case file documentation could state that the evidence gathered for a specific criminal/willful element did not meet the greater burden of proof for criminal prosecution.

F. Repeated Violations

An employer may be cited for a repeated violation if that employer has been cited previously for a **substantially similar condition** and the citation has become a final order. All repeated violations must be cited based on the nature of the hazardous condition, not just the code being cited.

1. Identical Standard

Generally, similar conditions can be demonstrated by showing that in both situations the identical standard was violated.

EXAMPLE. Previously a citation was issued for a violation of § 1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of §1910.132(a) for not requiring the use of head protection (hard hats). Although the same standard was involved, the hazardous conditions found were not substantially similar and therefore a repeated violation would not be appropriate.

2. Different Standards

In some circumstances, similar conditions can be demonstrated when different standards are violated. Although there may be different standards involved, the hazardous conditions found could be substantially similar and therefore a repeated violation would be appropriate.

EXAMPLE. A citation was previously issued for a violation of § 1910.28(d)(7) for not installing standard guardrails on a tubular welded frame scaffold platform. A recent inspection of the same establishment reveals a violation of § 1910.28(c)(14) for not installing guardrails on a tube and coupler scaffold platform. Although there are different standards involved, the hazardous conditions found were substantially similar, and therefore citing a repeated violation would be appropriate.

3. When to Issue a Repeated Violation

a. Time Limitations. A citation will be issued as a repeated violation if the following apply:

- (1) The citation is issued within three (3) years of the final order of the previous citation, or,
- (2) The citation is issued within three (3) years of the final abatement date of that citation, whichever is later.

EXAMPLE. A programmed inspection is conducted on 16 December 2010. A serious hazard is found and cited. Although the employer corrects the hazard at the time of inspection, and the Compliance Officer witnesses the correction, the employer appeals the citation. An unprogrammed inspection is conducted on 17 January 2011.

The Compliance Officer finds a violation involving the same hazard which the employer had previously corrected.

Because the original violation is still under appeal, a repeated violation will not be issued. If the employer had not appealed the original violation, it would be a final order and a repeated violation would be issued.

b. Second Instance Repeated. When a violation is found during an inspection, and a repeated citation has been issued for a substantially similar condition which meets the above time limitations, the violation may be classified as a second instance repeated violation.

EXAMPLE: An inspection is conducted 17 February 2007, and a violation of a particular standard is found. On 09 October 2004, a repeated violation of the same standard was cited. The violation found on 17 February 2007 may be cited as a second repeated violation.

- c. Multiple Repeated. If an employer is **cited three times** for a violation **within three years** of the date of issuance of a Citation and Notice of Penalty, the violation **will be treated as a significant case**. The case shall be prepared and reviewed as such. It **may also be cited as willful**, if appropriate, and after review by the Division of the Legal Support.

4. Employers with Multiple Establishments or Operations

- a. No Instance of Statewide Repeated Violations. Employers with multiple establishments or operations, statewide or across VOSH regional boundaries, or without a fixed site of business, may not be cited for **statewide repeated violations where the violations occur in different VOSH Regional Office jurisdictions**.
- b. Multi-Facility Employer Within a VOSH Region. A multi-facility employer shall be cited for a repeated violation if the violation recurred at any worksite **within the same VOSH Regional Office jurisdiction**.

EXAMPLE: Where the construction site extends over a large area and/or the scope of the job is unclear (such as road building), that portion of the workplace specified in the employer's contract which falls within the Region Office jurisdiction is the establishment. If an employer has several worksites within the same Region Office jurisdiction, a citation of a violation at Worksite "A" in the region will serve as the basis for a repeated citation at Worksite "B" in the same region.

5. Joint Ventures

When several parent companies go together in a "joint venture" to contract or complete a project, the joint venture becomes a separate entity, different from each of the parent companies. Violations cited against the joint venture will be considered only against previous citations issued against the joint venture to be considered a repeat. Parent companies involved in joint ventures are not subject to violations of the joint venture.

6. Repeated vs. Willful

Repeated violations differ from willful violations in that they may result from an inadvertent, accidental or ordinarily negligent act. A willful violation need not be one for which the employer has been previously cited. Where a repeated violation also meets the criteria for willful, the violation shall be cited as willful.

7. Repeated vs. Failure to Abate

Repeated violations are also to be distinguished from a failure to abate. If during a later inspection a violation of a previously cited standard is found, but such violation does not involve the same piece of equipment or the same location within an establishment or worksite, the violation may be a repeated one. If during a later inspection a violation of a previously cited standard is found on the same piece of equipment or in the same location and the evidence indicates that the violation has continued uncorrected since the original inspection, there has been a failure to abate. If, however, the violation was not continuous; i.e., if it had been corrected and reoccurred, the subsequent reoccurrence is a repeated violation. Where there is no evidence or documentation available to determine whether the violation has continued uncorrected, or whether it has been corrected and subsequently reoccurred, it shall be cited as a repeated violation.

(For more information refer to Chapter 3, Program Planning, regarding follow-up and monitoring inspections, and Chapter 13, Abatement Verification)

8. Alleged Violation Description (AVD)

If a repeated citation is issued, the Compliance Officer must ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation, by completing box 23 of the VOSH-1B following the AVD directions for repeated violations in the IMIS Compliance Forms Manual. **The AVD should reference the date of issuance of the previously cited standard as well as the final order date for that violation.**

G. De Minimis Violations

De minimis violations are violations of standards which have no direct or immediate relationship to safety or health. Compliance Officers identifying *de minimis* violations of a VOSH standard shall not issue a citation for that violation, but should verbally notify the employer and make a note of the situation in the inspection case file. The criteria for classifying a violation as *de minimis* are as follows:

1. Employer Complies with Clear Intent of Standard

An employer complies with the clear intent of the standard but deviates from its particular requirements in a manner that has no direct or immediate relationship to employee safety or health. These deviations may involve distance specifications, construction material requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations, or the like.

EXAMPLE: Section 1910.27(1)(ii) allows 12 inches (30 centimeters) as the maximum distance between ladder rungs. Where the rungs are 13 inches (33 centimeters) apart, the condition is *de minimis*.

EXAMPLE: Section 1910.28(a)(3) requires guarding on all open sides of scaffolds. Where employees are tied off with safety belts in lieu of guarding, often the intent of the standard will be met, and the absence of guarding may be *de minimis*.

EXAMPLE: Section 1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

2. Employer Complies with Proposed Standard

An employer complies with a proposed standard or amendment or a consensus standard rather than with the standard in effect at the time of the inspection and the employer's action clearly provides equal or greater employee protection or the employer complies with a written interpretation issued by OSHA or VOSH.

3. Employer Technically Exceeds Standard

An employer's workplace is at the "state of the art" which is technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

Note: Maximum professional discretion must be exercised in determining the point at which noncompliance with a standard constitutes a de minimis violation.

III. Violations of Standards Requiring Special Documentation

A. Violations of the Abatement Verification Standard

Under the provisions of § 307 in the VOSH *Administrative Regulations Manual*, employers are required to certify in writing when and how all cited violations have been abated.

The standard also includes requirements for employee notification, and for tagging moveable equipment that is related to a violation. (See also Chapter 13, Abatement Verification.)

1. Employer Requirements to Tag Moveable Equipment

Only equipment, whether hand-held or not, which is moved within the worksite or between worksites is required to be tagged.

The tag is intended to provide an interim form of protection to employees through notification for those who may not have knowledge of the citation or the inherent hazardous condition. Compliance Officers should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to enforcement of the tagging requirement of § 307 of the VOSH *Administrative Regulations Manual* because the tagging provision is triggered upon *movement* of the equipment.

The employer, and not the Compliance Officer, shall apply the tags to any equipment. This is an employer responsibility.

2. Evidence of Tagging Violations

Tag-related citations must be observed by a Compliance Officer before a citation is issued for failure to initially tag cited moveable equipment. VOSH must be able to prove the employer's initial failure to act (tag the moveable equipment upon receipt of the citation). Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited moveable equipment, a citation may be issued for failure to maintain the tag.

3. Employee Notification Violations

Like tag-related citations, evidence of an employer's failure to notify employees of abatement activity by posting must be obtained at the worksite.

Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees the employer may post the abatement activity document(s) or a summary of the document(s) in a location where it will be readily observable by affected employees and their representatives or may otherwise communicate fully with affected employees and their representatives about abatement activities.

The Compliance Officer must determine not only whether the document(s) or summaries were appropriately posted, but also whether as an alternative, other communication methods such as meetings or employee publications were used.

B. Citation of Ventilation Standards

In cases where a ventilation standard citation may be appropriate, consideration shall be given to standards intended to control exposure to recognized hazardous levels of air contaminants, to prevent fire or explosions, or to regulate operations which may involve confined space or specific hazardous conditions.

In applying these standards, the following guidelines shall be observed:

1. Health-Related Ventilation Standards

An employer is considered in compliance with a health-related airflow ventilation standard when the employee exposure does not exceed appropriate airborne contaminant standards; e.g., the PELs prescribed in § 1910.1000.

- a. Where an overexposure to an airborne contaminant is detected, the appropriate feasible administrative or engineering control shall be required; e.g., § 1910.1000(e). In no case shall citations of this standard be issued for the purpose of requiring specific volumes of air to ventilate such exposures.
- b. Other requirements contained in health-related ventilation standards shall be evaluated without regard to the

concentration of airborne contaminants. Where a specific standard has been violated *and* an actual or potential hazard has been documented, a citation shall be issued.

2. Fire-and Explosion-Related Ventilation Standards

Although they are not technically health violations, the following guidelines shall be observed when citing fire- and explosion-related ventilation standards:

a. Adequate Ventilation. In the application of fire-and explosion-related ventilation standards, VOSH considers that an operation has *adequate* ventilation when both of the following criteria are met:

- (1) The requirement of the specific standard has been met.
- (2) The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

EXCEPTION: Certain standards specify violations when 10 percent of the LEL is exceeded. These standards are found in maritime and construction exposures.

b. Citation Policy. If 25 percent (10 percent when specified for maritime or construction operations) of the LEL has been exceeded and:

- (1) The standard requirements have not been met, the standard violation normally shall be cited as serious.
- (2) There is no applicable specific ventilation standard; § 40.1-51.A., of the *Code of Virginia* shall be cited in accordance with the guidelines given.

3. Special Conditions Ventilation Standards

The primary hazards in this category are those resulting from confined space operations and welding. (See Program Directives on Confined Space, 02-065B and 02-062, or their successors.)

C. Violations of the Noise Standard

Current enforcement policy regarding § 1910.95(b)(1) may allow employers to rely on personal protective equipment and a hearing conservation program rather than engineering and/or administrative controls when employee exposure to noise is no higher than 95 dBa, or a dose of 200%. Professional judgment is necessary to supplement the general guidelines provided here. In cases where deviations from these guidelines seem to be warranted, the Regional Safety or Health Director will consult with the Program Director.

1. Citing the Standard

Citations for violation of § 1910.95(b)(1) shall be issued when: exposure levels exceed 95 dBa for an eight hour time weighted average (TWA); engineering controls or administrative controls are

feasible, both technically and economically; and these controls will achieve at least a 3 dBa reduction.

Note: See guidelines on technical and economic feasibility. The Program Director can provide additional information on engineering control costs and technological feasibility when requested by the Regional Safety or Health Director.

2. Ongoing Testing Program

For levels from 90 dBa up to and including 95 dBa, a control is not reasonably necessary when an employer has an ongoing hearing conservation program and had the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees. (In making this decision, such factors as exposure levels, the number of employees tested, and the duration of the testing program shall be taken into consideration).

3. No Ongoing Testing Program

When employee noise exposures are less than 95 dBa, but the employer does not have an ongoing hearing conservation program, or the results of audiometric testing indicate that the employer's existing program is not working, citations § 1910.95(c)-(n) are appropriate. The Compliance Officer shall consider whether:

- a. Reliance on an effective hearing conservation program would be less costly than engineering or administrative controls.
- b. An effective hearing conservation program can be established, or improvements can be made, in an existing hearing conservation program which could bring the employer into compliance with Tables G-16 or G-16a.
- c. Engineering or administrative controls are both technically and economically feasible.

4. Comparing Attenuation

When comparing the degree of attenuation of personal protectors and engineering or administrative controls, all of the following factors in addition to the guidelines in the VOSH Industrial Hygiene Technical Manual must be considered and documented in the case file:

- a. Hearing Protection. Personal hearing protection must attenuate the occupational noise received by the employee's ears to within the levels specified in § 1910.95(c)(1). Hearing protectors shall be evaluated for the purpose of analyzing the benefits of administrative or engineering controls in accordance with Appendix B of § 1910.95.
- b. Employee Noise Reduction by Controls. Feasible engineering or administrative controls may only be required if a significant noise reduction can be achieved. An anticipated reduction in

employee noise exposure is significant if at least a 3 dBa decrease is achieved by one or a combination of the following:

- (1) Source controls;
- (2) Control of industrial environment (e.g., barriers, enclosure, etc.)
- (3) Administrative controls.

c. Control Options. When evaluating control options for the purpose of this instruction, consider all types of abatement possibilities such as the following:

- (1) Partial Use of Controls. It may be beneficial to implement some of the controls while forgoing more costly ones.
- (2) Substitution. Abatement plans may include replacing process equipment with quieter equipment that will significantly reduce exposure levels and make interim engineering controls for existing machinery impractical.

5. Classification as Serious

When hearing protection is required but not used and employee exposure exceeds the limits of Table G-16, § 1910.95(i)(2)(i) shall be cited and classified as serious whether or not the employer has instituted a hearing conservation program. Section 1910.95(a) shall no longer be cited, except in the case of the oil and gas drilling industry.

Note: Citations of § 1910.95(i)(2)(ii)(b) shall also be classified as serious.

6. Hearing Program Violation

If an employer has instituted a hearing conservation program and a violation of the hearing conservation amendment is found (*other than § 1910.95(i)(2)(i) or (i)(2)(ii)(b)*), a citation shall be issued if employee noise exposure equals or exceeds an 8-hour time-weighted average of 85 dBa.

7. 8-Hour TWA & Lack of Program

If the employer has not instituted a hearing conservation program and employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dBa, a citation only for § 1910.95(c) shall be issued.

8. Grouping & Classification

Violations of § 1910.95(i)(2)(i) from the hearing conservation amendment may be grouped with violations of § 1910.95(b)(1) and classified as serious when an employee is exposed to noise levels above the limits of Table G-16 and:

- a. Hearing protection is not used or is not adequate to prevent overexposure to an employee; or
- b. There is evidence of hearing loss which could reasonably be considered to:
 - (1) Be work-related, and
 - (2) Have been preventable, at least to some degree, if the employer had been in compliance with the cited provisions.

9. Citing for Overexposure

When an employee is overexposed, citations shall not be issued in cases where no engineering or administrative controls are possible, but effective hearing protection is being provided and used.
(See C.1. above)

D. Violations of the Respirator Standard

When considering a citation for respirator violations, the following guidelines shall be observed (see PDs 02-411 and 02-435, or their successors).

1. When Overexposure Does Not Occur

Where an overexposure has not been established:

- a. But an improper type of respirator is being used (e.g., a dust respirator being used to reduce exposure to organic vapors), a citation under § 1910.134(b)(2) shall be issued, provided the Compliance Officer documents that an overexposure is possible.
- b. And one or more of the other requirements of § 1910.134 is not being met, e.g., an unapproved respirator is being used to reduce exposure to toxic dusts, generally a *de minimis* violation shall be recorded in accordance with VOSH procedures. (Note that this policy does not include emergency use respirators.) The Compliance Officer shall advise the employer of the elements of a good respirator program as required under § 1910.134.
- c. In *exceptional* circumstances a citation may be warranted if an adverse health condition due to the respirator itself could be supported and documented. Examples may include a dirty respirator that is causing dermatitis, a worker's health being jeopardized by wearing a respirator due to an inadequately evaluated medical condition or a significant ingestion hazard created by an improperly cleaned respirator.

2. When Overexposure Does Occur

In cases where an overexposure to an air contaminant has been established, the following principles apply to citations of § 1910.134.

- a. Employer to Provide Respirators. Section 1910.134(a)(2) is the general section requiring employers to provide respirators "...when such equipment is necessary to protect the health of the employee" and also requiring the establishment and maintenance of a respiratory protection program which meets the requirements outlined in § 1910.134(b). If no respiratory program at all has been established, § 1910.134(a)(2) alone shall be cited. When a program has been established and some, but not all, of the requirements under § 1910.134(b) are being met, the specific standards under § 1920.134(b) that are applicable shall be cited.
- b. Respiratory Program Requirements. An acceptable respiratory program includes all of the elements of § 1910.134. However, the standard is structured such that essentially the same requirement is often specified in more than one section. In these cases, the section which most adequately describes the violation shall be cited.

E. Additive and Synergistic Effects

1. Evaluation

Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination shall be evaluated using the formula found in § 1910.1000(d)(2). The use of this formula requires that the exposures have an additive effect on the same body organ or system. Caution must be used in applying the additive formula, and prior consultation with the Program Director is required.

2. Notification

If the Compliance Officer suspects that synergistic effects are possible, it shall be brought to the attention of the Regional Safety or Health Director, who shall refer the question to the Program Director and the Division of Legal Support Director. If it is decided that there is a synergistic effect of the substances found together, the violations shall be grouped, when appropriate, for purposes of increasing the violation classification severity and/or the penalty.

F. Absorption and Ingestion Hazards

The following guidelines apply when citing absorption and ingestion violations. Such citations do not depend on measurements of airborne concentrations, but shall normally be supported by wipe sampling. Citations under § 40.1-51.1.A., *Code of Virginia*, may be issued when there is reasonable probability that employees will be exposed to these hazards.

1. Absorption Hazards

A citation for exposure to materials which can be absorbed through the skin or which can cause a skin effect (i.e., dermatitis) shall be issued where appropriate personal protective equipment (clothing) is necessary, but not worn. (See § 1910.1000, Table Z-1, substances marked “skin”). The citation shall be issued under § 1910.132(a) as either a serious or other-than-serious citation, according to the hazard.

If a serious skin absorption or dermatitis hazard exists which cannot be eliminated with protective clothing, a § 40.1-51.1.A., General Duty Clause, citation may be considered. Engineering or administrative (including work practice controls shall be required in these cases to prevent the hazard).

2. Ingestion Hazards

A citation under § 1910.141(g)(2) and (4) shall be issued when there are employees consuming food or beverages (including drinking fountains), a significant quantity of a toxic material may be ingested and subsequently absorbed.

Where, for any substance, a serious hazard is determined to exist due to the potential of ingestion or absorption of the substance for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under § 40.1-51.1A., or General Duty Clause.

3. Guidelines for Improper Personal Hygiene Citations

a. Issuing a Citation. There are three (3) primary considerations when issuing a citation of an ingestion or absorption:

(1) A health risk exists as demonstrated by one of the following:

(a) A potential for an illness, such as dermatitis, or

(b) The presence of a toxic material that can be ingested or absorbed through the skin or in some other manner. (See the Chemical Information Table.)

(2) The potential that the toxic material can be ingested or absorbed, e.g., that it can be present on the skin of the employee, can be established by evaluating the conditions of use and determining the possibility that a health hazard exists.

(3) The conditions of use can be documented by taking both qualitative and quantitative results of wipe

sampling into consideration when evaluating the hazard.

b. Supporting a Citation. There are four (4) primary considerations which must be met to support a citation:

- (1) The potential for ingestion or absorption of the toxic material must represent a health hazard.
- (2) The ingestion or absorption of the hazardous material must represent a health hazard.
- (3) The toxic substance must be of such a nature and exist in such quantities as to pose a serious hazard.

The substance must be present on surfaces which have had contact (such as lunch tables, cigarettes, etc.), or on other surfaces potential for ingestion or absorption of the toxic material (e.g., a water fountain.)

- (4) The protective clothing or other abatement means would be effective in eliminating or significantly reducing exposure.

G. Classification of Violations for the New Health Standards

In general, classification decisions regarding violations of the exposure limits of the new health standards shall be governed by the Chemical Information Manual.

H. Wipe Sampling

In general, wipe sampling, not air sampling, will be necessary to establish the presence of a toxic material posing a potential absorption or ingestion hazard. *(Refer to IH Technical Manual for sampling procedure).*

I. Determination of Source

Prior to the issuance of a citation, the Compliance Officer shall carefully investigate the source or cause of the observed hazards to determine if some type of engineering, administrative or work practice control, or combination thereof, may be applied which would reduce employee exposure.

J. Biological Monitoring

If the employer has been conducting biological monitoring, the Compliance Officer shall evaluate the results of such testing. The results may assist in determining whether a significant quantity of the toxic material is being ingested or absorbed through the skin.

K. Violations of Air Contaminant Standards (§ 1910.1000 Series)

When it has been established that an employee is exposed to a toxic substance in excess of the PEL established by VOSH standards (without regard to the use of respirator protection), a citation for exceeding the air contaminant standard shall be issued. The following guidelines shall be used when a citation of the air contaminant standards may be appropriate.

1. Requirements of the Standard

- a. Section 1910.1000(a) through (d) provides ceiling values and 8-hour time-weighted averages (threshold limit values) applicable to employee exposure to air contaminants.
- b. Section 1910.1000(e) provides that to achieve compliance with those exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When such controls do not achieve full compliance, protective equipment shall be used. Whenever respirators are used, their use shall comply with §1910.134.
- c. Section 1910.134(a) provides that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used. Their use shall comply with requirements contained in § 1910.134 which provide for the type of respirator and their proper maintenance.
- d. The situation may exist where an employer must provide all three: feasible engineering controls, feasible administrative controls (including work practice controls), and personal protective equipment. Section 1910.1000(e) has been interpreted to allow employers to implement feasible engineering controls to administrative and work practice controls in any combination the employer chooses, provided this abatement means eliminates the overexposure.
- e. Where engineering or administrative controls are feasible, the employer must institute them to mitigate contamination despite the fact that the controls would not reduce the air contaminant levels below the applicable ceiling value or threshold limit value. In addition, personal protective equipment will constitute satisfactory abatement only when implementing all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels.

2. Classification of Violations of Air Contaminant Standards

The violation shall be classified as serious or other-than-serious on the basis of the requirements in the Chemical Information Manual and on the basis of the use of respiratory protection at the time of the violation. Classification of violations depends upon whether the illness is serious or other-than-serious, whether the illness is reasonably predictable at

the exposure level, and whether the employer knew or could have known through reasonable diligence that a hazardous condition existed.

a. Principles of Classification. Exposure to a substance shall be considered serious if the exposure could cause impairment to the body as described in guidelines.

(1) In general, substances having a single health code of 13 or less shall be considered to be serious at any level above the Permissible Exposure Limit (PEL). Substances in categories 6, 8 and 12, however, are not considered to be serious at levels in which only mild, temporary effects would be expected to occur.

(2) Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which "moderate" irritation could be expected.

(3) For a substance (e.g., cyclohexanol, having multiple health codes covering both serious and other-than-serious effects, a classification of other-than-serious shall be applied up to a level at which a serious effect(s) could be expected.

(4) For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH recommended value, but no VOSH PEL, a citation for exposure in excess of the recommended value shall be considered under § 40.1-51.1, *Code of Virginia*, in accordance with the guidelines.

(5) If an employee is exposed to concentrations of a substance below the PEL, but in excess of recommended value (e.g., ACGIH TLV or NIOSH recommended value), a citation for inhalation cannot normally be issued. The Compliance Officer shall advise the employer that a reduction of the PEL has been recommended.

(6) For a substance having an 8-hour PEL with no ceiling PEL but for which a ceiling ACGIH or NOISH ceiling value has been recommended, the case shall be referred to the Program Director in accordance with guidelines. If no citation is to be issued, the Compliance Officer shall nevertheless advise the employer that a ceiling value has been recommended.

b. Effect of Respirator Protection Factors. The Compliance Officer shall consider protection for the type of respirator in use and the possibility of overexposure if the respirator fails. If

protection factors are exceeded and if the potential for overexposure exists, a citation for failure to control excessive exposure shall be issued.

3. **Limitations on Issuing Citations of Air Contaminant Violations**

No violation of the § 1910.1000 series would exist and no citation would be issued in the following circumstances:

- a. Where identified employee exposure level is not above that specified in the standard, regardless of whether engineering controls, administrative controls or personal protective equipment are utilized.
- b. Where the exposure level of an identified employee is above that specified in the standard, but all feasible engineering and administrative controls are utilized and personal protective equipment is provided, worn and maintained in accordance with the provisions of § 1910.134.

L. **Violations of the Hazard Communication Standard**

Violations of the hazard communication standard shall be classified as serious whenever such violations cause or contribute to a potential exposure capable of producing serious physical harm or death. Refer to PD 02-060A, or its successor.

1. **Combination or Grouping**

Such violations shall be combined or grouped in accordance with guidelines. Because of the difficulty of using the penalty calculation factors for shipped containers (as opposed to in-plant hazards), the following special penalty guidelines for shipped containers shall apply:

- a. If no hazard determination has been conducted, a high severity assessment and a lesser probability assessment shall be applied to produce a GBP of \$2,500.
- b. If there is no material safety data sheet (MSDS) available, or no label for a hazardous chemical (classified as serious), a high severity assessment and a greater probability assessment shall be applied to produce a GBP of \$5,000.
- c. If the label has an inadequate hazard warning, or none at all, a GBP of \$2,500 or \$5,000 with appropriate severity and probability assessments shall be applied, depending upon significance of the missing elements.
- d. If the MSDS does not contain sufficient hazard information, a GBP of \$2,500 or \$5,000, with appropriate severity and probability assessments, shall be applied, depending on the significance of the missing elements.

2. **Chemical Identity Violations**

Violations of § 1910.1200(i)(2) (when the employer refuses to provide specific chemical identity information in a medical emergency) shall be classified as willful with a probability/severity factor of 5 to 10, depending on the circumstances involved in the particular case.

CHAPTER 11

PENALTIES

I. Penalties

A. **General Policy**

The penalty structure provided under § 40.1-49.4, of the *Code of Virginia*, is intended primarily to provide an incentive toward correcting violations voluntarily, not only to the offending employer, but also to other employers who may be in violation of the same infractions of the standards or regulations. **Administratively, VOSH will not issue a penalty of less than \$100.**

1. **Deterrent to Violations**

Proposed penalties are not designed as punishment for violations or as a source of income for the Department; however, the penalty amounts should be sufficient to serve as an effective deterrent to violations.

2. **Other-Than-Serious Violations**

In accordance with § 40.1-49.4.G., *Code of Virginia*, other-than-serious or regulatory violations may be cited without a penalty. There is no statutory requirement that a penalty must be assessed when the violation is not serious; but a penalty must be assessed when the violation is serious.

B. **Civil Penalties**

The following factors are used by the CSHO Application Software to calculate a proposed penalty.

1. **Type of Violation as a Factor**

In assessing civil penalties for violations, a distinction is made between serious and other-than-serious violations.

- a. Serious. The maximum penalty that may be assessed for a serious violation is \$7,000 **at issuance**.
- b. Other-Than-Serious. The maximum penalty that may be assessed for an other-than-serious violation is \$7,000.
- c. Willful or Repeated. Willful or repeated violations may be based on hazards classified as either serious or other-than-serious. In the case of willful or repeated violations, a civil penalty of up to \$70,000 may be assessed, but the penalty may not be less than \$5,000 for a willful violation.
- d. Regulatory Violations. The maximum penalty that may be assessed for an other-than-serious regulatory violation is \$7,000.

- e. Failure to Abate. Penalties for failure to abate a violation may be up to \$7,000 for each calendar day that the violation continues beyond the final abatement date.

2. **Statutory Authority**

Section 40.1-49.4.A.4.(a) provides the Commissioner with the statutory authority to assess civil penalties for violations of § 40.1-49.4.

- a. Section 40.1-49.4.H., *Code of Virginia*, provides that any employer who has received a citation for an alleged violation of a serious nature shall be assessed a civil penalty of up to \$7,000 for each violation.
- b. Section 40.1-49.4.G., *Code of Virginia*, provides that, when the violation is specifically determined to be other-than-serious, a civil penalty of up to \$7,000 may be assessed for each violation.
- c. Section 40.1-49.4. G., *Code of Virginia*, provides that, when violations of certain posting requirements (refer to Section I.B.14) are cited, a civil penalty of up to \$7,000 shall be assessed.

3. **Minimum Penalties**

The following guidelines apply:

- a. Serious. The minimum penalty amount for serious violations shall be \$100 **at issuance**.
- b. Willful. The assessed penalty for any willful violation shall not be less than \$5,000. This is an OSH Act statutory minimum and not subject to administrative discretion.

4. **Penalty Factors**

Section 40.1-49.4.A.4(a), *Code of Virginia*, provides that, in assessing penalties, the Department shall give due consideration to the following factors:

- a. The gravity of the violation,
- b. The size of the business (i.e., number of employees),
- c. The good faith of the employer, and
- d. The employer's history of previous violations.

Neither a penalty calculation factor (e.g. probability assessment factors), nor penalty adjustment factor (e.g. the gravity of the violation, size of the business, good faith of the employer, or the employer's history of previous violations) shall materially affect the final penalty calculation if it would tend to dilute the penalty excessively.

EXAMPLE: In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight that might be otherwise given to the number of employees exposed.

5. Gravity of Violation

The gravity of the violation primarily determines penalty amounts. It shall be the basis for calculating the basic penalty for both serious and other-than-serious violations.

- a. Gravity Factors. To determine the gravity of a violation, the following two assessments shall be made:
 - (1) The **severity** of the injury or illness which could result from the alleged violation.
 - (2) The **probability** that an injury or illness could occur as a result of the alleged violation.
- b. Other Penalty Factors. The size of the business, the good faith of the employer, and the history of previous violations shall be taken into account in deciding whether and to what extent the gravity-based penalty (GBP) may be reduced or increased.
- c. Severity Assessment. The classification of the alleged violation(s) as serious or other-than-serious is based on the severity of the injury or illness which could *reasonably* be expected to result from the employee's exposure to the hazard. This classification constitutes the first step in determining the gravity of the violation. The most serious injury or illness which is reasonably predictable as a result of an employee's exposure to the safety or health hazard cited shall be assigned a severity assessment in accordance with the following factors:
 - (1) High Severity. This would include death from injury or illness, injuries involving permanent disability, or chronic, irreversible illnesses.
 - (2) Medium Severity. This would include injuries or temporary, reversible illnesses resulting in hospitalization, substantial outpatient care of a variable but limited period of disability.
 - (3) Low Severity. This would include injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment, i.e., limited out-patient care.
 - (4) Minimal Severity. This would include other-than-serious violations. Although such violations reflect conditions

which have a direct and immediate relationship to the safety and health of employees, the injury or illness most likely to result would probably not cause death or serious physical harm.

- d. Probability Assessment. The probability (likelihood or chance) that an injury or illness would result from a hazard affects the amount of the penalty to be assessed. However, **probability has no role in determining the classification of the violation.**

To determine penalty, the Compliance Officer, using professional judgment, shall identify and evaluate all of the factors influencing the probability of the occurrence of an injury or illness and shall assign them a weight in accordance with the relative contribution of each.

Probability shall be categorized as either greater or lesser probability:

- (1) Greater probability. This applies when the likelihood that an injury or illness will occur is relatively high, for example, when a serious injury or near miss has actually occurred. The violation shall be assessed as “greater probability.”
- (2) Lesser probability. This applies when the likelihood that an injury or illness will occur is judged to be relatively low.
- (3) Violations. When violations likely to result in injury and/or illness are involved, the following circumstances shall be considered (and documented in the case file).
 - (a) Probability for Imminent Danger. The Compliance Officer shall assign a greater probability value for hazards determined to be imminent danger. Documentation to support the imminent danger shall be included on the VOSH -1C and be noted on the probability line of the VOSH -1D. See Chapter 7, Fatality, Catastrophe and Imminent Danger, for definition and procedures for imminent danger.
 - (b) Safety Violations. Among the factors to be considered are:

- 1 Number of employees exposed.
- 2 Frequency of exposure or the duration of employee overexposure to contaminants.
- 3 Employee proximity to hazardous condition.
- 4 Weather/working conditions.
- 5 Employee skill level.
- 6 Employee awareness of hazard.
- 7 Pace/speed/nature of task/work.
- 8 Use of appropriate PPE.
- 9 Medical surveillance program
- 10 Youth and inexperience of employees, especially those under 18 years old.
- 11 Other pertinent working conditions or mitigating circumstances.

EXAMPLE:

Greater Probability: Five employees exposed 24 hours per week, installing roofing materials on a 10/12 pitch roof, gusty wind and showers. Two of the employees have less than two weeks experience, no fall protection equipment on site, no documented safety training or orientation.

Versus:

Lesser Probability: Two employees exposed 4 hours per week, installing roofing materials on a 4/12 pitch roof, sunny and fair weather, both workers having over three years experience.

- (c) Health Violations. Program violations are **not** included in probability assessment, but are considered separately in Section I.B.6. Health violations typically involve exposure to chemicals, noise, infectious agents, heat stress, or non-ionizing radiation.

- 1 Number of workers exposed to the hazardous conditions, both at the same time and sequentially.

- 2 Duration of employee overexposure to hazardous levels of contaminants or other illness-producing conditions.
 - 3 Use of appropriate personal protective equipment; whether, for example, such equipment is utilized by all exposed employees and the employer has an effective PPE program in effect should be mentioned, or whether it is not utilized by any of the exposed employees and the employer has no program.
 - 4 Medical surveillance program is in place as appropriate and effectively protects the employees, and a defective program which only partially and inadequately protects them, or no medical surveillance program is in effect.
- (d) Elements of Actual or Potential Exposure. The following three items shall normally be considered for actual or potential exposure in relation to the hazard and standard violated, and weighted accordingly (as documented in the case file). Violations with actual overexposure will usually receive a higher probability factor than comparable violations with potential overexposure. All violations shall be considered for conditions, circumstances, and/or practices at the worksite which would affect the likelihood of harmful contact, ingestion, inhalation, or other harmful exposure cited.
- 1 Level of Exposure. Generally, the greater the level of exposure, the greater the probability of harm. Inhalation exposure shall be considered in relation to the level above the PEL, STEL, ceiling, IDLH, or proximity to the lethal level. Ingestion or contact exposure shall take into account area and amount of contaminant in solid or liquid form, and relation to the likelihood of harmful exposure. Noise shall be considered for the level above the PEL. Other agents shall be considered in relation to the level above established limits or for the intensity of exposure where there is a dose/effect relationship.

- 2 Frequency/Duration of Employee Overexposure. Generally, the greater the frequency or length of exposure, the greater the probability for harm. Frequency of exposure (how often) may be more significant for acutely acting agents, whereas duration (how long) may be more significant for chronically acting agents.
 - 3 Number of Employees Exposed. The probability of harm is usually dependent upon the number of employees exposed. An exception would be when the exposure situation reaches an upper level in which all would be affected if the event or exposure occurred.
- (e) Other Considerations in Determining Probability. The following two items may also be considered in determining probability. These considerations will be used less often, but the Compliance Officer shall weigh them into the probability assessment as applicable (and document in the case file.)
- 1 Personal Protective Equipment. When the use of appropriate PPE is a factor, the Compliance Officer shall consider whether such equipment *is* utilized by all exposed employees and the extent to which such equipment is *effectively* utilized, if at all.
 - 2 Medical Surveillance. Where medical surveillance is a factor, the Compliance Officer shall consider if it effectively protects the employees or if it is a defective program which only partly and inadequately protects them, or no medical surveillance at all is in effect.
- (f) Other Factors Affecting Probability. There are other factors which may significantly affect the probability that the hazard will produce an injury or illness. They shall also be considered and documented:

- 1 **Mitigating Circumstances.** Mitigating circumstances that may lower the probability, such as specific safety or health instructions, effective training programs, evidence of correction underway, warning signs and labels or special procedures, or mandatory administrative controls providing some, though not complete protection, may be used to lower the probability.

- 2 **Contributing Circumstances.** On the other hand, contributing circumstances may be used to raise probability. This would include inappropriate or inadequate safety or health instructions, inadequate or no training, or widespread hazardous conditions or faulty equipment, with little or no attempt to control them, may be used to raise the probability.

