



COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

AGENDA

SAFETY AND HEALTH CODES BOARD

Main Street Centre
600 East Main Street
12th Floor Conference Room - South
Richmond, Virginia

Thursday, March 3, 2016

10:00 a.m.

1. Call to Order
2. Approval of Agenda
3. Approval of Minutes for Board Meeting of October 29, 2015
4. Opportunity for the Public to Address the Board on these issues pending before the Board today or on any other topics that may be of concern to the Board or within the scope of authority of the Board.

This will be the only opportunity for public comment at this meeting. Please limit remarks to 5 minutes in consideration of others wishing to address the Board.

5. **Old Business**

a) Virginia Unique Regulations:

- 1) Proposed Amendments to the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, 16VAC25-60, et seq.

Presenter – Jay Withrow

- 2) Proposed Regulation on Virginia Voluntary Protection Program (VPP), 16VAC25-200

Presenter – Jay Withrow

6. **New Business**

a) Federal-identical Regulation:

Electrical Safety-Related Work Practices, §1910.331 (Subpart S –Electrical); Electric Power Generation, Transmission, and Distribution, 1910.269 (Subpart R – Special Industries); General, 1926.950 (Subpart V – Power Transmission and Distribution); and Working On or Near Exposed Energized Parts, 1926.960 (Subpart V – Power Transmission and Distribution); Corrections

Presenter – Jennifer Rose

b) Notice of Intended Regulatory Action for Amendments to 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations

Presenter – Ed Hilton

c) Notice of Periodic Review of Certain Existing Regulations:

- 1) 16VAC25-11, Public Participation Guidelines;
- 2) 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations;
- 3) 16VAC25-160, Construction Industry Standard for Sanitation; and
- 4) 16VAC25-180, Virginia Field Sanitation Standard, Agriculture

Presenter – Regina Cobb

8. Items of Interest from the Department of Labor and Industry

9. Items of Interest from Members of the Board

10. Meeting Adjournment

DRAFT

**SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
THURSDAY, October 29, 2015**

BOARD MEMBERS PRESENT: Mr. Lou Cernak, Jr.
Ms. Anna Jolly
Ms. Rebecca LePrell
Mr. Courtney Malveaux
Mr. David Martinez
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez, Chair
Mr. Chuck Stiff, Vice Chair
Mr. Tommy Thurston

BOARD MEMBERS ABSENT: Mr. Jerome Brooks
Mr. John Fulton
Mr. Travis Parsons

STAFF PRESENT: Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry
Mr. Bill Burge, Assistant Commissioner
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, OPP & OWP
Mr. Ron Graham, Director, Occupational Health Compliance
Ms. Reba O'Connor, Regulatory Coordinator
Ms. Jennifer Rose, Director, Occupational Safety Compliance
Mr. John Crisanti, Manager, Office of Policy and Planning
Ms. Diane Duell, Director, Legal Services
Mr. Warren Rice, Director, Consultation Services
Ms. Regina Cobb, Senior Management Analyst
Ms. Cathy Brown, Program Support Technician, Senior

OTHERS PRESENT: Ms. Terry Simmer, Court Reporter, Halasz Reporting & Videoconference
Elizabeth B. Peay, Assistant Attorney General, OAG
Ms. Beverly Crandell, Safety Program Coordinator, Tidewater
Community College
Samuel R. Brumberg, Esq., Association of Electric Cooperatives, Glen
Allen, VA

ORDERING OF AGENDA

In the absence of Chair Milly Rodriguez, Vice Chair Chuck Stiff called the meeting to order at 10:00 a.m. A quorum was present.

Mr. Stiff requested a motion to approve the Agenda. Mr. Kenneth Richardson moved to accept the Agenda, and Mr. Tommy Thurston properly seconded the motion. The Agenda was approved, as submitted, and the motion was carried by unanimous voice vote.

APPROVAL OF MINUTES

Mr. Stiff asked the Board for a motion to approve the Minutes from the December 11, 2014, Board meeting. On proper motion by Mr. Tommy Thurston and seconded by Mr. Richardson, the Minutes were approved by unanimous voice vote.

PUBLIC COMMENTS

Mr. Stiff opened the floor for comments from the public, however, there were no comments. Mr. Stiff then turned the meeting over to Chair Milly Rodriguez, who arrived a little late, to continue presiding.

OLD BUSINESS

Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program

Mr. Jay Withrow, Director of Legal Support, BLS, VPP, ORA, OPP & OWP for the Department, informed the Board that the package looks familiar because 99 percent of it was presented by him to the Board during the last Board meeting on July 9, 2015. He explained that after the package was submitted for comment, he had another idea that he wanted to add, so the Department withdrew the NOIRA and have brought it back now to consider an additional item. He continued by stating that this is a request for the Board to authorize the Department to initiate the regulatory process to amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

He stated that he went through a list of issues back in July and he was not planning to go through the list again, unless the Board needed him to. He began by discussing the newest section to be reviewed which reads as follows:

Allowing VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (MUTCD) in any contract for construction, repair or maintenance between either the Commonwealth or one of its local governments, which provides that the parties assure compliance with the VDOT Work Area Protection Manual.

He informed the Board that there is a federal identical OSHA regulation that incorporates by reference the Manual on Uniform Traffic Control Devices (MUTCD) which details traffic control in construction work projects – work zones. That regulation was not developed by OSHA, but instead, it was developed by the U.S. Department of Transportation (DOT). When the regulation was drafted, DOT was not thinking of it as an enforceable regulation, so a lot of language in it is references that employers “should” do this or you “may” do that. He stated that case law at the federal level says that OSHA cannot enforce regulatory language that is merely a recommendation, such as “should” or “may”, instead the language must be descriptive – it “shall” do this, or you “will” do this. When there are accidents in construction work zones and the Department must use the manual to see how the employer was supposed to set up the work zone to prevent the accident, so much of the document is

unenforceable. He informed the Board that VDOT developed its own manual the use of which is required in their contracts with employers.

He continued by asking the Board to consider a proposal where the Department can enforce a Virginia manual which is called the Work Area Protection Manual. The proposal from our regulation would allow the Department to enforce the Virginia Work Area Protection Manual in a situation where there is a contract either with VDOT or a locality that says you're required to comply with the Virginia manual.

When asked by Mr. Stiff if the manual is not referred to in a contract, Mr. Withrow responded that the Department would revert to using the Manual on Uniform Traffic Control. He added there will always be a fallback and that this would just be used in those contract situations. Mr. Withrow stated that Virginia would be more effective than federal OSHA on this issue. Also, he stated that from a cost standpoint, a company would include this in its bid about how much it costs to comply with the Virginia Work Area Protection Manual, and the company knows upfront what the requirements are, so there is no cost impact to this – another benefit.

He stated that the Basis, Purpose and Impact all remain the same as in the previous briefing package for the Administrative Regulations NOIRA.

In conclusion, Mr. Withrow recommended that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to amend the Administrative Regulation for the VOSH Program by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

A motion to accept the Department's recommendation was properly made by Mr. Stiff and seconded by Ms. Anna Jolly. The motion was approved unanimously by voice vote.

NEW BUSINESS

Confined Spaces in Construction, 29 CFR 1926, Subpart AA, §§1926.1200-1926.1213; and Other Related Provisions: §1926.953, Enclosed Spaces; and §1926.968, Definitions; Excavations, 29 CFR Part 1926.650-1926.652; and Underground Construction, 29 CFR 1926.800, and the Repeal of Virginia Confined Space Standard for the Construction Industry, 16VAC25-140-10 *et seq.*, Virginia Underground Construction, Construction Industry, 16VAC25-150-10, *et seq.*; and Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.*

Mr. Ron Graham, Director of Occupational Health Compliance for the Department of Labor and Industry, began by requesting the Board to consider for adoption federal OSHA's Final Rule for Confined Spaces in Construction, Subpart AA, §§1926.1200 – 1926.1213, and Other Related Provisions, as published on May 4, 2015 in 80 FR 25365. Concurrently, VOSH requested that the Board also consider the repeal of the Virginia Unique Standard for Confined Spaces in Construction, 16VAC25-140-10 *et seq.*, which would be supplanted by the new federal Confined Spaces in Construction standard.

In addition, Mr. Graham stated that VOSH also requests the repeal of the following existing unique Virginia standards which would be impacted by the above change:

- Virginia Underground Construction Standard, 16VAC25-150-10, *et seq.*, and
- Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.*

He informed the Board that both of these existing unique state standards mandate that the requirements of the Virginia Confined Space Standard for the Construction Industry, that are more stringent than corresponding requirements each contains, shall apply to underground construction areas which also meet the definition of "confined space" in Construction.

He added that the Board is also requested to adopt the existing federal identical versions of the Underground Construction Standard, §1926.800, and the Excavation Standard, §1926.650, made necessary by the repeal of the unique Virginia Confined Space Standard so as to enable the VOSH Program to continue to meet the federal requirement to remain "as effective as" the federal enforcement program itself.

The proposed effective date is January 1, 2016.

Mr. Graham summarized the federal identical Confined Spaces in Construction standard by explaining that the standard requires employers to ensure that their workers are informed about the existence, location, and dangers posed by each permit-required confined space, and that they may not enter such spaces without authorization. He defined a confined space as any space that has limited means of entry and/or exit, is large enough for a worker to enter it, and is not intended for regular/continuous occupancy. He explained that the final rule is similar in content to the general industry confined spaces standard, §1910.146, and reflects that standard's organization, language, and most substantive requirements. He listed aspects of construction industry activity that are not present in general industry work, including: information exchange requirements to ensure that multiple employers have shared vital safety information; addressing the heightened need, on constantly evolving construction worksites for communication, worksite evaluation; and training for confined spaces in construction.

Mr. Graham listed several types of confined spaces that may be found on construction sites, such as: manholes, tanks, pits, boilers, and bins, common hazards, i.e., acute atmospheric (respirable) hazards – e.g., carbon monoxide; explosive hazards, e.g., combustible dusts; and physical hazards, e.g., fall hazards. He then listed activities that are excluded from the Confined Spaces in Construction Standard, i.e., diving, Subpart Y; excavations, Subpart P; and Underground Construction, Caissons, Cofferdams and Compressed Air, Subpart S.

After explaining the distinctions between the new requirements of the Confined Spaces in Construction Standard and the General Industry Confined Spaces Standard, Mr. Graham detailed the five new requirements for the Confined Spaces in Construction standard which include: providing more detailed provisions requiring coordinated activities when there are multiple employers at the worksite; requiring a competent person to evaluate the work site and identify confined spaces before work begins; requiring continuous monitoring of atmospheric and engulfment hazards; and allowing for the suspension of a permit, instead of cancellation, in the event of changes from the entry conditions listed on the permit or an unexpected event requiring evacuation of the space.

He then described added provisions to the new rule that clarify existing requirements in the General Industry standard, §1910.146, including: alternate procedures; requiring employers to arrange for local emergency services and for the emergency responders to give employers advance notice if they will be unable to respond for a period of time because of other emergencies; and requiring employers to provide training in a language and vocabulary that the worker understands. Mr. Graham explained several important defined terms in §1926.1202, such as: "entry employer", "controlling contractor", "host employer"; "entry", and "entry rescue".

Next, he detailed the general requirements for confined spaces; permit-required confined space written program; permitting process; training; entrants, attendants, and entry; and rescue and emergency services.

With respect to the Basis for the final rule, Mr. Graham informed the Board that federal OSHA published an Advance Notice of Proposed Rulemaking (ANPR) on confined spaces for the construction industry on March 25, 1980, and that federal OSHA issued the general industry confined spaces standard on January 14, 1993. The Safety and Health Codes Board adopted an identical version of the federal standard on June 21, 1993, with an effective date of September 1, 1993. At the same time, the Board amended the Virginia Confined Space Standard by deleting the applicability of the Virginia standard to general industry and, thereby, restricting its applicability to the construction industry and telecommunications.

With respect to the purpose of the Final Rule, Mr. Graham stated that the new standard will provide construction workers with protections similar to those which manufacturing and general industry workers have had for more than two decades, with some differences tailored to the construction industry.

Next, he discussed other VOSH standards impacted by the adoption of the final rule, starting with existing federal identical standards impacted: OSHA removed paragraph (b)(6) of §1926.21, Safety Training and Education; amended Subpart V of Part 1926 – Power Transmission and Distribution – to replace references to the general industry confined spaces standard with references to this final construction rule; amended paragraphs (a) and (g) of §1926.953 by replacing each reference to “§1910.146” with a reference to “Subpart AA” so that the appropriate construction standards apply; and in §1926.968, Definitions, a note was added to the definition of “enclosed space” that corresponds to the note in paragraph §1910.269 (x). The note in 1926.968 references “subpart AA.”

Mr. Graham also discussed the existing Virginia unique Standards impacted by the adoption of the final rule which include: the repeal of the unique Virginia Confined Space Standard in Construction, 16VAC25-140-10, *et seq.*, which is necessitated because it is being replaced by the new federal rule. This repeal will then necessitate the repeal of two other standards: the unique Virginia Underground Construction Standard, 16VAC25-150-10, *et seq.*, and the unique Virginia Excavation Standard, 16VAC25-170-10, *et seq.*, as these two standards reference the Virginia Confined Space in Construction Standard being repealed. The repeal of the two other Virginia standards noted above will then necessitate the adoption of federal identical versions of the Underground Construction Standard, 29 CFR Part 1926.800, and the Excavation Standard, 29 CFR Part 1926.650 in order for the VOSH Program to retain its “as effective as” status required by the federal OSHA enforcement program.

Mr. Graham referred the Board to the list of establishments impacted by the new standard.

With respect to the impact of this new standard, Mr. Graham stated that OSHA recognizes that requiring employers to comply with different standards for employers to comply with two different sets of procedures to perform maintenance and construction work at the same time in the same confined space creates a burden. Therefore, issuing a final standard that is similar to its general industry counterpart is not drastically changing industry practice for addressing confined space hazards. He reiterated the duties of all employers engaged in construction work, for example: identify confined spaces at their worksites; establish a written program; issue entry permits for qualifying confined spaces; exchange of information on the hazards of permit spaces with other affected employers; train affected employees; provide for rescue and emergency services, and assign duties to authorized entrants, attendants, and supervisors.

He stated that in Virginia, it is estimated that there are 13,000 establishments with approximately 134,000 employees affected by the final rule. Additionally, he informed the Board that in Virginia, there have been eight fatalities and three non-fatal accidents involving confined spaces.

He stated that the new standard will provide construction workers with new additional protections similar to those that have been provided to manufacturing and general industry workers for more than two decades, and that OSHA estimates that it will also reduce the number of related fatalities. He stated that no additional costs to the Department are anticipated with the adoption of this new standard and the related changes because VOSH has been enforcing the unique Virginia Confined Space Standard covering the Construction Industry since January 1, 1988.

