COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR MARCH 7, 2006

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

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption as "final" standards of the Board the following amendments to the Administrative Regulations for the VOSH Program, and to continue the regulatory adoption process.

The proposed effective date is June 1, 2006.

II. Summary of the Proposed Regulation.

A. Amend certain definitions contained in §10, Definitions, including "Abatement period," "Commissioner," "Commissioner of Labor and Industry," "Person," and "Public employer."

B. Amend §§20, 40 and 130 to correct subparagraph numbering, and correct spelling error in word “tunneling” in §130.

C. Amend §30.C., Applicability to Public Employers, to apply Va. Code §40.1-10, Offenses in regard to examinations, inspections, etc., to public employers (any person sworn to give testimony who willfully refuses, or any person to whom interrogatories have been sent who refuses to answer, or any person who obstructs an inspection or investigation can be subject to conviction for a misdemeanor and a fine not exceeding $100.00 nor less than $25.00, or imprisonment in jail not exceeding 90 days);

D. Amend §30.E., Applicability to Public Employers, to apply Va. Code §§40.1-49.9, Issuance of warrant; 40.1-49.10, Duration of warrant; 40.1-49.11, Conduct of inspection, testing, or collection of samples for analysis; 40.1-49.12, Review by courts, to political subdivisions in the Commonwealth. Delete the section symbols following the word, “Sections.”

E. Amend §40, Notification and Posting Requirements, to clarify that notices of contests shall be delivered by the employer to any authorized employee representative.

F. Amend §80, Access to Employee Medical and Exposure Records, to delete the obsolete reference to “Va. Code §2.1-377 to -386" and change it to the re-designated 2.2-3800 to -3809.

G. Amend §90.D., Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas, to permit the release of VOSH contested case file information once litigation has been initiated and a copy of the file has been released to the employer under a discovery request (request for production), or to a third party in response to a *subpoena duces tecum* for contested case file documents *(Note: This provision would not apply in cases where documents from an active investigation are released in response to a subpoena duces tecum from a third party).*

H. Amend §§100A., E., and F., Complaints, to eliminate obsolete references to “formal” (signed employee complaints) and “nonformal” complaints (unsigned employee complaints or complaints filed by former employees) and substitute language similar to that in the VOSH Field Operations Manual (and federal OSHA requirements) which describes complaints as those that are either inspected (i.e., the employer receives an onsite inspection), or investigated (the employer is contacted by phone or fax).

I. Amend Part III, Occupational Safety and Health Standards, §§120 (General Industry Standards), 130 (Construction Industry Standards) 140 (Agriculture Standards) and 150 (Maritime Standards), to add regulatory authority for the

VOSH Program to issue citations and penalties for an employer's failure to comply with the applicable manufacturer's specifications and limitations for the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment. Use of any non-compliant item would be prohibited. These provisions would apply unless specifically superseded by a more stringent corresponding requirement in Parts 1910, 1926, 1928, 1915, 1917 and 1919. The new provisions will also supersede any less stringent requirements currently contained in Parts 1910, 1926, 1928, 1915, 1917 and 1919.

J. Amend §140, Agricultural standards, to clarify "Agricultural Operations." Current VOSH standards for Agriculture use the term "agricultural operations" but do not define the term.

K. Amend §150, Maritime Standards, to include references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively).

L. Amend §260.A., Issuance of Citation and Proposed Penalty, guidance on how to apply the requirement in Va. Code §40.1-49.4.A.3. which provides that "No citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation." The amendment would provide that:

1. the six month time frame is tolled (i.e., suspended) on the date the citation is issued by the Commissioner, without regard for when the citation is received by the employer;

2. the six month time frame begins to run on the day after the incident or event occurred or notice was received by the Commissioner (see exceptions noted below), in accordance with Va. Code §1-13.3. The word "month" shall be construed to mean one calendar month regardless of the number of days it may contain, in accordance with Va. Code §1-13.13.;

3. an alleged violation is deemed to have "occurred" on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected;

4. notwithstanding 2. above, if an employer fails to notify the Commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence as required by Va. Code §40.1-51.1.D, the six month time frame will begin when the Commissioner receives actual notice of the incident.