6. Final Probability Assessment

All of the factors outlined above shall be considered together in arriving at a final probability assessment.

- a. A factor shall not materially affect the final probability assessment if, based on the professional judgment of the Compliance Officer as documented in the case file, it:
 - (1) Does not significantly influence the probability of an injury or illness causing condition, or
 - (2) Would tend to dilute the penalty excessively.

EXAMPLE: In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight given to the number of employees exposed.

- b. When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the Compliance Officer shall use professional judgment to adjust the probability appropriately. Such decisions shall be adequately documented in the case file.

7. Program Violations

Certain program and certification requirements have specific performance criteria within the body of their codes and can be readily processed through the gravity based penalty (GBP) structure. These include, but are not limited to: hazard communication program, respirator protection program, confined space entry program, bloodborne pathogen program, and the hearing conservation program. *(Refer to the applicable program directive for further guidance).*

Other program and certification requirements are not as readily processed through the GBP structure. These include, but are not limited to: accident prevention program, first aid certification, fall protection work plan, lockout/tagout program, logging plan, effective supervision, etc.

a. Classification. The following procedures shall generally be followed in determining the severity of the program violation *(See VOSH PD 01-009A, October 15, 2007, or successor for further guidance)*:

(1) Other-than-serious. Program violations are classified as other-than-serious when it is documented that the employer does not have a written program or the program is missing one (1) or more element(s) *and no related serious hazards exist*.

(2) Serious. Program violations are classified as serious when it is documented that the employer does not have the required written program or certification *and it can be documented that a related serious hazard is associated with a program deficiency*.

8. Gravity-Based Penalty (GBP)

The GBP is an unadjusted penalty and is calculated in accordance with the following procedures:

a. Severity and Probability

The GBP for each violation shall be determined based on an appropriate and balanced professional judgment, combining the severity assessment and the final probability assessment.

b. **For serious violations**, the GBP shall be assigned on the basis of the following scale:

<u>Severity</u>	<u>Probability</u>	<u>GBP</u>
High	Greater	\$7,000
Medium	Greater	\$4,900
Low	Greater	\$3,500

<u>Severity</u>	<u>Probability</u>	<u>GBP</u>
High	Lesser	\$3,500
Medium	Lesser	\$2,800
Low	Lesser	\$2,100

NOTE: *The gravity of violation is defined by the GBP.*

A high gravity violation is one with GBP of \$7,000 or greater.

A moderate gravity violation is one with a GBP between \$2,800 and \$4,900.

A low gravity violation is one with GBP of \$2,100 or below.

c. **Regulatory Violations**

Penalties to be assessed for regulatory violations are discussed in I.B.14. of this chapter.

d. **Adjusted Penalty Adjustment**

IMIS/OIS shall be used for determining appropriate adjusted penalties for violations, which consider the employer's good faith, size of business, and history.

- No adjustment of penalty amounts for good faith is made in cases for high gravity serious violations.
- The Regional Safety or Health Director has the option to determine that no adjustment for an other-than-serious violation may, on occasion, be appropriate and a high unadjusted penalty amount is warranted.

e. **Other-Than-Serious (O-T-S) Severity Assessment**

For other-than-serious safety and health violations, there is only minimal severity:

- (1) Other-than-serious safety and health violations judged to be of greater probability shall be assigned a GBP of \$1,000 to which appropriate adjustment factors shall be applied.
- (2) Other-than-serious safety and health violations judged to be of lesser probability shall be cited with no penalty.
- (3) Penalties to be proposed for other-than-serious regulatory violations are discussed in the section covering regulatory violations.

9. **Gravity Calculations for Combined or Grouped Violations**

Combined or grouped violations are normally considered as one violation and shall be assessed one GBP. *(For guidance on when to combine or group violations see Chapter 10, Violations)*

The following procedures apply to the calculation of penalties for combined and grouped violations:

a. **Combined Violations**

The severity and the probability assessments for combined violations shall be based on the instance with the highest gravity.

It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation if it is clear which instance *or* sub item will have the highest gravity.

b. **Grouped Violations**

For grouped violations, the following special guidelines shall be adhered to:

(1) Severity Assessment. There are two considerations to be kept in mind in calculating the severity of grouped violations:

- (a) The severity assigned to the grouped violation shall be no less than the severity of the most serious injury or illness that could reasonably be expected to result from the employee's exposure to the hazard on any single item.
- (b) If a more serious injury or illness is reasonably predictable from the grouped items than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor of the grouped violation.

(2) Probability Assessment. There are two considerations to be kept in mind in calculating the probability of grouped violations:

- (a) The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness.
- (b) If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment of the grouped violation.

In addition, it should be kept in mind that some individual probability factors may be increased

by grouping, and others may not. The increased values shall be used in the probability calculation if, in the professional judgment of the Compliance Officer, a more appropriate assessment will result. For example, the number of employees exposed may be increased, while the proximity factor may not.

- (3) Gravity-Based Penalty. A single severity assessment and a single probability assessment for the combined or grouped violation will result from the foregoing considerations. That result shall be the basis for determining an appropriate GBP for the violation item according to the guidelines.

10. **Penalty Adjustment Factors**

Since these adjustment factors are based on the general character of a business and its safety and health performance, the factors shall generally be calculated only once for each employer. After the classification and probability ratings have been determined for each violation, the adjustment factors shall be applied subject to the limitations indicated in the following paragraphs.

- a. Penalties assessed for violations that are classified as high severity and greater probability shall be adjusted only for size and history.
- b. Penalties assessed for violations that are classified as repeated shall be adjusted only for size.
- c. Penalties assessed for regulatory violations which are classified as willful shall be adjusted only for size. Penalties assessed for violations classified as willful shall be adjusted only for size and history.

NOTE: If one violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation and at the same time acting in good faith.

- d. The rate of penalty reduction for size of business, employer's good faith and employer's history of previous violations shall be calculated on the basis of the criteria described in the following paragraphs:

- (1) Size. A maximum penalty reduction of 60 percent is permitted for small businesses. "Size of business" shall be measured on the basis of the maximum number of employees of an employer at all workplaces nationwide, including federal OSHA and State Plan States at any

one time during the previous 12 months. Information on the total number of an employer's employees can generally be obtained at the inspected worksite. However, on occasion, it may be necessary to obtain or confirm the information from the employer's headquarters.

- (a) The rates of reduction are as follows:

<u>Number of Employees</u>	<u>Percent Reduction</u>
1-25	60
26-100	40
101-250	20
251 or more	zero

- (b) When a small business has one or more serious violation(s) of high gravity or a number of serious violations of moderate gravity indicating a lack of concern for employee safety and health, the Regional Safety or Health Director may determine that only a partial reduction in penalty shall be permitted for size of business.
- (c) An employer's ability to pay a penalty shall not normally be investigated or considered in determining the penalty reduction for size of business.
- (d) However, if an employer presents convincing evidence at an informal conference of inability to pay a penalty because of financial difficulties, the Regional Safety or Health Director may determine that a penalty reduction or a penalty installment payment plan is appropriate. Such a determination shall be documented in the case file.
- (2) Good Faith. A penalty reduction of up to 25 percent is permitted in recognition of an employer's "good faith." No *single* factor shall be used to determine good faith. Some of the factors to be considered in determining good faith are:
- (a) The employer's awareness of VOSH requirements.

- (b) Whether any efforts were made to comply with safety standards before the inspection.
- (c) If possible, whether the employer promptly abates violations during the inspection.
- (d) The employer's cooperation/attitude during the inspection.
- (e) The employer's overall attempts to implement safety and health in the workplace, including a safety and health program.

EXCEPTION: If one willful violation is found, no reduction for good faith can be applied to any of the violations found during the same inspection. As stated above, an employer cannot be willfully in violation of the Act and at the same time be acting in "good faith."

- (f) A reduction of 25 percent shall normally be given if the employer has a written safety and health program (as documented during the inspection) that has been effectively implemented in the workplace, and also:

1 Provides for appropriate management commitment and employee involvement; worksite analysis for the purpose of hazard identification; hazard prevention and control measures, and safety and health training.

NOTE: One example of a framework for such a program is given in OSHA's voluntary "Safety and Health Program Management Guidelines," Federal Register, Vol. 54, No. 16, January 26, 1989, pp. 3904-3916, or later revisions as published.

2 Has deficiencies that are only incidental.

3 Includes all programs required under VOSH standards applicable to the workplace (e.g., hazard communication, lockout-tagout, hazardous materials and emergency response, safety and health programs for construction [§ 1926.20] and trenching and excavation).

- 4 Where young persons, i.e., less than 18 years old, are employed the Compliance Officer's evaluation shall consider whether the employers program appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they might be exposed.
- 5 Where persons who speak limited or no English are employed the Compliance Officer's evaluation shall consider whether the employers program appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they might be exposed.
- 6 One example of an effective safety and health management program is the Safety and Health Program Management Guidelines; Issuance of Voluntary Guidelines (*Federal Register, January 16, 1989; 54 FR 3904*).
- (g) A reduction of 15 percent shall normally be given if the employer has a documentable and effective safety and health program, but with no more than only incidental deficiencies. For example, an acceptable program will be documentable by such means as the minutes of employee safety and health meetings, employee training sessions, or other evidence of implemented programs applicable to the workplace.
- (h) Only these percentages: (15% or 25%) may be used to reduce penalties due to the employer's good faith; no intermediate percentages shall be used.
- (i) No reduction shall be given to an employer for any violation in the inspection where a willful, repeated or failure to abate violation is found.
- (j) No reduction shall be given to any employer for a high gravity serious violation.

- (k) No reduction shall be given to an employer who has no safety and health program or if there are major deficiencies in the program.
 - (l) An employer whose inspection history includes fatality-related violations or has a willful or a significant number of serious violations within the previous three years may not receive a reduction for good faith.
 - (m) No reduction shall be given to an employer being cited for abatement verification violations.
- (3) History. A reduction of 10 percent shall be given to employers who have not been cited by VOSH for any serious, willful or repeated violations in the past three years.
 - (4) Total Adjustment. The total adjustment will normally be the sum of all the adjustment factors.
- e. No penalty reduction factors may be applied to any violation which has directly contributed to a fatality. Such a violation shall be penalized at \$7,000 for each serious and \$70,000 for each willful and repeat.
 - f. No adjustment of penalty amount may, on occasion, be appropriate for other-than-serious violations where the Regional Safety or Health Director has determined that a high unadjusted penalty amount is warranted.

11. Effect on Penalties If Employer Immediately Corrects or Initiates Corrective Action

Appropriate penalties will be assessed with respect to an alleged violation after being informed of such alleged violation by the Compliance Officer, even though the employer immediately corrects or initiates steps to correct the hazard. Such correction may be considered in calculating good faith.

12. Ability to Pay

An employer's ability to pay a penalty shall not normally be investigated or considered in determining any penalty reduction. However, if an employer presents convincing evidence of inability to pay a penalty because of financial difficulties at an informal conference, the Regional Safety or Health Director may determine that a penalty reduction is appropriate. Such a determination shall be documented in the case file.

Table 11-1: Penalty Table

Penalty Reductions in Dollars GBP	Gravity Assessments					
	OTS \$1,000	Low/Lesser \$2,100	Med/Lesser \$2,800	H/L or L/G \$3,500	Med/Greater \$4,900	High/Greater \$7,000
10%	\$900	\$1,890	\$2,520	\$3,150	\$4,410	\$6,300
15%	\$850	\$1,785	\$2,380	\$2,975	\$4,165	\$5,950
20%	\$800	\$1,680	\$2,240	\$2,800	\$3,920	\$5,600
25%	\$750	\$1,575	\$2,100	\$2,625	\$3,675	\$5,250
30%	\$700	\$1,470	\$1,960	\$2,450	\$3,430	\$4,900
35%	\$650	\$1,365	\$1,820	\$2,275	\$3,185	\$4,550
40%	\$600	\$1,260	\$1,680	\$2,100	\$2,940	\$4,200
45%	\$550	\$1,155	\$1,540	\$1,925	\$2,695	\$3,850
50%	\$500	\$1,050	\$1,400	\$1,750	\$2,450	\$3,500
55%	\$450	\$945	\$1,260	\$1,575	\$2,205	\$3,150
60%	\$400	\$840	\$1,120	\$1,400	\$1,960	\$2,800
65%	\$350	\$735	\$980	\$1,225	\$1,715	\$2,450
70%	\$300	\$630	\$840	\$1,050	\$1,470	\$2,100
75%	\$250	\$525	\$700	\$875	\$1,225	\$1,750
80%	\$200	\$420	\$560	\$700	\$980	\$1,400
85%	\$150	\$315	\$420	\$525	\$735	\$1,050
90%	\$100	\$210	\$280	\$350	\$490	\$700
95%	\$50	\$105	\$140	\$175	\$245	\$350

Severity	Probability	GBP
High	Greater	\$7,000
Medium	Greater	\$4,900
Low	Greater	\$3,500
High	Lesser	\$3,500
Medium	Lesser	\$2,800
Low	Lesser	\$2,100

13. Repeat Violations

Section 40.1-49.4.J., *Code of Virginia*, provides that an employer who repeatedly violates VOSH requirements may be assessed a civil penalty of not more than \$70,000 for each violation.

The VOSH *Administrative Regulations Manual* defines a repeated violation as "... a violation deemed to exist in a place of employment that is substantially similar to a previous violation of a law, standard or regulation that was the subject of a prior final order against the same employer. A repeated violation results from an inadvertent or accidental act, since a violation otherwise repeated would be willful."

Repeat violations may be cited for a period of three years following the issuance of a final order which cites any violation of standard, regulation or statute. If a repeat violation directly contributes to a fatality, a penalty of \$70,000 shall be assessed.

- a. Gravity-Based Penalty Factors. Each violation shall be classified as serious or other-than-serious. A GBP shall then be calculated for repeated violations based on facts noted during the current inspection. Only the adjustment factors for size appropriate to the facts at the time of the inspection shall be applied.
- b. Penalty Increase Factors. The amount of the increased penalty to be assessed for a repeated violation shall be determined by the size of the employer.
 - (1) Smaller Employers. For employers with 250 or fewer employees, the GBP shall be doubled for the first repeated violation and quintupled if the violations have been cited twice before. If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, the GBP may be multiplied by 10. The reasons for imposing a higher multiplier factor shall be explained in the file.
 - (2) Larger Employers. For employers with more than 250 employees, the GBP shall be multiplied by 5 for the first repeated violation and multiplied by 10 for the second repeated violation.
- c. Other-than-Serious Violations with No Initial Penalty. For a repeated other-than-serious violation that had no initial penalty, if a decision is made to penalize, a GBP of \$200 shall be assessed for the first repeated violation, \$500 if the violation has been cited twice before, and \$1,000 for a third repetition.
- d. Regulatory Violations. For repeated regulatory violations, the initial penalty shall be doubled for the first repeated violation and quintupled if the violation has been cited twice before. If the Program Director determines that it is appropriate to apply a deterrent effect, the initial penalty may be multiplied by 10.

14. Willful Violations

Section 40.1-49.4.J., *Code of Virginia*, provides that an employer who willfully violates VOSH requirements may be assessed a civil penalty of not more than \$70,000 but not less than \$5,000 for each violation.

- Willful violations shall be classified as serious or other-than-serious.
- There shall be no reduction for good faith.

- If a willful violation directly contributes to a fatality, a penalty of \$70,000 shall be assessed.
 - A \$70,000 penalty may also be assessed in cases where there is no fatality. See *Minimum Penalties* at Paragraph I.B.3 of this chapter.
- a. Gravity-Based Penalty Factors Each violation shall be classified as serious or other-than-serious. After determining the gravity of the violation for both severity and probability, a GBP shall be determined based on the facts noted during the inspection.
- b. Determination of the Gravity of the Violation
- Severity of the injury/illness:
 - High:** death from injury/illness; injuries involving permanent disability; or chronic, irreversible illnesses;
 - Medium:** injuries or temporary reversible illnesses resulting in hospitalization, substantial outpatient care of a variable but limited period of disability;
 - Low:** Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment, i.e., limited outpatient care.
 - Probability that an injury/illness could occur:
 - Actual:** death, actual injury, or illness;
 - Greater:** likelihood that an injury or illness will occur is judged to be relatively high;
 - Lesser:** likelihood that an injury or illness will occur is judged to be relatively low.
- (1) The Compliance Officer will determine the gravity of the violation based upon: 1) the severity of the injury or illness which could result from the alleged violation, and 2), the probability that an injury or illness could occur as a result of the alleged violation.
- (2) For willful violations, a severity of high, medium or low shall be assigned and a probability of actual, greater or lesser is also assigned. "Actual" has been added as a

probability factor. This factor shall be used if an employee(s) suffers an injury or illness as a result of a violation.

- (3) Once the gravity of the violation is determined, the penalty will be adjusted for size and history

NOTE: For a willful violation, no penalty reduction will be permitted on the basis of good faith, and no penalty reduction will be permitted where there has been a fatality.

EXAMPLE: A Compliance Officer inspects the trenching site of Employer X. Employer X has 15 employees. A review of the employer's history shows that the employer has been cited for serious violations within the past three years. The Compliance Officer categorizes the trenching violation as medium severity and greater probability. The Compliance Officer then determines that Employer X is entitled to a 60% reduction for size (fewer than 25 employees) and no reduction for history; therefore, the total penalty reduction is 60%.

Go to the following table. Look for the severity and probability factors which you have assigned to the violation. A willful violation categorized as medium severity/greater probability with a penalty reduction of 60% results in a proposed penalty of \$14,000.

c. **Reduction Factor for Size – Serious Willful**

The reduction factors for size for serious willful violations shall be applied as shown in the following chart. This chart helps minimize the impact of large penalties for small employers with 250 fewer employees.

However, in no case shall the proposed penalty be less than the statutory minimum, i.e., \$ 5,000, for these employers.

The rates of reduction are as follows:

<u>Number of Employees</u>	<u>Percent Reduction</u>
1-25	60% reduction
26-100	40% reduction
101-250	20% reduction
251 or more	zero reduction

d. Reduction Factor for History– Serious Willful

A ten percent (10%) reduction for history shall be given to employers who have not been cited by VOSH for any serious, willful, or repeat violations in the last 3 years. The percentage reduction factor for history shall be added to the percentage reduction for size and the combined percentage reduction factor shall be applied at the same time. The proposed penalty shall then be determined from the table below. In no case shall a proposed penalty for a willful violation be less than \$5,000.

PENALTIES FOR WILLFUL VIOLATION(S)**PENALTY REDUCTIONS**

Total percent reduction for size and/or History	High Gravity	Medium Gravity	Low Gravity
0%	\$70,000	\$55,000	\$40,000
10%	\$63,000	\$49,500	\$36,000
20%	\$56,000	\$44,000	\$32,000
30%	\$49,000	\$38,500	\$28,000
40%	\$42,000	\$33,000	\$24,000
50%	\$35,000	\$27,500	\$20,000
60%	\$28,000	\$22,000	\$16,000
70%	\$21,000	\$16,500	\$12,000

The proposed penalty for any willful violation shall not be less than \$5000.

No penalty reduction factors may be applied to any violation which directly contributed to a fatality. Such a willful violation shall be penalized at \$70,000.

- e. Other-than-Serious Violations. Sections 40 through 60 of the VOSH *Administrative Regulations Manual* provide that an employer who violates any of the posting or recordkeeping requirements may be assessed a civil penalty of up to \$7,000 for each violation. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after reduction for size and history, be less than \$5,000.
- f. Egregious Violations. For flagrant cases involving willful violations, an egregious (i.e., violation-by-violation) penalty

procedure may be considered. Under this procedure, standard penalty calculations described in section C. are applied, but instead of grouping or combining violations for penalty purposes, *each* instance of noncompliance is considered to be a separate violation and a separate penalty is applied. Compliance Officers who identify a case which could have egregious violations shall notify the Regional Safety or Health Director as soon as possible. Only the Commissioner may authorize the use of this policy and approve the assessment of egregious penalties.

15. General Application

The procedures that follow shall be used in determining proposed penalties for violations of VOSH regulatory requirements contained in the *VOSH Administrative Regulations Manual*, only when the employer has received a copy of the OSHA 300 Form through the Recordkeeping Requirements booklet or from any other source, or had knowledge of the requirements.

- a. If the employer has not received the booklet or the OSHA 300 Form, and did not have knowledge, citations without proposed penalties will be issued.
- b. Except as otherwise noted, penalties for regulatory violations shall have adjustment factors for size and history applied in determining the proposed penalty.

16. Posting Requirements

Penalties for violation of posting requirements shall be proposed as follows:

- a. VOSH Notice. If the employer has not displayed (posted) the notice furnished by the Virginia Occupational Safety and Health Program (or OSHA) as prescribed in § 40 of the *VOSH Administrative Regulations Manual*, an other-than-serious citation shall normally be issued. The unadjusted penalty for this alleged violation shall be \$1,000.
- b. Annual Summary. If an employer fails to post the summary portion of the OSHA-300 Form or acceptable substitute under § 60 of the *VOSH Administrative Regulations Manual* during the month of February, as required by § 40 of the *VOSH Administrative Regulations Manual*, even if there have been no injuries, an other-than-serious citation shall be issued with an unadjusted penalty of \$1,000.
- c. Citation. If an employer received a citation which has not been posted as prescribed in § 40 of the *VOSH Administrative Regulations Manual*, an other-than-serious citation shall be issued. The unadjusted penalty shall be \$3,000.

17. Reporting and Recordkeeping Requirements

Section 40.1-49.4.G., *Code of Virginia*, provides that violations of the recordkeeping and reporting requirements may be assessed civil penalties of up to \$7,000 for each violation.

- a. OSHA-300 Form or Acceptable Substitute. If the employer does not maintain the Log and Summary of Occupational Injuries and Illnesses, the OSHA-300 Form, as prescribed in **Part 1904 recordkeeping requirements for recordable injuries and illnesses have occurred during the calendar year**, an other-than-serious citation shall be issued. There shall be an unadjusted penalty of \$1,000 for each year the form was not maintained.
 - (1) No Recordable Injuries or Illnesses. When no recordable injuries or illnesses have occurred at a workplace during the current calendar year, the OSHA-300 need not be completed until the end of the calendar year for certification of the summary.
 - (2) Significant Recordkeeping Deficiencies. An OSHA-300 with significant deficiencies shall be considered as “not maintained”.
- b. OSHA-301 FORM. If the employer does not maintain the Supplementary Record, OSHA-301 Form (or equivalent), as prescribed in **Part 1904 recordkeeping requirements**, an other-than-serious citation shall be issued.

There shall be an adjusted penalty of \$1,000 for each OSHA-301 form not maintained.

- (1) A penalty of \$1,000 shall be assessed for each OSHA-301 form not maintained up to a maximum of \$7,000.
 - (2) A penalty of \$1,000 shall be assessed for each OSHA-301 form inaccurately maintained, up to a maximum of \$3,000.
 - (3) Minor inaccuracies shall be cited, but with no penalties.
 - (4) If a large number of violations or other circumstances indicate that the violations are willful, then other penalties, including violation-by-violation may be applied.
- c. Reporting. Employers are required to report, either orally or in writing, to the nearest Regional Office within eight (8) hours of any occurrence of an employment accident which is classified as a fatality or catastrophe. (See *VOSH Administrative Regulations Manual* § 50 and § 40.1-51.1.D. *Code of Virginia*.)

A penalty of \$5,000 shall be assessed. No adjustments shall be applied.

- (1) An other-than-serious citation shall be issued for failure to report such an occurrence. The unadjusted penalty shall be \$5,000.
- (2) If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of \$7,000 may be assessed.
- (3) If the Regional Safety or Health Director becomes aware of an incident required to be reported through some means other than an employer report prior to the elapse of the 8-hour reporting period and an inspection of the incident is made, a citable violation for failure to report does not exist.

18. Failure to Abate

Section 40.1-49.4.1., *Code of Virginia*, provides criteria for assessing civil penalties for failure to abate a violation. A penalty of not more than \$7,000 may be assessed for each day the violation continues past the final abatement date.

- a. Application. A Notification of Failure to Abate Alleged Violation (VOSH-2B) shall be issued in cases where violations have not been corrected as required.

Failure to abate penalties shall be applied when an employer has not corrected a violation which was cited previously when the previous citation has become a final order. A good faith but unsuccessful effort to abate the violation shall be taken into consideration when determining the appropriate penalty amount as indicated in later sections.

- (1) No Employer Contest. If a timely notice of contest has not been filed, the citation and proposed penalties shall be deemed to be a final order of the Commissioner upon the expiration of the contest period and not subject to review by any court or agency. Penalties for failure to abate shall be applied where abatement has not been accomplished.
- (2) Employer Contests Alleged Violation(s). If an employer contests one or more of the alleged violations, the period for abatement does not begin to run, for the contested items, until the day following the entry of the final order affirming the citation by the Circuit Court or by the Supreme Court in the case of an appeal.

- (a) If the employer contests only the amount of the proposed penalty, the employer must correct the alleged violation within the prescribed abatement period.
- (b) If an employer contests an abatement date in good faith, a Failure to Abate notice shall not be issued for the item contested until a final order affirming a date is entered, the new abatement period, if any, has been completed, and the employer has still failed to abate.

EXCEPTION: When a high gravity serious hazard is cited with an abatement date of less than 15 working days, a follow-up inspection may be scheduled after expiration of the abatement period, but still within the 15-day notice of contest period, provided that the employer has not actually filed such a notice.

- b. Employer Contest. If an employer contests one or more of the alleged violations, the period for abatement does not begin to run (as to those items contested) until the final order has been issued, and the contest rights have lapsed or been exhausted. If an employer has been granted an extension of abatement, a Failure to Abate Notice shall not be issued for that violation until the new abatement period has lapsed, and the employer has still failed to abate the violation.
- c. Calculation of Additional Penalties. A GBP for unabated violations shall be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon reinspection.

This recalculated GBP, however, shall not be less than that assessed for the item when originally cited, except as provided in I.B.16.e., *Good Faith Effort to Abate*, below.

- (1) Method of Calculation. In those instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Regional Safety or Health Director. In no case shall the penalty be less than \$1,000 per day. Adjustment factors shall then be applied to arrive at the daily proposed penalty.
- (2) Only the adjustment factor for size, based upon the circumstances noted during the reinspection, shall then be applied to arrive at the daily proposed penalty.
- (3) The daily proposed penalty shall be multiplied by the number of calendar days that the unabated violation has continued, except as provided below.

- (a) The number of days unabated shall be counted from the day following the abatement date specified in the citation as the final order. It will include all calendar days between that date and the date of reinspection, excluding the date of reinspection.
 - (b) Normally, the maximum total proposed penalty for failure to abate a particular violation shall not exceed 30 times the amount of the daily proposed penalty.
 - (c) At the discretion of the Program Director, a lesser penalty may be proposed with the reasons for doing so (e.g., achievement of an appropriate deterrent effect) documented in the case file.
 - (d) If a penalty in excess of the normal maximum of 30 times the amount of the daily proposed penalty is deemed appropriate by the Program Director, the case shall be treated under the violation-by-violation penalty procedures established.
- (4) In unusual circumstances such as where the gravity of the violation is at the highest level (high severity and greater probability), or when the employer has willfully failed to abate the violation or has failed to abate a second time, higher penalties shall be proposed. In such situations, the proposed penalty and factors involved shall be developed in consultation with the Director of VOSH Programs and the Director of the Division of Legal Support and approved by the Commissioner.

d. Partial Abatement

- (1) Partial Reduction. When the violation has been partially abated, the Regional Safety or Health Director may authorize the Compliance Officer to factor in a reduction of 25% to 75% to the amount of the assessed penalty calculated as outlined in part (2), above. The reasons for this action shall be documented in the case file.
- (2) Only Some Instances Corrected. When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional assessed penalty shall take into consideration the extent to which the violation has been abated.

EXAMPLE: Where three out of five instances have been corrected, the assessed penalty (calculated as outlined in part (2) above, without regard to any partial abatement) may be reduced by 60%.

- (3) Substantive Requirements. In multi-step correction items, only the failure to comply with substantive (rather than procedural) requirements shall generally incur a failure to abate penalty.
 - (4) Procedural Requirements. On rare occasions, when the Department decides to issue a Failure to Abate Notice for failure to comply with procedural requirements, the calculation of the assessed penalty shall consider the extent to which a violation has been substantially abated, with the daily assessed penalty (calculated as outlined in above, without regard to any partial abatement) reduced accordingly.
- e. Good Faith Effort to Abate. When the Compliance Officer believes, and so documents in the case file, that the employer has made a good faith effort to correct the violation and the employer had good reason to believe that it was fully abated, the Compliance Officer may reduce or eliminate the assessed penalty that would otherwise be justified.

19. Grouping

Violations of the posting and recordkeeping requirements which involve the same document (e.g., summary portion of the OSHA-300 Form was neither posted nor maintained) shall be grouped as an other-than-serious violation for penalty purposes. The unadjusted penalty for the group violations would then take on the highest dollar value of the individual items, which would normally be \$1,000.

20. Access to Records

The VOSH *Administrative Regulations Manual* requires an employer to maintain forms and records and provide them for inspection and copying by an authorized representative of the Commissioner or by an employee, former employee or authorized representative of employees. (See VOSH *Administrative Regulation Manual*, §§ 60 and 80).

21. Notification Requirements

An employer who has received advance notice of an inspection, as required by § 40 of the *Administration Regulations Manual*, must notify the authorized employee representative.

When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by § 230 of the VOSH *Administrative Regulations Manual*, an other-than-serious citation shall be issued with an unadjusted penalty for \$2,000.

C. Criminal Penalties

1. Code of Virginia Provisions

The *Code of Virginia* provides for criminal penalties in the following cases:

- a. Willful violations of a VOSH standard, rule of order causing death of an employee. (§ 40.1-49.4.K.)
- b. Giving unauthorized advance notice. (§ 40.1-51.3:1)
- c. Giving false information. (§ 40.1-51.4:2)
- d. Refusal to answer questions; obstruction of inspection.(§40.1-10)

2. Imposed by Courts

Criminal penalties are imposed by the courts after trials and not by VOSH.

D. Egregious Penalties

1. Purpose

Large proposed penalties, e.g., where penalties are proposed on a violation-by-violation basis, and criteria guiding approval of such penalties by the Commissioner, are based on meeting the public purpose.

2. Guidance

- a. Early Identification of Cases. It is important that the Regional Safety or Health Director identify, as early as possible, cases which may be appropriate for violation-by-violation treatment.

- (1) Careful documentation of evidence for each violation and appropriate involvement of technical specialists required for litigation is essential to the successful pursuit of potential egregious cases.

- (2) Coordination with the Central Office must be scheduled in time for comprehensive review before the expiration of the statutory 6-month citation period.

- (3) Early involvement of the Division of Legal Support will ensure adequate legal, evidentiary, and resource coordination.

- b. Criteria. Those conditions which constitute a flagrant violation of the law or of VOSH standards/regulations are appropriate for violation-by-violation handling. The following criteria shall be used by the Regional Safety or Health Director to determine whether to recommend the use of violation-by-violation citations and penalties:

- (1) Cases must be classified as willful.

- (a) The employer is found in violation of a VOSH requirement:
 - 1 Of which he has actual knowledge at the time of the violation. Such knowledge may be demonstrated through previous citation history, accident experience, widely publicized agency compliance, direct evidence of specific recognized jobsite hazards or other appropriate factors; and
 - 2 Intentionally, through conscious, voluntary action or inaction, having made no reasonable effort to eliminate the known violation.
- (2) Cases must fall in at least one of the categories given in the following list, (a) through (f).
 - (a) The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.
 - (b) The violations resulted in persistently high rates of worker injuries or illnesses.
 - (c) The employer has an extensive history of prior violations of VOSH law.
 - (d) The employer has intentionally disregarded safety and health responsibilities.
 - (e) The employer's conduct taken as a whole amounts to clear bad faith in the performance of his duties under the law.
 - (f) The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.
- (3) Cases which satisfy only one of the two main criteria, above, are not suitable for violation-by-violation penalties. For example, an employer who has an extensive history for the case in question may not be subject to egregious penalties.

- c. Case Support Requirements. Because these cases involve administrative and legal issues critical to effective compliance with the law, it is essential to ensure that the highest professional standards are met in the conduct of inspections, the issuance of citations and the prosecution of litigation in such cases.
- (1) Documentation. Whenever a case is proposed for violation-by-violation treatment, fully detailed written responses to the questions in the appendix must be developed. Supporting documentation shall be provided and cross-referenced whenever possible. Mandatory use of these questions is intended to provide a consistent format to aid in review of these cases, as well as to ensure as much as possible uniformity of case development across the state.
- (2) Evidence. Documentary support shall ordinarily be planned for and obtained early in the investigation.
- (a) The evidence necessary to support citations being considered for violation-by-violation penalty sanctions shall be included in the case file. Such evidence must be present for each separate violation.
- 1 Photographs, videotapes, audiotapes, sampling data, and witness statements shall be used whenever possible to provide supporting evidence of violative conditions.
- 2 Company documents supporting knowledge of that standard and the violative conditions as well as willfulness of the violation shall be diligently sought and obtained by interrogatories as appropriate.
- 3 Examples of such documents are internal audit reports, consultant or insurance company reports, trade association articles, minutes from safety meetings, complaints from employees, memoranda and other correspondence from safety personnel, especially from plant (or site) safety to plant (or site) management.

Also included might be recognition by corporate safety personnel of violations

and bringing these violations to the attention of higher management, notes relating to VOSH activities, and industry practice in other companies or industries.

- (b) Employers must be asked explicitly:
- 1 If and when they recognized the hazardous nature of each of the violations;
 - 2 If they knew what VOSH's standards require and, if so, what steps the company had taken to abate the violations and why the apparent violations had not been corrected;
 - 3 Whether they knew of the documents identified under subparagraph (a), above, and what those documents contained.
- (c) Their response shall be carefully documented in writing (verbatim, if possible). An attempt shall be made to have a second person present as a witness, particularly when dealing with potentially compromising matters.
- (d) Signed employee statements shall be obtained routinely to support each of these violations in as much detail as possible.
- (e) Employee exposure and the nature and extent of injuries or illnesses related to the violations shall be carefully and adequately described.
- (f) The need for interrogatories and medical access orders shall be decided and documents obtained as soon as possible.
- (g) The need for experts shall also be decided and necessary arrangements made as soon as possible. It is anticipated that experts will be needed for cases involving complex violations, such as ergonomics or abatement methods.
- (h) Particular attention shall be paid to anticipating and preparing for possible employer defenses in accordance with the guidelines in this FOM.

- (3) The Division of Legal Support Involvement. Early involvement of the Division of Legal Support is essential to examine and evaluate the documentation and other evidence supporting the violations and to determine whether expert witnesses or depositions will be necessary, as well as to provide sufficient time for the Division of Legal Support to write an opinion on the merits of the case.
- d. Citations. The law authorizes penalties to be proposed for each violation but limits the maximum penalty that can be proposed. In accordance with the guidelines, the following procedures shall be adhered to in issuing citations with violation-by-violation penalties.
 - (1) Each separate violation must have its own Alleged Violation Description which will describe the particular conditions associated with that violation instance.
 - (2) Each separate violation must have its own penalty calculated in accordance with the procedures given in this Chapter.
- e. Case Review. The procedures and timetables for significant case review will be followed in all cases involving violation-by-violation citations.
 - (1) The Regional Safety or Health Director shall notify the Program Director of a potential egregious case. The Program Director shall, in turn, notify the Commissioner of the following:
 - (a) Establishment name.
 - (b) Regional Office of jurisdiction.
 - (c) Six-month date.
 - (d) Opening conference date.
 - (e) General type of apparent violations (e.g., safety, health, recordkeeping).
 - (2) Regional Safety or Health Director(s) shall take care not to expand the inspection beyond what they can reasonably expect to accomplish within these time frames.
 - (3) The Program Director shall coordinate the provision of needed technical support and expert witnesses and may request assistance from federal OSHA, if necessary.

