



Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Department of Labor and Industry
Virginia Administrative Code (VAC) citation	16 VAC 25-73
Regulation title	Regulation Applicable to Tree Trimming Operations
Action title	Proposed regulation to adopt Regulations Applicable to Tree Trimming Operations
Date this document prepared	October 29, 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 proposed change is to reduce/eliminate employee injuries and fatalities by considering for adoption a comprehensive regulation to address non-logging, arborist/tree trimming and cutting operations on residential and commercial work sites.

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.

VOSH currently applies the Logging Standard, 1910.266, to arborist/tree trimming operation any time a tree is “felled,” or cut down. The Logging Standard does not apply to tree trimming activities where the tree is not felled or cut down, so there is no specific regulation to address hazards associated with just trimming trees.

In instances where the Logging Standard does not apply, VOSH has had to use regulations of general application to address some hazards (e.g., 1910.95, Occupational Noise Exposure; 1910.132, Personal protective equipment; 1910.133, Eye and face protection; 1910.135, Head Protection; 1910.136, Foot protection; 1910.151, Medical services and first aid; 1910.67, Vehicle-mounted elevating and rotating work platforms; etc.), and the “general duty clause,” Va. Code §40.1-51.1(a), which provides 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 in anyway the issue of hazards associated with tree trimming operations. 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 tree trimming hazards (such as the ANSI Z133.1-2006 standard), or some other reliable industry standard the tree trimmer 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 tree trimming hazards. Other problems with the use of the general duty clause include the inability to use it to enforce and consensus standard provisions which use “should” or “may” language, and the inability to cite other-than-serious violations.

The arborist industry has complained at times about application of the Logging Standard to their industry because they work in residential neighborhoods and commercial areas, not in a forest; and because they often use teams of workers in directional felling of trees (with the use of ropes) and “piecing out” of trees or cutting down trees in sections (loggers usually do not operate in teams or piece out trees). They consider their work and the hazards they face to be fundamentally different from hazards faced by loggers.

Additionally, statistics show that since 1993, there have been 46 non-logging, tree trimming/cutting/felling fatalities (7% of all fatalities since 1993), with 34 of those occurring since 2000 (9% of all fatalities since 2000). For an industry of the relatively small size of the tree care industry, this is a very high number of fatal accidents.

**Virginia Occupational Safety and Health
Tree-Related Fatality Statistics (Non-Logging) as of September 28, 2007**

Year	Chipper	Tree Trimming	Aerial Lift	Power Line	Struck-by Vehicle	Site Clearance	Total	Total VOSH Fatalities	Percentage of Tree Fatalities
2007		2					2	30	7%
2006		4		3	1		8	56	14%
2005		1			1		2	59	3%
2004		2		1		1	4	51	8%
2003		4		1			5	47	11%
2002		4					4	48	8%
2001		4			2		6	54	11%
2000		1		2			3	59	5%
subtotal		22	0	7	4	1	34	404	8%
1999		2					2	45	4%
1998				2			2	40	5%
1997	1	1	1			1	4	56	7%
1996		2					2	49	4%
1995							0	32	0%
1994						1		50	0%
1993				1			1	26	4%
subtotal	1	5	1	3	0	2	12	298	4%
Total	1	27	1	10	4	3	46	702	7%

SIC Codes: 0782, 0783, 0191, 1623, 1629 and 2411

NOTE: Logging fatalities are not included in the above table.

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 regulations applicable to Tree Trimming Operations. The VOSH Program intends to conduct a review of existing regulations in other states as well as national consensus standards, such as the American National Standard's Institute (ANSI) Z133.1-2006, Safety Requirements for Arboricultural Operations (With Modifications), for Application to Tree Trimming Operations. The proposal would address non-logging, tree-trimming and cutting operations on residential and commercial work sites.

As an example of existing industry requirements, ANSI-Z133.1-2006 contains the following components:

- General safety requirements (traffic control around the jobsite, emergency procedures and readiness, personal protective equipment, fire protection);
- Electrical hazards (working in proximity to electrical hazards, storm work and emergency conditions, line clearance);
- Safe use of vehicles and mobile equipment used in arboriculture (aerial devices, brush chippers, sprayers and related equipment, stump cutters, vehicles, log loaders, knucklebooms, cranes and related hoists, specialized units, equipment-mounted winches);
- Portable power hand tools (portable electric power tools, chain saws, powered pole tools and backpack power units);
- Hand tools and ladders (cant hooks, cant dogs, peaveys and tongs, wedges, chisels, gouges, chopping tools, ladders);
- Work procedures (ropes and arborist climbing equipment, pruning and trimming, cabling, rigging, tree removal, bush removal and chipping, limbing and bucking, pesticide application); and
- Training.