Mr. Graham listed the benefits of the new standard, and noted that federal OSHA determined that this final standard will facilitate a 96 percent reduction nationally in the average number of fatalities and injuries in confined spaces covered by this standard. He also noted that this does not assume the impacts of a pre-existing Virginia unique standard, although it was less comprehensive than the new federal standard.

In discussing the costs of the new standard, Mr. Graham stated that OSHA estimated national cost of compliance to total \$60.3 million and VOSH estimated cost of compliance for Virginia employers to be \$1.6 million. He further explained that it is anticipated that the actual costs of compliance for Virginia employers will be significantly less than the costs listed in the briefing packages which are based on the federal estimates and assumed no preexisting state unique standard.

With respect to technological feasibility, Mr. Graham explained that none of the requirements, including the new requirements which are not in §1910.146, present any technological feasibility concerns since the provisions simply require observation of hazards, training, and communication among all parties, including employees and all employers at a worksite. Mr. Graham also stated that compliance with the requirements of the final rule is economically feasible in every affected industry sector.

Mr. Stiff expressed confusion and asked for clarity concerning the language in the middle of page 3 of the briefing package which read: "Section 1926.1201(a) makes it clear that the focus of the final standard is on the type of work performed...", then in the next paragraph the language says "...the presence of a confined space on the worksite triggers this duty rather than the type of work the employer is performing." Another point of clarification concerned employers who rely on local emergency services having to arrange for responders to give the employer advance notice if they will be unable to respond for a period of time because they are responding to another emergency, attending department-wide training, etc. Mr. Stiff asked what is really meant by this statement and how will the Department enforce it. Mr. Graham responded that he does not think the standard mandates the use of a local rescue service. Maybe, employers should look into developing their own rescue team. Mr. Graham added that the Department may have to look at this on a case-by-case basis, and consult with federal OSHA. Mr. Graham agreed to get clarification. When asked by Ms. LePrell, Mr. Graham explained the term "competent person". Mr. Stiff stated that his questions could be followed up on because he didn't think they were pivotal to the protection of the standard. Mr. Malveaux agreed that the Board could get clarification on the questions later.

In conclusion, on behalf of the Department of Labor and Industry, Mr. Graham recommended that the Board adopt the following:

Federal OSHA's new final rule:

- Confined Spaces In Construction, 29 CFR Part 1926, Subpart AA, §1926.1200 – 1926.1213; and Other Related Provisions: §1926.953, Enclosed Spaces; and §1926.968, Definitions;

The existing federal-identical construction industry standards for:

- Excavations, 29 CFR Part 1926.650 through 29 CFR Part 1926.652; and
- Underground Construction, 29 CFR Part 1926.800.

As a necessary part of the above action staff also recommended that the Board act to repeal:

- Virginia Confined Space Standard for the Construction Industry, 16VAC25-140-10 *et seq.*;
- Virginia Underground Construction, Construction Industry, 16VAC25-150-10, *et seq.*; and
- Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.*

These above actions are authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of January 1, 2016.

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

A motion to accept the Department's recommendation was properly made by Mr. Stiff and seconded by Mr. Malveaux. The motion was approved unanimously by voice vote.

Report of Periodic Review of Certain Existing Regulations – Departmental Review and Findings

Ms. Reba O' Connor, Regulatory Coordinator for the Department, explained that the following three regulations of the Board had been identified for review in 2015 in accordance with Executive Order 17 (2014):

1. Financial Responsibility of Boiler & Pressure Vessel Contact Fee Inspectors, 16VAC25-55;
2. Regulation Applicable to Tree Trimming Operations, 16VAC25-73; and
3. Telecommunications, General, Approach, Distances, 16VAC25-75.

She reminded the Board of its approval at the July 9, 2015, meeting for the Department to proceed with the periodic review process which had a public comment period of the required 21 days. She stated that the public comment period began on August 10, 2015, when the Notice of Periodic Review was published, and closed on August 31, 2015. She informed the Board that no comments were received for any of the regulations during the public comment period and that following the public comment period, Department staff reviewed the regulations and prepared recommendations for the Board's consideration at this meeting.

She explained that the Department is obligated to evaluate the economic impact of these regulations on small businesses, which must consider: the continued need for the regulation; the complexity of the regulation; the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law

or regulation; and the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

With respect to Financial Responsibility of Boiler and Pressure Vessel Contact Fee Inspectors, 16VAC25-55, Ms. O'Connor stated that the regulation is not overly complex, has no negative impact on the regulated community and does not overlap, duplicate, or conflict with federal or state law or regulation. She also stated that the Department recommended that this regulation be retained with no changes.

With respect to the Regulation Applicable to Tree Trimming Operations, 16VAC25-73, she explained that the Department determined that the current regulation is the least burdensome alternative for the protection of employees working in tree trimming occupations; and, since the Logging Standard did not apply to tree trimming activities where a tree was not felled or cut down, no alternatives were considered for this regulation because there is no viable alternative to this regulation. She explained that the regulation was promulgated in 2011, and this is the first review since that time. She informed the Board that during the Public Comment period no online comments were posted on the Regulatory Town Hall, however, there was one emailed comment with an attached letter from the Tree Care Industry Association, Inc. (TCIA) expressing support for retaining the regulation. Again, the Department recommended that this regulation be retained with no changes.

Ms. O'Connor stated that, with the regulation on Telecommunications, General, Approach, Distances, 16VAC25-75, there is a continued need for this regulation because it ensures uniformity of the regulations for General Industry, Construction, and Telecommunication workers who perform the same type of electrical transmission work. The regulation is not overly complex, has no negative impact on the regulated community and does not overlap, duplicate, or conflict with federal or state law or regulation; and no alternatives were considered. The Department recommended retaining this regulation without changes.

She concluded with a request that the Board vote to retain these three regulations with no changes.

Mr. Malveaux asked if any other state had adopted Tree Trimming regulations, and Mr. Withrow responded that Maryland had adopted a tree trimming regulation as a direct result of Virginia's regulation.

A motion to accept the Department's recommendation was properly made by Mr. Richardson and seconded by Ms. Jolly. The motion was approved unanimously by voice vote.

There were no **Items of Interest from the Department or from the Board**

Adjournment

There being no further business, a motion was made by Mr. Stiff and properly seconded by Mr. Martinez to adjourn the meeting. The motion was carried unanimously by voice vote. The meeting adjourned at 11:25 a.m.



COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

VIRGINIA SAFETY AND HEALTH CODES BOARD

Briefing Package

March 3, 2016

Proposed Amendments to the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, 16VAC-25-60, et seq.

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption, as a proposed regulation of the Board, the attached proposed language to amend the Administrative Regulation for the VOSH Program, 16VAC25-60, et seq.

II. Summary of the Issues Under Consideration for Amendment

This proposed amendment addresses certain issues in regard to the Administrative Regulation of the VOSH Program:

- Allowing VOSH to enforce the requirements of the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices, i.e., Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition, in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments and an employer, where such contract stipulates employer compliance with the VDOT Work Area Protection Manual.

Although the federal MUTCD has been adopted by OSHA and VOSH in §§1926.200 through 1926.202, a significant amount of the language provisions therein are merely recommended and non-compulsory, i.e., the terms "should" or "may" are used rather than the mandatory "must" or "shall" for desired activities and procedures, and are therefore not enforceable in a compliance

setting. To mitigate this problem, VDOT has adopted its own Work Area Protection Manual which contains fewer “shoulds” and “mays”. VDOT routinely specifies language in its contracts with employers that requires employer compliance with the VDOT Work Area Protection Manual.

- Clarification of anti-retaliation safeguards for public sector employees, *16VAC25-60-30*. Allowing Commonwealth’s Attorney to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30.F*.
- Allowing the Commissioner to petition the Cabinet Secretary and then the Executive regarding resolution of anti-retaliation violations with a state agency, *16VAC25-60-30.G*.
- Virginia Freedom of Information Act requirements in regard to the Voluntary Protection Program, *16VAC25-60-90*.
- Change of section title(s) to reflect recent terminology changes in occupational discrimination or anti-retaliation cases, *16VAC25-60-110*.
- Clarifies that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage, *16VAC25-60-110*.
- Title update to reflect naming change with regard to the Commissioner's authority to issue administrative subpoenas, *16VAC25-60-245*.
- Clarifying that the “burden of proof” in VOSH court cases is by a “preponderance of the evidence”, *16VAC25-60-260*.
- Clarifying that the burden for proving an affirmative defense to a citation lies with the employer, *16VAC25-60-260*.

III. **Basis, Purpose and Impact of the Proposed Rulemaking.**

A. **Basis.**

The Safety and Health Codes Board is authorized by Title 40.1-22(5) to:

“... adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be necessary to carry out its functions established under this title”.

“In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity”.

“However, such standards shall be at least as stringent as the standards promulgated by the federal OSH Act of 1970 (P.L.91-596). In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws.”

B. Purpose

The purpose of amending the Administrative Regulation is to make certain substantive, procedural and clarifying changes that reflect current VOSH policy:

1. Amendment to 16VAC25-60-130 allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition) in any contract for construction, repair or maintenance between either the Commonwealth or one of its local governments and an employer, when such contract provides that the parties assure compliance with the VDOT Work Area Protection Manual. A housekeeping change to renumber all paragraphs in §§16VAC25-60-120 through 16VAC25-60-150 correctly is also proposed here.
2. Amendment to 16VAC25-60-30.D clarifies whistleblower anti-retaliation safeguards for public sector employees other than the Commonwealth and its agencies, e.g., political subdivisions such as city and county governments.

The VOSH ARM defines the term "public employer" in §16VAC25-60-10 as:

"Public employer" means the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.

The current wording of §16VAC25-60-30.D applies §40.1-51.2:2.A of the *Code of Virginia* to all public employers, i.e., both state and local government, but states that the Commissioner shall not bring an action in Circuit Court for a violation involving a public employer.¹ This language appears to conflict with paragraph §16VAC25-60-30.E's comprehensive application of §40.1-51.2:2. of the *Code of Virginia* to political subdivisions or public bodies, which allows the Commissioner to litigate such a violation in Circuit Court.

Prior to proposing this amendment, it has been the Department's position that the right of the Commissioner to litigate a violation against a political subdivision or public body in §16VAC25-60-30.E, takes precedence over §16VAC25-60-30.D, because paragraph E. is the more specific provision in that it specifically applies §40.1-51.2:2 to a subset of the broader

category of the term "public employer". The proposed amendment will eliminate this conflict.

3. Amendment to 16VAC25-60-30.E applies §40.1-7 of the *Code of Virginia* to public employers other than the Commonwealth and its agencies, which will allow Commonwealth's Attorneys to act on behalf of the Commissioner in certain situations involving those public sector employers.

Section 16VAC25-60-30.E provides that the following sections of the Code of Virginia apply to public employers other than the Commonwealth and its agencies:

- a. §40.1-49.4.F - Commissioner's authority to seek injunctive relief in certain situations.
 - b. Commissioner's authority to obtain administrative search warrants under §§40.1-49.9 through -49.12 of the *Code of Virginia*.
4. Amendment to 16VAC25-60-30.G clarifies that when seeking to resolve whistleblower anti-retaliation cases involving the Commonwealth and its agencies, the Commissioner will petition the appropriate state official in a manner similar to that specified in 16VAC25-60-300.B, which outlines the process for resolving failure to abate issues involving the Commonwealth and its agencies.

Section 16VAC25-60-300.B provides:

"B. Whenever the Commonwealth or any of its agencies fails to abate a violation within the time provided in an appropriate final order, the Commissioner of Labor and Industry shall normally petition for redress as follows: For violations in the Department of Law, to the Attorney General; for violations in the Office of the Lieutenant Governor, to the Lieutenant Governor; for violations otherwise in the executive branch, to the appropriate cabinet secretary; for violations in the State Corporation Commission, to a judge of the commission; for violations in the Department of Workers' Compensation, to the Chairman of the Workers' Compensation Commission; for violations in the legislative branch of government, to the Chairman of the Senate Committee on Commerce and Labor; for violations in the judicial branch, to the chief judge of the circuit court or to the Chief Justice of the Supreme Court. Where the violation cannot be timely resolved by this petition, the commissioner shall bring the matter to the Governor for resolution."

5. Amendment to 16VAC25-60-90 clarifying Virginia Freedom of Information Act (FOIA) requirements in regard to the Voluntary Protection Program, §40.1-49.13 of the *Code of Virginia*. The proposed amendment tracks federal OSHA's FOIA provisions for the federal

VPP and provides that the following documents are releasable pursuant to an FOIA request:

- Participant applications and amendments;
 - Onsite evaluation reports;
 - Annual self-evaluations;
 - Agency staff correspondence containing recommendations to the Commissioner;
 - Approval letters; and
 - Notifications to compliance staff removing the participants from the general inspection list, Related formal correspondence.
6. Amendment to 16VAC25-60-110 specifies that occupational safety and health anti-discrimination cases will also be referred to as "whistleblower" cases. This terminology change reflects changes implemented by federal OSHA to refer to employees who allege discriminatory practices by an employer when the employees have engaged in activities protected by §11(c) of the OSH Act of 1970, as "whistleblowers".
7. Amendment to 16VAC25-60-110 clarifies that the Commissioner may request penalties that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation stage pursuant to §40.1-51.2:2.

Section 40.1-51.2:1 prohibits employers from discriminating against employees who have exercised their safety and health rights under Title 40.1. Section 40.1-51.2:2.A provides that the Commissioner shall bring an action in Circuit Court when it is determined that a violation of 40.1-51.2:1 has occurred and attempts at conciliation have failed. Section §40.1-51.2:2.A further provides that the court "...shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief...."

The amendment clarifies that the court's authority to "restrain violations and order appropriate relief" includes the ability to issue penalties or fines to the employer which would be payable to the employee.

8. Amendment to 16VAC25-60-245 clarifies that the Commissioner's authority in Subdivision 4 of § 40.1-6 of the Code of Virginia to take and preserve testimony, examine witnesses and administer oath constitutes an administrative subpoena power.
9. Amendment to 16VAC25-60-260 clarifies that the Commissioner's burden of proving the basis for a VOSH citation, penalty and order of abatement is by a "preponderance of the evidence". While the Virginia Court of Appeals has ruled that the burden of proof for the Commissioner in a VOSH case is by a preponderance of the evidence (Nat'l Coll. of Bus. & Tech., Inc. v. Davenport, 57 Va. App. 677, 685, 705 S.E. 2d 519, 523 (2011)), the issue has not been definitively ruled on by the Virginia Supreme Court.

