COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

C. RAY DAVENPORT
COMMISSIONER

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AGENDA

SAFETY AND HEALTH CODES BOARD

Tuesday, March 7, 2006

State Corporation Commission
Tyler Building
1300 East Main Street, Second Floor
Richmond, Virginia

Court Room A

10:00 a.m.

1. Call to Order

2. Approval of Agenda

3. Approval of Minutes of September 15, 2005 and of January 31, 2006

4. Opportunity for the Public to Address the Board on the issues pending before the Board today or on any other topic that may be of concern to the Board or within the scope of authority of the Board.

This will be the only opportunity for public comment at this meeting.

[Please limit remarks to 5 minutes in consideration of others wishing to address the Board]

5. Old Business

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

b) 16 VAC 25-60, Proposed Regulation to Amend the Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program; Final Adoption

6. New Business

a) Powered Industrial Trucks, §1910.178 (m)(12)(i) through (iii); Correction;

b) Updating OSHA Standards Based on National Consensus Standards, etc., Final Rule;

c) Roll-Over Protective Structures for the Construction Industry and the Agriculture Industry, Direct Final Rule, §§1926.1002, 1926.1003, 1928.51, 1928.52, 1928.53;

d) Safety Standards for Fall Protection in Steel Erection: Slip Resistance of Skeletal Structural Steel, §1926.754(c)(3) and Appendix B; Final Rule;

e) Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend the Medical Services and First Aid Standards for General Industry, §1910.151(b) and the Construction Industry, §1926.50(c);

f) Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend Reverse Signal Operation Safety Procedures for Existing General Industry and Construction Industry Standards Governing for Off-road Vehicles and Equipment; and Establish Reverse Signal Operation Safety Procedures for Motor Vehicles or Equipment Not Covered by Existing Standards for General Industry and Construction; and

g) Occupational Exposure to Hexavalent Chromium for Part 1910.1026 for General Industry, Part 1915.1026 for Shipyards and Part 1926.1126 for Construction; Final Rules

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

8. Items of Interest from Members of the Board

9. Meeting Adjournment

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 7, 2006

POWERED INDUSTRIAL TRUCKS, §1910.178 (m)(12)(i) through (iii); Correction

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption federal OSHA's correcting amendment to the final rule for Powered Industrial Trucks, §1910.178, as published in 70 FR 57146 on September 30, 2005.

The proposed effective date is June 1, 2006.

II. Summary of the Amendment.

On June 2, 2003, OSHA corrected a 22-year old error by deleting subsection (m)(12) from the Powered Industrial Trucks Standard, §1910.178, covering the use of powered industrial trucks to lift personnel. Section 1910.178 (m)(12) was deleted because it had been invalidly promulgated in 1971 from a non-mandatory provision of a national consensus standard into a mandatory standard. As a result, OSHA determined that paragraph (m)(12) was legally unenforceable (68 FR 32637).

This current change completes the 2003 correction by removing and reserving the subordinate paragraphs, (i) through (iii), of paragraph (m)(12) of the Powered Industrial Trucks standard, §1910.178.

The affected paragraphs formerly read as follows:

"Paragraph (m) Truck operations.

(12) [Reserved]
(i) Use of a safety platform firmly secured to the lifting carriage and/or forks.
(ii) Means shall be provided whereby personnel on the platform can shut off power to the truck.
(iii) Such protection from falling objects as indicated necessary by the operating conditions shall be provided."

III. Basis, Purpose and Impact of the Amendment.

A. Basis.

On May 29, 1971, OSHA published a final rule adopting national consensus standards, as authorized by Congress, and established federal standards as OSHA's initial Occupational Safety and Health Standards for General Industry. These standards adopted were intended to include only the mandatory provisions of the relevant American National Standards Institute (ANSI) or the National Fire Protection Association (NFPA) standards.

The ANSI standard for Powered Industrial Trucks, ANSI B56.1-1969, was the source standard for 29 CFR 1910.178 (e) through (p). The corresponding base standard to the provisions on personnel lifts, ANSI B56.1-1969, section 604L, did not contain mandatory language, but instead contained advisory language. OSHA, however, revised the language of the base ANSI standard in its initial adoption in 1971 and made it mandatory, too. As a result, OSHA improperly promulgated the language in §1910.178 (m)(12).

B. Purpose.

Federal OSHA removed and reserved paragraph (m)(12) of §1910.178 and stated its intention in the preamble to remove all of the subordinate paragraphs as well. The publication of this change, however, did not show that the subordinate paragraphs (m)(12)(i) through (m)(12)(iii) had also been removed and reserved (68 FR 32637).

OSHA is now removing the subordinate paragraphs (m)(12)(i) through (iii) to complete the removal of the invalidly adopted and, thus, unenforceable provisions, dealing with Powered Industrial Trucks and personnel lifts.

C. Impact on Employers.

No impact on employers is anticipated.

D. Impact on Employees.

No impact on employees is anticipated. The American Society of Mechanical Engineers' (ASME) current standard for powered industrial trucks (ASME B56.1-200) addresses these hazards.

D. Impact on the Department of Labor and Industry.

No impact on the Department of Labor and Industry is anticipated.

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

Contact Person:

Mr. Glenn Cox
Director, VOSH Programs
(804) 786-2391
Glenn.Cox@doli.virginia.gov

RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt federal OSHA's correcting amendment to the final rule for Powered Industrial Trucks, §1910.178, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of June 1, 2006.

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

16 VAC 25-90-1910.178, POWERED INDUSTRIAL TRUCKS, §1910.178

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16 VAC 25-90-1910.178

When the regulations, as set forth in the amendment to the standard for 16 VAC 25-90-1910.178, Powered Industrial Trucks, §1910.178, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
September 30, 2005	June 1, 2006

http://www.osha.gov/FedReg_osha_pdf/FED20050930.pdf

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 7, 2006

Updating OSHA Standards Based on National Consensus Standards:
General, Incorporation by Reference, §1910.6;
Hazardous Materials, Flammable and Combustible Liquids, §1910.106;
General Environmental Controls, Temporary Labor Camps, §1910.142;
Hand and Portable Powered Tools and Other Hand-Held Equipment,
Guarding of Portable Powered Tools and Other Hand-Held Equipment,
Guarding of Portable Powered Tools, §1910.243;
Welding, Cutting and Brazing, Arc Welding and Cutting, §1910.254; and
Special Industries, Sawmills, §1910.265

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption federal OSHA's revised final rule for Updating OSHA Standards Based on National Consensus Standards, as published in 70 FR 53925 on September 13, 2005.

The proposed effective date is for June 1, 2006.

II. Summary of the Amendment.

Federal OSHA has revoked three references to outdated national consensus standards and two references to industry standards. By eliminating the outdated references, OSHA will clarify employer obligations under the applicable OSHA standards and reduce administrative burdens on employers and OSHA.

These revisions are part of OSHA's overall effort to update OSHA standards that reference, or that include language taken directly from, outdated consensus standards.

OSHA amended the following:

1. **29 CFR 1910 Subpart A – General (§1910.6)** OSHA has amended by removing and reserving the following paragraphs:

   - **(e)(31)**, referring to the purchase of certain American National Standard Institute (ANSI) and the American Petroleum Institute (API) materials: "ANSI B71.1-1968—Safety Specifications for Power Lawn Mowers, IBR approved for 1910.243(e)(1)(i)";

   - **(e)(35)**, referring to "ANSI D8.1-67—Practices for Railroad Highway Grade Crossing Protection, IBR approved for 1910.265(c)(31)(i)";

   - **(e)(48)**, referring to "ANSI Z4.2-42 Standard Specifications for Drinking Fountains, IBR approved for 1910.142(c)(4)";

   - **(f)(1)**, referring to "API 12A (Sept. 1951) Specification for Oil Storage Tanks with Riveted Shells, 7th Ed., IBR approved for 1910.106(b)(1)(i)(*a*)(*2*)"; and

   - **(i)(2)**, referring to "AWS A6.1 (1966), Recommended Safe Practices for Gas Shielded Arc Welding, IBR approved for 1910.254(d)(1)".

2. **Subpart H – Hazardous Materials [§1910.106(b)(1)(iii)(a)(2)]**. OSHA has revoked from its standard for flammable and combustible liquids, American Petroleum Institute Standard No. 12A, Specification for Oil Storage Tanks with Riveted Shells, Seventh Edition, September 1951 (API 12A).

   Rationale:

   - API 12A is over 50 years old and it does not consider recent developments in the construction of atmospheric tanks.

   - The issuing Standards Development Organization (SDO) withdrew API 12A in 1974 and has not replaced it, nor incorporated its provisions into

another consensus standard, and no longer makes the standard available to the public.

3. **Subpart J – General Environmental Controls [§1910.142(c)(4)] – Temporary labor camps, drinking fountains)** OSHA revoked a requirement that drinking fountains be constructed in accordance with the American National Standard Institute Standard Specifications for Drinking fountains which are based on the technology and construction practices that existed in 1942.

   Rationale:

   - Specific recommendations in ANSI Z4.2-1942 use advisory "should" language; therefore, they are unenforceable.

   - Referencing recommendations issued over 60 years ago for the construction of drinking fountains does not enhance the safety and health of employees because technology has changed significantly since the 1940's.

   - The issuing SDO withdrew the standard in 1972 and it has not been replaced.

4. **Subpart P – Hand and Portable Powered Tools and Other Hand-Held Equipment [§1910.243 (e)(1)(i)]**. OSHA has revoked a provision requiring certain power lawnmowers designed for sale to the general public to meet the design specifications in ANSI B71.1-1968.

   Rationale:

   - OSHA is replacing this provision with a reference to the general machine guarding requirements contained in 29 CFR 1910.212. OSHA is also removing the final two sentences of paragraph 1910.243(d)(1) that describe the types of mowers for which the specifications in ANSI B71.1-1968 do not apply. These changes will simplify and clarify the scope and coverage for 29 CFR 1910.243.

5. **Subpart Q – Welding, Cutting and Brazing [§1910.254(d)(1)].** OSHA has revoked a recommendation that employers be acquainted with the American Welding Society's Recommended Safe Practices for Gas-Shielded Arc Welding, A6.1-1966.

   Rationale:

   - The hazard information included in AWS A6.1-1966 is extremely outdated, particularly compared to the information that employers are already required to provide to employees under OSHA's Hazard

Communication Standard, 29 CFR 1910.1200.

- Virtually all of the recommendations contained in AWS A6.1-1966 are covered elsewhere in OSHA's welding standards.

- Other applicable OSHA standards protect employees performing gas-shielded arc welding from many of the underlying hazards discussed in AWS A6.1-1966.

6. **Subpart R – Special Industries [§1910.265(c)(31)(i) – Sawmills]**. OSHA revoked a provision which suggests that employers use "appropriate traffic control devices," as set forth in American National Standard D8.1-1967 for Railroad Highway Grade Crossing Protection (ANSI D8.1-1967).

   Rationale:

   - Referencing a withdrawn 37-year-old consensus standard that was intended to address railroad and highway grade crossings – not crossings specifically in sawmills – adds little value to employers and employees in the sawmill industry.

   - The reference uses advisory "should" language and is thus unenforceable.

III. Basis, Purpose and Impact of the Amendment.

A. Basis.

On November 24, 2004, OSHA published a notice in the federal Register announcing its overall project to update OSHA standards that are based on national consensus standards (69 FR 68283). The notice explained that OSHA will use a variety of regulatory approaches, including notice and comment rulemaking, direct final rulemaking, and technical amendments for updating or revoking outdated references to consensus standards incorporated by reference, and updating regulatory text of current OSHA rules that were adopted directly from the language of outdated consensus standards.

Also on November 24, 2004, OSHA published in the Federal Register a direct final rule (69 FR 68712) and a companion proposed rule (69 FR 68706) to delete three references to national consensus standards and two references to industry standards that are outdated. OSHA announced that the direct final rule would become effective on February 22, 2005, unless OSHA received a significant adverse comment before the comment period closed.

OSHA received five comments and one it considered to be significantly adverse.

On February 18, 2005, OSHA published a notice which withdrew the direct final rule (70 FR 8291)

B. Purpose.

Federal OSHA has revoked references to consensus standards that are outdated, no longer represent the state of art in workplace safety, and are confusing to employers and employees. In proposing the revocation, OSHA found that the changes would enhance employee safety by eliminating confusion and clarifying employer obligations.

C. Impact on Employers.

The final rule simply deletes or revises a number of provisions in OSHA standards that are outdated. Since the final rule imposes no additional costs on any private or public sector entity, OSHA concluded that the revocations would not result in additional costs to employers, and may even produce cost savings. OSHA also concluded that the changes would enhance employee safety by eliminating confusion and clarifying employer obligations.

D. Impact on Employees.

OSHA determined that deleting the outdated references will not reduce employee protections put into place by the standards being revised.

E. Impact on the Department of Labor and Industry.

No impact on the Department is anticipated. The final rule does not impose additional requirements instead it clarifies employer obligations and removed outdated and potentially confusing references.

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

Contact Person:

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt federal OSHA's final rule for Updating OSHA Standards Based on National Consensus Standards, etc., as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of June 1, 2006.

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

Updating OSHA Standards Based on National Consensus Standards:
General, Incorporation by Reference;
Hazardous Materials, Flammable and Combustible Liquids;
General Environmental Controls, Temporary Labor Camps;
Hand and Portable Powered Tools and Other Hand-Held Equipment, Guarding or Portable Powered Tools and Other Hand-Held Equipment, Guarding of Portable Powered Tools;
Welding, Cutting and Brazing, Arc Welding and Cutting;
Special Industries, Sawmills

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16 VAC 25-90-1910.6, Incorporation by Reference, §1910.6
16 VAC 25-90-1910.106, Flammable and Combustible Liquids, §1910.106
16 VAC 25-90-1910.142, Temporary Labor Camps, §1910.142
16 VAC 25-90-1910.243, Guarding of Portable Powered Tools, §1910.243
16 VAC 25-90-1910.254, Arc Welding and Cutting, §1910.254
16 VAC 25-90-1910.265, Sawmills, §1910.265

When the regulations, as set forth in the amendments updating OSHA Standards Based on National Consensus Standards, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
November 14, 2005	June 1, 2006

http://www.osha.gov/FedReg_osha_pdf/FED20050913.pdf

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 7, 2006

Updating OSHA Standards Based on National Consensus Standards:
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Rationale:

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Rationale:

- Specific recommendations in ANSI Z4.2-1942 use advisory "should" language; therefore, they are unenforceable.

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Federal OSHA has revoked references to consensus standards that are outdated, no longer represent the state of art in workplace safety, and are confusing to employers and employees. In proposing the revocation, OSHA found that the changes would enhance employee safety by eliminating confusion and clarifying employer obligations.

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D. Impact on Employees.

OSHA determined that deleting the outdated references will not reduce employee protections put into place by the standards being revised.

E. Impact on the Department of Labor and Industry.

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

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RECOMMENDED ACTION

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Updating OSHA Standards Based on National Consensus Standards:
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Welding, Cutting and Brazing, Arc Welding and Cutting;
Special Industries, Sawmills

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16 VAC 25-90-1910.6, Incorporation by Reference, §1910.6
16 VAC 25-90-1910.106, Flammable and Combustible Liquids, §1910.106
16 VAC 25-90-1910.142, Temporary Labor Camps, §1910.142
16 VAC 25-90-1910.243, Guarding of Portable Powered Tools, §1910.243
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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 7, 2006

Safety Standards For Fall Protection In Steel Erection:

Slip Resistance of Skeletal Structural Steel, §1926.754(c)(3) and Appendix B; Final Rule

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption federal OSHA's revised final rule for the Safety Standards for Fall Protection in Steel Erection: Slip Resistance of Skeletal Structural Steel, §1926.754(c)(3) and Appendix B of subpart R, Steel Erection, as published in 71 FR 2879 on January 18, 2006.

The proposed effective date is for June 1, 2006.

II. Summary of the Amendment.

Federal OSHA has revoked paragraph (c)(3) of §1926.754, which establishes a slip-resistance requirement for the painted and coated top walking surface of any structural steel member installed after July 18, 2006.

Section 1926.754(c)(3) required that coated structural steel meet a specified level of slip resistance when measured using an American Society for Testing and Materials (ASTM) test method. At the time the final rule was issued, ASTM had developed testing methods for two testing machines; however, under ASTM rules, these standards were provisional, pending the completion of precision and bias statements for each. A precision and bias statement is documentation that the test method, in laboratory tests, has been shown to have an acceptable degree of repeatability and reproducibility. OSHA believed that completion of the precision and bias statements was critical to validate these test methods before they could be deemed acceptable for measuring slip resistance under the Standard. (71 FR 2880)

ASTM's technical developments, which needed to occur for employers to comply with the provision by its effective date of July 18, 2006, have not occurred. The ability to comply with the slip resistance provision depended upon two technical developments: (1) completed industry protocols for slip testing equipment; and (2) the availability of suitable slip resistant coatings.

Rulemaking comments indicated that the test methods were not likely to be completed by the July effective date because ASTM will not have completed the required validation process. Comments also indicated that ASTM will likely withdraw the test methods altogether because they are brand-specific rather than generic. Lack of completed test methods has delayed the development of suitable slip resistant coatings. Additionally, there has not been adequate testing of coatings to determine whether they have sufficient durability in the variety of applications in which they will be used, especially in corrosive environments.

