



COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

C. RAY DAVENPORT
COMMISSIONER

MAIN STREET CENTRE
600 EAST MAIN STREET, SUITE 207
RICHMOND, VIRGINIA 23219
PHONE (804) 371-2327
FAX (804) 371-6524
TDD (804) 786-2376

September 17, 2019

Steven Brown
Brown Bear Vineyard
229 Springhouse Lane
Woodstock, VA 22664

SUBJECT: Interpretation of 1910.142(a)(2), Temporary Labor Camps
Brown Bear Vineyard
Temporary Labor Camp Housing

Dear Mr. Brown:

Your company has requested an interpretation of Virginia Occupational Safety and Health (VOSH) regulation 1910.142(a)(2) and its application to temporary labor camp housing you are building at the Brown Bear Vineyard located at the above-referenced address.

The building under construction is intended to house H2A workers who may reside there off and on from March to November annually as they engage in a number of different work activities at your vineyard (see photographs in Attachment A).

The housing is within 500 feet of livestock grazing land and a pond located on an adjoining property (Bly Farm) – not owned by Brown Bear Vineyard. The primary purpose of the pond is to serve as a watering hole for a herd of from 25-30 beef cattle. A fence line and a substantial tree and vegetation line separate the two properties (see photographs in Attachment B).

The distance of the housing to the fence line varies from approximately 120 feet at its closest to 390 feet to the closest edge of the pond (See Attachments C and D). The cattle have a grazing area of approximately 85-90 acres and are not subject to being enclosed in either a smaller fenced area or barn.

Section 1910.142(a)(2) of the VOSH Standards for General Industry provides as follows:

All sites shall be adequate in size to prevent overcrowding of necessary structures. The principal camp area in which food is prepared and served and **where sleeping quarters are located shall be at least 500 feet from any area in which livestock is kept.** (Emphasis added).

The purpose of the 500 feet setback requirement is sanitary.¹ Federal OSHA has previously noted in an interpretation dealing with this same regulatory provision that:

“The purpose of the 500 feet setback is sanitary. In cases where livestock are generally kept for protracted periods of time in enclosures closer than 500 feet to sleeping and food preparation areas, a potential health hazard to employees exists.

....

The purpose of OSHA standards is to ensure health and safety of the working population. When it is difficult for an employer to adhere to certain stipulations of a standard because of the inherent nature of his operation, an evaluation of the health and safety repercussions is necessary. If it can be demonstrated that no significant risk to workers' health and safety would occur as a result of a nonconforming activity, then the situation may be judged to be "de minimis" and no citation of the aberrant activity will be issued.”

Federal OSHA has also noted in Federal Register 80:23822-23823 that one purpose of the standard is to eliminate the incidence of communicable disease:

“The main purpose of these provisions [1910.142(l)²] is to eliminate the incidence of communicable disease among temporary labor camp residents. The Standard requires camp superintendents to report immediately to the local health officer the name and address of any individual in the camp known to have, or suspected of having, a communicable disease (29 CFR 1910.142(l)(1)). Whenever there is a case of suspected food poisoning or an unusual prevalence of any illness in which fever, diarrhea, sore throat, vomiting or jaundice is a prominent symptom, the standard requires the camp superintendent to report that immediately to the health authority (29 CFR 1910.142(l)(2)).”

¹ OSHA Interpretation dated April 12, 1988 from Assistant Secretary John A. Pendergrass to Linda M. Jones, Executive Director, Wyoming/Colorado Agricultural Employers Association. <https://www.osha.gov/laws-regs/standardinterpretations/1988-04-12>

² 1910.142(l), "Reporting communicable disease."

1910.142(l)(1)

It shall be the duty of the camp superintendent to report immediately to the local health officer the name and address of any individual in the camp known to have or suspected of having a communicable disease.

1910.142(l)(2)

Whenever there shall occur in any camp a case of suspected food poisoning or an unusual prevalence of any illness in which fever, diarrhea, sore throat, vomiting, or jaundice is a prominent symptom, it shall be the duty of the camp superintendent to report immediately the existence of the outbreak to the health authority by telegram, telephone, electronic mail or any method that is equally fast.