10. Amendment to 16VAC25-60-260 clarifies that the burden for proving an affirmative defense to a citation lies with the defendant. While it is generally accepted in case law that the burden for proving an affirmative defense to an OSHA/VOSH citation lies with the employer, it is not conclusively so. For instance the Fourth Circuit Court of Appeals has ruled that the burden of proving unforeseeable and unpreventable employee misconduct lies with the government (*Ocean Electric Corp. v. Sec of Labor*, 594 F. 2d 396 (4th Cir. 1979); and *L.R. Willson & Sons, Inc. v. Occupational Safety and Health Review Comm'n*, 134 F. 3d 1235 (4th Cir.), cert denied, 525 U. S. 962 (1998)). While the Virginia Court of Appeals has ruled that the burden of proof on the issue of employee misconduct lies with the employer in Virginia (*Magco of Maryland, Inc., v. Barr*, 33 Va. App. 78, 531 S. E. 2d 614 (2000)), the issue has not been definitively ruled on by the Virginia Supreme Court.

C. Impact on Employers

Employer impact is discussed by item number listing from Section B. above:

Item 1. The amendment to 16VAC25-60-130, which allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices in certain situations, will subject employers to the potential for VOSH citations and penalties should they violate requirements in the Manual. However, by the terms of the regulation, such violations and penalties will only be issued in situations where the employer violates a contract freely and voluntarily entered into with a public sector body. Since such an employer is bound contractually to comply with the VDOT Work Area Protection Manual and incur the costs associated with compliance, the proposed regulation will place no additional financial burden on the employer for compliance with the VDOT requirements.

Items 2. - 6. No additional impacts on employers are anticipated.

Item 7. Employers could accrue increased costs in cases where the Commissioner files a complaint in Circuit Court alleging that an employer discriminated against a whistleblower employee should the Commissioner request and the Court grant additional penalties or fines under its authority to restrain violations and order appropriate relief. The fiscal impact is very limited as VOSH whistleblower court cases average less than one per year.

Items 8. - 10. No additional impacts on employers are anticipated.

D. Impact on Employees

Employees should be provided with additional safety and health protections in construction work zones as the amendment to 16VAC25-60-130 will permit VOSH to enforce the VDOT Work Area Protection Manual in certain situations in lieu of enforcing 1926.200 through 1926.202

which incorporate by reference Part VI of the Manual of Uniform Traffic Control Devices (MUTCD), 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition.

Employees should benefit from the amendment to 16VAC25-60-110 that clarifies that the Commissioner may request penalties or fines that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation stage pursuant to §40.1-51.2:2. Although litigated cases are infrequent, the possibility that a court could restrain violations by adding additional fines or penalties should serve to deter discriminatory conduct by employers.

No adverse impacts to employees are anticipated from the adoption of the proposed amendments.

E. Impact on the Department of Labor and Industry.

Other than training DOLI employees on the changes to the regulation, no additional fiscal or other programmatic impacts are anticipated for the Department if the proposed amendments are adopted.

Footnote:

¹ Section §40.1-51.2:2.A of the *Code of Virginia* contains several provisions:

- The right of an employee who believes he or she has been discriminated against to file a complaint with the Commissioner of Labor and Industry.
- The complaint must be filed within 60 days after such violation occurs.
- Failure to file the complaint within 60 days bars the employee from seeking relief under §40.1-51.2:2.
- The Commissioner is authorized to conduct investigations of timely complaints received.
- If the Commissioner determines that a violation of the statute has occurred, settlement must be attempted.
- If voluntary settlement cannot be reached, the Commissioner will file litigation in Circuit Court.
- The Court has jurisdiction to "restrain violations and order appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay plus interest at a rate not to exceed eight percent per annum."

Contact Person:

Mr. Jay Withrow
Director, Legal Support, VPP, ORA, OPP, and OWP
(804) 786-9873
withrow.jay@dol.gov

RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board consider for adoption, as a proposed regulation of the Board, the attached proposed amendments to the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program; 16VAC25-60, *et seq.*, in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act §2.2-4000, *et seq.*

The Department also recommends that the Board state in any motion it may make that it will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision of any regulation under the purview of the Board.

**Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program, 16VAC25-60, et seq.**

As Adopted by the
Safety and Health Codes Board

Date: _____



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

**Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program, 16VAC25-60, et seq.**

Part II
General Provisions

....

16VAC25-60-30. Applicability to public employers.

- A. All occupational safety and health standards adopted by the board shall apply to public employers and their employees in the same manner as to private employers.
- B. All sections of this chapter shall apply to public employers and their employees. Where specific procedures are set out for the public sector, such procedures shall take precedence.
- C. The following portions of Title 40.1 of the Code of Virginia shall apply to public employers: §§ 40.1-10, 40.1-49.4 A(1), 40.1-49.8, 40.1-51, 40.1-51.1, 40.1-51.2, 40.1-51.2:1, 40.1-51.3, 40.1-51.3:2, and 40.1-51.4:2.
- D. Section 40.1-51.2:2 A of the Code of Virginia shall apply to ~~public employers~~ the Commonwealth and its agencies except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained.
- E. Sections 40.1-7, 40.1-49.4 F, 40.1-49.9, 40.1-49.10, 40.1-49.11, 40.1-49.12, and 40.1-51.2:2 of the Code of Virginia shall apply to public employers other than the Commonwealth and its agencies.
- F. If the commissioner determines that an imminent danger situation, as defined in § 40.1-49.4 F of the Code of Virginia, exists for an employee of the Commonwealth or one of its agencies, and if the employer does not abate that imminent danger immediately upon request, the Commissioner of Labor and Industry shall forthwith petition the governor to direct that the imminent danger be abated.
- G. If the commissioner is unable to obtain a voluntary agreement to resolve a violation of § 40.1-51.2:1 of the Code of Virginia by the Commonwealth or one of its agencies, the Commissioner of Labor and Industry shall petition for redress in the same manner as provided in ~~this chapter~~ 16VAC25-60-300.B.

....

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 pursuant to § 40.1-49.8 of the Code of Virginia are confidential. Pursuant to the requirements set forth in § 40.1-11 of the Code of Virginia, individuals shall have the right to request a copy of their own interview statements.

C. All file documents contained in case files which are under investigation, and where a citation has not been issued, are not disclosable until:

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.

E. 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 nondisclosable:

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.

F. 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.

G. 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.

H. 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.

I. All information gathered through participation in voluntary protection programs of the department pursuant to §40.1-49.13 of the Code of Virginia shall be withheld from disclosure except for statistical data which does not identify individual employers and the following:

1. Participant applications and amendments, onsite evaluation reports, and annual self-evaluations;
2. Agency staff correspondence containing recommendations to the Commissioner, approval letters, notifications to compliance staff removing the participants from the general inspection list, and related formal correspondence.

I.J. 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.K. 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.

....

16VAC25-60-110. Whistleblower discrimination; Discrimination; discharge or retaliation; remedy for retaliation.

A. In carrying out his duties under § 40.1-51.2:2 of the Code of Virginia, the commissioner shall consider case law, regulations, and formal policies of federal OSHA. An employee's engagement in activities protected by Title 40.1 does not automatically render him immune from discharge or discipline for legitimate reasons. Termination or other disciplinary action may be taken for a combination of reasons, involving both discriminatory and nondiscriminatory motivations. In such a case, a violation of § 40.1-51.2:1 of the Code of Virginia has occurred if the protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity.

Employee whistleblower activities, protected by § 40.1-51.2:1 of the Code of Virginia include, but are not limited to:

1. Making any complaint to his employer or any other person under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;
2. Instituting or causing to be instituted any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;
3. Testifying or intending to testify in any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;
4. Cooperating with or providing information to the commissioner during a worksite inspection; or
5. Exercising on his own behalf or on behalf of any other employee any right afforded by the safety and health provisions of Title 40.1 of the Code of Virginia.

Discharge or discipline of an employee who has refused to complete an assigned task because of a reasonable fear of injury or death will be considered retaliatory only if the employee has sought abatement of the hazard from the employer and the statutory procedures for securing abatement would not have provided timely protection. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement. In addition, in such circumstances, the employee, where

possible, must also have sought from his employer, and been unable to obtain, an abatement of the dangerous condition.

Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations shall not be regarded as retaliatory action prohibited by § 40.1-51.2:1 of the Code of Virginia.

B. A complaint pursuant to § 40.1-51.2:2 of the Code of Virginia may be filed by the employee himself or anyone authorized to act in his behalf.

The investigation of the commissioner shall include an opportunity for the employer to furnish the commissioner with any information relevant to the complaint.

An attempt by an employee to withdraw a previously filed complaint shall not automatically terminate the investigation of the commissioner. Although a voluntary and uncoerced request from the employee that his complaint be withdrawn shall receive due consideration, it shall be the decision of the commissioner whether further action is necessary to enforce the statute.

The filing of a retaliation complaint with the commissioner shall not preclude the pursuit of a remedy through other channels. Where appropriate, the commissioner may postpone his investigation or defer to the outcome of other proceedings.

C. Section 40.1-51.2:2.A provides that the Commissioner shall bring an action in Circuit Court when it is determined that a violation of 40.1-51.2:1 has occurred and attempts at conciliating a voluntary agreement could not be obtained. Section §40.1-51.2:2.A further provides that the court "...shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief..." The court's authority to "restrain violations and order appropriate relief" includes the ability to issue penalties or fines to the employer which would be payable to the employee. In determining the appropriate level of penalties or fines, the court may look to §§40.1-49.4.G, H, I and

J.

Part III

Occupational Safety and Health Standards

16VAC25-60-120. General industry standards.

A. The occupational safety or health standards adopted as rules or regulations by the board either directly or by reference, from 29 CFR Part 1910 shall apply by their own terms to all employers and employees at places of employment covered by the Virginia State Plan for Occupational Safety and Health.

B. 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 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that 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.

16VAC25-60-130. Construction industry standards.

A. The occupational safety or health standards adopted as rules or regulations by the Virginia Safety and Health Codes Board either directly, or by reference, from 29 CFR Part 1926 shall apply by their own terms to all employers and employees engaged in either construction work or construction related activities covered by the Virginia State Plan for Occupational Safety and Health.

B. 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 29 CFR Part 1926. The use of any machinery, vehicle, tool, material or equipment that 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.

~~1-C.~~ 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.

D. The employer shall comply with the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition - referenced in 1926.200 through 1926.202), when working under any contract for construction, repair or maintenance between the employer and the Commonwealth, its agencies, authorities, or instrumentalities, or any political subdivision or public body; when such contract stipulates employer compliance with the VDOT Work Area Protection Manual in effect at the time of contractual agreement.

~~2-E.~~ Certain standards of 29 CFR Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.

~~3.F.~~ The standards adopted from 29 CFR Part 1910.19 and 29 CFR Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.

16VAC25-60-140. Agriculture standards.

A. The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1910 and 29 CFR Part 1928 shall apply by their own terms to all employers and employees engaged in either agriculture or agriculture related activities covered by the Virginia State Plan for Occupational Safety and Health.

B. For the purposes of applicability of such Part 1910 and Part 1928 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. 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 subdivision 1 of 16VAC25-60-130, 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.

C. 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 29 CFR Part 1910 or 29 CFR Part 1928. The use of any machinery, vehicle, tool, material or equipment that 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.

16VAC25-60-150. Maritime standards.

A. The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1915, 29 CFR Part 1917, 29 CFR Part 1918 and 29 CFR Part 1919 shall apply by their own terms to all public sector employers and employees engaged in maritime related activities covered by the Virginia State Plan for Occupational Safety and Health.

B. 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 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment that 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.

....

Part V
Inspections

16VAC25-60-245. Use of Administrative Subpoenas to take and preserve testimony, examine witnesses and administer oaths.

A. Subdivision 4 of § 40.1-6 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 subdivision 5 of § 40.1-6 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 subdivision 4 of § 40.1-6 of the Code of Virginia. Such appointments shall be made in writing; identify the individual being appointed, the length of appointment, and the method of withdrawal of such appointment; and specify what duties are being prescribed.

B. 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."

C. Testimony given under oath shall be recorded by a court reporter.

D. Questioning of employers, owners, operators, agents or employees under oath shall be in private in accordance with subdivision 2 of § 40.1-49.8 of the Code of Virginia.

E. 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 through 40.1-49.12 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.

F. 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 attorney for the Commonwealth for prosecution.

.....

Part VI
Citation and Penalty

16VAC25-60-260. Issuance of citation and proposed penalty.

A. Each citation shall be in writing and describe with particularity the nature of the violation or violations, including a reference to the appropriate safety or health provision of Title 40.1 of the Code of Virginia or the appropriate rule, regulation, or standard. In addition, the citation must fix a reasonable time for abatement of the violation. The citation will contain substantially the following: "NOTICE: This citation will become a final order of the commissioner unless contested within fifteen working days from the date of receipt by the employer." The citation may be delivered to the employer or his agent by the commissioner or may be sent by certified mail or by personal service to an officer or agent of the employer or to the registered agent if the employer is a corporation.

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 § 1-210 A of the Code of Virginia. The word "month" shall be construed to mean one calendar month in accordance with § 1-223 of the Code of Virginia.

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 subdivision 1 b of this subsection, 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 § 40.1-51.1 D of the Code of Virginia, the six-month time frame shall not be deemed to commence until the commissioner receives actual notice of the incident.

d. Notwithstanding subdivision 1 b of this subsection, 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 § 65.2-900 of the Code of Virginia, the six-month time frame shall not be deemed to commence until the commissioner actually receives the EAR form.

e. Notwithstanding subdivision 1 b of this subsection, 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 16VAC25-60-100 or referral, the six-month time frame shall not be deemed to commence until the commissioner actually receives the complaint or referral.

B. A citation issued under subsection A 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.

C. For the purposes of subsection B only, the term "employee" shall not include 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.

D. The penalties as set forth in § 40.1-49.4 of the Code of Virginia shall also apply to violations relating to the requirements for record keeping, reports or other documents filed or required to be maintained and to posting requirements.

E. In determining the amount of the proposed penalty for a violation the commissioner will ordinarily be guided by the system of penalty adjustment set forth in the VOSH Field Operations Manual. In any event the commissioner shall consider the gravity of the violation, the size of the business, the good faith of the employer, and the employer's history of previous violations.

F. On multi-employer worksites for all covered industries, citations shall normally be issued to an employer whose employee is exposed to an occupational hazard (the exposing employer). Additionally, the following employers shall normally be cited, whether or not their own employees are exposed:

1. The employer who actually creates the hazard (the creating employer);
2. The employer who is either:

a. 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 (the 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 (the controlling employer); or

3. The employer who has the responsibility for actually correcting the hazard (the correcting employer).

G. A citation issued under subsection F of this section 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.

H. The Commissioner's burden of proving the basis for a VOSH citation, penalty or order of abatement is by a preponderance of the evidence.