5. notwithstanding 2. above, if the Commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of an Employer's Accident Report (EAR) from the Virginia Workers' Compensation Commission, the six month time frame will commence when the Commissioner actually receives the EAR form;

6. notwithstanding 2. above, if the Commissioner is first notified of a work-related hazard or incident resulting in an injury or illness to an employee(s) through receipt of a complaint or referral, the six month time frame will commence when the Commissioner actually receives the complaint or referral.

M. Amend §260, Issuance of Citation and Proposed Penalty, by adding a new subsection 260.F. to codify the Department's multi-employer worksite inspection policy. The language provides that on multi-employer worksites, both construction and non-construction citations normally shall be issued to employers whose employees are exposed to hazards (the exposing employer). Additional employers can be cited, whether or not their own employees are exposed, including the employer who actually creates the hazard (the creating employer); the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer); and the employer who has the responsibility for actually correcting the hazard (the correcting employer).

N. Amend §260, Issuance of Citation and Proposed Penalty, by adding a new subsection 260.G., to codify the Department's multi-employer worksite defense. The language provides that a multi-employer citation issued to an exposing employer shall be vacated if it is determined that the employer did not create the hazard; the employer did not have the responsibility or the authority to have the hazard corrected; the employer did not have the ability to correct or remove the hazard; the employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his/her employees are exposed; and the employer has instructed his/her employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it (where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; when extreme circumstances justify it, the exposing employer shall have removed his/her employees from the job).

O. Amend § 300.A., Contest Proceedings Applicable to the Commonwealth, by changing "Attorney General" to "Governor" as the individual to whom VOSH will refer contested citations involving the Commonwealth or one of its agencies if the case cannot be settled at the Department level.

P. Amend §§320.G. and I., Extension of Abatement Time to clarify that the Commissioner or his designated representative will be responsible for hearing objections to and appeals concerning extensions of abatement or denials thereof; and clarifying that such decisions will be heard in accordance with the Virginia Administrative Process Act.

Q. Amend §§340C., D. And E., Settlement, to eliminate references to "amended citations" as the VOSH Program no longer issues amended citations as part of informal or formal settlement agreements.

III. History.

The current Administrative Regulations were completely revised and adopted by the Board at its April 25, 1994 meeting. It has subsequently been amended four times by the Board as indicated below:

April 17, 1995:	To reduce from 48 hours to 8 hours the time limit for employers to report any work-related incident resulting in a fatality or in the hospitalization of at least 3, rather than 5, individuals; to broaden the definition of "employee representative" for purposes of filing a VOSH complaint; and to correct a typographical error.
September 29, 1997:	To require those employers who have received VOSH citation(s) for violation(s) of Virginia Occupational Safety and Health standards to certify to VOSH that they have abated the hazardous condition for which they were cited and to inform affected employees of the abatement action.
October 18, 2001:	To repeal Section 50 on Accident Reports, Section 60 on Occupational Injury and Section 70 on the Annual Survey and instead adopt federal OSHA's regulations at 29 CFR 1904 for the Occupational Injury and Illness Recording and Reporting Requirements which again allow VOSH regulations to be identical to and "as effective as" those of federal OSHA.
December 2, 2002:	To make housekeeping changes to replace outdated references to the Title 9 Administrative Process Act with the revised references in the *Code of Virginia*.

IV. Basis and Purpose.

A. Basis.

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."

The Administrative Regulations lay out the rules and basic parameters of employer responsibilities and how to redress issues with the VOSH Program in cases of disagreement. Amendments are necessary to comply with changes to statutory law or to address procedural or other administrative changes that have occurred since the Administrative Regulations were revised.

B. Purpose.

1. The amendments to certain definitions contained in §10, Definitions, including "Abatement period," "Commissioner," "Commissioner of Labor and Industry," "Person," and "Public employer" are primarily for clarification purposes and do not involve any substantive changes.

2. The amendments to §§20, 40 and 130 correct subparagraph numbering are housekeeping measures and do not involve any substantive changes.