The revoked testing methods specified in Appendix B of 1926 subpart R (Steel Erection) are:

- Standard Test Method for Using a Portable Inclinable Articulated Strut Slip Tester (ASTM F1677-96); and

- Standard Test Method for Using a Variable Incidence Tribometer (ASTM F1679-96)

III. Basis, Purpose and Impact of the Standard/Amendment.

A. Basis.

The steel erection standard is the first OSHA safety standard developed under the Negotiated Rulemaking Act of 1990 and the Department's Negotiated Rulemaking Policy (NPRM) for subpart R – Steel Erection – issue on August 13, 1998. Federal OSHA published a final Safety Standard for Steel Erection on

January 18, 2001 (66 FR 5195). On July 17, 2001, OSHA published a notice (66 FR 37137) revising the effective date of the new final rule for steel erection from July 18, 2001 until January 18, 2002. On October 18, 2001, the Safety and Health Codes Board adopted the steel erection standard which became effective on January 18, 2002.

The standard addresses the hazards that have been identified as the major causes of injuries and fatalities in the steel erection industry. The slip resistance provision was not intended to be the sole or primary means of protecting workers from fall hazards. Rather, it was intended to complement other requirements in the steel erection standard as part of a collective strategy for reducing these fall-related injuries and fatalities.

The basis of the slip resistance requirement in §1926.754(c)(3) is that the coating used on the structural steel walking surface must have achieved a minimum average slip resistance of 0.50 [when wet] when measured, using the appropriate ASTM standard test method. In the preamble to the final rule, OSHA noted that the two ASTM standard test methods had not yet been validated through statements of precision and bias, documentation that the test method, in laboratory tests, has been shown to have an acceptable degree of repeatability and reproducibility.

Representatives of the coatings industry indicated that it would take time to develop new coatings to meet the requirement. Therefore, federal OSHA delayed the provision's effective date until July 18, 2006, because the evidence in the record indicated that it was reasonable to expect these developments to be completed by that date (71 FR 2879)

The slip-resistance provision was challenged in the U.S. Court of Appeals for the D.C. Circuit by the Steel Coalition and the Resilient Floor Covering Institute. On April 3, 2003, OSHA entered into a settlement agreement with those petitioners. OSHA agreed to provide the petitioners and other interested parties with a further opportunity to present evidence on the progress that has been made on slip resistant coatings and test methods. OSHA agreed to then evaluate the evidence and issue a final rule, not later than January 18, 2006, reaffirming, amending, or revoking the requirements in §1926.754(c)(3).

Subsequently, on July 15 2004, OSHA conducted a limited reopening of the rulemaking record, as part of a settlement to resolve legal challenges to the slip resistance provision. OSHA asked for comments on whether suitable and appropriate test methods and slip–resistant coatings could reasonably be expected to be available by July 2006. In the settlement agreement, OSHA also committed to publishing a notice by January 18, 2006, reaffirming, amending, or revoking the provision. On January 18, 2006, OSHA decided to revoke the requirements in §1926.754(c)(3) (71 FR 2879).

B. Purpose.

The purpose of §1926.754(c)(3) was to help prevent falls by reducing the chance of slipping on coated structural steel surfaces when wet. (71 FR 2880) Section 1926.754(c)(3) was designed to supplement other requirements in subpart R that collectively form a strategy for reducing fatalities and injuries due to falls. OSHA determined that there was a high probability that the test methods would not be validated through statements of precision and bias by the effective date and that ASTM was likely to withdraw the test methods shortly thereafter. As a result, employers would be unable to comply with §1926.754(c)(3). Consequently, OSHA decided to revoke (c)(3) of §1926.754 and Appendix B of subpart R of part 1926.

C. Impact on Employers.

Without completion of the ASTM test methods, employers will not be able to comply with §1926.743(c)(3). When OSHA prepared the economic analysis for the final rule of subpart R, it projected $29.5 million annualized cost of which approximately $725,000 is estimated for Virginia for affected establishments. As a result of the revocation of this provision, these annualized costs will not be incurred.

By revoking the slip-resistance provision, OSHA has determined that the final rule is likely to reduce the regulatory burdens imposed on public and private employers. OSHA claims that this final rule would not expand existing regulatory requirements nor increase the number of employers covered by the Steel Erection Standard. Consequently, the deletion covered in this amendment would require no additional expenditures by either public or private employers.

D. Impact on Employees.

No impact on employees is anticipated because §1926.754(c)(3) was designed to supplement other requirements in subpart R that collectively form a strategy for reducing fatalities and injuries due to falls. (71 FR 2880) Additionally, §1926.21 requires employers to "instruct each employee in the recognition and avoidance of unsafe conditions..." This requirement included slipping hazards due to factors such as moisture from weather conditions and unsafe footwear. (66 FR 5214)

E. Impact on the Department of Labor and Industry.

No impact on the Department is anticipated.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six

months of the occurrence of a federal program change, to adopt identical changes or promulgate equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting these revisions will allow Virginia to conform to the federal program change.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt federal OSHA's revisions to 16 VAC 25-175-1926.754, Safety Standards for Fall Protection in Steel Erection: Slip Resistance of Skeletal Structural Steel, §1926.754(c)(3), as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of June 1, 2006.

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

Safety Standards for Fall Protection in Steel Erection:

Slip Resistance of Skeletal Structural Steel, §1926.754(c)(3); Final Rule

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16 VAC 25-175-1926.754(c)(3)

When the regulations, as set forth in the amended final rule to 16 VAC 25-175-1926.754, Safety Standards for Steel Erection in Fall Protection: Slip Resistance of Skeletal Structural Steel, §1926.754(c)(3), are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
January 18, 2006	June 1, 2006

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 7, 2006

Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend the Medical Services and First Aid Standards for General Industry, §1910.151(b) and the Construction Industry, §1926.50(c)

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to authorize the Department to initiate the regulatory process to amend the medical services and first aid standards for general industry, §1910.151(b), and the construction industry, §1926.50(c), by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act (§2.2-4007).

II. Sections of the Standards under Consideration for Amendment.

General Industry and Construction

The VOSH Program seeks the amendment of medical services and first aid standards for general industry, §1910.151(b), and the construction industry, §1926.50(c), to require employers to train employee(s) to render first aid and cardio pulmonary resuscitation (CPR) when employees are exposed to occupational hazards which could result in death or serious physical harm.

The following boxes highlight the differences between the existing standards on this issue:

The General Industry Standard for Medical and First Aid

Section 1910.151(b) provides:

"In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available."

The Construction Industry Standard for Medical Services and First Aid

Section 1926.50(c) provides:

"In the absence of an infirmary, clinic, hospital or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first aid training from the U. S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.

The general industry and construction first aid standards do not assure that adequate first aid attention for employees will be provided in certain hazardous occupations. They do not include a requirement for training to include CPR as well as first aid; they do not clearly state that designated first aid providers will be available at each work location and work shift; they would allow employers to opt to physically move an employee who had suffered a head or spinal injury by transporting them to a medical facility in an area where emergency medical responders were not available within the prescribed 3-4 minute time limit, in lieu of having a trained first aid responder present.

Conversely, the general industry standard is overreaching in requiring first aid training in certain occupational settings where there is no exposure to hazards that could cause death or serious physical harm, such as in an office setting

[NOTE 1: The construction industry is considered to be a high hazard industry].

In addition, the standards are confusing and difficult to enforce for the VOSH Program as they do not define the terms "near proximity" and "reasonably accessible," which by federal OSHA interpretation have been defined to mean a 3-4 minute response time for life threatening injuries and up to 15 minutes for non-life threatening injuries. Because

the response time for emergency responders varies widely around the state depending on such factors as whether the worksite is in an urban or rural location, whether the medical/emergency response facility is staffed 24 hours a day or not, and such vagaries as traffic congestion, road construction and weather, injured employees cannot receive reliable and consistent first aid response to injuries suffered on the job.

Finally, from an enforcement standpoint, the VOSH Program is often faced with having to document whether an infirmary, clinic or hospital would be accessible within 3-4 minutes by going to such lengths as having to drive from the inspection site to the facility.

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

A. Basis.

The Safety and Health Codes Board is authorized by Title 40.1-22(5) to: "... adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be necessary to carry out its functions established under this title".

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

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

B. Purpose.

The purpose of the proposed change is to provide additional protection to employees in hazardous occupations in construction and general industry. Issues that could be considered include:

- assuring that employers provide immediate access to first aid and CPR on each work site and for each workshift;

- allowing an employer to make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders, to lessen the cost of compliance with the standard;

- clarifying that only worksites containing job classifications or workplace hazards that would expose employees to serious physical harm or death would be required to provide immediate access to first aid and CPR.

[NOTE 2: According to statistics for the year 2003 from the Department of Emergency Medical Services, EMS providers arrived at the scene of 522,345 calls with an average response time of approximately 12 minutes. Approximately 72% of all reported calls were provided in less than 10 minutes, and approximately 87% of all reported calls were provided in less than 15 minutes.]

[NOTE 3: For calendar year 2005, the VOSH Program issued 117 violations of §1910.151(b) in general industry and 424 violations of §1926.50(c) in the construction industry.]

[NOTE 4: Employers in the Logging Industry must assure that all logging employees receive first aid and CPR training (see §1910.266(i)(7);

general industry employers in the Electric Power Generation, Transmission and Distribution Industry must assure that trained first aid and CPR providers are present for field work and fixed work locations (see §1910.269(b)(1);

construction Power Generation and Distribution employers must assure that employees are trained in first aid and CPR (see §1926.950(e)(1)(ii);

employers in the Telecommunications Industry must assure that employees are trained in first aid CPR (see §1910.268(c)(3);

employers with a Temporary Labor Camp must assure that a trained first aid and CPR provider is present at the camp (see §1910.142(k)(2);

employers engaged in Welding, Cutting and Brazing must assure that first aid can be rendered to an injured employee until medical attention can be provided (see §1910.252(c)(13);

employers involved in Underground Construction, Caissons, Cofferdams and Compressed Air must provide a first aid station at each project (see §1926.803(b)(7);

Commercial Dive Operation employers must assure that all dive team members are trained in first aid and CPR (see §1910.410(a)(3).]

C. Impact on Employers.

Employers with employees in hazardous occupations could be required to have at each job site and for each work shift at least one employee trained in first aid and CPR. While many employers in construction and general industry already assure that some employees are trained in first aid and CPR, some employers would have to incur the additional cost of securing such training. Other issues that could be considered include:

- allowing an employer to make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders, to lessen the cost of compliance with the standard;

- clarifying that only worksites containing job classifications or workplace hazards that would expose employees to serious physical harm or death would be required to provide immediate access to first aid and CPR;

- whether employers who regularly assign individual employees to travel to worksites (e.g. a single delivery driver, plumber, etc.) would be required to either have the employee trained in first aid or make arrangements with contractors/employers to provide designated first aid responders at the sites their employees travel to

D. Impact on Employees.

Construction and general industry employees hazardous occupations across the state would benefit from the immediate presence of trained first aid/CPR responders.

E. Impact on the Department of Labor and Industry.

No significant impact is anticipated on the Department.

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RECOMMENDATION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to amend the medical services and first aid standards for general industry, §1910.151(b), and the construction industry, §1926.50(c), to require employers to train employee(s) to render first aid and cardio pulmonary resuscitation (CPR), when employees are exposed to occupational hazards which could result in death or serious physical harm.

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

COMMONWEALTH of VIRGINIA

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR March 7, 2006

Roll-over Protective Structures
for the Construction Industry and the Agriculture Industry

16VAC25-175-1926.1002; 16VAC25-175-1926.1003;
and Appendix "A" to Subpart "W" of 16VAC25-175.

16VAC 25-190-1928.51; 16VAC25-190-1928.52; 16VAC25-190-1928.53;
and Appendix "B" to Subpart "C" of 16VAC25-190.

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption federal OSHA's direct final rule for Roll-Over Protective Structures, as published in 70 FR 76979 on December 29, 2005.

The proposed effective date is June 1, 2006.

II. Summary of the Changes to the Standard.

OSHA is rescinding its 1996 amendments which incorporated the national consensus standards regulating the testing of Roll-Over Protective Structures (ROPS) used to

protect operators of wheel-type tractors and restores OSHA’s originally developed standards. Minor non-substantive changes to improve readability and understanding were also added.

A. Construction Standards

In revising the ROPS standards for construction in the 1996 technical amendment, OSHA deleted paragraphs (c) through (i) and (k) from 29 CFR 1926.1002, which addressed testing of protective frames for wheel-type tractors used in construction, and replaced them with a reference to Society of Automotive Engineers (``SAE'') consensus standard J334a-1970 in paragraph (a)(1) of revised 29 CFR 1926.1002. OSHA also revised 29 CFR 1926.1003, specifying testing requirements for overhead protection used with tractors, by removing paragraphs (c)) through (g) and substituting a reference to SAE consensus standard J167-1970 in paragraph (a)(1) of the revised standard.

While most of the revisions to the construction ROPS standards made in the 1996 technical amendment were non-substantive, OSHA identified two substantive revisions. The first revision involved paragraph (c)(1) of original 29 CFR 1926.1002, which allowed the regulated community to use either a laboratory test or a field test for impact testing, while the SAE standard requires both tests. In this current action, OSHA reinstated the impact-testing option provided by paragraph (c))(1) of original 29 CFR 1926.1002, and which is not available in the SAE standard.

The second 1996 amendment reversed by OSHA addressed paragraphs (i)(ii) of original 29 CFR 1926.1002 and (f)(1) of original 29 CFR 1926.1003, in combination with paragraph (f)(2)(iv) of 29 CFR 1926.1001. These paragraphs permitted manufacturers to conduct the required performance tests using either zero-degree Fahrenheit (0°F) testing or Charpy V-notch testing, while the SAE standard specifies that performance tests must be conducted only at 0°F. Therefore, reinstating the original OSHA standards will provide an additional cold-temperature testing option not available in the SAE standard.

B. Agriculture Standards

In its 1996 revision to the ROPS standards for the agriculture industry, OSHA deleted entirely original 29 CFR 1928.52 and 1928.53, as well as Appendix B to subpart C of 29 CFR part 1928. Those deleted standards specified procedures for testing, respectively, protective frames and enclosures for wheel-type tractors used in agriculture, while Appendix B provided diagrams depicting these testing procedures. In place of those requirements, OSHA referenced SAE consensus standard J334a-1970 and American Society of Agricultural Engineers (“ASAE") consensus standard S306.3-1974 for protective frames, and SAE consensus standard J168-1970 and ASAE consensus standard S336.1-1974 for protective enclosures, in paragraph (b)(1) of revised 29 CFR 1928.51.

For both protective frames and protective enclosures, the testing conducted under the ASAE and SAE standards adopted in 1996 generally is consistent with the

testing requirements of the original OSHA standards. However, OSHA found several substantive differences between the original OSHA standards and the consensus standards (for testing both protective frames and protective enclosures) that replaced them. First, both the original OSHA standards and the ASAE standards differ substantively from the SAE standards by providing an exemption from field-upset testing based on results for either the static or dynamic versions of the laboratory energy-absorption test, while the SAE standards require field-upset testing only under dynamic test conditions.

Consequently, this 2006 amendment reinstates the testing exemption found in the original OSHA ROPS standards. Second, the original OSHA and the SAE standards allow either static or dynamic testing at 0°F, while the ASAE standards limit testing at 0°F to dynamic testing. Therefore, reinstating the original OSHA standards under this direct final rule restores the testing option found in the original OSHA standards, but which is not in the ASAE standards. Finally, as an alternative to 0°F testing, the original OSHA and ASAE standards offer the Charpy V-notch test, while the SAE standards do not. Accordingly, reinstating the original OSHA standard will provide an additional cold-temperature testing option not available in the SAE standards.

C. Minor Non-substantive Changes.

Paragraph (c)(1) of OSHA's original 29 CFR 1926.1002 contains an editorial error. The original paragraph states that laboratory or field tests "...determine the performance requirements set forth in paragraph (c)(1) of this [standard]." However, paragraph (i) of the standard, not paragraph (c)(1), provides the performance requirements that the tests must determine. Therefore, OSHA has corrected this reference accordingly.

OSHA also made two additional revisions related to the original (pre-1996 amendments) construction standards for ROPS.

First, paragraph 5.3.2 of SAE consensus standard J334a-1970 defines the term "Pu" as the "...(u)ltimate force capacity of mounting connection, lb (kg)." However, paragraph (j)(3) of original 29 CFR 1926.1002 lists no definition for this term. Since the original OSHA standard duplicates the remaining terminology of the SAE consensus standard, OSHA has added this term and the SAE consensus standard definition to the now reinstated 29 CFR 1926.1002(j)(3).

Second, in reinstating the original 29 CFR 1926.1002 and 1926.1003 standards, OSHA removed the following sentence from paragraphs (k) and (g) of these respective standards: "The SAE standard shall be used in the event that questions of interpretation arise." The Agency is removing this sentence because the referenced SAE standard provides no additional information on which to base such interpretations.

Finally, OSHA made a number of plain-language revisions to the regulatory text of the original OSHA ROPS standards for the construction and agriculture industries. OSHA finds that using plain language will improve the understandability of these provisions. These improvements will, in turn, enhance employer compliance with the revised provisions and, concomitantly, increase the protection afforded to employees. OSHA believes that rewriting these provisions in plain language did not alter the substantive requirements of the existing provisions.