- (4) The Regional Safety or Health Director shall complete his part of the significant case review as soon as possible, but not later than 45 days prior to the 6-month date, and forward the case file to the Program Director for review.
- f. Recordkeeping Violations. If the case involves recordkeeping violations which are being considered for additional penalties, further steps are necessary.
- (1) Copies of evidence supporting each recordkeeping violation proposed as egregious, as developed from the company's occupational injury and illness logs and supplementary records, worker's compensation records, medical records, first aid logs and other sources shall be included in the package.
(See guidelines in Appendix.)
 - (2) This evidence must support the existence of a violation for both non-recorded and mis-recorded cases. It must include the particular recordability criteria involved: whether the case involved days away from work or days of restricted work activity beyond the day of injury or onset of illness as well as evidence that the case was work-related.

NOTE: Medical records contained in the case file shall be handled in accordance with the guidelines.

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CHAPTER 12

CITATION AND CASE REVIEW PROCEDURES

I. Pre-citation Consultation

A. **General**

In order to ensure uniformity, consistency and the legal adequacy of a limited category of citation items, there shall be appropriate consultation between Regional Safety or Health Director(s), Program Director(s), and the Division of Legal Support Director.

NOTE: *This consultation is different from significant case review inasmuch as it occurs while the investigation is still under way or while draft citations are being prepared.*

1. Procedures. Consultation in accordance with program procedures shall occur when the citation items could involve important, novel or complex litigation in which the Regional Safety or Health Director would expect the investment of major litigation resources.
 - a. Categories of cases where consultation shall occur are as follows:
 - (1) All willful and general duty clause violations;
 - (2) Complex OSH Act 4(b)(1) preemption questions involving other enforcement agencies such as MSHA, NRC or DOT;
 - (3) Cases arising under newly promulgated safety and health standards;
 - (4) Cases of significant public concern such as fatalities and catastrophes;
 - (5) Cases which are likely to become major litigation vehicles in the development of VOSH law;
 - (6) Categories of cases designated by the Office of the Attorney General and the Commissioner of Labor and Industry as being appropriate for pre-citation consultation for reasons of litigation strategy or the elimination of unnecessary duplication of effort;
 - (7) Categories of cases that have been identified by Federal OSHA as being of significant concern on the national level;

- (8) In addition, the Program Director may request appropriate consultation with the Regional Safety or Health Director or the Division of Legal Support Director in other cases not listed in the above categories.
- b. Pre-citation consultation shall be conducted at the earliest possible stage of a VOSH investigation in order to assist in developing an investigation strategy, particularly in cases involving fatalities, catastrophes and cases of significant public concern.
- c. If a case involves some citation items which warrant pre-citation consultation and others which do not, the Regional Safety or Health Director may issue the routine citation items promptly and delay the issuance of only those items which require pre-citation consultation.
- d. Where required as a result of pre-citation consultation, the Regional Safety or Health Director will undertake additional investigation which may involve obtaining expert assistance.
- e. Nothing in the above procedures shall affect VOSH's responsibility and final authority to issue citations.

B. Citation Considerations

1. General. Section 40.1-49.4.A.1, *Code of Virginia*, controls the writing of citations.
 - a. Section 40.1-49.4.A.1. "...the Commissioner...shall with reasonable promptness issue a citation to the employer." The time which has elapsed from the completion of the inspection or investigation until the issuance of citation(s) shall be closely monitored and kept as short as possible by the Regional Safety or Health Director.
 - (1) The Regional Safety or Health Director shall issue citations as soon as possible after an inspection for safety violations and for health violations which do not require laboratory analysis of samples.
 - (2) When potential health violations require the receipt of laboratory results before they can be cited, a citation shall be issued as soon as possible after the results are received in the Regional Office.
 - b. Section 40.1-49.4.A.3. "No citation may be issued...after the expiration of six (6) months following the occurrence of any violation." Accordingly, no citation shall be issued where the date on which it is actually assigned and dated is six (6) months past when the alleged violation last occurred.

Where the actions or omissions of the employer concealed the existence of the violation, the time limitation is suspended until such time as VOSH learns or could have learned of the violation. The Director of the Division of Legal Support shall be consulted prior to any such issuance.

2. Specific Instructions. The proper writing of a citation is an essential part of the enforcement process. *Specific instructions on how to complete the Citation and Notification of Penalty, VOSH-2 Form, will be added to this FOM at a future date or provided in a separate 01 series Program Directive.*
 - a. Standards and Regulations. After identifying a hazardous condition, the Compliance Officer shall review existing standards and regulations to ensure that the hazardous condition noted is covered within the scope and application of the standard. Citations shall not be issued unless the citation is based on mandatory language in VOSH Standards and, when applicable, in referenced standards.
 - b. Alternative Standards. In rare cases, the same factual situation may present a possible violation of more than one standard. For example, the facts which support a violation of § 1910.28(a)(1) may also support a violation of § 1910.132(a) if no scaffolding is provided when it should be and the use of safety belts is not required by the employer.
 - (1) When more than one standard applies to a given factual situation and compliance with any of the applicable standards would effectively eliminate the hazard, alternative standards may be cited using the words, "in the alternative." A reference in the citation to each of the standards involved shall be accompanied by a separate Alleged Violation Description (AVD) which clearly alleges all of the necessary elements of a violation of that standard.
 - (2) Where violations are alleged in the alternative, only one penalty, not one penalty for each standard cited, shall be proposed for the violative condition.

NOTE: Section 40.1-51.1.A., Code of Virginia, may be cited in the alternative when a specific standard is cited to cover situations in which the cited standard may not apply. Before using alternative citing, the Director of the Division of Legal Support shall be consulted.
 - c. Ordering of Violations on the Citation. Violations shall be written in the numerical order in which they appear in the standards. Grouped violations shall also be written in the same order. If penalties are to be proposed for a grouped violation, the penalty shall be written across from the first violation item appearing on the VOSH-2.

- d. Ensuring Consistency of Citations with Safety and Health Evaluation. Before issuing any citation, the Compliance Officer and the Regional Safety or Health Director will review IW-1/EMPLOYER INTERVIEW SHEET to ensure that the evaluations made at that time are consistent with the citations to be issued. The Regional Safety or Health Director shall note this review on the case file review notes.
 - (1) Should any difference exist between the original evaluation and the citation, either the evaluation should be changed or the citation should not be issued.
 - (2) An example of inconsistency between a citation and the prior safety and health evaluation are where an evaluation graded the employer at Average (2) or Above Average (3) for most of the items in IW-1/EMPLOYER INTERVIEW SHEET and a training violation was cited.
 - (3) In the above example, if the initial evaluation is considered correct, the citation should not be issued, and if the facts of the case show that the earlier evaluation was incorrect, the IW-1/EMPLOYER INTERVIEW SHEET should be changed.
 - (4) Where employee misconduct is a potential defense, it is also important to check this section as an adequate training program since an adequate training program is a vital part of the employer's defense.
3. Issuing No Citation. When an inspection, either partial or comprehensive, results in a finding of no violations, a letter will be sent to the employer to inform them of the findings. *(Refer to the applicable letter in Appendix "A".)*

C. Writing Citations

1. Timeline for Writing Citations

Section 40.1-49.4.A. of the Code of Virginia controls the writing of citations. "...the Commissioner...shall with reasonable promptness issue a citation to the employer. No citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation."

- a. The Regional Safety or Health Director shall issue citations as soon as possible after an inspection for safety violations and for health violations which do not require laboratory analysis of samples.
- b. When potential health violations require the receipt of laboratory results before they can be cited, a citation shall be issued as soon as possible after the results are received in the regional office.
- c. If questions arise concerning the 6-month statute of limitations, the Director of the Division of Legal Support shall be consulted.

NOTE: If the inspection results include some citation items which do not require extensive investigation, and others which do, those citation items which do not require extensive investigation shall be issued promptly. A new citation should be issued with a new citation number (but the same inspection number) after the investigation of the additional hazard(s) is completed. In such cases, the employer shall be informed of the potential for additional citations, and of anticipated time frames.

2. Delayed Notification of Alleged Violation

No inspection shall be initiated where an alleged violation last occurred six months or more prior to the date on which the Department was notified of the condition. Where the actions or omissions of the employer concealed the existence of the violation, the time limitation is suspended until such time that VOSH learns or could have learned of the violation. A citation shall not be issued where any alleged violation last occurred six months or more prior to the date on which the opening conference occurred.

3. Alternative Standards

Where it appears that more than one standard is applicable to a given factual situation and that compliance with any of the applicable standards would effectively eliminate the hazard, it is permissible to cite alternative standards using the words "in the alternative." A reference in the citation to each of the standards involved shall be accompanied by a separate Alleged Violation Description (AVD) which clearly alleges all of the necessary elements of a violation of that standard. Only one penalty shall be assessed for the violative condition.

D. Combining and Grouping of Violations

Except for standards which deal with many unrelated hazards, the same standard may not be cited more than once on a single citation. However, the same standard may be cited on different citations on the same inspection .

1. Combining

Violations of a **single standard** having the same classification that are found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Normally, different facets of the same standard shall also be combined. Each instance of the violation shall be separately set out within that item of the citation. General violations of a standard may be combined with serious violations of the same standard when appropriate.

2. Grouping

When the source of *one* hazard is identified and involves interrelated violations of different standards, these may be grouped into a single violation. Within the grouping, the most serious violation(s) should be listed first. The following situations normally call for grouping violations:

- a. Grouping Related Violations. When the Compliance Officer believes that violations classified as serious are so closely related as to constitute a single hazardous condition, the violations should be grouped.
- b. Grouping Other than Serious Violations Where Grouping Results in a Serious Violation. Two or more individual violations which, if considered individually represent other than serious violations may be grouped and alleged as a single serious violation if together they create a substantial probability of death or serious physical harm.
- c. Where Grouping Results in Higher Gravity Other-than-Serious Violation. If a number of other-than-serious violations exist in the same piece of equipment, and when viewed together, these violations affect the overall gravity of possible injury resulting from an accident involving the combined violations, then the violations may be grouped, although the resulting citation will be an other-than-serious violation.
- d. Violations of Posting and Recordkeeping Requirements. Violations of the posting and recordkeeping requirements which involve the same document, e.g., OSHA-300 Form was not posted or maintained, shall normally be grouped for penalty purposes.

3. **When Not to Group**

Instances when grouping is normally inappropriate:

- a. Single Inspection. Only violations discovered in a single inspection of a single establishment or worksite may be grouped. An inspection in the same establishment or at the same worksite shall be considered to be a single inspection even if it continues for a period of more than one day or is discontinued with the intention of resuming it after a short period of time and only VOSH-1 is completed.
- b. Multiple Inspections. Violations discovered in multiple inspections of a single establishment or worksite may not be grouped. An inspection in the same establishment or at the same worksite shall be considered a single inspection even if it continues for a period of more than one day or is discontinued with the intention of resuming it after a short period of time if only one VOSH-1 is completed.
- c. Separate Establishments of the Same Employer. Where inspections are conducted, either at the same time or different times, at two establishments of the same employer and instances of the same violation are discovered during each inspection, the employer shall be issued separate citations for each establishment. The violations shall not be grouped.
- d. General Duty Clause Violations. Because § 40.1-51.1.A. is cited so as to cover all aspects of a serious hazard for which no standard exists,

no grouping of separate General Duty Clause or standard violations is permitted. This provision, however, does not prohibit grouping a § 40.1-51.1. A violation with a related violation of a specific standard.

- e. Egregious Penalty Cases. Violations suitable for egregious penalties (i.e., proposed as violation-by-violation citations) shall not be combined or grouped. Other violations in an egregious penalty case which are not suitable for egregious penalties may be grouped or combined. (See information on egregious penalties.)
- f. Violations Related to a Fatality. Violations which are directly related to a fatality may not be combined or grouped. Other violations in a fatality case which are not directly related to the fatality may be grouped or combined.

II. Citation Review

A. **Regional Safety or Health Director's Authority and Responsibility to Review Citations**

1. **Elements of Review**

The Regional Safety or Health Director and Engineer shall be responsible for ensuring, with regard to all citations, that:

- a. The documentation of the violation supports the citation;
- b. The language of the citation is clear and adequately communicates to the employer a clear description of the hazard (including its location) and employee exposure;
- c. The proper codes were cited; and,
- d. The penalty was calculated correctly.

2. **Substantial Deficiency Found**

If the Regional Safety or Health Director finds a substantial deficiency in the citation or the documentation, e.g., inappropriate gravity or the documentation does not support the citation, the report with an explanation shall be returned to the Compliance Officer for modification.

3. **Errors Regional Safety or Health Director May Correct**

The Regional Safety or Health Director may personally correct errors in the following: the code cited, calculation of penalty assessed, and minor inaccuracies in the citation narrative (AVD/variable information) as follows:

- a. Justification in File and Communication to Compliance Officer. The Regional Safety or Health Director shall include justifications in the case file for each change and shall communicate the changes to the Compliance Officer.

- b. Method Used to Make Changes. Changes shall be made by drawing a single line through the incorrect information, then writing in the correct information. The original recommendations from the Compliance Officer must remain legible, and the Regional Safety or Health Director must initial each change.
- c. Difference of Opinion Between Compliance Officer and Regional Safety or Health Director. If the Regional Safety or Health Director and the Compliance Officer disagree about changes, such differences shall be resolved through consultation by the Regional Safety or Health Director with the Program Director.

B. Case File Review Procedures

1. General

All case files will be reviewed and approved by the Regional Safety or Health Director to ensure that the files are organized in accordance with procedures, and that they are well documented, and that they are clearly presented with appropriate findings and conclusions. Significant case files shall be reviewed and approved as described in this chapter.

2. Significant Case Review

- a. Definition of Significant Case. Any occupational safety or health compliance case which involves one of the following conditions shall be considered a VOSH “significant case”:
 - (1) Willful/criminal willful violation;
 - (2) Willful violations case suitable for egregious penalty treatment;
 - (3) Fatality/catastrophe;
 - (4) Interest at national level identified by OSHA;
 - (5) Interest by media, public officials, or other interest groups;
 - (6) Identified as significant by the Commissioner;
 - (7) Repeat violation (third instance or higher);
 - (8) Ergonomics violations.
- b. Review Procedures for Significant Cases. All significant cases shall be reviewed by the Regional Safety or Health Director, Program Director and the Division of Legal Support.
- c. Time Frame for Issuance of Citations for Significant Cases. All citations will be issued by the Regional Safety or Health Director following the case review process. Citations will be issued no later than six (6) months following the occurrence of the alleged violations (see §16VAC25-60-260.A.1 of the VOSH *Administrative Regulations Manual*, and Chapter 15, Legal Issues).

- d. Tracking Significant Cases. Significant cases will be tracked by the Division of Legal Support.

3. **Review of Contested Cases**

All contested cases not settled during an informal conference will be reviewed by the Regional Safety or Health Director and Program Director.

The Program Director may refer the contested case to the Division of Legal Support for advice on drafting a settlement agreement, for preparation of a final order, or for filing a bill of complaint.

4. **Regional Safety or Health Director's Review**

Regional Safety or Health Directors will review cases for compliance with all requirements of the FOM and other agency policy and procedures.

At a minimum, the Regional Safety or Health Director will review each of the following case file elements:

- a. Case file organization is consistent with requirements;
- b. Case narrative is complete, clear, and prepared in accordance with procedures;
- c. Findings and conclusions are well documented; appropriate documentation is contained in the file;
- d. All exhibits are properly numbered and tabbed;
- e. All required VOSH forms are completed correctly;
- f. Appropriate testing/sampling was done;
- g. Sufficient photos and witness statements of employees, accident witnesses and supervisory personnel are included;
- h. Violations are properly cited and are described sufficiently;
- i. Citations are written in accordance with the FOM;
- j. Justification is included in the file for all willful and criminal willful cases;
- k. Penalties were accurately calculated;
- l. Inspection was conducted and the file prepared in a timely manner;
- m. Citations are consistent with safety and health evaluation on VOSH-IW1.

The Regional Safety or Health Director will always prepare written case file notes. (See *VOSH-FRN form in Appendix "B"*). These notes will be attached to the file.

For all significant or contested cases, the Regional Safety or Health Director will also complete a case review process form (*See Appendix B*). When this form is used, the review notes should be attached to it. The forms then will be included in Section 2 of the case file and forwarded to the Program Director for review.

For cases where it may be appropriate to use the egregious penalty procedures, the Regional Safety or Health Director will apply the required criteria. If the case meets the criteria, the Regional Safety or Health Director will notify the Program Director who shall then notify the Commissioner. The documentation and evidence required for violation-by-violation penalties shall be added to the case file, if these are not already included.

The Regional Safety or Health Director will ensure that all deficiencies are corrected by the Compliance Officer before forwarding the case file to the Program Director for review.

The case file will be forwarded to the Central Office as soon as possible, but no later than 45 days prior to the 6-month date.

5. Program Director's Review

The Program Director will review all significant cases and all cases which have proposed egregious penalties. The Program Director will also review all contested cases which are sent to Headquarters. The Program Director will document any comments from such reviews to the case file.

At a minimum, the Director will review the file to determine the following:

- a. Regional Safety or Health Director properly reviewed the file before forwarding it for a significant case review;
- b. File is organized in accordance with the procedures;
- c. Case narrative is clear and is written in accordance with procedures;
- d. All findings and conclusions are proper and well documented;
- e. Violations are properly cited; citations are written correctly;
- f. Investigation and case file preparation was completed in a timely fashion;
- g. Closing conference was held unless the Regional Safety or Health Director was directed otherwise and all VOSH forms have been completed accurately;
- h. Penalty was calculated properly.

If the Program Director determines that additional investigation or documentation is needed to substantiate the case findings or conclusions, the file will be returned to the Regional Safety or Health Director for action.

6. The Division of Legal Support Review

The Division of Legal Support is responsible for conducting a pre-citation issuance review of all VOSH significant cases.

The purpose of the Division of Legal Support review is to ensure that the Department's course of action in the case is legally supported by the documentation in the case file and that the evidence is sufficient to withstand a contest from the employer, or, in the case where no citation is issued, that the evidence supports the decision, and that proper investigative procedures were utilized by the inspector. The results of the review conducted by the Division of Legal Support shall be summarized in writing.

The following areas will be reviewed by the Division of Legal Support:

- a. Prima Facie Case. The Division of Legal Support shall review each violation to ensure that the following elements of the *prima facie* case are sufficiently documented for each violation cited:
 - (1) Existence of a safety or health hazard;
 - (2) Content and applicability of VOSH regulation or statute and employer violation of the regulation, statute or general duty clause;
 - (3) Employee exposure; and
 - (4) Employer knowledge;
- b. Citation Language. Each violation on the citation shall be reviewed to ensure that the language is used accurately and reflects the meaning and intent of the regulation or statute cited.
- c. General Duty Violations. This will be reviewed to ensure compliance with the requirements in the FOM.
- d. Classification of Violations. These shall be reviewed to ensure accuracy, i.e., Serious vs. Other-than-Serious; or Repeat vs. Willful.
- e. Citation for Multi-Employer Worksites. These are reviewed to ensure that the right employer was cited. Unusual issues include employee vs. independent contractor relationship and general contractor/subcontractor vs. owner/independent contractor.
- f. Violation-by-Violation Penalties. These shall be reviewed to evaluate the documentation and other evidence and to provide an opinion on the merits of the case.
- g. Affirmative Defenses. These must be evidenced in the documentation contained in the case file.
- h. Training Violations. These will be reviewed for appropriateness.

- i. Case File Documentation. This must be sufficient to support all findings and conclusions.

7. Compliance Officer Notification

The Regional Safety or Health Director shall inform the Compliance Officer of the results of the significant case review and provide him with a copy of the completed case review process form for that file. (See *VOSH-FRN form in Appendix "B"*).

III. Citation Issuance

A. Issuing Citations

1. Sending Citations to the Employer

Citations shall be issued in accordance with the requirements of §260 of the *VOSH Administrative Regulations Manual*. Citations shall be sent by certified mail or professional courier/parcel delivery service. Hand delivery of citations to the employer or an appropriate agent of the employer may be substituted for certified mailing if it is believed that this method would be more effective. Professional messenger service is acceptable. A signed receipt shall be obtained whenever possible; otherwise, the circumstances of delivery shall be documented in the file.

2. Sending Citations to Employees or Employee Representative

The Regional Office shall mail copies of citations to qualified employee representatives. Citations shall also be mailed to any employee upon request.

B. Amending or Administratively Vacating Citation & Notification of Penalty

1. Citation Amendment or Administrative Vacating Justified

A citation shall be replaced by an amended citation, or administratively vacated when information is presented to the Regional Safety or Health Director which indicates a need for such amendment or vacation under certain conditions which may include:

- a. Administrative or technical error:
 - (1) Citing of an incorrect standard.
 - (2) Incorrect or incomplete description of the alleged violation.
 - (3) A serious violation which should originally have been classified as other-than-serious.
- b. The Regional Safety or Health Director shall review the following circumstances before amending or withdrawing a citation:

- (1) Additional facts establish a valid affirmative defense.
- (2) Additional facts establish that there was no employee exposure to the hazard.
- (3) Additional facts establish a need to modify abatement date, penalty, or to reclassify citation items.
- (4) Citations issued to the wrong employer.

2. Citation Amendment or Administrative Vacating Not Justified

A citation shall *not* be amended or administratively vacated under certain conditions which include:

- a. The 15-working days for filing a notice of contest has expired and the citation has become a final order.
- b. Employee representatives have not been given the opportunity to present their views unless the amendment/vacation involves only an administrative or technical error.
- c. Editorial and/or stylistic modifications.

3. Procedures for Amending or Administratively Vacating Citations

The following procedures are to be followed in amending or administratively vacating citations:

- a. Regional Safety or Health Director. The Regional Safety or Health Director or his designee shall issue an amended citation when becoming aware of any of the conditions in section I.B.1. This will replace a previous citation in its entirety, or if the entire citation and notice is to be withdrawn, will administratively vacate the citation and notice. A copy of the original citation shall be attached to the amended Citation and Notification of Penalty Form when the amended form is sent to the employer. In the latter case, the Regional Safety or Health Director shall follow the procedures below to notify the employer and employee representative, where applicable, of the amended or vacated citation.
- b. When Amendments Change Classification of Citation Items. Changes initiated by the Regional Safety or Health Director without an informal conference are the exception. In such cases, if proposed amendments to citation items change the classification of the items; e.g., serious to other-than-serious, the original citation items shall be replaced with new, appropriate citation items on the amended citation.
- c. Elements of Amended Citation and Notice. The amended Citation and Notification of Penalty Form (VOSH-2) shall clearly indicate that:

- (1) The employer is obligated to post the amended citation until the amended violation has been corrected or for three working days, whichever is longer;
 - (2) The period of contest of the amended VOSH-2 will begin from the day following the date of receipt of the amended Citation and Notification of Penalty Form; and
 - (3) The contest period does not apply to the unchanged portions of the citation.
- d. Citation Vacated in Entirety. When circumstances warrant, a citation may be administratively vacated in its entirety by the Regional Safety or Health Director, Occupational Health Program Director, Director of VOSH Programs, or the Commissioner. The Regional Safety or Health Director must place justifying documentation in the case file. If a citation is to be withdrawn, the following procedures apply:
- (1) Letter to Employer. A letter withdrawing the Citation and Notification of Penalty should be sent to the employer, by the Regional Safety or Health Director. The letter should refer to the original citation and penalty, state that they are vacated, and direct that the letter be posted by the employer for three working days in those locations where the original citation was posted. The letter should direct the employer to discard the original citation.
 - (2) Copy to Employee or Employee Representative. When applicable to the specific situation (e.g., an employee representative participated in the walkaround inspection, the inspection was in response to a complaint signed by an employee or an employee representative, or the withdrawal resulted from an informal conference or settlement agreement in which an employee representative exercised the right to participate), a copy of the letter shall also be sent to the employee or the employee representative as appropriate. A copy of the withdrawal letter shall also be sent to any employee representative who has received a copy of the Citation and Notice, according to section I.A.2., above.
 - (3) The instructions contained in this section, with appropriate modification, are also applicable to the amendment of the notification of Failure to Abate Alleged Violation, VOSH-2B Form.
 - (4) The assistance of the Program Director shall be sought when amendments cause complicated drafting problems.

CHAPTER 13

ABATEMENT VERIFICATION

I. Abatement

The VOSH Abatement Verification regulation, § 307 through § 320 of the *VOSH Administrative Regulations Manual*, includes requirements that employers must follow, if they are cited for a VOSH violation, to ensure that they have abated the cited hazard(s).

A. Important Terms and Concepts

1. **Abatement verification** consists of abatement certification and abatement documentation, e.g., abatement photographs, abatement plans, and progress reports, etc.

Abatement certification is a brief, signed statement from the employer attesting to when and how abatement was achieved for the violations cited.

Abatement documentation is additional material submitted along with the abatement certification to show that abatement is complete and can include, but is not limited to, photos or videos, and receipts for materials and/or labor (*see below*).

Abatement documentation must be accurate and describe or portray the abated condition adequately. It may be submitted in electronic form, if approved by the Regional Safety or Health Director. The abatement regulation does not mandate a particular type of documentary evidence for any specific cited condition. The adequacy of the abatement documentation submitted by the employer will be assessed by VOSH using the information available in the citation and the Department's knowledge of the employer's workplace and history.

2. **Examples of documents** that demonstrate that abatement is complete include, but are not limited to:
 - a. Photographic or video evidence of abatement.
 - b. Evidence of the purchase or repair of equipment.
 - c. Evidence of actions taken to abate.
 - d. Bills from repair services.
 - e. Reports or evaluations by safety and health professionals describing the abatement of the hazard or a report of analytical testing.

- f. Records from the manufacturer that the article repaired is within the manufacturer's specifications.
 - g. Records of training completed by employees if the citation is related to inadequate employee training.
 - h. A copy of program documents if the citation was related to a missing or inadequate program, such as a deficiency in the employer's respirator or hazard communication program.
3. **Affected employee** means those employees who are exposed to the hazards(s) identified as violations(s) in a citation. This term is critical for the proper application of paragraph H. of §307, VOSH ARM, Employee notification.

4. **Effect of Contest Upon Abatement Period**

- a. Contest of Citation. Where the employer has filed a notice of contest to the citation within the contest period, the abatement period does not begin to run until the citation has become a final order. Under these circumstances, any follow-up inspection within the contest period shall normally be discontinued and a failure to abate notice shall not be issued. In situations where an *employee* has contested the abatement date, the abatement requirements of the citation remain unchanged.

NOTE: There is one exception to the above rule. If an early abatement date has been designated in the initial citation and it is the opinion of the Compliance Officer and/or the Regional Safety or Health Director that the cited condition presents an imminent danger, appropriate imminent danger proceedings shall be initiated even when the employer has filed an appeal.

- b. Abatement Date Affirmed. If an employer contests an abatement date in good faith, a Failure to Abate Notice shall not be issued for the item contested until a final order affirming a date is entered, the new abatement period, if any, has been completed, and the employer has still failed to abate. (*Refer to § 310 of the VOSH Administrative Regulations Manual*).
- c. Only Penalty Contested. Where an employer has contested only the assessed penalty, the abatement period continues to run unaffected by the contest.
- d. No Contest Filed. Where the employer does not contest, the employer must abide by the date set forth in the citation even if such date is within the 15 working-day notice of the contest period. Therefore, when the abatement period designated in the citation is 15 working-days or less and a notice of contest

has not been filed, a follow-up inspection of the worksite may be conducted for purposes of determining whether abatement has been achieved within the time period set forth in the citation. A failure to abate notice may be issued on the basis of the Compliance Officer's findings.

NOTE: Normally, a follow-up inspection would only be conducted in this circumstance if a serious violation with high gravity has been cited. (See Chapter 3, Program Planning, for follow-up inspections.)

5. Final Order Date Determination

- a. For an uncontested citation item, the day following the fifteenth working day after the employer's receipt of the citation.
- b. For a contested citation item:
 - (1) The effective date of a settlement agreement signed by VOSH; or
 - (2) The thirtieth day after the date on which a decision or order of a circuit court judge has been entered; or
 - (3) The date upon which the Virginia Court of Appeals issues a decision affirming the violations in a VOSH case.
- c. Any partial workday, i.e., any workday that is less than the normal duration of daily working hours for the regional office which has jurisdiction for the workplace inspection, shall not be counted as a "working day" in calculating final order date.

This would include workdays cut short because of inclement weather, power outage, office relocation, special leave or extended holiday leave granted, or other situations causing partial day office closures before the normal close of business.

6. **Movable equipment** means a hand-held or non-hand-held machine or device, powered or unpowered, that is used to do work and is moved within or between worksites. Hand-held equipment is equipment that is hand-held when operated. Basically, hand-held equipment is equipment that can be picked up and operated with one or two hands, such as a hand grinder, skill saw, portable electric drill, nail gun, etc.
7. **Worksite** is, for the purpose of enforcing this regulation, the physical location specified under the heading "Description" in the citation; if no location is specified, the worksite shall be the inspection site where the cited violation occurred.

8. Coding Requirements for Database Entry

- a. "X" Abatement Completed. Verified by certification and supporting documentation.
- b. "I" Corrected During Inspection. Compliance Officer witnesses abatement action and supplies a certification on VOSH 1-B form or case file narrative.
- c. "E" Abatement Not Completed. Employer out of business.
- d. "W" Abatement Not Completed. Worksite change.
- e. "S" Abatement Not Completed. DLS contact advised. Can be used only with permission at program level.
- f. "A" Abatement not completed. Regional Safety or Health Director's Discretion. When VOSH *Administrative Regulations Manual* § 307 E.1 citations are issued, the original non-verified citation items shall be coded with an "A."

B. Outreach

To encourage voluntary compliance, the subject matter of the regulation must be distributed to the affected employees and employers. Regional Offices are encouraged to actively seek out employer and employee groups to inform them of the regulation. Some suggested outreach approaches are:

1. Opening Conference

During the opening conference the Compliance Officer should explain to the employer the advantages of immediate abatement and that there are no additional certification and documentation requirements for violations quickly corrected during the inspection. The agency's new Form 197 (Warning tag) is available through the normal procurement process by the Regional Office. Compliance Officers are encouraged to offer "WARNING TAGS" to employers during the inspection. Compliance Officers must not apply the tags to any equipment; this is an employer responsibility.

2. Closing Conference

During the closing conference, the Compliance Officer should thoroughly explain to the employer the abatement verification requirements.

- a. Abatement verification (this means certification and documentation) is required for all citation item(s) which the employer receives except for those citation items which are identified as "Corrected During Inspection."
- b. The violation(s) that will reflect on-site abatement and will be identified in the citations as "Corrected During Inspection" shall be reviewed at the closing conference.

- c. **Abatement certification and documentation (the employer's physical proof of abatement) is required to be submitted along with each willful, repeat and serious violations.** To minimize confusion, the distinction between abatement certification and abatement documentation should be discussed.
 - d. Where abatement periods for citations are expected to exceed 90 calendar days, the submission and requirements of abatement plans and progress reports are to be explained.
 - e. The required placement of tags or the citation (VOSH *Administrative Regulations Manual*, § 307 J.) must also be discussed at the closing conference if it has not been discussed during the walkaround portion of the inspection.
3. Incorporate VOSH's abatement verification policy and requirements into local speeches, presentations, press releases, or other public information. A special effort should be placed on approaches that can reach those small employers who would not normally be informed about new VOSH standards or regulations.
 4. Initiate mailing programs to local industry associations and employee unions, to publicize the regulation and encourage voluntary compliance.

C. Verification of Abatement

The Regional Safety or Health Director is responsible for determining if abatement has been accomplished. **Abatement of all violations must be verified through Compliance Officer observation**, or through employer provided **abatement certification**, and additional **abatement documentation** when required by the citation.

Certifications. The effective date of the Virginia regulation is December 15, 1997. VOSH will apply the regulation for all inspections initiated after December 16, 1997.

1. Except for the application of tags on movable equipment (VOSH *Administrative Regulations Manual*, § 307 J.) requiring attachment of the tag or citation immediately after receiving the citation, the abatement verification regulation does not impose any requirements on the employer until a citation item has become a final order of the Commissioner.
2. All "final order" citation items, no matter what the characterization, require abatement certification within 10 calendar days of the abatement. Where there has been a contest of a violation or abatement date (not penalty), the abatement date is calculated by adding the original amount of time for abatement to the final order date.

3. Employers are not required to certify abatement for violations which they promptly abate during the on-site portion of the inspection and whose abatement the Compliance Officer observes. Regional Safety or Health Directors may use their discretion in extending the "24 hours" time limit to document abated conditions during the inspection. Observed abatement will be documented on the VOSH 1-B for each violation, as well as on the citation.
4. In accordance with VOSH *Administrative Regulations Manual*, § 307 E.1., **all willful and repeat citations require abatement verification i.e., certification and documentation**, such as written, videographic, or photographic evidence of abatement.
5. In accordance with VOSH *Administrative Regulations Manual*, § 307 E.1., the employer must provide abatement documentation for any serious violation for which the Agency indicates on the citation that such abatement documentation is required. **VOSH policy is that all serious violations, including moderate and low gravity violations, will require abatement documentation.**
6. For abatement periods greater than 90 calendar days, the regulation allows the Regional Safety or Health Director flexibility in either requiring or not requiring monitoring information. Note that paragraphs F. and G. of § 307 of the VOSH *Administrative Regulations Manual* have limits; the Regional Safety or Health Director is not allowed to require abatement plan for abatement periods less than 91 days or for citations characterized as other-than-serious.

Progress reports may not be required unless abatement plans are specifically required. The requirement for abatement plans and progress reports must be indicated for the citation item to which they relate. The regulation places an obligation on employers, where necessary, to identify how employees are to be protected from exposure to the violative condition during the abatement period. One way of ensuring that interim protection is included in the abatement plan is to note this requirement on the citation. There is nothing in this Directive or the regulation prohibiting progress reports as a result of settlement agreements.

7. All settlement agreements (informal, formal, and corporate-wide) that have citation(s) characterized as "Section 17" or "Unclassified" must contain language stating that the employer must comply with the requirements of VOSH *Administrative Regulations Manual*, § 307 for all final order citations.
8. Only equipment, whether hand-held or not, which is moved within the worksite or between worksites, is required to be tagged. The tag is intended to provide an interim form of protection to employees through notification for those who may not have knowledge of the citation or the inherent hazardous condition. Compliance Officers should make

every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement (*see VOSH Administrative Regulations Manual, § 307 J.*) because the tagging provision is triggered upon movement of the equipment.

9. Tag-related citations must be observed by a Compliance Officer before a citation is issued for failure to initially tag cited movable equipment. VOSH must be able to prove the employer's initial failure to act (tag the movable equipment upon receipt of the citation). Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation may be issued for failure to maintain the tag or copy of the citation using *VOSH Administrative Regulations Manual, § 307 J.6.*
10. An initial minor non-substantive omission in an abatement certificate (e.g., lack of a definitive statement stating that the information being submitted is accurate) should be considered a *de minimis* violation of the regulation. If there are minor deficiencies such as omitting the signature or date, the employer should be contacted by telephone to verify that the documents received were the ones they intended to submit. If so, the date stamp of the Regional Office can serve as the date on the document. A certification with an omitted signature should be returned to the employer to be signed, when the Regional Safety or Health Director believes it would be beneficial or eliminate concerns about the authenticity of the certification.
11. Like tag-related citations, evidence of an employer's failure to notify employees by posting must be obtained at the worksite. Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees (as per *VOSH Administrative Regulations Manual, § 307 H.2.*), the employer may post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives or may otherwise communicate fully with affected employees and their representatives about abatement activities. The Compliance Officer must determine not only whether the documents or summaries were appropriately posted but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used.
12. As a matter of policy, a Petition for Modification of Abatement Date (PMA) received and processed in accordance with the guidance of the VOSH FOM will suspend the 10-day time period for receipt of the abatement certification for the item for which the PMA is requested. Thus, no citation will be issued for this item for failure to submit the certificate within 10 days of the abatement date. If the PMA is denied, the 10-day time period for submission to VOSH begins on the day the employer receives notice of the denial.

13. Citations issued to construction companies are issued to the employer, not to the construction site or project. In many cases, this means that the citation and the need for abatement verification (certification and documentation) can continue beyond the existence of a particular construction project.

Violations which are specific to a particular construction site may sometimes be abated by completion of that particular project. For example, a floor hole may be abated by the installation of the stairway below the hole. The need for guardrails on a roof may be abated by the end of roofing work. In these cases, the employer must certify that the hazard is eliminated by completion of the project or closure of the construction site.

