COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. RAY DAVENPORT
COMMISSIONER

POWERS-TAYLOR BUILDING
13 SOUTH THIRTEENTH STREET
RICHMOND, VA 23219
PHONE (804) 371-2327
FAX (804) 371-6524
TDD (804) 786-2376

SAFETY AND HEALTH CODES BOARD

PUBLIC HEARING

State Corporation Commission
1300 East Main Street
Court Room B
Richmond, VA 23219

TUESDAY, JANUARY 31, 2006

10:00 A.M.

AGENDA

I. Call to Order

II. Agenda Items:

a) 16 VAC 25-55, Proposed Regulation Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors; and

b) 16 VAC 25-60, Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program

III. Opportunity for Public Comment on the Proposed Amendments

IV. Adjournment

VIRGINIA SAFETY AND HEALTH CODES BOARD

PUBLIC HEARING

BRIEFING PACKAGE

FOR JANUARY 31, 2006

Re-Adoption:
16 VAC 25-55, Proposed Regulation Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors

I. Summary of the Revised Proposed Regulation.

The revised proposed regulation changes none of the intent of the original proposed regulation adopted by the Board at its meeting on August 3, 2004 which required contract fee inspectors operating in the Commonwealth to demonstrate financial responsibility for bodily injury and property damage resulting from, or directly relating to, an inspector=s negligent inspection or recommendation for certification of a boiler or pressure vessel. As before, financial responsibility in the form of insurance, guaranty, surety, or self-insurance will be required as follows:

Aggregate limits of $500,000 for any contract fee inspector with less than 1% market share; $1 million for those with 1% up to and including 10% market share; and $2 million for those with more than 10% market share or any contract fee inspector that employs or has an arrangement with other contract fee inspectors.

The major changes in this revision include an amended definition of Amarket share@ and the addition of a definition for Acontract fee inspection agency.@ Further clarified is the coverage when a contract fee inspector is working for a contract fee inspection company, as well as to how the aggregate limits apply to contract fee inspection companies. Minor changes correct errors of grammar and punctuation.

II. Basis, Purpose and Impact of the Proposed Rulemaking.

A. Basis.

The Safety and Health Codes Board is authorized by Title 40.1-51.9:2 C of the *Code of Virginia* to, AYpromulgate regulations requiring contract fee inspectors, as a condition of their doing business in the Commonwealth, to demonstrate financial responsibility sufficient to comply with the requirements of this chapter. Regulations governing the amount of any financial responsibility required by the contract fee inspector shall take into consideration the type, capacity and number of boilers or pressure vessels inspected or certified.@ *(' 40.1-51.9:2. of the Code of Virginia, Financial Responsibility Requirements for Contract Fee Inspectors, is contained in Appendix AA.@)*

B. Purpose.

The purpose of the proposed regulation is to set minimum aggregate limits for coverage or other means provided for in the *Code of Virginia* and approved by the Board to ensure the financial responsibility of boiler and pressure vessel contract fee inspectors operating in the Commonwealth. The intent of this financial responsibility is to assure additional protection to the public, including compensation to third parties, in cases where there is bodily injury and property damage resulting from, or directly relating to, a contract fee inspector=s negligent inspection or recommendation for certification of a boiler or pressure vessel.

C. Impact on Contract Fee Inspectors.

Contract fee inspectors would be required to indemnify boiler and pressure vessel owners for any bodily injury and property damage resulting from or directly related to an inspector=s negligent inspection or recommendation for certification of a boiler or pressure vessel. Contract fee inspectors would be required to provide documentation of their means of indemnification at the time of their certification or before performing inspections and at renewal of the instrument of insurance, guaranty, surety or self-insurance.

D. Impact on Boiler or Pressure Vessel Owners.

It is anticipated that any additional costs to the contract fee inspector, as a result of the requirements of this regulation, would be passed on to the boiler or pressure vessel owner, who is the end user of the service.

E. Impact on Employers and Employees.

Employers, employees, and the general public would be compensated up to the level of the required financial responsibility in cases of bodily injury and property damage resulting from or directly related to a contract fee inspector=s negligent inspection or recommendation for certification of a boiler or pressure vessel.

F. Impact on the Department of Labor and Industry.

No significant impact on the Department is anticipated beyond the cost to promulgate the regulation.

G. Technological Feasibility.

There are no technological feasibility issues associated with this regulation.

H. Benefit/Cost.

The benefit of these changes would be to ensure a minimum level of indemnification in cases involving bodily injury and property damage resulting from, or directly relating to, a contract fee inspector=s negligent inspection or recommendation for certification of a boiler or pressure vessel.

The financial responsibility requirements would cost contract fee inspectors approximately $2,500 - $10,000 per year. It is anticipated that the costs would be passed on to the boiler or pressure vessel owner, who is the end user of the service.

Individual property damage costs from boiler or pressure vessel incidents in Virginia during the past three years have ranged from $300,000 to $500,000. The proposed requirements would protect contract fee inspectors from potential lawsuits to the level of their coverage. The financial responsibility would also give contract fee inspectors a vested interest in the performance of the inspections they conduct.

III. Implementation Schedule.

Not applicable.

Contact Person:
Mr. Fred Barton
Director, Boiler Safety Compliance
(804) 786-3262
fpb@doli.state.va.us

APPENDIX AA@

Enabling Statute from the Code of Virginia Authorizing Regulatory Action by the Board.

' 40.1-51.9:2. Financial responsibility requirements for contract fee inspectors.

A. Contract fee inspectors inspecting or certifying regulated boilers or pressure vessels in the Commonwealth shall maintain evidence of their financial responsibility, including compensation to third parties, for bodily injury and property damage resulting from, or directly relating to, an inspector's negligent inspection or recommendation for certification of a boiler or pressure vessel.

B. Documentation of financial responsibility, including documentation of insurance or bond, shall be provided to the Chief Inspector within thirty days after certification of the inspector. The Chief Inspector may revoke an inspector's certification for failure to provide documentation of financial responsibility in a timely fashion.

C. The Safety and Health Codes Board is authorized to promulgate regulations requiring contract fee inspectors, as a condition of their doing business in the Commonwealth, to demonstrate financial responsibility sufficient to comply with the requirements of this chapter. Regulations governing the amount of any financial responsibility required by the contract fee inspector shall take into consideration the type, capacity and number of boilers or pressure vessels inspected or certified.

D. Financial responsibility may be demonstrated by self-insurance, insurance, guaranty or surety, or any other method approved by the Board, or any combination thereof, under the terms the Board may prescribe. A contract fee inspector whose financial responsibility is accepted by the Board under this subsection shall notify the Chief Inspector at least thirty days before the effective date of the change, expiration, or cancellation of any instrument of insurance, guaranty or surety.

E. Acceptance of proof of financial responsibility shall expire on the effective date of any change in the inspector's instrument of insurance, guaranty or surety, or the expiration date of the inspector's certification. Application for renewal of acceptance of proof of financial responsibility shall be filed thirty days before the date of expiration.

F. The Chief Inspector, after notice and opportunity for hearing, may revoke his acceptance of evidence of financial responsibility if he determines that acceptance has been procured by fraud or misrepresentation, or a change in circumstances has occurred that would warrant denial of acceptance of evidence of financial responsibility under this section or the requirements established by the Board pursuant to this section.

G. It is not a defense to any action brought for failure to comply with the requirement to provide acceptable evidence of financial responsibility that the person charged believed in good faith that the owner or operator of an inspected boiler or pressure vessel

possessed evidence of financial responsibility accepted by the Chief Inspector or the Board. (1996, c. 294.)

16 VAC 25-55, Financial Requirements for Boiler and Pressure Vessel Contract Fee Inspectors

As Adopted by the

Safety and Health Codes Board

Date:_____

BOILER SAFETY COMPLIANCE PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

16 VAC 25-55, Financial Requirements for Boiler and Pressure Vessel Contract Fee Inspectors

Note: **New language is in Bold and underlined** ~~deleted language is struck through~~.

16 VAC - 25- CHAPTER 55

FINANCIAL REQUIREMENTS FOR BOILER AND PRESSURE VESSEL CONTRACT FEE INSPECTORS

16 VAC 25-55-10. Definitions.

The following words and terms, when used in this chapter, ABoard@ ABoiler@, AChief Inspector@ and APressure Vessel@, shall have the same meanings as defined in 16 VAC-25-50-10 unless the context clearly indicates otherwise.

AContract fee inspector@ means any certified boiler inspector contracted to inspect boilers or pressure vessels on an independent basis by the owner or operator of the boiler or pressure vessel.

AMarket share@ means **a fraction, (a) the numerator of which is the total fees charged by the inspector or agency under 16 VAC 25-50-150 for conducting power boiler and high temperature water boiler, heating boiler, and pressure vessel inspections in the most recent calendar year and (b) the denominator of which is the total fees charged by all inspectors and agencies under 16 VAC 25-50-150 for conducting power boiler and high temperature water boiler, heating boiler, and pressure vessel inspections in the most recent calendar year.** ~~the percentage of the total number of boilers and pressure vessels in the Commonwealth with valid inspections in most recent calendar year for which data is available as reported by the Chief Inspector.~~

AContract fee inspection agency@ means a company that directly employs contract fee inspectors or has contractual arrangements with other contract fee inspectors for the purpose of providing boiler and pressure vessel inspections to the general public.

16 VAC 25-55-20. Financial Requirements.

A. Current certified contract fee inspectors shall provide documentation of financial responsibility to the Chief Inspector for approval within ninety days of the effective date of this regulation, in such form as required by the Chief Inspector.

Contract fee inspectors initially certified following the effective date of this regulation shall provide such documentation to the Chief Inspector within thirty days following the issuance of the certification of the contract fee inspector. The Chief Inspector may revoke a contract fee inspector=s inspector identification card, as described in 16 VAC 25-50-70, for failure to provide documentation of financial responsibility within the required timeframe.

B. Financial responsibility of a contract fee inspector shall be demonstrated by maintenance of an instrument of insurance, guaranty, surety or **by** self-insurance, individually or in any combination thereof, for the purpose of compensation to third parties, for bodily injury and property damage resulting from, or directly relating to, an inspector=s negligent inspection or recommendation for certification of a boiler or pressure vessel:

1. An aggregate limit of $500,000 or more for any contract fee inspector **or contract fee inspection agency** with less than 1% market share;

2. An aggregate limit of $1 million or more for any contract fee inspector **or contract fee inspection agency** from 1% up to and including 10% market share; and

3. An aggregate limit of $2 million or more for any contract fee inspector **or contract fee inspection agency** with more than 10% market share. ~~or any contract fee inspector who is not a sole proprietor and sole operator and employs or may have contractual agreements for the provision of such services with other contract fee inspectors.~~

4. Contract fee inspectors may be covered under ~~the~~ **an** instrument **or instruments** of insurance, guaranty, surety or **the** self-insurance of their employer or a company on behalf of which they have a contractual arrangement to provide boiler and pressure vessel inspections. To be acceptable as proof of financial responsibility **for inspections not conducted for the benefit of their employer or company with which the inspector has a contractual arrangement such instrument, instruments or self-insurance must also cover** ~~such coverage must extend to the inspections conducted by~~ the contract fee inspector **for such inspections.** ~~which are not performed for their employer or the company with which they have a contractual arrangement.~~ Where contract fee inspectors are not covered for inspections conducted on their own behalf under the instrument of insurance, guaranty, surety or self-insurance of their employer or company with which they have a contractual arrangement, they must provide a separate instrument that covers such inspections.