III. Basis, Purpose and Impact of the Standard/Amendment.

A. Basis and Purpose.

In 1996, OSHA published a technical amendment revising the construction and agricultural standards regulating the testing of Roll-Over Protective Structures (ROPS) used to protect operators of wheel-type tractors. This 1996 revision removed the original OSHA performance requirements for testing of ROPS and substituted the existing national consensus standards for ROPS testing as OSHA then believed that the national consensus standards essentially duplicated the original OSHA ROPS standards which they were replacing.

Subsequently, OSHA has identified several substantive differences between the national consensus standards and the original pre-1996 OSHA developed ROPS standards. In order to rectify this situation, OSHA is reinstating its original ROPS standards for both construction and agriculture. Also included in this direct final rule are a number of minor non-substantive revisions to improve comprehension, and ultimately compliance with, the standard.

B. Impact on Employers.

Although this direct final rule applies to employers in construction and agriculture so that their employees may operate safe equipment (i.e., wheel-type tractors), it more directly affects equipment manufacturers who design and build machines that have ROPS to meet the testing criteria specified in OSHA's ROPS standards.

Fewer than 10 original equipment manufacturers nationally are directly affected by this direct final rule and OSHA states that none of the changes impose conditions that would generate new costs for these equipment manufacturers, including small manufacturing firms.

Employers in the construction and agriculture industries who purchase and use wheel-type tractors are in violation of OSHA's ROPS standards and are subject to

penalty when the tractors do not have protective structures meeting these standards. Therefore, employers in the construction and agriculture industries would be affected indirectly if changing the ROPS testing procedures were to change the price of equipment.

C. Impact on Employees.

OSHA finds that the re-adoption of the pre-1966 provisions and the additional plain language revisions enhance employer and manufacturer compliance with the revised provisions and, concomitantly, increase the injury protection afforded to employees.

D. Impact on the Department of Labor and Industry.

No significant impact is anticipated on the Department.

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

E. Technology Feasibility

The reinstated standards are both technologically and economically feasible and do not impose new compliance costs on equipment manufacturers or on the construction and agriculture industries.

F. Benefit/Cost

OSHA has determined that these changes provide equipment manufacturers with more options for testing ROPS than the current ROPS standards. Therefore, none of the provisions in this new change impose conditions that would generate new costs for equipment manufacturers, including small manufacturing firms. Cost savings under this direct final rule, if any, depend on the extent that equipment manufacturers choose to avail themselves of its alternative provisions.

OSHA has not quantified the benefit of the increased testing options to manufacturers. It has concluded that the economic impact is negligible on any of the potentially affected industries, including potentially affected small employers. Employers will incur no significant costs of complying with this revised rule.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the amendments to the Standards for Roll-over Protective Structures for Parts 1926 and 1928, as specified herein and as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4.(c.), with an effective date of June 1, 2006.

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

Roll-over Protective Structures
for the Construction Industry and the Agriculture Industry

16VAC25-175-1926.1002; 16VAC25-175-1926.1003;
and Appendix "A" to Subpart "W" of 16VAC25-175.

16VAC 25-190-1928.51; 16VAC25-190-1928.52; 16VAC25-190-1928.53;
and Appendix "B" to Subpart "C" of 16VAC25-190

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16VAC25-175-1926.1002; 16VAC25-175-1926.1003;
and Appendix "A" to Subpart "W" of 16VAC25-175.

16VAC 25-190-1928.51; 16VAC25-190-1928.52; 16VAC25-190-1928.53;
and Appendix "B" to Subpart "C" of 16VAC25-190

When the regulations, as set forth in the amendments to the standards for Roll-Over Protective Structures for the Construction Industry and the Agriculture Industry, 16VAC25-175-1926.1002; 16VAC25-175-1926.1003; and Appendix "A" to Subpart "W" of 16VAC25-175; 16VAC 25-190-1928.51; 16VAC25-190-1928.52; 16VAC25-190-1928.53; and Appendix "B" to Subpart "C" of 16VAC25-190, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
February 27, 2006	June 1, 2006

http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-24462.pdf

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 7, 2006

Request to Initiate a Notice of Intended Regulatory Action (NOIRA) to:

Amend Reverse Signal Operation Safety Procedures for Existing General Industry and Construction
Industry Standards Governing for Off-road Vehicles and Equipment;

and

Establish Reverse Signal Operation Safety Procedures for Motor Vehicles or Equipment Not Covered By Existing Standards for General Industry and Construction.

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to authorize the Department to initiate the regulatory process pursuant to the Virginia Administrative Process Act (§2.2-4007) by the filing of a Notice of Intended Regulatory Action (NOIRA) to:

A. Amend the following Part 1910 General Industry and Part 1926 Construction Industry standards governing the reverse signal operation safety procedures for off-road motor vehicles and vehicular or mechanical equipment:

§1910.269(p)(1)(ii)	-	Vehicular Equipment for Electric Power Generation, Transmission and Distribution
§1926.601(b)	-	Motor Vehicles
§1926.602(a)(9)(ii)	-	Material Handling Equipment
§1926.952(a)(3)	-	Mechanical Equipment, Power Transmission and Distribution;

B. Establish new reverse signal operation safety procedures for motor vehicles and equipment not covered by existing standards for General Industry and the Construction Industry.

II. Sections of the Standards under Consideration for Amendment.

Construction Standards

The existing construction reverse signal standards listed below do not provide adequate protection for employees in construction work zones from vehicular traffic. The VOSH Program seeks the amendment of reverse signal operation safety procedures in standards for the construction industry in §§1926.601(b)(4), 1926.602(a)(9)(ii), and 1926.952(a)(3); and to establish a comprehensive reverse signal operation procedures regulation for construction vehicles and equipment not otherwise covered.

The following boxes highlight the differences between the existing standards on this issue:

§1926.601(b)(4): "No employer shall use any motor vehicle equipment having an obstructed view to the rear unless:
(i)The vehicle has a reverse signal alarm audible above the surrounding noise level or;
(ii)The vehicle is backed up only when an observer signals that it is safe to do so."

§1926.602(a)(9)(ii): "No employer shall permit earthmoving or compacting equipment which has an obstructed view to the rear to be used in reverse signal unless the equipment has in operation a reverse signal alarm distinguishable from the surrounding noise level or an employee signals that it is safe to do so."

§1926.952(a)(3): "No employer shall use any motor vehicle equipment having an obstructed view to the rear unless:
(i)The vehicle has a reverse signal alarm audible above the surrounding noise level or;
(ii)The vehicle is backed up only when an observer signals that it is safe to do so."

Background and Basis for the Request

A review of Virginia Occupational Safety and Health (VOSH) fatal accident investigations since 1992 found 15 fatal vehicle or equipment accidents in construction work zones where employees were struck:

Number of fatalities		Type of vehicle
8		dump truck
7		One each: cement truck, fuel truck, pavement planer, vacuum truck,
15	total	tandem truck, trackhoe and other-unspecified.

While in some cases it was found that reverse signal alarms were not operational, many accidents occurred even with operational reverse signal alarms. In a situation where an existing standard appears to be applicable, VOSH is often faced with the difficulty of having to document whether a reverse signal alarm was audible over the surrounding construction noise at the time of the accident. This can be problematic at best, since exact accident conditions cannot be recreated. In at least two cases, an employee operating as the signaler was struck by the vehicle when the driver lost sight of the employee while backing-up.

Fatal accidents also occurred to employees engaged in their own work unrelated to such vehicles or equipment where they apparently became de-sensitized to the familiar and repeated sounds of reverse signal alarms and other construction noise in the work zone.

Finally, the existing standards are limited in their scope and do not apply to all construction vehicles or equipment with an obstructed view to the rear. For instance, §1926.601(b)(4) only applies to motor vehicles on an off-highway jobsite not open to public traffic, and specifically does not apply to earthmoving equipment covered by §1926.602(a)(9)(ii). Neither regulation covers compactors or “skid-steer” equipment.

In VOSH investigations of a back-up accidents involving vehicles or equipment not covered by the previously cited standards, the only enforcement tool available is the use of §40.1-51.1.A. This statutory provision, used in the absence of an applicable regulatory standard, is more commonly referred to as the “general duty clause". It 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....”

This general wording does not specifically mention hazards associated with vehicles or equipment or any other specific situation. Therefore, according to case law VOSH must document that the hazard in question was "recognized" either through industry recognition (e.g. a national consensus standard), employer recognition (e.g. a company safety rule, or the existence of an operator's manual for the vehicle), or common sense recognition.

A concern with the use of the general duty clause is that it does not always result in consistent application of safety rules. This occurs as the use of the clause is often fact specific and dependent on a particular industry's national consensus standard, or employer work rule or equipment operator's manual.

Another issue regarding the general duty clause is that the statute has been interpreted in case law to only apply to "serious" violations, i.e., those that would cause "death or serious physical harm". It cannot be used to eliminate "other-than-serious" hazards before they can become serious in nature.

General Industry

The VOSH Program seeks the amendment of the reverse signal operation safety procedures for the Electric Power Generation, Transmission and Distribution standard for general industry contained in §1910.269(p)(1)(ii); and to establish a comprehensive reverse signal operation safety procedures regulation for general industry vehicles or equipment not otherwise covered.

The following box highlights the existing standard on this issue:

§1910.269(p)(1)(ii): "No vehicular equipment having an obstructed view to the rear may be operated on off-highway jobsites where any employee is exposed to the hazards created by the moving vehicle unless:
(i)The vehicle has a reverse signal alarm audible above the surrounding noise level, or;
(ii)The vehicle is backed up only when a designated employee signals that it is safe to do so."

The requirements of §1910.269(p)(1)(ii) do not provide adequate protection for employees under the Electric Power Generation, Transmission and Distribution standard and provide no coverage at all for all other areas in general industry. A review of VOSH fatal accident investigations since 1992 found nine fatal accidents in general industry work zones where employees were struck:

Number of fatalities		Type of vehicle
3		logging vehicles
2		garbage trucks
2		tractor-trailer trucks
1		fork lift
1		tow truck
9	total	

As with the accident history in Construction, General Industry also had cases were it was found that reverse signal alarms were not operational, but other accidents occurred even with operational reverse signal alarms. Again, as in Construction, General Industry fatal accidents often occurred to employees who were engaged in their own work who apparently became de-sensitized to the sound of reverse signal alarms and other sounds in the work zone.

In addition, the standard is limited in its scope and does not apply to all general industry vehicles or equipment with an obstructed view to the rear. Section 1910.269(p)(1)(ii) only applies to motor vehicles in the electric power generation, transmission and distribution industry. When VOSH investigates a back-up accident involving a vehicle not covered by the above Part 1910 standard, the only enforcement tool available is the use of §40.1-51.1.A., referred to as the "general duty clause." The same concerns regarding the use of the statute in the Construction Industry apply to its use in the General Industry sector as well.

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

A. Basis.

The Safety and Health Codes Board is authorized by Title 40.1-22(5) to: ... adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal VOSH Act of 1970...as may be necessary to carry out its functions established under this title".

> "In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity".
>
> "However, such standards shall be at least as stringent as the standards promulgated by the federal OSH Act of 1970 (P.L.91-596). In addition to

the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws."

B. Purpose.

The purpose of the proposed change is to provide more comprehensive protection to employees in construction and general industry work zones exposed to vehicular and equipment traffic covered by the aforementioned standards and to provide the same degree of protection to employees in similar working conditions where vehicles and machinery with obstructed views to the rear are not otherwise covered by the above regulations.

Methods that may be considered for providing additional protection for employees would be to require the following for all vehicles in construction and general industry with an obstructed view to the rear:

* Covered vehicles have a reverse signal alarm audible above surrounding noise, and

* Covered vehicles only travel in reverse when a designated employee has signaled that it is safe to do so, and

* Designated employee signalers would have no other assigned duties while engaged in signaling activities, and would be required to wear reflective vests, and

* Drivers of covered vehicles only travel in reverse when they have the designated employee signalers in view and that if visual contact is lost, that the vehicle be immediately stopped until visual contact is regained, and

* Employers train drivers of covered vehicles and designated employee signalers on the requirements of the amended or new regulations.

C. Impact on Employers.

Employers would be required to train both drivers of covered vehicles and equipment and designated employee signalers on the requirements of the amended or new regulations. Some costs to employers would be associated with the training required under the standard. Other issues that could be considered

include:

* Covered vehicles with the technological capability to provide the driver with a full view behind the vehicle (e.g. thought the use of a video camera) could be operated in reverse without a designated employee signaler.

* In the construction industry, covered vehicles could be exempted from using a designated employee signaler if they a have a reverse signal alarm audible above surrounding noise and the driver visually determines from outside the vehicle that no employees are in the backing zone and that no employees are capable of entering the backing zone during back-up.

* In general industry, covered vehicles that were not equipped with a reverse-signal alarm upon manufacture or later retro-fitted with an alarm would be exempt from the reverse signal alarm requirement if they either use a designated employee signaler, or if the driver visually determines from outside the vehicle that no employees are in the backing zone and that no employees are capable of entering the backing zone during back-up.

* Vehicles with a cab capable of rotating 360 degrees would not be considered to have an obstructed view to the rear.

* To the extent that any federal Department of Transportation (DOT) regulation applying to general industry vehicles conflicts with any new regulation adopted by the Board, the DOT regulation would preempt any Board regulation in accordance with Va. Code §40.1-1, which provides in part that:

> "...however, nothing in the occupational safety and health provisions of this title or regulations adopted hereunder shall apply to working conditions of employees or duties of employers with respect to which the Federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4 (b) (1) of the federal act."
>
> [NOTE: Section 4(b)(1) of the OSH Act provides that "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."]

D. <u>Impact on Employees</u>.

Construction and general industry employees across the state would benefit from increased work zone safety requirements from vehicular and equipment traffic.

A significant reduction in employee deaths attributed to covered vehicles is anticipated.

E. Impact on the Department of Labor and Industry.

No significant impact is anticipated on the Department.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to amend the following standards:

Vehicular Equipment for Electric Power Generation, Transmission and Distribution in General Industry, 1910.269(p)(1)(ii);

Motor Vehicles in the construction industry, §1926.601(b)(4);

Material Handling Equipment in the Construction Industry, §1926.602(a)(9)(ii); and

Mechanical Equipment, Power Transmission and Distribution in the Construction Industry, §1926.952(a)(3).

and also establish reverse signal operation regulations for vehicles not otherwise covered in general industry and the construction industry.

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

COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 7, 2006

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

I. Action Requested.

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

The proposed effective date is June 1, 2006.

II. Summary of the Proposed Regulation.

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 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 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 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 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 language provides that a multi-employer citation issued to an exposing employer 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.

III. 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*.

IV. 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. Purpose.

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

3. The 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 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 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 amendment would allow the Commissioner to pursue an administrative search warrant through the local court system.

5. The 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 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 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 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 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; 1910.266(f)(1)(iii), (f)(2)(iv) and (f)(2)(vi) – logging machinery; 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 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 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: During the period January, 2004 through June, 2005, the VOSH Program 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 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 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 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 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 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 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 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 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 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 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 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 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 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 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 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 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 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 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 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 amendment 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 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.

14. The 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 amendment provides that a multi-employer citation issued to an “exposing employer” 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 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.

15. The 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 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.

16. The 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 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 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 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 amendments are adopted, as it merely codifies current and longstanding VOSH policies, interpretations and procedures previously detailed. With regard to the 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 amendments.

E. Impact on the Department of Labor and Industry.

No additional fiscal impact is anticipated for the Department if the amendments are adopted.

F. Summary of Public Participation Efforts.

The proposed amendments to the ARM for the VOSH program, in accordance with the Virginia Administrative Process Act (APA), were the subject of a 60-day public comment period that was held from December 12, 2005 to February 13, 2006. No written comments were received during the 60-day comment period. Additionally, the Board received two comments during the public hearing for this proposed regulation that was held on January 31, 2006 **(see section VII. Comments, below).**

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 amendments.

VI. Benefit/Cost.

As the amendments 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 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 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 amendment.

VII. Summary of Public Participation Efforts.

The Public Participation Guidelines of the Board in accordance with the Virginia Administrative Process Act (APA) require a 60-day public comment period which was held from December 12, 2005 through February 13, 2006. During this period, the Board also held a public hearing on the proposed regulation on January 31, 2006.

The following comments were submitted at a public hearing of the Safety and Health Codes Board on January 31, 2006:

Commenter 1: Robert Ledbetter, Kenbridge Construction Company

Mr. Ledbetter spoke in opposition to the proposed amendments addressing multi-employer worksite citation policy (see §260.F.), and asked "that citations only be issued to those who fail to meet the safety requirements and not hold the general contractor as a second person to be held liable for the citations." In support of his opposition, Mr. Ledbetter also stated "We also expect all individuals on our jobs – and I believe most of my other general contractors here today [do as well] – that if you come on our site, you have to obey and follow our safety regulations and rules, which meet or in many cases, ours do exceed the OSHA and the VOSH requirements."

