

FINAL
SAFETY AND HEALTH CODES BOARD
PUBLIC MEETING MINUTES
Wednesday, February 16, 2022

On February 16, 2022, the Safety and Health Codes Board (“Board”) held a public meeting at the Patrick Henry State Building in Richmond, Virginia. The Board held a hybrid in person meeting with the option for the board members to attend both virtually along with a quorum of board members participating in person. The public also had the option of attending in person or virtually utilizing **WebEx**.

Notice of the public meeting was provided to the public as required by VA Code §2.2-3708.2 and Executive Order 14 (2018). The notice invited the public to witness the meeting remotely via **WebEx**. Notice was provided on the Virginia Regulatory Town Hall’s website here: <https://townhall.virginia.gov/L/ViewMeeting.cfm?MeetingID=34796>

The participating Board members noted as either in person or virtual participation. There was a quorum of Board members *physically* assembled at one location.

A recording of the meeting in its entirety is available here: <https://www.doli.virginia.gov/wp-content/uploads/2022/02/Virginia-Safety-and-Health-Codes-Board-Meeting-in-Response-to-Executive-Order-6-20220216-1510-1.mp4>

BOARD MEMBERS

PARTICIPATING:

Mr. Chuck Stiff, Acting Vice-Chair (*in person*)
Mr. Louis (Lou) Cernak (*in person*)
Mr. John Fulton (*in person*)
Dr. Colin Greene (*in person*)*
Ms. Julie Henderson (*in person*)*
Ms. Tina Hoover (*in person*)
Ms. Elizabeth (Beth) Lohman (*in person*)
Mr. Jay Abbott (*virtual*)
Mr. Robert Buchler (*virtual*)
Mr. Travis Parsons (*virtual*)
Ms. Lutheria Smith (*virtual*)

*VDH representation

BOARD MEMBERS ABSENT: Ms. Kelly Bundy
Mr. Michael Luce
Mr. Thomas Thurston

STAFF PRESENT:

Mr. Gary Pan, Commissioner of Dept. of Labor & Industry
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, & OWB
Ms. Princy R. Doss, Director, Policy, Planning, & Public Information
Mr. Richard White, IT Project Manager
Ms. Cristin Bernhardt, Regulatory Coordinator
Ms. Diane Duell, Director of Litigation
Mr. Alex West, Senior Staff Attorney
Marta Fernandes, Director of VOSH Safety Compliance
Christine Childress, Information Security Officer
Zahra Qarni, Policy & Planning Specialist

OTHERS PARTICIPATING:

Mr. Joshua Laws, Assistant Attorney General (*virtual*)
Ms. Lisa Wright, Court Reporter, Chandler & Halasz (*in person*)

CALL TO ORDER

Vice-Chair Stiff called the meeting to order at 10:13 AM. A quorum was present. Vice-Chair Stiff made opening remarks informing the public that this meeting was being held in person with virtual attendance available for Board members and for the public via WebEx. Vice-Chair Stiff announced that Julie Henderson has been designated as the representative of the Virginia Department of Health by Dr. Colin Greene, Acting Commissioner.

BOARD MEMBER ROLE CALL

IP=in person; V=virtual

BOARD MEMBER	Present	Absent			
Mr. Jay Abbott	V				
Mr. Robert Buchler	V				
Ms. Kelly Bundy		X			
Mr. Louis (Lou) Cernak	IP				
Mr. John Fulton	IP				
Dr. Colin Greene (Julie Henderson)	IP				
Ms. Tina Hoover	IP				
Ms. Elizabeth (Beth) Lohman	IP				
Mr. Michael Luce		X			
Mr. Travis Parsons	V				
VACANT					
Ms. Lutheria Smith	V				
Mr. Charles ("Chuck") Stiff	IP				
Mr. Thomas Thurston		X			
TOTALS	6 IP, 4V	3			

APPROVAL OF AGENDA

Vice-Chair Stiff asked the Board if there was any discussion on the agenda. There was none. Vice-Chair Stiff asked if there was a motion to approve the agenda. The motion was made, properly seconded and the roll call vote was conducted. **The motion carried.**

TIME STAMP OF RECORDING:

Motion #1: Approval of Agenda	Yea	Nay	Abstain	Absent	Other
Mr. Jay Abbott	1				
Mr. Robert Buchler	1				
Ms. Kelly Bundy				1	
Mr. Louis (Lou) Cernak	1				
Mr. John Fulton	1				
Ms. Julie Henderson	1				
Ms. Tina Hoover	1				
Ms. Elizabeth (Beth) Lohman	1				
Mr. Michael Luce				1	
Mr. Travis Parsons	1				
VACANT					
Ms. Lutheria Smith	1				
Mr. Charles ("Chuck") Stiff	1				
Mr. Thomas Thurston				1	
TOTALS	10			3	