3. The amendments to §30, Applicability to Public Employers, would apply Va. Code §40.1-10, Offenses in regard to examinations, inspections, etc., to public employers (any person sworn to give testimony who willfully refuses, or any person to whom interrogatories have been sent who refuses to answer, or any person who obstructs an inspection or investigation can be subject to conviction for a misdemeanor and a fine not exceeding

$100.00 nor less than $25.00, or imprisoned in jail not exceeding 90 days). Va. Code §40.1-2.1 provides that:

> **"The provisions of this title and any rules and regulations promulgated pursuant thereto shall not apply to the Commonwealth or any of its agencies, institutions, or political subdivisions, or any public body, unless, and to the extent that, coverage is extended by specific regulation of the Commissioner or the Safety and Health Codes Board.** The Commissioner is authorized to establish and maintain an effective and comprehensive occupational safety and health program applicable to employees of the Commonwealth, its agencies, institutions, political subdivisions, or any public body. Such program shall be subject to any State plan submitted to the federal government for State enforcement of the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596), or any other regulation promulgated under Title 40.1. The Commissioner shall establish procedures for enforcing the program which shall include provisions for fair hearings including judicial review and sanctions to be applied for violations." *(Emphasis added.)*

Under the current ARM, public employers are not subject to the criminal provisions of 40.1-10 *(NOTE: The criminal provision contained in Va. Code §40.1-51.4:2, Penalty for making false statements, etc., which carries a fine of not more than $10,000.00 or imprisonment for not more than six months or by both, does apply to public employers by operation of the VOSH ARM §30.C.).* The amendment's purpose is to subject public sector employers (and in the case of Va. Code §40.1-10, public sector employees, since that section applies to any "person" found to be in violation) to the same potential criminal sanctions as private sector employers and employees. There does not appear to be any sound policy or legal rationale for shielding public employers/employees from criminal sanctions when they have engaged in conduct that would otherwise be considered criminal in nature.

4. The amendment to §30.E., Applicability to Public Employers, applies Va. Code §§40.1-49.9, Issuance of warrant; 40.1-49.10, Duration of warrant; 40.1-49.11, Conduct of inspection, testing, or collection of samples for analysis; 40.1-49.12, Review by courts, to political subdivisions in the Commonwealth. As noted in 3. above, Va. Code §40.1-2.1, provides that the provisions of Title 40.1 and VOSH standards and regulations will only apply to public employers insofar as the Commissioner and Codes Board specify in regulation.

Under the current ARM, the VOSH program has no enforcement tool that would allow it to compel a political subdivision to allow the Department to conduct an enforcement inspection, were the political subdivision to refuse its consent to allow an inspection With regard to state agencies, the Commissioner can pursue cooperation through consulting with the appropriate Cabinet Secretaries and, if necessary, the Governor's Office. At the political subdivision level, while requests can be made to local government officials for cooperation, should the local entity still refuse, the Commissioner has very limited ability to force cooperation. The amendment would allow the Commissioner to pursue an administrative search warrant through the local court system.

5. The amendment to §80, Access to Employee Medical and Exposure Records, to delete the obsolete reference to "Va. Code §2.1-377 to -386" and change it to the re-designated 2.2-3800 to -3809, is a housekeeping measure and does not involve any substantive change. The Virginia Privacy Protection Act was repealed by the General Assembly and re-designated as the Government Data Collection and Dissemination Practices Act.

6. The amendment to §40, Notification and Posting Requirements, clarifies that notices of contests shall be delivered by the employer to any authorized employee representative, and does not involve any substantive change to VOSH policy or procedure.

7. The amendment to §90.D., Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas, will permit the release of VOSH contested case file information once litigation has been initiated and a copy of the file has been released to the employer under a discovery request (request for production); or to a third party in response to a subpoena duces tecum for contested case file documents *(Note: This provision would not apply in cases where documents from an active investigation are released in response to a subpoena duces tecum from a third party).*

   The purpose of this request is primarily to assist family members of accident victims to obtain documents from VOSH inspection files in a more timely fashion. The current ARM provision does not allow release of documents until the case is closed, which can stretch out to a period of years when the case is in litigation. However, once a file has been released to the employer through a discovery request or a litigant in a third-party legal action, any benefit to the Department's litigation strategy has disappeared, and there is no purpose served in maintaining confidentiality.