Agency Response:

The Virginia State Plan is required by federal regulation to establish either the "same" standards, procedures, criteria and rules as federal OSHA or alternative ones that are "as effective as" those of federal OSHA, so Virginia is required to have a multi-employer worksite policy. Based on information received from federal OSHA, all state plan states have a multi-employer worksite policy. **[SEE AGENCY RESPONSE TO COMMENTER 2 FOR ADDITIONAL DETAIL.]**

Although adoption of the proposed language in §260.F. will allow the VOSH program to again issue citations to general contractors as "controlling employers," there is proposed language in § 260.F.2.b. which is different than federal OSHA's multi-employer citation policy. That section will allow VOSH to pursue citations against a prime subcontractor in its roll as a "controlling employer" (e.g. the main framing contractor has subcontracted framing work out to another subcontractor who creates a hazard, and the main framing contractor knew or should have known of the hazard and was responsible by contract or through actual practice for that area of the worksite). As related to the Safety and Health Codes Board at its September 15, 2005 meeting on this proposed regulation, this new provision will in some cases result in the general contractor avoiding citation, and thereby

address some of Mr. Ledbetter's concerns. **[SEE AGENCY RESPONSE TO COMMENTER 2 FOR ADDITIONAL DETAIL.]**

Commenter 2: Steve Vermillion, Chief Executive Office, Associated General Contractors

Mr. Vermillion expressed his organization's concern about the multi-employer policy, noting that the policy is "a gray area" and that although the policy is a requirement at the federal level, it is not a federal regulation. He inquired whether the VOSH Program had to have such a policy or regulation to be "as effective as" federal OSHA. Mr. Vermillion stated that "I can look at the policy and say in a lot of cases it's the right thing to do, and I could look at other cases where it's totally unfair to cite the general contractor in these cases." Mr. Vermillion observed that the construction industry has changed tremendously in the last few years and noted that the general contractor is not always the controlling contractor on job sites as they used to be where you just had a general contractor, subcontractors and suppliers. Now you have situations where you have "subs to the subs to the subs" and the general contractor may hardly know about all the different subcontractors on site. Mr. Vermillion stated the multi-employer policy before the court case [the Summit decision referenced above] caused too much confusion and had too much unfairness built into the system.

Agency Response:

With regard to Mr. Vermillion's question about whether the VOSH Program has to have a multi-employer worksite policy to be "as effective as" federal OSHA, see the following selected excerpts from federal OSHA regulations regarding the establishment and maintenance of state plans for occupational safety and health:

Selected Excerpts from 29 CFR 1902, Indices of Effectiveness

1902.4(a)

General. In order to satisfy the requirements of effectiveness under 1902.3(c)(1) and (d)(1), the State plan shall:

1902.4(a)(1)

Establish the same standards, procedures, criteria and rules as have been established by the Assistant Secretary under the Act, or:

1902.4(a)(2)

Establish alternative standards, procedures, criteria, and rules which will be measured against each of the indices of effectiveness in paragraphs (b) and (c) of this section to determine whether the alternatives are at least as effective as the Federal program with respect to the subject of each index. For each index the State must demonstrate by the

presentation of factual or other appropriate information that its plan is or will be at least as effective as the Federal program.

1902.4(c)(2)(xi)

Provides effective sanctions against employers who violate State standards and orders, such as those prescribed in the Act.

As the above excerpts indicate, the Virginia State Plan is required by federal regulation to establish either the "same" standards, procedures, criteria and rules as federal OSHA or alternative ones that are "as effective as" those of federal OSHA, so Virginia is required to have a multi-employer worksite policy. Based on information received from federal OSHA, all state plan states have a multi-employer worksite policy.

With regard to Mr. Vermillion's comments about recent changes in the construction industry and the example of a general contractor having to deal with situations where there is a "sub to a sub to a sub," the VOSH program has noted the same changes in the industry. In part as a response to those changes and as a reflection of actual VOSH citation practices, there is proposed language in § 260.F.2.b. which is different than federal OSHA's multi-employer citation policy which allows VOSH to pursue citations against a prime subcontractor in its roll as a "controlling employer" (e.g. the main framing contractor has subcontracted framing work out to another subcontractor who creates a hazard, and the main framing subcontractor knew or should have known of the hazard and was responsible by contract or through actual practice for that area of the worksite). Section 260.F.2.B. provides that citations may be issued to an employer who is not a general contractor, but is:

> "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 facts from an actual VOSH accident inspection involving such a business arrangement was related to the Safety and Health Codes Board at its September 15, 2005, meeting when it considered the proposed regulation. The accident involved a truss collapse during the construction of an 8 unit townhouse, and the general contractor had hired a framing subcontractor, who then subcontracted the truss installation to a second subcontractor. The trusses were not braced in accordance with the manufacturer's instructions and they collapsed. After reviewing the specific facts of the case, the VOSH program issued citations related to the accident to the framing subcontractor and its subcontractor, but not to the general contractor.

Facts that are looked at in such a case to determine which companies will receive citations include, but are not limited to: contractual rights and responsibilities, actual work practices on the site, whether the individual employers knew or should have known

of the hazard (i.e. employer knowledge), whether employers had provided adequate safety and health programs and trained their employees, whether employers had complied with VOSH standards requiring frequent and regular inspections of the job site; what was the level of technical expertise and experience of the employers involved; how long the hazard was in existence before the accident occurred, etc.

Although adoption of the proposed language in §260.F. will allow the VOSH program to again issue citations to general contractors as "controlling employers," the proposed language in § 260.F.2.B. will also allow VOSH to pursue prime subcontractors as well, which in some cases will result in the general contractor avoiding citation and thereby address some of Mr. Vermillion's concerns.

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Recommended Action

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board consider for adoption the final regulation to amend 16 VAC 25-60, Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program, as authorized by Virginia Code, §40.1-22(5), with an effective date of June 1, 2006.

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

16 VAC 25-60, Final 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 superseded 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 superseded 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 superseded 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 superseded 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; and

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~~ <u>All</u> parties will be advised of the ~~Commissioner of Labor and Industry's~~ decision <u>within 15 working days of the hearing</u>.

~~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:	
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COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 7, 2006

Regulation Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors Final Adoption

I. Action Requested.

The Boiler Safety Compliance Program of the Department of Labor and Industry requests the Safety and Health Codes Board to consider for adoption as a final regulation of the Board the attached regulatory language governing the financial responsibility of boiler and pressure vessel contract fee inspectors.

The proposed effective date is June 1, 2006.

II. Summary of the Draft Final Regulation.

This draft final language requires 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. 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 draft final regulation has one change from the proposed regulation adopted by the Board at its meeting on May 24, 2005. This change, based on a comment received during the 60-day public comment period, does not change regulatory intent, but is made solely to provide further clarification. The final draft new definition of a 'Contract fee inspection agency' is modified to add the word "certificate" do further define the type of inspection being performed under these regulations:

> "Contract 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 **certificate** inspections to the general public.

III. Basis, Purpose and Impact of the 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 "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." *(§ 40.1-51.9:2. of the Code of Virginia, Financial Responsibility Requirements for Contract Fee Inspectors, is contained in this package.)*

B. Purpose.

The purpose of the 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 additional fiscal impact is anticipated to the Department beyond the cost of 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/or 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 - $20,000 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 indemnify 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.

V. Summary of Public Participation Efforts.

The Public Participation Guidelines of the Board in accordance with the Virginia Administrative Process Act (APA) require a 60-day public comment period which was held from December 26, 2005 through February 25, 2006. During this period, the Board also held a public hearing on the proposed regulation on January 31, 2006 in Richmond.

The Public Participation Guidelines of the Board in accordance with the Virginia Administrative Process Act (APA) require a 60-day public comment period which was held from December 26, 2005 through February 25, 2006 and a public hearing which was held on January 31, 2006 in Richmond. There was one commenter at the public hearing:

Mr. Mark Anderson, of American Boiler Inspection Service, Inc., who provided a written copy of his comments. *(Attached as Appendix "A")*

Three written comments received during the sixty day comment period have also been included in this package:

Mr. James Mannion of Valley Boiler Inspection, Inc., *(part of Appendix "A")*
Mr. Kurt D. Crist of Tidewater Immediate Inspections, Inc.; *(Appendix "B")* and
Mr. John Pitman of Inspection Specialties, Inc. *(Appendix "C")*

Where the separate commenters express similar concerns, the agency response is grouped.

Comment 1:
All commenters state that their firm has never had a claim as a result of the inspector's *negligent* inspection or recommendation for certification of a boiler or pressure vessel.

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.
- Mr. James Mannion of Valley Boiler Inspection, Inc.
- Mr. John Pitman of Inspection Specialties, Inc.

Agency Response:
DOLI agrees. However, there have been a few cases in the past where Inspectors have submitted inspection reports recommending certificates for boilers/pressure vessels that

were no longer at the location which are referred to as "drive-by inspections". A negligent recommendation for a certification that is based upon a "drive-by inspection" is a potential risk from which the public needs protection.

Comment 2:
The proposed requirements appear to address an accident frequency problem.
- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
Concern is exposure to severity based upon the statutes' (§40.1-50.9:2C) mandate: "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."

Comment 3:
DOLI's response to Mr. Anderson's FOIA request regarding this proposal did not contain any documents which provide factual support for the proposed insurance limits for Contract Fee Inspectors.
- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.
- Mr. John Pitman of Inspection Specialties, Inc.

Agency Response:
In the year 2000 there were many meetings, memos, and discussions amongst Mr. Anderson, Mr. Barton, and then Director of State Programs, Mr. Robert (Mac) Krauss to allow for the adding of two companies, Inspection Specialties and Tidewater Immediate Inspections, Inc. under the insurance coverage of another company, American Boiler Inspection Services, Inc.

Initially, Inspection Specialties was added to the coverage of American Boiler Inspection Services, Inc. as everyone attempted to resolve the issues of the Virginia Code requiring the Safety and Health Codes Board having to be involved in providing any regulations and the fact that the statute did not address contract fee companies but only individuals. *(See Addendum 1 for letter dated 8/21/00).*

Later in 2000 Mr. Crist notified DOLI that a separate company that he had started, Virginia Tidewater Immediate Inspections, had ceased operation because of the cost of the policy for liability insurance ($1,000,000 worth of coverage). Mr. Anderson advised he was adding the new company, Tidewater Immediate Inspections, Inc, to the same $1,000,000 aggregate insurance policy as the previous two. There would now be four companies (Contract Fee Inspectors) under the same policy with a $1,000,000 aggregate instead of four Contract Fee Inspectors with $4,000,000 aggregate. Mr. Barton expressed strong concern for the lack of public protection with this arrangement.

Virginia is one of only two states that allow individuals to perform certificate inspections of boilers and pressure vessels. Therefore, there was no precedence to follow.

Consequently, Mr. Barton was directed to contact the boiler insurance industry and get their input. *(See Addendum 2 for Mr. Barton's notes of that meeting.)* On Oct. 30, 2000, the American Insurance Association sent an E-mail that read in part "that it would make sense to require fee-for-service inspectors to maintain a professional liability policy with at least $2 million in coverage." *(See Addendum 3 for e-mail dated 10/30/00.)* Mr. Barton did not believe $2,000,000 for all Contract Fee Inspectors was warranted.

Therefore, a three-tiered concept was developed: $500,000 coverage for small businesses starting up, in order to resolve Mr. Crist's concern and as suggested by a representative of the Bureau of Insurance to Mr. Dennis Merrill of the Department and reported to Mr. Robert Krauss. *(See Addendum 4 for an e-mail dated 2/23/01.)*; and continuing upward for coverages of $1,000,000; and then $2,000,000 for companies with highest exposure.

Prior to the start of the current APA process, the Department dealt with this issue administratively.

Comment 4:
"Two incidents had estimated loss values of $500,000 and one was for $350,000. DOLI guessed to set these loss values."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
Three of the four worst incidents in the last five years had actual property damages values provided by the owner/users of approximately $317,000, $330,000, and $626,000, respectively, excluding litigation costs. DOLI did not develop estimates.

Comment 5:
"There is no indication that DOLI has approached the primary Contract Fee Inspection companies for their input. … DOLI should not ignore good administrative practice and due process, and try to slide this through unnoticed."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.
- Mr. James Mannion of Valley Boiler Inspection, Inc.
- Mr. John Pitman of Inspection Specialties, Inc.
- Mr. Kurt Crist of Tidewater Immediate Inspections, Inc.

Agency Response:
DOLI has followed the Administrative Process Act and all state regulations to involve all Contract Fee Inspectors in the process of rulemaking. On November 15, 2003, the Safety and Health Codes Board approved the Department's request to initiate regulatory rulemaking procedures. The proper notice was published in The Virginia Register on January 12, 2004.

There were no comments received during the 30-day comment period which began on

January 12, 2004 and ended on February 12, 2004. As there was no proposal or other comments offered by the public, DOLI prepared a proposal with required reviews from both the Department of Planning and Budget and the Office of the Attorney General. Once a public hearing date was known Mr. Barton notified Mr. Anderson by e-mail as a professional courtesy. During the regulatory process DOLI continued to remind Contract Fee Inspectors as their Certificate/Financial document came due. Note the last paragraph of memos dated 9/10/03 and 12/2/04 to Mr. Anderson. American Boiler Inspection Services, Inc. had been providing the Insurance Certificate for Inspection Specialties, Inc.; Tidewater Immediate Inspections, Inc; and Valley Boiler Inspection, Inc. *(See Addenda 5 & 6 for memos dated 9/10/03 and 12/2/04.)*

In addition, Mr. Barton reminded all Inspectors attending the Spring 2005 meeting of the Virginia Boiler and Pressure Vessel Inspectors Association that the proposed Regulation Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors was still progressing.

Comment 6:
"A tiered insurance requirement is not in the best interest of the businesses and citizens of Virginia."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
The statute, §40.1-50.9:2C, mandates otherwise: "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."

Comment 7:
"Because all Contract Fee Inspectors will have the opportunity to inspect boilers with the same exposure to loss, they should be required to carry the same insurance limits."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
The statute, §40.1-50.9:2C, mandates otherwise: "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."

Comment 8:
"Since the probability of a high frequency of the type of claim is very low, the Board should focus on the severity of a possible claim."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
DOLI agrees. Three of the four worst incidents in the last five years had actual property damages of approximately $317,000, $330,000, and $626,000, excluding litigation costs.

Comment 9:
"My premium for 2006 will most likely exceed $20,000 for the $2,000,000 limits; not $10,000 as DOLI sets forth."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

"Our current policy premium for our $2,000,000 limit significantly exceeds the DOLI maximum estimated figure of $10,000."

- Mr. James Mannion of Valley Boiler Inspection, Inc.

" The amount that we currently pay for our insurance of $2,000,000 is well above the amounts reported in the Financial Impact Analysis that DOLI presents at $10,000"

- Mr. Kurt Crist of Tidewater Immediate Inspections, Inc.

"What happens if $2,000,000 limit is adopted, but later cannot be secured from a carrier? Does the affected company go out of business?"

- Mr. John Pitman of Inspection Specialties, Inc.

Agency Response:
A figure of $10,000 was the approximate cost in mid 2004 when the estimate was obtained in preparation of the Aug. 3, 2004 Briefing Package. In response to Mr. Anderson's memo of July 7, 2003, *(See Addendum 7),* Commissioner Ray Davenport had ordered the memorandum of March 9, 2001 that administratively required financial responsibility be suspended and replaced with communications requiring only documentation confirming each Inspector's financial responsibility. Therefore, as of September, 2003 DOLI was no longer requiring any minimum financial limits for any Contract Fee Inspector. A memo was sent to each Contract Fee Inspector as their Certificate of Insurance expired. *(See Addenda 5 & 6 for memos dated 9/10/03 and 12/2/04.)*

It is important to emphasize that the proposal broadens the choices of instruments each Contract Fee Inspector or Contact Fee Agency can make. Professional Liability or Errors and Omission Insurance is just one avenue for financial responsibility. Alternatively, a guaranty, a surety, or self-insurance should be carefully considered as they also are allowable.

Comment 10:
"16 VAC 25-50-150 *Inspection certificate and inspection fees.* Does not mention fees charged by an inspector. This section pertains to fees charged by DOLI, not by the inspection company."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
DOLI agrees. However, this is considered to be modified risk assessment. No Contract Fee Inspector or Contract Fee Inspector Agency will have to provide any financial data to DOLI in order for DOLI to determine its market share. The market share is determined by multiplying registered objects with the inspection fee values which would have been used by the Department had it performed the inspections itself. *(See Addendum 8 for a sample of how the market shares for two Contract Fee Inspector Agencies will be determined.)*

Comment 11:
"In addition to the *nine* companies listed on the DOLI website as *Contract Fee Inspectors*, two companies, Seneca Insurance Company and XL Insurance America Incorporated, provide contracted inspections for the boiler or pressure vessels, thereby qualifying as *Contract Fee Inspectors.*"

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
Seneca Insurance Company and XL Insurance America have been listed on the DOLI website as insurance companies only. Management of Seneca Insurance Company and XL Insurance America have written letters that they do not perform any certificate inspections for a fee in Virginia. *(See Addenda 9 & 10*) XL Insurance America/ARISE does perform third party inspections for "R" Stamp holders performing repairs and alterations. To clarify that this proposal only applies to boilers and pressure vessels operating in Virginia, we have recommended that the new definition of a "Contract fee inspection agency" be modified as follows: "Contract 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 certificate inspections to the general public.

Comment 12:
"The proposed regulation treats companies, certified by DOLI, which have a substantial nationwide inspection business, differently than those which inspect only in Virginia."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
DOLI does not, nor has it ever, certified companies, only individuals. Virginia is one of only two states that allow individuals to perform certificate inspections of boilers and pressure vessels. One of the longstanding issues from other jurisdictions throughout the United States over allowing private individuals to perform boiler and pressure vessel inspections has been, and continues to be, that private individuals have no financial interest in the object as an insurance company inspector would.

