

FINAL

**SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
THURSDAY, JULY 10, 2008**

BOARD MEMBERS PRESENT: Ms. Milagro Rodriguez, Outgoing Chair
Mr. Louis Cernak
Mr. M. Frank Hartsoe, Newly Elected Vice Chair
(Outgoing Secretary)
Mr. Daryl Hines
Ms. Anna Jolly
Mr. Satish Korpe
Mr. Rick Linker
Dr. James Mundy
Mr. Chuck Stiff, Newly Elected Chair (Outgoing Vice Chair)
Mr. Linwood Saunders
Mr. Danny Sutton
Dr. Carl Armstrong

BOARD MEMBERS ABSENT: Mr. Roger Burkhart
Ms. Juanita Garcia

STAFF PRESENT: Mr. Ray Davenport, Commissioner, Dept. of Labor and
Industry
Mr. Bill Burge, Assistant Commissioner
Mr. Glenn Cox, Director of VOSH Programs
Mr. Jay Withrow, Director, Division of Legal Support
Mr. Ronald Graham, Director, Health Compliance
Mr. John Crisanti, Manager, Office of Planning and
Evaluation
Ms. Jennifer Wester, Director, Cooperative Programs
Ms. Reba O'Connor, Regulatory Coordinator
Mr. Eric Delia, Policy Analyst
Ms. Regina Cobb, Agency Management Analyst Senior

OTHERS PRESENT: Ms. Donna Chandler, Court Reporter, Chandler & Halasz
Mr. Tony Banks, VA Farm Bureau Federation
Ms. Kate Joachim, Circle Safety and Health
Ms. Katie Frazier, VA Agribusiness Council
Ms. Penda Giles, VDACS
Mr. Adam Thompson, Circle Safety and Health
Mr. Steve Vermillion, Associated General Contractors of
Virginia
Mr. Harry J. Juance, ABC Professional Tree Service
Mr. Jeff Geis, Dominion Virginia Power

ORDERING OF AGENDA

Chair Milagro “Milly” Rodriguez called the meeting to order at 10:00 a.m. The presence of a quorum was established. Ms. Rodriguez then asked for a motion from the Board to approve the Agenda. On proper motion and second, the Agenda was approved, as submitted. The motion was carried by unanimous voice vote.

APPROVAL OF MINUTES

Chair Rodriguez asked for a motion from the Board to approve the Minutes of the February 28, 2008, meeting. Mr. Linwood Saunders made the motion and Mr. Chuck Stiff seconded it. The motion was carried unanimously by voice vote.

ELECTION OF OFFICERS

Ms. Rodriguez then opened the floor for nominations for Board Chair. Mr. Lou Cernak nominated Mr. Chuck Stiff, the current Vice Chair, as Chair. Mr. Stiff was elected unanimously by voice vote. Next, Mr. Saunders nominated Mr. Frank Hartsoe, the current Board Secretary, to be Vice Chair. Mr. Hartsoe was elected unanimously by voice vote. Following the elections, Ms. Rodriguez turned over the meeting to Chairman Stiff.

PUBLIC COMMENTS

Chairman Stiff thanked Ms. Rodriguez for her contribution to the Board. In his first order of business, Mr. Stiff opened the floor to comments from the public, however no one had any comments.

In his first order of business, Chairman Stiff invited the public to address the Board on the issues pending before the Board today or on any other topic that may be of concern to the Board or within the scope of authority of the Board. He stated that anyone wanting to comment should place their names on the sign-in sheets. No one had any comments.

OLD BUSINESS

Update on 16 VAC 25-50, Boiler and Pressure Vessel Rules and Regulations

Mr. John Crisanti, Manager of the Office of Planning and Evaluation for the Department of Labor and Industry, began by welcoming Dr. Armstrong back to the Board. Mr. Crisanti informed the Board that he was giving the Boiler update because Mr. Ed Hilton, Chief Boiler Inspector, was attending a meeting at the National Board in Ohio. Mr. Crisanti informed the Board that the preliminary review of the proposed regulation took longer than anticipated. As such, the public comment period did not end until yesterday (July 9th), and the Department has not had time to review any comments and put a package together. He stated that the Department will have a proposed regulation for the Board to review at the next Board meeting.