8. The amendment to §§100A., E. and F., Complaints, eliminate references to “formal” (signed employee complaints) and “nonformal” complaints (unsigned employee complaints or complaints filed by former employees) and codifies current VOSH procedures which describes complaints as those that are either inspected (i.e., the employer receives an onsite inspection), or investigated (the employer is contacted by phone or fax). The proposal does not involve any substantive change to VOSH policy or procedure.

9. The amendments to §§120 (General Industry Standards), 130 (Construction Industry Standards) 140 (Agriculture Standards) and 150 (Maritime Standards), to add regulatory authority for the VOSH Program to issue citations and penalties for an employer’s failure to comply with the applicable manufacturer’s specifications and limitations for the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment. Use of any non-compliant item is prohibited. These new provisions will apply unless specifically superseded by a more stringent corresponding requirement in Parts 1910, 1915, 1917, 1919, 1926 and 1928. The new provisions will also supersede any less stringent requirements currently contained in Parts 1910, 1915, 1917, 1919, 1926 and 1928.

   With the exception of a few construction and general industry standards which require employers to comply with manufacturer specifications and limitations (e.g., 1910.254(d)(6) - arc welding; 1910.266(f)(1)(iii), (f)(2)(iv) and (f)(2)(vi) – logging machinery; 1926.552(a) - material hoists, personnel hoists and elevators; 1926.554(a)(6) overhead hoists; etc.), when VOSH investigates an accident and finds that the cause of the accident was primarily due to misuse or improper operation of a piece of machinery, vehicle, tool, material or equipment, the only enforcement tool available is the use of §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 specifically mention manufacturer’s specifications and limitations, nor does it contain a requirement to remove the item from service until any problems are fixed. The statute has also been interpreted in case law to only apply to "serious" violations (i.e., those that would cause "death or serious physical harm"). The purpose of the amendment is to clarify an employer’s current

responsibility under the "general duty clause" to comply with manufacturer's specifications and limitations, as well as allow the use of the new provision to address "other-than-serious" hazards before they can become serious in nature. The amendment also provides an additional enforcement tool for the Commissioner to prevent the recurrence of accidents by assuring that machinery, vehicles, tools, materials and equipment which are not functioning properly, are removed from service until the condition is corrected.

[NOTE: During the period January, 2004 through June, 2005, the VOSH Program investigated at least eight fatal and one non-fatal catastrophic event where the cause of the accident could be directly attributed to failure to follow manufacturer's specifications and limitations.]

10. The amendment to §140, Agricultural standards, would clarify the meaning of "Agricultural Operations." Current VOSH standards for Agriculture use the term "agricultural operations" but do not define the term. The purpose of the amendment is to provide further guidance to VOSH personnel, employers and employees concerning the applicability of, and in certain cases the non-applicability, of the agricultural standards contained in Part 1928. The amendment reflects current VOSH enforcement policy and is based in part on a definition of "farming operation" contained in Federal OSHA Instruction CPL 2-0.51J:

> A **"farming operation"** means any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations. These are employers engaged in businesses that have a two digit Standard Industrial Classification (SIC) of 01 (Agricultural Production - Crops), 02 (Agricultural Production - Livestock and Animal Specialties), and four digit SIC 0711 (Soil Preparation Services), 0721 (Crop Planting, Cultivating, and Protecting), 0722 (Crop Harvesting, Primarily by Machine), 0761 (Farm Labor Contractors and Crew Leaders), and 0762 (Farm Management Services).

However, the amendment further clarifies that operations that meet the definition of construction work contained in §130 shall not be considered to be included within the definition of "agricultural operations," nor shall any operations which are substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.

11. The amendment to §150, Maritime Standards, would add references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively) to the list of maritime standards that apply to public sector employers. Federal OSHA has retained jurisdiction over private sector maritime employers but has no jurisdiction over public sector employers and employees. The purpose of the amendment is to provide safety and health protections to any public sector employees in the longshoring and gear certification industries equivalent to those provided to private sector employees in those industries. Research indicates that there are currently no public sector employers and employees in the longshoring and gear certification industries, but the VOSH Program is responsible under the Virginia State Plan for providing coverage of public sector employees and employees in these industries should there be any, so inclusion of these Parts is appropriate and necessary.

