DRAFT

SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
TUESDAY, MARCH 7, 2006

A regular meeting of the Safety and Health Codes Board was called to order at 10:05 a.m.

BOARD MEMBERS PRESENT: Mr. Roger Burkhart, Vice Chair presided
Mr. James J. Golden
Dr. James H. Mundy
Mr. Satish Korpe
Mr. Chuck Stiff
Mr. Daniel A. Sutton
Dr. Khizar Wasti

BOARD MEMBERS ABSENT: Mr. Louis Cernak, Chairman
Ms. Juanita Garcia
Ms. Anna Jolly
Mr. Alvin Keels, Sr.
Mr. Kenneth Rigmaiden
Ms. Milagro Rodriguez, Secretary
Mr. Linwood Saunders

STAFF PRESENT: Mr. Ray Davenport, Labor and Industry Commissioner
Mr. Bill Burge, Assistant Commissioner – Programs
Mr. Glenn Cox, Director of VOSH Programs
Mr. Fred Barton, Director/Chief Inspector –Boiler Safety Compliance
Mr. Ronald Graham, Health Compliance Director
Mr. Jay Withrow, Office of Legal Support Director
Mr. John Crisanti, Office of Planning and Evaluation Manager
Ms. Reba O'Connor, Regulatory Coordinator
Ms. Debbie Rigdon, Human Resource Manager
Ms. Jennifer Wester, Director, Cooperative Programs
Ms. Regina Cobb, Agency Management Analyst Sr.

OTHERS PRESENT: Mr. Mark Anderson, American Boiler Inspection Services, Inc.
Mr. Robert I. Ledbetter, Kenbridge Construction Co., Inc.
Mr. Steve Vermillion
Mr. Tom Pope, Federal OSHA
Ms. Anne Burkhart

ORDERING OF AGENDA

Vice Chairman Roger Burkhart presided over the meeting in the absence of Chairman Louis Cernak. After calling the meeting to order at 10:05 a.m., Mr. Burkhart asked for a motion from the Board to approve the proposed Agenda. Dr. James Mundy made the motion to approve the Agenda, as submitted, and Mr. Chuck Stiff seconded the motion. The motion was carried by voice vote.

APPROVAL OF MINUTES

Mr. Burkhart asked for a motion from the Board to approve the Minutes of the September 15, 2005 Board meeting Mr. Stiff made the motion and Dr. Mundy seconded the motion. The motion was carried by voice vote. Next, Mr. Burkhart asked for a motion to approve the Minutes of the January 31, 2006 Public Hearing. Dr. Mundy made the motion to accept the Minutes, as submitted, and Mr. Stiff seconded the motion. The motion was carried by voice vote.

PUBLIC COMMENT

Mr. Burkhart opened the floor to comments from the public on matters relevant to the Board. The first speaker was Mr. Mark Anderson, President of the American Boiler Inspection, Inc., Richmond, VA, who appeared to speak regarding the Regulation Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors. He stated that he opposed the current language and intent of the DOLI proposal to regulate the Financial Responsibility of Contract Fee Inspection companies. He noted that he does not oppose financial responsibility and that his company carried insurance prior to any DOLI requirements for insurance. He stated that he opposed the proposed tiered financial responsibility as it is written.

Mr. Anderson stated that he has not seen "any reports, any consideration, any research, nothing in Department of Labor's drawing up of this $2 million limit." He admitted to seeing one email to American Insurance Association (AIA), asking his competition how much insurance that Mr. Anderson's company should carry. He said that the AIA's goal is to support the agenda of their members, who are insurance companies of Virginia and who are in competition with Mr. Anderson's company. Mr. Anderson also stated that his company has never had a single accident in ten years and they have never seen a single reported incident of negligent inspection, nor has he seen a single documented report of a drive-by inspection taking place.

Mr. Anderson stated that the bases of his comments are "there's nothing to justify these limits that the Department of Labor is suggesting." He added that "DOLI cannot provide one piece of evidence to show that they studied or evaluated the possible limits or risk assessment."

Mr. Anderson concluded by urging the Board not to adopt the DOLI proposal for tiered Financial Responsibility as it is written.