I. The burden of proof in establishing an affirmative defense to a VOSH citation resides with the employer.



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE FOR

March 3, 2016

Proposed Regulation on Virginia Voluntary Protection Programs (VPP), 16VAC25-200

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption as a proposed regulation of the Board the attached Virginia Voluntary Protection Programs (VPP), 16VAC25-200.

II. Summary of Intended Regulatory Action

On March 19, 2015, the Virginia General Assembly approved the adoption of §40.1-49.13 of the *Code of Virginia* (see Attachment 1), which codified the VOSH Voluntary Protection Program (VPP). Subsection B. of §40.1-49.13 requires the Safety and Health Codes Board to adopt a VPP regulation and provides for the following:

B. "The Safety and Health Codes Board shall adopt definitions, rules, regulations, and standards necessary for the operation of the Voluntary Protection Program in a manner that will promote safe and healthy workplaces throughout the Commonwealth. The standards for the VPP shall include the following requirements for VPP participation:

1. Upper management leadership and active and meaningful employee involvement;

2. Systematic assessment of occupational hazards;
3. Comprehensive hazard prevention, mitigation, and control programs;
4. Employee safety and health training; and
5. Safety and health program evaluation."

Subsection B. of §40.1-49.13 also provides that current participants may continue as such, but on and after July 1, 2016, their continued participation is conditional upon complying with the standards for participation ultimately adopted by the Safety and Health Codes Board.

The proposed regulation addresses the following issues:

- Scope, purpose, and applicability
- Definitions
- Categories of participation (Star, Merit, Challenge, etc.);
- Ways to participate (site-based in both general industry and construction, mobile workforce, VPP corporate);
- Application requirements;
- Comprehensive safety and health management system requirements;
- Certification and re-certification processes;
- On-site evaluations;
- Annual submissions;
- Other participation requirements;
- Enforcement activity at VPP sites; and
- Withdrawal or termination

III. **Basis, Purpose and Impact of the Proposed Rulemaking**

A. **Basis**

In Virginia, the Voluntary Protection Program was instituted in 1996 and is patterned after federal OSHA's VPP, which was originally created in 1982. The VOSH Program adopted VPP as a component of DOLI's larger mission to "...make Virginia a better place in which to work, live and conduct business...by promoting safe, healthful workplaces, best employment practices...." An employer's membership in VPP is recognized as the nation's and Virginia's highest award that can be bestowed by a government agency to an employer for excellence in occupational safety and health management systems.

The traditional site-based VPP has two levels of participation, Star worksite and Merit worksite. Star participants are a select group of worksites that have designed and implemented outstanding safety and health programs, including full and meaningful employee involvement. Merit participants are those that have demonstrated the potential and willingness to achieve Star status and are implementing planned actions

to fully meet the VPP Star requirements.

VPP also encompasses the following programs which provide interested employers and employees the opportunity to develop and implement exemplary safety and health management systems:

- Challenge – where employers guided by Challenge Administrators through a three stage process, which can prepare a company to achieve VPP Star status;
- Site-based Construction – for long term construction sites;
- Mobile Workforce – for employers that move from site to site; and
- Corporate - designed for corporate applicants.

On March 19, 2015, the Virginia General Assembly approved the amendment of the *Code of Virginia* by adding §40.1-49.13, which codifies the VPP.

B. Purpose

The purpose of the proposed change is to adopt those definitions, rules, regulations, and standards required by §40.1-49.13 of the *Code of Virginia*, and necessary for the operation of the Virginia VPP in a manner that will promote and recognize employer implementation of exceptional safety and health management systems throughout the Commonwealth. Historically, employer adoption of the VPP concepts has consistently resulted in injury and illness rates 50 % or more below that of the employer's industry as a whole.

C. Impact on Employers

VPP is a voluntary program so there is no negative impact on Virginia's employers that are not program participants. Program participants do incur costs associated with developing and implementing safety and health management systems that often exceed current requirements in VOSH laws, standards and regulations. However, the costs are incurred on a voluntary basis.

Employers that take proactive steps to improve safety and health protections for employees can realize significant savings and avoided costs associated with workplace injuries and illnesses. In 2015, the National Safety Council reported that the average cost of a medically consulted occupational injury in 2013 was \$42,000. In 2013, the Washington Post reported that the average net profit margin for all U.S. companies was 8.2 percent. With a net profit margin of 8.2%, a business would need to generate \$512,195 in new revenues to simply pay for the costs of that single injury.

The Department tracks injury and illness rates for each VPP site on an annual basis. Virginia VPP participating worksites average more than 50 % lower injury and illness rates than their non-participating counterparts in their respective industries. Virginia VPP helps employers identify and correct occupational hazards in a proactive and cooperative approach that will reduce or eliminate debilitating injuries, illnesses and

fatal accidents suffered by Virginia's employees. Nationally, VPP sites' recordable injury and illness rates for VPP sites have averaged 50 % below that of other worksites in their industry.

VPP Star sites regularly report decreased bottom line expenditures, which are associated with both drastically reduced injury and illness rates, and improved productivity and employee morale. Reducing private sector employer costs associated with injuries, illnesses and fatal accidents enhances a company's economic viability and competitiveness, and increases available capital for reinvestment, expansion and new hiring.

Virginia VPP worksites have demonstrated over many years that VPP participation will:

- substantially reduce workplace injuries and illnesses;
- reduce workers' compensation costs;
- result in a more highly trained and experienced workforce;
- improve company productivity; and
- promote competitiveness in the marketplace.

VPP is available to private and public sector employers of all sizes. For example, it includes the Dominion Power North Anna nuclear facility, which has almost 1,000 employees as well as Veritiv-Lynchburg with approximately ten employees. A small sample of other participants in the Virginia VPP include: Delta Airlines, Miller Coors, Raytheon, Eastman Chemical Company, and International Paper.

Virginia was the first VPP in the country to recognize state correctional institutions as VPP members – Augusta and Lunenburg Correctional Facilities of the Virginia Department of Corrections (VADOC). Both facilities have consistently incurred lower workers' compensation costs than other comparable Virginia Department of Corrections (VADOC) sites and have significantly lower injury and illness rates than the national rates for correctional facilities.

VADOC, a participant in the VPP program since 2001, estimates that the Commonwealth saved approximately \$1.5 million at Lunenburg Correctional Center (LCC) between 2002 and 2006. VADOC further estimates that since 2001, based on a 2009 comparative analysis, the five other medium security dormitory-design Virginia correctional centers achieved similar results in VPP to that of LCC. The potential savings may have been approximately \$3 million in direct (insured) costs and \$10.4 million in indirect costs, for a total savings of \$13.4 million. With the program's continued expansion into other state facilities, the Commonwealth could expect increased savings. Other state agencies, as well as local governments, could also experience these benefits from participating in VPP.

Virginia's VPP has recognized a total of 66 Star worksites since the program began in 1996. Currently, there are a total of 45 active Star sites providing exceptional worksite safety and health protections for more than 11,000 employees through Virginia's VPP. [*Virginia Capitol Connections, Winter 2015, p.12*]. The number of Star worksites in the

program fluctuates for a variety of reasons, including a site's withdrawal because injury and illness rates become too high; a business gets downgraded; a site is purchased by another company; or a business site closes.

Virginia VPP sites host VPP Best Practices Days which annually provide occupational safety and health training and education to current and prospective VPP members, state and local government entities, as well as other selected invitees. Recent subjects covered include:

- electrical safety;
- lockout/tagout protection;
- workplace violence and active shooter scenarios;
- ergonomics;
- fall protection in general industry;
- machine guarding;
- safety and health wellness fairs; and
- forklift safety.

D. Impact on Employees

VPP participation benefits employees by enhancing workplace safety and health practices; reducing workplace injuries and illnesses and the associated workers' compensation and medical costs; and improving employee morale.

VPP participation encourages active employee involvement in safety and health, which can lead to higher quality production, increased productivity and better general housekeeping. Employee suggestions translate into improved efficiency and other exceptional business metrics. [*Virginia Capitol Connections, Winter 2015, p. 13*]

The Virginia VPP tracks injury and illness rates at each VPP site on an annual basis. Virginia VPP participating worksites average over 50 % lower injury and illness rates than their counterparts in their respective industries.

E. Impact on the Department of Labor and Industry

Expanding Virginia's VPP will promote safer and healthier work places in Virginia by using a proactive, cooperative approach between employers, employees and Virginia government, rather than a punitive one. The Department benefits from this cooperative relationship by having exemplary sites to lead and guide other employers to improve their occupational safety and health performance.

Once a site has qualified and successfully submitted an application for consideration in the VPP Star program, final approval requires an intensive weeklong onsite evaluation by a VOSH VPP team. Final approval is determined by DOLI's Commissioner. VPP participants are exempt from regular VOSH programmed compliance inspections while they maintain their VPP status. Each VPP member site is required to be re-certified by

an onsite evaluation team of safety and health professionals every 3-4 years to remain in VPP.

Adopting a regulation for the operation of VPP and establishing a formal and permanent structure for VPP will also assist DOLI in its pursuit of several bold initiatives it hopes will greatly enhance safety and health protections for Virginia's workers.

First, DOLI is using VPP staffing resources to work cooperatively with the Virginia Associated General Contractors (AGC) to establish a pilot strategic partnership, known as Virginia BEST (Building Excellence in Safety and Health Training) to encourage and recognize construction contractors who voluntarily implement extensive safety and health management systems to benefit construction workers. Virginia BEST is a modified version of the Challenge concept where employers are guided by Challenge Administrators through a three stage process to achieving exemplary safety and health management systems.

Second, DOLI is developing a pilot strategic partnership with the Virginia Department of Corrections (VADOC) to substantially increase VADOC participation in VPP. The VADOC partnership will use Challenge concepts as well.

Finally, DOLI is working to expand the scope of VPP by implementing a Virginia unique version of the OSHA Challenge Program which would establish three levels of participation for employers wishing to enhance their safety and health management systems.

Contact Person:

Mr. Jay Withrow
Director, Legal Support, VPP, ORA, OPP and OWP
(804) 786-9873
withrow.jay@dol.gov

RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board consider for adoption as a proposed regulation of the Board, the attached draft of 16VAC25-200, Virginia Voluntary Protection Programs in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act §2.2-4000, *et seq.*

The Department also recommends that the Board state in any motion it may make that it will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision of any regulation under the purview of the Board.

VIRGINIA ACTS OF ASSEMBLY -- 2015 SESSION

CHAPTER 339

An Act to amend the Code of Virginia by adding a section numbered 40.1-49.13, relating to Safety and Health Codes Board; establishment of a Voluntary Protection Program.

[H 1768]

Approved March 19, 2015

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 40.1-49.13 as follows:

§ 40.1-49.13. Voluntary Protection Program.

A. As used in this section:

"Model system" means an exemplary, voluntarily implemented worker safety and health management system that (i) implements comprehensive safety and health programs that exceed basic compliance with occupational safety and health laws and regulations and (ii) meets the VPP standards adopted by the Safety and Health Codes Board pursuant to subsection B.

"Voluntary Protection Program" or "VPP" means a program under which the Commissioner recognizes and partners with workplaces in which a model system has been implemented.

B. The Safety and Health Codes Board shall adopt definitions, rules, regulations, and standards necessary for the operation of the Voluntary Protection Program in a manner that will promote safe and healthy workplaces throughout the Commonwealth. The standards for the VPP shall include the following requirements for VPP participation:

- 1. Upper management leadership and active and meaningful employee involvement;*
- 2. Systematic assessment of occupational hazards;*
- 3. Comprehensive hazard prevention, mitigation, and control programs;*
- 4. Employee safety and health training; and*
- 5. Safety and health program evaluation.*

C. Applications for participation in the VPP shall be submitted by the workplace's management. Applications shall include documentation establishing to the satisfaction of the Commissioner that the employer meets all standards for VPP participation.

D. The Department shall provide for onsite evaluations by VPP evaluation teams of each workplace that has applied to participate in the VPP to determine that the applicant's workplace complies with the standards for VPP participation.

E. A workplace's continued participation in the VPP shall be conditioned on compliance with the standards for VPP participation, as determined by periodic onsite evaluations by VPP evaluation teams.

F. During periods in which a workplace is a participant in the VPP, the workplace shall be exempt from inspections or investigations under § 40.1-49.4; however, this exception shall not apply to inspections or investigations of the workplace arising from complaints, referrals, fatalities, catastrophes, nonfatal accidents, or significant toxic chemical releases.

2. That any workplace that was a participant in the uncodified voluntary protection program conducted by the Department of Labor and Industry prior to July 1, 2015, may continue as a participant in the Voluntary Protection Program established pursuant to § 40.1-49.13 of the Code of Virginia, as created by this act. On and after July 1, 2016, the continued participation by such a workplace in the Voluntary Protection Program shall be conditioned upon the workplace's compliance with the standards for participation in the Voluntary Protection Program adopted by the Safety and Health Codes Board pursuant to subsection B of § 40.1-49.13.

**Proposed Regulation on
Virginia Voluntary Protection Programs,
16VAC25-200**



As Adopted by the
Safety and Health Codes Board

Date: _____

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16VAC25-200

16VAC25-200-10. Scope, purpose, and applicability.

A. Scope.

In accordance with the requirements of §40.1-49.13 of the *Code of Virginia*, this regulation establishes requirements for Virginia Occupational Safety and Health (VOSH) Voluntary Protection Programs (VPP) as established by the Commissioner and based on the following principles:

1. Participation in VPP is strictly voluntary. The applicant who wishes to participate freely submits information to VOSH on its safety and health management system and opens itself to agency review.
2. VPP emphasizes trust and cooperation between VOSH, the employer, employees, and employee representatives and is complementary to the agency's enforcement activity, but does not take its place. This partnership enables the agency to remove participating sites from programmed inspection lists, allowing it to focus inspection resources on establishments in greater need of agency oversight and intervention. However, VOSH will continue to investigate valid employee safety and health complaints, referrals, fatalities, accidents, and other significant events at VPP participant sites, in accordance with VOSH enforcement procedures.
3. VPP participants develop and implement a systems approach to effectively identify, evaluate, prevent, and control occupational hazards so that injuries and illnesses to employees are prevented. Participants are often on the leading edge of hazard prevention methods and technology, and serve as models of safety and health excellence, demonstrating the benefits of a systems approach to worker protection.
4. VPP participants are selected based on their written safety and health management system, the effective implementation of this system over time, and their performance in meeting VPP requirements. Not all worksites are appropriate candidates for VPP. At qualifying sites, all personnel are involved in the effort to maintain rigorous, detailed attention to safety and health. VPP participants often mentor other worksites interested in improving safety and health, participate in safety and health outreach and training initiatives, share best practices and promote excellence in safety and health in their industries and communities.
5. VPP participants must demonstrate continuous improvement in the operation and impact of their safety and health management systems. Annual VPP self-evaluations help participant's measure success, identify areas needing improvement, and determine needed changes. VOSH on-site evaluation teams verify this improvement.
6. Participation in VPP does not diminish employee and employer rights and responsibilities under VOSH laws, standards and regulations.
7. The provisions of this regulation are intended to provide solely for the safety, health and welfare of employees and the benefits thereof shall not run to any applicant, participant or any other person nor shall a third party have any right of action for breach of any provision of this regulation except as otherwise specifically provided herein.

