

**FINAL**

**SAFETY AND HEALTH CODES BOARD  
MEETING MINUTES  
THURSDAY, October 29, 2015**

**BOARD MEMBERS PRESENT:** Mr. Lou Cernak, Jr.  
Ms. Anna Jolly  
Ms. Rebecca LePrell  
Mr. Courtney Malveaux  
Mr. David Martinez  
Mr. Kenneth Richardson, II  
Ms. Milagro Rodriguez, Chair  
Mr. Chuck Stiff, Vice Chair  
Mr. Tommy Thurston

**BOARD MEMBERS ABSENT:** Mr. Jerome Brooks  
Mr. John Fulton  
Mr. Travis Parsons

**STAFF PRESENT:** Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry  
Mr. Bill Burge, Assistant Commissioner  
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, OPP & OWP  
Mr. Ron Graham, Director, Occupational Health Compliance  
Ms. Reba O'Connor, Regulatory Coordinator  
Ms. Jennifer Rose, Director, Occupational Safety Compliance  
Mr. John Crisanti, Manager, Office of Policy and Planning  
Ms. Diane Duell, Director, Legal Services  
Mr. Warren Rice, Director, Consultation Services  
Ms. Regina Cobb, Senior Management Analyst  
Ms. Cathy Brown, Program Support Technician, Senior

**OTHERS PRESENT:** Ms. Terry Simmer, Court Reporter, Halasz Reporting & Videoconference  
Elizabeth B. Peay, Assistant Attorney General, OAG  
Ms. Beverly Crandell, Safety Program Coordinator, Tidewater  
Community College  
Samuel R. Brumberg, Esq., Association of Electric Cooperatives, Glen  
Allen, VA

**ORDERING OF AGENDA**

In the absence of Chair Milly Rodriguez, Vice Chair Chuck Stiff called the meeting to order at 10:00 a.m. A quorum was present.

Mr. Stiff requested a motion to approve the Agenda. Mr. Kenneth Richardson moved to accept the Agenda, and Mr. Tommy Thurston properly seconded the motion. The Agenda was approved, as submitted, and the motion was carried by unanimous voice vote.

## **APPROVAL OF MINUTES**

Mr. Stiff asked the Board for a motion to approve the Minutes from the December 11, 2014, Board meeting. On proper motion by Mr. Tommy Thurston and seconded by Mr. Richardson, the Minutes were approved by unanimous voice vote.

## **PUBLIC COMMENTS**

Mr. Stiff opened the floor for comments from the public, however, there were no comments. Mr. Stiff then turned the meeting over to Chair Milly Rodriguez, who arrived a little late, to continue presiding.

## **OLD BUSINESS**

### ***Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program***

Mr. Jay Withrow, Director of Legal Support, BLS, VPP, ORA, OPP & OWP for the Department, informed the Board that the package looks familiar because 99 percent of it was presented by him to the Board during the last Board meeting on July 9, 2015. He explained that after the package was submitted for comment, he had another idea that he wanted to add, so the Department withdrew the NOIRA and have brought it back now to consider an additional item. He continued by stating that this is a request for the Board to authorize the Department to initiate the regulatory process to amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

He stated that he went through a list of issues back in July and he was not planning to go through the list again, unless the Board needed him to. He began by discussing the newest section to be reviewed which reads as follows:

Allowing VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (MUTCD) in any contract for construction, repair or maintenance between either the Commonwealth or one of its local governments, which provides that the parties assure compliance with the VDOT Work Area Protection Manual.

He informed the Board that there is a federal identical OSHA regulation that incorporates by reference the Manual on Uniform Traffic Control Devices (MUTCD) which details traffic control in construction work projects – work zones. That regulation was not developed by OSHA, but instead, it was developed by the U.S. Department of Transportation (DOT). When the regulation was drafted, DOT was not thinking of it as an enforceable regulation, so a lot of language in it is references that employers “should” do this or you “may” do that. He stated that case law at the federal level says that OSHA cannot enforce regulatory language that is merely a recommendation, such as “should” or “may”, instead the language must be descriptive – it “shall” do this, or you “will” do this. When there are accidents in construction work zones and the Department must use the manual to see how the employer was supposed to set up the work zone to prevent the accident, so much of the document is

unenforceable. He informed the Board that VDOT developed its own manual the use of which is required in their contracts with employers.