The second speaker was Mr. Robert I. Ledbetter, Director of Safety & Human Resources, Kenbridge Construction Company, Inc., Kenbridge, Virginia, who expressed his desire not to

have the multi-employer citation policy reinstated. While praising the Department for its good work in the citations and for correcting problems on the worksites, he stressed that he does not feel that the general contractors should be responsible for everything that happens on the site.

After all of the Public Comments had been received, Mr. Burkhart moved on to Old Business.

OLD BUSINESS

16 VAC 25-55, Proposed Regulations Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors

Mr. Fred Barton, Chief Boiler Inspector, acknowledged reviewing the public comments that had been received and that the Department saw no reason to alter its original proposal. He stated that the Boiler Safety Compliance Program of the Department of Labor and Industry requests the Safety and Health Codes Board to consider for adoption as a final regulation of the Board the regulatory language governing the financial responsibility of boiler pressure vessel contract fee inspectors, with a proposed effective date of June 1, 2006.

Mr. Barton explained that the draft final language requires contract fee inspectors operating in the Commonwealth to demonstrate financial responsibility (in the form of insurance, guaranteed surety or self-insurance) for bodily injury and/or property damage resulting from or directly related to an inspector's negligent inspection or recommendation for certification of a boiler pressure vessel. With respect to financial responsibility, Mr. Barton explained the proposed aggregate limits of $500,000 for any contract fee inspector with less than 1 percent market share; $1 million for those with 1 percent up to and including 10 percent market share; and $2 million for those with more than 10 percent market share or any contract fee inspector that employees or has an arrangement with other contract fee inspectors.

Mr. Barton called the Board's attention to a non-substantive change from the proposed regulation adopted by the Board at its May 24, 2005 meeting. He noted that the change in the definition of "contract fee inspection agency", made solely to further clarification, does not change regulatory intent. The definition was modified to add the word "certificate" to further define the type of inspection being performed under these regulations.

The purpose of the regulation is to set minimum aggregate limits for coverage or other means provided for the *Code of Virginia* to insure the financial responsibility of boiler and pressure vessel contract fee inspectors operating in the Commonwealth and to assure additional protection to the public in cases where there's bodily injury and/or property damage resulting from or directly relating to a contract fee inspector's negligent inspection or a recommendation for certification of a boiler or pressure vessel.

Mr. Barton informed the Board that contract fee inspectors would be required to provide documentation of their means of indemnification (instrument of insurance, guaranty, surety, or self-insurance) at the time of the certification or before performing inspections and at renewal.

With regard to impact on employers and employees, Mr. Barton stated that employers, employees, and the general public would be compensated up to the level of the required financial responsibility in case of a bodily injury and property damage resulting from or directly related to a contract fee inspector's negligent inspection or recommendation for certification of a boiler and pressure vessel. He informed the Board that no additional fiscal impact is anticipated on the Department beyond the cost of promulgation of the regulation. Mr. Barton pointed out that there had been four comments received and that responses to these comments were included in the briefing package for this proposed regulation.

Mr. Burkhart asked Mr. Barton how would the level of insurance and the availability of insurance be monitored by Virginia as things change for boiler inspectors. He then asked "when the extra umbrella insurance or the level of insurance is not available, not to the fault of the inspector, what means do they have to contact the State or try to get the issue resolved."

Mr. Barton responded that "the law encourages other ways: surety bonds, guaranties, other instruments that the inspector or agency would have a choice to choose from." He explained that as the industry changes, the Department will bring revisions of the regulation before the Board. He added that the reason we need these regulations is that the law has always said that the contract fee inspectors had to have insurance.

Next, Mr. Stiff asked Mr. Barton to talk a little bit about the negligent inspections. Mr. Barton recalled a couple of prior instances where insurance inspectors submitted inspection reports for inspections that they did not see, inspect nor perform. He stated that the Department became aware of this because the Department had to send an invoice for the fee and the customer complained because they don't have a boiler at that site. He stated that the customer's complaint is the impetus for starting an investigation and that these regulations would cover contract fee inspectors or companies in the future.

Mr. Stiff then asked Mr. Barton if there is a database in place to track negligent inspections. Mr. Barton responded in the negative but the law allows him as Chief Inspector to investigate those carriers, and that "it's just from personal knowledge." Mr. Stiff requested a little more information on how the $2 million amount was determined. Mr. Barton responded that since there had been no precedence, he contacted the American Insurance Association ("AIA") as the only entity that might have any experience. The AIA recommendation of $2 million for all inspectors became the basis of the Department's policy.