8. Nothing in this regulation shall be construed to in any way limit the Commissioner's discretion to use agency personnel and resources in accordance with the powers and duties as set forth in Title 40.1 of the *Code of Virginia*.

B. Purpose.

This regulation establishes requirements necessary for the operation of Virginia Voluntary Protection Programs in a manner that will promote safe and healthy workplaces throughout the Commonwealth. The elements for VPP shall include the following requirements for participation:

1. Upper management leadership and active and meaningful employee involvement;
2. Systematic assessment of occupational hazards;
3. Comprehensive hazard prevention, mitigation, and control programs;
4. Employee safety and health training;
5. Safety and health program evaluation.

C. Applicability.

1. This regulation applies to Virginia employers and employees that volunteer to participate in Virginia VPP.
2. Because Virginia VPP is a voluntary program, the Commissioner's final decision to accept or reject an application, or suspend or terminate a company's participation in VPP, or to take any other action contemplated by this regulation or §40.1-49.13 of the *Code of Virginia*, is not subject to the provisions of the Virginia Administrative Process Act, Va. Code §2.2-4000 through 2.2-4032 of the *Code of Virginia*.

16VAC25-200-20. Definitions.

"1-Year Conditional Goal" means a target for correcting deficiencies in safety and health management system elements or sub-elements identified by VOSH during the on-site evaluation of a Star participant. Such deficiencies, which indicate that a participant no longer fully meets Star requirements, must be corrected within 90 days, and the participant must then operate at the Star level for 1 year, for the conditional status to be lifted. Failure to meet this requirement will result in termination from VPP.

"90-Day Item" means compliance related issues that must be corrected within a maximum of 90 days, with effective protection provided to employees in the interim.

"Annual Evaluation" means a participant's yearly self-assessment to gauge the effectiveness of all required VPP elements and any other elements of the safety and health management system.

"Annual Submission" means a document written by a participant and submitted to the Department on or before the 15th of February each year, consisting of the following information: Updated names and addresses, the participant's and applicable contractors' injury and illness case numbers and rates, average annual employment and hours worked for the previous calendar year, a copy of the most recent annual evaluation of the safety and health management system, descriptions of significant changes or events, progress made on the previous year's recommendations, Merit or 1-Year Conditional goals (if applicable), and any success stories.

"Applicable Contractor" means a contractor whose employees worked at least 1,000 hours for the participant in any calendar quarter within the last 12 months and are not directly supervised by the applicant/participant.

"Challenge Administrator" means selected individuals in organizations such as corporations, state agencies or non-profit associations that have met VOSH VPP criteria including, dedicated resources to administer the Challenge program for their worksites/members or other organizations' worksites/members. Administrators are involved in the application and review processes. In certain situations as specified by the Commissioner, VOSH can serve as a Challenge Administrator.

"Commissioner" means the Commissioner of Labor and Industry or his designees.

"Contract Employees" means workers who are employed by a company that provides services under contract to the VPP applicant or participant, usually at the VPP applicant's or participant's worksite.

"Days Away, Restricted, and/or Transfer Case Incidence Rate (DART rate)" means the rate of all injuries and illnesses resulting in days away from work, restricted work activity, and/or job transfer. This rate is calculated for a worksite for a specified period of time, usually one to three years.

"Department" means the Department of Labor and Industry.

"Mentoring" means the assistance that a VPP participant provides to another company to improve that site's safety and health management system or prepare it for VPP application or participation.

"Merit Goal" means a target for improving one or more deficient safety and health management system elements for a participant approved to the Merit program. A Merit goal must be met in order for a site to achieve Star status.

"Merit Program" means a program designed for worksites that have demonstrated the potential and commitment to achieve Star quality, but that need to further improve their safety and health management system. A worksite may be designated as Merit when, during an initial Star certification review, the VOSH review team determines that not all Star requirements are being fully met. In the case of a Merit designation, the participant must complete specified Merit goals in order to achieve Star status and continue in VPP. "Merit" is not a participation level that can be applied for.

"Misclassification" means when an employer improperly classifies a worker as an independent contractor who should in fact be an employee.

"Model system" means an exemplary, voluntarily implemented worker safety and health management system that (i) implements comprehensive safety and health programs that exceed basic compliance with

occupational safety and health laws and regulations and (ii) meets the VPP standards adopted by the Safety and Health Codes Board pursuant to this regulation.

"On-site Assistance Visit" means a visit to an applicant or participant site by agency personnel or other non-enforcement personnel, to offer assistance, including help with their application, conduct a records review, and/or make general observations about the site's safety and health management system.

"On-site Evaluation" means a visit to an applicant or participant site by a VOSH on-site evaluation team to determine whether the site qualifies to participate, continue participation, or advance within VPP.

"On-site Evaluation Report" means a document written by the VOSH on-site evaluation team and consisting of the site report. This document contains the team's assessment of the safety and health management system and the team's recommendation regarding approval of the applicant or re-approval of the participant in VPP.

"On-site Evaluation Team" means an interdisciplinary group of VOSH professionals and private industry volunteers who conduct on-site evaluations. The team normally consists of a team leader, a backup team leader, safety and health specialists, and other specialists as appropriate.

"Private Industry Volunteer (PIV)" means a volunteer from a VPP site or corporation, knowledgeable in safety and health management system assessment, formally trained in the policies and procedures of VPP, and determined by VOSH to be qualified to perform as a team member on a VPP on-site evaluation.

"Recommendations" means suggested improvements noted by the on-site evaluation team that are not requirements for VPP participation but that would enhance the effectiveness of the site's safety and health management system. Compliance with VOSH standards is a requirement, not a recommendation.

"Safety and Health Management System" means a method of preventing worker fatalities, injuries and illnesses through the ongoing planning, implementation, integration, and control of four interdependent elements: management leadership and employee involvement, worksite analysis, hazard prevention and control, and safety and health training.

"Small Business" means a company having no more than 250 employees at any one facility, and no more than 500 employees nationwide.

"Star Program" means the program within VPP designed for participants whose safety and health management systems operate in a highly effective, self-sufficient manner and meet all VPP requirements. Star is the highest level of VPP participation.

"Temporary Employee" means an employee hired on a non-permanent basis by the applicant/participant site.

"Total Case Incidence Rate (TCIR)" means a number that represents the total recordable injuries and illnesses per 100 full-time employees, calculated for a worksite for a specified period of time (usually one to three years).

"Voluntary Protection Programs" or "VPP" means voluntary programs under which the Commissioner recognizes and partners with workplaces in which a model system has been implemented.

"Voluntary Protection Program Participants' Association (VPPPA)" means a nonprofit 501(c) (3) organization whose members are involved in VPP. The mission of the VPPPA is to promote safety, health, and environmental excellence through cooperative efforts among employees, management, and government.

16VAC25-200-30. Categories of participation.

A. Categories of participation may include, but are not limited to:

1. Site-based fixed worksites and long term construction sites, including traditional Star and Merit designations;
2. Challenge participants where employers are guided by Challenge Administrators through a three stage process, which can prepare a company to achieve VPP Star status;
3. Mobile workforce participants where employers often work as subcontractors and move from site to site;
4. Corporate participants that have adopted VPP on a large scale.

B. Levels of recognition:

1. Star Worksite status recognizes the safety and health excellence of worksites where workers are successfully protected from fatality, injury, and illness by the implementation of comprehensive and effective workplace safety and health management systems. These worksites are self-sufficient in identifying and controlling workplace hazards.
2. Merit Worksite status recognizes worksites that have good safety and health management systems and that show the willingness, commitment, and ability to achieve site-specific goals that will qualify them for Star participation.
 - a. If the on-site evaluation team recommends participation in the Merit program, the site must then complete a set of goals in order to maintain Merit status and qualify for the Star Program.
 - b. Merit goals must address Star requirements not presently in place or aspects of the safety and health management system that are not up to Star quality.
 - c. Methods for improving the safety and health management system that will address identified problem areas must be included in Merit goals.
 - d. Correction of a specific hazardous condition must be a 90-day item, not a Merit goal. However, when a safety and health management system deficiency underlies a specific hazardous condition, then corrections to the system must be included as Merit goals.
 - e. Reducing a 3-year TCIR or DART rate to below the national average is not by itself an appropriate Merit goal. Corrections to safety and health management system deficiencies underlying the high rate must be included in the Merit goals.

f. Merit worksites are given a three year conditional goal of achieving Star status. A participant must meet Star rate requirements within the first two years of its Merit participation. This is to afford an additional year's experience, for a total of no more than three years to gain Star approval.

g. A Merit participant qualifies for Star when it has met its Merit goals, Star rate requirements, and when all other safety and health elements and sub-elements are operating at Star quality.

h. A Merit participant may qualify for the Star Program before the end of its Merit term if the participant meets all conditions in g., above.

3. Challenge recognizes three stages of accomplishment as specified in 16VAC25-200-40.B.

C. Nothing in this regulation shall be construed to prohibit the Commissioner from establishing programs that are site-specific, company-wide, statewide, or any combination thereof.

16VAC25-200-40. Ways to participate.

- A. Site-based fixed participation is directed at the owners and site officials who control site operations and have ultimate responsibility for assuring safe and healthful working conditions of:
1. Private-sector fixed worksites in general industry;
 2. Construction worksites or projects that will have been in operation for at least 12 months at the projected time of approval and that expect to continue in operation for at least an additional 12 months;
 3. State and local government sector fixed worksites;
 4. Resident contractors at participating VPP sites for the contractors' operations at those VPP sites;
 5. Resident contractors at non-participating sites for the contractors' operations at those sites, so long as the resident contractors are part of a larger organization approved to participate under the corporate option.
- B. Challenge provides participating employers and workers an avenue to work with designated Challenge Administrators to develop and/or improve their safety and health management system. Challenge participants do not generally receive exemptions from VOSH programmed inspections, although it is within the Commissioner's discretion to design programs that permit exemption from programmed inspections for successful Stage 3 applicants.

Challenge Administrators collaborate with participating employers to improve their safety and health management programs in three stages through mentoring, training and progress tracking:

1. Stage 1 - Assess, Learn, and Develop. Challenge participants learn the elements necessary to develop and implement an effective safety and health management program; assess performance of existing safety and health programs and policies; provide training to management and workers; and develop strategies, programs, and policies.

2. Stage 2 - Implement, Track, and Control. Challenge participants complete and implement policies and programs developed in Stage 1; continue to enhance and develop their safety and health management program; implement and improve their safety and health management program; and begin to incorporate policies for contractor/special trade contractor safety and health management program requirements.
 3. Stage 3 - Reassess, Monitor, and Improve. Challenge participants monitor, reassess, and continuously improve their safety and health management program. Challenge participants who complete Stage 3 have a safety and health management system sufficiently advanced for the participant to begin the application process for VPP Star certification.
- C. Mobile workforce companies typically function as contractors or subcontractors which may or may not have the authority for safety and health for an entire worksite; and for those companies that have employees that move site-to-site, such as a specialty trade contractor or repair and maintenance company, regardless of size or length and duration of the project or service.
- D. VPP corporate is designed for corporate applicants, who demonstrate a strong commitment to employee safety and health and VPP. These applicants, typically large corporations or state or local government agencies, have adopted VPP on a large scale for protecting the safety and health of their employees. VPP corporate applicants must have established standardized corporate-level safety and health management systems that are effectively implemented organization-wide, as well as internal audit/screening processes that evaluate their facilities for safety and health performance.

16VAC25-200-50. Application requirements.

- A. Term of Participation.
1. There is no time limit to the term of participation in Star, as long as a site continues to meet all Star requirements and to maintain Star quality.
 2. Fixed-site construction participation ceases with the completion of the construction project.
 3. There is no time limit to the term of participation for Mobile Worksite, Corporate or Challenge site as long as the participant continues to meet all applicable requirements and maintain quality systems.
- B. Injury and Illness History Requirements.
1. Injury and illness history is evaluated using a 3-year total case incident rate (TCIR) and a 3-year day away, restricted, and/or transfer case incident rate (DART rate). The 3-year TCIR and DART rates must be compared to the published Bureau of Labor Statistics (BLS) national average for the five- or six-digit North American Industrial Classification System (NAICS) code for the industry in which the applicant is classified. The BLS publishes NAICS industry averages two years after data is collected. For example, in calendar year 2016, calendar year 2014 national averages will be available and used for comparison.

2. Both the 3-year TCIR and the 3-year DART rate must be below one of the three most recently published BLS national averages for the specific NAICS code.
3. Some smaller worksites may be eligible to use the alternate rate calculation as provided for in VOSH written procedures.

C. VOSH Inspection History.

1. The applicant must not have been issued final VOSH citations related to a fatality in the preceding three-year period. In the event that the company elects to contest a citation related to a VOSH fatality, the company may not submit a VPP application until such time as all fatality-related citations have been successfully contested.
2. If VOSH has inspected an applicant site in the 36 months preceding the application, the inspection, abatement, and any other history of interaction with VOSH must indicate good faith attempts by the employer to improve safety and health at the site. This includes verification of correction of all serious violations. In addition, the existence of any of the following at the site precludes the site's participation in VPP:
 - a. Open enforcement investigations;
 - b. Pending or open contested citations or notices under appeal at the time of application;
 - c. Affirmed willful or anti-discrimination whistleblower violations under §40.1-51.2:1 of the *Code of Virginia* during the 36 months prior to application;
 - d. Documented instances of misclassification of employees during the 36 months prior to application;
 - e. Unresolved, outstanding enforcement actions, such as long term abatement agreements or contests.