He continued by asking the Board to consider a proposal where the Department can enforce a Virginia manual which is called the Work Area Protection Manual. The proposal from our regulation would allow the Department to enforce the Virginia Work Area Protection Manual in a situation where there is a contract either with VDOT or a locality that says you're required to comply with the Virginia manual.

When asked by Mr. Stiff if the manual is not referred to in a contract, Mr. Withrow responded that the Department would revert to using the Manual on Uniform Traffic Control. He added there will always be a fallback and that this would just be used in those contract situations. Mr. Withrow stated that Virginia would be more effective than federal OSHA on this issue. Also, he stated that from a cost standpoint, a company would include this in its bid about how much it costs to comply with the Virginia Work Area Protection Manual, and the company knows upfront what the requirements are, so there is no cost impact to this – another benefit.

He stated that the Basis, Purpose and Impact all remain the same as in the previous briefing package for the Administrative Regulations NOIRA.

In conclusion, Mr. Withrow recommended that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to amend the Administrative Regulation for the VOSH Program by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

A motion to accept the Department's recommendation was properly made by Mr. Stiff and seconded by Ms. Anna Jolly. The motion was approved unanimously by voice vote.

## **NEW BUSINESS**

**Confined Spaces in Construction, 29 CFR 1926, Subpart AA, §§1926.1200-1926.1213; and Other Related Provisions: §1926.953, Enclosed Spaces; and §1926.968, Definitions; Excavations, 29 CFR Part 1926.650-1926.652; and Underground Construction, 29 CFR 1926.800, and the Repeal of Virginia Confined Space Standard for the Construction Industry, 16VAC25-140-10 *et seq.*, Virginia Underground Construction, Construction Industry, 16VAC25-150-10, *et seq.*; and Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.***

Mr. Ron Graham, Director of Occupational Health Compliance for the Department of Labor and Industry, began by requesting the Board to consider for adoption federal OSHA's Final Rule for Confined Spaces in Construction, Subpart AA, §§1926.1200 – 1926.1213, and Other Related Provisions, as published on May 4, 2015 in 80 FR 25365. Concurrently, VOSH requested that the Board also consider the repeal of the Virginia Unique Standard for Confined Spaces in Construction, 16VAC25-140-10 *et seq.*, which would be supplanted by the new federal Confined Spaces in Construction standard.

In addition, Mr. Graham stated that VOSH also requests the repeal of the following existing unique Virginia standards which would be impacted by the above change:

- § Virginia Underground Construction Standard, 16VAC25-150-10, *et seq.*, and
- § Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.*

He informed the Board that both of these existing unique state standards mandate that the requirements of the Virginia Confined Space Standard for the Construction Industry, that are more stringent than corresponding requirements each contains, shall apply to underground construction areas which also meet the definition of "confined space" in Construction.

He added that the Board is also requested to adopt the existing federal identical versions of the Underground Construction Standard, §1926.800, and the Excavation Standard, §1926.650, made necessary by the repeal of the unique Virginia Confined Space Standard so as to enable the VOSH Program to continue to meet the federal requirement to remain "as effective as" the federal enforcement program itself.

The proposed effective date is January 1, 2016.

Mr. Graham summarized the federal identical Confined Spaces in Construction standard by explaining that the standard requires employers to ensure that their workers are informed about the existence, location, and dangers posed by each permit-required confined space, and that they may not enter such spaces without authorization. He defined a confined space as any space that has limited means of entry and/or exit, is large enough for a worker to enter it, and is not intended for regular/continuous occupancy. He explained that the final rule is similar in content to the general industry confined spaces standard, §1910.146, and reflects that standard's organization, language, and most substantive requirements. He listed aspects of construction industry activity that are not present in general industry work, including: information exchange requirements to ensure that multiple employers have shared vital safety information; addressing the heightened need, on constantly evolving construction worksites for communication, worksite evaluation; and training for confined spaces in construction.