Updated on 16 VAC 25-185, Confined Space standard for Agriculture

Mr. Jay Withrow, Director of the Division of Legal Support for the Department of Labor and Industry, began by summarizing the events since the approval of the Notice of Intended Regulatory Action. He informed the Board that on June 11, 2008, VOSH held a meeting with employer and employee representatives of agricultural interests on confined space hazards in agriculture. He referred to the briefing package which listed the names of the attendees at the meeting.

Mr. Withrow stated that there were two main reasons that VOSH was pursuing a possible regulation in agriculture: 1) a horrific accident last year in the Shenandoah Valley involving five fatalities in a confined space which was an enclosed manure pit; and 2) since 1997, there have been a couple of fatalities in open manure pits. He stated in that meeting with industry representatives, the Department learned that the technology, particularly with the open manure pits, was outdated and not in use very much on farms in Virginia. Mr. Withrow informed the Board that the industry representatives said that they'd be willing to conduct a survey of their members to determine how much of this old technology remains in Virginia, and what other kinds of technologies are used.

Mr. Withrow discussed the positive impact that the Virginia Farm Bureau (VFB) and other insurance agencies can have on this issue. He also mentioned a brief discussion with VFB about how the Department's Boiler and Pressure Vessel Safety Program works with insurance companies. He mentioned specifically how the Department issues certificates to boiler owner/operators after they receive a boiler inspection from their insurance company; while the Department handles uninsured boiler issues.

Mr. Withrow informed the Board of his discussions about aspects of dairy farming that can make applying safety/possible health regulations difficult, i.e, small family farms with none or few "employees"; cash flow problems which are not conducive to spending money on safety equipment and warning signs; and small farmers are basically "jacks-of-all-trades" when it comes to fixing problems without considering safety and health issues. He stated that there was some discussion about tying requirements for safety/health issues to the renewal of milk permits issued by VDACS, Board of Agriculture.

Mr. Withrow, on behalf of the Department of Labor and Industry, recommended that the Board take no additional action on an adoption of a confined space standard for the Agriculture Industry at this time, thereby providing the Department with additional time to research technical issues and explore other methods to address confined space hazards in enclosed manure pits and open manure ponds.

Dr. James Mundy made a motion to accept the Department's recommendation and Ms. Anna Jolly seconded the motion which was approved unanimously by voice vote.

Proposed Regulation to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, 16 VAC 25-60-240 and 245, Take and Preserve Testimony, Examine Witnesses and Administer Oaths

On behalf of the VOSH Program, Mr. Withrow requested the Safety and Health Codes Board to consider for adoption as a proposed regulation of the Board the following VOSH proposal to amend the Administrative Regulation for the VOSH Program, by amending 16 VAC 25-60-240, and adding a new section, 16 VAC 25-60-245, to establish procedures for the Commissioner or his appointed representatives under Va. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10, pursuant to Va. Code §40.1-22(5).

Mr. Withrow referred the Board to the summary of the proposed regulation on page 2 of the briefing package. He then explained that the basis for this action is that sometimes in fatal accidents, in particular, VOSH personnel encounter witnesses/employees/supervisors who refuse to talk with VOSH inspectors or avoid answering specific questions for a variety of reasons. He further explained that such refusals interfere with VOSH's ability to gather crucial information from eyewitnesses and the testimony of the injured employee, thereby, hampering the VOSH Program's ability to complete a full and fair investigation of the accident in a timely manner.

He stated that there is a code section which states that VOSH investigations must be completed within six months of the occurrence of a situation; therefore, refusals to talk can cause havoc with the investigation.

Mr. Withrow explained that the purpose of the proposal is to provide VOSH personnel with procedures on how to exercise the Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, in instances where witnesses/employees/supervisors refuse requests for interviews or refuse to answer specific questions posed by a VOSH inspector.

With respect to impact on employers, Mr. Withrow stated that employers would have to make employees available for private interview as identified by the Commissioner or his representative in accordance with procedures in the proposed regulation implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10. He added that VOSH estimates that it will seek to use the new procedures in the proposed regulation to require employers to make employees available for an interview on an average of five or fewer cases per year.

He informed the Board that the average length of a VOSH interview is normally 15 minutes or less; however, in accident cases an interview may last up to 60-90 minutes. He stated that VOSH does not anticipate significant down time for employers or employees; interview locations would normally be at the employer's worksite, an agreed-to alternate site, or at the local VOSH Office; that VOSH does not anticipate any significant travel costs; and VOSH will assume the cost of transcription services.