5. Contract fee inspectors who elect to self-insure for the full amount of their financial responsibility under this regulation shall maintain assets of an amount sufficient to cover the full minimum liability amount in regulation for his level of market share and shall provide audited financial statements showing total assets and liabilities.

6. Contract fee inspectors who elect to partially self-insure shall maintain assets in an amount sufficient to cover ~~that~~ **the stated** partial liability amount and shall provide audited financial statements showing their total assets and liabilities. Such assets shall be held in combination with an instrument or instruments of insurance, guaranty, or surety to provide a total amount sufficient to cover the minimum liability amount in regulation for his level of market share. They shall provide copies of such documents to the Chief Inspector.

7. Aggregate limits approved at such time shall remain in effect until the occurrence of an event described in 16 VAC 25-55-20(E).

C. Within thirty days of receipt of documentation of financial responsibility submitted by a contract fee inspector for the purpose of complying with these regulations, the Chief Inspector shall issue a determination to the contract fee inspector as to whether the documentation provided is acceptable. Documentation approval by the Chief Inspector is a requirement to operate as a contract fee inspector within the Commonwealth of Virginia.

D. A contract fee inspector shall notify the Chief Inspector at least thirty days before the effective date of ~~the~~ **any** change **in coverage**, expiration, or cancellation of an instrument of insurance, guaranty or surety or self-insurance. In the case of self-insurance, the

contract fee inspector shall notify the Chief Inspector immediately upon such time as he can no longer maintain self-insurance at the required limit and has not secured insurance, guaranty or a surety to cover his liability to the required limit.

E. Acceptance of proof of financial responsibility shall expire on the effective date of any change in the inspector=s instrument of insurance, guaranty or surety, or the expiration date of the inspector=s certification **whichever is sooner**. Application for renewal of acceptance of proof of financial responsibility shall be filed at least thirty days before.

VIRGINIA SAFETY AND HEALTH CODES BOARD

PUBLIC HEARING

FOR JANUARY 31, 2006

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16 VAC 25-60, Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program

I. <u>Summary of the Proposed Regulation</u>.

The Virginia Occupational Safety and Health (VOSH) Program has requested that the Safety and Health Codes Board consider for adoption as "proposed" standards of the Board the following draft amendments to the Administrative Regulations for the VOSH Program, and to continue the regulatory adoption process.

A. Amend certain definitions contained in §10, Definitions, including "Abatement period," "Commissioner," "Commissioner of Labor and Industry," "Person," and "Public employer."

B. Amend §§20, 40 and 130 to correct subparagraph numbering, and correct spelling error in word "tunneling" in §130.

C. Amend §30.C., Applicability to Public Employers, to:

1. apply Va. Code §40.1-10, Offenses in regard to examinations, inspections, etc., to public employers (any person sworn to give testimony who willfully refuses, or any person to whom interrogatories have been sent who refuses to answer, or any person who obstructs an inspection or investigation can be subject to conviction for a misdemeanor and a fine not exceeding $100.00 nor less than $25.00, or imprisonment in jail not

exceeding 90 days);

D. Amend §30.E., Applicability to Public Employers, to apply Va. Code §§40.1-49.9, Issuance of warrant; 40.1-49.10, Duration of warrant; 40.1-49.11, Conduct of inspection, testing, or collection of samples for analysis; 40.1-49.12, Review by courts, to political subdivisions in the Commonwealth. Delete the section symbols following the word, "Sections."

E. Amend §40, Notification and Posting Requirements, to clarify that notices of contests shall be delivered by the employer to any authorized employee representative.

F. Amend §80, Access to Employee Medical and Exposure Records, to delete the obsolete reference to "Va. Code §2.1-377 to -386" and change it to the re-designated 2.2-3800 to -3809.

G. Amend §90.D., Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas, to permit the release of VOSH contested case file information once litigation has been initiated and a copy of the file has been released to the employer under a discovery request (request for production), or to a third party in response to a subpoena *duces tecum* for contested case file documents *(Note: This provision would not apply in cases where documents from an active investigation are released in response to a subpoena duces tecum from a third party).*

H. Amend §§100A., E., and F., Complaints, to eliminate obsolete references to "formal" (signed employee complaints) and "nonformal" complaints (unsigned employee complaints or complaints filed by former employees) and substitute language similar to that in the VOSH Field Operations Manual (and federal OSHA requirements) which describes complaints as those that are either inspected (i.e., the employer receives an onsite inspection), or investigated (the employer is contacted by phone or fax).

I. Amend Part III, Occupational Safety and Health Standards, §§120 (General Industry Standards), 130 (Construction Industry Standards) 140 (Agriculture Standards) and 150 (Maritime Standards), to add regulatory authority for the VOSH Program to issue citations and penalties for an employer's failure to comply with the applicable manufacturer's specifications and limitations for the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment. Use of any non-compliant item would be prohibited. These proposed provisions would apply unless specifically superseded by a more stringent corresponding requirement in Parts 1910, 1926, 1928, 1915, 1917 and 1919. The new provisions will also supersede any less stringent requirements currently contained in Parts 1910, 1926, 1928, 1915, 1917 and 1919.

J. Amend §140, Agricultural standards, to clarify "Agricultural Operations." Current VOSH standards for Agriculture use the term "agricultural operations" but do not define the term.

K. Amend §150, Maritime Standards, to include references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively).

L. Amend §260.A., Issuance of Citation and Proposed Penalty, guidance on how to apply the requirement in Va. Code §40.1-49.4.A.3. which provides that "No citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation." The proposed amendment would provide that:

1. the six month time frame is tolled (i.e., suspended) on the date the citation is issued by the Commissioner, without regard for when the citation is received by the employer;

2. the six month time frame begins to run on the day after the incident or event occurred or notice was received by the Commissioner (see exceptions noted below), in accordance with Va. Code §1-13.3. The word "month" shall be construed to mean one calendar month regardless of the number of days it may contain, in accordance with Va. Code §1-13.13.;

3. 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;

4. notwithstanding 2. above, if an employer fails to notify the Commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence as required by Va. Code §40.1-51.1.D, the six month time frame will begin when the Commissioner receives actual notice of the incident.

5. notwithstanding 2. above, if the Commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of an Employer's Accident Report (EAR) from the Virginia Workers' Compensation Commission, the six month time frame will commence when the Commissioner actually receives the EAR form;

6. notwithstanding 2. above, if the Commissioner is first notified of a work-related hazard or incident resulting in an injury or illness to an employee(s) through receipt of a complaint or referral, the six month time

frame will commence when the Commissioner actually receives the complaint or referral.

M. Amend §260, Issuance of Citation and Proposed Penalty, by adding a new subsection 260.F. to codify the Department's multi-employer worksite inspection policy. The proposed language provides that on multi-employer worksites, both construction and non-construction citations normally shall be issued to employers whose employees are exposed to hazards (the exposing employer). Additional employers can be cited, whether or not their own employees are exposed, including the employer who actually creates the hazard (the creating employer); the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer); and the employer who has the responsibility for actually correcting the hazard (the correcting employer).

N. Amend §260, Issuance of Citation and Proposed Penalty, by adding a new subsection 260.G., to codify the Department's multi-employer worksite defense. The proposed language provides that a multi-employer citation shall be vacated if it is determined that the employer did not create the hazard; the employer did not have the responsibility or the authority to have the hazard corrected; the employer did not have the ability to correct or remove the hazard; 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/her employees are exposed; and the employer has instructed his/her employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it (where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; when extreme circumstances justify it, the exposing employer shall have removed his/her employees from the job).

O. Amend § 300.A., Contest Proceedings Applicable to the Commonwealth, by changing "Attorney General" to "Governor" as the individual to whom VOSH will refer contested citations involving the Commonwealth or one of its agencies if the case cannot be settled at the Department level.

P. Amend §§320.G. and I., Extension of Abatement Time to clarify that the Commissioner or his designated representative will be responsible for hearing objections to and appeals concerning extensions of abatement or denials thereof; and clarifying that such decisions will be heard in accordance with the Virginia Administrative Process Act.

Q. Amend §§340C., D. And E., Settlement, to eliminate references to "amended citations" as the VOSH Program no longer issues amended citations as part of informal or formal settlement agreements.

II. History.

The current Administrative Regulations were completely revised and adopted by the Board at its April 25, 1994 meeting. It has subsequently been amended four times by the Board as indicated below:

April 17, 1995: To reduce from 48 hours to 8 hours the time limit for employers to report any work-related incident resulting in a fatality or in the hospitalization of at least 3, rather than 5, individuals; to broaden the definition of "employee representative" for purposes of filing a VOSH complaint; and to correct a typographical error.

September 29, 1997: To require those employers who have received VOSH citation(s) for violation(s) of Virginia Occupational Safety and Health standards to certify to VOSH that they have abated the hazardous condition for which they were cited and to inform affected employees of the abatement action.

October 18, 2001: To repeal Section 50 on Accident Reports, Section 60 on Occupational Injury and Section 70 on the Annual Survey and instead adopt federal OSHA's regulations at 29 CFR 1904 for the Occupational Injury and Illness Recording and Reporting Requirements which again allow VOSH regulations to be identical to and "as effective as" those of federal OSHA.

December 2, 2002: To make housekeeping changes to replace outdated references to the Title 9 Administrative Process Act with the revised references in the *Code of Virginia*.

III. Basis and Purpose.

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."

The Administrative Regulations lay out the rules and basic parameters of employer responsibilities and how to redress issues with the VOSH Program in cases of disagreement. Amendments are necessary to comply with changes to statutory law or to address procedural or other administrative changes that have occurred since the Administrative Regulations were revised.

B. <u>Purpose</u>.

1. The proposed amendments to certain definitions contained in §10, Definitions, including "Abatement period," "Commissioner," "Commissioner of Labor and Industry," "Person," and "Public employer" are primarily for clarification purposes and do not involve any substantive changes.

2. The proposed amendments to §§20, 40 and 130 correct subparagraph numbering are housekeeping measures and do not involve any substantive changes.

3. The proposed amendments to §30, Applicability to Public Employers, would apply Va. Code §40.1-10, Offenses in regard to examinations, inspections, etc., to public employers (any person sworn to give testimony who willfully refuses, or any person to whom interrogatories have been sent who refuses to answer, or any person who obstructs an inspection or investigation can be subject to conviction for a misdemeanor and a fine not exceeding $100.00 nor less than $25.00, or imprisoned in jail not exceeding 90 days).