Refer to *"Boiler Inspection Programs- A Question of Value"* published by the National

Board of Boiler and Pressure Vessel Inspectors. As contract fee agencies expand to other states their financial responsibility will be closely scrutinized.

One major boiler insurer reports that they had nine (9) incidents nationwide over the last five years with losses over $500,000, six (6) losses were over $1,000,000 and two (2) were over $2,000,000. High limits for whichever financial instrument the contract fee agency chooses most likely would satisfy a very real perspective.

Comment 13:
"Regarding my first concern, the FOIA package contained a DOLI March 9, 2001 Memorandum addressed to all Contract Fee Inspectors, stating that there was a change in the Financial Requirements. However, there was no indication of this Health and Safety Code Board's approval, as required by Section 40.1-51.9.2-C."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
The Safety and Health Codes Board was appraised of this oversight under Purpose of the Proposed Rulemaking in the Briefing Package for the November 5, 2003 NOIRA. "This request for proposed rulemaking is necessary as the guidelines for insurance coverage previously issued by the Department did not have the force of law. The Department therefore needs this rulemaking to comply with the mandate and intent of the governing statute, §40.1-51.9:2."

Comment 14:
"Mr. Barton told me that he was going to retire in two years and set up a competing "contract fee inspection" company. I do not object to competition, however, it seems inappropriate for such a government employee to be charged with proposing regulations with unusually high limits for his future competition, which will have established clients, when Mr. Barton starts his business."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

"This appears to be an old fashioned witch-hunt directed towards contract fee inspection companies that might be your competition in the future."

- Mr. Kurt Crist of Tidewater Immediate Inspections, Inc.

Agency Response:
The comment about possibly retiring and starting a contract fee inspection company was made as a humorous aside during a telephone conversation with Mr. Anderson about the requirement for external inspections of high pressure boilers in addition to the required internal inspection. At first, Mr. Anderson stated that external inspections were not required for high pressure boilers. Later, he admitted he couldn't perform external inspections because his customers wouldn't pay for them. That's when Mr. Barton mentioned, with a humorous intent and to make a point, that he would retire in two years, start an inspection company and include external inspections in his fee structure. This is

an example where a company has 270 high pressure boilers and doesn't perform necessary and informative external inspections on perhaps 180 of them because of economic reasons. It should be noted that the decision to have a $2,000,000 limit came from a recommendation by the American Insurance Association in 2000. *(See Addendum 3.)*

Comment 15:
"Mr. Barton's DOLI memorandum of December 12, 2000 to Mac Krauss contains personal attacks on my integrity, and indicates restraint of trade actions directed towards me and Tidewater Immediate Inspections, Inc."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
The December 12, 2000 memo, *(See Addendum 11)*, was an internal memo to Mr. Barton's supervisor, Mac Krauss, about different issues one of which related to the employment of a contract fee inspector. Mr. Krauss decided against one recommendation and no further action was taken. Furthermore, as soon as DOLI received a memo from the Bureau of Insurance of the State Corporation Commission, *(See Addendum 12)* stating that there was nothing in the insurance statute that prevented DOLI from requiring a certain limit of liability insurance. Mr. Krauss approved the signing of Mr. Barton's memo of 3/9/01. *(See Addendum 13.)*

Comment 16:
"Mr. Barton singles me out of all the Contract Fee Inspection Companies and personnel to provide a Certificate of Insurance with $2,000,000. Aggregate limit….His memorandum infers a hidden punishment for some alleged and unidentified, violation. The Board should not endorse such unfair, and possibly defamatory and illegal behavior."

- Mr. Mark Anderson, of American Boiler Inspection Service, Inc.

Agency Response:
The December 12, 2000 memo was an internal memo to Mr. Barton's supervisor, Mac Krauss, about different issues one of which related to the employment of a contract fee inspector. The third paragraph of the first page *(See Addendum 11*) clearly stated the issue that was being brought to the attention of Mr. Barton's supervisor for a decision. Mr. Krauss decided against this recommendation and no further action was taken. Further, the sixth and seventh paragraphs of this internal memorandum explain why Mr. Barton was recommending $2,000,000 liability coverage for one company.

Comment 17:
"Paragraph II-H further states that the proposed changes would "give contract fee inspectors a vested interest in the performance of the inspections they conduct". This statement is an unwarranted assault on the quality of the inspections we conduct….To insinuate that the quality of an inspection is going to change based on employer is absurd and offensive."

- Mr. James Mannion of Valley Boiler Inspection, Inc.

Agency Response:
Virginia is one of only two states that allow individuals to perform certificate inspections of boilers and pressure vessels. One of the longstanding issues from other jurisdictions throughout the United States over allowing private individuals to perform boiler and pressure vessel inspections has been, and continues to be, that private individuals have no financial or other vested interest in the object as an insurance company inspector would. Refer to " Boiler Inspection Programs- A Question of Value," published by the National Board of Boiler and Pressure Vessel Inspectors. As Contract Fee Agencies expand to other states their financial responsibility will be closely scrutinized.

Comment 18:
"Based on a July 28, 2005 email from Mr. John Crisanti to Mr. Fred Barton saying to limit contact and keep "our control" the input into "our regulation", it seems that DOLI wanted to control and adopt this proposal without input."

- Mr. John Pitman of Inspection Specialties, Inc.

Agency Response:
The comments made by Mr. Crisanti to Mr. Barton were germane to an internal discussion regarding steps in the APA regulatory adoption process and to clarifying that Crisanti was to provide answers to the APA procedural questions and Barton was to respond to inquiries regarding the technical boiler issues.

Comment 19:
"Why are other states reportedly extending Sovereign Immunity to inspectors, while Virginia tries to burden them with dictates."

- Mr. John Pitman of Inspection Specialties, Inc.

Agency Response:
An e-mail from Mr. Eric Goldberg of American Insurance Association dated 9/13/00 to Mr. Fred Barton, *(See Addendum 14)*, wherein the concept of sovereign immunity was discussed was in reference to insurance inspectors not contract fee inspectors. The Commonwealth of Virginia does not offer sovereign immunity to any boiler inspectors.

Contact Person:

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

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.)

RECOMMENDED ACTION

The Boiler Safety Compliance Program recommends that the Safety and Health Codes Board adopt the attached draft final language for contract fee inspector financial responsibility regulation as a final regulation of the Board, with an effective date of June 1, 2006 as authorized by '' 40.1-51.9:2 C. and 40.1-51.6.

The Department also recommends that the Board state in any motion it may make to promulgate this regulation that it will receive, consider and respond to petitions by any interested persons at any time to reconsider or revise the proposed regulation to be adopted in accordance with the Administrative Process Act.

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

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, “Board” “Boiler”, “Chief Inspector”, and “Pressure Vessel”, shall have the same meanings as defined in 16 VAC-25-50-10 unless the context clearly indicates otherwise.

“Contract 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.

“Market 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.

“Contract 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 **certificate** 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.

4. Contract fee inspectors may be covered under 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 the contract fee inspector for such inspections. 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 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 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.

APPENDIX "A"

American Boiler Inspection Service, Inc.
12800 Saddles eat Place
Richmond, Virginia 23233-7687

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e-mail-,- AmerBoiler@AOLcom

January 31, 2006

TO: SAFETY AND HEALTH CODES BOARD

FROM: Testimony of R. Mark Anderson, President

RE: PROPOSED 16 V AC 25-55-10 and 16 V AC 25-55-20, CHAPTER 55. REGULATE FINANCIAL RESPONSIBILITY OF BOILER AND PRESSURE CONTRACT FEE INSPECTORS

Summary

I appear today to oppose the current proposal to regulate financial responsibility of boiler and pressure Contract Fee Inspectors. As a Contract Fee Inspector, I concur with the need for financial responsibility, however, I ask the Board to revise the regulations to better reflect the claim experience and realistic possibilities of risk exposure in Virginia. We recommend a $1,000,000 aggregate and a minimum $500,000 occurrence limit for all inspection companies.

Background

The claims history and loss exposure in Virginia do not justify the proposed regulation. Both my company's experience and the records of DOLI demonstrate that the proposed insurance requirements are unwarranted for companies which do business in the Commonwealth.

I. My company's experience does not justify such regulation.

In our 11 years as a *Contract Fee Inspection Company,* American Boiler Inspection Service, Inc., has never had a claim as a result of the inspector's *negligent* inspection or recommendation for certification of a boiler or pressure vessel. Further, I am not aware of a single claim against any Contract Fee Inspector since they were certified to inspect in Virginia on July 1, 1995. It is evident that there is no *frequency* problem with *negligent* inspections. However, the proposed requirements appear to address an accident frequency problem.

II. **DOLI** does. not justify this regulation.

DOLI's response to my FOIA request regarding this proposal did not contain any documents which provide factual support for the proposed insurance limits for Contract Fee Inspectors. *See* Attachment C. There was no evidence of background work, theories, relevant loss data, expert recommendations, studies, professional articles, meeting notes, industry consensus, actuarial analysis, homework, or any other supporting information. Nor is there any evidence of public demand for this proposed change. Without any such information or research how could DOLI reasonably arrive at the proposed limits?

Director/Chief Inspector Fred Barton states the 3 year property losses ranged from $350,000 to $500,000. This statement appears to be based on only 3 losses out of the 30 incidents reported to

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DOLI involving Boilers and Pressure Vessels in the past 11 years. 1 Two incidents had estimated loss values of $500,000 and one was for $350,000. DOLI guessed to set these loss values. The next highest loss estimate for an incident was $106,000, set by an insurance company, an independent entity. Significantly, 15 incidents had *no* loss value assigned and eight (8) are valued at *less than $26,000.* Using even the unusually high DOLI loss values, the incident average loss value is $61,233. If the DOLI "guesses" are excluded, the incident average loss value is $18,038. This is far below the average of $500,000 put forth by DOLI, and provides no realistic justification for the current proposed regulation.

There is no indication that DOLI has approached the primary Contract Fee Inspection companies for their input. A December e-mail from Mr. Barton about this proposal is the only notice which I received about this proposed change. DOLI says that only seven (7) companies are affected by this proposal. However, until I called Valley Boiler Inspection, Tidewater Immediate Inspection and Inspection Specialties, Inc., they had not heard of the proposal. DOLI should not ignore good administrative practice and due process, and try to slide this through unnoticed. It is unfair to the group which will be regulated.

A tiered insurance requirement is not in the best interest of the businesses and citizens of Virginia. A single insurance requirement for all inspection companies would best serve the public. The part-time and smaller companies complete fewer inspections and, therefore, have lower inspection experience level compared to the full-time and larger inspection companies.

The regulation proposes that the small companies should carry coverage with a $500,000 and the larger companies should carry coverage with a $2,000,000 limit. This presumes that the larger companies will have four times as many claims as the small companies. Yet there has not been a single claim of negligent inspection in Virginia in the past eleven years. In short, no frequency exists. Because all Contract Fee Inspectors will have the opportunity to inspect boilers and pressure vessels with the same exposure to loss, they should be required to carry the same insurance limits.

Since the probability of a high frequency of this type of claim is very low, the Board should focus on the severity of a possible claim. If DOLI has already determined that $500,000 is adequate and a reasonable, as well as typical, limit for a Contract Fee Inspection company, as stated in a DOLI emai1 from Robert Krauss to Dennis Merrill, dated 2/23/01, then $500,000 should be the limit.

As I have on several occasions advised Mr. Barton, $2,000,000 limits are hard to find and expensive to retain. My premium for 2006 will most likely exceed $20,000.00 for the $2,000,000 limits; not $10,000 as DOLI sets forth. The letter from our insurance agent, as Attachment A, demonstrates these problems.

Specific errors and deficiencies to the DOLI proposal:

1 Some of these incidents involved furnace explosions and CO exposure, areas not covered by DOLI Boiler and Pressure Vessel Rules. The vast majority were a result of the failure of operating controls.

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1. *"Market Share"* - the definition is flawed. ("*... the denominator of which is the total fees charged by the inspector and 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...* ")

   a. 16 *VAC 25-50-150 Inspection certificate and inspection fees.* Does not mention fees charged by an inspector. This section pertains to fees charged by DOLI, not by the inspection company!
   b. This does not allow DOLI to take the total number of inspections and multiply by the DOLI rates for inspection.
   c. "Fees charged by an inspector or inspection agency" are impossible for DOLI to determine without financial data from the inspection agencies.
   d. This will require the financial data to be provided by all of the 20 inspection agencies to DOLI for consideration, not just the *Contract Fee Inspectors,*
   e. ".. *total fees charged..* " will be by the company's total fees charged, not just their Virginia operations,
   f. There is no DOLI requirement for any inspection agency to provide financial data to DOLI,
   g. American Boiler Inspection Service, Inc. will not provide any financial information to DOLI.

2. *Economic Impact Analysis obtained from* DOLI *website*

   a. States that". .. there are *seven* inspection companies that provide inspections in Virginia..." HOWEVER,
      i. 9 *Contract Fee Inspection Companies* are listed on the DOLI Web site, and there are 20 inspection companies in all. *See* Attachment D for summary.
      ii. In addition to the *nine* companies listed on the DOLI web site as *Contract Fee Inspectors,* two other companies, Seneca Insurance Company and X L Insurance America Incorporated, provide contracted inspections for the boiler or pressure vessels, thereby qualifying as *Contract Fee Inspectors.*
      iii. The pool of inspection companies is not stable as DOLI states. In the past year, three companies have joined the DOLI list. Additionally, 24 companies have ceased inspection activities since July 1, 1995.
   b. States that the costs will range between $2,500 and $10,000. HOWEVER,
      i. American Boiler Inspection Service, Inc., 2004 premium - $13,383.
         American Boiler Inspection Service, Inc., 2005 premium - $11,104 pre-audit, plus an estimated additional $4,000 audit premium.
      ii. American Boiler Inspection Service, Inc., 2006 estimated premium - $20,000.
      iii. The cost of the insurance has increased each year, and will continue to do so.
      iv. The availability of the insurance is questionable and, as stated in the Economic Impact Analysis, *"not well developed.* "

3. DOLI states the 3 year property loss ranged from $350,000 to $500,000. HOWEVER, *(See* Attachment B)

   a. There were 5 loses reported during the past 3 years in the Commonwealth.
   b. Using DOLI supplied loss data, the 3 year loss range is from $0 to $500,000.

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c. The 2 losses DOLI employees guessed to have a value of $500,000 occurred after the $2,000,000 limit was "proposed".
d. Not considering the very high DOLI guesses for losses, the range has been from $0 to $106,000.
e. Only 30 incidents have been reported to DOLI in the last 11 years.
f. Using DOLI supplied loss data, the 11 year average loss is $61,233. If you do not use 3 very high DOLI loss guesses, the average is only $18,000.

4. The proposed regulation treats companies, certified by DOLI, which have a substantial nationwide inspection business, differently than those which inspect only in Virginia. It proposes insurance limit requirements only based on Virginia business while their exposure to loss is on a national basis.

Concern about Personal Nature of the Proposed Regulation

Two other aspects related to the proposed regulation concern me. First, DOLI appears to have misrepresented its authority regarding Financial Requirements. Second and particularly troubling is that this regulation appears to be directed solely at my firm with no reasonable basis, as indicated by comments by Mr. Barton to me and documents provided in response to the FOIA.

Regarding my first concern, the FOIA package contained a DOLI March 9, 2001 Memorandum addressed to All Contract Fee Inspectors, stating that there was a change in the Financial Requirements. However, there was no indication of this Health and Safety Code Board's approval, as required by Section 40.1-51.9.2 - C. Therefore, there appears to be no basis for Mr. Fred Barton's opinions, beginning in 2001, about such a departmental policy. Mr. Barton has required the affected Contract Fee Inspectors to expend considerable money to obtain higher insurance limits than actually authorized by law.

With respect to my second concern, I spoke with Mr. Barton last week on an unrelated matter. Mr. Barton told me that he was going to retire in two years and set up a competing "contract fee inspection" company. I do not object to competition, however, it seems inappropriate for such a government employee to be charged with proposing regulations with unusually high limits for his future competition, which will have established clients, when Mr. Barton starts his business.

Mr. Barton's DOLI memorandum of December 12,2000 to Mac Krauss contains personal attacks on my integrity, and indicates restraint of trade actions directed towards me and Tidewater Immediate Inspections, Inc. An excerpt from this memorandum follows:

> "It is my recommendation that *only* Mr. Anderson provide a certificate of insurance with $2,000,000 aggregate limit because he has over 10% market share of objects, has financial interests in 3 companies, and employs or has arrangements with 4 inspectors (Tom Barron, Jim Mannion, John Pitman and Kurt Crist).
>
> In summary, Mr. Anderson has more customers and therefore has more exposure to possible damages. I discussed this with Mr. Anderson on December 1, 2000 and he indicated that he Indicated that he already had coverage with $2,000,000 aggregate limit.[2]

[2] This insurance was acquired solely because of Mr. Barton's statements in 2001, which appear to have no regulatory foundation.

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> The one barrier to resolving this issue is the *violation of the Virginia Rules.* This violation is *yet another example of untrustworthiness on the part of Mr. Anderson.* I believe there should be a 2-3 months delay of adding the name to the list after Mr. Anderson is advised of the violation." [Emphasis added.]

Mr. Barton singles me out of all of the Contract Fee Inspection companies and personnel to provide a Certificate of Insurance with $2,000,000 aggregate limit. He did not recommend that American Boiler Inspection Service, Inc., or any other company provide the Certificate. His memorandum infers a hidden punishment for some alleged, and unidentified, violation. The Board should not endorse such unfair, and possibly defamatory and illegal behavior.