Violations which are related to required programs, training, or problems with specific equipment may only be abated by establishing the program, conducting the training, or repairing or guarding the equipment in question, or removing it from service. The employer must certify that these deficiencies have been corrected in a manner that will protect all employees in the company from the cited hazards. For example, where personal protective equipment is not provided, the employer must demonstrate that the equipment has been acquired, or that employees are no longer exposed to the hazard which made it necessary; or, where fall protection training is required, the employer must certify that all its employees exposed to fall hazards have received the requisite training.

D. Follow-up Procedures and Citation Issuance

Normally, follow-up inspections will be used to determine the status of abatement when verification is not received and when the work site is still active or the employer's main office is located in the region. See Chapter 3, Program Planning, for Follow-up inspection procedures.

1. Follow-up inspection decision:

If abatement verification is not received within 13 calendar days after the abatement date (the regulation requires filing within 10 calendar days after the abatement date; and another three (3) calendar days is added for mailing), the Regional Safety or Health Director may either schedule a follow-up inspection or issue a single other-than-serious citation combining all the individual instances where the employer has not submitted abatement verification (certification and documentation).

2. Follow-ups will not be conducted and the Regional Safety or Health Director may follow the procedures in section E., Citation Issuance Procedures, under the following circumstances:

- a. Where the main office of the employer is located in another state and the work site is closed.

- b. Where the main office of the employer being cited is physically located in another regional jurisdiction and the work site is closed, the Regional Safety or Health Director having jurisdiction over the work site will proceed as if the employer's main office were in the Regional Safety or Health Director's own jurisdiction, and notify the affected Regional Office of the communication with the employer.

E. Citation Issuance Procedures

Citations for failure to certify can be issued without formal follow-up activities by following the procedures identified below except as provided in section D. above:

1. If abatement verification (certification and documentation) is not received within one (1) calendar day after the abatement date, telephone the employer and remind him/her of the requirement to submit the material, and tell the employer that a citation may be issued if verification is not received by the abatement date.
2. If abatement verification is not received within seven (7) calendar days after the telephone call, issue a dunning letter to the employer.
3. If abatement verification is not received within the next seven (7) calendar days of the dunning letter date, a single other-than-serious citation will be issued combining all the individual instances where the employer has not submitted abatement verification (certification and documentation). This other-than-serious citation will be issued under the same inspection number which contained the original violations cited. The "abatement date" for this citation shall be set 30 days from the date of issuance.
4. If abatement verification is not received by the time that the 30-day abatement period expires, the Regional Safety or Health Director will schedule a follow-up inspection. Where a follow-up inspection cannot reasonably be conducted the Regional Safety or Health Director shall note the reason in the case file, i.e., site closed and employer out of state.

Notes:

- a. During the time between the reminder letters and citation issuance, efforts should be made to speak with the employer and determine why he/she has not complied. All communication efforts will be documented in the case file.
- b. For those rare instances where the reminder letter is returned to the Regional Office by the Post Office as undeliverable and telephone contact efforts fail, the Regional Safety or Health Director has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certificate.

5. For those situations where the abatement date falls within the 15-day informal conference time period, and an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation's characterization or abatement period is to be modified.

F. Penalties

1. The penalty for failing to submit abatement certification and abatement documentation (*VOSH Administrative Regulations Manual*, §§ 307 D. and E.) will be \$1,000. No adjustments for size, history or good faith will be given.
2. The penalty for not notifying employees and tagging (*VOSH Administrative Regulations Manual*, § 307 H.1, H.2, H.4, J.1, J.2, J.3., J.5. and J.6) will follow the same penalty structure (unadjusted \$3,000) which is currently being applied for failure-to-post citations in the VOSH FOM.

G. Special Enforcement Situations

1. Agriculture. A farming operation with 10 or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months is not exempt from VOSH inspection. The inspection may include all working conditions covered by VOSH standards, including Field Sanitation, § 1928.110, and Temporary Labor Camps.
2. Construction activities. Special consideration may be required where:
 - a. Construction site closure or hazard removal due to completing of the structure or project will only be accepted as abatement without certification where a Compliance Officer directly verifies the site closure. Without Compliance Officer-observed verification, the employer must certify to VOSH that the hazards have been abated by the submission of an abatement certificate. Site closure is an acceptable method of abatement.
 - b. Equipment-related and all program-related (e.g., crane inspection, HAZCOM, respirator, training, competent person, qualified persons, etc.) violations will always require employer verification of abatement (certification and documentation). Where the construction site which was inspected is closed, follow-up inspections may be initiated at the employer's main office, and may include additional construction sites as necessary to insure that the violations have been abated. For situations where the main office of the employer being cited is physically located in another regional jurisdiction, the Regional

Safety or Health Director having the jurisdiction over the work site will proceed as if the employer's main office were in the Regional Safety or Health Director's own jurisdiction, and notify the affected Regional Office of the communication with the employer.

Where a follow-up inspection to verify abatement is deemed necessary, the affected Regional Offices will determine the most efficient and mutually beneficial approach to conducting the inspection.

H. Case File Documentation

1. The closing of a case file without abatement certificate(s) must be justified through a statement in the case file by the Regional Safety or Health Director or his/her designee, addressing the reason for accepting each uncertified violation as an abated citation.
2. The Regional Offices are encouraged to review employer-submitted abatement verification materials as soon as possible but no later than 30 days after receipt. If the review will be delayed, notify the employer that the material will be reviewed by a date certain, and that the case will be closed, if appropriate after that time.
3. Abatement documentation (photos, employer programs, etc.) will normally remain with the inspection file. The Regional Safety or Health Director has the discretion to return certain forms of abatement documentation (e.g., safety and health program manuals) to the employer should storage of the material become overly burdensome or upon the request of the employer. If material is returned, the Regional Safety or Health Director shall assure that a receipt and explanation is included with the inspection file.

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CHAPTER 14

POST-CITATION PROCEDURES

I. POST-CITATION PROCESSES

A. Informal Conferences

1. General

Pursuant to § 330 of the *VOSH Administrative Regulations Manual*, the employer, any affected employee or the employee representative may request an informal conference.

2. Procedures

Whenever an informal conference is requested by the employer, an affected employee or the employee representative, both parties shall be afforded the opportunity to participate fully. If the requesting party objects to the attendance of the other party, separate informal conferences may be held. During the conduct of a joint informal conference, separate or private discussions may be permitted if either party so requests.

a. Notification of Participants - Employer Requested Informal Conference. After an informal conference requested by an employer has been scheduled, it is the duty of the employer to notify the employees of the issues involved, and the date, time and place of the informal conference in accordance with § 330 E. of the *VOSH Administrative Regulations Manual*.

b. Notification of Participants - Employee Requested Informal Conference. After an informal conference requested by an employee has been scheduled, the Regional Safety or Health Director shall notify the affected parties of the date, time and place by telephonic or electronic means, and, if considered useful, in writing in accordance with § 330 E. of the *VOSH Administrative Regulations Manual*.

(1) The employer shall be requested to complete and post the form provided in the citation package.

(2) Documentation of the Regional Safety or Health Director's actions notifying the parties of the informal conference shall be placed in the case file.

3. Participation by VOSH Officials

The inspecting Compliance Officer(s) shall be notified of an upcoming informal conference and, if feasible, shall be given the opportunity to participate in the informal conference unless the Regional Safety or Health Director anticipates that only a penalty adjustment will result.

They shall be advised of any changes made by the Regional Safety or Health Director in the event they were unable to participate.

- a. In complex cases, in order to ensure that discussions of, and possible settlement or modifications to, the citation(s) or penalty may be completely and accurately recalled, at least, one other VOSH employee in addition to the Regional Safety or Health Director may be present at the informal conference. This employee may be the Compliance Officer, a clerical staff member, or other assigned person.
- b. A second VOSH staff member such as the compliance officer or other assigned person should attend all informal conferences in the following situations:
 1. Cases which involve total proposed penalties of \$100,000 or more;
 2. Cases which are so lengthy or complex that an additional individual is needed to provide assistance to the principal VOSH representative.
- c. The Regional Safety or Health Director shall ensure that notes are made indicating the basis for any decisions made at, or as a result of, the informal conference. It is appropriate to tape record the informal conference and to use the tape recording in lieu of written notes, but the tape recording should not be used as a substitute for the second VOSH conference participant cited in the above paragraph.

4. Conduct of the Informal Conference

The Regional Safety or Health Director shall normally conduct the informal conference. The following guidelines shall be used.

- a. Opening Remarks. The opening remarks shall include discussions of the following:
 - (1) Purpose of the informal conference.
 - (2) Rights of participants.
 - (3) Contest rights and time restraints.
 - (4) Limitations, if any.
 - (5) Settlement of cases.
 - (6) Other relevant information. For example, if no employee or employee representative has responded, whether the employer has posted the notification form regarding the informal conference, etc.

- b. Conference. The conference shall include discussion of any relevant matters including citations, safety and health programs, conduct of the inspection, means of correction and penalties in accordance with the following:
- (1) All parties shall be encouraged to participate fully so their views can be properly considered.
 - (2) Positions on all issues discussed shall be fully considered before making a determination regarding possible settlement of the case in accordance with current VOSH procedures.
 - (3) VOSH representatives shall make every effort to assist both the employer and the affected employees and their representatives to improve safety and health in the workplace.
 - (4) No opinions regarding the legal merits of an employer's case shall be expressed during the informal conference.
 - (5) There should be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the Commonwealth's Attorney for criminal prosecution.
- c. Closing. At the conclusion of the discussion, the main issues and potential courses of action shall be summarized. A written summary of the informal conference shall be compiled. This summary, together with any other relevant notes or tapes of the discussions that are made by the Regional Safety or Health Director, shall be placed in the case file.

5. Decisions

At the end of the informal conference, unless it involves a significant case, the Regional Safety or Health Director shall make a decision as to what action is appropriate in light of facts brought up during the conference.

- a. When preparing to make a decision to settle a case, the Regional Safety or Health Director shall make a reasonable effort to obtain the views of the employee representative, if there is one, and if he did not attend the conference. There is no need to contact the employee representative if only a penalty adjustment is involved.
- b. Changes to citations, penalties, or abatement dates normally shall be made by a means of an informal settlement agreement in accordance with current VOSH procedures. The reasons for such changes shall be documented in the case file.

- c. Employers shall be informed that they are required by § 330 F. of the *VOSH Administrative Regulations Manual* to post copies of all amendments to the citation resulting from informal conferences.
- d. Affected parties shall be notified of the results and decisions of the informal conference in accordance with current VOSH procedures. They shall be informed of VOSH policy granting them the right to appeal, informally, to the Program Director, any decision with which they disagree.
- e. The Compliance Officers who conducted the inspection and the Regional Safety or Health Directors shall be informed of the results and decisions of informal settlement agreements and amended citations.
- f. For more detail on settlement agreements, refer to I.D.

6. Failure to Abate

If the informal conference involves an alleged failure to abate, the Regional Safety or Health Director and/or the Regional Safety or Health Director may set a new abatement date Regional Safety or Health Director in the informal settlement agreement, documenting for the case file the time that has passed since the original citation, the steps that the employer has taken to inform the exposed employees of the risk and to protect them from the hazard, and the measures that will have to be taken to correct the condition.

- a. Once a new abatement date has been set, a modification of abatement date shall be entered into the data system following current IMIS procedures.
- b. A letter shall be sent to the employer reminding him in the strongest possible terms that abatement is legally required if no written notice of contest is submitted within the contest period for the Notification of Failure to Abate Alleged Violations.
- c. The employer shall also be reminded that if there is any problem in meeting the new abatement date after it becomes a final order, a written request for extension of abatement date must be filed with the Regional Safety or Health Director in accordance with guidelines.

B. Petitions for Modification of Abatement (PMA) Date – Extension of Abatement Time

Section 320 of the *VOSH Administrative Regulations Manual* governs the disposition of petitions for extensions of abatement time. If the employer requests additional time after the 15 working-day contest period has passed, the following procedures are to be observed:

1. Filing Date

A written petition for extension of abatement time must be mailed to, or received by, the Regional Safety or Health Director who issued the citation no later than the close of business on the date which abatement was originally required.

- a. If a request is submitted orally, the employer shall be informed that VOSH cannot accept an oral request and that a written petition must be mailed by the end of the next working day after the abatement date. If there is not sufficient time to file a written petition, the employer shall be informed of the requirements as listed in § 320 of the *VOSH Administrative Regulations Manual*.
- b. A late petition may be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.

2. Failure to Meet All Requirements

If the employer's letter does not meet all the requirements, a letter spelling out these requirements and identifying the missing elements shall be sent to the employer within 10 working days, specifying a reasonable amount of time for the employer to return the completed petition.

- a. If no response is received or if the information returned is still insufficient, a second attempt (by telephone or in writing) shall be made. The employer shall be informed of the consequences of a failure to respond adequately; namely that the petition will not be granted and that the employer may consequently be found in failure to abate upon a follow-up inspection.
- b. If the employer responds satisfactorily by telephone and if the Regional Safety or Health Director determines that the requirements for the petition have been met, appropriate documentation shall be placed in the case file.

3. Delayed Decisions

Although VOSH policy is to handle petitions for extension of abatement as quickly as possible, there are some cases where the Regional Safety or Health Director's decision on the petition is delayed because of inadequacies in the petition itself, a decision to conduct a monitoring inspection or the need for the Commissioner's involvement. A letter conveying the need for further time shall be sent to the employer and the employee representatives.

4. Position on Petition for Modification of Abatement (PMA)

- a. When a Petition is Anticipated. Whenever a citation for engineering controls or other violation which the Regional Safety or Health Director believes can be reasonably expected to give rise to a future petition for extension of abatement time, the following procedures shall apply:
- (1) A follow-up date 45 days prior to the final abatement date shall be entered into the information retrieval system used by the Regional Office. When that follow-up date arrives, the file shall be pulled and reviewed by the Regional Safety or Health Director and the Compliance Officer involved.
 - (2) After review, the Regional Safety or Health Director shall contact the employer to determine abatement progress. Information on the status of abatement shall be obtained and documented in the case file. The potential need for additional time shall be discussed with the employer. If the employer indicates that more time will be necessary to complete correction of the citations, this need shall be documented and the procedures for seeking an extension shall be explained.
- b. Requirements for a Petition. If a letter is received from an employer requesting a modification of an abatement date, the Regional Safety or Health Director shall ensure that the following five requirements (refer to § 320.C. of the VOSH *Administrative Regulations Manual*) are set forth in sufficient detail in the employer's petition:
- (1) All steps taken by the employer and the dates of such action in an effort to achieve compliance during the prescribed abatement period.
 - (2) The specific additional abatement time necessary to achieve compliance.
 - (3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.
 - (4) Interim steps being taken to safeguard the employees against the cited hazard during the abatement period.
 - (5) A certification that a copy of the petition has been posted in a conspicuous place near the location where the violation occurred or where all affected employees

will have notice thereof. The petition shall remain posted for 10 working days and shall be served on the authorized representative of affected employees, if there is one. Such certification shall include the date on which posting and service was made.

- c. Processing the Petition for Extension. After 15 working days following certification of the petition posting, the Regional Safety or Health Director shall determine VOSH's position, agreeing with, or objecting to, the petition. This shall be done within 10 working days following the 15 days (if additional time has not been requested from the Commissioner). The following action shall be taken:
- (1) If the request is six months or less from the issuance date of the citation, the Regional Safety or Health Director has the authority to approve or object to the petition.
 - (2) Any petition requesting an abatement date which is more than six months and up to and including one year from the issuance date of the citation requires the approval of the Program Director.
 - (3) Any petition requesting an abatement date which is more than one year from the issuance date of the citation requires the approval of the Commissioner.
 - (4) If the petition is approved, the Regional Safety or Health Director shall notify the employer and the employee representatives by letter.
 - (5) If, after a second contact with the employer, the information required continues to be substantially insufficient, the Regional Safety or Health Director shall contact the Program Director who, after consultation with the Commissioner, shall object to the petition.
 - (6) If supporting evidence justifies it (e.g., employer has taken no meaningful abatement action at all or has otherwise exhibited bad faith), the Regional Safety or Health Director, the Program Director or the Commissioner, as appropriate, shall object to the petition.
 - (a) Both the employer and the employee representatives shall be notified on the date the decision is made by letter with return receipt requested.

- (b) When appropriate, a failure to abate notification may be issued in conjunction with the objection to the extension request.

5. Employee Objections

Affected employees or their representatives may file an objection in writing to an employer's petition with the Regional Safety or Health Director within 10 working days of the date of posting of the petition by the employer or its service upon an authorized employee representative.

- a. Failure to file such a written objection within the 10 working-day period constitutes a waiver of any further right to object to the petition.
- b. If an employee or an employee representative objects to the extension of the abatement date, the appropriate VOSH official, as set out in the guidelines, shall hold an informal conference to try to resolve the issue (see this chapter for procedures to be followed). If settlement is not made through the informal conference or does not appear probable, the matter will be set for a hearing by the Commissioner under §§ 2.2-4019-2.2-4021, *Code of Virginia*. (See § 320 of the *VOSH Administrative Regulations Manual*).

6. Appeals of Adverse Decisions

The employer or an affected employee or employee representative may seek review of an adverse decision regarding the petition for extension of abatement by mailing a written request to the Commissioner within five working days of receipt of the decision. The Commissioner will hear the appeal using the procedures of §§ 2.2-4019-2.2-4021, *Code of Virginia*. (See § 320 of the *VOSH Administrative Regulations Manual*).

7. Abatement Efforts

The Regional Safety or Health Director shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.

- a. Where engineering controls have been cited or required for abatement, a monitoring inspection shall normally be scheduled to evaluate the employer's abatement efforts. Failure to conduct a monitoring inspection shall be fully explained in the case file.
- b. Where no engineering controls have been cited but more time is needed for other reasons not requiring assistance from VOSH such as delays in receiving equipment, a monitoring visit need not normally be scheduled.

- c. Monitoring inspections shall be scheduled as soon as possible after the initial contact with the employer rather than be delayed until actual receipt of the extension petition.
- d. The Compliance Officer shall decide during the monitoring inspection whether sampling is necessary and, if so, to what extent; i.e., spot sampling, short-term sampling, or full-shift sampling.
- e. The Compliance Officer shall include pertinent findings in the narrative along with recommendations for action. To reach a valid conclusion when recommending action, it is important to have all the relevant factors available in an organized manner. The following factors shall be considered:
 - (1) Progress reports or other indications of the employer's good faith, demonstrating effective use of technical expertise and management skills, accuracy of information reported by the employer and timeliness of progress reports.
 - (2) The employer's assessment of the hazards by means of surveys performed by in-house personnel, consultants or the employer's insurance company.
 - (3) Other documentation collected, including verification of progress reports, success or failure of abatement efforts, and assessment of current exposure levels to employees.
 - (4) Employer and employee interviews.
 - (5) Specific reasons for requesting additional time including specific plans for controlling exposure, and specific calendar dates.
 - (6) Personal protective equipment.
 - (7) Medical programs.
 - (8) Emergency action plans.

NOTE: Not all these factors will be pertinent in every extension review. Neither are all the factors listed which must be considered in every case.

C. Services Available to Employers

Employers requesting abatement assistance shall be informed that VOSH is willing to work with them even after citations have been issued. In addition, the employer shall be made aware of the availability of VOSH onsite consultation services for which they may qualify. Such services are provided at no charge to the employer. (See related guidelines).

D. Settlement of Cases

1. General

Regional Safety or Health Directors are granted settlement authority to make the informal conference a more significant and uniformly used element of the compliance process; to avoid delays in correction of hazards which could result from litigation, and to give VOSH and affected employers and employees a way to resolve conflicts without prolonged litigation.

- a. Regional Safety or Health Directors should send a letter to employers with each set of citations issued. The letter shall notify employers of the opportunity to discuss amendments to citations and proposed penalties during an informal conference and of the Regional Safety or Health Director's authority to make certain appropriate amendments. (Refer to section I.A.2. of this Chapter for additional notification requirements).
- b. Regional Safety or Health Directors are authorized to enter into Informal Settlement Agreements with an employer before the employer files a written notice of contest.
- c. For routine cases, the Regional Safety or Health Directors are authorized, as outlined in this chapter, to change abatement dates, to reclassify violations (e.g., serious to other-than-serious), and to modify or withdraw a penalty, a citation or a citation item. The employer must present evidence during the informal conference which convinces the Regional Safety or Health Director that the changes are justified.
 - (1) Decisions shall be made in accordance with the guidelines given in this chapter.
 - (2) Reduction in penalties or negotiation of a penalty installment payment plan must be based on evidence of financial hardship presented by the employer. Such evidence could consist of federal/state tax returns, copies of financial statements or other appropriate documents depicting the financial condition of the employer.
 - (3) Adequate documentation of settlement negotiations and the justification for any changes made shall be placed in the case file.

- d. For significant cases and those cases where the Program Director has settlement authority, the Regional Safety or Health Director shall conduct the informal conference to determine what proposed settlement is offered by the employer.

The Regional Safety or Health Director shall submit this information to the Program Director who shall make a decision, if the change falls within his settlement authority, or review the proposed settlement and submit it to the Commissioner for final action. (*Refer to VOSH Program Directive 01-004, or its successor, for Director and Managers Responsibilities*).

- e. The Regional Safety or Health Director shall negotiate the amount of penalty reduction or a penalty installment payment plan, depending on the circumstances of the case, the financial condition of the employer and what improvements in employee safety and health can be obtained in return.

- (1) Improvements in employee safety and health that can be added to settlement agreements include:

- (a) Written safety procedures addressing the particular hazard;
- (b) Written training requirements specifying initial training, weekly/monthly safety meetings and annual retraining;
- (c) Written training records documenting those employees having received training in addition to the subject of the training and date of training;
- (d) Written disciplinary procedures specifying measures to be taken against employees who violate safety and health procedures;
- (e) Written disciplinary records documenting discipline taken against employees for violation of safety and health procedures.

NOTE: Regional Safety or Health Director(s) may contact the Division of Legal Support to request assistance in drafting settlement agreements containing any of the above safety and health improvements.

- f. Employers shall be informed that they are required by §§ 40 and 330 of the *VOSH Administrative Regulations Manual* to post copies of all amendments or changes resulting from informal conferences. Employee representatives must also be provided with copies of such documents by the employer when

the informal conference was at the request of the employer. This regulation covers amended citations, citation withdrawals and settlement agreements. (Refer to section I.A.2. of this Chapter for complete notification requirements).

2. Pre-Contest Settlement (Informal Settlement Agreement)

Pre-contest settlements generally occur during the informal conference.

- a. If a settlement is reached during the informal conference, an Informal Settlement Agreement shall be prepared, and the employer representative shall be invited to sign it. The Informal Settlement Agreement shall be effective upon signature by both the Regional Safety or Health Director and the employer representative. Both shall date the document as of the day of actual signature.
 - (1) If the employer representative requests more time to consider the agreement and if there is sufficient time remaining of the 15-working day period, the Regional Safety or Health Director shall sign and date the agreement and provide the signed original for the employer to study while considering whether to sign it.
 - (2) If the agreement is not prepared during the informal conference, the Regional Safety or Health Director shall provide the original to the employer by certified mail, return receipt requested or in person, if circumstances warrant such action (e.g., an agreement has been reached over the phone, but there is not sufficient mailing time for the employer to sign the agreement and return it to the Regional office before the end of the contest period).
 - (a) If the signed agreement is provided to the employer, a copy shall be kept in the case file. The employer shall be informed in writing that no changes are to be made to the original by the employer without explicit prior authorization for such changes from the Regional Safety or Health Director.
 - (b) The Regional Safety or Health Director shall also make it very clear that it is the employer's responsibility to sign the agreement prior to the expiration of the contest period.
 - (c) In every case, the Regional Safety or Health Director shall inform the employer during the informal conference that the citation will become final and unreviewable at the end of the contest

period unless the employer either signs the agreement or files a written notice of contest.

- (d) If the employer representative wishes to make any changes to the text of the agreement, the Regional Safety or Health Director must agree to and authorize the proposed changes prior to the expiration of the contest period.

1 If the changes proposed by the employer are acceptable to VOSH, the Regional Safety or Health Director shall authorize the change and work out the exact language to be written into the agreement. The employer shall be instructed to incorporate the agreed-upon language into the agreement, sign it and return it to the Regional Office as soon as possible.

2 Annotations, including the exact language of any changes authorized by the Regional Safety or Health Director, shall be made to the file copy of the agreement, and a dated record of the authorization shall be signed by the Regional Safety or Health Director and placed in the case file.

- (e) If the employer's copy of the agreement has not been received in the Regional Office by the close of business on the day before the last day of the contest period, the Regional Safety or Health Director should make every effort to contact the employer to determine his intention.

1 The employer shall be reminded that the agreement must have been signed by both parties prior to the expiration date of the contest period if it is to be valid.

2 If the employer representative does not wish to sign the agreement, the Regional Safety or Health Director shall point out that the citation will become a final order unless the employer files a timely notice of intent to contest.

3 If time is short and if the employer and the Regional Office have fax equipment, the signed and dated agreement may

thereby be transmitted to the Regional Safety or Health Director by the employer.

- (f) Upon receipt of the Informal Settlement Agreement signed by the employer, the Regional Safety or Health Director shall ensure that any modified text of the agreement is in accordance with the notations made in the case file. The Regional Safety or Health Director shall initial and date the changes.
 - 1 If so, the citation record shall be updated in IMIS in accordance with current procedures.
 - 2 If not, and if the variations substantially change the terms of the agreement, the agreement signed by the employer shall be considered as a notice of intent to contest and shall be handled accordingly. If there is any question as to whether any variation is substantive, the Regional Safety or Health Director shall contact the Program Director for guidance.
- (g) If the employer cannot be reached, a reasonable time shall be allowed for return of the agreement from the employer.
 - 1 After that time, if the agreement has still not been received, the Regional Safety or Health Director shall presume that the employer is not going to sign the agreement and treat the citation as a final order until such time as the agreement is received.
 - 2 The employer shall be required to certify that the Informal Settlement Agreement was signed prior to the expiration of the contest period.
- (3) In any case where the Regional Safety or Health Director provides an employer with a signed original of the proposed agreement, the Informal Settlement Agreement is effective the moment the employer representative signs it as long as the contest period has not expired.

- (a) If the citation is amended as a result of the informal conference, the amended citation shall include the following or similar language:

“This citation has been amended by agreement between the Commissioner and the Employer named above. As part of the written agreement, the employer has waived his right to file a Notice of Contest to this order. This agreement shall not be construed as an admission by the Employer of civil liability for any violation alleged by the Commissioner. This agreement may be used for future enforcement purposes pursuant to Title 40.1 of the Code of Virginia.” (See Appendix “B” VOSH-ISA, Informal Settlement Agreement Form.)

- (b) If the Regional Safety or Health Director’s settlement efforts are unsuccessful and the employer contests the citation, the Regional Safety or Health Director shall state the terms of the final settlement offer in a memorandum to the Program Director and to the Division of Legal Support.

3. Procedures for Preparing the Informal Settlement Agreement

VOSH will prepare and process informal settlement agreements in accordance with the provisions of § 340 of the *VOSH Administrative Regulations Manual*.

4. Contest of Citations, Notifications of Penalty or Abatement Dates

The employer must notify the Regional Office in writing of its intent to contest. Such notification must be postmarked no later than the 15th working day after receipt of the citation and notification of penalty (working days are Monday through Friday, excluding holidays), otherwise the citation becomes a final order of the Commissioner. The Department has no authority to modify the contest period. Employers may also send their notice of contest electronically via email or fax. Oral notices of contest do not satisfy the requirement to give written notification.

An employer’s notice of contest must clearly state what is specifically being contested. It must identify which item(s) of the citation, penalty, the abatement date, or any combination of these is being objected to. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the 15 working day period in which the employer must contest, §270.A of the *VOSH Administrative Regulations Manual*.

VOSH will normally cease all investigatory activities once an employer has filed a notice of contest. Any action relating to a contested case must first have the concurrence of the Division of Legal Support.

- a. Computation of Time. The employer must file a notice of contest within 15 working days from receipt of the citation(s). See § 40.1-49.4.B, *Code of Virginia*. The computation of time for the purpose of filing a notice of contest begins the day after the employer receives the citation (see green card to determine date of receipt). Therefore, the date of receipt is not included when calculating the 15-working day period. (See § 1-13.3, *Code of Virginia*.) Any questions concerning this issue should be directed to the Division of Legal Support for guidance.
- b. Employer Contest. This written notification, called a Notice of Intent to Contest, must clearly state what is being contested--which item of the citation, the penalty, the correction date, or any combination. The Compliance Officer shall ask the employer to read the pamphlet accompanying the citation for additional details.
 - (1) If the employer wishes a later abatement date only and there is a valid reason, the Regional Safety or Health Director should be contacted. The Regional Safety or Health Director may issue an amended citation changing an abatement date prior to the expiration of the 15-working day period without the employer's filing a contest.
 - (2) If the employer contests just the penalty or only some of the citation items, all uncontested items must still be abated by the dates indicated on the citation and the corresponding penalties paid within 15 days of notification.
- c. Employee Contest. The Compliance Officer shall indicate that the law provides that employees or their authorized representative(s) have the right to contest in writing any or all of the abatement dates set for a violation if they believe the date(s) to be unreasonable.
- d. Contest Process. If settlement is not reached, VOSH will forward the contested case to the Commonwealth's Attorney for the jurisdiction where the violation occurred, and after a complaint has been filed, the Circuit Court shall promptly set the matter for a hearing.
 1. Upon receipt of the Notice of Intent to Contest, the Regional Safety or Health Director shall notify the Commonwealth's Attorney, and the Office of Legal Support, immediately.
 2. An employer or employee or employee representative with party status, pursuant to § 40.1-49.4.E., *Code of*

Virginia, may be represented by a person who is not an attorney.

3. The Circuit Court shall hear the case and issue a written order affirming, modifying, or vacating the Commissioner's citation or proposed penalty, or directing other appropriate relief.
 - e. Penalties. Penalties must be paid within 15 working days after the citation and penalty become a final order of the Commissioner. If, however, the employer contests the citation or the penalty in good faith, the penalties need not be paid for those items contested until a final decision is made.
 - f. Abatement Action. For violations that the employer does not contest, the employer is expected to notify the Regional Safety or Health Director promptly by letter that the cited conditions have been corrected by the abatement date set in the citation.
 - g. Public Sector Contest Procedures. Contest procedures applicable to the State agencies are contained in §280 and §300 of the *VOSH Administrative Regulations Manual*. Contest procedures applicable to the political subdivisions are contained in §280 and §290 of the *VOSH Administrative Regulations Manual*.
- 5. Post-Contest Settlement (Informal Settlement Agreement)**
- Post-contest settlements will generally occur before the bill of complaint is filed with the court. The time limits are goals for internal use only. If time limits need to be extended, approval for an extension shall be obtained from the next person in the supervisory chain (e.g., the Regional Safety or Health Director would contact the Program Director for an extension). The reasons for the extension shall be documented in the case file. The following procedures are guides to be used except in extraordinary cases:
- a. Following the filing of a Notice of Contest, the Regional Safety or Health Director shall notify the employer that settlement negotiations will only be available at the Regional Office for a brief period following the end of the 15-working day contest period.
 - b. If the employer expresses no interest in trying to reach a settlement agreement, the Regional Safety or Health Director shall attempt to find out why and forward that information, along with the case file, to the Central Office for review.
 - c. If negotiations are attempted but no settlement agreement is reached within three weeks of the close of the contest period the Regional Safety or Health Director will send the case file to the Central Office.

- d. When the Regional Safety or Health Director submits the case file to the Central Office, recommendations concerning settlement possibilities shall be included and all settlement proposals made to the employer shall be documented. A detailed explanation of the employer's reasons for contest shall be provided if known. (Information contained in an informal conference report or employer's contest letter may be referenced to satisfy this requirement).
- 6. Corporate-Wide Settlement Agreements**
In certain egregious violation situations, or at an employer's request, VOSH may negotiate and enter into Corporate-Wide Settlement Agreements (CSAs) to obtain formal recognition by the employer of cited hazards and formal acceptance of the obligation to seek out and abate those hazards throughout all workplaces under its control.
- 7. Court's Post-Contest Settlement (Agreed Order)**
Settlement negotiations for agreed orders will be through the Commonwealth's Attorney and the Division of Legal Support after the bill of complaint has been filed with the court. Section 340 of the *VOSH Administrative Regulations Manual* requires any formal settlement agreement to be embodied in an agreed order and presented to the court for approval.
- 8. Penalty Installment Payment Agreement**
Penalty Installment Payment Plans negotiated by the Regional Safety or Health Director will become part of the Informal Settlement Agreement. (See *Appendix "A"*).

CHAPTER 15

LEGAL ISSUES

I. Legal Considerations

A. **General**

During the course of a Compliance Officer's work, numerous questions can arise which require legal advice. This section will not substitute for contact with the Division of Legal Support or the Assistant Attorney General, but may serve to answer some initial questions. The legal authority for the VOSH program, subpoenas of VOSH personnel, definitions of employees and contest procedures are among the topics covered in this section. The Division of Legal Support should be contacted if any questions arise about the legal considerations addressed under this chapter.

B. **VOSH Program Authority**

1. **General**

Authority for VOSH to conduct inspections is derived from the State Constitution. While the federal program relies on the commerce clause of the U.S. Constitution for authority to inspect, the VOSH program relies on the state police power found in the Virginia Constitution. During an inspection, federal OSHA must ensure that an employer is engaged in interstate commerce, a step VOSH does not have to do. All employers are subject to the police power of the state and therefore are subject to VOSH inspection, except those industry sectors in which federal OSHA has retained direct enforcement authority or for which 4(b)(1) of the OSH Act provides federal preemption.

2. **Employer Rights**

While employers are subject to inspection by VOSH, the Fourth Amendment of the U.S. Constitution and the Virginia Constitution guarantees them the right to be free from unreasonable searches and seizures. So, they may insist on a warrant before VOSH inspects them. The warrant shall be issued by a court based on a finding of probable cause to search. Two court cases have made clear the requirements of probable cause for VOSH:

a. Marshall v. Barlows. Probable cause to issue a warrant may be based on:

- (1) specific evidence of an existing violation (e.g., employee complaint), or
- (2) showing of reasonable legislative or administrative standards for conducting an inspection (e.g., general schedule or special emphasis programs).

- b. Amato v. Mosher Steel. This case has further defined reasonable legislative or administrative standards by requiring that the inspection program be based on reasonable standards that are applied to a particular workplace in a neutral and fair manner. (See §40.1-49.9, *Code of Virginia*.)

NOTE: Under no circumstances is an employer to be treated any differently because he has exercised his constitutional right to require a warrant.

- c. Jurisdictional Limitations. VOSH does not have authority to inspect working conditions of:

- (1) Employees not covered by the federal OSH Act, including but not limited to:
- (a) Mines and quarries.
 - (b) Railroads.
 - (c) Nuclear facilities.

NOTE: VOSH has "Memoranda of Understanding" with certain federal safety agencies which further define the scope of VOSH's inspection authority in the above industries. Contact the Division of Legal Support when jurisdiction questions arise.

- (2) Employees of the United States.
- (3) Employees who, although employed by private employers, are working within enclaves of the federal government where the United States federal government exercises exclusive jurisdiction.
- (4) Private sector maritime employees.

NOTE: VOSH does have maritime standards for public sector employees, but does not cover private sector maritime employees.

3. Employees for Compliance Purposes – Definition

VOSH is often confronted with situations in which the definition of employee is important. There are cases in which issuing a citation depends on whether the individual exposed to the hazard is an employee for purposes of the law. Employers are only subject to §40.1-49.4, *Code of Virginia*, if they are engaged in business and have one or more employees.

a. Examples of “Employees”. In the following situations, an individual would be considered an employee for purposes of the law:

- (1) A management representative such as a company president, vice-president or plant manager is an employee for purposes of the law when he is performing work on the site for the employer and is exposed to the hazard cited.

EXAMPLES: The president of a company is working near a hazard after all other employees have left the premises. He is entitled to the protections of occupational safety and health laws as much as any other worker. A company vice-president who spends 40 hours per week working with a shovel in an excavation is an employee.