   Va. Code §40.1-2.1 provides that:

   > **"The provisions of this title and any rules and regulations promulgated pursuant thereto shall not apply to the Commonwealth or any of its agencies, institutions, or political subdivisions, or any public body, unless, and to the extent that, coverage is extended by specific regulation of the Commissioner or the Safety and Health Codes Board.** The Commissioner is authorized to establish and maintain an effective and comprehensive occupational safety and health program applicable to employees of the Commonwealth, its agencies,

institutions, political subdivisions, or any public body. Such program shall be subject to any State plan submitted to the federal government for State enforcement of the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596), or any other regulation promulgated under Title 40.1. The Commissioner shall establish procedures for enforcing the program which shall include provisions for fair hearings including judicial review and sanctions to be applied for violations." *(Emphasis added.)*

Under the current ARM, public employers are not subject to the criminal provisions of 40.1-10 *(NOTE: The criminal provision contained in Va. Code §40.1-51.4:2, Penalty for making false statements, etc., which carries a fine of not more than $10,000.00 or imprisonment for not more than six months or by both, does apply to public employers by operation of the VOSH ARM §30.C.).* The proposed amendment's purpose is to subject public sector employers (and in the case of Va. Code §40.1-10, public sector employees, since that section applies to any "person" found to be in violation) to the same potential criminal sanctions as private sector employers and employees. There does not appear to be any sound policy or legal rationale for shielding public employers/employees from criminal sanctions when they have engaged in conduct that would otherwise be considered criminal in nature.

4. The proposed amendment to §30.E., Applicability to Public Employers, applies Va. Code §§40.1-49.9, Issuance of warrant; 40.1-49.10, Duration of warrant; 40.1-49.11, Conduct of inspection, testing, or collection of samples for analysis; 40.1-49.12, Review by courts, to political subdivisions in the Commonwealth. As noted in 3. above, Va. Code §40.1-2.1, provides that the provisions of Title 40.1 and VOSH standards and regulations will only apply to public employers insofar as the Commissioner and Codes Board specify in regulation.

Under the current ARM, the VOSH program has no enforcement tool that would allow it to compel a political subdivision to allow the Department to conduct an enforcement inspection, were the political subdivision to refuse its consent to allow an inspection With regard to state agencies, the Commissioner can pursue cooperation through consulting with the appropriate Cabinet Secretaries and, if necessary, the Governor's Office. At the political subdivision level, while requests can be made to local government officials for cooperation, should the local entity still refuse, the Commissioner has very limited ability to force cooperation. The proposed amendment would allow the Commissioner to pursue an administrative search warrant through the local court system.

5. The proposed amendment to §80, Access to Employee Medical and Exposure Records, to delete the obsolete reference to "Va. Code §2.1-377 to -386" and change it to the re-designated 2.2-3800 to -3809, is a housekeeping measure and does not involve any substantive change. The Virginia Privacy Protection Act was repealed by the General Assembly and re-designated as the Government Data Collection and Dissemination Practices Act.

6. The proposed amendment to §40, Notification and Posting Requirements, clarifies that notices of contests shall be delivered by the employer to any authorized employee representative, and does not involve any substantive change to VOSH policy or procedure.

7. The proposed amendment to §90.D., Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas, will permit the release of VOSH contested case file information once litigation has been initiated and a copy of the file has been released to the employer under a discovery request (request for production); or to a third party in response to a subpoena *duces tecum* for contested case file documents *(Note: This provision would not apply in cases where documents from an active investigation are released in response to a subpoena duces tecum from a third party).*

   The purpose of this request is primarily to assist family members of accident victims to obtain documents from VOSH inspection files in a more timely fashion. The current ARM provision does not allow release of documents until the case is closed, which can stretch out to a period of years when the case is in litigation. However, once a file has been released to the employer through a discovery request or a litigant in a third-party legal action, any benefit to the Department's litigation strategy has disappeared, and there is no purpose served in maintaining confidentiality.

8. The proposed amendment to §§100A., E. and F., Complaints, eliminate references to "formal" (signed employee complaints) and "nonformal" complaints (unsigned employee complaints or complaints filed by former employees) and codifies current VOSH procedures which describes complaints as those that are either inspected (i.e., the employer receives an onsite inspection), or investigated (the employer is contacted by phone or fax). The proposal does not involve any substantive change to VOSH policy or procedure.

9. The proposed amendments to §§120 (General Industry Standards), 130 (Construction Industry Standards) 140 (Agriculture Standards) and 150

(Maritime Standards), to add regulatory authority for the VOSH Program to issue citations and penalties for an employer's failure to comply with the applicable manufacturer's specifications and limitations for the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment. Use of any non-compliant item is prohibited. These new provisions will apply unless specifically superseded by a more stringent corresponding requirement in Parts 1910, 1915, 1917, 1919, 1926 and 1928. The new provisions will also supersede any less stringent requirements currently contained in Parts 1910, 1915, 1917, 1919, 1926 and 1928.

With the exception of a few construction and general industry standards which require employers to comply with manufacturer specifications and limitations (e.g., 1910.254(d)(6) - arc welding; 1926.552(a) - material hoists, personnel hoists and elevators; 1926.554(a)(6) overhead hoists; etc.), when VOSH investigates an accident and finds that the cause of the accident was primarily due to misuse or improper operation of a piece of machinery, vehicle, tool, material or equipment, the only enforcement tool available is the use of §40.1-51.1.A., which is more commonly referred to as the "general duty clause." That section provides in part that:

> "It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees...."

As is evident from the wording of the statute, it does not specifically mention manufacturer's specifications and limitations, nor does it contain a requirement to remove the item from service until any problems are fixed. The statute has also been interpreted in case law to only apply to "serious" violations (i.e., those that would cause "death or serious physical harm"). The purpose of the proposed amendment is to clarify an employer's current responsibility under the "general duty clause" to comply with manufacturer's specifications and limitations, as well as allow the use of the new provision to address "other-than-serious" hazards before they can become serious in nature. The proposed amendment also provides an additional enforcement tool for the Commissioner to prevent the recurrence of accidents by assuring that machinery, vehicles, tools, materials and equipment which are not functioning properly, are removed from service until the condition is corrected.

[NOTE: Over the last 18 months, the VOSH Program has investigated at least eight fatal and one non-fatal catastrophic event where the cause of the accident could be directly attributed to failure to follow manufacturer's

specifications and limitations.]

10. The proposed amendment to §140, Agricultural standards, would clarify the meaning of "Agricultural Operations." Current VOSH standards for Agriculture use the term "agricultural operations" but do not define the term. The purpose of the proposed amendment is to provide further guidance to VOSH personnel, employers and employees concerning the applicability of, and in certain cases the non-applicability, of the agricultural standards contained in Part 1928. The proposed amendment reflects current VOSH enforcement policy and is based in part on a definition of "farming operation" contained in Federal OSHA Instruction CPL 2-0.51J:

> A **"farming operation"** means any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations. These are employers engaged in businesses that have a two digit Standard Industrial Classification (SIC) of 01 (Agricultural Production - Crops), 02 (Agricultural Production - Livestock and Animal Specialties), and four digit SIC 0711 (Soil Preparation Services), 0721 (Crop Planting, Cultivating, and Protecting), 0722 (Crop Harvesting, Primarily by Machine), 0761 (Farm Labor Contractors and Crew Leaders), and 0762 (Farm Management Services).

However, the proposed amendment further clarifies that operations that meet the definition of construction work contained in §130 shall not be considered to be included within the definition of "agricultural operations," nor shall any operations which are substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.

11. The proposed amendment to §150, Maritime Standards, would add references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively) to the list of maritime standards that apply to public sector employers. Federal OSHA has retained jurisdiction over private sector maritime employers but has no jurisdiction over public sector employers and employees. The purpose of the proposed amendment is to provide safety and health protections to any public sector employees in the longshoring and gear certification industries equivalent to those provided to private sector employees in those industries. Research indicates that there are currently no public sector employers and employees in the longshoring and gear certification industries, but the VOSH Program is responsible under the Virginia State Plan for providing coverage of public sector employees and

employees in these industries should there be any, so inclusion of these Parts is appropriate and necessary.

12. The proposed amendment to §260, Issuance of Citation and Proposed Penalty, codifies guidance on how to apply the requirement in Va. Code §40.1-49.4.A.3. which provides that "No citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation." The proposed amendments and purpose for each are as follows:

    a. §260.A.1.a. - the six month time frame is tolled (i.e., suspended) when the citation is issued by the Commissioner, without regard for when the citation is received by the employer;

    The purpose of the proposed amendment is to clarify for employers and employees that in order to comply with Va. Code §40.1-49.4.A.3., the Commissioner only need "issue" the violations within six months of the occurrence of any alleged violation, even if the employer receives the citations several days after the end of the six month period. Although a rare occurrence, the VOSH Program has had employers question the application of the statute to such a fact situation.

    b. §260.A.1.b. - the six month time frame begins to run on the day after the incident or event occurred or notice was received by the Commissioner in accordance with Va. Code §§1-210, and the word “month” in the statute means a calendar month in accordance with Va. Code §1-223 (see exceptions noted below);

    The purpose of the proposed amendment is to clarify for employers and employees how the six month time frame is calculated by specifically referencing Code of Virginia provisions that apply to computation of time in statutes. Specifically, Va. Code §1-223 provides in part that:

    > § 1-210. (Effective October 1, 2005) Computation of time.
    >
    > A. When an act of the General Assembly or rule of court requires that an act be performed a prescribed amount of time before a motion or proceeding, the day of such motion or proceeding shall not be counted against the time allowed, but the day on which such act is performed may be counted as part of the time. **When an act of the General Assembly or rule of court requires that an act be**

performed within a prescribed amount of time after any event or judgment, the day on which the event or judgment occurred shall not be counted against the time allowed. *(Emphasis added).*

Va. Code §1-223 provides as follows:

> § 1-223. (Effective October 1, 2005) Month; year.
>
> "Month" means a calendar month and "year" means a calendar year.

By way of example, if a fatal accident occurred on January 15th and the violation which caused the accident was corrected on the same day, the six month time frame would begin on January 16th, and would end on July 16th.

c. §260.A.1.c. - notwithstanding §260.A.1.b. above, 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 uncorrected;

The purpose of the proposed amendment is to clarify for employers and employees that for purposes of calculating the six month time frame for issuing a citation, the date a violation occurred includes not only the first day that it was created, but also every day thereafter that it continues to go uncorrected. The proposed amendment reflects current federal Occupational Safety and Health Review Commission legal precedent. *(Secretary of Labor v. General Dynamics Corp., Electric Boat Div., Quonset Point Facility, 15 OSHC 2122, 2128 (1993)).*

d. §260.A.1.d. - notwithstanding §260.A.1.b. above, if an employer fails to notify the Commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence, as required by Va. Code §40.1-51.1.D, the six month time frame will begin when the Commissioner receives actual notice of the incident.

The purpose of the proposed amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to a fatal or catastrophic accident as defined in Va. Code §40.1-51.1.D. does not begin until the Commissioner receives actual notice of the accident. The proposed amendment

reflects current federal Occupational Safety and Health Review Commission legal precedent. The case law is based on the premise that if an employer failed to comply with the notification provisions of the statute, he should not be rewarded for violating the law by allowing the six month time frame to start running on the day of the accident. *(Secretary of Labor v. Yelvington Welding Service, 6 OSHC 2013, 2016 (1978)).*

e. §260.A.1.e. - notwithstanding §260.A.1.b. above, if the Commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of an Employer's Accident Report (EAR) from the Virginia Workers' Compensation Commission, the six month time frame will commence when the Commissioner actually receives the EAR form;

The purpose of the proposed amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to an inspection that the Commissioner initiated following receipt of a Employer's Accident Report (EAR) does not begin until the Commissioner receives actual notice of the accident. The proposed amendment reflects a reasonable reading of current federal Occupational Safety and Health Review Commission legal precedent in that the Commissioner's first opportunity to discover the violation does not occur until receipt of the EAR form. *(Secretary of Labor v. Kaspar Electroplating Corp., 16 OSHC 1517 (1993).*

f. §260.A.1.f. - notwithstanding 260.A.1.b. above, if the Commissioner is first notified of a work-related hazard or incident resulting in an injury or illness to an employee(s) through receipt of a complaint or referral, the six month time frame will commence when the Commissioner actually receives the complaint or referral.