Mr. Graham listed several types of confined spaces that may be found on construction sites, such as: manholes, tanks, pits, boilers, and bins, common hazards, i.e., acute atmospheric (respirable) hazards – e.g., carbon monoxide; explosive hazards, e.g., combustible dusts; and physical hazards, e.g., fall hazards. He then listed activities that are excluded from the Confined Spaces in Construction Standard, i.e., diving, Subpart Y; excavations, Subpart P; and Underground Construction, Caissons, Cofferdams and Compressed Air, Subpart S.

After explaining the distinctions between the new requirements of the Confined Spaces in Construction Standard and the General Industry Confined Spaces Standard, Mr. Graham detailed the five new requirements for the Confined Spaces in Construction standard which include: providing more detailed provisions requiring coordinated activities when there are multiple employers at the worksite; requiring a competent person to evaluate the work site and identify confined spaces before work begins; requiring continuous monitoring of atmospheric and engulfment hazards; and allowing for the suspension of a permit, instead of cancellation, in the event of changes from the entry conditions listed on the permit or an unexpected event requiring evacuation of the space.

He then described added provisions to the new rule that clarify existing requirements in the General Industry standard, §1910.146, including: alternate procedures; requiring employers to arrange for local emergency services and for the emergency responders to give employers advance notice if they will be unable to respond for a period of time because of other emergencies; and requiring employers to provide training in a language and vocabulary that the worker understands. Mr. Graham explained several important defined terms in §1926.1202, such as: "entry employer", "controlling contractor", "host employer"; "entry", and "entry rescue".

Next, he detailed the general requirements for confined spaces; permit-required confined space written program; permitting process; training; entrants, attendants, and entry; and rescue and emergency services.

With respect to the Basis for the final rule, Mr. Graham informed the Board that federal OSHA published an Advance Notice of Proposed Rulemaking (ANPR) on confined spaces for the construction industry on March 25, 1980, and that federal OSHA issued the general industry confined spaces standard on January 14, 1993. The Safety and Health Codes Board adopted an identical version of the federal standard on June 21, 1993, with an effective date of September 1, 1993. At the same time, the Board amended the Virginia Confined Space Standard by deleting the applicability of the Virginia standard to general industry and, thereby, restricting its applicability to the construction industry and telecommunications.

With respect to the purpose of the Final Rule, Mr. Graham stated that the new standard will provide construction workers with protections similar to those which manufacturing and general industry workers have had for more than two decades, with some differences tailored to the construction industry.

Next, he discussed other VOSH standards impacted by the adoption of the final rule, starting with existing federal identical standards impacted: OSHA removed paragraph (b)(6) of §1926.21, Safety Training and Education; amended Subpart V of Part 1926 – Power Transmission and Distribution – to replace references to the general industry confined spaces standard with references to this final construction rule; amended paragraphs (a) and (g) of §1926.953 by replacing each reference to “§1910.146” with a reference to “Subpart AA” so that the appropriate construction standards apply; and in §1926.968, Definitions, a note was added to the definition of “enclosed space” that corresponds to the note in paragraph §1910.269 (x). The note in 1926.968 references “subpart AA.”

Mr. Graham also discussed the existing Virginia unique Standards impacted by the adoption of the final rule which include: the repeal of the unique Virginia Confined Space Standard in Construction, 16VAC25-140-10, *et seq.*, which is necessitated because it is being replaced by the new federal rule. This repeal will then necessitate the repeal of two other standards: the unique Virginia Underground Construction Standard, 16VAC25-150-10, *et seq.*, and the unique Virginia Excavation Standard, 16VAC25-170-10, *et seq.*, as these two standards reference the Virginia Confined Space in Construction Standard being repealed. The repeal of the two other Virginia standards noted above will then necessitate the adoption of federal identical versions of the Underground Construction Standard, 29 CFR Part 1926.800, and the Excavation Standard, 29 CFR Part 1926.650 in order for the VOSH Program to retain its “as effective as” status required by the federal OSHA enforcement program.