12. The amendment to §260, Issuance of Citation and Proposed Penalty, codifies guidance on how to apply the requirement in Va. Code §40.1-49.4.A.3. which provides that "No citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation." The amendments and purpose for each are as follows:

    a. §260.A.1.a. - the six month time frame is tolled (i.e., suspended) when the citation is issued by the Commissioner, without regard for when the citation is received by the employer;

       The purpose of the amendment is to clarify for employers and employees that in order to comply with Va. Code §40.1-49.4.A.3., the Commissioner only need "issue" the violations within six months of the occurrence of any alleged violation, even if the employer receives the citations several days after the end of the six month period. Although a rare occurrence, the VOSH Program has had employers question the application of the statute to such a fact situation.

    b. §260.A.1.b. - the six month time frame begins to run on the day after the incident or event occurred or notice was received by the Commissioner in accordance with Va. Code §§1-210, and the word “month” in the statute means a calendar month in accordance with Va. Code §1-223 (see exceptions noted below);

       The purpose of the amendment is to clarify for employers and employees how the six month time frame is calculated by specifically referencing Code of Virginia provisions that apply to computation of time in statutes. Specifically, Va. Code §1-223

provides in part that:

> § 1-210. (Effective October 1, 2005) Computation of time.
>
> A. When an act of the General Assembly or rule of court requires that an act be performed a prescribed amount of time before a motion or proceeding, the day of such motion or proceeding shall not be counted against the time allowed, but the day on which such act is performed may be counted as part of the time. **When an act of the General Assembly or rule of court requires that an act be performed within a prescribed amount of time after any event or judgment, the day on which the event or judgment occurred shall not be counted against the time allowed. *(Emphasis added).***

Va. Code §1-223 provides as follows:

> § 1-223. (Effective October 1, 2005) Month; year.
>
> "Month" means a calendar month and "year" means a calendar year.

By way of example, if a fatal accident occurred on January 15th and the violation which caused the accident was corrected on the same day, the six month time frame would begin on January 16th, and would end on July 16th.

c. §260.A.1.c. - notwithstanding §260.A.1.b. above, an alleged violation is deemed to have "occurred" on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains uncorrected;

The purpose of the amendment is to clarify for employers and employees that for purposes of calculating the six month time frame for issuing a citation, the date a violation occurred includes not only the first day that it was created, but also every day thereafter that it continues to go uncorrected. The amendment reflects current federal Occupational Safety and Health Review Commission legal precedent. *(Secretary of Labor v. General Dynamics Corp., Electric Boat Div., Quonset Point Facility, 15 OSHC 2122, 2128 (1993)).*

d. §260.A.1.d. - notwithstanding §260.A.1.b. above, if an employer fails to notify the Commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence, as required by Va. Code §40.1-51.1.D, the six month time frame will begin when the Commissioner receives actual notice of the incident.

The purpose of the amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to a fatal or catastrophic accident as defined in Va. Code §40.1-51.1.D. does not begin until the Commissioner receives actual notice of the accident. The amendment reflects current federal Occupational Safety and Health Review Commission legal precedent. The case law is based on the premise that if an employer failed to comply with the notification provisions of the statute, he should not be rewarded for violating the law by allowing the six month time frame to start running on the day of the accident. *(Secretary of Labor v. Yelvington Welding Service, 6 OSHC 2013, 2016 (1978)).*

e. §260.A.1.e. - notwithstanding §260.A.1.b. above, if the Commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of an Employer's Accident Report (EAR) from the Virginia Workers' Compensation Commission, the six month time frame will commence when the Commissioner actually receives the EAR form;

The purpose of the amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to an inspection that the Commissioner initiated following receipt of a Employer's Accident Report (EAR) does not begin until the Commissioner receives actual notice of the accident. The amendment reflects a reasonable reading of current federal Occupational Safety and Health Review Commission legal precedent in that the Commissioner's first opportunity to discover the violation does not occur until receipt of the EAR form. *(Secretary of Labor v. Kaspar Electroplating Corp., 16 OSHC 1517 (1993).*

f. §260.A.1.f. - notwithstanding 260.A.1.b. above, if the Commissioner is first notified of a work-related hazard or incident resulting in an injury or illness to an employee(s) through receipt of a complaint or referral, the six month time frame will commence when the Commissioner actually receives the complaint or referral.