- (2) A partner in a partnership is an employee for the purposes of the law when he is performing work on the site for the partnership and is exposed to the cited hazard.

EXAMPLE: A “silent partner” has invested in a business and received half of the profits worked in the store six or seven hours per week when the other partner was absent. This silent partner considered his role to be just looking after the investment, but was held by a court to be an employee because he was actually performing duties done by employees.

- (3) Stockholders in a corporation are considered employees for the purpose of the law when they are performing work on the site for the employer/corporation and are exposed to a cited hazard.

EXAMPLE: Three stockholders of a company were forced to work as production workers for a weekly salary for the company after it had lost money for two consecutive years. They were exposed to a hazard and were considered employees because they were doing production work for the company.

- (4) An employer’s family members are employees for the purposes of the law when they are performing work on the site for the employer and are exposed to a cited hazard.

EXAMPLE: An employer who has three members of his family as his only workers is subject to the law

because his family members are doing work for the company and are as entitled to the protection of VOSH as any other worker.

NOTE: Immediate family members of a farm employer are granted a specific exemption from OSHA or VOSH regulations under the Federal Appropriations Act. (See VOSH PD 02-003L or successor).

b. Examples of “Not an Employee.” In the following situations, the individuals exposed to the hazard would not be considered employees:

(1) A self-employed person or a sole owner of a business who is the only one exposed to the hazard cited. (*Refer to discussion on “Employees vs. Independent Contractors”*).

(2) Any person exposed to the hazard cited who is not doing any work for the employer (e.g., bystander, or stockholder or partner not doing any work for the company).

c. Volunteers. Members of volunteer rescue squads and volunteer fire departments and other volunteers serving the state pursuant to the Virginia State Government Volunteers Act are not public employees and are, therefore, not covered by VOSH. Volunteers serve without pay or benefits, except those benefits listed in §2.1-558, *Code of Virginia*. Where benefits go beyond, or are different from, those listed in §2.1-558, the Compliance Officer shall consult with the Regional Safety or Health Director who may contact the Division of Legal Support, if necessary.

NOTE: Consult with the Division of Legal Support in all cases when questions arise about who is an employee.

4. Employer/Employee Responsibilities

a. Section 40.1-51.2(a), Code of Virginia: “It shall be the duty of each employee to comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this chapter which are applicable to his own actions and conduct.”

(1) The law does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

(2) Although the employer is not the absolute guarantor or insurer of all employee actions, reasonable steps must be taken by the employer to protect employees from hazards that may result from failure to comply with the standards; e.g., informing employees of hazards and how to protect themselves, enforcing safety and health rules, and the like.

- b. Employee Refusal to Comply. In cases where the Compliance Officer determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Regional Safety or Health Director, who shall consult with the Program Director, for discussion and advice.

Under no circumstances is the Compliance Officer to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. The Compliance Officer is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with VOSH laws, standards and regulations. However, concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge, to ensure compliance with the law.

- c. Employer Exercise of Authority. Under no circumstances is the Compliance Officer to become involved in an *on site* dispute involving labor/management issues or interpretation of collective-bargaining agreements. The Compliance Officer is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with VOSH laws, standards and regulations. Concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge.

5. Six Month Statute of Limitations to Issue Citations

From §16VAC25-60-260.A of the *VOSH Administrative Regulations Manual*:

“1. No citation may be issued after the expiration of six months following the occurrence of any alleged violation. The six month time frame is deemed to be tolled on the date the citation is issued by the commissioner, without regard for when the citation is received by the employer. For purposes of calculating the six month time frame for citation issuance, the following requirements shall apply:

- a. The six month time frame begins to run on the day after the incident or event occurred or notice was received by the commissioner (as specified below), in accordance with Va. Code §1-210.A. The term “month” shall be construed to mean one calendar month in accordance with Va. Code §1-223.
- b. An alleged violation is deemed to have “occurred” on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected.
- c. Notwithstanding b., above, if an employer fails to notify the commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence as required by Va. Code §40.1-51.1.D, the six month time frame shall not be deemed to commence until the commissioner receives actual notice of the incident.
- d. Notwithstanding b., above, if the Commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of an Employer’s Accident Report (EAR) form from the Virginia Workers’ Compensation Commission as provided in Va. Code § 65.2-900, the six month time frame shall not be deemed to commence until the commissioner actually receives the EAR form.
- e. Notwithstanding b., above, if the Commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee(s), through receipt of a complaint in accordance with § 100 of these regulations, or referral, the six month time frame shall not be deemed to commence until the commissioner actually receives the complaint or referral.”

C. Affirmative Defenses

1. Definition

An affirmative defense is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proven by VOSH.

2. Burden of Proof

Although affirmative defenses must be proven by the employer at the time of the hearing, VOSH must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. The Compliance Officer shall keep in mind the potential affirmative defenses that the employer may make, and during the inspection shall attempt to gather contrary evidence.

3. Common Affirmative Defenses

The following are explanations of the more common affirmative defenses with which the Compliance Officer shall become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.

- a. Unpreventable Employee Misconduct or "Isolated Event." Section 260.B. of the VOSH *Administrative Regulations Manual* codifies the "employee misconduct defense:"

"B. A citation issued...to an employer who violates any VOSH law, standard, rule or regulation shall be vacated if such employer demonstrates that:

- (1) Employees of such employer have been provided with the proper training and equipment to prevent such a violation;
- (2) Work rules designed to prevent such a violation have been established and adequately communicated to employees by such employer and have been effectively enforced when such a violation has been discovered;
- (3) The failure of employees to observe work rules led to the violation; and
- (4) Reasonable steps have been taken by such employer to discover any such violation."

- b. Application to Management. Section 260.C. of the VOSH *Administrative Regulations Manual* provides that the employee misconduct defense does not apply to "any officer, management official or supervisor having direction, management control or custody of any place of employment which was the subject of the violative condition cited."

- c. Investigation of Employee Misconduct. The following example illustrates the questions to be asked about employee misconduct situations. An unguarded table saw is observed. The saw, however, has a guard which is reattached while the Compliance Officer watches. Facts which the Compliance Officer shall document may include:

- (1) Who removed the guard and why?
- (2) Did the employer know that the guard had been removed?
- (3) How long or how often had the saw been used without guards?

- (4) Did the employer have a work rule that the saw guards not be removed?
 - (5) How was the work rule communicated?
 - (6) Was the work rule enforced?
 - (7) Were there written training procedures?
 - (8) Were there training records?
 - (9) Were there disciplinary policies?
 - (10) Was the disciplinary policy enforced?
- d. Impossibility. In some instances, compliance is impossible. In this case, compliance with the requirements of a standard would:
- (1) Be functionally impossible or would prevent performances of required work; and
 - (2) Necessitate that there are no alternative means of employee protection.

EXAMPLE: During the course of the inspection an unguarded table saw is observed. The employer states that the nature of its work makes a guard unworkable. Facts which the Compliance Officer shall document may include: Would a guard make performance of the work impossible or merely more difficult? Could a guard be used part of the time? Has the employer attempted to use guards? Has the employer considered alternative means or methods of avoiding or reducing the hazard?

- e. Greater Hazard. Compliance with a standard would result in greater hazards to employees than non-compliance and:
- (1) There are no alternative means of employee protection; and
 - (2) An application of a variance would be inappropriate.

EXAMPLE: The employer indicates that a saw guard had been removed because it caused particles to be thrown into the operator's face. Facts which the Compliance Officer shall consider may include: Was the guard used properly? Would a different type of guard eliminate the problem? How often was the operator struck by particles and what kind of injuries

resulted? Would safety glasses, a face mask, or a transparent shelf attached to the saw prevent injury? Was operator technique at fault and did the employer attempt to correct it? Was a variance sought?

NOTE: The Division of Legal Support is responsible for processing all variance requests.

- (3) Documentation Requirements. When it is reasonable to assume an affirmative defense may be an issue, the Compliance Officer shall make efforts to gather and record facts relevant to the defense. Closing conferences are often a good opportunity to examine employee misconduct questions. The Compliance Officer shall bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the Regional Safety or Health Director. Where it appears that every element of an affirmative defense is present, the Regional Safety or Health Director may decide, after consultation with the Program Manager and the Division of Legal Support Director, that a citation shall not be issued.

II. Powers and Duties of the Commissioner

A. **Take and Preserve Testimony, Examine Witnesses and Administer Oaths**

1. Section 40.1-6(4) of the *Code of Virginia* authorizes the commissioner, in the discharge of his duties, to take and preserve testimony, examine witnesses and administer oaths. In accordance with §40.1-6(5) of the *Code of Virginia*, the Commissioner of Labor and Industry may appoint such representatives as are necessary to carry out the functions outlined in §40.1-6(4) of the *Code of Virginia*. Such appointments shall be made in writing, identify the individual being appointed, the length of appointment, the method of withdrawal of such appointment, and specify what duties are being prescribed.
2. The oath shall be administered by the commissioner's appointed representative to the witness as follows: "Do you swear or affirm to tell the truth".
3. Testimony given under oath shall be recorded by a court reporter.
4. Questioning of employers, owners, operators, agents or employees under oath shall be in private in accordance with §40.1-49.8(2) of the *Code of Virginia*.
5. An employer's refusal to make an owner, operator, agent or employee available to the commissioner for examination under this section shall be considered a refusal to consent to the commissioner's inspection authority under §40.1-49.8 of the *Code of Virginia*. Upon such refusal

the commissioner may seek an administrative search warrant in accordance with the provisions contained in §§40.1-49.9 to -49.12 of the *Code of Virginia*, and obtain an order from the appropriate judge commanding the employer to make the subject owner, operator, agent or employee available for examination at a specified location by a date and time certain.

6. In accordance with §40.1-10 of the *Code of Virginia*, if any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of the examination under §40.1-6 of the *Code of Virginia*, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days or both. Any such refusal on the part of any person to comply with this section may be referred by the Commissioner of Labor and Industry to the appropriate Commonwealth's Attorney for prosecution.

B. Interrogatories

1. Under Va. Code §40.1-6(4): The Commissioner has the authority to: "file a written or printed list of relevant interrogatories and require full and complete answers to the same to be returned under oath within thirty days of the receipt of such list of questions."
2. The appropriate Program Director shall consult with the Division of Legal Support about pursuing possible interrogatories in accordance with Va. Code §40.1-6(4). The Division of Legal Support shall notify the Office of the Attorney General in cases where the Commissioner has determined that the issuance of interrogatories is necessary to the furtherance of the inspection/investigation. Such interrogatories may be issued to employers, employer representatives, employees and employee representatives, and others as determined by the Commissioner.

C. Injunctive Relief

1. Va. Code §40.1-49.4.F.1 for an imminent danger situation:

"...the Commissioner may file a civil action with the clerk of the circuit court having equity jurisdiction over the employer or the place of employment involved asking the court to temporarily or permanently enjoin any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this title.

Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

No order issued without prior notice to the employer shall be effective for more than five working days. Whenever and as soon as the Commissioner concludes that conditions or practices described in this subsection exist in any place of employment and that judicial relief shall be sought, he shall immediately inform the affected employer and employees of such proposed course of action.”

- a. The appropriate Program Director shall consult with the Division of Legal Support about pursuing possible injunctive relief in imminent danger situations when the employer has indicated its unwillingness to immediately remove employees from exposure to the imminent danger hazard or condition. The Division of Legal Support shall notify the Office of the Attorney General and the appropriate Commonwealth’s Attorney in cases where the Commissioner has determined that injunctive relief is necessary to provide protection to employees from such imminent danger hazards/conditions.
2. Va. Code §40.1-49.4.F.2 (injunctive relief generally - e.g., final order situations where an employer fails to provide abatement information):
“Any court described in this section shall also have jurisdiction, upon petition of the Commissioner or his authorized representative, to enjoin any violations of this title or the standards, rules or regulations promulgated thereunder.”
 - a. Injunctive relief may be appropriate in a number of situations involving an employer’s failure to comply with VOSH laws, standards and regulations. The appropriate Program Director shall consult with the Division of Legal Support about pursuing possible injunctive relief in situations including but not limited to:
 - (1) in the case where a final order was obtained by the Commissioner and no or incomplete abatement verification information has been provided;
 - (2) in the case where a final order was obtained and the employer has failed to comply with one or more terms of the settlement agreement or agreed order.

- b. The Division of Legal Support shall notify the Office of the Attorney General and the appropriate Commonwealth's Attorney in cases where injunctive relief is being sought in accordance with Va. Code §40.1-49.4.F.2.

III. Judicial Review of VOSH Contested Cases

Section 40.1-49.4, *et seq.*, *Code of Virginia*, requires the Commissioner, upon receipt of a notice of contest of a citation, proposed penalty or order of abatement, to begin proceedings to have a contested case heard in the Circuit Court for the jurisdiction where the violation occurred. The Commonwealth's Attorney for that jurisdiction represents the Department before the Circuit Court in any criminal or civil matter involving the compliance of Virginia's Occupational Safety and Health laws, pursuant to §40.1-49.6, *Code of Virginia*. Assistance from the Office of the Attorney General is also available.

A. Transmittal of Notice of Contest

1. General

- a. Once a letter of contest regarding a VOSH citation is received, it is reviewed by the appropriate Regional Safety or Health Director to determine which parts of the citation are contested. The Division of Legal Support shall be consulted in questionable cases.
- b. The envelope that contained the Notice of Contest shall be retained in the case file with the postmark intact.
- c. Where the Regional Safety or Health Director is certain that the Notice of Contest was not received, e.g., postmarked, within the 15-working day period allowed for contest, the employer should be advised of the statutory time limitation. The employer or employee shall be informed that the court has no jurisdiction to hear the case when the Notice of Contest was not filed within the 15-working days allowed and, therefore, that the citation, abatement order and proposed penalty are final orders.
- d. If the Notice of Contest is submitted to the Regional Safety or Health Director after the 15-working day period but the Notice contests only the reasonableness of the abatement period, it shall be treated as a Petition for Extension of Abatement Time and handled in accordance with the relevant instructions.
- e. If written communication is received from an employer containing objection, criticism, or other adverse comment about a citation or proposed penalty which does not clearly appear to be a Notice of Contest, the Regional Safety or Health Director

should contact the employer as soon as possible to clarify the intent of the communication. Such clarification must be obtained prior to the end of the 15-working day contest period. The Regional Safety or Health Director shall not attempt to talk the employer out of the contest, but shall seek only to clarify whether the employer intends the document to be a Notice of Contest. The Regional Safety or Health Director shall write a memorandum for the case file regarding the substance of this conversation. If the employer did not intend the document to be a Notice of Contest, it shall be retained in the case file with the memorandum of the contact with the employer.

- f. If the Regional Safety or Health Director's contact with the employer reveals a desire for an informal conference, the employer shall be informed that an informal conference does not stay the running of the 15-working day period for contest.

B. Post-Filing VOSH Activities

After the VOSH complaint has been filed with the Circuit Court, there shall be no investigations of, or conferences with, the employer without clearance from the Division of Legal Support and the Office of the Commonwealth's Attorney.

C. Elements of Proof in a VOSH Case

To establish the existence of a VOSH violation, a Compliance Officer must document four elements during an investigation. These elements are:

1. **A standard, regulation or a statute applies to the hazard in question.**
 - a. Construction standards apply only to employers with employees engaged in construction work. Construction work includes any work consisting of construction, alteration or repair, including painting or decoration of any structure. Work performed in one of the traditional construction trades (e.g., plumbing, carpentry, masonry, roofing, etc.), whether performed on a construction site or in a manufacturing plant, will normally fall under the definition of construction work. Alteration or repair performed on a structure, as opposed to a piece of machinery or equipment, will normally be considered construction work. Workers engaged in operations which are an integral part of, or involved with, the performance of construction work are protected by the construction standards. See §130.1 of the *VOSH Administrative Regulations Manual*. For example, an employer who is dismantling cranes used on a construction site is performing work that is integral to the construction industry, and is therefore subject to construction standards.

- b. Agricultural standards apply exclusively to employers with employees engaged in agricultural operations.
- c. Private sector maritime employers are covered by federal OSHA. Maritime standards apply only to public sector employers with employees engaged in maritime activities.
- d. General Industry standards apply to all covered employees unless the general industry standard is limited to a certain type of business or the construction, maritime or agricultural standards apply. Certain general industry standards have been included by reference in the construction, maritime or agricultural standards.

The Compliance Officer should check the particular standard for the industry being inspected in order to determine which general industry standards apply.

2. The Employer has Violated the Standard, Regulation or Statute in Question. See Chapter 10, Violations.

The testimony of the Compliance Officer is crucial to prove this element. The Compliance Officer will tell the court what hazard he or she saw. Photographs of the hazard, if the Compliance Officer authenticates them, can also be used to prove this element. ('Authenticates' means the Compliance Officer testifies that the picture accurately represents what he or she saw at the time the photo was taken.) This is all that is necessary if the Compliance Officer witnessed or photographed the violative condition.

If the violation occurred before the Compliance Officer arrived at the site, documentation of the item and proof in court must come from a different source. If an employee or a person not employed by the employer tells the Compliance Officer about the hazardous condition that employee or non-employee must testify about it in court because of the hearsay rule. This legal rule provides that a person can only testify about what they know and not what someone else knows. Something a person tells you about a violation is something they know and cannot be testified to by you. There is an exception to this rule which helps the Compliance Officer when they are testifying. You are allowed to say what a supervisory representative of the company tells you during the investigation. When a foreman or other company superintendent tells you that he saw a hazard or that they had been working in a trench without shoring for a week, that is proof of the hazard.

Your case file should accurately document what an employee or another witness told you about a condition even though you cannot testify about it. This documentation can still serve as proof for issuing a citation and matters of settlement even though we may not be able to use it in court.

Since the Compliance Office can testify to the statements of foremen and other supervisory personnel in court, it is especially important to document what they tell you somewhere in the file. If at all possible, a statement should be taken from supervisors and foremen addressing each violation.

If a statement cannot be taken, the Compliance Officer should put in quotes any statements made by supervisory personnel which could help to prove any of the four elements of the violation.

3. **The Employer has Actual Knowledge or Should have Known of the Violative Condition.** See Chapter 10, Violations, for more information on this subject.
 - a. Proof of a supervisor's knowledge can be imputed to the employer.
 - b. Proof of the employer's knowledge of the physical condition or hazard constituting the violation is enough for this element. It is not necessary to show knowledge of the law or standard to prove a violation, but it will be necessary for proof of a willful violation.

At trial, the Compliance Officer will testify about employer knowledge. The scope of the testimony will depend upon the type of employer knowledge VOSH wants to prove (actual knowledge or constructive knowledge - i.e., the employer should have known).

There are several ways to show actual knowledge of the hazardous condition. A statement to the Compliance Officer during the investigation by a representative of the employer about their knowledge of the hazard is easiest and should be documented in an interview statement, or if that is not possible, by the Compliance Officer noting in quotes any statement by the representative that would provide proof of actual knowledge.

A photograph of the violation with a company representative in the picture or actually exposed to the hazard is excellent documentation of actual knowledge. A statement by employee(s) that a supervisor had been present previously when the hazard existed and no order to correct the hazard was issued, or the supervisor ordered the employees to disregard the hazard, would provide proof of actual knowledge sufficient to issue a citation.

Another method of proving employer knowledge is to show that the employer should have known of the hazard. The first step in demonstrating this is a photograph or the Compliance Officer's testimony that the violation was in plain view. VOSH also needs to show that the employer representative had the opportunity to discover the hazard. The employer may have a practice of supervisory personnel walking through the work site or the industry of the employer

has a practice of examining their worksites. The hazard must have existed long enough for the employer to have been able to discover it, which will have to be determined through employee/supervisory statements.

Photos of machinery showing a significant accumulation of dust with the guard removed is one method of showing duration. An employer's statement that they normally do walk around the site or actively supervise the site should be documented. The frequency with which they do so should be noted. The supervisor's statement should be discussed with employees to verify that the supervisor actually performed the inspections as frequently as they said they did.

If the hazard is not in plain view, then the Compliance Officer needs better documentation to show that an employer representative visited the area where the hazard was and did it frequently enough that they should have discovered the violation.

4. **An Employee of the Cited Employer is Exposed to the Violative Condition.** See Chapter 10, Violations, for more information on this subject.

Demonstrating employee exposure in court will most often be done by the testimony of the Compliance Officer. Among the methods of documenting the employee exposure are oral and written statements by employer representatives; oral and written statements by employees; photographs or videotapes and possibly other documents. The Compliance Officer can tell the court about employee exposure if the employer representative admitted exposure to them in either an oral or a written statement. If the proof is a statement by an employee, either oral or written, the Compliance Officer will not be able to use that in court. The employee would have to testify directly.

A photograph of the hazard with an employee exposed takes us 90% of the way toward proving this element. VOSH must still show that the picture is of an employee of the cited employer. Unless it is obvious on the face of the photo VOSH will need to rely on the statements of supervisory personnel to demonstrate this element. It is likely in manufacturing situations that exposure can be demonstrated solely by a photograph, while in multi-employer worksites in construction, the Compliance Officer needs to get verification of employment from supervisory personnel.

In any case where VOSH is using past exposure of employees to the hazard the Compliance Officer will need documentation of the exposure. Evidence of an injury or the statement of an employer representative should be enough.

D. Outline of Legal Process

1. General

- a. After a Notice of Contest is received and all reasonable attempts at settlement have failed, the Program Director may authorize a request to file a complaint in Circuit Court. The Division of Legal Support will draft the request for issuance. The Division of Legal Support will also arrange contact with the Commonwealth's Attorney in the jurisdiction where the violation occurred. A copy of the case file will be sent to the Commonwealth's Attorney.
- b. The Staff Attorneys assigned to the case will contact the Commonwealth's Attorney to arrange a date to file the complaint. The Commonwealth's Attorney may decide to request leave of court to have the Division of Legal Support Attorney appointed as a Special Assistant Commonwealth's Attorney pursuant to §19.2-155 of the Code of Virginia.
- c. Attempts may be made to settle the case by the Division of Legal Support and the Program Manager even after the filing of the suit. If a settlement cannot be reached, the case will proceed to trial.
- d. Prior to trial, both parties may engage in discovery as authorized by §40.1-49.4.L.2., *Code of Virginia*. Discovery may include the release of the Compliance Officer's notes, findings and narrative.

(1) Discovery Methods

Once a legal proceeding has been initiated, each party has the opportunity to "discover" evidence in the possession of an opposing party. Traditionally, discovery methods include:

- (a) Request for Admissions,
- (b) Interrogatories,
- (c) Requests for Production of Documents, and
- (d) Depositions.

An attorney from the Division of Legal Support or the Commonwealth's Attorney will represent the agency in responding to discovery requests. It is essential that all VOSH personnel coordinate and cooperate with the assigned attorney to ensure that such responses are accurate, complete, and filed in a timely manner.

(2) Interrogatories

Compliance Officers shall draft and sign answers to interrogatories, with Division of Legal Support assistance. It is the responsibility of the Compliance Officer to answer each interrogatory separately and fully. The Division of Legal Support attorney or the Commonwealth's Attorney will sign any objections to the interrogatories. Compliance Officers should be aware that they may be deposed and/or examined at hearing on the interrogatory answers provided.

(3) Production of Documents

(a) If a request for production of documents is served on the Department the Regional Office will immediately make all documents relevant to that discovery demand available to the Division of Legal Support attorney.

(b) While portions of those materials may be later withheld based on governmental privileges or doctrine (e.g., statements that would reveal the identity of an informer), Compliance Officers must not withhold any information from the Division of Legal Support attorney.

(c) It is the responsibility of the Division of Legal Support to review all material and to assert any applicable privileges that may justify withholding documents/materials that would otherwise be discoverable.

(4) Depositions

Depositions permit an opposing party to take a potential witness' pre-hearing statement under oath in order to better understand the witness's potential testimony if the matter later proceeds to a hearing. Compliance Officers or other VOSH personnel may be required to offer testimony during a deposition. In such cases, a Division of Legal Support attorney or the Commonwealth's Attorney will be present with the witness.

(5) Testifying in Hearings

While instructions provided by Division of Legal Support attorneys and Commonwealth's Attorney take precedence, particularly during trial preparation, the following considerations will generally enhance the hearing testimony of Compliance Officers:

(a) Review Documents and Evidence

In consultation with the Division of Legal Support, Compliance Officers should review documents and evidence relevant to the inspection or investigation before the proceeding so that when testifying, they are very familiar with the evidence and need not regularly refer to the file or other documents.

- (b) Attire
Wear appropriate clothing that reflects the agency's respect for the court or other tribunal before which you are testifying. This also applies when appearing before a magistrate to seek an administrative search warrant.
 - (c) Responses to Questions
Answer all questions directly and honestly. If you do not understand a question, indicate that and ask that the question be repeated or clarified.
 - (d) Judge's Instruction(s)
Listen carefully to any instruction provided by the judge and, unless instructed to the contrary by Division of Legal Support counsel or the Commonwealth's Attorney, follow the judge's instruction(s).
- e. Trial preparation will include at least one pretrial meeting between the Department (the Staff Attorney, Compliance Officer and/or Regional Safety or Health Director) and the Commonwealth's Attorney.
 - f. The Commonwealth's Attorney or the Division of Legal Support attorney, if appointed as a Special Assistant Commonwealth's Attorney, will present the case on behalf of VOSH. After opening statements by both attorneys, the Compliance Officer will normally be called as the first witness to explain the events leading up to the citation.
 - g. At the end of the Commonwealth's evidence, the defense attorney may file a motion to strike the evidence as a way of having the case dismissed. The judge will only grant such a motion if VOSH is unable to prove all the prima facie elements for the violations cited. If the motion to strike is not granted, the defense attorney will present the employer's testimony and evidence.
 - h. After all testimony is heard at the trial, and each side has made their closing arguments, the judge will issue an order affirming, modifying or vacating the citation or proposed penalty.

IV. Appeals

A. **General**

Appeals from Circuit Court may be heard by the Virginia Court of Appeals. Should the Circuit Court judge not decide any or all issues in a case for VOSH, the Department has thirty (30) days to file an appeal with the Virginia Court of Appeals. Because of this time limitation, the following procedures must be done in a timely manner.

B. **The Division of Legal Support Memorandum**

After each trial, the staff attorney in consultation with other VOSH personnel in attendance will prepare a memorandum outlining the results of the trial. The memorandum will discuss the strengths and weaknesses of the case and its result, and **include** a recommendation regarding **any** appeal **of an adverse decision**.

1. The **above mentioned** memorandum will be given to the Director of the Division of Legal Support as soon as possible after the entry of the Final Order. A copy of this memorandum will be sent to the Assistant Attorney General.
2. The Director of the Division of Legal Support will review the memorandum and make a recommendation **whether or not to go forward with any** appeal immediately thereafter. This recommendation will be **forwarded** to the Program Director, the Director of VOSH Programs, and the Commissioner for review.
3. The Commissioner will make a final **determination** on the appeal **within three working days** upon its receipt by his office.

C. **Commissioner's Decision**

The final decision on appealing the judge's decision will be made by the Commissioner after consultation with the Attorney General's Office and/or the Commonwealth's Attorney.

Appendix A

- I. Sample Letters**
- II. Checklists**
- III. Sample Case Narratives**

The following items are sample letters for use and other supplemental materials referred to in Chapters 1 through 15. The general reference is noted in order to guide the reader as to the location of the topic.

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**SAMPLE LETTER:
Complaint Notification to Employer – Type 1**

Date

Company

Attn:

Street

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Complaint Number _____

Dear :

On _____, the Virginia Occupational Safety and Health (VOSH) Program received notice of safety and health hazards at your above worksite. We notified you by telephone of these alleged hazards on _____. The specific nature of the alleged hazards is as follows:

[Insert list of complaint items]

We have not determined whether the alleged hazards exist at your workplace, and we do not intend to conduct an inspection at this time. However, since allegations of workplace hazards have been made, we request that you immediately investigate the alleged conditions and make any necessary corrections or modifications.

Please advise me in writing no later than _____, of the results of your investigation. Please also provide supporting documentation of your findings, including any applicable measurements or monitoring results, and photographs which would demonstrate elimination of the hazard, as well as a description of any corrective action you have taken or are in the process of taking.

If you believe a complaint item is not valid then please state why. To facilitate providing our department with a timely response you may, if desired, fax your response to us at [Fax number].

This letter is not a citation or a notification of proposed penalty which, according to VOSH laws and regulations may be issued only after an inspection of the workplace. It is our goal to assure that hazards are promptly identified and eliminated. Please take immediate corrective action where needed. We encourage employee participation in investigating and responding to any alleged hazard.

If we do not receive a response from you by _____, indicating that appropriate action has been taken or that no hazard exists and why, a VOSH inspection will likely be conducted. An inspection may include a review of the following: injury and illness records, hazard communication, personal protective equipment, emergency action or response, bloodborne pathogens, confined space entry, lockout/tagout and related safety and health issues.

Please note, however, that VOSH selects for inspection some cases where we have received letters in which employers have indicated satisfactory corrective action. This is to ensure that employers have actually taken the action stated in their letters.

The State of Virginia offers VOSH Consultation services without charge, to assist in resolving all occupational safety and health issues. However, the variety of services available or the scheduling of those services may be limited by the VOSH Consultation project's requirement to give priority to small businesses in high hazard industries and by its backlog. To discuss or request the services call or write _____, Manager, Consultation Services, Virginia Department of Labor and Industry, Main Street Centre, 600 E. Main St., Richmond 23219-2430, *(Insert phone number)*.

You are required by VOSH laws and regulations to post a copy of this letter where it will be readily accessible for review by all of your employees and return a copy of the signed Certificate of Posting (Attachment A) to this office. In addition, you are required to provide a copy of this letter and your response to a representative of any recognized union or safety committee if these are at your facility. Failure to do so may result in an onsite inspection.

The complainant has been furnished a copy of this letter and will be provided a copy of your response. Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

If you have any questions concerning this matter, please contact _____ at the address in the letterhead. Your personal support and interest in the safety and health of your employees is appreciated.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosure: Attachment A

Attachment A

CERTIFICATE OF POSTING

VOSH NOTIFICATION OF ALLEGED HAZARD(S)

Complaint Number _____

Date of Posting: _____

Date Copy Given to an
Employee Representative: _____

On behalf of the employer, I certify that a copy of the complaint letter received from the Virginia Occupational Safety and Health (VOSH) Program has been posted in a conspicuous place, where all affected employees will have notice, or near such location where the alleged hazardous condition(s) occurred, and such notice has been given to each authorized representative of affected employees, if any. This notice was or will be posted for a minimum of ten (10) working days or until any hazardous conditions found are corrected.

Signature

Title

Employer/Establishment Name

**SAMPLE LETTER:
Complaint Notification to Employer – Type 2**

Date _____

Company _____

Attn: _____

Street _____

City, State Zip _____

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Complaint Number _____

Dear _____ :

On _____, the Virginia Occupational Safety and Health (VOSH) Program received a notice of alleged unsafe conditions at your above worksite. We notified you by telephone of these alleged hazards on _____. The specific nature of the alleged hazards is as follows:

[Insert list of complaint items]

We have not determined whether the hazards, as alleged, exist at your workplace; and we are not conducting an inspection at this time. However, since allegations of workplace hazards have been made, we request that you immediately investigate the alleged conditions and make any necessary corrections or modifications within (5) five calendar days from receipt of this notification by telephone.

Please provide the date when the corrective action was actually COMPLETED and give a brief statement explaining what corrective actions were made.

NOTE: When responding, if your corrective actions for any given complaint item cannot be completed until a future date - due to ordering parts, repair contracts, etc. - then we will need a follow-up letter from you confirming completion of abatement on the affected item(s).

Please also provide supporting documentation of your findings, including any applicable measurements or monitoring results, and photographs which would demonstrate elimination of the hazard, as well as a description of any corrective action you have taken or are in the process of taking. If you believe a complaint item is not valid then please state why. To facilitate providing our department with a timely response you may, if desired, fax your response to us at [Fax number].

This letter is not a citation or a notification of proposed penalties. Our goal is to ensure that hazards are promptly identified and eliminated. We also encourage employee participation in investigating and responding to any alleged hazard. **However, if we do not receive a written response from you by (five calendar days) indicating that appropriate action has been taken or that no hazard exists and why, a VOSH inspection may be conducted.** An inspection may include a review of the following: injury and illness records and any required programs such as hazard communication, personal protective equipment, emergency action or response, bloodborne pathogens, confined space entry, lockout/tagout, and other related safety and health issues.

The State of Virginia offers VOSH Consultation services, without charge, to assist in resolving all occupational safety and health issues. The variety of services available or the scheduling of those services may be limited by the consultation project's requirement to give priority to small businesses in high hazard industries and by its case backlog. You may also be able to obtain similar services from your insurance carrier or private consultant. To discuss or request the services call or write _____, Manager, Consultation Services, Virginia Department of Labor and Industry, Main Street Centre, 600 E. Main St., Richmond 23219-2430, *(Insert phone number)*.

You are required by VOSH laws and regulations to post a copy of this letter and your response to it where it will be readily accessible for review by all of your employees and to return a copy of the signed Certificate of Posting (Attachment A enclosed) to this office. In addition, you are required to provide a copy of this letter and your response to it to a representative of any recognized employee union or safety committee if these are at your facility. Failure to do this may result in an on-site inspection. A copy of this letter and your response may also be furnished to the complainant.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

If you have any questions concerning this matter, please contact this office. Your personal support and interest in the safety and health of your employees is appreciated.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosure: Attachment A

Attachment A

CERTIFICATE OF POSTING

VOSH NOTIFICATION OF ALLEGED HAZARD(S)

Complaint Number _____

Date of Posting: _____

Date Copy Given to an
Employee Representative: _____

On behalf of the employer, I certify that a copy of the complaint letter received from the Virginia Occupational Safety and Health (VOSH) Program has been posted in a conspicuous place, where all affected employees will have notice, or near such location where the alleged hazardous condition(s) occurred, and such notice has been given to each authorized representative of affected employees, if any. This notice was or will be posted for a minimum of ten (10) working days or until any hazardous conditions found are corrected.

Signature

Title

Employer/Establishment Name

**SAMPLE LETTER:
Initial Response to Complainant – Type 1**

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear :

The purpose of this letter is to acknowledge receipt of your complaint and to inform you that an inspection of the above worksite will be scheduled as soon as possible, in accordance with the priorities established by the Virginia Occupational Safety and Health (VOSH) Program. You will be informed of the results of our inspection when they are available.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Insert Name, Address, Email Address and Telephone Number of Discrimination Investigator]

Thank you for your interest in workplace safety and health.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

**SAMPLE LETTER:
Initial Complaint Response – Type 2**

Date:

Name

Address

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Inspection Number _____

Dear :

In response to your complaint concerning safety/health hazards at the above worksite, the Virginia Occupational Safety and Health (VOSH) Program conducted an inspection at the location detailed in the complaint. The inspection was finalized on *(enter date complaint is closed, citations were issued, or no citations issued)* and the results of our investigation of your complaint are as follows:

Examples - of different scenarios:

Item 1. Employees performing welding operations are exposed to *(provide description of hazard/work operation)*.

Findings: This complaint item was confirmed. The employees performing the welding were *(provide description of hazard facts)*. This item was cited as detailed in the attached copy of the citation.

Item 2: Employees performing *[provide description of hazard/work operation]*.

Findings: This complaint item was partially confirmed but was determined not to be a violation of the VOSH standards. The employees performing *...[provide description of facts uncovered which support finding that complaint was partially confirmed but that no violation exists]*.

Item 3: Employees performing *[provide description of hazard/work operation]*.

Findings: This complaint item was not confirmed. The employees performing *...[provide description of facts uncovered which support finding that complaint was not confirmed and that no violation exists]*.

Item 4: Employees performing *[provide description of hazard/work operation]*.

Findings: This complaint item could not be *confirmed or documented* at the time of the

inspection. The employees performing [*provide description of facts uncovered which support finding that complaint could not confirmed or documented (e.g., process no longer being used)*].

[NOTE: If the initial complaint had both safety and health items and these were divided between two separate inspections - one addressing the safety items and one addressing health items - address the items you inspected as detailed above and then use the following paragraphs to address the items on the companion inspection depending on the circumstances. Don't bother writing out each complete item beside each item number in this situation. The complainant will get a listing of these items with the other case's findings anyway.]