D. Contract Worker Coverage.

1. Workers for applicable contractors must be provided with safety and health protection equal in quality to that provided to participant employees.
2. All contractors, whether regularly involved in routine site operations or engaged in temporary projects such as construction or repair, must follow the safety and health rules of the host site.
3. VPP participants must have in place a documented oversight and management system covering applicable contractors to:
 - a. Ensure that safety and health considerations are addressed during the process of selecting contractors and when contractors are on-site;
 - b. Ensure that contractors follow site safety rules;

- c. Include provisions for timely identification, correction, and tracking of uncontrolled hazards in contractor work areas;
 - d. Include a provision for removing a contractor or contractor's employees from the site for safety or health violations.
 4. Nested contractors, such as contracted maintenance workers, and temporary employees who are supervised by host site management and governed by the site's safety and health management system are entitled to the same workplace protections as host employees; and are therefore included in the host site's injury and illness rates.
 5. Site management must maintain copies of the TCIR and DART rate data for all applicable contractors based on hours worked at the site. Sites must report all applicable contractors' TCIR and DART rate data to VOSH annually.
 6. Managers, supervisors, and non-supervisory employees of contract employers must be made aware of:
 - a. The hazards they may encounter while on the site;
 - b. How to recognize hazardous conditions and the signs and symptoms of workplace-related illnesses and injuries;
 - c. The implemented hazard controls, including safe work procedures;
 - d. Emergency procedures.
- E. Assurances.
 1. Applicants must understand and agree, through assurances, to fulfill program requirements for participation in VPP.
 2. Applicants must assure that:
 - a. The applicant will comply with VOSH laws, standards, and regulations, and will correct in a timely manner all hazards discovered through self-inspections, employee notification, accident investigations, a VOSH on-site review, process hazard reviews, annual evaluations, or any other means. The applicant will provide effective interim protection as necessary.
 - b. Site deficiencies related to compliance with VOSH requirements and identified during the VOSH on-site review will be corrected within 90 days, with interim protection provided to employees.
 - c. Site employees support the VPP application.
 - d. VPP elements are in place, and the requirements of the elements will be met and maintained.
 - e. Employees, including newly hired employees and contract employees when they reach the site, will have the VPP explained to them, including employee rights under the program and VOSH laws, standards and regulations.

f. Employees performing safety and health duties as part of the applicant's safety and health management system will be protected from discriminatory actions resulting from their carrying out such duties. See §40.1-51.2:1 of the *Code of Virginia*.

g. Employees will have access to the results of self-inspections, accident investigations, and other safety and health management system data upon request. At unionized sites, this requirement may be met through the employee representative's access to these results.

h. The information listed below will be maintained and available for VOSH review to determine initial and continued approval to the VPP:

(1) Written safety and health management system;

(2) Any agreements between management and the collective bargaining agent(s) concerning safety and health;

(3) Any data necessary to evaluate the achievement of individual Merit or 1-Year Conditional goals.

i. On or before the 15th of February each year, each participating site must submit its annual evaluation to the Department.

j. Whenever significant organizational, ownership, union, or operational changes occur, such as but not limited to a change in management, corporate takeover, merger, or consolidation, a new statement of commitment signed by both management and any authorized collective bargaining agents, as appropriate will be provided to VOSH within 60 days of the effective date of the aforementioned changes.

3. The applicant must demonstrate a willingness to follow through on all assurances.

4. Employees must be aware of the recourse available to them if management fails to fulfill any of these assurances. This may include rescinding their support of VPP participation or exercising the right to file a VOSH complaint.

F. Pre-Application Assistance.

1. Agency personnel may visit a prospective applicant's site to offer assistance in the application process or before scheduling the on-site evaluation to obtain additional information or clarification of information provided in the application.

2. Pre-application assistance may also include referrals to the VPP mentoring program, Virginia VPP Best Practices training sessions, VPPPA conferences, and VPPPA application workshops.

G. Application Receipt and Review.

1. The Commissioner shall establish written procedures to address requirements concerning receipt and review of application contents, including but not limited to the comprehensive safety and health management system requirements outlined in 16VAC25-200-60.

2. If, upon review, the application is considered incomplete, the Department shall notify the applicant by letter, noting the missing elements and requesting that the missing information be submitted within 90 days. If the additional information is not provided within that time, the application must be returned to the applicant. Applications can be resubmitted at any time.

3. If it is clear that the applicant cannot qualify for VPP, the agency must ask the applicant to withdraw the application within 30 days. If the application is not withdrawn, the application will be returned with a letter indicating the reasons the application was denied.

4. An applicant may withdraw the application by notifying the Department. The withdrawal is effective on the date the notification is received. The original application must be returned to the applicant. If the application had already been accepted, the agency must retain a working copy for one year, for use in responding to questions that may arise.

16VAC25-200-60. Comprehensive safety and health management system requirements.

- A. The elements for VPP shall include the following requirements for VPP participation:
1. Upper management leadership and active and meaningful employee involvement;
 2. Systematic assessment of occupational hazards;
 3. Comprehensive hazard prevention, mitigation, and control programs;
 4. Employee safety and health training;
 5. Safety and health program evaluation.
- B. The Commissioner shall establish written procedures to address applicant and participant requirements concerning the elements and sub-elements appropriate to the program:
1. Management commitment;
 2. VPP commitment;
 3. Employee involvement;
 4. Contract worker coverage;
 5. Safety and health management system evaluation;
 6. Worksite analysis;
 7. Baseline and comprehensive safety and industrial hygiene hazard analysis;
 8. Hazard analysis of routine jobs, tasks and processes;
 9. Hazard analysis of significant changes;
 10. Pre-use analysis;
 11. Documentation and use of hazard analysis;
 12. Routine self-inspections;
 13. Hazard reporting system for employees;
 14. Industrial hygiene (IH) program;
 - a. IH surveys;

- b. Sampling strategy;
- c. Sampling results;
- d. Documentation;
- e. Communication;
- f. Use of results;
- g. IH expertise;
- h. Procedures;
- i. Use of contractors for IH surveys;
- 15. Analysis of injury, illness and near-hit incidents;
- 16. Trend analysis;
- 17. Hazard prevention and control;
- 18. Certified professional resources;
- 19. Hazard elimination and control methods;
 - a. Engineering;
 - b. Administrative;
 - c. Work practices;
 - d. PPE;
- 20. Hazard control programs;
- 21. Compliance with applicable Virginia unique occupational safety and health regulations;
- 22. Occupational health care program;
- 23. Preventative maintenance of equipment;
- 24. Tracking of hazard correction;
- 25. Disciplinary system;
- 26. Emergency preparedness and response; and
- 27. Safety and health training.

16VAC25-200-70. Certification process.

A. Evaluation periods.

The Commissioner shall establish written procedures to set time periods and scheduling requirements for on-site evaluations in response to initial applications accepted by the agency and for re-certification of participants.

B. Scheduling exceptions.

1. On-site evaluations shall be conducted earlier than normal scheduled requirements when:
 - a. Significant changes have occurred in management, processes or products that may require evaluation to ensure the site is maintaining a VPP quality safety and health management system;
 - b. VOSH has learned of significant problems at the site, such as increasing injury and illness rates, serious deficiencies described in the site's annual evaluation of its safety and health management

system, or deficiencies discovered through VOSH enforcement activity resulting from an employee complaint, fatality, accident, or other event.

C. Decision to conduct the on-site evaluation.

1. Once an application is accepted, the agency must:

- a. Notify the site by letter or e-mail in a timely manner that an on-site evaluation will be conducted. However, no on-site evaluation may be conducted until all prior enforcement actions have been closed.
- b. Notify the appropriate VOSH enforcement personnel so that the site can be removed from any programmed inspection lists, effective no more than 75 days prior to the scheduled on-site review.

D. Methods of evaluation.

The three primary methods of evaluation during the certification or recertification process are document review, walkthrough, and employee interviews. Additional activities that must occur are the opening conference, daily briefings, report preparation, and closing conference. The on-site evaluation team must evaluate each element and sub-element of the safety and health management system and VPP requirements.

E. Recommendations.

At the conclusion of the on-site evaluation, the on-site evaluation team must reach a consensus to recommend to the Commissioner as to whether the site is suitable for participation or continued participation in VPP, and at what level of participation.

16VAC25-200-80. On-site evaluations.

A. On-site evaluation team.

An on-site evaluation consists of a thorough evaluation of a VPP applicant's or participant's safety and health management system in order to recommend approval or re-approval. On-site evaluations are carried out by a team consisting of VOSH staff acting in a non-enforcement capacity, qualified volunteer safety or health professionals from private industry, and other qualified team members.

B. On-site evaluation procedures.

The Commissioner shall establish written procedures for onsite evaluations of applicants and participants undergoing recertification. The procedures shall address issues including, but not limited to:

1. Prioritizing and scheduling on-site evaluations;

2. Inclusion of union representatives, if any, in the opening and closing conferences and the opportunity to accompany the on-site evaluation team on the site walkthrough;
3. On-site evaluation team composition, qualifications, preparation and assessment of personal protective equipment needed;
4. Opening conference subjects, review of injury and illness records, incentive programs, document review, walkthrough, review of safety and health management system elements and sub-elements, formal and informal interviews of employees, including applicable contractor employees, and closing conference subjects and recommendations;
5. Employee rights under the program and under VOSH laws, standards and regulations;
6. Assuring that employees performing safety and health duties as part of the applicant's safety and health management system will be protected from discriminatory actions resulting from their carrying out such duties, pursuant to §40.1-51.2:1 of the *Code of Virginia*.

C. Correction of hazards.

1. As hazards are found and discussed during the walkthrough, the on-site evaluation team must add them to a written list of the uncontrolled hazards identified. This list will be used when the team briefs site management at the end of each day on-site.
2. VOSH expects that every effort will be made by the site to correct identified hazards before the closing conference. If hazard correction cannot be accomplished before the conclusion of the on-site evaluation, the on-site evaluation team and site management must discuss and agree upon correction methods and time frames.
3. The site may be given up to a maximum of 90 days to correct uncontrolled hazards, as long as interim protection is provided. These "90-day Items" must be corrected before the final on-site evaluation report can be processed. Management must provide the team leader with a signed letter indicating how and when the correction will be made. The team leader may decide to return to the site to verify correction.
4. If, after repeated attempts to reach agreement, site management refuses to correct a situation that exposes employees to serious safety or health hazards, that situation shall be referred for enforcement action.
5. Should any identified hazard be determined to present a risk of imminent danger to life or health of an employee, agency personnel shall assure that its procedures for immediately removing employees from exposure to the hazard until corrected are complied with by the applicant or participant.

D. Deficiencies in the Safety and Health Management System.

Where the team detects deficiencies in the safety and health management system, even when physical hazards are not present, the on-site evaluation team must document these deficiencies as goals for correction, recommendations for improvement, or both.

1. If the system deficiency is a requirement for VPP at the Star level, it must become the subject of a goal, either Merit or One-Year Conditional. Implementation of goals is mandatory for VPP participation. Time frames, interim protection, and methods of achieving goals must be discussed and agreed to with site management.

2. If improvement of the system deficiency is not necessarily a requirement for VPP, but will improve worker safety and health at the site, the improvement must be a recommendation. Implementation of recommendations is encouraged but is not mandatory for VPP participation.

E. Final Analysis of Findings.

1. When the documentation review, the walkthrough, and employee interviews have been completed, the on-site evaluation team must meet privately to review and summarize its findings before conducting the closing conference.

2. A draft of the certification or re-certification report shall be completed by the team before leaving the site. The draft report must reflect the consensus of the on-site evaluation team.

F. Closing conference.

The findings of the on-site evaluation team, including its recommendation to the Commissioner, must be presented to site management and appropriate employee representatives before the team leaves the site.

16VAC25-200-90. Annual submissions.

A. Annual self-assessment.

1. Participation in VPP requires each site/participant to annually evaluate the effectiveness of its safety and health management system, including the effectiveness of all VPP elements and sub-elements.

2. The Commissioner shall establish written procedures establishing the content and reporting requirements of participant annual submissions.

3. Annual submissions are due on or before the 15th of February each year.

B. Applicable contractors.

Participants shall report on the injury and illness data for all applicable contractors.

16VAC25-200-100. Enforcement activity at VPP sites.

A. Types of enforcement activity.

Two types of enforcement activity trigger additional VPP assessment:

1. Unprogrammed VOSH inspections, which occur in response to all referrals, formal complaints, fatalities, and certain accidents;
2. Other incidents or events, whether or not injuries or illnesses have occurred and whether or not normal enforcement procedures apply to the situation, may trigger reassessment.

B. Site reassessment.

VOSH may reassess the site's safety and health management system if there is reason to believe that a serious deficiency exists that would have an impact on the site's continued qualification for VPP.

C. Enforcement personnel.

The Commissioner shall establish written procedures describing the use of enforcement personnel during on-site evaluations and any limitations placed on their conducting an enforcement inspection at a VPP site.

D. Impact of enforcement activity.

1. If the event that triggers enforcement activity occurs during the time between application and on-site evaluation, the on-site evaluation must be postponed until the enforcement case is closed.
2. If the event that triggers enforcement activity occurs during the on-site evaluation, the on-site evaluation must cease until the enforcement case is closed.

16VAC25-200-110. Withdrawal, suspension or termination.

A. Withdrawal.

1. Participants may withdraw of their own accord or be asked by VOSH to withdraw from the programs.
2. Any participant may choose to withdraw voluntarily at any time.
3. VOSH shall request that a participant withdraw from VPP if it is determined that it is no longer meeting the requirements for VPP participation.
4. The Commissioner shall establish written withdrawal procedures which provide for the company's formal notification to the Department, the Commissioner's acknowledgement of receipt and notification to the company of the status change, notification to agency personnel of the status change, return of the company to the VOSH programmed inspection list and disposition of the VPP participant file.

5. The Commissioner shall establish written procedures to address a VPP participant's change of location which establishes criteria for determining whether the participant can retain its VPP status or must withdraw.

6. The Commissioner will consider the company's reapplication to VPP if and when eligibility requirements are met.

B. Suspension.

1. Participants that experience a work-related fatality, whether an employee or contract employee, may be immediately suspended from program participation until such time as a VOSH fatality investigation can be completed.

2. The Commissioner shall establish written procedures to address a VPP participant's temporary suspension from VPP, which provides for the Department's formal notification to the participant and removal of the VPP flag or other recognition device from display until the suspension is lifted.

3. A participant's suspension will not result in the company being returned to the VOSH programmed inspection list.

C. Termination.

1. The Commissioner may terminate a site from the VPP for failure to maintain the requirements of the program.

2. In the event a fatality investigation shows substantial deficiencies in the participant's safety and health programs, such that during a normal certification audit the types of deficiencies would have precluded the site from participation in the VPP, the Commissioner, at his discretion, may terminate the site's participation in VPP.

3. In the a whistleblower investigation pursuant to §40.1-51.2:1 and §40.1-51.2:2 of the *Code of Virginia* shows substantial deficiencies in the participant's safety and health programs, such that during a normal certification audit the types of deficiencies would have precluded the site from participation in the VPP, the Commissioner, at his discretion, may terminate the site's participation in VPP.