Mr. Graham referred the Board to the list of establishments impacted by the new standard.

With respect to the impact of this new standard, Mr. Graham stated that OSHA recognizes that requiring employers to comply with different standards for employers to comply with two different sets of procedures to perform maintenance and construction work at the same time in the same confined space creates a burden. Therefore, issuing a final standard that is similar to its general industry counterpart is not drastically changing industry practice for addressing confined space hazards. He reiterated the duties of all employers engaged in construction work, for example: identify confined spaces at their worksites; establish a written program; issue entry permits for qualifying confined spaces; exchange of information on the hazards of permit spaces with other affected employers; train affected employees; provide for rescue and emergency services, and assign duties to authorized entrants, attendants, and supervisors.

He stated that in Virginia, it is estimated that there are 13,000 establishments with approximately 134,000 employees affected by the final rule. Additionally, he informed the Board that in Virginia, there have been eight fatalities and three non-fatal accidents involving confined spaces.

He stated that the new standard will provide construction workers with new additional protections similar to those that have been provided to manufacturing and general industry workers for more than two decades, and that OSHA estimates that it will also reduce the number of related fatalities. He stated that no additional costs to the Department are anticipated with the adoption of this new standard and the related changes because VOSH has been enforcing the unique Virginia Confined Space Standard covering the Construction Industry since January 1, 1988.

Mr. Graham listed the benefits of the new standard, and noted that federal OSHA determined that this final standard will facilitate a 96 percent reduction nationally in the average number of fatalities and injuries in confined spaces covered by this standard. He also noted that this does not assume the impacts of a pre-existing Virginia unique standard, although it was less comprehensive than the new federal standard.

In discussing the costs of the new standard, Mr. Graham stated that OSHA estimated national cost of compliance to total \$60.3 million and VOSH estimated cost of compliance for Virginia employers to be \$1.6 million. He further explained that it is anticipated that the actual costs of compliance for Virginia employers will be significantly less than the costs listed in the briefing packages which are based on the federal estimates and assumed no preexisting state unique standard.

With respect to technological feasibility, Mr. Graham explained that none of the requirements, including the new requirements which are not in §1910.146, present any technological feasibility concerns since the provisions simply require observation of hazards, training, and communication among all parties, including employees and all employers at a worksite. Mr. Graham also stated that compliance with the requirements of the final rule is economically feasible in every affected industry sector.

Mr. Stiff expressed confusion and asked for clarity concerning the language in the middle of page 3 of the briefing package which read: "Section 1926.1201(a) makes it clear that the focus of the final standard is on the type of work performed...", then in the next paragraph the language says "...the presence of a confined space on the worksite triggers this duty rather than the type of work the employer is performing." Another point of clarification concerned employers who rely on local emergency services having to arrange for responders to give the employer advance notice if they will be unable to respond for a period of time because they are responding to another emergency, attending department-wide training, etc. Mr. Stiff asked what is really meant by this statement and how will the Department enforce it. Mr. Graham responded that he does not think the standard mandates the use of a local rescue service. Maybe, employers should look into developing their own rescue team. Mr. Graham added that the Department may have to look at this on a case-by-case basis, and consult with federal OSHA. Mr. Graham agreed to get clarification. When asked by Ms. LePrell, Mr. Graham explained the term "competent person". Mr. Stiff stated that his questions could be followed up on because he didn't think they were pivotal to the protection of the standard. Mr. Malveaux agreed that the Board could get clarification on the questions later.

In conclusion, on behalf of the Department of Labor and Industry, Mr. Graham recommended that the Board adopt the following:

Federal OSHA's new final rule:

- § Confined Spaces In Construction, 29 CFR Part 1926, Subpart AA, §1926.1200 – 1926.1213; and Other Related Provisions: §1926.953, Enclosed Spaces; and §1926.968, Definitions;

The existing federal-identical construction industry standards for:

- § Excavations, 29 CFR Part 1926.650 through 29 CFR Part 1926.652; and
- § Underground Construction, 29 CFR Part 1926.800.