Conclusion

Succinctly, American Boiler Inspection Service, Inc. opposes the current proposal to regulate financial responsibility of boiler and pressure Contract Fee Inspectors. We concur with the need for financial responsibility. We ask the Board to revise the regulations to better reflect the claim experience and realistic possibilities of risk exposure in Virginia. Reasonable insurance limits will protect the public and also minimize the cost of inspections to our public and private clients in the Commonwealth. We recommend a $1,000,000 aggregate and a minimum $500,000 occurrence limit for all inspection companies.

I would be glad to work with the Board. Thank you for your anticipated serious review of this matter.

ATTACHMENT A

Thompson
Insurance
AGENCY

INCORPORATED "1971

1/9/2006

;\merican Boiler Inspection Service, Inc.
12800 Saddleseat Pl.
Richmond, VA 23233-7687

Re: Errors & Omissions
GL1237341
08/08/2005 to 08/08/2006

Dear Mr. Anderson:

This letter is to confirm our phone conversation that your insurance cost has increased considerably since *I999.* When we first wrote your insurance, your premiums were not quite $3,000. Today, your premium for your Errors & Omissions insurance well exceeds $10,000. For your 2004-2005 policy period, your premium exceeded $13,000. For your 2004-2005 policy period, your *premium exceeded $13,000. Your current premium* exceeds *$ll,000 and* per our conversation, we feel you will have a large increase due to audit, added to that figure.

I would like to remind you of the difficulty in obtaining insurance for a Boiler Inspection Service. We submitted your account to a number of companies and because of the type of the type of operation, we *found* only one carrier willing *to* offer you a quote. We feel fortunate that we are able to continue offering your protection. If you have any questions, please free in calling me again.

Cordially,

H. Freeman Thompson, III
H. Freeman Thompson, III

H. F. THOMPSON INSURANCE AGENCY, INC.
2515 WACO STREET RICHMOND, VA 23294-3750 IELEPHONE: (804) 672-3039
TOll FREE: {BOO) 288-3039 FAX; (804) 672-1038

Incident reports and dollar losses from DOLI records

(compiled by Mark Anderson 01-26-2006 - American Boiler Inspection Service, Inc)

Date	Inspection Company	Incident Reported by	Cause	Negligence	$ Loss	Determining loss
10/2612005	Hartford Steam Boiler	DOLI - Mike Morgan	Operator Error	No	$ 500,000.00	Guess
1/10/2005	C N A	CNA	Dry Fire	No	$ 106,000.00	Insurance
3/8/2004		DOLI - Fred Barton	Furnace Explosion	No	$ 500,000.00	Guess
5/312003		Chubb & Sons	Dry Fire	No	$ 80,000.00	Insurance
2/15/2003		FM	Design Error	No	$ -	Insurance
7/2412002		Royal Sunalliance	Improper Repair	No	$ 100,000.00	Insurance
5/14/2002	Cincinatti	DOLI - Ed Hilton	Faulty Safety Valve	No	$ -	Guess
3/14/2001		DOLI - Steve Tynes	Improper Repair	No	$ -	Guess
5/712001	Hartford Steam Boiler	Hartford Steam Boiler	Mechanical Malfunction	No	$ 24,000.00	Insurance
7/17/2000		DOLI - Ed Hilton	Furnace Explosion	No	$ 350,000.00	Guess
7/8/1999		DOLI - Steve Tynes	Mechanical Malfunction	No	$ 3,000.00	Guess
7/1/1999		DOLI - Steve Tynes	Electrical	No	$ 500.00	Guess
5/1/1999		ABI - Mark Anderson	Manufactiruing Error	No	$ 25,000.00	Guess
1/4/1999	None	DOLI - Fred Barton	Installation	No	$ -	Guess
11/25/1998		DOLI	Unknown	No	$ -	Guess
1/6/1998		DOLI - Ed Hilton	Mechanical Malfunction	No	$ 75,000.00	Guess
12/9/1997		Kemper - Jim Mannion	Mechanical Malfunction	No	$ -	Insurance
11/15/1997		ISA - Jerry Eltzroth	None	No	$ -	Plant
8/6/1997		DOLI - Ed Hilton	Mechanical Malfunction	No	$ -	Guess
Unknown		DOLI- Tom Barron	Mechanrcal Malfunction	No	$ 22,000.00	Guess
3/2/1997		Hartford Steam Boiler	Burner Failure	No	$ 25,000.00	Insurance
Unknown		DOLI - Ed Hilton	Mechanical Malfunction	No	$ 500.00	Guess
2/13/1997		DOLI- Tom Barron	Mechanical Failure	No	$ -	Guess
2/1/1997		Kemper - Eppa Winbish	Mechanical Malfunction	No	$ -	Insurance
1/1/1997		Allied Signal - David Dewell	Mechanical Malfunction	No	$ -	Plant
1/26/1995		DOLI - Will Long	Leaking Water	No	$ -	Guess
1/9/1995		DOLI - George Eldridge	Furnace Explosion	No	$ 26,000.00	Guess
8/25/1995		DOLI - Jim Mannion	Poor Maintenance	No	$ -	Guess
12/1/1995		ABI - Mark Anderson	Mechanical Malfunction	No	$ -	Plant
1/6/1995		DOLI - George Eldridge	Poor Maintenance	No	$ -	Guess
				30 failures	$ 1,837,000.00	
				Average Failure	$ 61,233.00	

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ATTACHMENT C

Items, included in the package provided by DOLI in response to my FOIA, which appear to be relevant to this proposed regulation, are listed below:

- 1 internal DOLI email stating that $500,000 is a typical limit *(No backup provided)*
- 3 e-mails from the Virginia Department of Planning and Budget, referencing Amy Wilson (DBP Economist) contacting an insurance agent and chastising DOLI for giving her my name as a person to contact.
- 9 emails to and from the Office of the Attorney General questioning procedural
- matters 1 letter to SCC asking if provisions of Virginia law would affect the Board's
- discretion 2 e-mails to and 2 return e-mai1s from Eric Goldberg, with the American Insurance Association. (dated 09/13/2000) *The AIA website states that the singular purpose of AIA is to advance their interests of their members before Congress and legislatures in every state. It does not mention the interests of Virginia.*
- 1 piece of scratch paper
- 30 Incident Reports for boiler or pressure vessel occurrences in Virginia *(No analysis)*
- 197 pages of various Certificates on Insurance *(NOTE - two current inspection companies do not provide a certificate for E* & 0 *or Professional Liability)*
- 1 DOLI Memorandum highly critical of my personal reputation and honesty *(See text)*
- 1 report with calculations for American Boiler Inspection Service, Inc., using imaginary DOLI inspection fees.

Importantly, no documents were provided in response to the following requests (so they must not exist):

- All documents pertaining to the establishment of the existing insurance requirements for contract fee inspection companies.
- All documents used to determine the proposed limits of insurance for contract fee inspection companies.
- All documents used in the development process of the proposed Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors (16 V AC 25-55) insurance requirements for contract fee inspection companies.
- All documents pertaining to the mechanics of how DOLI will determine the "market share" of the contract fee inspection companies.
- All documentation as to why insurance companies performing inspections for a fee will or will not be classified as a contract fee inspection company and are therefore included or excluded in this proposed regulation.
- A copy of the DOLI Economic Impact Analysis of this proposed regulations and all background documents relating to this analysis, including contract fee inspection companies contacted and their responses to the DOLI inquiry. **(My response and that of Kurt Crist, Tidewater Immediate Inspections, Inc., to Amy Wilson with Virginia DPB are not even included.)**

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ATTACHMENT D

January 24, 2006

Contract Fee Inspection Companies	Status
Accident Inspection Specialist	Not inspecting
American Boiler Inspection Service, Inc	Operating
Arise, Inc	Operating
Arise/Seneca Inc	Operating
Atlantic Services, Inc	Operating
B & M Inspection Service	Out of business
Boiler and Pressure Vessel Inspections, Inc Boiler	Out of business
Inspection Company, Inc	Out of business - 2 times
CJIT Consulting, Inc	Operating
Hampton Roads Boiler Inspection, Inc	Out of business - 3 times
Hartford Steam Boiler Insurance	Operating
Kemper Insurance	Out of business
Inspection Specialist Associates	Out of business Operating
Inspection Specialties	Out of business
Integrity Assured Inspection Company, Inc	Not inspecting
Mid Atlantic Tank Inspection Service, Inc Pete's Boiler	Out of business
and Pressure Vessel Inspections Royal Insurance	Out of business
Royal Technical Services	Out of business
SfW Virginia Inspection Service	Out of business
Safety Consulting Services, Inc	Not inspecting
Senaca Insurance Company,Inc	Operating
Southern Inspection Services, Inc	Out of business - 2 times
Tech Marine Services	Operating
Tenitram Company	Out of business - 2 times
Tidewater Immediate Inspections, Inc	Operating
Tn-State Testing Services	Not inspecting
U S Marine Management	Not inspecting Operating
Valley Boiler Inspection	Out of business
Virginia Steam Boiler	Out of business
Virginia Statewide Boiler Inspection Services, Inc	

24 companies have ceased inspection services since 1995

11 Companies inspecting for a fee
11 Insurance Companies inspecting

3 original companies - American Boiler Inspection Service, Inc Arise *I* Seneca Insurance Hartford Steam Boiler Insurance

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PO Box 248
Harrisonburg, Virginia 22801-0248

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e-mail- ValleyBoiler@ao1.com

January 27, 2006

Virginia Department of Labor and Industry
Mr. Fred Barton, Director, Boiler Safety Compliance
Powers Taylor Building
13 South Thirteenth Street
Richmond,VA 23219

1Y1r. Barton:

I am writing to you in reference to 'the DOLI proposal for Financial Requirements for Boiler and Pressure Vessel Contract Fee Inspectors. I have just learned that there is going to be a public hearing on this subject on January 31, 2005. Unfortunately this short notice does not anew enough time for me to re-arrange my inspection schedule for that day. There are a small number of Contract Fee Inspectors operating in Virginia, and we should all be informed of any proposed regulation that will affect us. Had I been informed of this hearing earlier, I could have made the following comments in person.

Valley Boiler Inspection, Inc. does not be1ieve that it is in the best interest of Virginia to adopt a multi-level insurance requirement. We believe that a single $1,000,000 aggregate limit would best serve the owners and users of the boilers and pressure vessels.

Further, Valley Boiler Inspection, Inc. does not intend to provide any financial data to DOLI to be used to calculate the required level of insurance as described under the definition *of "Market Share"* as stated in the proposal. Valley Boiler is not a publicly traded company and does not release any financial data.

Our current policy premium for our $2,000,000 limit significant1y exceeds the DOLI maximum estimated figure of $10,000.

Paragraph "II- H" of the Public Hearing briefing package mentions boiler and pressure vessel incidents with property damage losses of $300,000 to $500,000. To the best of my knowledge, none of these incidents involved a negligent inspection by a Contract Fee Inspector, Insurance Inspector, or Commonwealth Inspector.

Paragraph "II-H" further states that the proposed changes would "give contract fee inspectors a vested interest in the performance of the inspections they conduct". This statement js an unwarranted assault on the quality of the inspections we conduct. I have been inspecting boilers and pressure vessels for over 25 years: 9 years as an Insurance Inspector, 10 years as a Commonwealth Inspector, and 6 years as a Contract Fee Inspector. I have had the same vested interest in my performance no matter who my employer was. I know of no boiler inspector who is making inspections for free. Every boiler inspector I know, including you, is in the business to earn a paycheck. **To insinuate that the quality of an inspection is going to change based on employer is absurd and offensive.**

Valley Boiler inspection, Inc.
PO Box 248
Harrisonburg, Virginia *22801-0248*

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Ton Free-1-888-833-4155
e-mail- ValleyBoiler@aol..com

For the record, we have not had a single claim, or reported accident involving any boiler *or* pressure vessel inspected in the Commonwealth of Virginia, or for that matter, anywhere in the United States.

Sincerely,

James M. Mannion
James M. Mannion

Copy:

Mr. C. Ray Davenport,. Commissioner
Commonwealth of Virginia Department
of Labor and Industry
13 South Thirteenth Street
Richmond, VA 23219

Tidewater Immediate Inspections, Inc.
4735 Greenlaw Drive
Virginia Beach, Virginia 23464-6352

Office (757) 495-5957
Fax (757) 495-3907

January' 27, 2006

Virginia Department of Labor and Industry
Mr. Fred Barton
Director, Boiler Safety Compliance
Powers Taylor Building
Thirteen South Thirteenth Street
Richmond, VA. 23 219

Mr. Fred Barton:

Concerning me new DOLI Insurance requirements. We do not believe that they are in the best interest of the Owner/Users of boilers and pressure vessels in and outside of Virginia (remember you are certifying inspectors to work outside of Virginia). Tidewater Immediate Inspections, Inc. proposes a single $1,000,000 aggregate limit requirement. If a boiler or pressure vessels kills someone that was inspected by a company with less than 1 % market share, there child is only worth $500,000. But on the other hand if it was a company wjth a larger market share then they would be compensated more. Also this requirement may appear to be using a government employee's position for future personal financial gain, which might violate ethics laws, if Mr. Barton intends to become a contract fee inspector when he retires from the state of Virginia he would be directly benefiting from, this change.

The Market Share proposal says that the amount of insurance we will be required to carry will be based on our inspection fees charged for inspections (in or outside of Virginia) to DOLI.

The amount that we currently pay for our insurance of $2,000,000 is well above the amounts reported in the Financial Impact Analysis that DOLI presents at $10,000.

We have not had a claim and we are not aware of a single claim against any inspector or inspection agency for negligent inspection in Virginia.

Why is it that I heard about this from a boiler- inspector, not the Office of Boiler Safety Compliance? There is only a hand full of contract fee inspectors, why couldn't you call me or send a letter? You have no problem contacting me for other issues by phone or mail. This appears to be an old fashion witch-hunt directed towards contract fee inspection companies that might be your competition in the future.

Sincerely,

Kurt D. Crist
Kurt D. Crist

Cc: Mr. C. Ray Davenport, Commissioner
Commonwealth of Virginia
Department of Labor and Industry
Thirteen South Thirteenth Street
Richmond, Virginia 23219

APPENDIX "B"

Tidewater Immediate Inspections, Inc.
4735 Greenlaw Drive
Virginia Beach, Virginia 23464-6352

Office (757) 495-5957
Fax (757) 495-3907

January 27,2006

Virginia Department of Labor and Industry
Mr. Fred Barton
Director, Boiler Safety Compliance
Powers Taylor Building
Thirteen South Thirteenth Street
Richmond, VA. 23219

Mr. Fred Barton:

Concerning the new DOLI Insurance requirements. We do not believe that they are in the best interest of the Owners/Users of boilers and pressure vessels in and outside of Virginia (remember you are certifying inspectors to work outside of Virginia). Tidewater Immediate Inspections, Inc. proposes a single $1,000,000 aggregate limit requirement. If a boiler or pressure vessels kills someone that was inspected by a company with less than 1 % market share, there child is only worth $500,000. But on the other hand if it was a company with a larger market share then they would be compensated more. Also this requirement may appear to be using a government employee's position for future personal financial gain, which might violate ethics laws, if Mr. Barton intends to become a contract fee inspector when he retires from the state of Virginia he would be directly benefiting from, this change.

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...

Sincerely,

Kurt D. Crist

Kurt D. Crist

Cc: Mr. C. Ray Davenport, Commissioner
Commonwealth of Virginia
Department of Labor and Industry
Thirteen South Thirteenth Street
Richmond, Virginia 23219

APPENDIX "C"

Inspection Specialties, Inc 7932
Peyton Forest Trail Annandale,
Virginia 22003-1560

Toll Free - 1-888-408-7778
e-mail- InspectSpec@AOL.com

February 10, 2006

Mr. Ray Davenport
Commissioner,
Virginia Department of Labor and Industry
13 South Thirteenth Street
Richmond, VA 23219

Mr. Davenport:

I am writing in reference to the DOLI proposed regulation for Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors. I would have appeared in person to be heard by the Safety and Health Codes Board; however, I was unaware of any pending proposals that would directly impact contract fee inspectors.

I have significant concerns with the contents of this proposal and the way information concerning this proposal was kept from the companies most affected. My only notification came from Mr. Mark Anderson, American Boiler Inspection Service, Inc. Mr. Anderson also shared with me the DOLI response to his FOIA request made with respect to this proposal.

#1 - Based on the DOLI FOIA response, there is no factual evidence to justify this proposal. #2 - There has never been a recorded case of negligent inspection in the Commonwealth of
Virginia.
#3 - The cost of insurance that is used by DOLI for this proposal is extremely low.
#4 - The unusually high loss ranges presented are based on DOLI guesses, not actual loss values.
#5 - Why were the affected Contract Fee Inspection Companies not consulted or informed of the DOLI proposal?
#6 - Did DOLI bother to check with the affected companies to see if a claim had ever been filed for a negligent inspection?
#7 - What happens if $2,000,000 limit is adopted, but later cannot be secured from a carrier?
Does the affected inspection company go out of business?
#8 - Why are other states reportedly extending Sovereign Immunity to the inspectors, while Virginia tries to burden them with dictates.