The purpose of the proposed amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to an inspection that the Commissioner initiated following receipt of complaint or referral does not begin until the Commissioner actually receives the complaint or referral. The proposed amendment reflects current federal Occupational Safety and Health Review Commission legal precedent in that the Commissioner's first opportunity to discover the violation does not occur until receipt of the complaint or referral. *(Secretary of Labor v. Sun Ship, Inc., 12 OSHC 1185 (1985)).*

13. The proposed amendment to §300, Contest Proceedings Applicable to the Commonwealth, changes "Attorney General" to "Governor" as the individual to whom VOSH will refer contested citations involving the Commonwealth or one of its agencies if the case cannot be settled at the Department level.

The purpose of the proposed amendment is to change the decision maker for resolution of contested state agency VOSH cases from the Attorney General to the Governor. As the Attorney General provides legal support and advice to state agencies, but does not have the authority to issue orders to Executive Branch agencies, it is appropriate to take the Attorney General's Office out of the decision process for VOSH contested cases and give that authority to the Governor, who has such authority.

14. The proposed amendment to §260, Issuance of Citation and Proposed Penalty, would add a new subsection 260.F. to codify the Department's multi-employer worksite inspection policy. The proposed regulation provides that on multi-employer worksites, both construction and non-construction citations normally shall be issued to employers whose employees are exposed to hazards (the exposing employer).

Additional employers can be cited, whether or not their own employees are exposed, including the employer who actually creates the hazard (the creating employer); the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer); and the employer who has the responsibility for actually correcting the hazard (the correcting employer).

The purpose of the proposed amendment is to codify VOSH's longstanding enforcement policy for the issuance of citations in multi-employer worksite situations. As a result of a recent decision of the Virginia Court of Appeals in the case of *C. Ray Davenport, Commissioner of Labor and Industry v. Summit Contractors*, on May 3, 2005, the VOSH Program's multi-employer citation policy was upheld in part and overturned in part. The Commissioner filed a request for appeal with the Virginia Supreme Court, which was refused July 12, 2005, making the Court of Appeals decision final. The main result of the decision is that, in the absence of a regulation or statute authorizing it, VOSH cannot issue citations to a "controlling employer" also acting as a general contractor (in the *Summit* case the "controlling employer" was the general contractor on a construction site), unless one of its employees was exposed to the safety/health hazard, or unless the company was found to have created the hazard.

The multi-employer worksite policy dates to the late 1970's and is a high

profile issue at both the state and federal levels, even though it affects a relatively small percentage of VOSH inspections (VOSH annually conducts over 3,000 inspections per year and the decision is estimated to affect approximately 1% or fewer of those cases). The Occupational Safety and Health Act of 1970 ("OSH Act") and federal regulations require VOSH laws, regulations and policies to be "as effective as" those of federal OSHA (see 29 CFR 1902.4). Since 1988, the VOSH Program has had a fully approved State Plan under §18(e) of the OSH Act with exclusive jurisdiction over worksites covered by the Virginia State Plan. The Court's invalidation of part of the VOSH Program's multi-employer citation policy potentially places that portion of the VOSH Program in violation of the "as effective as" requirement.

15. The proposed amendment to §260, Issuance of Citation and Proposed Penalty, would add a new subsection 260.G., to codify the Department's multi-employer worksite defense. The proposed regulation provides that a multi-employer citation shall be vacated if the employer demonstrates that the employer did not create the hazard; the employer did not have the responsibility or the authority to have the hazard corrected; the employer did not have the ability to correct or remove the hazard; 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/her employees are exposed; and the employer has instructed his/her employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it (where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; when extreme circumstances justify it, the exposing employer shall have removed his/her employees from the job).

    The purpose of the proposed amendment is to codify VOSH's longstanding recognition of a defense to the multi-employer citation policy for a certain class of employers as discussed above. As noted above, the multi-employer worksite policy dates to the late 1970's and is a high profile issue at both the state and federal levels, even though it effects a relatively small percentage of VOSH inspections (VOSH annually conducts over 3,000 inspections per year and the decision is estimated to affect approximately 1% or fewer of those cases). Since we propose that the Board codify the multi-employer citation policy, it is appropriate that we include in the new regulation a codification of the defense as well.

16. The proposed amendment to §§320.G. and I., Extension of Abatement Time, to clarify that the Commissioner or his designated representative will be responsible for hearing objections to and appeals concerning extensions of abatement or denials thereof; and clarifying that such

decisions will be heard in accordance with the Virginia Administrative Process Act, are primarily for clarification and procedural purposes. Neither the rights nor responsibilities of employers or employees are diminished in anyway by the proposed changes. In fact, the rights of both are expanded as the change to §320.I. assures the right of appeal of the Commissioner's decision on a request for an extension of abatement.

17. The proposed amendment to §340, Settlement, would eliminate references to "amended citations" as the VOSH Program no longer issues amended citations as part of informal or formal settlement agreements. The proposed amendment is primarily procedural in nature and provided for clarification purposes, and does not involve any substantive changes to VOSH operations.

C. Impact on Employers.

No significant impact on employers is anticipated if the proposed standard is adopted, as it merely codifies current and longstanding VOSH policies, interpretations and procedures previously detailed. With regard to the proposed amendments to §260 codifying the multi-employer citation policy and defense, there will be an impact only on employers that fall into the category of a "controlling" employer, as the current policy does not apply to them by virtue of the *Summit* decision referenced above. It is estimated that 1% or less of the more than 3,000 VOSH inspections conducted on an annual basis concern the application of the multi-employer citation policy to "controlling" employers.

D. Impact on Employees.

No adverse impact to employees is anticipated from the adoption of the proposed standard.

E. Impact on the Department of Labor and Industry.

No additional fiscal impact is anticipated for the Department if the proposed standard is adopted.

V. Technological Feasibility.

As the proposed changes reflect current VOSH enforcement policies, interpretations or procedures or reflect current statutory requirements which impact the program, it is anticipated that there are no significant issues of feasibility associated with adoption of the proposed amendments.

VI. Benefit/Cost.

As the proposed changes primarily reflect previously longstanding VOSH enforcement policies, interpretations or procedures or reflect current statutory requirements which impact the program, it is anticipated that there are no significant additional cost issues associated with adoption of the regulation.

The proposed amendment to §150, Maritime Standards, to include references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively) can potentially result in cost increases for public sector employers in those industries. However, the cost impact should be minimal since the number of employees affected is estimated to not exceed a few hundred employees.

The proposed amendments to §260 codifying the multi-employer citation policy and defense can result in some cost increases for employers that fall into the category of a "controlling" employer who was also acting as a general contractor, as the current policy does not apply to them by virtue of the *Summit* decision referenced above. It is estimated that 1% or less of the more than 3,000 VOSH inspections conducted on an annual basis concern the application of the multi-employer citation policy to "controlling" employers. The additional cost would be in the form of potential citations and penalties issued by the Department in the estimated 1% of cases that could be affected under the proposed amendment.

Contact Person:

Mr. Jay Withrow
Director, Office of Legal Support
804.786.9873
Jay.Withrow@doli.virginia.gov

16 VAC 25-60, Proposed Regulation to Amend the Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the

Safety and Health Codes Board

Date: _____

PART I.
DEFINITIONS

§ 10 Definitions

The following words and terms, when used in these regulations, shall have the following meaning, unless the context clearly indicates otherwise:

"Abatement period" means the period of time defined or set out in the citation permitted for correction of a violation.

"Bureau of Labor Statistics" means the Bureau of Labor Statistics of the United States Department of Labor.

"Citation" means the notice to an employer that the Commissioner has found a condition or conditions that violate Title 40.1 of the *Code of Virginia* or the standards, rules or regulations established by the commissioner or the board.

"Board" means the Safety and Health Codes Board.

"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any such reference ~~to the commissioner~~ shall include his authorized representatives.

"Commissioner of Labor and Industry" means only the individual who is Commissioner of Labor and Industry.

"Department" means the Virginia Department of Labor and Industry.

"De minimis violation" means a violation which has no direct or immediate relationship to safety and health.

"Employee" means an employee of an employer who is employed in a business of his employer.

"Employee representative" means a person specified by employees to serve as their representative.

"Employer" means any person or entity engaged in business who has employees but does not include the United States.

"Establishment" means, for the purpose of recordkeeping requirements, a single physical location where business is conducted or where services or industrial operations are performed, e.g., factory, mill, store, hotel, restaurant, movie theater, farm, ranch, bank, sales office, warehouse, or central administrative office. Where distinctly separate activities are performed at

a single physical location, such as contract activities operated from the same physical location as a lumberyard; each activity is a separate establishment. In the public sector, an establishment is either (a) a single physical location where a specific governmental function is performed; or (b) that location which is the lowest level where attendance or payroll records are kept for a group of employees who are in the same specific organizational unit, even though the activities are carried on at more than a single physical location.

"Failure to abate" means that the employer has failed to correct a cited violation within the period permitted for its correction.

"FOIA" means the Freedom of Information Act.

"Imminent danger condition" means any condition or practice in any place of employment such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through standard enforcement procedures provided by Title 40.1 of the *Code of Virginia*.

"OSHA" means the Occupational Safety and Health Administration of the United States Department of Labor.

"Other violation" means a violation which is not, by itself, a serious violation within the meaning of the law but which has a direct or immediate relationship to occupational safety or health.

"Person" means ~~one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons~~ any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.

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

"Public employee" means any employee of a public employer. Volunteer members of volunteer fire departments, pursuant to § 27-42 of the *Code of Virginia*, members of volunteer rescue squads who serve without pay, and other volunteers pursuant to the Virginia State Government Volunteers Act are not public employees. Prisoners confined in jails controlled by any political subdivision of the Commonwealth and prisoners in institutions controlled by the Department of Corrections are not public employees unless employed by a public employer in a work-release program pursuant to §§ 53.1-60 or 53.1-131 of the *Code of Virginia*.

"Recordable occupational injury and illness" means (I) a fatality, regardless of the time between the injury and death or the length of illness; (ii) a non-fatal case that results in lost work days; or (iii) a non-fatal case without lost work days which results in transfer to another job or termination of employment, which requires medical treatment other than first aid, or involves loss of consciousness or restriction of work or motion. This category also includes any

diagnosed occupational illness which is reported to the employer but is not otherwise classified as a fatality or lost work day case.

"Repeated violation" means a violation deemed to exist in a place of employment that is substantially similar to a previous violation of a law, standard or regulation that was the subject of a prior final order against the same employer. A repeated violation results from an inadvertent or accidental act, since a violation otherwise repeated would be willful.