The purpose of the amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to an inspection that the Commissioner initiated following receipt of complaint or referral does not begin until the Commissioner actually receives the complaint or referral. The amendment reflects current federal Occupational Safety and Health Review Commission legal precedent in that the Commissioner's first opportunity to discover the violation does not occur until receipt of the complaint or referral. *(Secretary of Labor v. Sun Ship, Inc., 12 OSHC 1185 (1985)).*

13. The amendment to §260, Issuance of Citation and Proposed Penalty, would add a new subsection 260.F. to codify the Department's multi-employer worksite inspection policy. The amendment provides that on multi-employer worksites, both construction and non-construction citations normally shall be issued to employers whose employees are exposed to hazards (the exposing employer).

Additional employers can be cited, whether or not their own employees are exposed, including the employer who actually creates the hazard (the creating employer); the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer); and the employer who has the responsibility for actually correcting the hazard (the correcting employer).

The purpose of the amendment is to codify VOSH's longstanding enforcement policy for the issuance of citations in multi-employer worksite situations. As a result of a recent decision of the Virginia Court of Appeals in the case of *C. Ray Davenport, Commissioner of Labor and Industry v. Summit Contractors*, on May 3, 2005, the VOSH Program's multi-employer citation policy was upheld in part and overturned in part. The Commissioner filed a request for appeal with the Virginia Supreme Court, which was refused July 12, 2005, making the Court of Appeals decision final. The main result of the decision is that, in the absence of a regulation or statute authorizing it, VOSH cannot issue citations to a "controlling employer" also acting as a general contractor (in the *Summit* case the "controlling employer" was the general contractor on a construction site), unless one of its employees was exposed to the safety/health hazard, or unless the company was found to have created the hazard.

The multi-employer worksite policy dates to the late 1970's and is a high profile issue at both the state and federal levels, even though it affects a relatively small percentage of VOSH inspections (VOSH annually

conducts over 3,000 inspections per year and the decision is estimated to affect approximately 1% or fewer of those cases). The Occupational Safety and Health Act of 1970 (“OSH Act”) and federal regulations require VOSH laws, regulations and policies to be “as effective as” those of federal OSHA (see 29 CFR 1902.4). Since 1988, the VOSH Program has had a fully approved State Plan under §18(e) of the OSH Act with exclusive jurisdiction over worksites covered by the Virginia State Plan. The Court’s invalidation of part of the VOSH Program’s multi-employer citation policy potentially places that portion of the VOSH Program in violation of the "as effective as" requirement.

14. The amendment to §260, Issuance of Citation and Proposed Penalty, would add a new subsection 260.G., to codify the Department’s multi-employer worksite defense. The amendment provides that a multi-employer citation issued to an “exposing employer” shall be vacated if the employer demonstrates that the employer did not create the hazard; the employer did not have the responsibility or the authority to have the hazard corrected; the employer did not have the ability to correct or remove the hazard; the employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his/her employees are exposed; and the employer has instructed his/her employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it (where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; when extreme circumstances justify it, the exposing employer shall have removed his/her employees from the job).

    The purpose of the amendment is to codify VOSH’s longstanding recognition of a defense to the multi-employer citation policy for a certain class of employers as discussed above. As noted above, the multi-employer worksite policy dates to the late 1970's and is a high profile issue at both the state and federal levels, even though it effects a relatively small percentage of VOSH inspections (VOSH annually conducts over 3,000 inspections per year and the decision is estimated to affect approximately 1% or fewer of those cases). Since we propose that the Board codify the multi-employer citation policy, it is appropriate that we include in the new regulation a codification of the defense as well.

15. The amendment to §300, Contest Proceedings Applicable to the Commonwealth, changes "Attorney General" to "Governor" as the individual to whom VOSH will refer contested citations involving the Commonwealth or one of its agencies if the case cannot be settled at the Department level.