I have been inspecting boilers for almost 22 years. I have never heard of a boiler occurrence due to a negligent inspection in Virginia. The records that DOLI provided to Mr. Anderson show that there have been NO boiler or pressure vessel occurrences in the past 11 years as a result of a negligent inspection.

There is not one piece of technical information in the DOLI FOIA response package to support the proposal. There is absolutely nothing to show that an engineering analysis, risk assessment, technical study, or a. study of any kind was conducted to formulate the proposed insurance limits. The only information in the DOLI FOIA response that seems to have any relevance are several emails internal to the Commonwealth of Virginia, and 3 emails to AlA (an advocate of the inspectors employed by insurance companies). In fact, if appears that

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Annanda1e, Virginia 22003-1560

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only Mr. Barton's personal opinions and one piece of scratch paper (copy attached) have been used to establish the proposed insurance limits and this scratch paper specifies $1,000,000 NOT $2,000,000.

Why were the Contract Fee Inspection companies not informed of the proposal? Based on a July 28, 2005 email from Mr. John Crisanti to Mr. Fred Barton (copy attached) saying to limit contact and keep "our control" the input into "our regulation", it seems that DOLI wanted to control and adopt this proposal without input. This email from John Crisanti is quoted below:

> "An additional concern I have is your facilitating her contacting Anderson. Having her contact Anderson is really inappropriate given her role in the process. You are supposed to be the tech expert on these issues and be the only touch point for tech issues for them if I can't answer them. Anderson should not have access in the process at her level In addition it effectively eliminates our control of input into our regulation. I strongly suggest calling her back after 3:30 when she is out of her meeting and answering her questions as best as you can and firmly dissuading her from contacting Anderson."

Why would DOLI not want input into a regulation from the affected parties? Quality regulations should not be pushed through without input! Input should be sought from all affected parties!

Further, Mr. Barton first made the requirements for $2,000,000 limits in a 2001 Memorandum (copy attached). Apparently, this was without the Health and Safety Code Board action that is required under Boiler and Pressure Vessel Rules and Regulations, Section 40.1-51.9:2 Subsection C. DOLI did not provide any documentation to support the decision for the 2001 "requirement". This has required us to pay considerable higher insurance premiums for the unjustified insurance limits that were apparently not required.

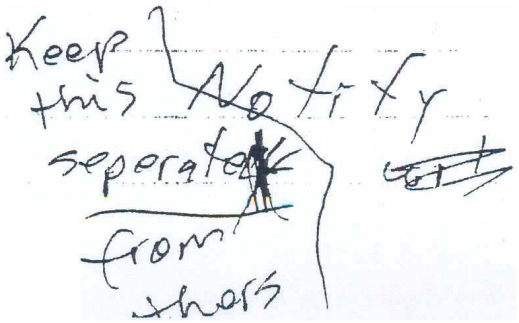
As I stated above, DOLI has provided nothing other than unsubstantiated personal opinion to justify this proposal. We support requirements for financial responsibility for Contract Fee Inspectors. However, we cannot support the unjustifiable insurance limits in this proposal. We request that DOLI withdraw this proposal and work with the affected companies to establish justifiable limits.

Sinc;rely' ,

John R. Pitman
John R. Pitman

Cc:
Mr. Fred Barton
Virginia Department of Labor and Industry
13 South Thirteenth Street
Richmond, VA 23219

Safety and Health Codes Board Members


Keep
this
Notify
seperated
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theirs

From: John Crisanti
To: Barton, Fred
Date: Thu, Ju128, 2005 1:42 PM
Subject: Re: DPB economist - addtional followup Amy W.

Fred,

An additional concern I have is your facilitating her contacting Anderson. Having her contact Anderson is really inappropriate given her role in the process. You are supposed to be the tech expert on these issues and be the only touch point for tech issues for them if I can't answer them. Anderson should not have access in the process at her level In addition it effectively eliminates our control of input into our regulation. 1 strongly suggest calling her back after 3:30 when she is out of her meeting and answering her question as best as you can and firmly disuading her from contacting Anderson.

John J. Crisanti
Virginia Dept. of Labor and Industry 13
South Thirteenth Street Richmond, VA
23219 804.786.4300
804.786.8418 fax
John. Grisanti@DOLI.virginia.gov

»> Fred Barton 7/28/2005 11:44 AM »>
John,
Only remaining question is: would a contract fee inspector be able to drop some insurance policies (general liability] to obtain an insurance policy that is more suited to inspections [professional liability or errors and omissions] and *consolidate* insurance costs. I gave her Mark Anderson's phone number so she could talk with his agent.
Fred Barton

»> John Crisanti 7/28/2005 9:50 AM »> Fred,

Please keep me in the loop till we put this thing to bed. Let me know all the topics she questions about and what your answers were.

thanks.

John

cc: Feild, Robert; Withrow, Jay

From: Fred Barton
To: John Crisanti
Date: 7/29/20058:37:27 AM
Subject: DPB Questions

I talked with Amy W this am. I gave her the following info from an agent I talked with yesterday:
Insurance policies with more specific coverage for persons performing inspections such as professional liability or errors and omissions cost a minimum of $2500 depending on the business size and experience. If the person's only business is inspecting, the person could drop other liability insurance policies and have only the more specific coverage depending on the size of business and experience.
There are 7 organizations performing contract fee inspections. Two or three offer more than inspection services [NDTesting] to possibly have more than one type of insurance. Most companies are one person organizations performing just inspection services.

Fred P. Barton
Director/Chief Boiler Inspector
Department of labor & Industry
Commonwealth of Virginia
Powers Taylor Building
13 South 13th Street
Richmond, VA. 23219
Tel: [804] 786-3262
Fax: [804] 371-2324
email: Fred.Barton@doILvirginia.gov

cc: Robert Feild; William Burge

COMMONWEALTH *of VIRGINIA*

DEPARTMENT OF LABOR AND INDUSTRY

JEFFREY D. BROWN
COMMISSIONER

POWERS-TAYLORSBUILDING
13 SOUTH THIRTEENTH STREET
RICHMOND, VA 23219
PHONE (804) *3T1-2327*
FAX (804) 371.6524
me (804) 7SG-2Z76

MEMORANDUM

TO_ All Contract Fee Inspectors

FROM: Fred P. Barton, Director/Chief Inspector *FPBARTON*
Boiler Safety Compliance Program

SUBJECT: Financial Requirements

DATE: March 9, 2001

There is a change on the financial requirements for Contract Fee Inspectors. Effective immediately the minimum aggregate limit for all Contract Fee Inspectors is $500,000 in either a professional liability or error omission type policy.

Any Contract Fee Inspector who has more than 1% market share per DOLI's records shall have an aggregate limit of $1,000,000 in either a professional liability or error omission type policy.

Any Contract Fee Inspector who has more than 10% market share per DOLI records or employs or has an arrangement with at least three other Contract Fee Inspectors shall *have* an aggregate limit of *$2,000,000* In either a professional liability or error omission

If you have recently received communications on this subject from us, please provide a. revised Certificate of Insurance with the proper aggregate limit within 30 days.

Addendum 1

/"

COMMONWEALTH *of* VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

JEFFREY D. BROWN
COMMISSIONER

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

August 21, 2000

Inspection Specialties

Mr. Richard M. Anderson
American Boiler Inspection Service
12800 Saddleseat Place
Richmond, Virginia 23233

Dear Mr. Anderson:

This letter is in response to your letter of August 3, 2000. We have a different understanding of the meeting. They are as follows:

1. The "lost decals" in question happened in 1998 and 1999 during the "pilot" phase of the new certification process. The decisions were based on the best judgement of different situations by the Director of the Boiler Safety Compliance Program, Fred Barton. Fred stated that he had learned from these early experiences. "Lost decals" are still reported and handled on a case by case basis.

2. We agreed to list any American Boiler Inspection Service, Inc. Inspector, part time or full time, in areas where they are especialy needed. We specifically agreed to list any Inspector employed by your company (ABI) in Roanoke or Northern Virginia.

3. We agreed to reassess a4ding Inspection Specialties to our list of companies having Inspectors with valid Virginia work cards provided all required and supporting documentation was submitted. To date we have not received the Certificate of Insurance nor Mr. Pittmans application for a Virginia work card under Inspection Specialties name. Is Mr. Pittman moving to Northern Virginia? Subsequent to receiving your letter, Fred has raised some questions with regard to your request and the statute, Section 40.1-51.9:2, covering your financial responsibility. The statute specifies that the Safety Health Codes Board to provide regulations. Statute references to individuals verus companies as well as amounts based on inspections needs some discussion.

Your plan for Inspection Specialties is consistent with present policy. However, we will not be taking on new companies under the new certification process until October, 2000 at the earliest.

Unfortunately, I cannot agree to Inspection Specialities be returned _0 the Dept. of Labor and Industry (DOLI) list of qualified Inspectors until all required documents are submitted.

If you have any questions, please contact Fred Barton.

Sincerely,

Robert M. Krauss
Director of State Programs

RMKjfs

Addendum 2

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Addendum 3

From: "Goldberg, Eric" <egoldberg@aiadc.org>
To: 'Fred Barton' <FredBarton@doli.state.va.us>
Date: 10/30/00 4:16PM
Subject: RE: Inspector's Protection for Negligent Inspection

Fred, sorry for the delay in getting back to you. Actually, the Committee met last week, and we did discuss this issue. In terms of what our members are doing to protect their inspectors, I believe that most (if not all) are self-insured but have excess-of-Ioss reinsurance treaties with fairly high retention levels. The Committee did seem to agree, however, that it would make sense to require fee-for-service inspectors to maintain a professional liability policy with at least $2 million in coverage. The amount of coverage certainly has to be set high enough to provide meaningful protections to the people and businesses of Virginia.

As for other ways to improve timeliness of reporting and overall quality of inspections, perhaps 2001 would be a good year to revisit your statute authorizing fee-for-service inspectors to do inservice inspections in the Commonwealth - maybe next year would be a good time to repeal it!

Please let me know if you have any questions or would like additional information.

Cordial regards, Eric Goldberg.

-Original Message-
From: Fred Barton [mailto:FredBarton@doILstate.va.us] Sent: Monday, October 30, 2000 11 :58 AM
To: egoldberg@aiadc.org
Subject: Fwd: Inspector's Protection for Negligent Inspection

Has your Boiler & Machinery Legislative Committee had a chance yet to review the attachment. Or have you surveyed your members. There already is a statute on the books that we are preparing complementary Rules for. We appreciate your input

Fred P. Barton
Director/Chief Boiler Inspector
Department of Labor & Industry
Commonwealth of Virginia
Powers Taylor Building
13 South 13th Street
Richmond, VA. 23219
Tel: [804] 786-3262
Fax: [804] 371-2324
emaH: fpb@doli.state.va.us

Addendum 4

From: Robert Krauss
To: Dennis Merrill
Date: 2/23/0110:50:17 AM
Subject: Re: SCC Ins. Question

Dennis: Thank you very much, Mac

»> Dennis Merrill 02/23/01 1 0:35AM »>
Mac; I called the SCC and was referred to the Bureau of Insurance, Consumer Services Division, spoke with Senior Insurance Market Examiner Rick Wright. I explained the question to him and he says they don't have anything that would affect the Board's decision on this. He said DMV called with the same question; they are planning to raise the required insurance levels for truckers. His answer to them was the same as to us. He also said that $500,000 is a typical limit, and that the $1M and $2M limits were not unusual. He said that many companies will purchase a basic $500,000 policy and an additional umbrella policy to cover them up to the higher limit. I'm not sure what the significance of the manner of purchasing the higher limit is, but thought I would pass it on for you interest. In summary, it seems clear that the Board is free to set the limits as it sees fit.

Addendum 5

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
TOO (804) 786-2376

MEMORANDUM

TO: Richard M. Anderson
American Boiler Inspection
12800 Saddleseat Place
Richmond, Virginia 23233

FROM: Fred P. Barton, Chief Inspector
Boiler Safety Compliance Program *FPBarton*

SUBJECT: Documentation of Financial Responsibility

DATE: September 10, 2003

In 1996 a law was passed requiring each Contract Fee Inspector to acquire and maintain evidence of financial responsibility. Our memorandum of March 9, 2001 regarding financial requirements is replaced with the following:

Each Contract Fee Inspector must annually provide documentation to the Chief Inspector confirming the inspector's 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.

A Certificate of Insurance is one acceptable means of documentation. Should you choose to provide a Certificate of Insurance the following levels of insurance are suggested.

Either professional liability or errors and omissions policy with an aggregate limit of $500,000 for contract fee inspectors with less than 1% market share; $1,000,000 for inspectors with 1% to less than 10% market share; or $2,000,000 for a 10% or more market share. These are solely suggested amounts and are not required under the current law and regulations.

Please provide the documentation (certificate of insurance or other written documentation) within thirty (30) days after expiration of previous documentation as required by Section 40.1-51.9:2, B.,D., and E. f the Virginia Code.

DOLI is in the process of requesting the Safety and Health Codes Board to develop specific rules governing demonstration of financial responsibility.

FPB/fs

Addendum 6

COMMONWEALTH *of* VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

j DAVENPORT
/MMISSIONER

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

MEMORANDUM

TO: Mr. Richard M. Anderson
American Boiler Inspection Service
12800 Saddleseat Place
Richmond, VA 23233

FROM: Fred P. Barton, Chief Inspector *FP BARTON*
Boiler Safety Compliance Program

SUBJECT: Documentation of Financial Responsibility

DATE: December 2, 2004

In 1996 a law was passed requiring each Contract Fee Inspector to acquire and maintain evidence of financial responsibility. Our memorandum of March 9, 2001 regarding financial requirements is replaced with the following:

Each Contract Fee Inspector must annually provide documentation to the Chief Inspector confirming the inspector's 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.

A Certificate of Insurance is one acceptable means of documentation. Should you choose to provide a Certificate of Insurance the following levels of insurance are suggested:

Either professional liability or errors and omissions policy with an aggregate limit of $500,000 for contract fee inspectors with less than 1% market share; $1,000,000 for inspectors with 1% to less than 10% market share; or $2,000,000 for a 10% or more market share. These are solely suggested amounts and are not required under the current law and regulations.

Please provide the documentation (certificate of insurance or other written documentation) within thirty (30) days after expiration of previous documentation as required by Section 40.1-51.9:2, B.,O., and E of the Virginia Code.

DOLI is in the process of requesting the Safety and Health Codes Board to develop specific rules governing demonstration of financial responsibility.

FPB/fs

Addendum 7

American Boiler Inspection Service, Inc.
12800 Saddleseat Place
Richmond, Virginia 23233-7687

Office - (804) 364-8990
Toll Free -1-800-560-9958
Fax - (804) 364-3767
e-mail- AmerBoiler@AOL.com

Monday, July 07, 2003

Addendum 7

Mr. Fred Barton
Virginia Department of Labor and
Industry Powers-Taylor Building
13 South Thirteenth Street
Richmond, VA 23219

SUBJECT: Contract Fee Inspection Company Insurance Requirements

Dear Mr. Barton:

The purpose of this letter is twofold. The first is to request clarification of your Memorandum dated March 9, 2002 on the Subject of *Financial Requirements for Contract Fee Inspectors* (see the attached Memorandum). In that Memorandum, the requirements are specifically directed to "Contract Fee Inspectors" and not "Contract Fee Inspection Companies". As an individual Contract Fee Inspector, I do not inspect more than 10% of the market share and as an individual Contract Fee Inspector I do not employ or have an arrangement with three other Contract Fee Inspectors. Therefore, as an individual, I should not be held to the requirement of an aggregate limit of $2,000,000 for insurance coverage.

However, it has always been my interpretation of that memo that you intended the insurance requirements to apply to Contract Fee Inspection Companies and not individual Contract Fee Inspectors. As a Corporation, American Boiler Inspection Service, Inc. inspects greater that 10% of the market share and employs seven inspectors. For these reasons we carry the aggregate insurance limit of $2,000,000. If you intended for your insurance requirements to apply to individual Contract Fee Inspectors, I will be reducing the insurance coverage limits for American Boiler Inspection Service, Inc. If in fact, you intended for the Insurance Requirements to apply to Contract Fee Inspection Companies and not to an individual Contract Fee Inspector, I will proceed to the second purpose of this letter.

The second purpose is to request that DOLI review and make changes to the insurance requirements for the Contract Fee Inspection Companies. Currently, Contract Fee Inspection Companies with less than a 1 % market share are required to carry a minimum aggregate limit of $500,000. Companies with greater than 1 % are required to carry a minimum aggregate limit of $1,000,000 in applicable coverage. Companies with more than a 10% market share, or that employ or have an arrangement with three other Contract Fee Inspection Companies, are required to carry a minimum aggregate limit of $2,000,000 in either Professional Liability or Errors and Omissions coverage.

American Boiler Inspection Service, Inc. supports the basic DOLI requirement for adequate insurance limits to be carried by all inspection companies. However, we question the risk management logic behind the requirement for a lower level of insurance limits for the "smaller" companies. The coverage requirements should not be based on the anticipation of protection for a lower claims *frequency* for the companies with a smaller market share and a higher *frequency* of claims for the inspection companies with a greater market share. The risk management logic should be based on an anticipated claims *severity* approach. Using the claim severity risk management logic, all contract inspection companies should be expected to encounter a possible claim of equal severity and should be required to carry the equivalent insurance limits.
Additionally, the inspectors performing the least amount of inspections (i.e. the smaller companies) should be expected to have a lesser amount of inspection experience and knowledge as they are making fewer inspections and do not have the shared pool of experience upon which to draw guidance when making critical decisions. This lack of experience could lead to conditions producing a greater likelihood of claims experience and severity by the smaller inspection company carrying the lowest limits of insurance coverage.