"Serious violation" means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. The term "substantial probability" does not refer to the likelihood that illness or injury will result from the violative condition but to the likelihood that, if illness or injury does occur, death or serious physical harm will be the result.

"Standard" means an occupational safety and health standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

"VOSH" means Virginia Occupational Safety and Health.

"Willful violation" means a violation deemed to exist in a place of employment where (I) the employer committed an intentional and knowing, as contrasted with inadvertent, violation and the employer was conscious that what he was doing constituted a violation; or (ii) the employer, even though not consciously committing a violation, was aware that a hazardous condition existed and made no reasonable effort to eliminate the condition.

"Working days" means Monday through Friday, excluding legal holidays, Saturday, and Sunday.

PART II.
GENERAL PROVISIONS

§ 20 Jurisdiction

All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer, employee and place of employment in the Commonwealth of Virginia except where:

~~1~~ A. The United States is the employer or exercises exclusive jurisdiction;

~~2~~ B. The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider Federal OSHA case law in determining where jurisdiction over specific working conditions has been preempted by the regulations of a federal agency; or,

~~3~~ C. The employer is a public employer, as that term is defined in these regulations. In such cases, the Virginia laws, standards and regulations governing occupational safety and health are applicable as stated including §§ 10, 30, 280, 290, and 300 of these regulations.

§ 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 these regulations 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 except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained.

E. Sections §§ 40.1-49.4.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 manner provided in these regulations.

§ 40 Notification and Posting Requirements

Every employer shall post and keep posted any notice or notices, as required by the commissioner, including the Job Safety and Health Protection Poster which shall be available from the Department. Such notices shall inform employees of their rights and obligations under the safety and health provisions of Title 40.1 of the *Code of Virginia* and these regulations. Violations of notification or posting requirements are subject to citation and penalty.

~~1~~ A. Such notice or notices, including all citations, notices of contest, petitions for variances or extensions of abatement periods, orders, and other documents of which employees are required to be informed by the employer under statute or by these regulations, shall be delivered by the employer to any authorized employee representative, and shall be posted at a conspicuous place where notices to employees are routinely posted and shall be kept in good repair and in unobstructed view. The document must remain posted for 10 working days unless a different period is prescribed elsewhere in Title 40.1 of the *Code of Virginia* or these regulations.

~~2~~ B. A citation issued to an employer, or a copy thereof, shall remain posted in a conspicuous place and in unobstructed view at or near each place of alleged violation for three working days or until the violation has been abated, whichever is longer.

~~3~~ C. A copy of any written notice of contest shall remain posted until all proceedings concerning the contest have been completed.

~~4~~ D. Upon receipt of a subpoena, the employer shall use the methods set forth in this section to further notify his employees and any authorized employee representative of their rights to party status. This written notification shall include both the date, time and place set for court hearing, and any subsequent changes to hearing arrangements. The notification shall remain posted until commencement of the hearing or until an earlier disposition.

§ 50 Reserved *(Refer to the Part 1904 standards for the regulatory requirements regarding Accident Reporting).*

§ 60 Reserved *(Refer to the Part 1904 standards for the regulatory requirements regarding Occupational Injury and Illness Records).*

§ 70 Reserved (*Refer to the Part 1904 standards for the regulatory requirements regarding the Annual Survey.)*

§ 80 Access to Employee Medical and Exposure Records

A. An employee and his authorized representative shall have access to his exposure and medical records required to be maintained by the employer.

B. When required by a standard, a health care professional under contract to the employer or employed by the employer shall have access to the exposure and medical records of an employee only to the extent necessary to comply with the requirements of the standard and shall not disclose or report without the employee's express written consent to any person within or outside the workplace except as required by the standard.

C. Under certain circumstances it may be necessary for the commissioner to obtain access to employee exposure and medical records to carry out statutory and regulatory functions. However, due to the substantial personal privacy interests involved, the commissioner shall seek to gain access to such records only after a careful determination of the need for such information and only with appropriate safeguards described at 29 CFR 1913.10(i) in order to protect individual privacy. In the event that the employer requests the commissioner to wait 24 hours for the presence of medical personnel to review the records, the commissioner will do so on presentation of an affidavit that the employer has not and will not modify or change any of the records. The commissioner's examination and use of this information shall not exceed that which is necessary to accomplish the purpose for access. Personally identifiable medical information shall be retained only for so long as is needed to carry out the function for which it was sought. Personally identifiable information shall be kept secure while it is being used and shall not be released to other agencies or to the public except under certain narrowly defined circumstances outlined at 29 CFR 1913.10(m).

D. In order to implement the policies described in subsection C of this section, the rules and procedures of 29 CFR Part 1913.10, Rules of Agency Practice and Procedure Concerning Access to Employee and Medical Records, are hereby expressly incorporated by reference. When these rules and procedures are applied to the commissioner the following federal terms should be considered to read as below:

FEDERAL TERM	**VOSH EQUIVALENT**
AGENCY	VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY
OSHA	VOSH

ASSISTANT SECRETARY	COMMISSIONER
OFFICE OF THE SOLICITOR OF LABOR	OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE	OFFICE OF THE ATTORNEY GENERAL
PRIVACY ACT	VA. CODE ~~§ 2.1-377 TO 386~~ § 2.2-3800 to § 2.2-3809

§ 90 Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas

A. Pursuant to the Virginia Freedom of Information Act (FOIA) and with the exceptions stated in subsections B through H of this section, employers, employees and their representatives shall have access to information gathered in the course of an inspection.

B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the *Code of Virginia* shall not be disclosed for any purpose, except to the individual giving the statement.

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

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. 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.

J. 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.

§ 100 <u>Complaints</u>

A. <u>An employee or other</u> ~~Any~~ person who believes that a safety or health hazard exists in a workplace may request an inspection by giving notice to the commissioner. ~~Written complaints signed by an employee or an authorized representative will be treated as formal complaints. Complaints by persons other than employees and authorized representatives and unsigned complaints by employees or authorized representatives shall be treated as nonformal complaints. Nonformal complaints will generally be handled by letter and formal complaints will generally result in an inspection.~~

B. For purposes of this Section and § 40.1-51.2(b) of the *Code of Virginia*, the

representative(s) that will be recognized as authorized ~~by~~ to act for employees ~~for such action shall~~ can be:

1. A representative of the employee bargaining unit;

2. Any member of the employee's immediate family acting on behalf of the employee; or

3. A lawyer or physician retained by the employee.

C. A written complaint may be preceded by an oral complaint at which time the commissioner will either give instructions for filing the written complaint or provide forms for that purpose. Section 40.1-51.2(b) of the *Code of Virginia* stipulates that the written complaint follow an oral complaint by no more than two working days. However, if an oral complaint gives the commissioner reasonable grounds to believe that a serious condition or imminent danger situation exists, the commissioner may cause an inspection to be conducted as soon as possible without waiting for a written complaint.

D. A complaint should allege that a violation of safety and health laws, standards, rules, or regulations has taken place. The violation or hazard should be described with reasonable particularity.

E. A complaint will be classified as formal or nonformal and be evaluated to determine whether there are reasonable grounds to believe that the violation or hazard complained of exists.

1. If the commissioner determines that there are no reasonable grounds for believing that the violation or hazard exists, the employer and the complainant shall be informed in writing of the reasons for this determination.

2. An employee or authorized representative may obtain review of the commissioner's determination that no reasonable grounds for believing that the violation or hazard exists by submitting a written statement of his position with regard to the issue. Upon receipt of such written statement a further review of the matter will be made which may include a requested written statement of position from the employer, further discussions with the complainant or an informal conference with complainant or employer if requested by either party. After review of the matter, the commissioner shall affirm, modify or reverse the original determination and furnish the complainant and the employer written notification of his decision.

F. ~~If the commissioner determines that the complaint is formal and offers reasonable grounds to believe that a hazard or violation exists, then an inspection will be conducted as soon as possible. Valid nonformal complaints may be resolved by letter or may result in an inspection if the commissioner determines that such complaint establishes probable cause to conduct an inspection.~~ The commissioner’s response to a complaint will either

be in the form of an onsite inspection or an investigation which does not involve onsite response by the Commissioner.

1. Onsite inspections will normally be conducted in response to complaints alleging the following:

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

2. A complaint investigation, which does not involve onsite activity, shall normally be conducted for all complaints that do not meet the criteria listed in §100.F.1 above.

3. The commissioner reserves the right, for good cause shown, to initiate an inspection with regard to certain complaints that don't meet the criteria listed in §100.F.1 above; as well as to decline to conduct an inspection and instead conduct an investigation, for good cause shown, when certain complaints are found to otherwise meet the criteria listed in §100.F.1. above.

G. If there are several complaints to be investigated, the commissioner may prioritize them by considering such factors as the gravity of the danger alleged and the number of exposed employees.

H. At the beginning of the inspection the employer shall be provided with a copy of the written complaint. The complainant's name shall be deleted and any other information which would identify the complainant shall be reworded or deleted so as to protect the complainant's identity.

I. An inspection pursuant to a complaint may cover the entire operation of the employer,

particularly if it appears to the commissioner that a full inspection is warranted. However, if there has been a recent inspection of the worksite or if there is reason to believe that the alleged violation or hazard concerns only a limited area or aspect of the employer's operation, the inspection may be limited accordingly.

J. After an inspection based on a complaint, the commissioner shall inform the complainant in writing whether a citation has been issued and briefly set forth the reasons if not. The commissioner shall provide the complainant with a copy of any resulting citation issued to the employer.

§ 110 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 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.

PART III.
OCCUPATIONAL SAFETY AND HEALTH STANDARDS

§ 120 General Industry Standards

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.

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 superceded by a more stringent corresponding requirement in Part 1910. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.

§ 130 Construction Industry Standards

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 C.F.R. 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.

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 superceded by a more stringent corresponding requirement in Part 1926. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.

1 A. 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, ~~tunnelling~~ 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.

~~2~~ B. Certain standards of 29 C.F.R. Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.

~~3~~ C. The standards adopted from 29 C.F.R. Part 1910.19 and 29 C.F.R. 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.

§ 140 Agriculture standards

The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1928 and 29 CFR Part 1910 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.

For the purposes of applicability of such Part 1928 and Part 1910 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 § 130.A. of this regulation; nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.

The 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 superceded by a more stringent corresponding requirement in Part 1928 or Part 1910. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.

§ 150 Maritime Standards

The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 C.F.R. Part 1915, ~~and~~ 29 C.F.R. Part 1917, 29 C.F.R. Part 1918 and 29 C.F.R. 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.

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 superceded by a more stringent corresponding requirement in Parts 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.

§ 160 General Duty

Where a recognized hazard exists that is causing or likely to cause death or serious physical harm, and specific general industry, construction and agricultural standards do not apply or may not exist, the requirements of § 40.1-51.1(a) of the *Code of Virginia* shall apply to all employers covered by the Virginia State Plan for Occupational Safety and Health.

§ 170 Public Participation in the Adoption of Standards

Interested parties, e.g., employers, employees, employee representatives, and the general public, may offer written and oral comments in accordance with the requirements of the Public Participation Guidelines of either the board or the department, as appropriate, regarding the adoption, alteration, amendment, or repeal of any rules or regulations by the board or the commissioner to further protect and promote the safety and health of employees in places of employment over which the board or the commissioner have jurisdiction.

