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**Periodic Review / Retain Regulation
Agency Background Document**

Agency name	Virginia Department of Labor and Industry/Safety and Health codes Board
Virginia Administrative Code (VAC) citation	16 VAC 25 - 140 et seq.
Regulation title	Virginia Confined Space Standard for the Construction Industry
Document preparation date	July 18, 2013

This form is used when the agency has done a periodic review of a regulation and plans to retain the regulation without change. This information is required pursuant to Executive Orders 14 (2010) and 58 (1999).

Legal basis

Section 40.1-22(5) of the Code of Virginia mandates that the Safety and Health Codes Board adopt standards that most adequately assure that no employee will suffer material impairment of health or functional capacity and that the standards be at least as stringent as the standards promulgated by Federal OSHA. The Federal Occupational Safety and Health Administration does not have a comparable standard for construction, but does enforce confined space entry procedures through the use of the General Duty Clause Section 5(a)(1) of the Federal OSH Act and other construction standards that are considered vague and provide very little guidance to employers. While this standard exceeds current federal standards for the construction industry, it does provide substantially similar safety and health protection as the required, mandated standards in general industry. The standard also provides construction employers with clearer guidelines for providing a safe workplace in the area of confined space entry.

Alternatives

Two alternatives were considered, whether (1) to eliminate the regulation and revert to the federal system of enforcement which utilizes the General Duty Clause or (2) to retain the current regulation unchanged. The standard was originally subjected to the full Administrative Process Act notice and comment procedures when originally considered by the Safety and Health Codes Board. During a previous regulatory review process, the Department convened a group of independent employer and employee representatives from the regulated community to review the confined space regulations. This review panel considered all alternatives and recommended retention of the standard as originally adopted by the Safety and Health Codes Board. The Department is not aware of any alterations in the regulatory environment that would change that assessment.

During a previous regulatory review period, the Federal Occupational Safety and Health Administration began the promulgation process for a construction Confined Space Entry Standard, but continues to enforce confined space entry through the General Duty Clause and other related construction standards. Elimination of the Virginia Confined Space Entry Standard for Construction would therefore not eliminate compliance requirements for employers, but would instead provide a regulatory system which is vague and provides very little guidance. Thus, this regulation is the least burdensome alternative for the protection of employees working in confined spaces in the construction industry.

Public comment

No public comments were received on this regulation during the public comment period which began on April 8, 2013 and ended on May 23, 2013. The agency and the Safety and Health Codes Board did not establish an informal advisory group for the purpose of assisting in the periodic review.

Effectiveness

The regulation has three goals:

1. Reduce the incidence of material impairment of the health of Virginia workers due to workplace exposure to known hazards.
2. Provide protection to construction workers equal to that provided to workers in other industries.
3. Protect the public's health, safety and welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth.

The primary goal of this regulation is to prevent injuries and deaths of construction industry employees that are required to enter confined spaces. Among other things, the standard requires atmospheric testing of confined spaces prior to entry, the use of personal protective equipment, where necessary, and ventilation of the space to prevent accumulation of toxic atmospheres. The Department has set a target for inspecting the construction industry and continues to review compliance with this regulation and any reported injuries or fatalities as a result of non-compliance. Since promulgation of this regulation, there has been a consistent increase in compliance with these requirements and no deaths or serious injuries as a result of improper confined space entry.

The regulation is clearly written and easily understandable.

Result

The Department of Labor and Industry and the Safety and Health Codes Board recommend retaining the regulation without change.

Small business impact

In order to minimize the economic impact of regulations on small business, please include, pursuant to § 2.2-4007.1 E and F, a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) 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. Also, include a discussion of the agency's determination whether the regulation should be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses.

Construction companies must meet certain standards pursuant to the U.S. Occupational Safety and Health (OSH) Act (1970). In addition, because federal OSHA mandates that State Plan states be at least as effective as federal OSHA, there is a continued need for such a regulation. There were no comments on the regulation during the public comment period. This regulation affects all businesses (large and small) that are engaged in construction activity. The regulation is not overly complex. It does not increase the costs for small businesses, because the costs are the result of actions that are required by federal law and regulation to provide the protections mandated by this regulation.

As noted above, companies engaged in construction activity must meet certain standards pursuant to the U.S. Occupational Safety and Health (OSH) Act (1970) and federal OSHA mandates that State Plan states be at least as effective as federal OSHA. This regulation does not overlap, duplicate, or conflict with federal or state law or regulation, as these state regulations are enforced by the Department in lieu of direct federal enforcement as per agreement between the Department and federal OSHA.

This regulation was last subjected to a periodic review in 2009. Since that review, there have been no significant changes in technology, economic conditions, or other factors in the area affected by the regulation. At this time, there is nothing to indicate that the regulation should be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses. The Department believes that the regulation provides a positive cost/benefit to the regulated community, as adherence to the requirements of this regulation may actually lower costs to small businesses, by protecting the health and well-being of their employees, thus, shielding the businesses from the costs of litigation due to injuries or fatalities.

Family impact

This regulation has no impact on the institution of the family or family stability.