Onsite Inspection

A VOSH onsite inspection of the Brown Bear Vineyard temporary labor camp housing and surrounding area was conducted on July 17, 2019. Following is a summary of the results of the inspection:

- At any one time 25-30 cattle are not being “kept” in an enclosure or barn structure within 500 feet of the temporary labor camp housing, but do have access to water and grazing within 500 feet. On the day of the inspection 26 cattle were observed in the pasture, 5 of which were located at or near the pond and within 500 feet of the housing.
- The pond in question is currently the only water source for the herd. A second pond located more than 500 feet from the housing is located on the grazing land, but is temporarily closed off for repairs. It is scheduled to be available to the cattle by fall of 2019.
- Pat Racey³, whose family owns the property adjoining Brown Bear Vineyard, commented that historically, only a few cattle are at the pond at any one time. He stated that most of the herd is grazing or resting outside of the 500 feet distance, which was supported by the inspector’s observations.
- The inspector observed that the animals are free to wander the entire pasture, but there is a cow path that connects the two ponds. Mr. Racey commented that the herd spends most of its time in the vicinity of either the path or the ponds.
- There is one “barn” on the property but it is not used for sheltering cattle and is well outside the 500 feet distance.
- The contour of the land on both properties is hilly. Topographical data was provided to the inspector as supporting documentation (see Attachment D).
- According to the topographical data and photographs, the housing is approximately 5 feet lower in elevation in relation to the pond and there is a dense thicket of trees, brush and vegetation between the two points that can only be seen through in certain spots along the property line.
- There is a ravine on the pasture side of the fence that runs along the property line and serves as drainage for that land so that rain and waste runoff from the direction of the pond is carried downslope of the housing.
- The ravine on the pasture side of fence contained a minimal amount of standing water, estimated by the inspector to be a couple of gallons. The water is sluiced away by a primitive drainage system, which could be improved to eliminate standing water.

Interpretation

Section 1910.142(a)(2) of the VOSH Standards for General Industry provides as follows:

All sites shall be adequate in size to prevent overcrowding of necessary structures. The principal camp area in which food is prepared and served and where sleeping quarters are located shall be at least 500 feet from any area in which livestock is kept. (Emphasis added).

³ Mr. Racey and his company, Racey Engineering, have been providing engineering and consulting services to Brown Bear Vineyard before and during the pendency of this interpretation request.

There is some question concerning the meaning of the word “kept”⁴ in the text of the above regulation. For purposes of this interpretation, the Department will evaluate the facts presented using a broad definition of “kept” (e.g., any place livestock may be present), to assure that a high level of employee protection is given due consideration.

If a broad definition is used, the current placement of the Brown Bear Vineyard temporary labor camp housing is within 500 feet of where livestock is kept or present and would constitute a violation of §1910.142(a)(2).

The VOSH Field Operations Manual (FOM), Chapter 10, page 38, describes a de minimis violation in the following manner:

“De minimis violations are violations of standards which have no direct or immediate relationship to safety or health. Compliance Officers identifying de minimis violations of a VOSH standard shall not issue a citation for that violation, but should verbally notify the employer and make a note of the situation in the inspection case file. The criteria for classifying a violation as de minimis are as follows:

1. Employer Complies with Clear Intent of Standard.

An employer complies with the clear intent of the standard but deviates from its particular requirements **in a manner that has no direct or immediate relationship to employee safety or health. These deviations may involve distance specifications**, construction material requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations, or the like.” (Emphasis added).

Based on the information provided by Brown Bear Vineyard and observations and evidence obtained during the VOSH inspection of July 17, 2019, it appears that the location of the Brown Bear Vineyard temporary labor camp housing within 500 feet of grazing land and a pond that serves as a watering hole, does not pose a significant risk to worker safety and health:

⁴ At this time there is insufficient information available from the OSHA regulatory promulgation record on whether the term “kept” was to be given a narrow definition (e.g., the livestock are “enclosed” in a confined area) or a broad definition (e.g., any place livestock may be present).