Mr. Barton recommended, on behalf of the Boiler Safety Compliance Program, that the Safety and Health Codes Board adopt the attached draft final language for Contract Fee Inspector Financial Responsibility regulation as a final regulation of the Board, with an effective date of June 1, 2006, as authorized by §§ 40.1-51.9:2 C. and 40.1-51.6.

Mr. Burkhart asked for a motion on the recommended action. Mr. Satish Korpe stated that the Board needed more clarification about why the regulation should be adopted and about what the guidelines are and why the $2 million limit has been imposed by the Department. Mr. Korpe stated that there was no mention in the briefing package about the cost of boilers that are damaged and related damage occurring to the building or any of the safety concerns. He

continued by inquiring about how much revenue has been generated out of these inspections that justify the cost, what is the actual market and what is the expected damage.

Mr. John Crisanti, Manager of the Office of Planning and Evaluation for the Department, informed Mr. Korpe that we are discussing only property casualty damage which pertains directly to this regulation. Mr. Crisanti stated that "what's mandated in the charge by the legislature statutorily is to come up with limits for property casualty liability for the contract fee inspector. " Mr. Crisanti stated that, based on previous discussions with the insurance companies, the Department believed "these levels of $2 million just for property casualty, given the experience noted in Comment 8, are more than justified."

Mr. Korpe made a motion that more research be submitted by staff justifying the facts before us and to differentiate between bodily and physical damage. Mr. Korpe added that "research" should include systematic presentation and justification with relation to the facts. Messrs. Stiff and Sutton seconded the motion. The motion was carried by a voice vote of 5-2.

Mr. Barton distributed hand-outs that he believed would address the issue about bodily injury.

16 VAC 25-60, Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program

On behalf of the Department of Labor and Industry, Mr. Jay Withrow, Director of Legal Support, requested the Board to consider for adoption as "final" standards the following amendments to the Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program, and to continue the regulatory adoption process. The proposed effective date is June 1, 2006.

Mr. Withrow explained that the briefing package contained a summary of the approximately 17 changes listed and that these are the same changes that were discussed in detail before the Board on September 15, 2005. He did, however, call the Board's attention to one additional proposed typographical correction that the Department had made.

Mr. Withrow did not discuss each of the 17 amendments, however, he called the Board's attention to page 5 under the Basis and Purpose section. He informed the Board that a number of the 17 changes have been classified as non-substantive changes, procedural changes (e.g., the way we handle complaint processing), changes in statutory language, etc. that the Department has to update the regulation because they refer to particular statutes. He stated that the one issue that we received comments on was the multi-employer worksite issue, which was in response to a court case that the Department had which upheld in part and threw out in part our multi-employer citation policy.

He mentioned the recommended changes for the Freedom of Information section which will allow the Department to release information, especially to the family of victims, a little sooner than the Department had been allowed previously. He called the Board's attention to the clarification of the meaning of the term "agricultural operations" which had not been defined,

although it was used in the VOSH standards. He informed the Board that in Sections 120, 130, 140 and 150 provisions were added to allow the Department to cite employers who fail to comply with the applicable manufacturer's specifications and limitations for when equipment is used.

Mr. Withrow mentioned that in section 260, clarification was added, based on staff experience, to determine what the enabling statute means when it states "No citation may be issued after the expiration of six months following the occurrence of an alleged violation."

Mr. Withrow then directed the Board's attention to the public comments and the Department's responses to them. With respect to Mr. Steve Vermillion's comments concerning whether a multi-employer worksite is necessary for VOSH to be as effective as federal OSHA, Mr. Withrow informed the Board that every State Plan state has a multi-employer worksite policy and that VOSH is required to have one as well. He then addressed both commenters' concern that general contractors are almost held to a strict liability situation under multi-employers as if they are responsible for everything on the worksite. He stated that it is not the intent of the regulation and the policy, nor has it ever been, to hold general contractors strictly liable. In response to Mr. Robert I. Ledbetter's concerns, Mr. Withrow stated that "we specifically say in the regulation that the Department can hold responsible prime subcontractors who have control over a specific area of the job site or a particular phase of the construction project and in cases where the general contractor has done a good job of hiring reputable people, and done their normal oversight activities, they should be able to avoid citations.