§ 180 Response to Judicial Action

A. Any federal occupational safety or health standard, or portion thereof, adopted as rule or regulation by the board either directly, or by reference, and subsequently stayed by an order of any federal court will not be enforced by the commissioner until the stay has been lifted. Any federal standard which has been administratively stayed by OSHA will continue to be enforced by the commissioner until the stay has been reviewed by the board. The board will consider adoption or rejection of any federal administrative stay and will also subsequently review and then consider adoption or rejection of the lifting of

such stays by federal OSHA.

B. The continued enforcement of any VOSH standard, or portion thereof, which is substantively identical to a federal standard that has been vacated by an order of any federal court, shall be at the discretion of the commissioner until such time as the standard and related federal judicial action have been reviewed by the board. The board shall consider the revocation or the repromulgation of any such standard.

PART IV
VARIANCES

§ 190 General Provisions

A. Any employer or group of employers desiring a permanent or temporary variance from a standard or regulation pertaining to occupational safety and health may file with the commissioner a written application which shall be subject to the following policies:

1. A request for a variance shall not preclude or stay a citation or bill of complaint for violation of a safety or health standard;

2. No variances on recordkeeping requirements required by the U.S. Department of Labor shall be granted by the commissioner;

3. An employer, or group of employers, who has applied for a variance from the U.S. Department of Labor, and whose application has been denied on its merits, shall not be granted a variance by the commissioner unless there is a showing of changed circumstances significantly affecting the basis upon which the variance was originally denied;

4. An employer to whom the U.S. Secretary of Labor has granted a variance under OSHA provisions shall document this variance to the commissioner. In such cases, unless compelling local circumstances dictate otherwise, the variance shall be honored by the commissioner without the necessity of following the formal requirements which would otherwise be applicable. In addition, the commissioner will not withdraw a citation for violation of a standard for which the Secretary of Labor has granted a variance unless the commissioner previously received notice of and decided to honor the variance; and

5. Incomplete applications will be returned within 30 days to the applicant with a statement indicating the reason or reasons that the application was found to be incomplete.

B. In addition to the information specified in §§ 200.A and 210.A of this regulation, every variance application shall contain the following:

1. A statement that the applicant has informed affected employees of the application by delivering a copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with § 40 of these regulations, a summary of the application which indicates where a full copy of the application may be examined.

2. A statement indicating that the applicant has posted, with the summary of the application described above, the following notice: "Affected employees or their representatives have the right to petition the Commissioner of Labor and Industry for an opportunity to present their views, data, or arguments on the requested variance, or they may submit their comments to the commissioner in writing. Petitions for a hearing or written comments should be addressed to the Commissioner of Labor and Industry, Powers-Taylor Building, 13 South Thirteenth Street, Richmond, VA. 23219-4101 ~~23219~~. Such petitions will be accepted if they are received within 30 days from the posting of this notice or within 30 days from the date of publication of the commissioner's notice that public comments concerning this matter will be accepted, whichever is later."

3. A statement indicating whether an application for a variance from the same standard or rule has been made to any federal agency or to an agency of another state. If such an application has been made, the name and address of each agency contacted shall be included.

C. Upon receipt of a complete application for a variance, the commissioner shall publish a notice of the request in a newspaper of statewide circulation within 30 days after receipt, advising that public comments will be accepted for 30 days and that an informal hearing may be requested in conformance with subsection D of this section. Further, the commissioner may initiate an inspection of the establishment in regard to the variance request.

D. If within 30 days of the publication of notice the commissioner receives a request to be heard on the variance from the employer, affected employees, the employee representative, or other employer(s) affected by the same standard or regulation, the commissioner will schedule a hearing with the party or parties wishing to be heard and the employer requesting the variance. The commissioner may also schedule a hearing upon his own motion. The hearing will be held within a reasonable time and will be conducted informally in accordance with §§ 2.2-4019 and 2.2-4021 of the *Code of Virginia* unless the commissioner finds that there is a substantial reason to proceed under the formal provisions of § 2.2-4020 of the *Code of Virginia*.

E. If the commissioner has not been petitioned for a hearing on the variance application, a decision on the application may be made promptly after the close of the period for public comments. This decision will be based upon the information contained in the application, the report of any variance inspection made concerning the application, any other pertinent staff reports, federal OSHA comments or public records, and any written data and views submitted by employees, employee representatives, other employers, or the public.

F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either § 200.B.4. or § 210.B.4. of these regulations.

1. The commissioner shall advise the employer in writing of the decision and shall send a copy to the employee representative if applicable. If the variance is granted, a notice of the decision will be published in a newspaper of statewide circulation.

2. The employer shall post a copy of the commissioner's decision in accordance with § 40 of these regulations.

G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time and place that the board will consider the appeal. Any party that submitted written or oral views or participated in the hearing concerning the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of § 40 of these regulations.

H. The Board shall sustain, reverse, or modify the commissioner's decision based upon consideration of the evidence in the record upon which the commissioner's decision was made and the views and arguments presented as provided above. The burden shall be on the party filing the appeal to designate and demonstrate any error by the commissioner which would justify reversal or modification of the decision. The issues to be considered by the board shall be those issues that could be considered by a court reviewing agency action in accordance with § 2.2-4027 of the *Code of Virginia*. All parties involved shall be advised of the board's decision within 10 working days after the hearing of the appeal.

§ 200 Temporary Variances

A. The commissioner shall give consideration to an application for a temporary variance from a standard or regulation only if the employer or group of employers is unable to comply with that standard or regulation by its effective date for good cause and files an application which meets the requirements set forth in this section. No temporary variance shall be granted for longer than the time needed to come into compliance with the standard or one year, whichever is shorter.

B. A letter of application for a temporary variance shall be in writing and contain the following information:

1. Name and address of the applicant;
2. Address of the place or places of employment involved;

3. Identification of the standard or part thereof from which a temporary variance is sought; and
4. Evidence to establish that:

    a. The applicant is unable to comply with a standard by its effective date because professional or technical personnel or materials and equipment needed to come into compliance with the standard are unavailable, or because necessary construction or alteration of facilities cannot be completed by the effective date;

    b. The applicant is taking effective steps to safeguard his employees against the hazards covered by the standard; and

    c. The applicant has an effective program for coming into compliance with the standard as quickly as practicable.

C. A temporary variance may be renewed if the application for renewal is filed at least 90 days prior to the expiration date and if the requirements of subsection A of this section are met. A temporary variance may not be renewed more than twice.

§ 210 Permanent Variances

A. Applications filed with the commissioner for a permanent variance from a standard or regulation shall be subject to the requirements of § 190 of these regulations and the following additional requirements.

B. A letter of application for a permanent variance shall be submitted in writing by an employer or group of employers and shall contain the following information:

1. Name and address of the applicant;

2. Address of the place or places of employment involved;

3. Identification of the standard, or part thereof for which a permanent variance is sought; and

4. A description of the conditions, practices, means, methods, operations, or processes used and evidence that these would provide employment and a place of employment as safe and healthful as would be provided by the standard from which a variance is sought.

C. A permanent variance may be modified or revoked upon application by an employer, employees, or by the commissioner in the manner prescribed for its issuance at any time except that the burden shall be upon the party seeking the change to show altered circumstances justifying a modification or revocation.

§ 220 Interim Order

A. Application for an interim order granting the variance until final action by the commissioner may be made by the employer prior to, or concurrent with, the submission of an application for a variance.

B. A letter of application for an interim order shall include statements as to why the interim order should be granted and shall include a statement that it has been posted in accordance with § 40 of these regulations. The provisions contained in §§ 190.A, 190.B.1 and 190.B.3 of these regulations shall apply to applications for interim orders in the same manner as they do to variances.

C. The commissioner shall grant the interim order if the employer has shown by clear and convincing evidence that effective methods to safeguard the safety and health of employees have been implemented. No interim order shall have effect for more than 180 days. If an application for an interim order is granted, the employer shall be so notified and it shall be a condition of the order that employees shall be advised of the order in the same manner as used to inform them of the application for a variance.

D. If the application for an interim order is denied, the employer shall be so notified with a brief statement of the reason for denial.

PART V.
INSPECTIONS

§ 230 Advance Notice

A. Where advance notice of an inspection has been given to an employer, the employer, upon request of the commissioner, shall promptly notify the authorized employee representative of the inspection if the employees have such a representative.

B. An advance notice of a safety or health inspection may be given by the commissioner only in the following circumstances:

1. In cases of imminent danger;

2. Where it is necessary to conduct inspections at times other than regular working hours;

3. Where advance notice is necessary to assure the presence of personnel needed to conduct the inspection; or

4. Where the commissioner determines that advance notice will insure a more effective and thorough inspection.

§ 240 Walkthrough

Walkthrough by the commissioner for the inspection of any workplace includes the following privileges.

1. The commissioner shall be in charge of the inspection and, as part of an inspection, may question privately any employer, owner, operator, agent, or employee. The commissioner shall conduct the interviews of persons during the inspection or at other convenient times.

2. As part of an inspection, the commissioner may take or obtain photographs, video recordings, audio recordings and samples of materials, and employ other reasonable investigative techniques as deemed appropriate. As used herein, the term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges and other devices to employees in order to monitor their exposures.

3. Any employee representative selected to accompany the commissioner during the inspection of the workplace shall be an employee of the employer. Additional

employer representatives and employee representatives may be permitted by the commissioner to accompany the inspection team where the commissioner determines such additional persons will aid in the inspection. A different employer representative or employee representative may accompany the commissioner during each phase of the inspection if, in the determination of the commissioner, this will aid in the conduct of the inspection.

4. The commissioner may limit the number of representatives when the inspection group would be of such size as to interfere with the inspection or create possible safety hazards, or when the representative does not represent an employer or employee present in the particular area under inspection.

5. In such cases as stated in subsection 4 of this section, the commissioner must give each walkthrough representative the opportunity to advise of possible safety or health hazards and then proceed with the inspection without walkthrough representatives. Whenever the commissioner has limited the number of employee walkthrough representatives, a reasonable number of employees shall be consulted during the inspection concerning possible safety or health hazards.

6. Technical personnel such as safety engineers and industrial hygienists or other consultants to the commissioner or the employer may accompany the commissioner if the commissioner determines that their presence would aid in the conduct of the inspection and agreement is obtained from the employer or the commissioner obtains an order under § 40.1-6(8)(b) of the *Code of Virginia*. All such consultants shall be bound by the confidentiality requirements of § 40.1-51.4:1 of the *Code of Virginia*.

7. The commissioner is authorized to dismiss from the inspection party at any time any person or persons whose conduct interferes with the inspection.

§ 250 Trade Secrets

The following rules shall govern the treatment of trade secrets.

1. At the beginning of an inspection the commissioner shall request that the employer identify any areas of the worksite that may contain or reveal a trade secret. At the close of an inspection the employer shall be given an opportunity to review the information gathered from those areas and identify to the commissioner that information which contains or may reveal a trade secret.

2. The employer shall notify the commissioner prior to the case becoming a final order of any information obtained during the inspection which is to be identified as containing trade secrets.