APPROVAL OF MEETING MINUTES

Vice-Chair Stiff then called for discussion and motion for approval of the December 3, 2021 Meeting minutes. Vice-Chair Stiff asked the Board if there was any discussion on the December 3, 2021 minutes. There was none. There was a request for a motion to approve the minutes. The motion was made, properly seconded and the roll call vote was conducted. **The motion carried.**

TIME STAMP OF RECORDING:

Motion #2: Approval of SHCB December 3, 2021 Meeting Minutes	Yea	Nay	Abstain	Absent	Other
Mr. Jay Abbott	1				
Mr. Robert Buchler	1				
Ms. Kelly Bundy				1	
Mr. Louis (Lou) Cernak	1				
Mr. John Fulton	1				
Ms. Julie Henderson	1				
Ms. Tina Hoover	1				
Ms. Elizabeth (Beth) Lohman	1				
Mr. Michael Luce				1	

Mr. Travis Parsons	1				
VACANT					
Ms. Lutheria Smith	1				
Mr. Charles (“Chuck”) Stiff	1				
Mr. Thomas Thurston				1	
TOTALS	10			3	

OPPORTUNITY FOR THE PUBLIC TO ADDRESS THE BOARD

Vice-Chair Stiff called the next item on the agenda, which was the opportunity for the public to address the Board. Several members of the public registered to speak virtually using WebEx to address the Board on the Virginia Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus that Causes COVID19, 16VAC25-220 (“Virginia Standard”) that will be presented to the Board under New Business.

VIRTUAL SPEAKERS:

- Nandan Kenkeremath (Leading Edge Policy & Strategy)
- Hobey Bauhan (Virginia Poultry Federation)
- Josh Phelps (Winchester Metals, Inc.)
- David Broder (SEIU Virginia 512)
- Beck Stanley (Virginia Agribusiness Council)
- Kayla Mock (UFCW 400)
- Robert Hollingsworth (American Federation of State, County and Municipal Employees)
- Paul Denham (Southern Air)
- Michelle Austin (Bank of Botetourt)
- Michael Snell-Feikema (Coordinating Committee of Community Solidarity: Poultry Workers)
- MK Fletcher (AFL-CIO)
- Julia Hammond (National Federation of Independent Businesses)
- Jodi Roth (Virginia Retail Federation)
- Jared D. Miller (Candidate for Chesapeake School Board)
- Dale Bennett (Virginia Trucking Association)

IN PERSON SPEAKERS:

- Brett Vassey (Virginia Manufacturer’s Association)
- Manuel Gago (Legal Aid Justice Center: Virginia Justice Project for Farm/Immigrant Workers)
- Ben Traynham (attorney, on behalf of Virginia Wholesalers Association)
- Brandon Robinson (Associated General Contractors of Virginia)
- Robert Melvin (Virginia Restaurant, Lodging & Travel Association)

Vice-Chair Stiff called for a 10 MINUTE RECESS. THE MEETING RECONVENED AT 11:42 AM

Vice-Chair Stiff moved to the next item on the agenda, which was New Business.

NEW BUSINESS

The first item on the agenda for new business was the Virginia Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220 (“Virginia Standard”). Vice-Chair Stiff recognized Jay Withrow, Director of Legal Support from the Department to present the briefing package. Before presenting the briefing package, Mr. Withrow addressed some of the comments received from the public commenters.

- Standard called “permanent” was a concern for regulated community.
 - o Permanent was meant to replace the “temporary ETS, but the Department was contemplated the Standard would eventually go away after legal basis of “grave danger” did not exist in the workplace.
- Small business/employer costly to comply with the Virginia Standard, PPE and huge cost for small businesses.
 - o Mr. Withrow discussed free services of DOLI Cooperative Programs Division
- 45 other states do not have COVID S&H standards: Why does Virginia need one?
 - o Virginia has done better with COVID statistics/metrics and assisted with mitigating the spread of the virus along with Executive Orders in place and all the efforts of the VDH, etc.
- Comment that the adoption of the VA Standard was on “shaky ground”
 - o Both the previous and current Attorney Generals advised that the Virginia Standard was promulgated in accordance with the law.
- There was a denial of Judicial Review
 - o 4 lawsuits filed and have been reviewed at Circuit Court with some up to Court of Appeals and were dismissed.

Mr. Withrow began presenting the briefing package and the documents that were provided to the Board in advance. Mr. Withrow explained the Executive Order 6 that initiated the actions being taken by the Board to address the Virginia Standard.

Pursuant to Governor’s Executive Order 6, issued January 15, 2022, The Safety and Health Codes Board is to convene an emergency meeting of their membership to discuss whether there is a continued need for the “Permanent Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19.”