With respect to impact on employees, Mr. Withrow stated that employees would have to provide testimony in accordance with any procedures implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10.

Mr. Withrow stated that the Department would have to designate and train personnel on the procedures implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10, and that the average cost of transcription services for a one-hour interview is approximately \$200. He added that the VOSH Program estimates that annual costs for interviews under the proposed regulation would be \$1,000 or less.

Dr. Armstrong questioned whether enforcement of this proposed regulation would put a low-level employee in jeopardy of retaliation by the employer. Mr. Withrow responded that there are already regulations in place to handle this type of discriminatory activity while engaged in protected activity.

Mr. Withrow concluded by recommending that, on behalf of the staff of the Department of Labor and Industry, the Safety and Health Codes Board consider for adoption the proposed regulation, amending 16 VAC 25-60-240, and adding a new section 16 VAC 25-60-245, to establish procedures in the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program for the Commissioner or his appointed representatives under 40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10.

Ms. Rodriguez made the motion to accept Mr. Withrow's recommendation. Mr. Hartsoe seconded the motion, which was unanimously approved by voice vote.

Proposed Regulations: For General Industry, Part 1910: 16 VAC 25-96, Regulation to Amend Reverse Signal Operation Safety Procedures dealing with Vehicular Equipment, Motor Vehicles, Material Handling Equipment and Motor Vehicle Equipment in Existing Standards: 16 VAC 25-90-1910.269; 16 VAC 25-175-1926.601; 16 VAC 25-175-1926.602; and 16 VAC 25-175-1926.952; and

For Construction Industry, Part 1926: 16 VAC 25-97, Regulation to Establish Reverse Signal Operation Safety Procedures for Vehicles, Machinery and Equipment for General Industry and the Construction Industry

Mr. Withrow requested, on behalf of the VOSH Program, that the Board consider for adoption as a revised proposed regulation of the Board the following VOSH proposed amendments, pursuant to Va. Code §40.1-22(5): A. Amend the following Part 1910 General Industry and Part 1926 Construction Industry standards governing the Reverse Signal Operation Safety Procedures for off-road motor vehicles and vehicular or mechanical equipment, 16 VAC 25-96: §§1910.269(p)(1)(ii) – Vehicular Equipment for Electric Power Generation, Transmission and Distribution; 1926.601(b) – Motor Vehicles; 1926.602(a)(9)(ii) – Material Handling Equipment; and 1926.952(a)(3) – Mechanical Equipment, Power Transmission and Distribution; and

B. Establish new reverse signal operation safety procedures for all vehicles, machinery and equipment with an obstructed view to the rear in General Industry and the Construction Industry, 16 VAC 25-97.

Mr. Withrow summarized the rulemaking process by informing the Board that a NOIRA was adopted by the Board on March 7, 2006, and published on September 4, 2006, with a 30-day comment period ending on October 4, 2006. He noted that no comments were received. He stated that the Board then adopted proposed regulatory language on December 6, 2006, which was published on August 20, 2007, with a 60-day comment period ending on October 19, 2007. Again, he noted that no comments were received. He stated that a public hearing was held by the Board on October 18, 2007, and no comments were received. He continued by stating that after the close of the 60-day public comment period, the Department received requests from five individuals (listed on page 2 of the briefing package) for an additional opportunity to comment. Mr. Withrow stated that at its meeting on February 28, 2008, the Board approved the publication of an additional 30-day comment period, which was published from April 14 to May 14, 2008. He informed the Board that the Department held a meeting on April 16, 2008, with interested parties representing employer and employee interests for the construction and general industries.

Mr. Withrow discussed the basis for the proposed action. He informed the Board that from 1992 through September 30, 2007, there had been 19 fatal accidents in construction work zones and nine in general industry work zones where employees were struck by vehicles that were operating in reverse.

Mr. Withrow noted that a number of substantive changes had been made to the proposed regulation, thereby making it a revised proposed regulation, pursuant to Va. Code §§ 2.2-4007.03.B. and 2.2-4007.06, and justifying publishing the proposed regulation for an additional 30-day comment period.

