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

<b>Agency name</b>	Virginia Department of Labor and Industry
<b>Virginia Administrative Code (VAC) citations</b>	16 VAC 25- 96; 16 VAC 25-97; 16 VAC 25-178; and 16 VAC 25-179
<b>Regulation titles</b>	16 VAC 25-96, Reverse Signal Procedures – Existing General Industry Standards – Off-Road Vehicles and Equipment; 16 VAC 25-97, Reverse Signal Procedures – General Industry – Vehicles and Equipment Not Covered by Existing Standards; 16 VAC 25-178, Reverse Signal Procedures – Existing Construction Industry Standards – Off-Road Vehicles and Equipment; and 16 VAC 25-179, Reverse Signal Procedures – Construction Industry – Vehicles and Equipment Not Covered by Existing Standards
<b>Action titles</b>	Amendment to Reverse Signal Operation Safety Procedures for Existing General Industry Standards Governing Off-road Vehicles and Equipment; Amendment to Reverse Signal Operation Safety Procedures for Existing Construction Industry Standards Governing Off-road Vehicles and Equipment; Amendment to Reverse Signal Procedures for Existing Construction Industry Standards Governing Off-Road Vehicles and Equipment; and Amendment to Reverse Signal Procedures for Construction Industry Governing Vehicles and Equipment Not Covered By Existing Standards
<b>Date this document prepared</b>	March 10, 2006; Revised August 17, 2006

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 four proposed changes is to provide more comprehensive protection to employees in both general industry and construction industry work zones who are exposed to vehicular and equipment traffic.

16 VAC 25-96 addresses existing general industry standard 16 VAC25-90-1910.269(p)(1)(ii).

16 VAC 25-97 addresses general industry work zones not otherwise covered by the proposed amendment to 16 VAC25-96.

16 VAC25-178 addresses existing construction industry standards §§1926.601(b), 1926.602(a)(9)(ii) and 1926.952(a)(3).

16 VAC25-179 addresses existing construction industry work zones not otherwise covered by the proposed amendment to 16 VAC25-178.

These four regulations will provide the additional protection to all employees in general industry and the construction industry in working conditions where vehicles and machinery with obstructed views to the rear are operating and are not otherwise covered by existing regulation.

## 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 VOSH 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.*

The existing construction industry and general industry reverse signal standards do not provide adequate protection for employees in construction work zones from vehicular traffic and machinery operated with obstructed views to the rear.

The existing standards are limited in their scope and do not apply to all construction or general industry vehicles or equipment with an obstructed view to the rear. For instance, §1926.601(b)(4) only applies to motor vehicles on an off-highway jobsite not open to public traffic, and specifically does not apply to earth- moving equipment covered by §1926.602(a)(9)(ii). Neither regulation covers compactors or “skid-steer” equipment. In general industry, §1910.269(p)(1)(ii) only applies to motor vehicles in the electric power generation, transmission and distribution industry.

A review of Virginia Occupational Safety and Health (VOSH) fatal construction accident investigations since 1992 found 15 fatal vehicle or equipment accidents in work zones where employees were struck:

<u>Number of fatalities</u>	<u>Type of vehicle</u>
8	dump truck
7	One each: cement truck, fuel truck, pavement planer, vacuum truck, tandem truck, trackhoe and other-unspecified.
<hr style="width: 20%; margin: 0 auto;"/> 15      total	

A review of VOSH fatal general industry accident investigations since 1992 found nine fatal accidents in work zones where employees were struck:

<u>Number of fatalities</u>	<u>Type of vehicle</u>
3	logging vehicles
2	garbage trucks
2	tractor-trailer trucks
1	fork lift
1	tow truck
<hr style="width: 20%; margin: 0 auto;"/> 9      total	

While in some cases it was found that reverse signal alarms were not operational, many accidents occurred even with operational reverse signal alarms. In a situation where an existing standard appears to be applicable, VOSH is often faced with the difficulty of having to document whether a reverse signal alarm was audible over the surrounding construction noise at the time of the accident. This can be problematic at best, since exact accident conditions cannot be recreated. In at least two cases, an employee operating as the signaler was struck by the vehicle when the driver lost sight of the employee while backing-up. Fatal accidents also occurred to employees engaged in their own work unrelated to such vehicles or equipment where they apparently became de-sensitized to the familiar and repeated sounds of reverse signal alarms and other construction noise in the work zone.