Mr. Withrow referred to page 18 of the briefing package and read facts that are looked at in cases to determine which companies will receive citations. Next, Mr. Withrow discussed the one change in the briefing package, which appeared in section 260.G. on page 35. He informed the Board that a couple of non-substantive typographical errors, consisting of changing a period to semicolon at the end of item 5 and at the end of item 6, adding a semicolon followed by the word "and". He stated that this change will make it clear that all seven items are things you have to comply with and that all seven items come out of our procedures that we have had for years on multi-employer worksites.

Mr. Korpe asked Mr. Withrow about educating the industry about the amendments to the Administrative Regulations. Mr. Withrow responded that interested parties can become subscribers to the Department's newsletter, get information on our website, attend a VOSH conference which provides training sessions on new or amended regulations, or request a training session by the Department which can be provided around the state for individuals. Mr. Stiff also added that there a various local interest groups, like the American Society of Safety Engineers (ASSE), AIHA, Virginia Manufacturers Association (VMA) that are tied in and receive this information. Mr. Withrow noted that the Department does not have the wherewithal to do individual mailings to individual companies, but the Department would go through associations, contractors associations, etc.

With respect to the impact of these amendments, Mr. Withrow stated that the Department does not feel that there is a significant impact as we are codifying current and long-standing policies, interpretations, procedures reflected in case law and/or statutes with regard to the multi-employer

citation policy. He said that there would be some costs associated with reinstituting the multi-employer citation policy. He added that no adverse impact on employees or the Department was anticipated.

On behalf of the staff of the Department of Labor and Industry, Mr. Withrow recommended that the Safety and Health Codes Board consider for adoption the final regulation to amend 16 VAC 25-60, Administrative Regulations for the Virginia Occupational Safety and Health Program, as authorized by Virginia Code Section 40.1-22(5), with an effective date of June 1, 2006.

Since there were no additional questions asked, Mr. Stiff made the motion to accept Mr. Withrow's recommendation. Messrs. Golden and Korpe seconded the motion, which was carried by unanimous voice vote.

NEW BUSINESS

16 VAC 25-90-1910.178, Powered Industrial Trucks, §1910.178

On behalf of the Department of Labor and Industry, Mr. Glenn Cox, Director of VOSH Programs, requested the Board to consider for adoption federal OSHA's correcting amendment to the final rule for Powered Industrial Trucks, §1910.178, as published in 70 FR 57146 on September 30, 2005, with a proposed effective date is June 1, 2006.

Mr. Cox explained that on June 2, 2003, OSHA corrected a 22-year old error by deleting subsection (m)(12) from the Powered Industrial Trucks Standard, §1910.178, covering the use of powered industrial trucks to lift personnel. Section 1910.178 (m)(12) was deleted because it had been invalidly promulgated in 1971 from a non-mandatory provision of a national consensus standard into a mandatory standard, thus making the standard legally unenforceable. He stated that this current change completes the 2003 correction by removing and reserving the subordinate paragraphs, (i) through (iii), of paragraph (m)(12) of the Powered Industrial Trucks standard, §1910.178.

Mr. Cox concluded by recommending that, on behalf of the staff of the Department of Labor and Industry, the Safety and Health Codes Board adopt federal OSHA's correcting amendment to the final rule for Powered Industrial Trucks, §1910.178, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of June 1, 2006. There was no discussion. Dr. Mundy made the motion to accept Mr. Cox's recommendation. Mr. Stiff seconded the motion which was carried unanimously by voice vote.

**Updating OSHA Standards Based on National Consensus Standards:
General, Incorporation by Reference, §1910.6;
Hazardous Materials, Flammable and Combustible Liquids, §1910.106;
General Environmental Controls, Temporary Labor Camps, §1910.142;
Hand and Portable Powered Tools and Other Hand-Held Equipment,
Guarding of Portable Powered Tools and Other Hand-Held Equipment, Guarding of Portable Powered Tools, §1910.243;
Welding, Cutting and Brazing, Arc Welding and Cutting, §1910.254; and
Special Industries, Sawmills, §1910.265**

On behalf of the Department of Labor and Industry, Mr. Glenn Cox, requested the Safety and Health Codes Board to consider for adoption federal OSHA's revised final rule for Updating OSHA Standards Based on National Consensus Standards, etc., as published in 70 FR 53925 on September 13, 2005, with an effective date of June 1, 2006.