Resort to standard dictionary definitions does not result in a definitive conclusion. According to the Cambridge English Dictionary, “kept” is the past tense and past participle of “keep”. “Keep” is variously defined “to be in or continue to be in someone’s possession”; or “to stay or cause to stay or continue in a particular place, direction or condition”. <https://dictionary.cambridge.org/us/dictionary/english/keep>

If the narrow definition is used, there is no information to indicate that the cattle on the adjoining farm have been or are ever kept in a tightly enclosed or confined area within 500 feet of the housing; which could result in overgrazing, concentration of cattle waste, potential increased risk of disease spread among the cattle, etc. In that event, §1910.142(a)(2) would not apply to the current placement of the Brown Bear Vineyard temporary labor camp housing, and our enquiry would stop there.

- The topography of the land combined with the size of the dense tree and vegetation line between the two properties provides a substantial barrier between the housing and the watering and pasture land of the cattle.
- The relatively small size of the cattle herd combined with the relatively large size of the grazing pasture serve to significantly reduce the likelihood of overgrazing, which could otherwise result in a concentration of cattle waste, degradation of the pasture grass and soil, potential increased risk of disease spread among the cattle, etc.
- The topography of the land on the pasture side of the fence provides natural run-off of water and cattle waste downslope away from the housing location; which serves to significantly reduce the likelihood of unsanitary conditions developing near the housing.
- The cattle are not enclosed in small areas or housed in a barn within 500 feet of the housing location, significantly reducing the likelihood of the conditions noted above related to overgrazing, degradation of the pasture, or concentration of cattle waste.
- Anecdotal information provided by Mr. Racey, who grew up on the adjoining property, and confirmed during the inspection, supports a reasonable conclusion that at any one time approximately 20% (5 to 6 cattle) of the cattle herd gather at the watering hole within 500 feet of the housing. This low concentration of cattle around the pond serves to significantly reduce the likelihood of unsanitary conditions.
- Once the second pond on the adjoining property (outside the 500 feet zone) is available to serve as another watering hole for the cattle, it should result in a reduced concentration of cattle around the first pond. This should serve to further reduce the possibility of unsanitary conditions developing within 500 feet of the housing.

Therefore, Brown Bear Vineyard's placement of the temporary labor camp housing within 500 feet of where livestock are kept does not pose a significant risk to worker safety and health, and is deemed to be a de minimis violation of §1910.142(a)(2).

NOTE: If the adjoining property owner is amenable, and to avoid a potential violation of 1910.142(a)(1)⁵ of the VOSH Standards for General Industry, it is recommended that the ravine on the pasture side of the fence which contained a minimal amount of standing water (estimated by the inspector to be a couple of gallons) be improved to eliminate the possibility of standing water.

The above interpretation is based on the facts as represented by Brown Bear Vineyard at the time of the VOSH inspection of July 17, 2019. Should workplace conditions substantively change in a manner that poses an increased risk to the safety and health of employees from unsanitary conditions due to the proximity of livestock, this interpretation is subject to revision or revocation.

This interpretation shall not be construed to abrogate in any way the employer's responsibility to comply with the remaining provisions of 1910.142, including, but not limited to 1910.142(l), Reporting communicable disease.

⁵ Section 1910.142(a)(1) provides that "All sites used for camps shall be adequately drained. They shall not be subject to periodic flooding, nor located within 200 feet of swamps, pools, sink holes, or other surface collections of water unless such quiescent water surfaces can be subjected to mosquito control measures."

Thank you for your sincere interest in the safety, health and welfare of workers in Virginia.

Should you have any questions, please feel free to contact me at 804.786.0574,
ron.graham@doli.virginia.gov

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald H. Graham", written in a cursive style.

Ron Graham
Occupational Health Director

ATTACHMENT A:

**Brown Bear Vineyard
229 Springhouse Lane
Woodstock, VA 22664**

July 17, 2019 VOSH Inspection Photos:

Temporary Labor Camp Under Construction



ATTACHMENT B:

**Brown Bear Vineyard
229 Springhouse Lane
Woodstock, VA 22664**

July 17, 2019 VOSH Inspection Photos:

Fence Line, Tree and Vegetation, and Pond and Grazing Land



ATTACHMENT D:

Brown Bear Vineyard
 229 Springhouse Lane
 Woodstock, VA 22664

July 17, 2019 VOSH Inspection Photos:

Topographical Data of the Housing and Surrounding Area

