



## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	Virginia Department of Labor and Industry/Safety and Health Codes Board
<b>Virginia Administrative Code (VAC) citation</b>	16 VAC 25-185
<b>Regulation title</b>	Confined Space Standard for Agriculture
<b>Action title</b>	Proposed regulation to adopt a Confined Space Standard for Agriculture
<b>Date this document prepared</b>	October 18, 2007

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Purpose

*Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.*

The purpose of the planned proposal regulation is to reduce or eliminate injuries, illnesses and fatal accidents associated with confined space hazards in agriculture, and to provide agricultural employees and employers with protective measures to use before and during entry into agricultural confined spaces to prevent entrants from being exposed to toxic or low oxygen atmospheres, hazardous chemicals and engulfment hazards.

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

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.”

## Need

*Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.*

There currently is no law or regulation governing safety requirements for work in confined spaces in agriculture, although employees and employers in essentially every other industry in the Commonwealth are covered by confined space regulations. General industry employers and employees are covered by the Permit Required Confined Space Standard, 16VAC25-90-1910.146; the construction industry is covered by the Virginia Confined Space Standard for the Construction Industry, 16VAC25-140; and the telecommunications industry is covered by the Virginia Confined Space Standard for the Telecommunications Industry, 16VAC25-70.

Individual industries also have regulations which address confined space hazards:

- 16VAC25-90-1910.252(b)(4) - Welding, Cutting and Brazing (General Industry)
- 16VAC25-175-1926.353(b) - Ventilation and Protection in Welding Cutting and Heating (Construction Industry)
- 16VAC25-90-1910.119(f)(4) - Process Safety Management of Highly Hazardous Chemicals
- 16VAC25-90-1910.272(g) - Grain Handling Facilities

Since 1997, VOSH has investigated five (5) fatal accidents involving confined spaces in agriculture resulting in the deaths of five (5) employees, one (1) owner and three (3) family members:

- 2007 One employee, the owner of the farm, the farmer’s wife and 2 daughters were killed when they were overcome by either hydrogen sulfide or methane gas in a manure pit on a dairy farm. The employee and family members consecutively entered the pit in an attempt to rescue the farmer and preceding victims.
- 2003 One employee was killed on a dairy farm while using a tractor to push manure out of a barn down a concrete runway into a holding pond. The tractor ran off the end of the runway and flipped over

into the pond, trapping the victim underneath.

- 2003 One employee was killed when he fell into a manure pit on a dairy farm. A steel grate that covered part of the pit had been removed from its protective position.
- 1998 One employee was killed while loading grain from a silo into a truck when the side wall of the silo collapsed, throwing the victim into the silo and grain where he was engulfed by the grain.
- 1997 One employee on a dairy farm was killed while scraping manure with a tractor and bucket up a ramp to a manure pit when the tractor drove into manure pit and overturned.

In the absence of a regulation to cover a hazard in a specific industry, the only enforcement tool available to the VOSH Program is the use of Va. Code §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 address directly the issue of confined space hazards. Instead, VOSH procedures and court case law would allow the VOSH Program to issue a general duty violation and base it on a national consensus standard addressing confined spaces in agriculture or on some other reliable industry standard the agricultural employer knew of or should have known about. While preferable to no enforcement tool at all, the general duty clause does not provide either the regulated community, employees or the VOSH Program with substantive and consistent procedures and guidance on how to reduce or eliminate confined space hazards in agriculture. Other problems with the use of the general duty clause include the inability to use it to enforce any consensus standard provisions which use “should” or “may” language, and the inability to cite other-than-serious violations.

**Substance**

*Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.*

The VOSH Program seeks to adopt a Confined Space Standard for Agriculture which would require agricultural employers to provide protections for employees prior to their entry into a confined space. Protective measures that could be considered include:

- testing of the atmosphere in the confined space immediately prior to entry and, where necessary, during work in the confined space;
- use of an approved ventilation system to ensure removal of harmful air contaminants prior to entry and, where necessary, during work in the confined space;
- use of proper respiratory protective equipment and, where necessary other personal protective equipment to protect employees from harm air contaminants and chemicals;

- where necessary, use by an entrant of a safety harness and lifeline with an attendant present at all times outside the confined space;
- provide that prior to entry into confined spaces, all mechanical, electrical, hydraulic and pneumatic equipment which presents a danger to employees inside the confined space be deenergized, disconnected, locked-out and tagged, blocked-off, or otherwise prevented from operating;
- provide for protective devices such as barriers, guard rails, covers, etc., to prevent employees from falling into, driving machinery into or being engulfed in manure pits, lagoons and other types of agricultural vats and pits; and
- training on what constitutes a confined space in an agricultural setting and what hazards could be present and what safety precautions should be followed under any proposed regulation.

## Alternatives

*Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.*

In the absence of a regulation to cover a hazard in a specific industry, the VOSH Program would have to continue to use the only enforcement tool available to it which is the use of Va. Code §40.1-51.1.A., 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 address directly the issue of confined space hazards. Instead, VOSH procedures and court case law would allow the VOSH Program to issue a general duty violation and base it on a national consensus standard addressing confined spaces in agriculture or on some other reliable industry standard the agricultural employer knew of or should have known about. While preferable to no enforcement tool at all, the general duty clause does not provide either the regulated community, employees or the VOSH Program with substantive and consistent procedures and guidance on how to reduce or eliminate confined space hazards in agriculture. Other problems with the use of the general duty clause include the inability to use it to enforce any consensus standard provisions which use “should” or “may” language, and the inability to cite other-than-serious violations.

## Public participation

*Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.*

---

The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Mr. Jay Withrow, Director of the Office of Legal Support, Powers-Taylor Building, 13 South Thirteenth Street, Richmond, VA 23219; Telephone no.: (804) 786-9873; Fax no.: (804) 786-8418; email: [Jay.Withrow@doli.virginia.gov](mailto:Jay.Withrow@doli.virginia.gov)

Written comments must include the name and address of the commenter. In order to be considered, comments must be received by the last day of the public comment period.

Although a date has not yet been determined, a public hearing will be held and notice of the hearing may be found on the Virginia Regulatory Town Hall website ([www.townhall.virginia.gov](http://www.townhall.virginia.gov)) and will be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

## Participatory approach

*Please indicate, to the extent known, if advisers (e.g., ad hoc advisory committees, technical advisory committees) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.*

---

The agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach.

## Family impact

*Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

---

No impact on the family is anticipated as a result of this intended regulatory action.