Mr. Cox explained that this was a type of housecleaning that OSHA incorporated. He stated that Federal OSHA revoked three references to outdated national consensus standards and two references to industry standards and that, by eliminating the outdated references, OSHA would clarify employer obligations under the applicable OSHA standards and reduce administrative burdens on employers and OSHA.

These revisions are part of OSHA's overall effort to update OSHA standards that reference, or that include language taken directly from, outdated consensus standards.

On behalf of the Staff of the Department of Labor and Industry, Mr. Cox recommended that the Safety and Health Codes Board adopt federal OSHA's final rule for Updating OSHA Standards Based on National Consensus Standards, etc., as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of June 1, 2006.

Mr. Sutton motioned to accept Mr. Cox's recommendation and Dr. Mundy seconded the motion which was unanimously carried by voice vote.

Roll-over Protective Structures for the Construction Industry and the Agriculture Industry; 16 VAC 25-175-1926.1002; 16 VAC 25-175-1926.1003; and Appendix "A" to Subpart "W" of 16 VAC 25-175; 16 VAC 25-190-1928.51; 16 VAC 25-190-1928.52; 16 VAC 25-190-1928.53; and Appendix "B" to Subpart "C" of 16 VAC 25-190.

Mr. Glenn Cox requested, on behalf of the Department, that the Safety and Health Codes Board consider for adoption federal OSHA's direct final rule for Roll-Over Protective Structures, as published in 70 FR 76979 on December 29, 2005, with an effective date of June 1, 2006.

Mr. Cox explained that OSHA has rescinded its 1996 amendments which incorporated the national consensus standards regulating the testing of Roll-Over Protective Structures (ROPS) used to protect operators of wheel-type tractors and restored its originally developed standards. He stated that minor non-substantive changes to improve readability and understanding were also added.

Mr. Cox stated that by going back to the original standard OSHA has allowed an additional testing method for the Roll-Over Protection Structures (ROPS) that had been omitted by use of the consensus standard. He added that this revision will have little effect on an employer, but instead on the manufacturer of the vehicles that are equipped with the roll-over protection. Since there were no questions, Mr. Cox continued by requesting, on behalf of the staff of the Department of Labor and Industry, that the Safety and Health Codes Board adopt the amendments to the Standards for Roll-over Protective Structures for Parts 1926 and 1928, as specified herein and as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4.(c.), with an effective date of June 1, 2006.

Dr. Mundy made the motion to accept Mr. Cox's recommendation and Mr. Stiff seconded the motion, which was carried unanimously by voice vote.

Safety Standards for Fall Protection in Steel Erection: Slip Resistance of Skeletal Structural Steel, §1926.754(c)(3) and Appendix B of subpart R, Steel Erection

Mr. Cox requested, on behalf of the VOSH Program, that the Safety and Health Codes Board consider for adoption federal OSHA's revised final rule for the Safety Standards for Fall Protection in Steel Erection: Slip Resistance of Skeletal Structural Steel, §1926.754(c)(3) and Appendix B of subpart R, Steel Erection, as published in 71 FR 2879 on January 18, 2006, with an effective date of June 1, 2006.

Mr. Cox began by explaining that Federal OSHA revoked the slip-resistance requirement for the painted and coated top walking surface of any structural steel member installed after July 18, 2006. He stated that the American Society for Testing and Materials (ASTM) was working to come up with a test which would show how much slip-resistance this coating would allow; however, ASTM could not come up with such a test. Mr. Cox concluded by stating that the lack of completed test methods has delayed the development of suitable slip resistant coatings. Therefore, OSHA had to revoke §1926.754(c)(3) because it was unenforceable.

On behalf of the staff of the Department of Labor and Industry, Mr. Cox recommended that the Safety and Health Codes Board adopt federal OSHA's revisions to 16 VAC 25-175-1926.754, Safety Standards for Fall Protection in Steel Erection: Slip Resistance of Skeletal Structural Steel, §1926.754(c)(3), as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of June 1, 2006.

Mr. Korpe made the motion to accept Mr. Cox's recommendation. Dr. Mundy seconded the motion. The motion was unanimously carried by voice vote.

Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend the Medical Services and First Aid Standards for General Industry, §1910.151(b) and the Construction Industry, §1926.50(c)

Mr. Withrow, Director of the Office of Legal Support, began by informing the Board that the Department is not suggesting regulatory language with this NOIRA to amend the Medical Services and First Aid Standards for General Industry and the Construction Industry. He stated

that the VOSH Program requests the Board to authorize the Department to initiate the regulatory process to amend the medical services and first aid standards for general industry, §1910.151(b), and the construction industry, §1926.50(c), by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act (§2.2-4007).

Mr. Withrow noted the language of the current standards and pointed out the differences in the general industry and construction industry standards. He listed some of the deficiencies of the general industry and construction first aid standards: they do not assure that adequate first aid attention for employees will be provided in certain hazardous occupations; they do not include a requirement for training to include CPR as well as first aid; nor do they clearly state that the designated first aid providers will be available at each work location and work shift. Also, the current general industry standard would allow employers to opt to physically move an employee who has suffered a head or spinal injury by transporting them to a medical facility in an area where emergency medical responders were not available within the three-to-four minute time limit, the normal response time for a hazardous industry. Compounding these deficiencies, the general industry standard was conversely overreaching by requiring first aid training in certain occupational settings where there is no exposure to hazards that could cause death or serious physical harm, such as in an office setting.

He added that the standards are confusing and difficult to enforce because of the difference in the regulatory language and because federal OSHA has traditionally enforced them by using a series of interpretations that it publishes. He also mentioned that, from an enforcement standpoint, there is additional difficulty for the VOSH Program to determine and document whether an infirmary, clinic or hospital would be accessible within 3-4 minutes by going to such lengths as having to drive from the inspection site to the facility.

He also noted that there is no current requirement for CPR training which is needed. He informed the Board that the Department would like to initiate the regulatory process and see if there is some way to make these regulations more consistent, more easily enforceable and possibly improve first aid response onsite for injured employees and, perhaps, eliminate the need for first aid responders in parts of general industry.

Mr. Withrow stated that one of the purposes of this NOIRA is to assure that an employer provides immediate access to first aid and CPR on each worksite for each work shift in hazardous industries or occupations.

He stated that, from an enforcement standpoint, for calendar year 2005, the Department issued 117 violations of the general industry standard first aid requirement and 424 violations of the first aid requirement in the construction industry.

In addressing the impact of an amended regulation on employers, Mr. Withrow stated the employers with employees in hazardous occupations or hazardous industries could be required to have at each job site for each job at least one employee trained in first aid and CPR. He added that while many employers in the construction industry already assure that some employees are trained, some employers would have to incur the additional cost of securing such training. He mentioned additional issues that could be considered include allowing an employer to make

written agreements with another contractor to provide designated employees to serve as first aid responders to lessen the cost of compliance with the standard.

On behalf of the staff of the Department, Mr. Withrow recommends that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action to amend the medical services and first aid standards for general industry, §1910.151(b), and the construction industry, §1926.50(c), to require employers to train employees to render first and CPR, when the employees are exposed to occupational hazards which could result in death or serious physical harm.

Since there were no additional questions, Mr. Korpe moved to accept Mr. Withrow's recommendation. Mr. Stiff seconded the motion, which was carried unanimously by voice vote.

Request to Initiate a Notice of Intended Regulatory Action (NOIRA) to: Amend Reverse Signal Operation Safety Procedures for Existing General Industry and Construction Industry Standards Governing for Off-road Vehicles and Equipment; and Establish Reverse Signal Operation Safety Procedures for Motor Vehicles or Equipment Not Covered By Existing Standards for General Industry and Construction

Mr. Withrow began with the requested action where the VOSH Program requests the Safety and Health Codes Board to authorize the Department to initiate the regulatory process pursuant to the Virginia Administrative Process Act (§2.2-4007) by the filing of a Notice of Intended Regulatory Action (NOIRA) to: Amend Reverse Signal Operation Safety Procedures for Existing General Industry and Construction Industry Standards Governing for Off-road Vehicles and Equipment; and to Establish Reverse Signal Operation Safety Procedures for Motor Vehicles or Equipment Not Covered By Existing Standards for General Industry and Construction.

Mr. Withrow called the Board's attention to some specific standards that already address back-up alarms and signalers listed in the briefing package. He noted, however, that there is a large gap in the kinds of vehicles are and are not covered.