(Additionally, if a review of the one Contract Fee Inspection Company that carries the $500,000 limits were to be performed, it would be found that there is or has been an arrangement with two or three other inspection companies.)

We also have a concern about the Contract Fee Inspectors that have provided no proof of insurance. From my conversations with some of these inspectors, they carry no liability insurance coverage. These inspectors include, but may not be limited to, Roland O'Brien-Bills and Richard A. Pais. Although these inspectors mayor may not be providing inspections in Virginia, they are using credentials provided by Virginia DOLI to perform inspections for Federal installations and other facilities. By definition, having a Virginia Contract Fee Inspectors Work Card requires that these inspectors meet Virginia's standards for financial responsibility. In the cases of these two inspectors they carry no professional liability coverage, they do not meet the Virginia DOLI minimum requirements for certification, yet they inspect boilers and pressure vessels using Virginia DOLI issued Work Cards. This is a misrepresentation of the facts by DOLI and the uninsured inspectors.

American Boiler Inspection Service, Inc. requests that all Contract Fee Inspection Companies be held to the same standard for the insurance coverage requirements and the same insurance limits. The $2,000,000 limit currently required by DOLI is increasingly very difficult to secure and significantly more expensive at each renewal. We request that DOLI set the required limit at $1,000,000 for all Contract Fee Inspection Companies, regardless of size and company association.

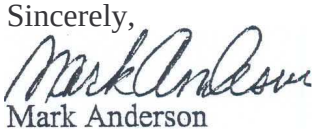
In support of our above position, American Boiler Inspection Service, Inc. has been a Contract Fee Inspection Company since July 1, 1995. During those eight (8) years, we have yet to be made aware of a single insurance claim against a Contract Fee Inspection Company. This absence of a history of claims supports our position that the DOLI insurance requirements should be focused on the need for protection against possible claims severity rather than a claims frequency need.

As for the financial impact on the Contract Fee Inspection Companies, only one (1) of the five (5) existing Contract Fee Inspection Companies carries less then the aggregate limit of $2,000,000. This single Contract Fee Inspection Company carries the minimum aggregate limit of $500,000. Therefore, any DOLI decision to set a single aggregate requirement would not have a significant impact on the majority of Contract Fee Inspection Companies.

The two inspectors without coverage should be made to comply with the Virginia DOLI insurance requirements, regardless of the number of inspections performed.

I look forward to your response.

Sincerely,



Mark Anderson

Cc: Mr. C. Ray Davenport,
Commissioner Commonwealth of
Virginia Department of Labor and
Industry
13 South Thirteenth Street
Richmond, VA 23219

Addendum 8

ACTIVE BOILERS AND PRESSURE VESSELS

SUMMARY BY OBJECT TYPE AND INSURANCE COMPANIES

Inspection Frequency	Type	CQV	Other	Total	Percent Total
1 Year Inspections	HIGH PRESSURE	139	2468	*(135)2607=$3519457*	3.81%
2 Year Inspections	LOW PRESSURE	1826	19803	(70) *21629=$757,015*	31.64%
2 Year Inspections	UNFIRED	2448	41679	(50)44127=$1,103,175	64.55%
		4413	63950	68363	$2,212,135

*****Total Active Objects Per Insurance Company*****

/VIARKET ;SHARE

Insurance Company Name	.	HP	.LP	Unfired	Total Objects	Percent	
ACE American Insurance Company		$36,450 *17$126,945*	*61$231,950*	388 $395,345	466	.68%	
AmericanBoilerInspSvcs,Inc		135 (270)*70/2* *(3627)*		92782 *2,212/135*	13175	19.27%	*17.8%*
Chubb		109	492	985	1586	2..32%	
Cincinnati Insurance Company		75	772	819	1666	2.44%	
CNA Insurance Company		97	726	1708	2531	3.70%	
Commonwealth of Virginia		139	1826	2448	4413	6.46%	
Dupont Spruance		1	0	0	1	.00%	
Federal Technical Associates		3	0	5	8	. 01%	
FM Global		328	930	6158	7416	10.85%	
Hartford Steam Boiler		801	7880	10747	19428	28.42%	
Hartford Steam Boiler-CT		6	21	435	462	.68%	
National Union Fire Insurance		57	10	521	588	.86%	
Royal & Sunalliance		*0*	2 .	19 *$19,405*	21	.03%	
Seneca Insurance	*$2,295*	71 *$7,910*	102	$9,200 738 *2,12,135*		1.33%	
St Paul Travelers		282	3067	4141	*7490*	10.96%	0.88%I
Tech Marine Services		*135* (17)	*70/2*(226)	*50/2*(368)	611	*.89%*	
Tidewater Immediate Insp.		9	118	463	590	.86%	I
Valley Boiler Inspection		5	83	84	172	.25%	
XL Insurance America, Inc.		64	1273	2652	3989	*5.84%*	
Zurich American Insurance Co		256	413	2170	2839	4.15%	
	Grand Total	2607	21629	44127	68363		

Addendum 9

SENECA

February 2, 2006

Fred P. Barton
Director/Chief Boiler Inspector
Department of Labor & Industry
Commonwealth of Virginia
Powers Taylor Building
13 South 13th Street
Richmond, VA 23219

Re: Seneca Insurance Company Jurisdictional Work In Virginia

Dear Mr. Barton:

To confirm our telephone conversation of February 1, 2006, the only Jurisdictional work Seneca performs in the State Of Virginia is in conjunction with an Insurance Policy. Also, we do not do any "R" Stamp work in the State Of Virginia.

Please call me if there is any additional information needed.

Thank you.

Sincerely,

Gary H. Cox
Gary Cox
Boiler & Machinery Department
Seneca Insurance Company

3850 Lawrenceville-Suwanee Road, Suite D, Suwanee GA 30024
(770) 904-4466 Fax (770) 904-4477

Addendum 10

ARISE

Grand Bay I
7000 South Edgerton Suite 100
Brecksville, OH 44141-3172
Phone: (440) 740-0197
FAX: (440) 746-8957
www.ariseinc.com

February 3, 2006

Mr. Fred P. Barton
Director and Chief Inspector
Department of Labor and Industry
Boiler Safety Compliance Powers-
Taylor Building
13 South Thirteenth Street
Richmond, VA 23219

RE: ARISE Inspections

Dear Mr. Barton:

This letter is to further confirm our conversation of February 2, 2006. That to the best of our knowledge, no work is being performed in the Commonwealth of Virginia by XL Insurance America, Inc./ARISE unless a policy has been issued for that client.

If you should have any questions or comments, please contact me at (440) 740-0197.

Regards,

Timothy B. Rhodes/pm

Timothy B. Rhodes
President

TBR:pm

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Addendum 11

MEMORANDUM

To: Mac Krauss
From: Fred P. Barton *FPB*
Subject: Tidewater Immediate Inspections, Inc.
Date: December 12, 2000

On September 29, 2000 Mark Anderson requested that the Department of Labor and Industry add Tidewater Immediate Inspections, Inc. to our list of inspection companies. Tidewater Immediate Inspections, Inc. is one of three (3) companies which Mr. Anderson either owns or has a financial interest.

Upon receipt of the certificate of insurance, additional information was requested. The requested documents was submitted by Mr. Anderson and received in this office on December 1, 2000.

Contrary to Section 16 V AC 25-50-50, Kurt D. Crist, the Inspector for Tidewater Immediate Inspections, Inc. was not an employee of Tidewater Immediate Inspections, Inc. until October 18, 2000. On September 29, 2000 Mr. Anderson requested a Virginia Work Card for Kurt Crist 2 1/2 weeks before signing the employment papers.

American Boiler Inspection Services, Inc., Mr. Anderson's inspection company, currently has over 10% market share of certificate inspections within the commonwealth. As mentioned before our policy needs to be changed to cover contract fee inspectors with a large amount of objects. Reference Section 40.1-51.9:2 (A) and (C). Mr. Anderson has a policy covering three (3) companies that meets 40.1-51.9:2 (A).

Our current policy is that each contract fee inspector have $1,000,000 aggregate limit and anywhere from $300,000 to 500,000 each occurrence under a Professional Liability or Error and Omission Policy. During a meeting with Jay Withrow we discussed developing rules to recommend to the Safety Health Codes Board. I was requested to find out how insurance company inspectors are insured for similar exposures. Most insurance companies include "hold harmless" clauses in their policies. American Insurance Association has suggested a minimum $2,000,000 for all contract fee inspectors.

It is my recommendation that only Mr. Anderson provide a certificate of insurance with $2,000,000 aggregate limit because he has over 10% market share of objects, has financial interests in 3 companies, and employs or has arrangements with 4 inspectors (Tom Barron, Jim Mannion, John Pittman and Kurt Crist).

In summary, Mr. Anderson has more customers and therefore has more exposure to possible damages. I discussed this with Mr. Anderson on December 1, 2000 and he indicated that he already had coverage with $2,000,000 aggregate limit.

The one barrier to resolving this issue is the violation of the Virginia Rules. This violation is yet another example of untrustworthiness on the part of Mr. Anderson. I believe there should be a 2-3 months delay of adding the name to the list after Mr. Anderson is advised of the violation.

Upon receipt of a certificate of insurance with $2,000,000 limit and resolving the above mentioned barrier, we can issue a Work Card for Kurt Crist (and allow the present one under American Boiler Inspection Service, Inc. to expire) and add Tidewater Immediate Inspections Inc. to our inspection company list. _

/Mark Anderson
12800 Saddleseat Place
Richmond, Virginia 23233-7687

Office - (804) 364-8990
Fax - (804) 364-3767

September 29, 2000

Mr. Fred Barton
Department of Labor and Industry
Powers-Taylor Building
13 South Thirteenth Street
Richmond, VA 23219

Dear Fred:

As the industry is ever expanding, I am requesting that DOLI add Tidewater Immediate Inspections, Inc. to the list of inspection companies. Tidewater Immediate Inspections, Inc. is Virginia corporation and registered with the SCC. The company address and telephone number is as follows:

Tidewater Immediate Inspections,
Inc. 4735 Greenlaw Drive
Virginia Beach, Virginia 23464-6352

Person to contact: Mr. Kurt D. Crist
Telephone Number: (757) 495-5957
1-888-408-9980

Mr. Kurt D. Crist will apply for a Virginia work card for Tidewater Immediate Inspections, Inc. The inspection reports will be on Tidewater Immediate Inspections, Inc. report forms (samples are attached for your review and input). I would like for Tidewater Immediate Inspections, Inc. to issue the certificate decals and collect the DOLI fees, however, I do not believe the startup volume would be sufficient to make it cost effective for DOLI or Tidewater Immediate Inspections, Inc. at this time. As business develops down the road, this is an area I would like your input and guidance.

The insurance policy for Tidewater Immediate Inspections, Inc. will be the same as for American Boiler Inspection Service, Inc. I have contacted the insurance company and they have no problem with the arrangement and in fact states that this is a common practice for closely held corporations. A Certificate of Insurance for Tidewater Immediate Inspections, Inc. will be issued to your office (and to any customer that requests one).

If DOLI has written requirements for establishing an inspection company and having it added to the DOLI list of contract fee inspectors, I would appreciate the opportunity to receive a copy of that policy.

Should you have any questions with respect to the above, please contact me.

Sincerely,

Mark Anderson

Mark Anderson

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1280(f Saddleseat
Richmond, Virginia 23'

Office - (804) 364-8990
Fax - (804) 364-3767

September 29, 2000

Mr. Fred Barton
Director/Chief Inspector
Boiler Safety Compliance Program
Department of Labor and Industry
Powers- Taylor Building
13 South Thirteenth Street
Richmond, Virginia 23219

Dear Fred,

Enclosed, please find $20.00 for the Virginia Work Card for Kurt D. Crist in the name of Tidewater Immediate Inspections, Inc. For reference and work history, Mr. Crist's current American Boiler Inspection Service, Inc. inspectors ID number is 959.

Also, I have requested that a certificate of insurance for Tidewater Immediate Inspections, Inc. be forwarded to your office.

If additional information is required, please feel free to call me.

Thank you,

Mark Anderson

Mark Anderson

Tidewater Immediate Inspections, Inc.
4735 Greenlaw Drive
Virginia Beach, Virginia 23464-6352

Office - (757) 4n8-5397
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October 18, 2000

Mr. Kurt Crist
4735 Greenlaw Drive
Virginia Beach. VA 23464

D ear Kurt:

This letter will confirm our offer of employment commencing during the month of October and your anticipated acceptanceof the position of Boiler and Pressure Vessel inspector. In this position, you will perform authorized inspections and/or in-service boiler and pressure vessel inspections.

You will also be responsible for the billing of your completed inspections. You will be the only inspector employed by *Tidewater Immediate Inspections, Inc.* You will be an at-will employee and your pay rate is 50% of the billed inspection fee.

It is anticipated that operations will begin as soon as DOLI adds Tidewater Immediate Inspecti.ons, Inc. to the list of inspection companies.

Acceptance: Kurt O. Crist Date: *10/18/00*

Addendum 12

ALFRED W. GROSS
COMMISSIONER OF INSURANCE

P.O. BOX 1157
RICHMOND, VIRGINIA 23218
TELEPHONE: (804) 371-9741
TDDNOlCE: (804) 371-9206
http://www.state.va.us/see

STATE CORPORATION COMMISSION
BUREAU OF INSURANCE

March 8, 2001

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Mack
appsd

Dennis G. Merrill
Director, Labor Law Division
Commonwealth of Virginia
Department of Labor and Industry
13 South Thirteenth Street
Richmond, VA 23219

Dear Mr. Merrill:

This letter is in response to your inquiry of March 7, 2001 regarding your agency's consideration of adjusting your liability insurance requirements.

Although the Virginia Bureau of Insurance oversees insurance companies and agents, the Bureau does not set any insurance limits required by any other State agency. There is nothing in the insurance statute that prevents your agency from requiring a certain limit of liability insurance.

If you have any further questions, please contact me at the number listed below.

Very truly yours,

Anne Marie Brooks

Anne Marie Brooks
Senior Insurance Market Examiner
Consumer Services Section
Property & Casualty Division
(804) 371-9185

AMB/vms

Addendum 13

COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

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POWERS-TAYLOR BIJILDING
13 SOUTH THIRTEENTH STREET
RICHWICND, VA 23219
PHONE (804) 371-2327
FAX. (804) 371-6524
TDD (804) 371-276

TO: All Contract Fee Inspectors

FROM: Fred P. Barton, Director/Chief lnspector
Boiler Safety Compliance Program

FP Barton

SUBJECT: Financial Requirements

DATE: March 9,.2001

'There is a change on the financia1 requirements for Contract Fee Inspectors. Effective immediately the minimum aggregate limit for all Contract Fee Inspectors is $500,000 in either a professional liability or error omission type policy.

Any Contract Fee Inspector who has more than 1% market share per DOLI's records shall have an aggregate limit of $1,000,000 in either a professional liability *or error* omission type policy.

Any Contract Fee who has more than 10% market share per DOLI records or employs or has an arrangement with at least three other Contract Fee Inspectors shall have an aggregate limit of $2,000,000 in either a professional liability or error omission type policy.

If you have recently . revised communications on this subject from us, please provide a revised Certfficate of Insurance with the proper aggregate limit within 30 days.

Addendum 14

From: To: "Goldberg, Eric" <egoldberg@aiadc.org>
Date: 'Fred Barton' <FredBarton@doli.state.va.us> *9/13/00*
Subject: 3:33PM
RE: Inspector's Protection for Negligent Inspection

Fred - I have forwarded your request to our Boiler & Machinery legislative Committee for their input. I observe that recently, several states have amended their laws to extend their sovereign immunity statutes to apply to insurance industry special inspectors, since they're essentially acting as' surrogate state inspectors looking for violations of state law. In addition, I would imagine that insurers are able to include "hold harmless" clauses or waivers in their contracts, although I'm not sure whether they're doing this as a matter of course.

I'll let you know what the Committee has to say. Regards, Eric.

---Original Message-
From: Fred Barton [mailto:FredBarton@doli.state.va.us]
Sent: Tuesday, September 12, 2000 5:27 PM
To: egoldberg@aiadc.org
Cc: Jay Withrow
Subject: Inspector's Protection for Negligent Inspection

Performance bond $25,000.

Section 40.1-51.9:2 of the Virginia Code addresses the requirements for financial responsibility of Contract Fee Inspectors. We have started to prepare regulations to cover a range of requirements for minimum and maximum insurance coverage for inspections by Contract Fee Inspectors. We are wondering how boiler insurance Inspectors are protected from negligent inspections. Please survey your members to find out:
1 Which type of insurance are Inspectors protected with [E & 0, professional liability or ??]?
2 What are the normal limits of coverage in $ by type [each occurance, general aggregate, etc]
3 Comments or suggestions on other ways to insure against negligent inspections or incorrect reports.
Thank you for surveying your members. We look forward to hearing from yoy on the results.

Fred P. Barton
Director/Chief Boiler Inspector
Department of labor & Industry
Commonwealth of Virginia Powers
Taylor Building
13 South 13th Street Richmond,
VA. 23219
Tel: [804]786-3262
Fax: [804] 371-2324
email: fpb@doli.state.va.us