4. Under most other situations, termination should occur only when all reasonable efforts for assistance have been exhausted.

5. The Commissioner shall establish written termination procedures which provide for the Commissioner's formal notification to the participant and union representatives, an appeal process, and notification of the Commissioner's final decision.

6. If the Commissioner finds the site's appeal valid, the site may continue in VPP.

7. In the event of a final decision to terminate, the written procedures shall provide for notification to agency personnel of the status change, return of the company to the VOSH programmed inspection list and disposition of the VPP participant file. If a terminated company wishes to pursue reinstatement, it must wait three years to reapply.

8. Because Virginia VPP is a voluntary program, the Commissioner's final decision to terminate a company's participation in VPP is not subject to the provisions of the Virginia Administrative Process Act, §2.2-4000 through §2.2-4032 of the *Code of Virginia*.



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For MARCH 3, 2016

**Electrical Safety-Related Work Practices, §1910.331 [Subpart S - Electrical];
Electric Power Generation, Transmission, and Distribution, §1910.269 [Subpart R - Special Industries];
General, §1926.950 [Subpart V – Power Transmission and Distribution]; and
Working On or Near Exposed Energized Parts, §1926.960 [Subpart V - Power Transmission and
Distribution]; Corrections**

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption federal OSHA's corrections to Electrical Safety-Related Work Practices, §1910.331- Subpart S - Electrical; Electric Power Generation, Transmission, and Distribution, §1910.269 - Subpart R - Special Industries; General, §1926.950 - Subpart V- Power Transmission and Distribution and Working On or Near Exposed Energized Parts, §1926.960 - Subpart V - Power Transmission and Distribution, as published on October 5, 2015 in 80 FR 60033.

The proposed effective date is June 15, 2016.

II. Summary of the Amendments

OSHA has corrected the Electrical Safety-Related Work Practices standard for General Industry and the Electric Power Generation, Transmission and Distribution standards for General Industry

and Construction to provide additional clarification regarding the applicability of the standard to certain operations, including some tree trimming work that is performed near, but that is not on or directly associated with, electric power generation, transmission, and distribution installations. OSHA also corrected minor errors in two minimum approach distances tables in the general industry and construction standards for electric power generation, transmission and distribution work. The corrections are as follows:

- 1) Expressly limiting the scope of §1910.269 as it relates to line-clearance tree trimming by revising §1910.269(a)(1)(i)(E) to state explicitly that the standard applies to line-clearance tree trimming only to the extent it is performed for the purpose of clearing space around electric power generation, transmission, or distribution lines or equipment and on behalf of an organization that operates, or that controls the operating procedures for, those lines or equipment.
- 2) Adding a note to the definition of “line-clearance tree trimming” in §1910.269(x), with corresponding revisions to Note 2 to the definition of “line-clearance tree trimmer,” to explain that:
 - a) The scope of §1910.269 limits the application of the standard to line-clearance tree trimming as noted in §1910.269(a)(1)(i)(E);
 - b) Tree trimming that is performed on behalf of a homeowner or commercial entity other than an organization that operates, or that controls the operating procedures for, electric power generation, transmission, or distribution lines or equipment, or that is not for the purpose of clearing space around electric power generation, transmission, or distribution lines or equipment, is not directly associated with an electric power generation, transmission, or distribution installation and is not covered by §1910.269.
 - c) Revising Appendix A-3 to §1910.269 to reflect the clarifications in this correcting amendment.
 - d) Replacing terms such as “line-clearance tree-trimming operations” and “line-clearance tree-trimming work” wherever they appear in §1910.269 and Subpart V of Part 1926 with “line-clearance tree trimming” and revising §1926.950(a)(3) to correspond to the changes to §1910.269(a)(1)(i)(E), noted earlier.
 - e) Referencing the scope of §1910.269 in Note 3 to §1910.331(c)(1).
 - f) Correcting minor errors in Table R-6 of §1910.269 and in Table V-5 of §1926.960 in Subpart V of Part 1926. Table R-3 of §1910.269 and Table V-2 of §1926.960 in Subpart V, which contain equations for employers to use to establish minimum approach distances from energized parts of electric circuits, set the minimum approach distance for 50 to 300 volts as “avoid contact.” Using the equations in Table R-3 and Table V-2, Table R-6 and Table V-5 provide default minimum approach distances for voltage ranges up to 72.5 kilovolts.

- g) The latter two tables, Table R-6 and Table V-5, erroneously list the first voltage range as 0.50 to 0.300 kilovolts. The correct voltage range is 0.050 to 0.300 kilovolts. Additionally, the word, “to”, is missing between the voltages in the first voltage range in Table V-5 of §1926.960. Accordingly, OSHA has corrected Table R-6 and Table V-5.

III. **Basis, Purpose and Impact of the Amendments**

A. **Basis**

In 1990, when OSHA promulgated §§1910.331 through 1910.335, as the Electrical Safety-Related Work Practices standard for General Industry, it did not define “work directly associated with” generation, transmission, or distribution installations. Examples OSHA provided in Notes to 1910.331(c)(1) were not precise in their description. While OSHA intended the examples to illustrate the type of work that generally, but not always, would be directly associated with electric power generation, transmission, and distribution lines, OSHA did not intend for the examples to be dispositive of the question of whether any particular activity is directly associated with those installations.

In 1994, when OSHA promulgated §1910.269, the Electric Power Generation, Transmission, and Distribution standard, the definition of “line-clearance tree trimming” in §1910.269(x) made the location of the tree or brush the key determining factor in deciding whether a trimming activity is line-clearance tree trimming. Consequently, any trimming or other maintenance of any tree or brush that is within the specified distances of an electric power line is line-clearance tree trimming, irrespective of the purpose of the activity or the occupation of the worker. Notwithstanding this definition, the only line-clearance tree trimming OSHA intended §1910.269 to cover is line-clearance tree trimming performed: 1) for the purpose of clearing space around electric power generation, transmission, or distribution lines or equipment; and 2) on behalf of an organization that operates, or that controls the operating procedures for, those lines or equipment.

After OSHA revised §1910.269 in 2014, tree care industry representatives raised questions that led OSHA to believe that the industry was unclear about the application of §1910.269, with respect to certain tree-trimming work. As a result, OSHA examined the relevant regulatory language in the general industry standards on Electrical Safety-Related Work Practices in Subpart S and on Electric Power Generation, Transmission and Distribution work, §1910.269.

OSHA determined that the scope provisions in §1910.331 did not accurately explain the applicability of the Electrical Safety-Related Work Practices at §§1910.331 through 1910.335 to qualified persons performing work near, but not on or directly associated with, the installations listed in §1910.331(c)(1) through (c)(4), including electric power generation, transmission, and distribution installations. As a result, OSHA made the

necessary corrections to provide improved clarity.

B. Purpose

OSHA concluded that the language in the existing standards did not accurately convey its intent with respect to tree-trimming activities that meet the definition of “line-clearance tree trimming,” but that are not directly associated with electric power generation, transmission, or distribution lines or equipment. Therefore, OSHA determined that:

- (1) revisions to §1910.269 are necessary to clarify that certain types of tree trimming meeting the definition of “line-clearance tree trimming” are not covered by that standard; and
- (2) revisions to §1910.331 in Subpart S are necessary to clarify that electrical safety-related work practices in §§1910.331 through 1910.335 apply to tree-trimming work that may meet the definition of “line-clearance tree trimming” when that work is not on or directly associated with electric power generation, transmission, and distribution or other installations listed in §1910.331(c) and, more generally, to work performed by qualified employees when that work is near, but not on or directly associated with, installations listed in §1910.331(c).

C. Impact on Employers

Other than improved clarity, there is no significant impact anticipated on employers with the adoption of these corrections.

D. Impact on Employees

There is no significant impact anticipated on employees with the adoption of these corrections.

E. Impact on the Department of Labor and Industry

There is no significant impact anticipated on the Department with the adoption of these corrections.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six months of the occurrence of a federal program change, to adopt identical changes or promulgate equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting these revisions will allow Virginia to conform to the federal program change.

Contact Person:

Ms. Jennifer L. Rose
VOSH Safety Compliance Director
804.786.7776
Rose.Jennifer@dol.gov

RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the Corrections to Electrical Safety-Related Work Practices, §1910.331 [Subpart S - Electrical]; Electric Power Generation, Transmission, and Distribution, §1910.269 [Subpart R - Special Industries]; General, §1926.950 [Subpart V - Power Transmission and Distribution]; and Working on or near Exposed Energized Parts, §1926.960 [Subpart V- Power Transmission and Distribution], as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of June 15, 2016.

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

**Electrical Safety-Related Work Practices, §1910.331 [Subpart S – Electrical];
Electric Power Generation, Transmission, and Distribution, §1910.269 [Subpart R - Special Industries];
General, §1926.950 [Subpart V – Power Transmission and Distribution]; and
Working On or Near Exposed Energized Parts, §1926.960 [Subpart V - Power Transmission and
Distribution]; Corrections**

As Adopted by the
Safety and Health Codes Board

Date: _____



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

**Electrical Safety-Related Work Practices, §1910.331 - Subpart S - Electrical;
Electric Power Generation, Transmission, and Distribution, §1910.269 [Subpart R - Special Industries];
General, §1926.950 [Subpart V - Power Transmission and Distribution]; and
Working On or Near Exposed Energized Parts, §1926.960 [Subpart V - Power Transmission and
Distribution]**

When the regulations, as set forth in the Corrections to Electrical Safety-Related Work Practices, §1910.331 [Subpart S – Electrical]; Electric Power Generation, Transmission, and Distribution, §1910.269 [Subpart R - Special Industries]; General, §1926.950 [Subpart V - Power Transmission and Distribution]; and Working On or Near Exposed Energized Parts, §1926.960 [Subpart V - Power Transmission and Distribution], are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms

VOSH Equivalent

29 CFR

VOSH Standard

Assistant Secretary

Commissioner of Labor and Industry

Agency

Department

October 5, 2015

June 15, 2016

The Occupational Safety and Health Administration amends parts 1910 and 1926 of title 29 of the Code of Federal Regulations as follows:

PART 1910—[AMENDED]

Subpart R—Special Industries

- 1. The authority citation for subpart R of part 1910 continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 5-2007 (72 FR 31159), 4-2010 (75 FR 55355), or 1-2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

* * * * *

- 2. Amend § 1910.269 by:
 - a. Removing the terms “line-clearance tree-trimming operations,” “line-clearance tree trimming operations,” “line-clearance tree-trimming work,” and “line-clearance tree trimming work” in paragraphs (a)(1)(i)(E) introductory text, (a)(1)(i)(E)(1) and (2), (a)(1)(ii)(A), (b)(1)(i), (r) subject heading and introductory text, (r)(1)(vi), and in the Note to paragraph (r)(1)(vi), and adding, in their place the term “line-clearance tree trimming”;
 - b. Revising paragraph (a)(1)(i)(E);
 - c. In Table R-6, first entry, removing “0.50” and adding in its place “0.050”;

- d. Revising paragraph (r) introductory text;
- e. In paragraph (x), revising Note 2 to the definition of “line-clearance tree trimmer” and adding a note to the definition of “line-clearance tree trimming”; and

- f. Revising appendices A-3 and A-5. The revisions and addition read as follows:

§ 1910.269 Electric power generation, transmission, and distribution.

(a) * * *

(1) * * *

(i) * * *

(E) Line-clearance tree trimming performed for the purpose of clearing space around electric power generation, transmission, or distribution lines or equipment and on behalf of an organization that operates, or that controls the operating procedures for, those lines or equipment, as follows:

(1) Entire § 1910.269, except paragraph (r)(1) of this section, applies to line-clearance tree trimming covered by the introductory text to paragraph (a)(1)(i)(E) of the section when performed by qualified employees (those who are knowledgeable in the construction and operation of the electric power generation, transmission, or distribution equipment involved, along with the associated hazards).

(2) Paragraphs (a)(2), (a)(3), (b), (c), (g), (k), (p), and (r) of this section apply to

line-clearance tree trimming covered by the introductory text to paragraph (a)(1)(i)(E) of this section when performed by line-clearance tree trimmers who are not qualified employees.

* * * * *

(r) *Line-clearance tree trimming.* This paragraph provides additional requirements for line-clearance tree trimming and for equipment used in this type of work.

* * * * *

(x) * * *

Line-clearance tree trimmer. * * *

Note 2 to the definition of “line-clearance tree trimmer”: A line-clearance tree trimmer is not considered to be a “qualified employee” under this section unless he or she has the training required for a qualified employee under paragraph (a)(2)(ii) of this section. However, under the electrical safety-related work practices standard in Subpart S of this part, a line-clearance tree trimmer is considered to be a “qualified employee.” Tree trimming performed by such “qualified employees” is not subject to the electrical safety-related work practice requirements contained in §§ 1910.331 through 1910.335 when it is directly associated with electric power generation, transmission, or distribution lines or equipment. (See § 1910.331 for requirements on the applicability of the electrical safety-related work practice requirements contained in §§ 1910.331 through 1910.335 to line-clearance tree trimming performed by such “qualified employees,” and see the note