Mr. Withrow stated that generally construction standards dealing with reverse signal alarms say that "if you have an obstructed view to the rear in your vehicle, you shall have a reverse signal alarm, or you shall have somebody who signals the vehicle to back up."

Historically speaking, Mr. Withrow stated that since 1992, there have been 15 fatal vehicle or equipment accidents in the construction industry and nine in general industry where employees were struck by vehicles that were backing up. He referenced page 3 of the briefing package which listed the kinds of vehicles that were involved. He continued by stating that the way the regulations are currently structured, whether the alarm was audible over the surrounding construction noise at the time of the accident must be documented although VOSH was not onsite at the time the accident occurred. Mr. Withrow also called the Board's attention to fatal accidents occurring when the victim had apparently become de-sensitized to the sound of the back-up alarm because of so many other noises.

He stated that existing regulations are limited in scope and do not apply to all construction vehicles with obstructed views to the rear. He added that for equipment that is not covered by current regulations, VOSH has to cite using the general duty clause, Va. Code §40.1-51.1.A.

Mr. Withrow informed the Board that the purpose of this NOIRA is to provide more consistent and comprehensive protection to the employees in construction and general industry work zones exposed to vehicular and equipment traffic, and to provide the same degree of protection to employees in similar working conditions where vehicles and machinery with obstructed views to the rear are not otherwise covered by the regulations.

Mr. Withrow listed issues that the Department would like to be considered for input during the comment process:

* 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 include:

* Covered vehicles with the technological capability to provide the driver with a full view behind the vehicle (e.g., though the use of a video system) 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 a 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 §40.1-1 of the Code of Virginia.

Mr. Withrow stated that, with respect to the impact on employees, construction and general industry employees would benefit from increased work zone safety requirements from vehicular and equipment traffic and significant reduction in the employee deaths attributed to other vehicles is anticipated. He added that no significant impact would be anticipated on the Department because there is no regulatory language proposed at this point; instead, the Department is trying to gather information.

Following numerous questions and responses, Mr. Withrow stated that staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to amend the following standards (sections only listed): §1910.269(p)(1)(ii); §1926.601(b)(4); §1926.602(a)(9)(ii); and §1926.952(a)(3).

In conclusion, Mr. Withrow reiterated that the Department is asking for comments about the issues that were presented in the briefing package.

Mr. Stiff made the motion to accept Mr. Withrow's recommendation. Mr. Korpe seconded the motion, which was carried by voice vote.

Occupational Exposure to Hexavalent Chromium, for Part 1910.1026 for General Industry, Part 1915.1026 for Shipyards and Part 1926.1126 for Construction; Final Rules

Mr. Ron Graham requested, on behalf of the VOSH Program, that the Safety and Health Codes Board consider for adoption federal OSHA's final rules and related amendments for Hexavalent Chromium as published in 71 FR 10099 on February 28, 2006, with an initial effective date of May 30, 2006, other start-up dates apply.

Mr. Graham stated that the new standard will reduce worker exposure to hexavalent chromium, or Cr(VI), by lowering the permissible exposure limit (PEL) from 52 micrograms of Cr (VI) per cubic meter of air (52 µg/m³) to 5 µg/m^3 for all sectors. An exemption is provided for employers who can demonstrate the Cr(VI) exposures under any anticipated working conditions will not exceed 0.5 µg/m³. He explained that the final rule, which establishes an 8-hour time-weighted average (TWA) exposure limit of 5 micrograms of Cr(VI) per cubic meter of air (5 µg/ m³), is a considerable reduction from the previous PEL of 1 milligram per 10 cubic meters of air (1 mg/10 m³, or 100 µg/m³) CrO_3, which is equivalent to a limit of 52 µg/m³ as Cr(VI). He added that the final standard separately regulates general industry, construction, and shipyards in order to tailor requirements to the unique circumstances found in each of these sectors.

By way of background and purpose, Mr. Graham stated that the original permissible exposure limit was established in 1971 as a result of an ANSI standard; however, this standard has become somewhat outdated and in 2002 the Third Circuit Court of Appeals mandated that OSHA revise the standard to more adequately protect employees. Mr. Graham noted that the Department included this Board package, although it was just published on February 28, 2006, to make sure that we were in compliance with the federal implementation dates.