In response to Governor’s Executive Order 6, the Department is requesting the Safety and Health Codes Board (SHCB) membership to determine whether there is a continued need for the “Permanent Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19.” The Department has identified three options for the Board to discuss:

1. There is a continued need for the Virginia Standard and no revisions should be made.
2. There is a continued need for the Virginia Standard but revisions should be made based on the current environment of the virus; and
3. There is no longer a continued need for the Virginia Standard.

The board is directed to consider federal action in regard to the Occupational Safety and Health Administration Emergency Temporary Standard. The Board should report its findings to the Governor within 30 days.

Federal OSHA issued statement 12/27/2021 regarding the OSHA Healthcare ETS that it will work expeditiously to issue a final standard and withdrawing the ETS but that the log and reporting provisions remain in effect. 16VAC25-220-10.B.3 provides that upon the fed OSHA ETS being stayed or revoked, the Virginia Standard relating to healthcare workers will take effect and the SHCB will meet within 30 days to determine whether there is a continued need for this chapter.

The Board and the Department of Labor of Industry is directed to seek guidance from the Office of the Attorney General regarding whether the proper legal and administrative procedures were followed during adoption and promulgation of the Permanent Standards.

Both the previous and current Attorney General have advised the Department that the Virginia Standard was promulgated in accordance with the law.

Mr. Withrow explained the regulatory notice and comment process for amending or revoking the Virginia Standard to include a 30 day public comment period for public and stakeholders to provide feedback to the Board about the proposed amendments/revocation, along with a public hearing and then another SHCB meeting to vote on the amendments/revocation as final.

Mr. Withrow discussed the Attachments to the Briefing Package includes information previously provided to the Board but was included for the new board members. Attachment H, Attachment O and Attachment P, Attachment Q are new attachments. Attachment P is a Draft Guidance Document that has been pulled back to be re-worked for posting as a General Notice with a 30 day comment period. No SHCB action is necessary for the Guidance Document process. The Guidance Document would be issued if the Board ultimately decides to revoke the Virginia Standard.

Mr. Withrow went through the background that led to the adoption of the Virginia Standard as both an emergency temporary standard and then a final standard. The issue of “grave danger” legal standard that resulted in the adoption of those phases of the standard in the past. The status and future predictions of the Omicron variant in Virginia was presented to the Board. A summary of “grave danger” case law was discussed to provide a background for the Board to determine if there still exists a “grave danger” in the Virginia workplace that would warrant continuation of the Virginia Standard.

Vice-Chair Stiff called for a LUNCH BREAK at 1:00 PM.

Mr. Withrow continued with briefing the Board on the current national, state and specific Virginia COVID studies, trends and statistics. Virginia vaccination and hospitalization statistics and trends along with other various metrics were presented to the Board. VOSH statistics regarding Virginia workplace inspections, penalties, fatalities and injuries were also provided to the Board.

Mr. Withrow discussed the federal OSHA Healthcare Standard that is being worked on at the federal level and the requirement that Virginia adopt a standard “at least as effective as” the federal standard. The Board will have the choice to either adopt the federal Healthcare Standard or promulgate their own healthcare standard that is “at least as effective as” the federal OSHA standard that is eventually adopted.

Mr. Withrow explained that there will remain legal protections for employees in Virginia if the Virginia Standard were to be revoked and went through the mandatory VOSH standards that protect workers from infections. He also discussed the guidance document: “Protecting Workers, Guidance on Mitigating and Preventing the Spread of Covid-19 in the Workplace” that would be developed and issued in the event of revocation of the Virginia Standard.

Mr. Withrow asked if the Board members had any questions about the presentation. Member Parson asked about the federal OSHA Healthcare Standard and whether it was based on grave danger or significant risk. Mr. Withrow did not know for sure but assumed it was not based on grave danger but there has not been any information in the Federal Register. Member Parsons followed up with questioning the justification for Virginia basing on grave danger and not significant risk. Member Parsons praised the Department for all the extensive studies and statistics and questioned why the recommendation for revocation when the studies/statistics in his opinion seem to show a continued need for the standard as opposed to revocation.

With no more questions from the Board, Mr. Withrow presented the Board with the Department’s recommendations below.

- 1. The Staff of the Department of Labor and Industry recommends that the Virginia Safety & Health Codes Board make a finding that there is no longer continued need for the Virginia Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus that Causes COVID-19, 16VAC25-220, based on emerging scientific and medical evidence that the current widespread variants of the virus no longer constitutes a “grave danger” to employees in the workplace under Va. Code 40.1-22(6a), and as discussed in the U.S. Supreme Court’s decision in National Federation of Independent Businesses, et. al.; Applicants v. Department of Labor, Occupational Safety and Health Administration, et al.**

Vice-Chair Stiff asked if there was a motion to accept Recommendation 1 of the Department. The motion was made, properly seconded and the roll call vote was conducted.