[Examples for Referencing the Findings on Companion Cases:]

Item 2: or if several items are involved use this next example:

Item 2 through Item 5, Item 7, and Items 10 and 11:

[If the companion case is still being completed use the following:]

The results of the investigation of the [safety/health] complaint item(s) are still being reviewed. Once completed, a separate letter will be sent to you relating the findings from [safety/health] inspection number _____, which has been conducted in conjunction with this [safety/health] inspection to address the [safety/health] item(s) detailed in your complaint.

[If the companion case is already completed use the following:]

Findings: For these findings, please refer to the separate letter that was sent to you which relates the results from [safety/health] inspection number _____ that was conducted in conjunction with this [safety/health] inspection to address the [safety/health] items detailed in your complaint.

[If the companion case hasn't been completed yet, use:]

Findings: The results of the investigation of these [safety/health] complaint items are still being reviewed. Once completed, a separate letter will be sent to you relating the findings from [safety/health] inspection number _____ which was conducted in conjunction with this [safety/health] inspection to address the [safety/health] items detailed in your complaint.

Following the formats above for addressing the findings, describe what you found or didn't find and then whether it was cited. When the condition was determined not to be a violation of the standard briefly detail why this was the case. Keep your responses streamlined and stick to the complaint items. Don't discuss things like "based on interviews, employer statements, etc., it appeared that ...etc., etc."

Don't explain that you are citing an item as serious or other than serious, etc. or get into a discussion of what the gravity factors are and why. All this is superfluous, as we will give them a copy of the citation anyway, if one is being issued. Conclude your response with one of the following catch all phrases depending on the outcome:

Option 1: The confirmed complaint items discussed above that were determined to be in violation of the VOSH standards have been cited.

Option 2: In addition to confirmed complaint items that were determined to be in violation of the VOSH standards, the inspection also identified other conditions that were VOSH violations.

Option 3: Although the complaint items discussed above were not determined to be in violation of the VOSH standards, the inspection did identify other conditions that were VOSH violations.

Option 4: Complaint items or other conditions identified during the course of this inspection that were determined to be in violation of the VOSH standards have been cited.

[Then add the following phrase to one of the above sentences if citations were issued:]

A copy of the VOSH Citation and Notification of Penalty, which was issued to the employer is enclosed for your review, and should have been posted by the employer at the workplace for at least three (3) days after receipt.

[Use this ending if no citations are issued:]

Based on our findings as detailed above, we have closed the complaint's investigation file as of the date of this letter, on the grounds that the alleged complaint item(s) [have been or are now] being properly addressed. However, if you have additional knowledge regarding the results of this complaint inspection which you believe would dispute our findings, then please send us written notification detailing the basis for your concerns as soon as possible following the receipt of this letter.

If you do not agree with our inspection results, you may contact me for a clarification of the matter. You also have the right to an informal review by VOSH. This review may be obtained by submitting a written statement of your position to the Regional Safety or Health Director. The Regional Safety or Health Director will provide the employer with a copy of such statement by certified mail. Your identity will be withheld unless you explicitly request that it be revealed.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as

soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Name, Address and Telephone Number of Discrimination Investigator]

Thank you for your interest in assuring a safe and healthful workplace.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Attachment A *[if citations were issued, attach copy]*

**SAMPLE LETTER:
Complaint Correction In Progress - Letter Response To Employer**

Date

Company

Attn:

Street

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Complaint Number _____

Dear _____:

Thank you for your recent response to our complaint letter. Your letter states that you are making progress toward correcting the conditions. Please send us confirmation, in writing by _____, when your corrective action has been completed.

Please contact us immediately, if you should encounter any difficulties which you believe might result in a delay in completing your corrective actions by this date.

A copy of your response and this letter is also being provided to the concerned person(s) who had initially reported the hazardous conditions.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

Your interest in the safety and health of your employees is appreciated.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

**SAMPLE LETTER:
Interim Response to Complainant – Type 1**

Date:

Name

Address

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Complaint Number _____

Dear :

In response to your complaint of alleged health and safety hazards at the above worksite, the Virginia Occupational Safety and Health (VOSH) Program has notified the employer requesting that appropriate action be taken to correct the described conditions. Enclosed is a copy of that letter for your information.

As the letter indicates, the employer has been given five working days to respond to these conditions. Please notify me if you have information that corrections and/or modifications have not been made within five (5) working days from receipt of this letter.

Unless requested otherwise, we have not revealed your identity to the employer. Upon receipt of any additional information from the employer, a copy of the response will be forwarded to you.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Name, Address and Telephone Number of Discrimination Investigator]

Your continued interest in workplace safety and health is appreciated.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosure

**Sample Letter:
Interim Response to Complainant – Type 2**

Date:

Name

Address

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Complaint Number _____

Dear :

We have been advised by the above employer that the hazards about which you complained are presently being investigated. Enclosed is a copy of a letter from the employer.

VOSH has requested that the employer submit written notification to us when all corrective action has been completed.

A copy of the employer's response will be forwarded to you for your information as soon as we receive it.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Name, Address and Telephone Number of Discrimination Investigator]

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosure

**SAMPLE LETTER:
Violation Correction in Progress -
Letter Response To Complainant**

Date:

Name

Address

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
 Complaint Number _____

Dear :

We have been advised by the above employer that the hazards which you had asked VOSH to investigate are presently being corrected. The results of the employer's response are enclosed for your information.

The Virginia Occupational Safety and Health Compliance (VOSH) has sent a letter to the employer requesting that they provide the agency with written notification once all of the corrective actions have been completed. A copy of this letter to the employer has been enclosed for your records. The results from the employer's final response will also be forwarded to you as soon as possible upon receipt.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Name, Address and Telephone Number of Discrimination Investigator]

Thank you for your concern for a safe and healthful workplace.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

SAMPLE LETTER
Complaint Notification to Employer
Citing Employer's Failure to Respond to Initial Complaint Notification

Date

Company

Attn:

Street

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Complaint Number _____

Dear :

A letter of complaint alleging unsafe working conditions at your work location was sent to you on _____. In the letter you were asked to respond to the alleged unsafe conditions by _____. We are not in receipt of your response at this time. If we do not receive a letter of response from you within 10 working days, an unannounced inspection may be scheduled to determine if these conditions do in fact exist and if so what measures your company has taken to abate them. Violations found during the inspection that pertain to the complaint items, as well as any other violations found during the inspection, would be cited.

We would appreciate your cooperation in this matter in order that our file on this complaint may be closed.

Please also note that VOSH selects for inspection a random sample of cases in which employers have indicated satisfactory corrective action. This policy has been established to ensure that employers have actually taken the action asserted in their letters.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

If you have any questions concerning this matter, please contact _____ at the above number. Your cooperation in this matter is appreciated.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

**SAMPLE LETTER:
Results of Inspection to Complainant**

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Complaint Number _____

Dear :

In response to your complaint concerning safety and health hazards at the above worksite, the Virginia Occupational Safety and Health (VOSH) Program conducted an inspection. That inspection was completed on _____ . The results of our inspection of your complaint items are as follows:

[List complaint item, result of inspection (e.g., complaint item confirmed or not confirmed), and violation item cited in response, as applicable]

Attached for your information is a copy of the VOSH Citation and Notification of Penalty, which was sent to the employer on _____, and should have been posted at the workplace for at least three days after receipt.

If you do not agree with our inspection results, you may contact me for a clarification of the matter. You also have the right to an informal review by VOSH. This review may be obtained by submitting a written statement of your position to the Regional Safety or Health Director. The Regional Safety or Health Director will provide the employer with a copy of such statement by certified mail. Your identity will be withheld unless you explicitly request that it be revealed.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

Thank you for your concern for a safe and healthy workplace.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

**SAMPLE LETTER:
Informal Conference: Need Response From Employer**

Date

Company

Attn:

Street

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Inspection Number _____

Dear :

Option 1: Since receiving your letter of contest for the above referenced Virginia Occupational Safety and Health (VOSH) inspection on _____, we have attempted unsuccessfully to contact you by telephone on numerous occasions to schedule the informal conference that you requested in your letter. If we have not heard from you in three weeks, we will proceed with the handling of your contest. However, you need to be aware that without an Explanatory Letter of Contest detailing the reasons for your contest and which provides additional information you wish us to consider regarding our inspection results, that it is unlikely that a contest review will change the initial findings.

Option 2: Pursuant to the Informal Conference which we held with you on the above referenced Virginia Occupational Safety and Health (VOSH) inspection on _____, you requested time to think over our proposed settlement offer to reduce the penalties from \$ _____ to \$ _____ and agreed to contact us regarding your decision within the next couple of weeks. Since then we have attempted unsuccessfully to contact you on numerous occasions to learn what you have decided regarding our proposal. Please contact us and advise if you wish to accept our offer or wish to continue your contest. If you do decide to continue your contest, we request you provide us with an Explanatory Letter of Contest along with any supporting documentation you wish us to consider on your behalf.

If we have not heard from you by [2 week date], we will proceed with the handling of your contest. However, you need to be aware that consideration of your contest by our Central Office in Richmond will be based upon the initial penalties as issued and that any proposed settlement offer tendered by the Central Office may not reflect any previous offers made. You should also be aware that if you do not provide any additional information you wish us to consider regarding our inspection results, that it is unlikely that a contest review will substantially change the initial findings.

Please contact us in writing by the above date and advise us of the action you wish take regarding this inspection. If we have not heard from you by this date, we will forward your case file to our Central Office in Richmond for review.

Please call me at _____, Ext. ____ if you have any questions.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

**SAMPLE LETTER:
Commonwealth Attorney-Notice of Employer Contest Letter**

Date

COMMONWEALTH ATTORNEY

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear :

Pursuant to 40.1-49.4E of the Code of Virginia, "the Commissioner [of Labor and Industry] shall immediately notify the Commonwealth's Attorney for the jurisdiction wherein the violation(s) is alleged to have occurred...."

The purpose of this letter is to notify you that the above-reference employer has issued a notice of its intention to contest the Virginia Occupational Safety and Health (VOSH) citation(s) issued by the Virginia Department of Labor and Industry, in accordance with Va. Code §40.1-49.4.A.4(b).

Please see the attached notice of contest received from the company. Further information will be sent to you if the contest is not withdrawn or settled.

We appreciate your assistance with our VOSH contested case.

Please call me at _____, Ext. ____ if you have any questions.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

**SAMPLE LETTER:
Response To Employer After Last Day To Contest**

Date

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear :

This letter is in reference to your phone message of _____, at _____ [a.m./p.m.] to arrange an informal conference for the above inspection and is to confirm the content of our subsequent conversation on _____, at _____ [a.m./p.m.] regarding your request.

I fully appreciate the difficulties that small companies may encounter when dealing with governmental agencies such as ours and understand that some of the requirements may be initially confusing. In fact, this is the reason our agency's inspectors give a detailed explanation of the employer's rights and responsibilities to the employer at the conclusion of each inspection, as well as a copy of the Closing Conference Guide. It is also the reason that citations are sent by certified mail and include additional instructions to the employer which again explain the employer's rights.

Regrettably, _____, was your company's last day to request an informal conference to discuss and/or to contest the citations and penalties that were issued. This date is the fifteenth working day following your company's receipt of the citations on _____. By delaying after _____, to contact us, the citations and penalties have become a Final Order of the Commissioner and are enforceable as an order of the Circuit Court.

As regards the \$_____ penalty owed by your company, VOSH is aware of the hardship a significant penalty might create for a small business and is always receptive to any company's efforts to meet their obligations. To this end, a penalty payment plan is available, upon request, which would help to mitigate the financial impact. Please advise me by _____, if you wish to arrange to a payment plan.

Also, for your future reference, I would like to suggest that you take time to read through the Closing Conference Guide our inspector provided to your company at the completion of the inspection and, where applicable, the cover letter which was enclosed with the citations you received on _____. These items explain your rights as the employer in the inspection and citation process and include a discussion of when and how to request an informal conference and/or to contest a citation. Many companies find it helpful to take advantage of these options and your company may also wish to do this in any future inspections (whether conducted by State or federal Agencies) that involve your operations.

Please contact me if you should have any questions or if I can be of any assistance. Thank you for your cooperation in our mutual efforts to improve workplace safety.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

**SAMPLE LETTER:
Petition for Modification of Abatement Request Received
Response To Employer**

Date:

Company

Attn:

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear _____:

As we discussed on _____, I am writing to you regarding your petition dated _____, in which you are requesting that the abatement due date for Citation 1, Item 1a be extended from _____ to _____. Your documentation of your need for the extension as detailed in your letter dated _____, is justifiable. However, before we can actually grant approval for the extension of the abatement period to the new date that your company is requesting, VOSH must wait for a period of fifteen (15) working days following _____, which is the date that you posted a copy of your petition letter and the Certificate Of Abatement Extension Request which I had faxed to you.

As we discussed, the Virginia Occupational Safety and Health (VOSH) standards require that these items be posted in a prominent place at or near the location of the violations for your affected employees to review for ten (10) working days to permit them the time to file a written objection to their employer's petition for the extension of abatement within that ten (10) working day period. If no employee objection has been filed by the time this period has expired and received within the fifteen (15) working days from the date that you posted your Petition and your Certificate, then I will send you written notification that your petition to modify the abatement due date has been approved.

During this extended abatement period your company must take the additional precautions outlined in your request and any others that are necessary to safeguard the safety and health of your employees.

Thank you for your continuing efforts to achieve a satisfactory abatement of this item and for your cooperation in our mutual efforts to improve workplace safety. Please contact me at _____, if you have any further questions regarding your petition or if I can be of further assistance.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: Employer Representative

**SAMPLE LETTER:
Petition for Modification of Abatement Request Granted
Response To Employer**

Date:

Company
Attn:
Address
City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Inspection Number _____

Dear :

I am writing to you in follow-up to your written petition concerning the above inspection dated _____, in which you requested that VOSH grant an extension of your abatement due date for Citation 1, Item 1a from _____, to _____. Based upon the documentation you provided regarding your need for the extension and upon the fact that no written petition objecting to the abatement extension has been filed with VOSH by any of your employees during the fifteen working day period since you posted your petition, I am writing you to confirm that your petition to extend the abatement due date for this item until _____, has been granted. Please post a copy of this letter granting the abatement extension next to the original citation in a prominent place at or near the location of the violation for your affected employee's information.

As we discussed previously, your company must continue to take the additional precautions outlined in your request and any others that are necessary to safeguard the safety and health of your employees during this extended abatement period. In addition, once you have completed your remaining abatement actions for this item, you will need to send me your completed Abatement Verification Form and your completed List of Corrective Actions Taken, along with your supporting documentation by _____, so that I can close the abatement actions for this item in your inspection file.

Thank you again for your continuing efforts to achieve a satisfactory abatement of this item and for your cooperation in our mutual efforts to improve workplace safety. Please contact me at _____, if you have any further questions regarding your abatement measures or if I can be of further assistance.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: Employer Representative

**SAMPLE LETTER:
Dunning Abatement Verification Request To Employer**

Date:

Company
Attn:
Address
City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Inspection Number _____

Dear :

The Virginia Occupational Safety and Health (VOSH) Program conducted the above inspection of your facility on _____. As a result of this inspection, your company was issued a Notice of Citation and Penalty dated _____, which was received by your company on _____. Your company's last date to contest the violations was on _____ (fifteen (15) working days from the date of receipt), and your company was required to provide the List of Corrective Actions Taken/Abatement Verification Form that was included with the Citation Package by _____. To date we have not received any response from your company regarding its corrective actions.

It is possible that we have not received your abatement package as yet, if you mailed this information to our offices in the past few days or if you forwarded your abatement package with your penalty payment to our Central Office in Richmond. Should this be the case, please call me promptly and advise me when you sent the package to us. Alternatively, if you have chanced to overlook sending your abatement package to us, then please submit your completed List of Corrective Actions by mail or fax (_____) as soon as possible so that it will reach our office by _____ [two (2) calendar weeks].

Our current records also indicate that your penalty payment has not been recorded as of the date of this letter. Please make out your payment of \$_____ to the "Treasure of Virginia" and mail it to the Virginia Department of Labor and Industry, Attn: Accounting Office, Main Street Centre, 600 E. Main Street, Richmond 23219-2430. To ensure proper payment credit, please write the inspection number _____ on the payment check.

An addressed envelope for your payment was provided for your convenience in the original citation package. If you submitted your payment recently, it is possible that it may not have posted yet. Please advise me should this be the case.

If you have not sent your payment because your company is experiencing serious financial difficulties, then please contact me to advise me of your circumstances, as it is generally possible to make arrangements to establish a Penalty Payment Installment Plan in such situations.

Please contact me in writing on or before _____, and advise me of the Corrective Actions you have taken to abate the items cited. Our agency is required to issue additional citations for

violations of the abatement verification requirements (as detailed in the VOSH Administrative Regulations Manual in parts §§16VAC25-60-307.D and -307.E) and to conduct a follow-up inspection to determine if the abatement is in fact completed, in any circumstance where an employer continues to fail to provide abatement documentation after written contact.

If we do not receive your abatement documentation by this time, VOSH will be required to issue a separate citation with a penalty of \$_____ to your company for failing to provide the required abatement verification.

Also, if a follow-up inspection becomes necessary because an employer fails to provide abatement, and it is consequently discovered that the cited items have remained uncorrected, then the employer may be subject to additional penalties for failing to abate the violation items. (Please be aware that the penalties for Failure-To-Abate violations are severe and start at a minimum of a \$_____ per violation for each calendar day past the abatement due dates - up to a total of 30 days per violation).

Please contact me at (telephone number), if you have additional questions regarding this inspection.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: Employer Representative

**SAMPLE LETTER:
Final Response to Complainant/Case Closed
Citing Employer's Affirmation of Corrective Action – Type 1**

Date:

Name
Address
City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Complaint Number _____

Dear _____:

[Employer name] has advised me that the hazards you complained about have been investigated. A copy of the employer's letter is enclosed.

With this information, VOSH feels the case can be closed on the grounds that the hazardous conditions have been corrected (or no longer exist). If you do not agree that the hazards you complained about have been satisfactorily abated, please contact us by _____. If we do not hear from you within that time, we will assume that the hazard has been corrected or eliminated and will take no further action with respect to this case.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Insert Name, Address, Email Address, and Telephone Number of Discrimination Investigator]

Thank you for your interest in workplace safety and health.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

**SAMPLE LETTER:
Complaint Closed Satisfactory
Letter Response To Complainant – Type 2**

Date:

Name
Address
City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear :

In response to your recent investigation request regarding alleged safety/health hazards at the above worksite, VOSH has received written confirmation from the employer regarding the completion of the corrective actions that the employer has taken relating to the conditions described in your complaint.

The employer's corrective actions appear adequate, however, if you have additional knowledge regarding the results of this complaint investigation which you believe would dispute the employer's response, then please send us written notification detailing the basis for your concerns as soon as possible upon receipt of this letter.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Insert Name, Address, Email Address and Telephone Number of Discrimination Investigator]

Your interest in the enhancement of safety in the workplace is appreciated. We did not reveal your identity to the employer.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

**SAMPLE LETTER:
Final Response Letter to Employer
Closing File/No Further Action on Complaint – Type 3**

Date:

Company

Attn:

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear _____:

On _____, the Virginia Occupational Safety and Health (VOSH) Program notified you of alleged safety and/or health hazards at your worksite.

Your response to these allegations was received in the Regional Office on _____ .

Based on our review of the information you provided in your response to these alleged hazards, we have determined that our file on this matter can be closed and no further action on this complaint is anticipated at this time.

Please note, however, that the complainant will also be given the opportunity to review the information provided in your response. If the complainant disputes the accuracy of the response, it may be necessary for VOSH to contact you for additional information or documentation of corrective action in order to resolve these issues. In some situations, it may be necessary to conduct an inspection of your workplace.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

We appreciate your prompt response to these allegations, and your interest in the safety and health of your employees. Please feel free to contact this office if we can be of additional assistance to you.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

**SAMPLE LETTER:
No Citations Issued Letter To Employer Form – Type 4**

Date:

Company
Attn:
Address
City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Complaint Number _____

Dear _____:

An inspection of your workplace was conducted under the Virginia Occupational Safety and Health Law on date. The inspection did not reveal any conditions which we consider to be violations of the standards.

Option A: This was a partial inspection which means the focus of the inspection was limited to certain potentially hazardous areas, operations, conditions or practices. It is possible, therefore, that inspections of your workplace in the future could result in conditions being found that we do consider to be violations of the VOSH standards.

OR

Option B: Even though this was a comprehensive inspection, it is possible that not all potentially hazardous conditions, operations or practices were observed. Therefore, future inspections of your workplace could result in conditions being found that we do consider to be violations of the VOSH standards.

We appreciate your interest in protecting the safety and health of Virginia's workers and wish to thank you for your cooperation during the conduct of this inspection.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

**SAMPLE LETTER:
Final Response To Complainant - Employer Out Of Business**

Date:

Name
Address
City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
 Complaint Number _____

Dear _____:

In response to your initial complaint on _____, concerning safety/health hazards at the above worksite, the Virginia Occupational Safety and Health (VOSH) Program attempted to contact the company owner, [Owner's Name], by phone on _____, and also sent [him/her] a certified letter requesting a response to the complaint allegations. [Owner's Name] did not respond to the initial written request and to subsequent phone contacts, nor has our agency been able to locate [Owner's Name] since these contacts.

In accordance with agency policy, when an employer fails to respond to reasonable attempts to resolve a complaint investigation, we conduct an inspection at the site. This inspection, however, was unable to be completed. The first time the inspection was attempted, during weekly working hours, the establishment was not open. Attempts to confirm this over the phone were unsuccessful, [Insert time frame and time of day]. The inspector then went by the establishment on [Insert day, date and time of day], but the business was not in operation.

Based on our current findings, the employer has completely ceased work operations, thereby effectively eliminating any further existing employee exposure to the alleged hazards. Therefore, we are closing this investigation request as we are unable to further investigate for existing complaint items in circumstances where the business is no longer in operation. However, if you have reason to believe that employees are still being exposed to these hazards, then please contact us in writing as soon as possible.

Thank you for your concern for a safe and healthful workplace.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

**SAMPLE LETTER:
Next of Kin Initial Information Letter**

Date

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear _____:

On behalf of the Virginia Department of Labor and Industry's Occupational Safety and Health (VOSH) Program, please accept my sincere sympathy on the death of your *(insert relationship- e.g., husband, wife, son, daughter, uncle, cousin, etc., then insert the victim's name).*

We are now in the process of investigating the circumstances surrounding your *[relative]*'s accident to determine its cause. The purpose of the VOSH investigation is to determine whether safety and health violations were involved in the accident. Citations may be issued to the employer as a result of this investigation. We intend to do everything possible with the information gathered to ensure that workplace accidents like this do not recur and that Virginia's workers have the safest working conditions possible.

If you have information that might assist us in our efforts, or if you have questions or concerns about VOSH's policies and procedures, please feel free to contact me at *[Phone number]*.

You are also welcome to request copies of the case file, and any penalties or citations issued as a result of our investigation.

Please address all such requests in writing to:

[Name of DLS contact person]
Legal Assistant
Commonwealth of Virginia
Department of Labor and Industry
Main Street Centre
600 East Main Street
Richmond, Virginia 23219-2430
804.786.9933

Again, I extend my sympathy.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

**SAMPLE LETTER:
Next of Kin Information Letter –
Citations Issued, Case Contested and Final Order Entered**

Date

Name

Address

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Inspection Number _____

Dear _____:

On behalf of the Virginia Department of Labor and Industry's Occupational Safety and Health (VOSH) Program, please accept my sincere sympathy on the death of your *(insert relationship- e.g., husband, wife, son, daughter, uncle, cousin, etc., then insert the victim's name).*

We have completed our investigation into the circumstances surrounding your [relative]'s accident. The purpose of the VOSH investigation was to determine whether safety and health violations were involved in the accident. Citations were issued to the employer as a result of this investigation, and then contested by the employer. The contested case and litigation process has resulted in a final order being entered for the case, and the case is now closed.

If you are interested in receiving a copy of the closed inspection file, you can do so by calling or writing:

[Name of DLS contact person]
Legal Assistant
Commonwealth of Virginia
Department of Labor and Industry
Main Street Centre
600 East Main Street
Richmond, Virginia 23219-2430
804.786.9933

Again, I extend my sympathy.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

**SAMPLE LETTER:
Medical Examiner Letter Form**

Date

Office of the Chief Medical Examiner

Name

Address

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Inspection Number _____

Dear _____:

Pursuant to the provisions of Labor Laws of Virginia, Title 40.1, a Virginia Occupational Safety and Health investigation is being conducted involving an industrial accident that occurred on _____, in _____.

In accordance with Va. Code §40.1-8, and to assist in our investigation, we request you provide to our agency copies of all reports including any toxicology reports on _____ victim's name _____, age _____, a former employee of the above employer.

We request the report(s) be sent to _____. We appreciate your assistance in this matter.

Sincerely,

VOSH Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

SAMPLE LETTER
Response to Inmate or Prisoner Complaint

Date

Name

Address

City, State Zip

Dear _____ :

This letter is being written in response to a complaint recently received from you regarding a hazardous condition in your area at the _____ Correctional Center. Your letter was sent to _____ in our _____ office, and he in turn forwarded them to this office which is the jurisdictional area for the _____ Correctional Center.

I wish to assure you that the Commissioner takes great interest in all complaints which allege unsafe working conditions. Indeed, complaint-initiated inspections are considered a high priority by the Department of Labor and Industry's Virginia Occupational Safety and Health (VOSH) Program. However, in accordance with the Code of Virginia (see paragraph below), VOSH is limited as to the actions it can take in circumstances such as yours.

Section 40.1-2.1 of the Code of Virginia specifically provides:

The provisions of this title and any rules and regulations promulgated pursuant thereto shall not apply to the State or any of its agencies, institutions, or political subdivisions, or any public body, unless, and to the extent that, coverage is extended by specific regulation of the Commissioner or the Safety and Health Codes Board.

While the Safety and Health Codes Board ("the Board") extended VOSH's enforcement authority over "public employees", VOSH regulations are not applicable to prisoners confined in jails and correctional institutions. Section 10 of the VOSH Administrative Regulations Manual defines a "**public employee**" as: "any employee of a public employer....*Prisoners confined in jails controlled by any political subdivision of the Commonwealth and prisoners in institutions controlled by the Department of Corrections are not public employees unless employed by a public employer in a work-release program, pursuant to § 53.1-60 or § 53.1-131 of the Code of Virginia.*"

As a program of the Department of Labor and Industry, VOSH is generally limited to initiating an on-site complaint inspection in response to a formally written complaint from a current employee or from the immediate family of a current employee. Since the circumstances you describe are not related to working conditions as a result of being employed by a public employer in one of the above work release programs, VOSH will not be conducting an inspection in response to your letter.

Please note also that VOSH, as a program of a state agency, is not authorized to represent private individuals in personal claims. VOSH is responsible for conducting safety inspections and accident investigations to determine if covered employees are exposed to unsafe or unhealthy working conditions, as defined by Title 40.1 of the Code of Virginia and the Virginia Occupational Safety and Health Standards. In the course of these inspections, if it is determined that an employer has violated the VOSH standards, we would issue citations to the employer which, depending upon the classification of the violations, may result in monetary fines.

Please contact me if you have any further questions concerning this matter.

Sincerely,

VOSH Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

SAMPLE LETTER

Complaint Notification to Correction Personnel following Inmate Complaint

(Discretionary use - to be sent only when situation warrants)

DATE

ADDRESS

Dear *(Correction Official)*:

On *(date)*, this Department received a complaint concerning alleged unsafe conditions at *(name of prison or institution)*. The specific nature of the complaint involves: *(describe alleged hazard(s) and location(s) below)*:

- 1.
- 2.
- 3.

The complaint was originally filed by a prisoner, and our jurisdiction over prisoners only extends to those who are “employed by a public employer in a work release program pursuant to §53.1-60 or §53.1-131 of the *Code of Virginia*” (see reference at 16VAC25-60-10). Our regulations also apply to workplace hazards alleged in the complaint that result in exposure of your guards or other employees to possible injury or illness.

We have not determined whether the hazard, as alleged, exists at your workplace; and we are not conducting an inspection at this time. However, we recommend you investigate the alleged condition(s) to assure that your employees are not exposed to the alleged hazards and make any necessary corrections or modifications within **five (5)** calendar days from receipt of this letter.

Please advise me in writing of your findings and of any action(s) you have taken. Your response should be detailed, stating specifically what action(s) you have taken to abate described conditions. This letter is not a citation. However, if we do not receive a response from you within **five (5)** days that appropriate action has been taken, an inspection may be conducted. Action taken by you in this matter will not remove your workplace from the possibility of an unannounced inspection by duly authorized representatives of the Virginia Department of Labor and Industry.

You are requested to post a copy of this letter and your response to it where it will be readily accessible for review by all of your employees, for three (3) working days. A copy of your response may be forwarded to the complainant.

If you have any questions concerning this matter, please contact this office. Your personal support and interest in the safety and health of your employees is appreciated.

Sincerely,

VOSH Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

Standardized Information and Optional Recordkeeping Case Outline

Case files for recordkeeping citations to be considered for violation-by-violation penalty procedures shall be set up to group violations, using a numerical code as shown below, followed by the case number of the violation as may be recorded in the optional recordkeeping case outline.

A. Case types are as follows:

INJURY:

- 01--Laceration
- 02--Puncture wound
- 03--Fracture
- 04--Eye injury
- 05--Burn
- 06--Contusion
- 07--Strain/sprain
- 08--Hernia
- 09--Other (major category)
- 10--All other injuries (non-specific)

ILLNESS:

- 11--Dermatitis
- 12--Cumulative trauma disorder
- 13--Hearing loss
- 14--Poisoning
- 15--Respiratory disorder
- 16--Cancer
- 17--Other (major category)
- 18--All other illnesses (non-specific)

- B. For burns, there shall be some estimate of the size of the burn. This can be given in the "Detailed Description of Event" column on the suggested recordkeeping case outline.
- C. Using the suggested recordkeeping case outline or some other appropriate format, include the following types of information for each violation under "Detailed Description of Event":

1. Work relationship.

EXAMPLE: "While working as a welder...."

2. Injury.

EXAMPLE: Employee sprained his left wrist. Employee fractured her right index finger.

3. Basis of recordability: injury or illness.

EXAMPLE: Employee was to take prescription medicine (Naprosyn) for 5 days and received heat therapy on three subsequent visits.

D. Each violation must have:

1. A unique case file number;
2. A way to be identified, either by name or employee clock number;
3. The reason the instance is a violation of the BLS guidelines; and
4. A detailed description of the event (injury or illness).

E. Five guides are used in determining recordability:

1. Recordability of Cases Under the Occupational Safety and Health Act
(NOTE: See VOSH Program Directive 09-104 (01 August 2012))
2. Guidelines for establishing Work Relationship.
(NOTE: See VOSH Program Directive 09-104 (01 August 2012))
3. Medical Treatment vs. First Aid Guidelines,
4. A partial list of prescription and nonprescription drugs based on previous recordkeeping investigation history.
5. Physician's Abbreviations Guide.

(Agency Letterhead)

MEMORANDUM

TO: Commonwealth's Attorney/Attorney General's Office

FROM: Commissioner, Department of Labor and Industry

DATE: ____/____/____

SUBJECT: Contested Case Review; Company Name _____
Inspection # _____

NOTE: This review is conducted solely for the benefit of the Commonwealth's Attorney and/or the Office of the Attorney General, and is protected from disclosure under the Freedom of Information Act by the attorney-client privilege.

Employer's Position: (Summarize the employer's position on the items contested. Attach Informal Conference Notes or Employer letter as appropriate. Continue on separate sheet of paper if more space is needed.)

Regional Safety or Health Director's Recommendations: *(Continue on Separate Sheet if more space is needed.)*

Director's Recommendations: _____
Date Received

Assistant Commissioner's Decision/Recommendation: _____
Date Received

Legal Support Recommendations: _____
Date Received

Commissioner's Decision: *(When required)* _____
Date Received

Commonwealth's Attorney/Attorney General's _____
Date Received

CONSTRUCTION SAFETY AND HEALTH CHECKLIST

The following checklist is a brief overview of common hazards found on a construction site. It is not comprehensive and should be used to supplement necessary hazard recognition by the safety designee which is site specific.

A. General

1. Are employees exposed to any unsafe conditions during their travel to and from their work stations and at their work stations?
 - a. housekeeping (tripping) hazards
 - b. overhead hazards
 - c. improper storage of materials or flammable substance
 - d. electrical hazards
 - e. open sided floors
 - f. floor openings and holes
 - g. unsafe or improperly installed stairs
 - h. inadequate illumination

B. Personal Protective Equipment

1. Are employees wearing required personal protective equipment?
 - a. hard hat
 - b. safety glasses
 - c. safety shoes
 - d. hearing protectors

C. Electrical

1. Are employees protected from electrical hazards?
 - a. exposed live electrical parts
 - b. GFCI provided or alternatively an assured equipment grounding program implemented
 - c. ungrounded electrical equipment
 - d. unprotected electrical cords

D. Fire Protection

1. Are fire extinguisher(s) provided as appropriate?

E. Flammable and Combustible Liquids

1. Are flammable and combustible liquids handled and stored properly?
 - a. safety cans used
 - b. flammable and combustible liquids not stored near exits or work areas

F. Compressed Gases

1. Are compressed gases stored and properly handled?
 - a. oxygen stored at least 20 feet from fuel gases
 - b. cylinders equipped with caps
 - c. fuel gases not stored inside a building
 - d. compressed cylinders secured and protected from damage

G. Tools

1. Are tools used properly and maintained in a safe condition?
 - a. hand tools in safe condition
 - b. electrical power tools equipped and used with guards
 - c. pneumatic tools and compressors equipped with proper safety devices

H. Ladders

1. Are ladders properly used and maintained?
 - a. no broken rungs or missing steps
 - b. properly secured and erected
 - c. metal ladders not used for electrical work
 - d. job-made ladders properly constructed

I. Scaffolds

1. Are scaffolds properly erected and guarded?
 - a. fully planked
 - b. equipped with guardrails
 - c. set on sound rigid footing

J. Material Storage

1. Are materials properly handled and stored?
 - a. stored in tiers and secured
 - b. not stored in aiseways

K. Material Hoists and Personnel Hoists

1. Are hoists properly erected, enclosed and used?

L. Motor Vehicles and Mechanized Equipment

1. Are vehicles with obstructed view(s) equipped with a back-up alarm or is an observer used to guide them?
2. Is mechanized equipment kept at least ten feet from overhead power lines?

EMPLOYER'S SAFETY AND HEALTH PROGRAM

A. Management Commitment and Leadership

1. Policy statement: goals established, issued, and communicated to employees.
2. Program revised annually.
3. Participation in safety meetings, inspections: agenda item in meetings.
4. Commitment of resources is adequate.
5. Safety rules and procedures incorporated into site operations.
6. Management observes safety rules.

B. Assignment of Responsibility

1. Safety designee on site, knowledgeable, and accountable.
2. Supervisors (including foremen) safety and health responsibilities understood.
3. Employees adhere to safety rules.

C. Identification and Control of Hazards

1. Periodic site safety inspection program involves supervisors.
2. Preventative controls in place (PPE, maintenance, engineering controls).
3. Action taken to address hazards.
4. Safety Committee, where appropriate.
5. Technical references available.
6. Enforcement procedures by management.

D. Training and Education

1. Supervisors receive basic training.
2. Specialized training taken when needed.
3. Employee training program exists, is ongoing, and is effective.

E. Recordkeeping and Hazard Analysis

1. Records maintained of employee illnesses/injuries, and posted.
2. Supervisors perform accident investigations, determine causes and propose corrective action.
3. Injuries, near misses, and illnesses are evaluated for trends, similar causes; corrective action initiated.

F. First Aid and Medical Assistance

1. First aid supplies and medical service available.
2. Employees informed of medical results.
3. Emergency procedures and training, where necessary.

SAFETY AND HEALTH PROGRAM EVALUATION

During all construction inspections the answers to the following questions, at a minimum, shall be obtained and specifically documented in the case file.