Next, Mr. Withrow stated that the purpose of the revised regulation is to provide more comprehensive protection to employees in construction and general industry work areas where vehicles, machinery equipment with obstructed views to the rear are operated in reverse. He then discussed the impact of the original revised proposed regulation on employers. He stated that the issue that got most of the attention concerned restructuring the regulation so that there was both an operating reverse signal alarm and a designated observer/ground guide to help the vehicle back up. He informed the Board that in the original regulation, if the driver got out of the vehicle and determined that nobody was in the back-up zone, then a designated ground guide was not needed. He added that this issue has been addressed in the revised Logging Standard where before operating any machine, the operator must determine that no employee is in the path of the machine.

Mr. Withrow informed the Board that no comments were received through Virginia's Regulatory Town Hall. He detailed many of the comments that were submitted directly to the VOSH Program on this proposed regulation.

In discussing additional substantive issues, Mr. Withrow addressed the issue of what happens if there is a back-up alarm but it's not operational. He stated that in the original document it was

determined that the defective equipment should be removed from service immediately. He noted that an exception to the rule was allowed where a vehicle with a defective back up alarm could continue in operation if a designated ground guide/observer is utilized. He stated that a designated observer is not needed if the vehicle has video or similar technological capability to allow the driver to see behind the vehicle. He added that for this exception to apply, the video equipment had to be operable and be in use by the driver of the vehicle.

Mr. Rick Linker questioned the clarity of the provisions in 16 VAC 25-97-30.C., Covered vehicle requirements, of the proposed regulation, which deals with operating a covered vehicle which does not have an audible reverse signal alarm. After much discussion, Mr. Crisanti suggested inserting "Where immediate correction is not feasible," at the beginning of the phrase so that it reads: "Where immediate correction is not feasible, covered vehicles equipped with a reverse signal alarm that is not operational or is not functioning properly shall be either:..."

After a 10-minute break, the meeting reconvened. Mr. Withrow continued discussing major changes to various provisions of the revised proposed regulation. He next addressed the comments received following the April 16th meeting with interested parties and the revised language resulting from those comments.

In conclusion, Mr. Withrow recommended that, on behalf of the staff of the Department of Labor and Industry, the Board consider for adoption 16 VAC 25-96, the revised proposed regulation to amend the following standards: Vehicular Equipment, Motor Vehicles, Material Handling Equipment and Motor Vehicle Equipment in Existing Standards: 16 VAC 25-90-1910.269; 16 VAC 175-1926.601; 16 VAC 25-175-1926.602; and 16 VAC 25-175-1926.952; and also consider for adoption the revised proposed comprehensive regulation: Reverse Signal Operation Safety Procedures for Vehicles, Machinery and Equipment for General Industry and the Construction Industry, 16 VAC 25-97.

Mr. Withrow also recommended that, on behalf of the Department of Labor and Industry, the Board approve an additional 30-day public comment period for the revised proposed amendments to Amend Reverse Signal Operation Safety Procedures for General Industry and the Construction Industry, pursuant to Va. Code §§40.1-22(5) and 2.2-4007.03.B.

Dr. Mundy made the motion to accept Mr. Withrow's recommendation. Mr. Linwood Saunders seconded the motion which was approved by unanimous voice vote.

Proposed Tree Trimming Operations, 16 VAC 25-73

Mr. Withrow, on behalf of the VOSH program, requested the Board to consider for adoption a proposed regulation applicable to Tree Trimming Operations, pursuant to Va. Code §40.1-22(5).

Mr. Withrow explained that the proposed regulation is based on the American National Standards Institute or ANSI Z133.1-2006, which is entitled, "Safety Requirements for Arboricultural Operations (With Modifications) for Application to Tree Trimming Operations." He stated that the proposal addresses non-logging, tree-trimming and cutting operations on residential and commercial work sites. Mr. Withrow then called the Board's attention to various

problems with using ANSI Z133.1-2006 as the basis for the Tree Trimming proposed regulation. He informed the Board that there were no potential conflicts with the Overhead High Voltage Line Safety Act and tree trimming work and power lines.

With respect to the basis, purpose and impact of the proposed regulation, Mr. Withrow stated that the VOSH Program currently applies the Logging Standard, §1910.266, to arborists/tree trimming operations any time a tree is felled or cut down because that is the way the Logging Standard is written. He noted that when a tree trimming company is only trimming a tree, the Logging Standard does not apply and VOSH has to use a variety of regulations to address the issues involved.