The motion carried.

TIME STAMP OF RECORDING: 4:43:00

Motion #3: Approve the Department Recommendation (1) that there is no longer a continued need for the Virginia Standard					
	Yea	Nay	Abstain	Absent	Other

Mr. Jay Abbott	1				
Mr. Robert Buchler	1				
Ms. Kelly Bundy				1	
Mr. Louis (Lou) Cernak		1			
Mr. John Fulton	1				
Dr. Colin Greene	1				
Ms. Tina Hoover		1			
Ms. Elizabeth (Beth) Lohman	1				
Mr. Michael Luce				1	
Mr. Travis Parsons		1			
VACANT					
Ms. Lutheria Smith	1				
Mr. Charles ("Chuck") Stiff	1				
Mr. Thomas Thurston				1	
TOTALS	7	3		3	

Mr. Withrow presented the Board with the Department’s Recommendation 2 if Recommendation 1 (above) was adopted.

2. If the Board finds that there is no longer a continued need for the standard, Staff of the Department of Labor and Industry recommends that the Virginia Safety and Health Codes Board propose that the Virginia Standard for Infectious Disease Prevention of the SARSCoV-2 Virus that Causes COVID-19, 16VAC25-220, be revoked and that such proposal be the subject of a thirty day written comment period and public hearing prior to any final vote to revoke the standard.

The Department also recommends that the Board state in any motion it may make to revoke 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.

Vice-Chair Stiff asked if there was discussion on the matter. There was none. Vice-Chair Stiff asked if there was a motion to accept the Recommendation 2 of the Department. The motion was made, properly seconded and the roll call vote was conducted. **The motion carried.**

TIME STAMP OF RECORDING: 4:46:00

Motion #4: Approve the Department Recommendation (2) that the SHCB propose that the Virginia Standard be revoked with a 30 day public comment period and public hearing prior to a final vote to revoke the standard					
	Yea	Nay	Abstain	Absent	Other
Mr. Jay Abbott	1				
Mr. Robert Buchler	1				

Ms. Kelly Bundy				1	
Mr. Louis (Lou) Cernak		1			
Mr. John Fulton	1				
Dr. Colin Greene	1				
Ms. Tina Hoover	1				
Ms. Elizabeth (Beth) Lohman	1				
Mr. Michael Luce				1	
Mr. Travis Parsons		1			
VACANT					
Ms. Lutheria Smith	1				
Mr. Charles ("Chuck") Stiff	1				
Mr. Thomas Thurston				1	
TOTALS	8	2		3	

Items of Interest from the Department of Labor and Industry

Vice-Chair Stiff asked for items of interest from the Department of Labor and Industry. Commissioner Gary Pan addressed the Board and thanked them for their service to the Safety & Health Codes Board.

Items of Interest from Members of the Board

Vice-Chair Stiff asked for items of interest from the Members of the Board. There were none. Vice-Chair Stiff thanked the Department staff for all their hard work preparing for the SHCB meeting and for compiling the impressive briefing package. Vice-Chair Stiff addressed the Board and thanked them for their time and service to the Board and for bringing their expertise to the Board and the decision making process.

Meeting Adjournment

Vice-Chair Stiff adjourned the meeting at 3:02 PM.

Mr. Jay Abbott <i>Representative for Agricultural Employers</i>
Mr. Robert Buchler <i>Industrial Representative Knowledgeable in Chemical and Toxic Substances</i>
Ms. Kelly Bundy <i>Representative from Construction Industry Employers</i>
Mr. Louis (Lou) Cernak <i>Representative from Labor in the Construction Industry</i>
Mr. John Fulton <i>Employer Representative of the Boiler and Pressure Vessel Industry</i>
Dr. Colin Greene <i>Virginia Department of Health</i>
Ms. Julie Henderson <i>(representative for VDH)</i>
Ms. Tina Hoover <i>Representative for Agricultural Employees</i>
Ms. Elizabeth (Beth) Lohman <i>Environmental Specialist II Department of Environmental Quality</i>
Mr. Michael Luce <i>Representative of an Insurance Company</i>
Mr. Travis Parsons <i>Representative from Labor in the Construction Industry</i>
VACANT <i>Labor Representative Knowledgeable in Chemical and Toxic Substances</i>
Ms. Lutheria Smith <i>Representative for the General Public</i>
Mr. Charles L. (Chuck) Stiff <i>Representative for Industrial Employers</i>
Mr. Thomas Thurston <i>Representative for Labor in the Manufacturing Industry</i>