He stated that there are approximately 30 major industries that use hexavalent chromium including: producers of chromates and related chemicals from chromite ore, electroplating, welding, painting, chromate production, as well as steel mills and iron mills and foundries as well and that the Department anticipates that the new standard will cover approximately 15,100 Virginia workers.

Mr. Graham estimated the cost for Virginia employers to be $7 million based on the assumption that the range of affected industries is represented at the same rate as the national estimates. He added that engineering controls would comprise approximately 41 percent of these costs wherein respiratory protection would absorb 25 percent of the cost. With respect to technological feasibility, Mr. Graham stated that OSHA has determined that a PEL of 5µg/m³ is technologically feasible for most operations in all affected industries through the use of engineering and work practice controls.

Having responded to questions by Board members, Mr. Graham recommended on behalf of the staff of the Department of Labor and Industry, that the Safety and Health Codes Board adopt federal OSHA's final rules for Occupational Exposure to Hexavalent Chromium for Part 1910.1026 for General Industry, Part 1915.1026 for Shipyards, and Part 1926.1126 for Construction and with the associated amended standards: Part 1910.1000, Air Contaminants; Part 1917.1, Scope and Applicability for Marine Terminals; Part 1918.1, Scope and Application for Longshoring; and Part 1926.55, Gases, Vapor, Fumes, Dusts and Mists, with an initial effective date of May 30, 2006.

He informed the Board of the start-up dates for all provisions, except engineering controls: 180 days after the date the standard was published or November 27, 2006 (one year for employers with fewer than 20 employees or not until May 30, 2007); however, all employers would be required to comply with all portions of the standard and specifically engineering controls by May 30, 2010.

Mr. Stiff made a motion based on Mr. Graham's recommendation. Mr. Sutton seconded the motion, which was carried by a unanimous voice vote.

Items of Interest From the Department of Labor And Industry

Ms. Jennifer Wester, Director of Cooperative Programs, informed the Board of the upcoming 11th Annual Virginia Occupational Safety and Health Conference to be held at the Hyatt Regency – Crystal City, in Arlington, Virginia from May 31-June 2, 2006. She provided brochures for the Conference and hoped the Board would encourage everyone to attend.

Items of Interest From Members of the Board

Mr. Korpe expressed his concerns about discussions among the Board members concerning items that come before the Board. Mr. Korpe stated that it was his understanding that Board members cannot discuss any issue outside of this forum. He requested legal guidance concerning whether there is a window of opportunity for the committee members to discuss any of the Agenda items prior to the meeting.

Mr. Crisanti responded that, according to the Freedom of Information Act, any discussion among more than two individuals constitutes a public meeting for which prior notification in *The Virginia Register* would have to be given. Such meetings would then become a full meeting of the Board. Mr. Crisanti continued by stating that "this is part of what is generally considered the 'Sunshine Laws' that give the general members of the public the ability to come in and understand everything that the Board discusses." Mr. Crisanti stated that the requirements are that this is the forum to cover all the issues, after the presentation of the briefing package. Mr. Crisanti added that he would be happy to present a white paper and develop the issue Mr. Korpe has raised.

Mr. Korpe then asked whether "the Board acts as a Board, one body together, or does the Board act as individual members only?" He asked if Board members are allowed to get their own information from outside to enhance their knowledge of the issue. Mr. Crisanti assured Mr. Korpe that Board members are entitled to get any additional information that they wish to enhance their knowledge of a specific area. Next, Mr. Korpe asked if the additional information gathered could be forwarded before the meeting to the Department to be incorporated or commented on. Mr. Withrow reiterated what Mr. Crisanti had said that a gathering of three Board members would be considered a meeting, that all the public participation guidelines would apply and that one can be sued if these guidelines are disregarded. With respect to additional information gathered by a Board member, Mr. Withrow suggested sending the information in so that it can be discussed at the public hearing, and placed in the public record. Additionally, Mr. Withrow suggested that for an APA regulation, the Board has the option of appointing a task force or a subcommittee of the Board to work on a regulation in more detail.

Adjournment

There being no further business to come before the Board, Dr. Mundy moved to adjourn the meeting and Mr. Stiff seconded the motion, which was carried by voice vote. The meeting adjourned at 12:45 p.m.