He informed the Board that the tree trimming industry does not want to be covered by the Logging Standard and that they requested their own regulation.

He stated that the purpose of the proposed regulation is to reduce employee injuries and fatalities by considering for adoption a comprehensive regulation to address non-logging, arborist/tree trimming and cutting operations in residential and commercial worksites.

Mr. Withrow summarized the Notice of Intended Regulatory Action (NOIRA) comments and described various issues encountered in developing the proposed regulation, such as site clearing where fatalities have resulted; work around high voltage lines; use of cranes to lift people and use of personnel baskets on cranes to lift people; past fatalities; and risk assessment of the trees involved.

With respect to the impact of the proposed regulation, Mr. Withrow stated that employers with employees in the affect industry would have to familiarize the employees with the requirements of the new regulation and train them. He added that the cost impact of the proposed regulation would be significantly less than the cost of a completely new regulation. He estimated that in Virginia, there are between approximately 570 and 840 employers and between approximately 1700 and 3400 employees impacted by the proposed regulation. Next, he discussed the cost of training and retraining workers. He informed the Board that the Department of Labor and Industry plans to develop a standardized training program for employers that could be placed on the Department's website for easy access and which should reduce implementation of training costs. He added that employers and employees should benefit from reductions in injuries or fatalities associated with current unsafe tree trimming practices. He informed the Board that Virginia averages three tree trimming fatalities a year.

Mr. Withrow concluded by recommending that, on behalf of the Department of Labor and Industry, the Board consider for adoption the proposed regulation 16 VAC 25-73, Tree Trimming Operations. Mr. Lou Cernak moved to accept the recommendation, and Ms. Jolly seconded the motion, which was approved unanimously by voice vote.

NEW BUSINESS

16 VAC 25-10, Public Participation Guidelines for the Safety and Health Codes Board

Mr. Crisanti requested that, on behalf of the VOSH Program and the Division of Boiler Safety Compliance, the Board consider for adoption a revised Public Participation Guidelines (PPGs) for use by the Board with a proposed effective date of September 15, 2008. Mr. Crisanti explained that this revision was developed in accordance with new additional requirements passed by Chapter 321 of the 2008 Acts of Assembly.

He explained that the purpose of the revised Public Participation Guidelines (PPG) is to implement a standardized set of PPGs consistent for each Executive branch agency and regulatory board that has authority to promulgate, compliant with Chapter 321 of the 2008 Acts of Assembly.

Mr. Crisanti informed the Board that there was no fiscal impact from the proposed PPGs on employers or employees and that, beyond the costs of promulgating the regulation, there is no impact on the Department.

In conclusion, Mr. Crisanti, on behalf of the Department of Labor and Industry, recommended that the revised PPGs for the Safety and Health Codes Board, as authorized by Chapter 321 of the 2008 Acts of Assembly, Va. Code §40.1-22(5) and §2.2-4006.A.4(c), be adopted with an effective date of September 15, 2008.

Mr. Saunders moved to accept Mr. Crisanti's recommendation, and Dr. Mundy seconded the motion which was approved unanimously by voice vote.

Items of Interest from the Department of Labor and Industry

Commissioner Ray Davenport of the Department of Labor and Industry began by welcoming Dr. Armstrong back to the Board and congratulating the newly elected officers. Commissioner Davenport called the Board's attention to the Department's Annual Report. Next, he addressed the Board's pending appointments by informing the Board that the pending appointments have been put in limbo with the most recent general Assembly action. He assured the Board that the Department should hear from the Governor's office shortly since the General Assembly session has ended.

Commissioner Davenport informed the Board that the Department faces budgetary challenges both on the state and federal levels. He reported that the Department is down about half a million dollars of our budget.

He concluded by thanking Ms. Rodriguez, the outgoing Board Chair, for her service. He also thanked all Board members for their continued work and support.

Items of Interest from Members of the Board

The Board had no items of interest to report.

Adjournment

There being no further business, Chairman Stiff requested a motion for adjournment. Dr. Mundy made the motion to adjourn the meeting. Ms. Rodriguez seconded the motion which was approved by unanimous voice vote. The meeting adjourned at 12:52 p.m.