1. Does the employer claim to have a safety and health program?
2. Who is designated to deal with safety and health matters at this worksite?
3. How often does this person conduct inspections of the worksite?
4. When was the last inspection conducted?
5. What hazards were observed during the last inspection?
6. What actions were taken to eliminate the observed hazards?
7. What hazards were noted during the VOSH inspection that a competent person as defined in 1926.32(f) should have recognized? (Indicate how many)
 - If a violation of 1926.20(b)(2) is contested a listing of each individual violation and the approximate date it was created shall be included in the case file.
8. How many of these hazards were in existence at the time of the last inspection? *
 - If a violation of 1926.20(b)(2) is contested a listing of each individual violation and the approximate date it was created shall be included in the case file.
9. What explanation was given for the continued existence of these hazards? (Be specific and indicate who provided the explanation)
10. If hazards were created after the last inspection how often should inspections be performed? (Explain the response in detail)

*

SAMPLE NARRATIVE #1

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

SIGNIFICANT CASE INSPECTION NARRATIVE

CSHO I.D.: W 2381-032-89
INSPECTION #: 000000000
DATE CASE OPENED: 3/3/89

TYPE INSPECTION: Accident-Fatality

EMPLOYER: Virginia Steel Corporation
6623 Wexford Lane
Richmond, Virginia 23225

BUSINESS TYPE: Steel Erection

INSPECTION SITE: 100 North Fourth Street
Richmond, Virginia 23241

I. BACKGROUND

A. PURPOSE - This inspection was initiated as a result of a fatal accident which occurred at the inspection site listed above at 9 a.m. on March 3, 1989. The accident was reported to the Richmond Regional Office at 9:30 a.m. on March 3, 1989, by R. E. Lee, Site Superintendent for Virginia Steel Corporation.

B. WORKSITE DESCRIPTION - Two multi-story office buildings are being constructed on the worksite by Imperial Builders Corporation. The two buildings are joined together by an atrium roof at the sixth floor level of buildings. (See photo #1 at Exhibit 2.)

Virginia Steel Corporation is the contractor erecting the steel beam structure of the building.

C. INSPECTION HISTORY - Virginia Steel Corporation has been inspected four (4) times in the past three (3) years. Eight (8) citations (6 - Serious, 2- Other) have been issued to the company. (See Inspection History at Exhibit 7a.)

D. CONDUCT OF THE INSPECTION

1. OPENING CONFERENCE - The opening conference was held at 1:30 p.m. on March 3, 1989, at the accident site. (See Exhibit 5b for details concerning the opening conference.)

2. WALKAROUND - The walkaround was conducted during the period of March 4-15, 1989. (See Exhibit 5b)

3. CLOSING CONFERENCE - The Closing Conference was held at 10 a.m. on June 2, 1989. (See Exhibit 5b)

II. FINDINGS OF FACT

- A. This accident involved a fall from the atrium roof at the worksite. The atrium roof structure consisted of steel beams with open web steel joists spaced five (5) feet on center across the beams. The structure measures approximately forty-eight (48) feet between the two (2) buildings, eighty (80) feet long at its longest point and is approximately seventy (70) feet above a concrete floor. (See photos #4 through #8 at Exhibit 2.)
- B. The joists had been spaced on the beams of the atrium roof structure but had not been completely welded and the bridging had not been installed. (See Employee Interview Statements at Exhibits 1a thru 1b.)
- C. A bundle of decking had been stored on the joists of the atrium roof. (See photo #5 at Exhibit 2 and Mr. Grant's (victim's coworker) Interview Statement at Exhibit 1b.)
- D. It is normal practice for employees of Virginia Steel Corporation to walk the beams to where the joists are and then sit down on the beam and wrap their safety lanyards around the beams. (See Employee Interview Statements at Exhibits 1d thru 1f.)
- E. It is also normal practice for employees of Virginia Steel Corporation not to tie off before reaching the work area, no matter how high above the ground they are. (See Site Supervisor's Interview Statement at Exhibit 1g.)
- F. On the morning of March 3, 1989, Mr. Lee, site supervisor, instructed Mr. Grant and Mr. Jackson (victim) to continue welding the beams and joists on the atrium roof. (See Interview Statement at Exhibit 1g.) Mr. Grant went to fabricate some steel frames; he last saw Mr. Jackson walking on the second beam. Within minutes of Mr. Grant's leaving, Mr. Jackson fell to his death. (See Mr. Grant's Interview Statement at Exhibit 1f.)
- G. No one witnessed the accident. After the fall, Mr. Jackson's safety belt and lanyard were found hooked across his shoulder and waist. He was not tied off to the beam and the employer had not provided any other form of fall protection such as a safety net. (See Employee Interview Statements at Exhibits 1d through 1g.)

III. CONCLUSIONS/RECOMMENDATIONS

- A. That a Serious citation be issued for violation of Title §40.1-51.1(a), Code of Virginia in that open web steel joists did not have the bridging installed and were not permanently fastened prior to storing construction loads on the joists, thereby creating an unstable condition, thus exposing an employee on the joist to a 70-foot fall hazard. (See Findings II.B, C, and D above.)

Proposed Penalty - \$300.

- B. That a Serious citation be issued for violation of 1926.20(b)(1). No danger signs were posted indicating an immediate hazard. (See findings II.D and E above)

Proposed Penalty - \$700.

- C. That a Willful citation be issued for violation of 1926.750(b)(1)(ii). A safety net was not installed; the potential fall distance greatly exceeded 25 feet. (See Finding II.G above) (See Section 1 for Willful Justification.)

Proposed Penalty - \$7,000.

(SEE PENALTY CALCULATION WORKSHEETS - Section 1)

SAMPLE NARRATIVE #2

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

SIGNIFICANT CASE INSPECTION NARRATIVE

CSHO I. D.: H0000-000-96
INSPECTION #: 105070555
DATE CASE OPENED: 10/5/89

TYPE INSPECTION: Accident/Fatality

EMPLOYER: Augusta Silo
Route 2, Box 104
Boxer, Virginia 20074

BUSINESS TYPE: Silo Construction and Repair

INSPECTION SITE: Waterside Plantation
Route 250 West (1/2 mile east of Zion Crossroads)
P.O. Box 463
Waterside, Virginia 22900

I. BACKGROUND

- A. PURPOSE - This inspection was initiated as a result of an accident which occurred at the inspection site listed above at 10:00 am on September 7, 1989. This accident resulted in the fatality of an employee, Mr. Joseph A. Smith on September 14, 1989.

The accident/fatality was reported to the Richmond VOSH Regional Office by Mr. J. M. Blackman, Loss Control Consultant for Consolidated Risk Management Service on October 4, 1989 at 10:15 am (20 days after the fatality).

- B. WORKSITE DESCRIPTION - The accident occurred in an Augusta Silo Feed Storage Structure, a silo measuring 80 feet in height and 25 feet in diameter. This structure was one of five (5) silos at the Waterside Plantation. (See Photo #1, Exhibit 2.)

- C. INSPECTION HISTORY - None

D. CONDUCT OF THE INSPECTION

1. OPENING CONFERENCE - The opening conference was conducted with employer representatives on October 5, 1989 at the employer address above. (See Exhibit 5b for opening conference report/Inspection Worksheet)
2. WALKAROUND - The walkaround was conducted on October 6, 1989 at the worksite located on Waterside Plantation. Employer representatives and the farm foreman were present. (See Exhibit 5b for summary of walkaround/Inspection Summary)

Interviews were conducted with the victim's co-workers, employer representatives, farm representatives, and medical experts. (See 1a thru 1d and 4g)

3. CLOSING CONFERENCE - The closing conference was held on October 30, 1989. (See Exhibit 5b)

II. FINDINGS OF FACT

- A. On September 7, 1989, the victim, along with Sam Clark, another serviceman were working to remove a forage unloader from an Augusta Silo Storage Structure at Waterside Plantation. This entailed entering a hatch in the silo measuring 32" x 20" tall. A tunnel approximately 36" in diameter was dug through the silage to allow the workers entry to work on the structure. (See photo's # 7 and 8, Exhibit 2 and employee statement at Exhibit 1a)

The work performed by Smith and Clark was continuing from the previous day. (Exhibit 1a)

- B. Mr. Clark entered the structure first, at approximately 9 a.m., and removed two (2) sections of the unloader arm before exiting the silo at 9:20 a.m. The victim, Mr. Smith then entered the silo at approximately 9:30 a.m. to continue removing the remaining parts of the unloader. (See Employee Interview Statement at Exhibit 1a)

According to Mr. Clark, Smith was wearing a MSA Constant Flow Air Line Respirator. (See photo #6, Exhibit 2 for picture of the respirator worn; see Exhibit 4a for specifications of the respirator) Clark observed Smith through the tunnel as Smith connected a Lugall and began pulling on the unloader chain. His light also was reflecting on the silo walls. At first, work progressed normally, but after approximately 15 minutes, Clark could no longer detect movement on the part of Smith. (See Exhibit 1a)

- C. Clark attempted to contact the victim by rapping on the steel backbone of the unloader but got no response from Smith. He then informed Gordon Carr, the Site Supervisor, who had arrived at the worksite just after the victim entered the silo, that he could not contact Smith. (See Exhibit 1a)
- D. Mr. Clark and Mr. Carr removed loose feed material which had gathered at the entrance of the silo in the tunnel. The victim was seen by Clark and Carr slumped in the center of the structure; he was not moving. (See Exhibits 1a and 1b)

Mr. Carr attached a length of pipe to a centrifugal blower and blew fresh air into the structure. (See photo #2, Exhibit 2, for a picture of the apparatus used)

Mr. Clark tied a rope around his waist that was attached to the outside of the structure and entered the silo to retrieve Smith. Clark did not wear a respirator since there was none available; he took periodic breaths from the end of the pipe supplied by the blower. (See Exhibits 1a and 1b)

- E. Clark attached a second rope around Smith's legs and with the assistance of Mr. Carr, pulled Smith outside the structure. This occurred at approximately 10 a.m. (See Exhibits 1a and 1b)
- Smith was wearing the respirator; it was observed to be functional by Mr. Carr. The hose did not appear to be obstructed or kinked. Smith's face and tongue were observed to be swollen; he was making a gurgling sound in his throat. (See Exhibit 1a)
- F. Mr. Carr removed the respirator from Smith, placed him on his stomach and pumped on his back until he regurgitated some green material and began breathing short breaths at approximately 10:03 a.m. (Exhibit 1a)
- G. The Orange County Rescue Squad arrived at 10:10 a.m. (The squad had been called during the rescue by a farm worker, John Snead.) Upon their arrival, a helicopter was summoned and the victim was transported to the University of Virginia Medical Center. (See Exhibit 1c and 4a)
- H. Mr. Smith lapsed into a coma on September 8, 1989, and his condition continued to deteriorate. His family requested that support be terminated on September 14, 1989; he expired at 8:20 p.m. that evening. (See Hospital Discharge Summary - Exhibit 4b)
- I. Joseph Allan Smith was a 34 year old white male, with no known past medical problems. He was not known to have any drug or alcohol problem. He was 5'9" tall, and weighed 182 pounds. He wore a full beard. He had worked for Augusta Silo for three (3) months. (See Medical History - Exhibit 4c)
- J. The cause of death according to the autopsy report was hypoxic encephalopathy or a lack of oxygen to the brain resulting in multi-organ failure. The circumstances which lead to the occurrence of the hypoxic event remain undetermined. (See autopsy report - Exhibit 4c)
- K. According to a statement from Dr. Sheets, (Exhibit 4d) one of the pathologists who assisted in the autopsy:
- (1) Heat stroke was not likely based on the victim's body temperature at admission and the fact that there was no mention of treatment for heat stroke by the emergency personnel. (The body temperature upon admission was 100.4.)
 - (2) A toxic exposure was not likely based on microscopic examination of the victim's lungs and other tissues which displayed no evidence of such an exposure.
 - (3) Hypoxia caused by a pre-existing medical condition was not consistent with the findings that the employee had no previous medical history which would suggest such a condition.
 - (4) Description of the victim during rescue suggests a respiratory asphyxia.
- L. The temperature on the day of the accident was reported to be 76 F. (Exhibit 8) The temperature inside the structure was not measured on the day of the accident, but was measured during the walkaround and was noted to be 101 F. The temperature outside

that day was 71 F. (Exhibit 8) Humidity inside the structure was not measured, but would be expected to be near 100% according to the manufacturer. (See Section 6)

The employer is aware that a hot environment exists inside the structure and recommends that employees stay inside no longer than 10 to 15 minutes before taking a break. (See Augusta Silo Operators Manual - Section 6) Gatorade is always made available at the worksites for employees. (See site supervisor's statement - Exhibit 1b)

- M. The Augusta Silo structure is not intended for continuous employee occupancy; it is designed for the storage of livestock feed. Egress is limited to the small hatch in the side of the structure. It is designed to limit oxygen from the stored feed creating a hazardous atmosphere inside. (See manual - Section 6)

The employer did not require that the atmosphere inside the structure be tested prior to any employee entering. The employer had no equipment to test the atmosphere for percent oxygen, flammability, or any other toxic material. (See employer statement - Exhibit 1d)

The manufacturer indicates that a lack of oxygen and excessive carbon dioxide are the major atmospheric hazards inside a structure. The build-up of toxic gasses such as hydrogen sulfide from decomposing protein, oxides of nitrogen, or carbon monoxide are extremely rare because oxygen is limited inside the structure. (See Manual - Section 6)

The employer assumes an oxygen-deficient atmosphere and requires the use of a respirator of the type worn by the victim. (See statements of employer and coworker - Exhibits 1b and 1d)

- N. The employer did not have written standard operating procedures for respirator use. The respirator used by the victim was stored in the tool box on the back of a service truck with other tools and equipment. The face piece and corrugated breathing tube were partially covered with cattle feed. The quick disconnect valve on the flow control valve had been modified by making the attachment to the air hose permanent. The respirator and compressor used by the victim were tested again on the walkaround and appeared to function satisfactorily. (See Exhibit 1e)

Employees have not been medically screened prior to respirator use. Some training was conducted on February 20, 1989, prior to the victim's hiring. A copy of General Rules for wearing a respirator was given to the victim upon hiring. A signed receipt is filed in his personnel file. (See Section 6)

- O. Employees attending the victim while inside the structure were not trained in first aid, CPR, or rescue procedures. (Exhibit 1a)

A respirator was not available for the attendant outside the entrance to the structure. (Exhibit 1a)

The victim was not wearing a retrieval device or retrieval line. (Exhibit 1a)

- P. The employer did not require the completion of an entry permit to be completed prior to any employee entering the structure. (See Employer and Employee Statements - Exhibits 1a, 1b, and 1d.)
- Q. The employer did not have a written hazard communication program. Material safety data sheets were posted on the bulletin board in the lunch room, but were not available for some hazardous chemicals. No labeling violations were documented. Training required by the hazard communication standard had not been conducted. (Exhibit 1a, b, and d)

III. CONCLUSIONS/RECOMMENDATIONS

- A. Issue a SERIOUS CITATION for violation of 1910.134(a)(2). No respiratory protection program in place. (Finding II.N.)

Proposed Penalty - \$640.
- B. Issue a SERIOUS CITATION for violation of 1910.146.3. Qualified person not present during confined space entry. (Finding II.O.)

Proposed Penalty - \$810.
- C. Issue a SERIOUS CITATION for violation of 1910.146.3. Atmospheric testing not performed prior to entry into a confined space. (Finding II.M.)

Proposed Penalty - \$810.
- D. Issue a SERIOUS CITATION for violation of 1910.146.5.C. Rescue team not available where confined space has hazardous atmosphere. (Finding II.A thru E)

Proposed Penalty - \$810.
- E. Issue a SERIOUS CITATION for violation of 1910.146.7.A.1 grouped with 1910.146.7.A.2.b. Employees not trained in confined space entry procedures and attendant not trained in first aid and CPR. (Finding II.A thru E and O)

Proposed Penalty - \$810.
- F. Issue a SERIOUS CITATION for violation of 1910.146.9.A.1. Retrieval devices with retrieval lines not worn by entrants into a confined space which has a hazardous atmosphere. (Finding II.O.)

Proposed Penalty - \$810.
- G. Issue a SERIOUS CITATION for violation of 1910.146.9.B. Appropriate respiratory protection not available immediately outside the entrance to a confined space having a hazardous atmosphere. (Finding II.O.)

Proposed Penalty - \$810.

- H. Issue a SERIOUS CITATION for violation of 1926.59(e)(1). No written hazard communication program. (Finding II.Q.)

Proposed Penalty - \$640.

- I. Issue a SERIOUS CITATION for violation of 1926.59(h). Hazard communication training not provided. (Finding II.Q.)

Proposed Penalty - \$640.

- J. Issue an OTHER-THAN-SERIOUS (OTS) CITATION for violation of the A.R.M., Section 11.2.A. Report of fatality not made within 48 hours after the occurrence. (Finding I.A.)

Proposed Penalty - \$320.

- K. Issue an OTHER-THAN-SERIOUS (OTS) CITATION for violation of 1926.59(g)(1). Material safety data sheets not available. (Finding II.Q.)

No Penalty.

SEE Section 1 FOR PENALTY CALCULATION WORKSHEET)

Appendix B

To insure uniform casework and presentation by all Regional Offices, the following revised VOSH forms have been **standardized** and are to be used **exclusively**.

Hard copies are provided in this Appendix and e-copies will be available on the LAN.

- These forms are **NOT** to be modified.
- No other regional forms are to be created or used in case files.

Any suggested changes to existing forms or suggestions for additional forms should be forwarded to the Office of Policy and Planning.

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Appendix B

I. VOSH Forms

VOSH-CCR/SCR	Contested Case Review and Significant Case Review
VOSH-CDL	Case Diary Log
VOSH-CDR	Citation Delivery Receipt
VOSH-CoC	Chain of Custody
VOSH-CPS	Casefile Photo Sheet
VOSH-CSR	Casefile Status and Routing
VOSH-EIS	Employee Interview Statement
VOSH-FRN	File Review Notes
VOSH-ICN	Informal Conference Notes
VOSH-ISA	Informal Settlement Agreement
VOSH-IW1	Inspection Worksheet/Employer Interview Form
VOSH-IW1C	Inspection Worksheet Construction – <i>(Reserved, in development)</i>
VOSH-NID	Notice of Imminent Danger
VOSH-PIPA	Penalty Installment Payment Agreement
VOSH-RoE	Refusal of Entry
VOSH-SIS	Supervisor Interview Statement
VOSH-TEW	Trenching Excavation Worksheet
VOSH-WWD	Willful Worksheet Documentation

II. VOSH Forms for the CSHO Application

VOSH-1	Inspection Report
VOSH-1B	Violation Worksheet
VOSH-170	Investigation Summary

III. Other Federal Forms

The following federal OSHA Forms are to be used and are available from the OSHA data system, the Regional Safety or Health Director or from the VOSH Office of Policy and Planning.

OSHA-7	Notice of Alleged Safety or Health Hazards
OSHA-31(S)	Weekly Program Activity Sheet
OSHA-33	Safety & Health Program Assessment Worksheet
OSHA-36(S)	Fatality/Catastrophe Report
OSHA-55	Intervention Activity Form
OSHA-90	Referral Report
OSHA-91(S)	Air Sampling Report
OSHA-92	Noise Survey Report
OSHA-93	Direct Reading Report
OSHA-98	Screening Report
OSHA-99	Octive Band Analysis and Impact Noise
OSHA-166*	Citation Record Update
OSHA-167C*	Complaint Record Update
OSHA-167I*	Inspection Record Update

** Note: These forms are no longer supported by federal OMDS because it is anticipated that most states and federal offices will enter inspection data and violation update data directly into the system from incoming or source documents (e.g., final orders) but VOSH will continue to use them as a local program option.*

Agency Letterhead

MEMORANDUM

TO: Commonwealth's Attorney/Attorney General's Office

FROM: Commissioner, Department of Labor and Industry

DATE:

SUBJECT: [] Contested Case Review Company Name:
[] Significant Case Review Inspection Number:

NOTE: This review is conducted solely for the benefit of the Commonwealth's Attorney and/or the Office of the Attorney General, and is protected from disclosure under the Freedom of Information Act by the Attorney General-client Privilege.

Please Review this case as it contains the following issue(s):

- [] Fatality/Catastrophe [] Third Repeat Violation
[] Willful Case [] Ergonomics Case
[] Potential Criminal Case
[] Willful Case Suitable for Egregious Penalties
[] Other case identified by the Commissioner as significant
[] Case Identified by VOSH Director/Division of Legal Support as significant

Date Citation must be issued by: (6 months MM/DD/YYYY) _____/_____/_____

Employer's Position: (Summarize the employer's position on the items contested. Attach Informal Conference Notes or Employer Letter as appropriate. Continue on separate paper if more space is needed.)

Comments:

Date Received:

Regional Safety or Health Director: _____/_____/_____

VOSH Regional (Safety/ Health) Director: _____/_____/_____

Program Director: _____/_____/_____

Division of Legal Support: _____/_____/_____

Commissioner: _____/_____/_____

Commonwealth Attorney/Attorney General Office: _____/_____/_____

Case File Diary Log



File Name:	Inspection Number:
CSHO Name:	Final Order Date:

Opening Conference Date:
Walkthrough Date:
Closing Conference Date:
Citation(s) Issuance Date:
Informal Conference Date:
Other Conferences (List Conference Type and Date):

Complaints

Date Received: _____

Date of Response: _____

Status Change Date: _____

Reason for Change or Re-classification:

See VAOSH-7 or 167(c) Form

Case Closed Date: _____
Comments:

Include Name & Title of Contact and Type of contact (phone, fax, etc.)

Date	Comments	VOSH Rep Initials

Include Name & Title of Contact and Type of contact (phone, fax, etc.)

Date	Comments	VOSH Rep Initials

CITATION DELIVERY RECEIPT



Employer Name: _____

Inspection Number _____

I, _____, an employee of the Virginia Department of Labor & Industry, have delivered the attached Citation packet to: _____ on this date _____.

Signature of person receiving:

Date:

NOTES:

EVIDENCE COLLECTION CHAIN OF CUSTODY FORM



Inspection #:	Inspection Date:	CSHO ID #:
---------------	------------------	------------

Employer Name:	Employer Address:

EVIDENCE COLLECTION		
Description of Property (<i>Provide Serial #, Make, Model, Color, etc.</i>):		Item #: ___ of ___ <i>Use a separate form for each item.</i>
Evidence Removed From (Location):		
Evidence Removed From (Person/Employee):		Job Title:
Receipt given to Employee for Evidence: <input type="checkbox"/> YES <input type="checkbox"/> NO	<i>If NO, explain why:</i>	
Item Collected By (CSHO Printed Name):	Item Collection Date:	Item Collection Time: <input type="checkbox"/> AM <input type="checkbox"/> PM
CSHO Signature:		

CHAIN OF CUSTODY		
How Was Item Secured (<i>Description of container and sealing process</i>):		
Storage Location:	Storage Date:	Storage Time: <input type="checkbox"/> AM <input type="checkbox"/> PM
Custodian (<i>Person and job title if other than self</i>):		

Released By:	Released To:	Reason:
_____ Printed Name	_____ Printed Name	_____ _____
_____ Signature	_____ Signature	Date: _____

Released By: _____ Printed Name _____ Signature	Released To: _____ Printed Name _____ Signature	Reason: _____ _____ Date: _____
--	--	--

Released By: _____ Printed Name _____ Signature	Released To: _____ Printed Name _____ Signature	Reason: _____ _____ Date: _____
--	--	--

Released By: _____ Printed Name _____ Signature	Released To: _____ Printed Name _____ Signature	Reason: _____ _____ Date: _____
--	--	--

Released By: _____ Printed Name _____ Signature	Released To: _____ Printed Name _____ Signature	Reason: _____ _____ Date: _____
--	--	--

Released By: _____ Printed Name _____ Signature	Released To: _____ Printed Name _____ Signature	Reason: _____ _____ Date: _____
--	--	--

Released By: _____ Printed Name _____ Signature	Released To: _____ Printed Name _____ Signature	Reason: _____ _____ Date: _____
--	--	--

CASEFILE PHOTO SHEET



Inspection No.	Report Number	Calendar Year	Area ID	Inspector ID

Employer/Contractor:

Address/Location:

Type of Inspection:

Photo Number:

Citation Ref. No. _____ **Item No.** _____

Compass Direction: _____ **Other** []
[]N []S []E []W

Date of Photo: _____ **Time:** _____

Description of Photo/Hazard/Alleged Violation:



CASEFILE STATUS & ROUTING SHEET

Employer: _____	Insp. No.: _____
Site Address: _____	Opt. Rpt. No.: _____
_____ ZIP: _____	CSHO Name: _____
Site Telephone: () _____	Office: _____
Mailing Address: _____	Region: _____
_____ ZIP: _____	Supervisor: _____
Employer Rep: _____	Insp. Type: _____
Title: _____	Confidential/Trade Secret? <input type="checkbox"/> Yes <input type="checkbox"/> No
Telephone: () _____	Copy of Citation to Employer Rep? <input type="checkbox"/> Yes <input type="checkbox"/> No
Send Citations to Mr., Ms.: _____	
(If other than Emp. Rep.) Title: _____	
Address : _____	

Employee's Rep: _____	Union Name: (No abbreviation) _____
Job Title : _____	_____
Union Position : _____	Local Number: _____
Home Address : _____	Address of Local: _____
(If applicable) _____	_____
_____ ZIP: _____	Telephone: () _____
Send a copy of Citation to Employer Representative? <input type="checkbox"/> Yes <input type="checkbox"/> No	Citation Issue Date: _____
Opening Conference Date: _____	Closing Conference Date: _____
Number of Working Days CSHO has had Case File: _____	Number of hours CSHO has worked on Case File: _____
<i>(NOTE: Include Opening Day and Day Released to Supervisor.)</i>	

CASE FILE ROUTING & PROCESSING				
<i>(List dates, names and actions taken by all individuals involved with the Case File.)</i>				
<u>Date Initiated</u>	<u>Name</u>	<u>Action Taken</u>	<u>Date Completed</u>	<u>Initials</u>
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

CASEFILE FOLDER ORGANIZATION OF NON-SIGNIFICANT CASES

(for casefile organization of Significant Cases refer to Chap. 9 of the VOSH FOM)

Contents (Left-hand side of folder)

Contents (Right-hand side of folder)

Section I

Case Diary Log
 Citations
 Narrative
 Post Citation Correspondence (in reverse chronological order (i.e., most recent correspondence on top))

EXAMPLES OF CORRESPONDENCE
 "Last Day to Contest" Letter to Employer
 Commonwealth Attorney Contest Notice
 Failure to Abate Citations
 Notice of Contest
 Corrective Actions/Abatement Verification
 Inspection Record Update (OSHA Form 167- I)
 Informal Conference Worksheet
 Informal Settlement Agreement
 Expedited Informal Settlement Agreement

Section II

Routing Sheet
 File Review Notes
 Exhibits - Tabbed:
 Interview Statements
 VOSH 1-B s
 Sketches, Diagrams, Etc.
 Medical/Police reports
 VOSH Forms
 Pre-Citation Correspondence
 Inspection History
 Inspection Notes
 Photos/Video Tape Reference

RESULTS OF CASE REVIEW:	<i>Reviewer's Initials/Date:</i>	Offered Expedited Informal Settlement:
1. _____ No Changes Necessary	_____ / _____	_____ Yes _____ No _____ N/A
2. _____ Minimal Changes	_____ / _____	Penalty: Initial: \$ _____
3. _____ Revised, See Notes in Sect.II*	_____ / _____	EISA Offer: \$ _____
Comments: _____ _____ _____		

INFORMAL CONFERENCE RESULTS: ISA Accepted: _____ Yes _____ No _____ Undecided Revised Penalty Due: \$ _____
Payment Plan: _____ Yes _____ No # of Months: _____ X's (Amt. Paym't) _____ Last Payment Date: _____

CONTEST DATA: Last Day to Contest: _____ LDC Reminder: Ck box (✓) Faxed() or Mailed() on: _____
Additional Notes: _____ _____ _____ _____ _____

EMPLOYEE INTERVIEW STATEMENT



Date: ___/___/___ Time: _____ a.m./p.m. _____/_____/_____/___/___
CSHO ID # Year Inspection No.

Employee Name: _____ Phone: (_____) - _____

Address: _____

Occupation: _____ (Male ___) (Female ___)

Job Title: _____

Employer Name: _____ Employed from: ___/___/___ to: ___/___/___

Credentials Presented
 Discrimination Protections Explained

Union Member: (yes ___) (no ___) *If yes*, Name of Bargaining Unit: _____
(If known) Address/Phone: _____

HAZARD COMMUNICATION CHECKLIST

- Access to Written Program Access to MSDS Sheets Labeling System Explained
- Training on Requirements of Standard Hazards of Chemicals/Precautions for Handling Explained

CONFINED SPACE CHECKLIST

- Qualified Person Preparation/Ventilation Atmospheric Testing
- Permit System Entry Procedures, Attendant/Non-Attendant
- Training Program Rescue Teams, Special Equipment and Tools, Rescue Devices

LOCKOUT/TAGOUT CHECKLIST

- Written Energy Control Procedures Proper Use of Tags or Locks
- Training Effectiveness of Energy Control Procedures

Employee Statement:

Employee Statement, Continued:

CSHO has assured the employee that the Commissioner of Labor and Industry will not release this statement to anyone unless ordered by a court to do so.

_____ *Print Name*

_____ *Print Name*

_____ *Employee Signature*

_____ *CSHO Signature*

FILE REVIEW NOTES



Insp. No.: _____ CSHO ID.: _____ Inspection Date: ____/____/____

Case Name (Employer/Contractor): _____

Reviewed By: _____ Date of Review: ____/____/____

I. General Case Construction: Check box <input type="checkbox"/> if OK.	Circle <input type="radio"/> box if correction needed & comment below.
<input type="checkbox"/> Appropriate sections utilized	<input type="checkbox"/> Forms forwarded in timely fashion
<input type="checkbox"/> Exhibits labeled correctly (if applicable)	<input type="checkbox"/> Employees
<input type="checkbox"/> All required OSHA forms completed	<input type="checkbox"/> Employer Representatives
<input type="checkbox"/> Adequate Number of Interviews Conducted:	<input type="checkbox"/> Pertinent witnesses, etc. (if accident investigation)

Reviewer's Comments: _____

II. Citation Issues: Check box <input type="checkbox"/> if OK, OR circle box if corrections needed & comment below.
<input type="checkbox"/> Appropriate standard is identified and cited correctly.
<input type="checkbox"/> Same standard number is shown in AVD and at top of 1B.
<input type="checkbox"/> AVD identifies location, process, equipment, hazard materials/chemicals, (as applicable) in a clear, concise manner. No superfluous information is included.
<input type="checkbox"/> Grammar, spelling, punctuation, sentence structure is adequate and understandable.
<input type="checkbox"/> Citation issues match findings and references made in narrative, notes, photos, video, etc.
<input type="checkbox"/> All photos/videos reviewed to determine if all shown violations were addressed.
<input type="checkbox"/> Employer knowledge is adequately identified and documented. (...exercise of reasonable diligence alone is not sufficient)
<input type="checkbox"/> Illness/Injury is sufficiently stated. (Does the <u>injury/illness</u> match the <u>probability/severity</u> ?)
<input type="checkbox"/> Is the correct "exposed employee" matched with the correct violation? (Note: Unless it is a very small operation, the same employee would not ordinarily be exposed to every single violation cited during the inspection.)

Reviewer's Comments: _____

III. Programmatic Issues: Check box <input type="checkbox"/> if OK, circle box if corrections needed.
<input type="checkbox"/> Adequate documentation for all program required as to their presence, absence, or shortfalls.

IV. General Comments by Reviewer: _____

This form and other delineated elements (i.e., VOSH-1B's, narrative pages, etc.) showing corrections to be made will be filed in Section. II, Exhibit. 8 - Notes. This form is for internal use only and is not discoverable through FOIA requests.



INFORMAL CONFERENCE NOTES

Employer:		Inspection #:	Optional Report #:
Date:	Employer Representatives / Titles:		VOSH Representative(s):
<p>Check box[✓] as applicable. Notes:</p> <p><input type="checkbox"/> Objective of Informal</p> <p><input type="checkbox"/> First Informal?</p> <p><input type="checkbox"/> Shows commitment.</p> <p><input type="checkbox"/> Clarify Final Order.</p> <p><input type="checkbox"/> Right to contest. Must post.</p> <p><input type="checkbox"/> Citation posted?</p> <p><input type="checkbox"/> Post Notice of Informal?</p> <p><input type="checkbox"/> Abatement complete?</p> <p><input type="checkbox"/> ARM §307?</p> <p><input type="checkbox"/> Yellow form complete?</p> <p><input type="checkbox"/> Questions?</p> <p><input type="checkbox"/> Discussion of issues?</p>			
Items Reclassified:	Items Vacated:	Penalty Relief Offered:	Length of Informal:

**Penalty Relief Justification
Good Faith in Abatement**

%	✓	Justification
20		<u>All</u> items abated during inspection OR well in advance of abatement date designated by CSHO. Clear, concise abatement letter with all supporting documentation is provided.
15		<u>All</u> items abated by abatement date designated by CSHO. Clear, concise abatement letter with all supporting documentation provided.
10		Timely abatement complete on all items except those that have time remaining (Informal Conference held before last date of abatement). Abatement will be complete by CSHO's designated abatement date for all items. Supporting documentation provided for all abated items. Additional information and supporting documentation to be provided by date due.
5-7 (At the discretion of Region Director or his/her agent.)		Timely abatement complete on all items where abatement dates have passed. Extension (PMA) requested for item(s) where abatement dates are not past due . Supporting documentation provided for all abated items. Additional information and supporting documentation to be provided by date due. OR Employer has made an attempt to abate violative conditions and has produced abatement documentation to the best of his/her ability. One or more exception in abatement letter or documentation exists.

ABATEMENT COSTS

%	✓	Justification
10		Extensive abatement costs for one or more items or extensive plant-wide abatement costs. Abatement cost is equal to or exceeds 50% of the issued penalty (not EISA penalty). Example: penalty of \$4000 with abatement costs of \$2000 would qualify for a 10% penalty reduction under " Penalty Reduction Summary ".
5		Moderate abatement costs or decision to use better abatement methods that result in higher abatement costs than are absolutely necessary. Abatement costs fall between 25% and 49% of the issued penalty. Example: Penalty of \$4000 with abatement costs of \$1000-\$1999 would qualify for a 5% penalty reduction under " Penalty Reduction Summary ".
3		Low cost options taken. Abatement costs are not excessively high. Abatement cost is less than 25% of the issued penalty. Example: penalty of \$4000 with some abatement costs up to \$999 would qualify for a 3% penalty reduction under " Penalty Reduction Summary ".

Penalty Reduction Summary

<i>Good Faith</i>	%
<i>Abatement Costs</i>	%
TOTAL	%

INFORMAL SETTLEMENT AGREEMENT



Employer: _____ Inspection No.: _____

Address: _____ Issuance Date: _____

I. Pursuant to an informal conference between duly authorized representatives of the Virginia Occupational Safety and Health Program, Department of Labor and Industry, and the employer named above, the Department has issued an Amended Citation modifying the original citation referenced above. As consideration for the modification of the terms of the original Citation(s), the Employer hereby:

- _____ (1) Waives its right to contest any terms of the Citation as amended.
- _____ (2) Withdraws its Notice of Contest filed in this matter and waives its right to contest the Citation as amended.

II. The Employer agrees to pay the remaining penalty as per the amendment to the citation.

III. The Employer agrees to correct the violations as cited in the attached amendment to the citation.

IV. The Employer agrees to immediately post a copy of this Informal Settlement Agreement and to immediately post a copy of the Citation(s) as amended alongside the original Citation(s) in a prominent place at or near the location of the violation(s) and to keep these items posted until each violation item of the amended Citation(s) has been completely corrected, or for three (3) working days (excluding weekends and State Holidays), whichever is longer.

V. If not already provided, the Employer agrees to provide to the Department within _____ days of the effective date of this agreement documentation verifying abatement of each violation affirmed in this agreement. The documentation shall comply with §307.E.2. of the Virginia Occupational Safety and Health (VOSH) *Administrative Regulations Manual* which states that "Documents demonstrating that abatement is complete may include, but are not limited to, evidence of purchase or repair of equipment, photographic or video evidence of abatement or other written records."