When VOSH investigates a back-up accident involving a vehicle not covered by existing regulatory standards, the only enforcement tool available is the use of §40.1-51.1.A., referred to as the “general duty clause.” The general wording of the “general duty clause” does not specifically mention hazards associated with vehicles or equipment or any other specific situation. A concern with the use of the general duty clause is that it does not always result in consistent application of safety rules. Another issue regarding the general duty clause is that the statute has been interpreted in case law to only apply to “serious” violations, i.e., those that would cause “death or serious physical harm”. It cannot be used to eliminate “other-than-serious” hazards before they can become serious in nature.

## 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.*

Methods that may be considered for providing additional protection for employees would be to amend the standards to require the following for all vehicles in construction and general industry with an obstructed view to the rear:

- \* Covered vehicles have a reverse signal alarm audible above surrounding noise, and
- \* Covered vehicles only travel in reverse when a designated employee has signaled that it is safe to do so, and
- \* Designated employee signalers would have no other assigned duties while engaged in signaling activities, and would be required to wear reflective vests, and
- \* Drivers of covered vehicles only travel in reverse when they have the designated employee signalers in view and that if visual contact is lost, that the vehicle be immediately stopped until visual contact is regained, and
- \* Employers train drivers of covered vehicles and designated employee signalers on the requirements of the amended or new regulations.

Other issues that could be considered include:

- \* Covered vehicles with the technological capability to provide the driver with a full view behind the vehicle (e.g., through the use of a video camera) could be operated in reverse without a designated employee signaler.
- \* In the construction industry, covered vehicles could be exempted from using a designated employee signaler if they have a reverse signal alarm audible above surrounding noise and the driver visually determines from outside the vehicle that no employees are in the backing zone and that no employees are capable of entering the backing zone during back-up.
- \* In general industry, covered vehicles that were not equipped with a reverse-signal alarm upon manufacture or later retro-fitted with an alarm would be exempt from the reverse signal alarm requirement if they either use a designated employee signaler, or if the driver visually determines from outside the vehicle that no employees are in the backing zone and that no employees are capable of entering the backing zone during back-up.

- \* Vehicles with a cab capable of rotating 360 degrees would not be considered to have an obstructed view to the rear.
- \* To the extent that any federal Department of Transportation (DOT) regulation applying to general industry vehicles conflicts with any new regulation adopted by the Board, the DOT regulation would preempt any Board regulation in accordance with Va. Code §40.1-1, which provides in part that:

“...however, nothing in the occupational safety and health provisions of this title or regulations adopted hereunder shall apply to working conditions of employees or duties of employers with respect to which the Federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4 (b) (1) of the federal act.”

[NOTE: Section 4(b)(1) of the OSH Act provides that “Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.”]

**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.*

The Department is unaware of any viable alternatives to the proposed regulatory action to decrease the number of worker fatalities and injuries caused by unintended backovers. Any alternatives to be considered by the Department would have to be feasible from both a technological and cost perspective as well as be practical to implement procedurally in the workplace.

**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 at the public hearing or by mail, email or fax to Mr. Jay Withrow, Director of the Office of Legal Support, Powers-Taylor Building, 13 South Thirteenth Street, Richmond, Virginia 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.

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 can 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.*

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The agency is not using the participatory approach in the development of the proposal at this time. The Public Participation Guidelines for the Safety and Health Codes Board (16 VAC 25-10-10, *et seq.*) allow for the formation of standing or ad hoc advisory groups to make recommendations on a proposed regulation (16 VAC 25-10-60), but the Board did not opt for such an approach when the NOIRA was approved.

### 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.*

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As a result of the proposed regulation, Virginia construction and general industry employees would benefit from increased work zone safety requirements from vehicular and equipment traffic. A significant reduction in employee deaths attributed to covered vehicles is anticipated.