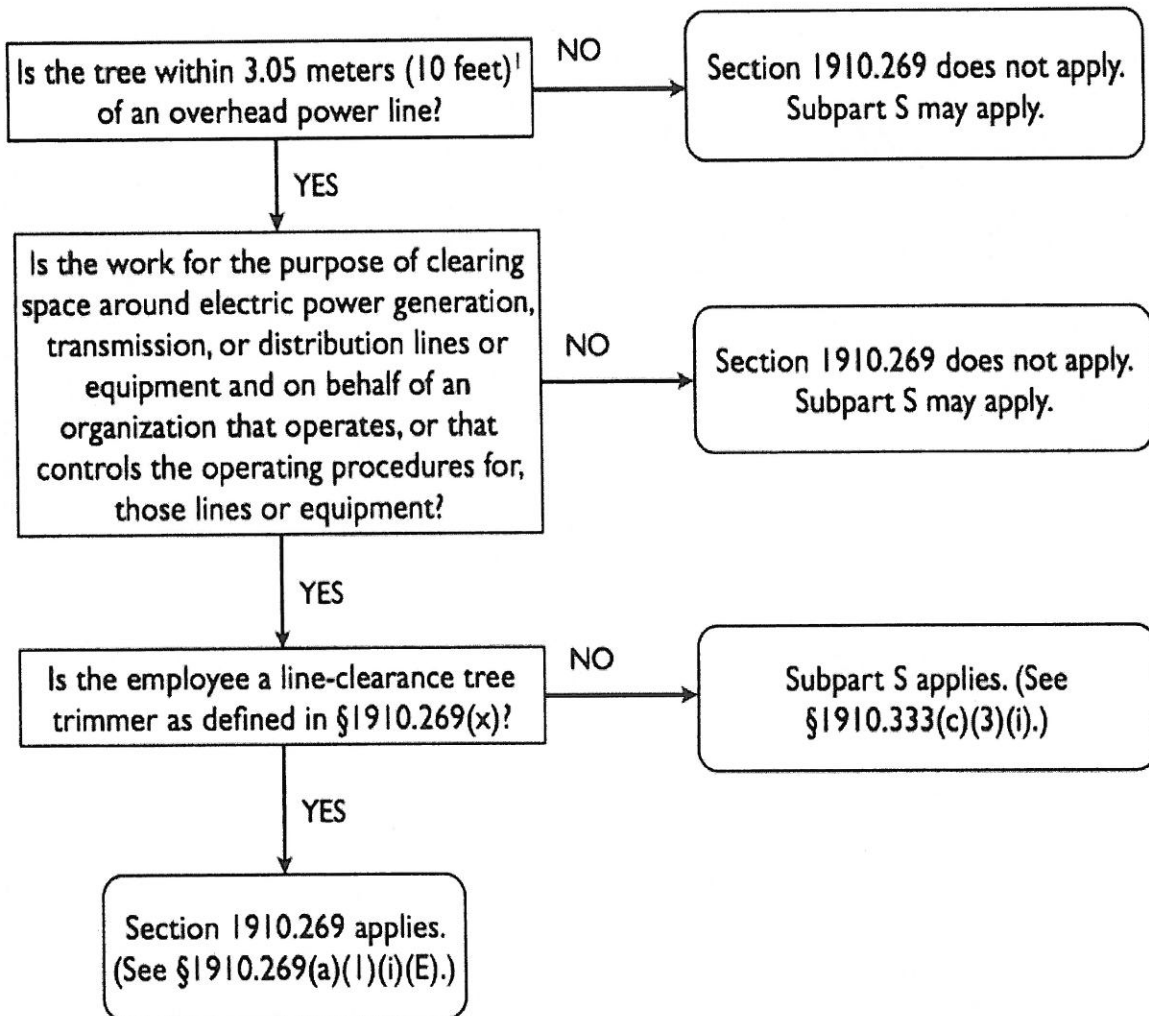
following § 1910.332(b)(3) for information regarding the training an employee must have to be considered a qualified employee under §§ 1910.331 through 1910.335.)

Line-clearance tree trimming. * * *

Note to the definition of “line-clearance tree trimming”: This section applies only to line-clearance tree trimming performed for the purpose of clearing space around electric power generation, transmission, or distribution lines or equipment and on behalf of an organization that operates, or that controls the operating procedures for, those lines or equipment. See paragraph (a)(1) of this section. Tree trimming performed on behalf of a homeowner or commercial entity other than an organization that operates, or that controls the operating procedures for, electric power generation, transmission, or distribution lines or equipment is not directly associated with an electric power generation, transmission, or distribution installation and is outside the scope of this section. In addition, tree trimming that is not for the purpose of clearing space around electric power generation, transmission, or distribution lines or equipment is not directly associated with an electric power generation, transmission, or distribution installation and is outside the scope of this section. Such tree trimming may be covered by other applicable standards. See, for example, §§ 1910.268 and 1910.331 through 1910.335.

* * * * *

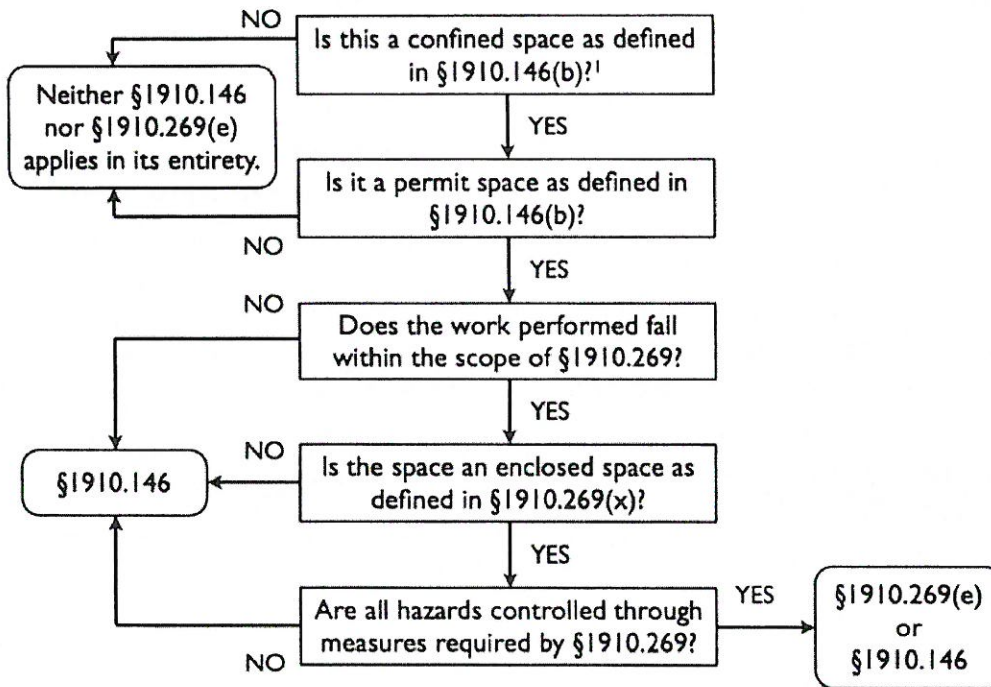
Appendix A-3—Application of §1910.269 and Subpart S of this Part to Tree Trimming



¹ 3.05 meters (10 feet) plus 0.1 meters (4 inches) for every 10 kilovolts over 50 kilovolts.

Appendix A-5 to §1910.269—Application of §§1910.146 and 1910.269 to Permit-Required

Confined Spaces



¹See §1910.146(c) for general nonentry requirements that apply to all confined spaces.

Note: Paragraph (t) of §1910.269 contains additional requirements for work in manholes and underground vaults.

Subpart S—Electrical

■ 3. The authority citation for subpart S of part 1910 continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 8-76 (41 FR 25059), 1-90 (55 FR 9033), 5-2002 (67 FR 65008), 5-2007 (72 FR 31160), or 1-2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

* * * * *
 ■ 4. Amend § 1910.331 by revising paragraph (b) and Note 3 to paragraph (c)(1) to read as follows:

§ 1910.331 Scope.

* * * * *
 (b) *Other covered work.* The provisions of §§ 1910.331 through 1910.335 also cover:
 (1) Work performed by unqualified persons on, near, or with the

installations listed in paragraphs (c)(1) through (4) of this section; and
 (2) Work performed by qualified persons near the installations listed in paragraphs (c)(1) through (c)(4) of this section when that work is not on or directly associated with those installations.

(c) * * *
 (1) * * *
Note 3 to paragraph (c)(1): Work on or directly associated with generation, transmission, or distribution installations includes:

- (1) Work performed directly on such installations, such as repairing overhead or underground distribution lines or repairing a feed-water pump for the boiler in a generating plant.
- (2) Work directly associated with such installations, such as line-clearance tree trimming and replacing utility poles, when that work is covered by § 1910.269 (see § 1910.269(a)(1)(i)(D) and (E) and the

definition of “line-clearance tree trimming” in § 1910.269(x)).

(3) Work on electric utilization circuits in a generating plant provided that:

(A) Such circuits are commingled with installations of power generation equipment or circuits, and

(B) The generation equipment or circuits present greater electrical hazards than those posed by the utilization equipment or circuits (such as exposure to higher voltages or lack of overcurrent protection).

This work is covered by § 1910.269.

* * * * *

PART 1926—[AMENDED]

Subpart V—Electric power transmission and distribution

■ 5. The authority citation for subpart V of part 1926 continues to read as follows:

Authority: 40 U.S.C. 3701 *et seq.*; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 1-2012 (77 FR 3912); and 29 CFR part 1911.

- 6. In § 1926.950, revise paragraph (a)(3) to read as follows:

§ 1926.950 General.

(a) * * *

(3) *Applicable part 1910 requirements.* (i) Line-clearance tree trimming performed for the purpose of clearing space around electric power generation, transmission, or distribution lines or equipment and on behalf of an organization that operates, or that controls the operating procedures for, those lines or equipment shall comply with § 1910.269 of this chapter.

(ii) Work involving electric power generation installations shall comply with § 1910.269 of this chapter.

* * * * *

§ 1926.960 [Amended]

- 7. In § 1926.960, in Table V-5, first entry, remove "0.50" and add in its place "0.050 to".

[FR Doc. 2015-25062 Filed 10-2-15; 8:45 am]

BILLING CODE 4510-26-P



COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 3, 2016

Notice of Intended Regulatory Action for Amendments to 16 VAC 25-50, Boiler and Pressure Vessel Rules and Regulations

I. **Action Requested.**

The Virginia Boiler Safety Compliance Program of the Virginia Department of Labor and Industry requests the Safety and Health Codes Board to authorize the Department to initiate the regulatory process to amend 16 VAC 25-50, Boiler and Pressure Vessel Rules and Regulations, by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007.01.

II. **Summary of Intended Regulatory Action.**

The Boiler Safety Compliance Program seeks to amend the Boiler and Pressure Vessel Rules and Regulations:

1. Adopt the 2015 Edition of the Boiler and Pressure Vessel Code, ASME Code, American Society of Mechanical Engineers for compliance with the most recent edition of documents incorporated by reference;

2. Adopt ANSI/NB 23, 2015 Edition of the National Board Inspection Code (NBIC), National Board of Boiler and Pressure Vessel Inspectors for compliance with the most recent edition of documents incorporated by reference;
3. Adopt the 2014 Edition of B31.1, ASME Code for Power Piping, American National Standards Institute to comply with the most recent edition of documents incorporated by reference;
4. Adopt the 2015 Edition of the NFPA 85, Boiler and Combustion Systems Hazards, National Fire Protection Association, to comply with the most recent edition of documents incorporated by reference;
5. Adopt the 2012 Edition of Part CG (General), Part CW (Steam and Waterside Control) and Part CF (Combustion Side Control) Flame Safeguard of ANSI/ASME CSD-1, Controls and Safety Devices for Automatically Fired Boilers, American Society of Mechanical Engineers; and
6. Adopt the 2014 Edition of API 510, Pressure Vessel Inspection Code, Maintenance Inspection, Rating, Repair and Alteration, Tenth Edition, May 2014, American Petroleum Institute to comply with the most recent edition of documents incorporated by reference.

III. Basis and Purpose of Intended Regulatory Action.

A. Basis.

The basis for this intended regulatory action is to provide both increased protection of human life and property from the unsafe or dangerous construction, installation, inspection, operation, and repair of boilers and pressure vessels in the Commonwealth of Virginia by complying with the most recent editions of industry required guidance documents.

B. Purpose.

The purpose for the intended regulatory action is to conform to the most current editions of NFPA, ASME and National Board safety and inspection codes; thereby, taking advantage of the latest technology available.

C. Impact on Employers.

For the most part, there will be little impact on employers by the code update. Companies that utilize the ASME or NBIC codes for construction or repair are already required to have and comply with the most current editions of the Code, thus there is no financial burden for them to purchase the most recent editions. The major change

would be the requirement in the NBIC for signage and metering for CO₂ tank installations.

D. Impact on Employees.

For employees working in (and citizens visiting) the restaurant, fast food, and convenience store industry utilizing CO₂ tanks for beverage dispensers, there will be additional safety added by the requirement for CO₂ metering/alarms. No negative impact to employees is anticipated.

E. Impact on the Department of Labor and Industry.

No negative impact to Department is anticipated.

Contact Person:

Mr. Ed Hilton
Director, Boiler Safety Compliance Management
(804) 786-3262
Ed.Hilton@doli.virginia.gov

RECOMMENDED ACTION

Staff of the Department of Labor and Industry requests that the Safety and Health Codes Board authorize the Department to initiate the regulatory process for 16 VAC 25-50, Boiler and Pressure Vessel Rules and Regulations, by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act (§2.2-4007.01).

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation.



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

VIRGINIA SAFETY AND HEALTH CODES BOARD
BRIEFING PACKAGE
FOR MARCH 3, 2016

NOTICE OF PERIODIC REVIEW OF CERTAIN EXISTING REGULATIONS

I. Action Requested

The Department requests the permission of the Board to proceed with the periodic review process of four of the Board's regulations listed in Section II, below.

II. Background and Basis

The Administrative Process Act (§2.2-4017 of the Code of Virginia) and Executive Order 17 (2014), "Development and Review of State Agency Regulations," governs the periodic review of existing regulations. This Executive Order requires that state agencies conduct a periodic review of regulations every four years. Four regulations of the Safety and Health Codes Board have been identified for review in 2016. They are as follows:

1. 16VAC25-11, Public Participation Guidelines;
2. 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations;
3. 16VAC25-160, Construction Industry Standard for Sanitation; and
4. 16VAC25-180, Virginia Field Sanitation Standard, Agriculture.

III. Current Status and Process

These four regulations of the Safety and Health Codes Board have been identified for review in 2016. If approval to proceed is granted by the Board, the process of periodic review begins with publication of a Notice of Periodic Review in the Virginia Register. With publication of this Notice of Periodic Review, a public comment period of at least 21 days, but not longer than 90 days, begins. Subsequently, the Department will review these regulations and related public comments, then prepare a brief with recommendations to be presented for the Board's consideration at the next meeting. Based on the decision of the Board, the Department of Labor and Industry will post a report on the Virginia Regulatory Town Hall website indicating for each regulation that the Board will either retain the regulation as is, or will begin a regulatory action to amend or repeal the regulation.

Contact Person:

Ms. Regina P. Cobb
Senior Management Analyst
Virginia Department of Labor and Industry
804.786.0610
cobb.regina@dol.gov

RECOMMENDED ACTION

The Department of Labor and Industry recommends that the Safety and Health Codes Board approve the publication of a Notice of Periodic Review in the Virginia Register for 16VAC25-11, Public Participation Guidelines; 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations; 16VAC25-160, Construction Industry Standard for Sanitation; and 16VAC25-180, Virginia Field Sanitation Standard, Agriculture.

The Department also recommends that the Board state in any motion it may make regarding the periodic review of these regulations that it will receive, consider and respond to petitions by any interested person at any time with respect to the periodic review which will be conducted in accordance with the above-cited § 2.2-4017 of the Administrative Process Act and Executive Order 17 (2014), "Development and Review of State Agency Regulations".

