



**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 25-140-10 <i>et seq.</i>
Regulation title	Virginia Confined Space Standard for the Construction Industry
Document preparation date	March 16, 2009

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 36 (2006) and 58 (1999).

Legal basis

Please identify the state and/or federal legal authority for the regulation, including (1) the most relevant law and/or regulation, and (2) promulgating entity, i.e., agency, board, or person.

Section 40.1-22(5) of the Code of Virginia mandates that the Safety and Health Codes Board adopt standards that most adequately assure that no employee will suffer material impairment of health or functional capacity and that the standards be at least as stringent as the standards promulgated by Federal OSHA. The Federal Occupational Safety and Health Administration does not have a comparable standard for construction, but does enforce confined space entry procedures through the use of the General Duty Clause Section 5(a)(1) of the Federal OSH Act and other construction standards that are considered vague and provide very little guidance to employers. While this standard exceeds current federal standards for the construction industry, it does provide substantially similar safety and health protection as the required, mandated standards in general industry. The standard also provides construction employers with clearer guidelines for providing a safe workplace in the area of confined space entry.

Alternatives

Please describe all viable alternatives for achieving the purpose of the existing regulation that have been considered as part of the periodic review process. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving the purpose of the regulation.

Alternatives considered were to eliminate the regulation and revert to the federal system of enforcement which utilizes the General Duty Clause or retain the current regulation unchanged. The standard was originally subjected to the full Administrative Process Act notice and comment procedures when considered by the Safety and Health Codes Board, an independent entity composed of employers and employees of the regulated industries. During a previous regulatory review process, the Department convened a group of independent employer and employee representatives from the regulated community to review the confined space regulations. This review panel considered all alternatives and recommended retention of the standard as originally adopted by the Safety and Health Codes Board. The Department is not aware of any alterations in the regulatory environment that would alter that assessment.

During a previous regulatory review period, the Federal Occupational Safety and Health Administration began the promulgation process for a construction Confined Space Entry Standard, but continues to enforce confined space entry through the General Duty Clause and other related construction standards. Elimination of the Virginia Confined Space Entry Standard for Construction would therefore not eliminate compliance requirements for employers, but would instead provide a regulatory system which is vague and provides very little guidance. Thus, this regulation is the least burdensome alternative for the protection of employees working in confined spaces in the construction industry.

Public comment

Please summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Please indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Commenter	Comment	Agency response

No public comments were received on this regulation during the public comment period which began on January 5, 2009, and ended on January 26, 2009. 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

Please indicate whether the regulation meets the criteria set out in Executive Order 36, e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable.

The regulation has three goals:

1. Reduce the incidence of material impairment of the health of Virginia workers due to workplace exposure to known hazards.
2. Provide protection to construction workers equal to that provided to workers in other industries.
3. Protect the public's health, safety 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 that are required to enter confined spaces. Among other things, the standard requires atmospheric testing of confined spaces prior to entry, the use of personal protective equipment, where necessary, and requires ventilation of the space to prevent accumulation of toxic atmospheres. The Department has set a target for inspecting the construction industry and continues to review compliance with this regulation and any reported injuries or fatalities as a result of non-compliance. Since promulgation of this regulation, there has been a consistent increase in compliance with these requirements and no deaths or serious injuries as a result of improper confined space entry.

The regulation is clearly written and easily understandable.

Result

Please state that the agency is recommending that the regulation should stay in effect without change.

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

Family impact

Please provide an analysis of the regulation's impact on the institution of the family and family stability.

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