3. Properly identified trade secrets shall be kept in a separate case file in a secure area not open for inspection to the general public. The separate case file containing trade secrets shall be protected from disclosure in accordance with § 40.1-51.4:1 of the *Code of Virginia*.

4. Upon the request of an employer, any employee serving as the walkthrough representative in an area containing trade secrets shall be an employee in that area or an employee authorized by the employer to enter that area. Where there is no such employee representative, the commissioner will interview a reasonable number of employees working in that area concerning matters of safety and health.

PART VI.
CITATION AND PENALTY

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

   b. An alleged violation is deemed to have "occurred" on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected.

   c. Notwithstanding b. above, if an employer fails to notify the commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence as required by Va. Code §40.1-51.1.D, the six month time frame shall not be deemed to commence until the commissioner receives actual notice of the incident.

   d. Notwithstanding b. above, if the Commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of an Employer's Accident Report (EAR) form from the Virginia Workers' Compensation Commission as provided in Va. Code § 65.2-900, the six month time frame shall not be deemed to commence until the

commissioner actually receives the EAR form.

e. Notwithstanding b. above, if the Commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee(s), through receipt of a complaint in accordance with § 100 of these regulations, or referral, the six month time frame shall not be deemed to commence until the commissioner actually receives the complaint or referral.

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 recordkeeping, 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);

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

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

1. The employer did not create the hazard;

2. The employer did not have the responsibility or the authority to have the hazard corrected;

3. The employer did not have the ability to correct or remove the hazard;

4. The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees were exposed;

5. The employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it.

6. Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard.

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

§ 270 Contest of Citation or Proposed Penalty; General Proceedings

A. An employer to whom a citation or proposed penalty has been issued may contest the citation by notifying the commissioner in writing of the contest. The notice of contest must be mailed or delivered by hand within 15 working days from the receipt of the

citation or proposed penalty. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the 15 working day period in which the employer must contest.

B. The notice of contest shall indicate whether the employer is contesting the alleged violation, the proposed penalty or the abatement time.

C. The employer's contest of a citation or proposed penalty shall not affect the citation posting requirements of § 40 of these regulations unless and until the court ruling on the contest vacates the citation.

D. When the commissioner has received written notification of a contest of citation or proposed penalty, he will attempt to resolve the matter by settlement, using the procedures of §§ 330 and 340 of these regulations.

E. If the matter is not settled or it is determined that settlement does not appear probable, the commissioner will initiate judicial proceedings by referring the contested issues to the appropriate Commonwealth's Attorney and arranging for the filing of a bill of complaint and issuance of a subpoena to the employer.

F. A contest of the proposed penalty only shall not stay the time for abatement.

§ 280 General Contest Proceedings Applicable to the Public Sector

A. The commissioner will not propose penalties for citations issued to public employers.

B. Public employers may contest citations or abatement orders by notifying the commissioner in writing of the contest. The notice of contest must be mailed or delivered by hand within 15 working days from receipt of the citation or abatement order. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the 15 working day period during which the employer may contest.

C. The notice of contest shall indicate whether the employer is contesting the alleged violations or the abatement order.

D. Public employees may contest abatement orders by notifying the commissioner in the same manner as described at subsection B.

E. The commissioner shall seek to resolve any controversies or issues rising from a citation issued to any public employer in an informal conference as described in § 330 of these regulations.

F. The contest by a public employer shall not affect the requirements to post the citation as

required at § 40 of these regulations unless and until the commissioner's or the court ruling on the contest vacates the citation. A contest of a citation may stay the time permitted for abatement pursuant to § 40.1-49.4.C of the *Code of Virginia*.

§ 290 Contest Proceedings Applicable to Political Subdivisions

A. Where the informal conference has failed to resolve any controversies arising from the citation, and a timely notice of contest has been received regarding a citation issued to a public employer other than the Commonwealth or one of its agencies, the Commissioner of Labor and Industry shall schedule a hearing in accordance with the provisions of §§ 2.2-4019 and 2.2-4021 of the *Code of Virginia*. Upon conclusion of the hearing, the commissioner will notify all participants within five working days of the decision to affirm, modify or vacate the contested aspects of the citation or abatement order.

B. Public employers may appeal decisions of the commissioner in the manner provided for in §§ 2.2-4025 and 2.2-4029 of the *Code of Virginia*.

C. Public employees and their authorized representative have full rights to notification and participation in all hearings and appeals as are given private sector employees.

D. If abatement of citations is not accomplished, the commissioner shall seek injunctive relief under § 40.1-49.4.F. of the *Code of Virginia*.

§ 300 Contest Proceedings Applicable to the Commonwealth

A. Where the informal conference has failed to resolve any controversies arising from a citation issued to the Commonwealth or one of its agencies, and a timely notice of contest has been received, the Commissioner of Labor and Industry shall refer the case to the Attorney General Governor, whose written decision on the contested matter shall become a final order of the commissioner.

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 & Industry shall formally 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.

C. Where abatement of a violation will require the appropriation of funds, the commissioner shall cooperate with the appropriate agency head in seeking such an appropriation; where the commissioner determines that an emergency exists, the commissioner shall petition the Governor for funds from the Civil Contingency Fund or other appropriate source.

PART VII.
ABATEMENT

§ 307 Abatement Verification

(Note: Sample abatement certification letters (forms A & B), and equipment tag (form C) which can be used with § 307 are found at the end of this manual.)

A. VOSH's inspections are intended to result in the abatement of violations of the Virginia Occupational Safety and Health Act. This section sets forth the procedures VOSH will use to ensure abatement. These procedures are tailored to the nature of the violation and the employer's abatement actions.

B. This section applies to employers who receive a citation for a violation of the Virginia Occupational Safety and Health Act.

C. Definitions.

1. Abatement means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by VOSH during an inspection.

2. Abatement date means:

a. For an uncontested citation item, the later of:

(1) The date in the citation for abatement of the violation;

(2) The date approved by VOSH or established in litigation as a result of a petition for modification of the abatement date (PMA); or

(3) The date established in a citation by an informal settlement agreement.

b. For a contested citation item the date established in a formal settlement agreement between VOSH and the employer; or for a contested citation item for which a Virginia Circuit Court has issued an order affirming the violation, the later of:

(1) The date identified in the final order; or

(2) The date computed by adding the period allowed in the citation for the abatement to the final order date; or

(3) The date established by an agreed order.

3. Affected employees means those employees who are exposed to the hazard(s) identified as violation(s) in a citation.

4. Final order date means:

a. For an uncontested citation item, the fifteenth working day after the employer's receipt of the citation;

b. For a contested citation item:

(1) Date that a formal settlement agreement is signed by VOSH; or

(2) The thirtieth day after the date on which a decision or order of a circuit court judge has been entered; or

(3) The date on which the Virginia Court of Appeals issues a decision affirming the violation in a VOSH case.

5. Movable equipment means a hand-held or non-hand-held machine or device, powered or unpowered, that is used to do work and is moved within or between worksites.

D. Abatement certification.

1. Within 10 calendar days after the abatement date, the employer must certify to VOSH (the Department) that each cited violation has been abated, except as provided in subsection D.2. of this section.

2. The employer is not required to certify abatement if the VOSH Compliance Officer, during the on-site portion of the inspection:

a. Observes, within 24 hours after a violation is identified, that abatement has occurred; and

b. Notes in the citation that abatement has occurred.

3. The employer's certification that abatement is complete must include, for each cited violation, in addition to the information required by subsection I. of this section, the date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement. A sample abatement certification letter is shown as Form A.

E. Abatement documentation.

1. The employer must submit to the Department, along with the information on abatement certification required by subsection D.3. of this section, documents demonstrating that abatement is complete for each willful or repeat violation and for any serious violation for which the Department indicates in the citation that such abatement documentation is required.

2. Documents demonstrating that abatement is complete may include, but are not limited to, evidence of the purchase or repair of equipment, photographic or video evidence of abatement, or other written records.

F. Abatement plans.

1. The Department may require an employer to submit an abatement plan for each cited violation (except an other-than-serious violation) when the time permitted for abatement is more than 90 calendar days. If an abatement plan is required, the citation must so indicate.

2. The employer must submit an abatement plan for each cited violation within 25 calendar days from the final order date when the citation indicates that such a plan is required. The abatement plan must identify the violation and the steps to be taken to achieve abatement, including a schedule for completing abatement and, where necessary, how employees will be protected from exposure to the violative condition in the interim until abatement is complete. A sample Abatement Plan is shown as Form B.

G. Progress reports.

1. An employer who is required to submit an abatement plan may also be required to submit periodic progress reports for each cited violation. The citation must indicate:

   a. That periodic progress reports are required and the citation items for which they are required;

   b. The date on which an initial progress report must be submitted, which may be no sooner than 30 calendar days after submission of an abatement plan;

   c. Whether additional progress reports are required; and

   d. The date(s) on which additional progress reports must be submitted.

2. For each violation, the progress report must identify, in a single sentence if possible, the action taken to achieve abatement and the date the action was taken.

A sample progress report is shown as Form B.

H. Employee notification.

1. The employer must inform affected employees and their representative(s) about abatement activities covered by this section by posting a copy of each document submitted to the Department or a summary of the document near the place where the violation occurred.

2. Where such posting does not effectively inform employees and their representatives about abatement activities (for example, for employers who have mobile work operations), the employer must:

   a. Post each document or a summary of the document in a location where it will be readily observable by affected employees and their representatives; or

   b. Take other steps to communicate fully to affected employees and their representatives about abatement activities.

3. The employer must inform employees and their representatives of their right to examine and copy all abatement documents submitted to the Department.

   a. An employee or an employee representative must submit a request to examine and copy abatement documents within three (3) working days of receiving notice that the documents have been submitted.

   b. The employer must comply with an employee's or employee representative's request to examine and copy abatement documents within five (5) working days of receiving the request.

4. The employer must ensure that notice to employees and employee representatives is provided at the same time or before the information is provided to the Department and that abatement documents are:

   a. Not altered, defaced, or covered by other material; and
   b. Remain posted for three working days after submission to the Department.

I. Transmitting abatement documents.

1. The employer must include, in each submission required by this section, the following information:

   a. The employer's name and address;

b. The inspection number to which the submission relates;

c. The citation and item numbers to which the submission relates;

d. A statement that the information submitted is accurate; and

e. The signature of the employer or the employer's authorized representative.

2. The date of postmark is the date of submission for mailed documents. For documents transmitted by other means, the date the Department receives the document is the date of submission.

J. Movable equipment.

1. For serious, repeat, and willful violations involving movable equipment, the employer must attach a warning tag or a copy of the citation to the operating controls or to the cited component of equipment that is moved within the worksite or between worksites. Attaching a copy of the citation to the equipment is deemed by VOSH to meet the tagging requirement of this section as well as the posting requirement of 16 VAC 25-60-40. *(Section 40 of these regulations)*

2. The employer must use a warning tag that properly warns employees about the nature of the violation involving the equipment and identifies the location of the citation issued. Form C is a sample tag that employers may use to meet this requirement.

3. If the violation has not already been abated, a warning tag or copy of the citation must be attached to the equipment:

a. For hand-held equipment, immediately after the employer receives the citation; or

b. For non-hand-held equipment, prior to moving the equipment within or between worksites.

