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Periodic Review / Retain Regulation
Agency Background Document

Agency name	Virginia Department of Labor and Industry/ Safety and Health Codes Board
Virginia Administrative Code (VAC) citation	16 VAC 25-170-10 et seq.
Regulation title	Virginia Excavation Standard, Construction Industry
Document preparation date	July 17, 2013

This form is used when the agency has done a periodic review of a regulation and plans to retain the regulation without change. This information is required pursuant to Executive Orders 14 (2010) and 58 (1999).

Legal basis

Virginia Code section 40.1-22(5) states that "…the Board shall adopt the standard which most adequately assures, 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 Occupational Safety and Health Act of 1970 (P.L. 91-596)". Also, federal OSHA mandates that State Plan states be at least as effective as federal OSHA. This regulation is identical to current federal OSHA standards for Excavation except for the section that provides for application of any requirements under the Virginia Confined Space Standard for the Construction Industry, 16 VAC 25-140-10 et seq., where that standard is more stringent.

Alternatives

The alternatives considered for this regulation were whether to retain the existing regulation as promulgated or repeal the regulation and adopt the federal identical excavation regulation for the construction industry. During a previous regulatory review, the Department established an independent review panel to consider the need for the standard or whether it should be eliminated. The panel recommended retention of the regulation in its present form. At this time, the Department is not aware of any alterations in the regulatory environment that would alter that assessment.

The repeal of this regulation would result in the implementation of the federal identical regulation for excavation work in the construction industry. Retaining the current regulation will ensure that employees are more adequately protected when engaged in confined space work in construction excavation work. Based on a previous review and the current review, the Department has determined that the current regulation is the least burdensome alternative for the protection of employees in this area.

Public comment

No public comments were received on this regulation during the public comment period, which began on April 8, 2013 and ended on May 23, 2013. The agency and the Safety and Health Codes Board did not establish an informal advisory group for the purpose of assisting in the periodic review.

Effectiveness

The regulation has two goals:

1. Reduce the incidence of construction fatalities of Virginia workers due to workplace exposure to known hazards.

2. Protect the public's health, safely and welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth.

The primary goal of this regulation is to prevent injuries and deaths of construction industry employees while they are working in excavation areas that also meet the definition of confined spaces. It provides minimum protections against exposure to hazardous chemicals and hazardous atmospheres and engulfment by physical hazards in excavation areas. It also provides protections against exposure to improperly energized equipment which might pose a crushing hazard, and exposure to electrical or explosive hazards in excavation areas defined as confined spaces. Since promulgation of this regulation, there have not been any confined space fatalities in excavations on construction worksites.
The regulation is clearly written and easily understandable.

Result

The Department of Labor and Industry and the Safety and Health Codes Board recommend retaining the regulation without change.

Small business impact

In order to minimize the economic impact of regulations on small business, please include, pursuant to § 2.2-4007.1 E and F, a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to the which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) 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. Also, include a discussion of the agency's determination whether the regulation should be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses.

Construction companies must meet certain standards pursuant to the U.S. Occupational Safety and Health (OSH) Act (1970). In addition, because federal OSHA mandates that State Plan states be at least as effective as federal OSHA, there is a continued need for such a regulation. There were no comments on the regulation during the public comment period. This regulation affects all businesses (large and small) that are engaged in construction activity. The regulation is not overly complex. It does not increase the costs for small businesses, because the costs are the result of actions that are required by federal law and regulation to provide the protections mandated by this regulation.

As noted above, companies engaged in construction activity must meet certain standards pursuant to the U.S. Occupational Safety and Health (OSH) Act (1970) and federal OSHA mandates that State Plan states be at least as effective as federal OSHA. This regulation does not overlap, duplicate, or conflict with federal or state law or regulation, as these state regulations are enforced by the Department in lieu of direct federal enforcement as per agreement between the Department and federal OSHA.

This regulation was last subjected to a periodic review in 2009. Since that review, there have been no significant changes in technology, economic conditions, or other factors in the area affected by the regulation. At this time, there is nothing to indicate that the regulation should be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on

small businesses. The Department believes that the regulation provides a positive cost/benefit to the regulated community, as adherence to the requirements of this regulation may actually lower costs to small businesses, by protecting the health and well-being of their employees, thus, shielding the businesses from the costs of litigation due to injuries or fatalities.

Family impact

This regulation has no impact on the institution of the family or family stability.