As a necessary part of the above action staff also recommended that the Board act to repeal:

- § Virginia Confined Space Standard for the Construction Industry, 16VAC25-140-10 *et seq.*;
- § Virginia Underground Construction, Construction Industry, 16VAC25-150-10, *et seq.*; and
- § Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.*

These above actions are authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of January 1, 2016.

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.

A motion to accept the Department's recommendation was properly made by Mr. Stiff and seconded by Mr. Malveaux. The motion was approved unanimously by voice vote.

#### **Report of Periodic Review of Certain Existing Regulations – Departmental Review and Findings**

Ms. Reba O' Connor, Regulatory Coordinator for the Department, explained that the following three regulations of the Board had been identified for review in 2015 in accordance with Executive Order 17 (2014):

1. Financial Responsibility of Boiler & Pressure Vessel Contact Fee Inspectors, 16VAC25-55;
2. Regulation Applicable to Tree Trimming Operations, 16VAC25-73; and
3. Telecommunications, General, Approach, Distances, 16VAC25-75.

She reminded the Board of its approval at the July 9, 2015, meeting for the Department to proceed with the periodic review process which had a public comment period of the required 21 days. She stated that the public comment period began on August 10, 2015, when the Notice of Periodic Review was published, and closed on August 31, 2015. She informed the Board that no comments were received for any of the regulations during the public comment period and that following the public comment period, Department staff reviewed the regulations and prepared recommendations for the Board's consideration at this meeting.

She explained that the Department is obligated to evaluate the economic impact of these regulations on small businesses, which must consider: the continued need for the regulation; the complexity of the regulation; the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law

or regulation; and the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

With respect to Financial Responsibility of Boiler and Pressure Vessel Contact Fee Inspectors, 16VAC25-55, Ms. O'Connor stated that the regulation is not overly complex, has no negative impact on the regulated community and does not overlap, duplicate, or conflict with federal or state law or regulation. She also stated that the Department recommended that this regulation be retained with no changes.

With respect to the Regulation Applicable to Tree Trimming Operations, 16VAC25-73, she explained that the Department determined that the current regulation is the least burdensome alternative for the protection of employees working in tree trimming occupations; and, since the Logging Standard did not apply to tree trimming activities where a tree was not felled or cut down, no alternatives were considered for this regulation because there is no viable alternative to this regulation. She explained that the regulation was promulgated in 2011, and this is the first review since that time. She informed the Board that during the Public Comment period no online comments were posted on the Regulatory Town Hall, however, there was one emailed comment with an attached letter from the Tree Care Industry Association, Inc. (TCIA) expressing support for retaining the regulation. Again, the Department recommended that this regulation be retained with no changes.

Ms. O'Connor stated that, with the regulation on Telecommunications, General, Approach, Distances, 16VAC25-75, there is a continued need for this regulation because it ensures uniformity of the regulations for General Industry, Construction, and Telecommunication workers who perform the same type of electrical transmission work. The regulation is not overly complex, has no negative impact on the regulated community and does not overlap, duplicate, or conflict with federal or state law or regulation; and no alternatives were considered. The Department recommended retaining this regulation without changes.

She concluded with a request that the Board vote to retain these three regulations with no changes.

Mr. Malveaux asked if any other state had adopted Tree Trimming regulations, and Mr. Withrow responded that Maryland had adopted a tree trimming regulation as a direct result of Virginia's regulation.

A motion to accept the Department's recommendation was properly made by Mr. Richardson and seconded by Ms. Jolly. The motion was approved unanimously by voice vote.

There were no **Items of Interest from the Department or from the Board**

### **Adjournment**

There being no further business, a motion was made by Mr. Stiff and properly seconded by Mr. Martinez to adjourn the meeting. The motion was carried unanimously by voice vote. The meeting adjourned at 11:25 a.m.