4. For the construction industry, a tag that is designed and used in accordance with 16 VAC 25-175-1926.20(b)(3) *(VOSH Standard 1926.20 (B)(3))* and 16 VAC 25-175-1926.200(h) *(VOSH Standard 1926.200 (H))* is deemed by VOSH to meet the requirements of this section when the information required by paragraph J.2. is included on the tag.

5. The employer must assure that the tag or copy of the citation attached to movable equipment is not altered, defaced, or covered by other material.

6. The employer must assure that the tag or copy of the citation attached to movable equipment remains attached until:

   a. The violation has been abated and all abatement verification documents required by this regulation have been submitted to the Department;

   b. The cited equipment has been permanently removed from service or is no longer within the employer's control; or

   c. The Virginia Circuit Court issues a final order vacating the citation.

§310 Contest of Abatement Period

A. The employer, employees, or employee representative may, by written notification to the commissioner, contest the time permitted for abatement.

B. The notice of contest of abatement period must be in writing and shall have been delivered by hand or mailed to the commissioner within 15 working days from the date of the receipt of the citation and order of abatement.

C. The same procedures and requirements used for contest of citation and penalty, set forth at §§ 270, 280, 290, and 300, of these regulations, shall apply to contests of abatement period.

D. The time permitted for abatement, if contested in good faith and not merely for delay, does not begin to run until the entry of a final order of the circuit court.

§ 320 Extension of Abatement Time

A. Where an extension of abatement is sought concerning a final order of the commissioner or of a court, the extension can be granted as an exercise of the enforcement discretion of the commissioner. While the extension is in effect the commissioner will not seek to cite the employer for failure to abate the violation in question. The employer shall carry the burden of proof to show that an extension should be granted.

B. The commissioner will consider a written petition for an extension of abatement time if the petition is mailed to or received by the commissioner prior to the expiration of the established abatement time.

C. A written petition requesting an extension of abatement time shall include the following information:

1. All steps taken by the employer, and the dates such actions were taken, in an effort to achieve compliance during the prescribed abatement period;

2. The specific additional abatement time necessary in order to achieve compliance;

3. The reasons such additional time is necessary, such as the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date;

4. All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period; and

5. A certification that a copy of the petition has been posted and served on the authorized representative of affected employees, if there is one, in accordance with § 40 of these regulations, and a certification of the date upon which such posting and service was made.

D. A written petition requesting an extension of abatement which is filed with the commissioner after expiration of the established abatement time will be accepted only if the petition contains an explanation satisfactory to the commissioner as to why the petition could not have been filed in a timely manner.

1. The employer is to notify the commissioner as soon as possible.

2. Notification of the exceptional circumstances which prevents compliance within the original abatement period shall accompany a written petition which includes all information required in subsection C.

E. The commissioner will not make a decision regarding such a petition until the expiration of 15 working days from the date the petition was posted or served.

F. Affected employees, or their representative, may file a written objection to a petition for extension of abatement time. Such objections must be received by the commissioner within 10 working days of the date of posting of the employer's petition. Failure to object within the specified time period shall constitute a waiver of any right to object to the request.

G. When affected employees, or their representatives object to the petition, the commissioner will attempt to resolve the issue in accordance with § 330 of these regulations. If the matter is not settled or settlement does not appear probable, ~~the Commissioner of Labor and Industry will hear the~~ objections <u>will be heard</u> in the manner set forth at subsection I below.

H. The employer or an affected employee may seek review of an adverse decision regarding the petition for extension of abatement to the Commissioner of Labor and Industry within five working days after receipt of the commissioner's decision.

I. An employee's objection not resolved under Subsection G of this section or an employer or employee appeal under Subsection H will be heard by the Commissioner of Labor and Industry using the procedures of §§ 2.2-4019 and 2.2-4021 of the *Code of Virginia*. Burden of proof for a hearing under subsection G shall lie with the employer. Burden of proof for an appeal under subsection H shall lie with the party seeking review.

1. All parties shall be advised of the time and place of the hearing by the commissioner.

2. ~~Within 15 working days of the hearing, all~~ All parties will be advised of the ~~Commissioner of Labor and Industry's~~ decision within 15 working days of the hearing.

~~3. Since the issue is whether the Commissioner of Labor and Industry will exercise his enforcement discretion, no further appeal is available.~~

PART VIII.
REVIEW AND SETTLEMENT

§ 330 Informal Conference

A. An informal conference may be held for the purpose of discussing any issue raised by the inspection, citation, abatement order, proposed penalty, notice of contest, or any other disputed issue.

B. The employer, an employee, or an employee representative may request an informal conference. Neither the conference nor a request for a conference shall stay the running of time allowed for abatement of a cited violation or the time allowed for filing a notice of contest of the citation, abatement period or proposed penalty.

C. The informal conference will be held by the commissioner. However, other personnel of the Department of Labor and Industry, Department of Health, and any other state department or agency may participate as deemed necessary.

D. The time and location of the informal conference shall be at the discretion of the commissioner, except that the conference shall not be held at the employer's work site.

E. An employee representative shall be given the opportunity to participate in a conference requested by the employer. This same right will be extended to the employer when an informal conference is requested by employees. It is the duty of the employer, if he has requested a conference, to notify the employees by the means described in § 40 of these regulations as soon as the time and place of the conference have been established. Upon granting an employee request for a conference, the commissioner is responsible for notifying the employer. The commissioner, at his discretion, may conduct separate portions of the conference with the employer and employee representative.

F. During or following the conference the commissioner may affirm or amend the citations, penalties, or abatement period if the order has not become final. The commissioner shall notify the employer in writing of his decision. The employer shall notify employees of this decision in the manner set forth in § 40 of these regulations.

G. The failure to request an informal conference before the expiration of 15 working days does not preclude settlement at a later stage of the proceedings if a notice of contest has been timely filed.

§ 340 Settlement

A. Settlement negotiations may be held for the purpose of resolving any dispute regarding an inspection, citation, order of abatement, proposed penalty, or any other matter involving potential litigation. Settlement is encouraged at any stage of a proceeding until

foreclosed by an order becoming final. It is the policy of the commissioner that the primary goal of all occupational safety and health activity is the protection of worker safety, health and welfare; all settlements shall be guided by this policy.

B. Settlement negotiations will ordinarily take place in the medium of an informal conference. Employees shall be given notice of scheduled settlement discussions and shall be given opportunity to participate in the manner provided for in § 330.E. of these regulations.

C. Where a settlement with the employer is reached before the 15th working day after receipt of a citation, order of abatement, or proposed civil penalty, and no notice of contest has been filed, the commissioner shall forthwith ~~amend~~ prepare a settlement agreement noting any changes to the citation, order of abatement, or proposed civil penalty, as agreed. The ~~amended citation shall bear a title to indicate that it has been amended and the amended citation or an accompanying~~ agreement shall contain a statement to the following effect: "~~This citation has been amended by agreement between the commissioner and the employer named above.~~ As part of the written agreement, the employer has waived his right to file a notice of contest to this order. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the commissioner."

D. Following receipt of an employer's timely notice of contest, the commissioner will immediately notify the appropriate Commonwealth's Attorney and may delay the initiation of judicial proceedings until settlement opportunities have been exhausted.

1. During this period, the commissioner may agree to amend the citation, order of abatement, or proposed civil penalty. ~~through the issuance of an amended citation. Every such amended citation shall bear a title to indicate that it has been amended and the amended citation or the accompanying~~ The settlement agreement shall contain a statement to the following effect: "~~This amended citation is being issued as a result of a settlement between the commissioner and the employer.~~ The employer, by his signature below, agrees to withdraw his notice of contest filed in this matter and not to contest the amended citation. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the commissioner."

2. At the end of this period, if settlement negotiations are not successful, the commissioner will initiate judicial proceedings by causing a bill of complaint to be filed and turning over the contested case to the Commonwealth's Attorney.

E. Employees or their representative have the right to contest abatement orders arising out of settlement negotiations if the notice is timely filed with the commissioner within 15 working days of issuance of the agreement ~~amended citation~~ and abatement order. Upon receipt of a timely notice of contest the commissioner will initiate judicial proceedings.

F. After a bill of complaint has been filed, any settlement shall be handled through the appropriate Commonwealth's Attorney and shall be embodied in a proposed order and presented for approval to the court before which the matter is pending. Every such order shall bear the signatures of the parties or their counsel; shall provide for abatement of any violation for which the citation is not vacated; shall provide that the employer's agreement not be construed as an admission of civil liability; and may permit the commissioner, when good cause is shown by the employer, to extend any abatement period contained within the order.

Sample Abatement Forms

Form A to 16 VAC 25-60-307
(Section 307 of these regulations)
Sample Abatement-Certification Letter (Nonmandatory)

(Name), Regional Director
Virginia Department of Labor and Industry
Address of the Regional Office (on the citation)

[Company's Name]
[Company's Address]

The hazard referenced in Inspection Number [insert 9-digit #] for violation identified as:

Citation [insert #] and item [insert #] was corrected on [insert date]
by:_____

Citation [insert #] and item [insert #] was corrected on [insert date]
by:_____

Citation [insert #] and item [insert #] was corrected on [insert date]
by:_____

Citation [insert #] and item [insert #] was corrected on [insert date]
by:_____

Citation [insert #] and item [insert #] was corrected on [insert date]
by:_____

Citation [insert #] and item [insert #] was corrected on [insert date]
by:_____

Citation [insert #] and item [insert #] was corrected on insert date
by:_____

Citation [insert #] and item [insert #] was corrected on [insert date]
by:_____

I attest that the information contained in this document is accurate and that affected employees and their representatives have been informed of the abatement(s).

_____
Signature

_____
Typed or Printed Name

Form B to 16 VAC 25-60-307
(Section 307 of these regulations)
Sample Abatement Plan or Progress Report (Nonmandatory)

(Name), Regional Director
Virginia Department of Labor and Industry Address of Regional Office (on the citation)
[Company's Name]
[Company's Address]

Check one:
Abatement Plan [ ]
Progress Report [ ]

Inspection Number_____
Page _____ of _____
Citation Number(s)*_____
Item Number(s)*_____

Action	Proposed Completion Date (for abatement plans only)	Completion Date (for progress reports only)
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____
4. _____	_____	_____
5. _____	_____	_____
6. _____	_____	_____
7. _____	_____	_____

Date required for final abatement: _____
I attest that the information contained in this document is accurate and that affected employees and their representatives have been informed of the abatement(s).

_____
Signature

_____
Typed or Printed Name

Name of primary point of contact for questions: [optional]
Telephone number:_____

*Abatement plans or progress reports for more than one citation item may be combined in a single abatement plan or progress report if the abatement actions, proposed completion dates, and actual completion dates (for progress reports only) are the same for each of the citation items.

Form C to 16 VAC 25-60-307
(Section 307 of these regulations)
Sample Warning Tag (Nonmandatory)

	
WARNING:	
EQUIPMENT HAZARD CITED BY VOSH	
EQUIPMENT CITED:	
HAZARD CITED:	
FOR DETAILED INFORMATION SEE VOSH CITATION POSTED AT:	
CITATION #	
CONTACT DOLI	Region
at ( )	