VI. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the Commissioner. Under Va. Code §40.1-51.3:2., the fact of the issuance of a citation under Chapter 3 of Title 40.1 of the *Code of Virginia* will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the *Code of Virginia*.

VII. Unless otherwise provided in this agreement or in a separate penalty installment payment agreement, penalties assessed under this agreement are due and payable within 30 calendar days of the effective date of this agreement. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date, constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.

Employer Representative

For VOSH Compliance

Date

Date

Note: Employees should refer to the bottom of the Citation for an explanation of employee rights.

IW1 - INSPECTION WORKSHEET & EMPLOYER INTERVIEW SHEET



_____/_____/_____

CSHO ID.

Year

Inspection Number

ENTRANCE & OPENING:

1. Date ____/____/____ Time _____ am/pm.
2. Type of Legal Entity: (____ Corp.) (____ Partnership) (____ Sole Owner) (____ Other: _____)
3. Ownership: (____ Private Sector) (____ Local Gov't) (____ State Gov't)
4. Employer Name: _____
5. Site Address: _____ Phone: _____
6. Mailing Address: _____ Phone: _____
Employer Rep. Email, Address : _____
Name of Controlling Corp., Partner or Owner (where applicable): _____
Federal Employer Identification No. (FEIN) _____ Dun's No. (If available) _____
7. Type of Business or Plant: _____ NAICS Code: _____
8. (____) Provide business card, Credentials Presented/ Recipient: _____ Title: _____
9. (____) Explain purpose of visit, employee participation, confidential matters, identify Title 40.1, & possibility of citation & penalties.

PERSONS:

11. Present at Opening (Name/Title):	Conference: (____ Separate) (____ Joint)	Present on
Walkaround:		
_____		(____ yes) (____ no)
_____		(____ yes) (____ no)
_____		(____ yes) (____ no)
_____		(____ yes) (____ no)
12. Employee Rep: (____ yes) (____ no) If yes, Name/Title:		(____ yes) (____ no)
Address _____		Phone: _____

BACKGROUND:

- 13 No. of Employees: In Establishment _____ Covered by Insp. _____ Controlled by Employer _____ Number of Shifts _____
14. Fire extinguishers: (____) Access/Egress: (____)
15. Hazard Communication: (____ Written Program) (____ MSDS Sheets) (____ Labeling) (____ Training)
16. Confined Space: (____ Permit System) (____ Preparation) (____ Training) (____ Air Monitoring) (____ Rescue Team/Materials)
17. Lockout/Tagout: (____ Written Program) (____ Periodic Inspections) (____ Training)
18. Bloodborne Pathogens: (____ PPE) (____ Exposure Control Plan) (____ Information and Training)
(____ Hepatitis B Vaccination & Post Exposure Evaluation & Follow-up)
19. Inspection: (____ yes) (____ no) Scope: (____ Partial) (____ Comprehensive)
20. Type: (____ Accident) (____ Complaint) (____ Referral) (____ Monitoring) (____ Variance) (____ Follow-up)
(____ Unprogrammed Related) (____ Planned) (____ Programmed Related)

Comments _____

OPENING CONFERENCE CHECKLIST:

21. (____) Explain that Inspection Consists of Opening/Walkaround/Closing Video/Photos Permitted? (____ yes) (____ no)
Familiar with S/H Laws, Regs? (____ yes) (____ no) (____ Explained) _____
Familiar With Recordkeeping Regs? (____ yes) (____ no) (____ Explained) _____
Trade Secrets/Restricted Areas? (____ yes) (____ no) (____ Explained) _____
(____ Right to Talk to Employees in Private, §40.1-49.8(2)) (____ Discrimination Prohibited, §40.1-51.2:1) (____ Posting Regs)

IW1-INSPECTION WORKSHEET & EMPLOYER INTERVIEW SHEET

(Page 2 - copy upside down)

SAFETY AND HEALTH PROGRAM EVALUATION:

22.a. Written program? (yes)(no) Copy Enclosed? (yes)(no) First Aid: (Kit Dispensary)

Time/Distance to: (Hospital _____ / Rescue Squad _____) Nurse: (On (Off (None)

Physician: (On (Off (None) Training: Safety Staff: (yes)(no) Health Staff (yes)(no)

First aid cardholders: _____

b. Accident Investigations Performed: _____ (yes) (no)

Preventive Action Taken: _____ (yes) (no)

c. Communication of Program to Employees (How? Effectiveness?) _____ (yes) (no)

Safety/Health Meetings (Frequency? By Whom? Effectiveness?) _____ (yes) (no)

d. Enforcement (How? Type of Discipline? Effectiveness?) _____ (yes) (no)

e. Employee Training: (Formal) (OJT) (Experienced) (Other) _____ (yes) (no)

f. OSHA 300 Recordkeeping: (Exemption? Annual Summary? OSHA 301s?)
 (yes) (no)

f. Health Monitoring: (Chemicals? Effectiveness?) _____ (yes) (no)

g. Health Recordkeeping: (Types? Employee Access?) _____ (yes) (no)

h. Medical Programs: (Frequency? Content? Effectiveness?) _____ (yes) (no)

i. Regulated Areas: (Sampling Done? Identified? Rosters?) _____ (yes) (no)

j. Hazard Control: (Engineering? PPE?) _____ (yes) (no)

k. Emergency Procedures: (What Conditions? Training?) _____ (yes) (no)

l. Comments on Comprehensiveness/Effectiveness of S/H Program _____

WALKAROUND AND INSPECTION CHECKLIST:

23. Begin: Date ___/___/___ Time: _____am/pm Departure: Date ___/___/___ Time: _____am/pm

24. Equipment Used _____

25. Other Personnel on Walkaround not listed in the Opening Conference section (Name/Title/Address):

_____ Phone: _____

_____ Phone: _____

_____ Phone: _____

_____ Phone: _____

26. Employer Representative Statement: [Knew or should have known of hazard? Hazard in plain view? Duration?
 Regular inspections of work site? Frequency of employer inspections? Previous accidents? Employer monitoring results?]

Employer Representative Statement, continued from page 2.

Employer Representative Signature _____ Date: ____/____/____

CLOSING CONFERENCE CHECKLIST:

27. Begin: Date ____/____/____ Time _____am/pm. Departure: Date ____/____/____ Time _____am/pm.

28. Personnel at Closing Not Already Listed (Name/Title/Address)

_____	Phone: _____
_____	Phone: _____
_____	Phone: _____
_____	Phone: _____

29. Review: (Items 1-18 of Closing Conference Guide and FAT/CAT notification requirements)

Comments:

30. Violations abated in CSHO's presence and method of abatement:

31. Employer Representative Signature _____ Date: ____/____/____

32. CSHO Signature _____ Date: ____/____/____

NOTICE OF ALLEGED IMMINENT DANGER



**TO: EMPLOYER(S) AND EMPLOYEES
AT THIS WORK SITE**

**From: COMMISSIONER of the VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY
Virginia Occupational Safety and Health Program (VOSH)**

An inspection has been conducted of *[name and address of employer]*, Inspection Number *[number]*. On the basis of this inspection, it is alleged that an imminent danger(s) exists at this work site, which could reasonably be expected to cause death or serious physical harm to employees immediately, or before the imminence of such danger can be eliminated through the normal enforcement procedures otherwise provided by the occupational safety and health provisions of the Labor Laws of Virginia (Code of Virginia §40.1 et seq.).

By posting this NOTICE OF ALLEGED IMMINENT DANGER, the employer(s) and employees affected by the conditions described in this NOTICE are being informed of the possible dangers which could reasonably be expected to result in death or serious physical harm.

THE EMPLOYER(S) AND ALL EFFECTED EMPLOYEES ARE LIKEWISE BEING INFORMED THAT AN INJUNCTION TO ENJOIN ANY IMMINENT DANGEROUS CONDITION(S) MAY BE SOUGHT FROM THE APPROPRIATE CIRCUIT COURT IN ACCORDANCE WITH VA. CODE §40.1-49.4.F.1.

Va. Code § 40.1-49.4.F.1. provides that the Commissioner of Labor and Industry may ask the circuit court having jurisdiction over the employer(s) or place of employment to temporarily or permanently enjoin the imminently dangerous activity and require the employer(s) to take such action as is necessary to avoid, correct, or remove the alleged imminent danger, including, where necessary, the removal of employees from the dangerous condition.

NOTE: This notice does not constitute a Citation or alleged violation or a Notification of Proposed Penalty. Appropriate Citations and/or Proposed Penalties may be issued at a later date. The maximum penalty for willful and repeated violations is \$70,000 per violation, and for serious and other-than-serious violations is \$7,000 per violation.

DESCRIPTION OF ALLEGED IMMINENT DANGER(S):

- 1.
- 2.
- 3.
- 4.

ISSUED BY: _____
Authorized Representative for the
Commissioner of the Department of Labor and Industry

DATE: ____/____/____

This NOTICE OF ALLEGED IMMINENT DANGER must remain posted until removed by a representative of the Commissioner of the Virginia Department of Labor and Industry.

**VIRGINIA OCCUPATIONAL SAFETY AND HEALTH
PENALTY INSTALLMENT PAYMENT AGREEMENT**



Employer: _____
Address: _____

Inspection Number: _____ Issuance Date: _____

THIS AGREEMENT is entered into by the Commonwealth of Virginia, Commissioner of Labor and Industry (Commonwealth) and (_____
Employer).

1. The Employer shall pay a penalty of \$ _____ [in lieu of the penalties originally proposed in the citations(s)] * The Employer shall pay an initial sum of \$ _____ no later than 15 days after the Employer receives a fully executed copy of this Agreement. The remaining amount of \$ _____ shall be paid in (_____) installment payments of \$ _____ each. Each of the (_____) installment payments is/are due on the fifteenth (15th) day of each month beginning _____ and ending _____.

Each check or money order, payable to the “*Treasurer of Virginia*” with the VOSH inspection number noted on it, shall be mailed to:

Accounting Division
Virginia Department of Labor and Industry
Main Street Centre
600 East Main Street
Richmond, Virginia 23219-2430

2. The Employer has the option to pay the total penalty due under this Agreement in one lump sum payment of \$ _____, to be remitted to the address listed in Paragraph 1 above no later than fifteen days after the Employer receives a fully executed copy of this Agreement.
3. It is expressly understood that any modifications to penalty level or citation classification, or any vacating of a citation or penalty in this Agreement or a separate Settlement Agreement between the Commonwealth and the Employer are contingent upon the Employer's full payment of all penalties due under this Agreement. Failure by the Employer to substantially comply with the terms of this Agreement or to make a penalty payment by the due date, constitutes a breach of this Agreement and any separate Settlement Agreement between the parties. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.
4. The Employer certifies that the violations alleged in the above citation(s) have been abated.

5. As consideration for the modification of the terms of the original citation(s), the Employer agrees to withdraw its original notice of contest filed with respect to the above citation(s) and waives its rights to contest the remaining terms contained in this Agreement.

POSTING

6. The Employer shall post a copy of this Agreement for a period of thirty (30) days at each worksite in Virginia in a conspicuous location where notices to its employees are generally posted.

SETTLEMENT OF CLAIMS

7. **THIS AGREEMENT** is meant to compromise and settle the contested claims that arose out of the above referenced inspection. Pursuant to Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.
8. All citations and penalties, as modified above, including all new obligations contained in this Agreement, are a final order of the Commissioner of Labor and Industry.

By: _____
Employer Representative Date

By: _____
VOSH Regional (Safety/ Health) Director Date

** Included only if penalty being reduced.*



REFUSAL OF ENTRY

After promptly contacting the Regional Safety or Health Director (*as applicable*) or Program Director and notifying them of the denial, the CSHO shall transmit in writing the following information to the applicable Regional Director:

1. Regional/Field Office involved: _____ Phone: (____)_____
2. CSHO full name: _____ CSHO ID#: _____
Insp. # (*if assigned*): _____ Insp. Type: Safety ___ Health ___ Both ___
3. Legal name of Establishment: _____
Site Address: _____ Zip _____
Mailing Address (*if different*): _____ Zip _____
4. Estimated number of Employees at the Establishment: _____
5. Date and Time of Entry: _____ Date and Time of Denial: _____
Inspection stage at denial (*entry, opening conference, walkaround*): _____
6. Full name and title of person to whom CSHO presented credentials: _____
Full name and title of person who refused entry: _____
Reason(s) stated for denial: _____
Response of CSHO to reason(s): _____
Name and address of witnesses to denial of entry: _____
7. VOSH inspection history? (___yes) (___no) (*attach additional sheet if "yes"*)
8. Previous requests for warrants? (___yes) (___no) (*attach additional sheet if "yes"*)
9. Any of current insp. report completed? (___yes) (___no) (*attach additional sheet if "yes"*)
10. Potential violations in plain view while on site (___yes) (___no) (*attach additional sheet if "yes"*)
11. Other relevant information such as a description of the workplace; work processes, chemicals, machinery, tools and materials used; known hazards associated with the industry and the types of injuries or illnesses that could result:

12. Investigative techniques which will be required during the proposed inspection:

Personal Sampling, Video, Photographs, Examination of records,
 Private interviews, Access to medical records, Bulk samples

Other techniques: (*specify*) _____

13. NAICS code: _____ High hazard ranking: _____

14. Inspection type: Imminent danger Fatality/Catastrophe Complaint/Referral
 Accident/ 1st Report Follow-up/Monitoring Programmed

Specify reasons for the selection of the establishment for inspection, including scope of the inspection and rationale. (See FOM for list of required information.)



SUPERVISOR INTERVIEW STATEMENT

Date: _____ Time: _____ a.m./p.m _____ / _____ / _____

CSHO ID Opt Rpt # Yr. Insp. No.

Employee Name: _____ Phone: (____) _____

Address: _____

Occupation: _____ Male () Female ()

Job Title: _____ Employed from: _____ / _____ / _____

Employer Name: _____ to: _____ / _____ / _____

() CSHO credentials presented () Discrimination Explained

Union: yes () no () *If yes, Name of Bargaining Unit:* _____

(If known) Address/Phone: _____

HAZARD COMMUNICATION CHECKLIST

- () Access to Written Program () Access to MSDS Sheets () Labeling System Explained
- () Training on Requirements of Standard () Hazards of Chemicals/Precautions for Handling Explained

CONFINED SPACE CHECKLIST

- () Qualified Person () Preparation/Ventilation () Atmospheric Testing
- () Permit System () Entry Procedures, Attendant/Non-Attendant
- () Training Program () Rescue Teams, Special Equipment and Tools, Rescue Devices

LOCKOUT/TAGOUT CHECKLIST

- () Written Energy Control Procedures () Proper Use of Tags or Locks
- () Training () Effectiveness of Energy Control Procedures

Employee Statement:

1. In your company , to whom do you report directly to? _____
name & title
2. Has your supervisor or the person you report to visited the project? yes() no() If yes, when and how frequently? _____
3. Do you have authority to hire and fire workers on this job? yes() no() _____
4. Do you have authority to discipline workers for violations of safety/health rules on this job? yes () no ()
If yes, please explain: _____
5. Do you have the authority to stop from working the employees you supervise if they are violating a company safety/health rule or state regulation? yes() no() _____
6. *(For construction inspections)* Do you have authority to request the general contractor or another subcontractor to correct a safety/health hazard? yes() no() If yes, please explain: _____

7. Did you know that the _____ hazard was a violation of the _____ standard? yes() no()
8. Have you been trained on the requirements of the *(specific industry)* Safety or Health Stds? yes() no()
(Provide training background) _____

9. Did you know your employees were exposed to the _____ hazard? If so, did you remove your employees from exposure to the hazard until it could be corrected? yes() no() If not, why not? _____

10. Did you work around the _____ hazard today or at any other day or time since you have been onsite? yes() no() If yes, please explain. _____

11. What specific company safety or health procedures are in effect on this project, worksite, or location? _____

13. Have you been employed at this project, worksite, or location? If so, for how long have you worked there? _____

14. Does your employer conduct safety and/or health training for employees? yes() no() If so, what and how often? _____

Any other comments or concerns? _____

Employee Signature

CSHO Signature

EXAMPLES OF ADDITIONAL QUESTIONS FROM AN INSPECTION WHERE TEMPORARY SHORING COLLAPSED
DURING THE CONSTRUCTION OF A MULTI-STORY BUILDING

15. Did you supervise the installation of the shoring system on the 4th floor of the project? If not, who was the supervisor of that work?
16. Have you supervised the installation of shoring in other areas of this or any other project?
17. What training have you received regarding the proper installation of shoring?
18. Have you seen an installation guide or written instructions for installing shoring?
Is the installation guide available to you? If so, where is it kept?
19. When was the shoring installed on the 4th floor of the project?
20. How do you determine the number and placement of the shoring when it is installed?
21. How is the temporary shoring held in position once they are set in place?
22. Is the temporary shoring inspected by anyone to ensure that they are installed correctly? By whom? How often?
23. Was the temporary shoring on the 4th floor inspected after they were installed? By whom? When?
24. Is it a common occurrence for the temporary shoring to come loose after they have been installed?
25. Is there a procedure to ensure that the temporary shoring stay in place after installation?
26. Are you aware of any instances of the temporary shoring becoming so loose that they fall out of place? If so, when and where?
27. How many employees do you supervise?
28. Are they trained to install shoring systems, in particular the _____ system? If so, please describe the type of training received?
29. Were you at the project site on the day of the fatality incident? If so, did you observe anything related to the incident?

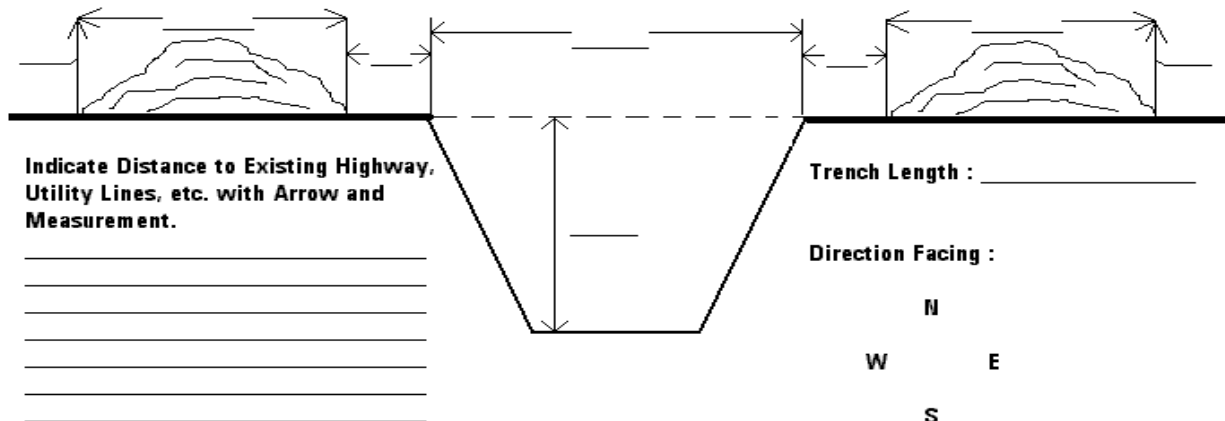
TRENCHING AND EXCAVATION WORKSHEET



Date: _____ Time: _____ / _____ / _____
 CSHO ID _____ Opt. Rpt. No. _____ Yr. Inspection No. _____

1. Employer: _____
2. Site Address: _____
3. Witness/Exposed Employee(s): _____
 Number Exposed: _____
4. Photos Taken? ___ Yes ___ No *If No, Why Not?* _____
5. Water in Trench
 Excavation? ___ Yes ___ No *If Yes, Circle Source* Running Rainwater Underground Other
6. Type of Material: Unstable/soft Hard/compact Other
7. Superimposed Load
 or Equipment Adjacent ___ Yes ___ No Type: _____
8. Previously Excavated/
 Subject to Vibrations ___ Yes ___ No Detail: _____
9. Ladder ___ Yes ___ No Tied? Above Landing?
 PPE ___ Yes ___ No (Hard Hat)
10. Confined Space? ___ Yes ___ No If Yes, Reason: _____

Indicate Dimensions



Additional Comments on Reverse

COMPETENT PERSON INTERVIEW STATEMENT

Date: _____ Time: _____ CSHO Id. _____
Insp. No. _____

Employee Name: _____ Phone: _____

Address: _____

Occupation: _____

Job Title: _____

Employer Name: _____ Employed from: _____ To: _____

___ Credentials presented ___ Discrimination explained

Union: ___ Yes *If yes,* Bargaining Unit:
___ No Address & Phone:

HAZCOM:

- ___ Yes ___ No Access to written program?
- ___ Yes ___ No Access to MSDS?
- ___ Yes ___ No Hazards of chemicals & precautions explained?
- ___ Yes ___ No Labeling system explained?
- ___ Yes ___ No Training?

RAMPS:

- ___ Yes ___ No Is Employer using a structural ramp?
[If no, skip to next section]
- ___ Yes ___ No Is ramp used solely for employee access? If yes,
___ Yes ___ No was it designed by competent person for safe
access & egress?
- ___ Yes ___ No Is ramp used for access and egress of equipment?
- ___ Yes ___ No Is the competent person who designed the ramp qualified in
structural design? List
qualifications: _____
- ___ Yes ___ No Does ramp meet design specifications?

CONFINED SPACE:

___Yes___No Does trench or excavation meet definition of Confined Space?
[If no, skip to next paragraph.]

___Yes___No Is the competent person ('qualified person') trained to recognize and evaluate confined space hazards?
Detail:

___Yes___No Is the competent person capable of specifying necessary control measures to assure worker safety?
Detail:

WATER CONDITIONS:

___Yes___No Is dewatering equipment being used on the site? If yes,

___Yes___No Is the competent person monitoring the equipment and its proper operation?

___Yes___No Has the excavation been subjected to heavy rainfall? If yes,

___Yes___No Has the competent person inspected the excavation and complied with precautions of (h) (1) and (h) (2)?

INSPECTIONS:

___Yes___No Has the competent person conducted daily inspections of the excavation?

___Yes___No Has the competent person conducted daily inspections of the adjacent areas?

___Yes___No Has the competent person conducted daily inspections of protective systems?

___Yes___No Were these inspections conducted prior to the start of work?

___Yes___No Were these inspections conducted as needed throughout the work shift?

___Yes___No Were these inspections conducted after rainstorm or hazard-increasing occurrence?

Yes No Based on CSHO's observation, has the competent person failed to recognize situations that could result in cave-ins?

If yes, detail:

Yes No Does the competent person have the authority to remove employees from a hazardous area until proper precautions are taken?

PROTECTIVE SYSTEMS:

General:

Yes No Is the excavation less than five (5) feet deep? If yes,

Yes No Has the competent person examined the ground for indication of potential cave-in?

Yes No Has the competent person inspected any damaged material or equipment used for protective systems and evaluated its suitability for continued use?

USE OF APPENDICES:

Yes No Is the employer relying upon either Appendices:

A & B to design a sloping and shoring system (Option 2)
OR

A & D to select and construct a protective system (Option 1)
If yes for either option,

Yes No Has the competent person properly classified the soil using Appendix A?

What type of soil does the competent person say is in the excavation? _____

What visual test(s) did the competent person perform? _____

What manual test(s) did the competent person perform? _____

Yes No **Has the Competent Person performed all tasks required by the standard?**

Yes No **Is the person “capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous or dangerous to employees”?**

If not, list deficiencies:

Yes No **Is the person authorized to take prompt corrective measures to eliminate such hazards or conditions?**

VOSH-TEW/2011

SOIL ANALYSIS CHECKLIST A

The following checklist can be used in the field to determine the soil type(s) present in an excavation. A

separate analysis should be done on each layer of soil in the excavation wall.

DATE: _____ CSHO ID NO.: _____

EMPLOYER: _____

SITE LOCATION: _____

WHERE SAMPLE WAS TAKEN FROM: _____

APPROXIMATE DEPTH: _____

VISUAL TESTS

1. Particle size:

_____ Fine-grained? (Cohesive)

_____ Coarse-grained, e.g., sand or gravel? (Granular)

2. Excavated soil:

_____ Remains in clumps (Cohesive)

_____ Breaks up easily and does not stay in clumps? (Granular)

3. Sides of excavation and adjacent surface area:

_____ Crack-like openings? (Indicates fissured material)

_____ Chunks of soil spalling from sides? (Moving ground; fissured material)

4. Previously disturbed soil:

_____ Evidence of existing utility or other underground structures?

_____ Other evidence that soil previously disturbed?

5. Layered system:

If opened side of excavation shows layered system, examine to determine if layers slope toward excavation. Estimate degree of slope of layers:

6. Water conditions:

_____ Evidence of surface water?

_____ Water seeping from sides of excavation?

_____ Location of level of water table?

7. Vibration:

_____ Sources of vibration in excavation or in area adjacent to excavation?

Identify:

MANUAL TESTS

1. Plasticity:

Mold moist or wet sample of soil into a ball and roll into 1/8 inch threads. If material can be rolled into threads at least 2 inches long without crumbling or tearing, soil is cohesive.

RESULT:

2. Dry strength:

Does dry soil crumble on its own, or with moderate pressure, into individual grains or fine powder?

If so, soil is granular.

Does dry soil fall into clumps which break up into smaller clumps and are the smaller clumps only broken up with difficulty? _____

If so, soil may be clay in any combination with gravel, sand or silt.

Does dry soil break into clumps which do not break up into smaller clumps? Can these clumps only be broken with difficulty? Is there no visual indication the soil is fissured? _____

If so, the soil may be considered unfissured.

3. Thumb penetration:

(Conduct test on undisturbed clump of soil that has not had opportunity to dry.)

Can the soil be readily indented with the thumb, but be penetrated only with great effort? _____

If so, the soil is Type A. (Unconfined compressive strength of 1.5 tsf)

Can soil be easily penetrated several inches by thumb and molded by light finger pressure? _____

If so, soil is Type C. (Unconfined compressive strength of 0.5 tsf)

Other manual tests, including pocket penetrometer, hand-operated shearvane, or drying test, need not be conducted by the CSHO. If the employer has used these tests to determine soil type, verify by use of the above manual tests. Use this section to record the employer's results:

ANALYSIS:

_____ Stable rock

_____ Type A

_____ Type B

_____ Type C

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SOIL ANALYSIS CHECKLIST B

The following checklist can be used in the field to determine the soil type(s) present in an excavation. A

separate analysis should be done on each layer of soil in the excavation wall.

DATE: _____

CSHO ID NO.: _____

EMPLOYER: _____

SITE LOCATION: _____

WHERE SAMPLE WAS TAKEN FROM: _____

APPROXIMATE DEPTH: _____

VISUAL TESTS

This analysis should be used to determine qualitative information regarding the excavation site in general, the soil adjacent to the excavation, the soil forming the sides of the open excavation, and the soil taken as samples from excavated material.

- (1) Observe samples of soil that are excavated and soil in the sides of the excavation. Estimate the range of particle sizes and the relative amounts of the particle sizes. Soil that is primarily composed of fine-grained material is cohesive material. Soil composed primarily of coarse-grained sand or gravel is granular material.

RESULTS:

- (2) Observe soil as it is excavated. Soil that remains in clumps when excavated is cohesive. Soil that breaks up easily and does not stay in clumps is granular.

RESULTS:

- (3) Observe the sides of the opened excavation and the surface area adjacent to the excavation. Crack-like openings such as tension cracks could indicate fissured material. If chunks of soil spall off a vertical side, the soil could be fissured. Small spalls are evidence of moving ground and are indications of potentially hazardous situations.

RESULTS:

- (4) Observe the area adjacent to the excavation and the excavation itself for evidence of existing utility and other underground structures and identify previously disturbed soil.

RESULTS:

- (5) Observe the opened side of the excavation to identify layered systems. Examine layered systems to identify whether the layers slope toward the excavation. Estimate the degree of slope of the layers.

RESULTS:

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- (6) Observe the area adjacent to the excavation and the sides of the opened excavation for the evidence of surface water, water seeping from the sides of the excavation, or the location of the level of the

water table.

RESULTS:

- (7) Observe the area adjacent to the excavation and the area within the excavation for sources of vibration that may affect the stability of the excavation face.

RESULTS:

MANUAL TESTS

These tests are conducted to determine quantitative as well as qualitative properties of soil and to provide more information in order to classify soil properly.

1. **Plasticity.** Mold a moist or wet sample of soil into a ball and attempt to roll it into threads as thin as 1/8-inch in diameter. Cohesive material can successfully be rolled into threads without crumbling. For example, if at least a two inch (50 mm) length of 1/8-inch thread can be held on one end without tearing, then the soil is cohesive.

RESULTS:

2. **Dry strength.** If the soil is dry and crumbles on its own or with moderate pressure into individual grains or fine powder, it is granular (any combination of gravel, sand or silt). If the soil is dry and falls into clumps which break up into smaller clumps but the smaller clumps can only be broken up with difficulty, it may be clay in combination with gravel, sand or silt. If the dry soil breaks into clumps which do not break up into smaller clumps and which can only be broken with difficulty, and there is no visual indication the soil is fissured, the soil may be considered unfissured.

RESULTS:

3. **Thumb penetration.** The thumb penetration test can be used to estimate the unconfined compressive strength of cohesive soils. Type A soils with an unconfined compressive strength of 1.5 tsf can be readily indented by the thumb; however, they can be penetrated by the thumb only with very great effort. Type C soils with an unconfined compressive strength of 0.5 tsf can be easily penetrated several inches by the thumb, and can be molded by light finger pressure. This test should be conducted on an undisturbed soil sample, such as a large clump of soil as soon as practicable after excavation to keep to a minimum the effects of exposure to drying influences. If the excavation is later exposed to wetting influences (rain, flooding) the classification of the soil must be changed accordingly.

RESULTS:

The following manual tests need not be conducted by the CSHO. IF the employer has used these tests to determine soil type, verify by use of the above manual tests. Use this section to record the employer's results.

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4. **Other strength tests.** Estimates of unconfined compressive strength of soils can also be obtained by use of a pocket penetrometer or by using a hand-operated shearvane.

RESULTS:

5. **Drying test.** The basic purpose of the drying test is to differentiate between cohesive material with fissures, cohesive material without fissures, and granular material. The procedure for the drying test involves drying a sample of soil that is approximately one inch thick (2.45 cm) and six inches (15.24 cm) in diameter until it is thoroughly dry.
- A. If the sample develops cracks as it dries, significant fissures are indicated.
 - B. Samples that dry without cracking are to be broken by hand. If considerable force is necessary to break a sample, the soil has significant cohesive material content. The soil can be classified as an unfissured cohesive material and the unconfined compressive strength should be determined.
 - C. If a sample breaks easily by hand, it is either a fissured cohesive material or a granular material. To distinguish between the two, pulverize the dried clumps of the sample by hand or by stepping on them. If the clumps do not pulverize easily, the material is cohesive with fissures. If they pulverize easily into very small fragments, the material is granular.

EMPLOYER'S RESULTS:

ANALYSIS

This section reviews the four classifications of soil in Appendix A. Note in the left margin the classification of this sample:

_____ Stable rock means natural solid mineral matter that can be excavated with vertical sides and remain intact while exposed.

_____ Type A means cohesive soils with an unconfined compressive strength of 1.5 ton per square foot (tsf) (144kPa) or greater. Examples of cohesive soils are: clay, silty clay, sandy clay, clay loam and, in some cases, silty clay loam and sandy clay loam. Cemented soils, such as caliche and hardpan, are also considered Type A.

However, soil is **NOT** Type A if:

- i. The soil is fissured, or
- ii. The soil is subject to vibration from heavy traffic, pile driving or similar effects, or
- iii. The soil has been previously disturbed, or
- iv. The soil is part of a sloped, layered system where the layers dip into the excavation on a slope of four horizontal to one vertical (4H: 1V) or greater, or
- v. The material is subject to other factors that would require it to be classified as a less stable material.

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_____ Type B means:

- i. Cohesive soil with an unconfined compressive strength greater than 0.5 tsf (144 kPa) but less than 1.5 tsf (144 kPa); or



- ii. Granular cohesionless soils, including: angular gravel (similar to crushed rock), silt, silt loam, sandy loam, and, in some cases, silty clay loam and sandy clay loam.
- iii. Previously disturbed soils except those which would otherwise be classed as Type C soil.
- iv. Soil that meets the unconfined compressive strength or cementation requirements for Type A but is fissured or subject to vibration, or
- v. Material that is part of a sloped, layered system where the layers dip into the excavation on a slope less steep than four horizontal to one vertical (4H: 1V), but only if the material would otherwise be classified as Type B.

_____ Type C means:

- i. Cohesive soil with an unconfined compressive strength of 0.5 tsf (48 kPa) or less, or
- ii. Granular soils including gravel, sand and loamy sand, or
- iii. Submerged soil or soil from which water is freely seeping, or
- iv. Submerged rock that is not stable, or
- v. Material in a sloped, layered system where the layers dip into the excavation on a slope of four horizontal to one vertical (4H: 1V) or steeper.

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WILLFUL WORKSHEET DOCUMENTATION

1. Hazard/violation:

2. Exposure:

a. Employee(s): _____

b. Task being performed:

3. Management Official(s):

a. Name(s): _____

b. Title(s): _____

c. Action/lack of action:

4. Employer/Management Knowledge of:

a. Condition/violation:

Beyond reasonable doubt? Explain:

b. Employee Exposure:

c. VOSH Requirement (*Std. Or 5(a) (1)*):

Beyond Reasonable doubt of Std. Not 5(a) (1):

5. Condition/Violation caused death of employee(s)? **Yes** **No**
(Required for considering criminal charges)

ELEMENTS OF A WILLFUL VIOLATION - A GUIDE FOR THE CSHO

1. What is the evidence that the employer/employer representative knew that the condition was hazardous (*knowledge*)?

2. What is the evidence that the employer/employer representative knew that the condition violated a standard or other obligation under V OSH?

3. What is the evidence that the employer/ employer representative knew VOSH requirements or other obligations involved?

4. What knowledge regarding safety and health matters for the violation or obligation under VOSH would be reasonably expected in this or for this industry?

5. What precautions were taken by the employer to limit the hazardous condition?

6. Were any similar violations or hazardous conditions brought to the employer's attention in the past?
_____ Yes _____ No

If so, what were the conditions, when did they occur, and who brought to the employer's attention in the past?

Were there any previous VOSH citations, letters or notifications (*if yes, when*)?

Were there any previous injuries, illnesses or accidents related to the violation or condition? (*If yes, when*)?

7. Was the violation or hazardous condition a generally recurring problem in this facility or other facilities under the employer's control? _____ Yes _____ No.

8. Did the nature and extent of the violation constitute plain indifference to safety and health?

9. Did the nature and extent of the violations constitute a purposeful or intentional disregard of the employer's responsibility under VOSH requirements (*if, so, describe how*)?

10. What was the company able to gain by not complying with the standards or the employer's obligation under VOSH?
(*Was there a motive?*)

**WILLFUL VIOLATION
SUPERVISOR'S REVIEW WORKSHEET**

A. Were management officials who ordered/allowed the hazardous exposure interviewed about their actions?

Yes No Case File Location: _____

B. Were exposed employees interviewed about how they came to be exposed to the hazard?

Yes No Case File Location: _____

C. Was the employee representative (if any) interviewed about the hazardous exposure?

Yes No Case File Location: _____

D. Does the evidence show that:

(1) The employer committed an *intentional* and *knowing* violation of VOSH standards?

Yes No Case File Location: _____

(2) The employer was aware that hazardous conditions existed and didn't make a reasonable effort to eliminate the condition?

Yes No Case File Location: _____

(3) The employer aware the condition violated a standard/other requirement of VOSH, and aware of the standard/other requirement was violated?

Yes No Case File Location: _____

E. Does the evidence also show that:

(1) The violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent?

Yes No Case File Location: _____

(2) The nature and extent of the violation disclose a purposeful disregard of the employer's responsibility for VOSH requirements?

Yes No Case File Location: _____

NOTE: In order for a proposed Willful Violation to clear safety and health review, the following affirmative responses must be present:

Items A, B, and C: if applicable

Item D: at least one affirmative

Item E: at least one affirmative

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Occupational Safety and Health

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