However, the following issues have been identified with regard to ANSI Z133.1-2006:

- The term "arboriculture" is not defined in sufficient detail.
- Clarification would be needed on the scope of any regulation in the following areas:

Line clearance tree-trimming (see 1910.269)

Logging operations (see 1910.266)

Lot clearing activities involving felling of trees (see 1910.266)

- The document contains “should” or “may” language in some provisions, which means those provisions would not be enforceable. Prescriptive language such as “shall” or “will” language would have to be added.
- VOSH currently enforces ARM §120 (16VAC25-60-120) requiring that employers comply with manufacturer’s specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of machinery, vehicles, tools, materials and equipment. ANSI Z133.1-2006 contains provisions that address the use and operation of machinery, vehicles, tools, etc., so any conflicts with ARM §120 (16VAC25-60-120) would have to be corrected (e.g., ANSI Z133.1-2006 contains provisions allowing the use of a crane to lift an individual in an arborist’s saddle, but the ability to make such a lift would be contingent on the crane manufacturer’s operating instructions).
- ANSI Z133.1-2006 contains provisions addressing traffic safety and references the U. S. Department of Transportation (DOT) Manual on Uniform Traffic Control Devices (MUTCD) and applicable state and local laws and regulations. Although the MUTCD has been adopted by OSHA and VOSH, it has been found to contain a great deal of “should” or “may” language, which means those provisions would not be enforceable. A review of the Virginia Department of Transportation (VDOT) Manual on Uniform Traffic Control Devices would have to be conducted for possible use instead of the federal version.
- ANSI Z133.1-2006 contains provisions addressing first aid and cardiopulmonary resuscitation (CPR). Such provisions would have to be reviewed in light of the Board’s current rulemaking which proposes a change in the general industry requirements for first aid/CPR.
- ANSI Z-133.1-2006 addresses the issue of exposure to noise hazards. Such provisions would have to be reviewed against any more stringent requirements contained in the VOSH Noise Standard, 1910.95.
- ANSI Z-133.1-2006 addresses the use of personal protective equipment (PPE). Such provisions would have to be reviewed against any more stringent requirements contained in the VOSH PPE Standards, 1910.132 through 138.
- ANSI Z133.1-2006 contains provisions addressing reverse signal operation of vehicles. Such provisions would have to be reviewed in light of the Board’s current rulemaking which proposes a change in the general industry requirements reverse signal operation of vehicles.
- ANSI Z133.1-2006 contains provisions addressing proper use of personal fall arrest systems while working from an aerial lift (permits use of only a body belt and lanyard). Such provisions would have to be reviewed in light of advances in personal protective equipment and current manufacturer’s requirements for use of PPE in aerial lifts (full body harness and energy absorbing lanyard are normally required while working from aerial lifts).
- ANSI Z-133.1-2006 addresses the use of cranes. Such provisions would have to be reviewed against any more stringent requirements contained in VOSH Standards 1910.180, Crawler, Locomotive and Truck Cranes, and 1910.184, Slings (e.g., the prohibition against employees working under a suspended load of a crane or other hoisting equipment).
- Certain arborist-related terms used in ANSI Z-133.1-2006 are not defined in (e.g., “split-tail system” and “split tails”).

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.

VOSH could continue to apply the Logging Standard, 1910.266, to arborist/tree trimming operations, however, this standard does not specifically address hazards associated with just trimming trees. In instances where the Logging Standard does not apply, VOSH has had to use regulations of general application to address some hazards (e.g., 1910.95, Occupational Noise Exposure; 1910.132, Personal protective equipment; 1910.133, Eye and face protection; 1910.135, Head Protection; 1910.136, Foot protection; 1910.151, Medical services and first aid; 1910.67, Vehicle-mounted elevating and rotating work platforms; etc.), and the “general duty clause,” Va. Code §40.1-51.1(a), which provides that:

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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
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) 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.

The proposed regulation will have no impact on the institution of the family or family stability.