The purpose of the amendment is to change the decision maker for resolution of contested state agency VOSH cases from the Attorney General to the Governor. As the Attorney General provides legal support and advice to state agencies, but does not have the authority to issue orders to Executive Branch agencies, it is appropriate to take the Attorney General's Office out of the decision process for VOSH contested cases and give that authority to the Governor, who has such authority.

16. The amendment to §§320.G. and I., Extension of Abatement Time to clarify that the Commissioner or his designated representative will be responsible for hearing objections to and appeals concerning extensions of abatement or denials thereof; and clarifying that such decisions will be heard in accordance with the Virginia Administrative Process Act, are primarily for clarification and procedural purposes. Neither the rights nor responsibilities of employers or employees are diminished in anyway by the changes. In fact, the rights of both are expanded as the change to §320.I. assures the right of appeal of the Commissioner's decision on a request for an extension of abatement.

17. The amendment to §340, Settlement, would eliminate references to "amended citations" as the VOSH Program no longer issues amended citations as part of informal or formal settlement agreements. The amendment is primarily procedural in nature and provided for clarification purposes, and does not involve any substantive changes to VOSH operations.

C. Impact on Employers.

No significant impact on employers is anticipated if the amendments are adopted, as it merely codifies current and longstanding VOSH policies, interpretations and procedures previously detailed. With regard to the amendments to §260 codifying the multi-employer citation policy and defense, there will be an impact only on employers that fall into the category of a "controlling" employer, as the current policy does not apply to them by virtue of the *Summit* decision referenced above. It is estimated that 1% or less of the more than 3,000 VOSH inspections conducted on an annual basis concern the application of the multi-employer citation policy to "controlling" employers.

D. Impact on Employees.

No adverse impact to employees is anticipated from the adoption of the amendments.

E. Impact on the Department of Labor and Industry.

No additional fiscal impact is anticipated for the Department if the amendments are adopted.

F. Summary of Public Participation Efforts.

The proposed amendments to the ARM for the VOSH program, in accordance with the Virginia Administrative Process Act (APA), were the subject of a 60-day public comment period that was held from December 12, 2005 to February 13, 2006. No written comments were received during the 60-day comment period. Additionally, the Board received two comments during the public hearing for this proposed regulation that was held on January 31, 2006 **(see section VII. Comments, below).**

V. Technological Feasibility.

As the proposed changes reflect current VOSH enforcement policies, interpretations or procedures or reflect current statutory requirements which impact the program, it is anticipated that there are no significant issues of feasibility associated with adoption of the amendments.

VI. Benefit/Cost.

As the amendments primarily reflect previously longstanding VOSH enforcement policies, interpretations or procedures or reflect current statutory requirements which impact the program, it is anticipated that there are no significant additional cost issues associated with adoption of the regulation.

The amendment to §150, Maritime Standards, to include references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively) can potentially result in cost increases for public sector employers in those industries. However, the cost impact should be minimal since the number of employees affected is estimated to not exceed a few hundred employees.

The amendments to §260 codifying the multi-employer citation policy and defense can result in some cost increases for employers that fall into the category of a "controlling" employer who was also acting as a general contractor, as the current policy does not apply to them by virtue of the *Summit* decision referenced above. It is estimated that 1% or less of the more than 3,000 VOSH inspections conducted on an annual basis concern the application of the multi-employer citation policy to "controlling" employers. The

additional cost would be in the form of potential citations and penalties issued by the Department in the estimated 1% of cases that could be affected under the amendment.

VII. Summary of Public Participation Efforts.

The Public Participation Guidelines of the Board in accordance with the Virginia Administrative Process Act (APA) require a 60-day public comment period which was held from December 12, 2005 through February 13, 2006. During this period, the Board also held a public hearing on the proposed regulation on January 31, 2006.

The following comments were submitted at a public hearing of the Safety and Health Codes Board on January 31, 2006:

Commenter 1: Robert Ledbetter, Kenbridge Construction Company

Mr. Ledbetter spoke in opposition to the proposed amendments addressing multi-employer worksite citation policy (see §260.F.), and asked "that citations only be issued to those who fail to meet the safety requirements and not hold the general contractor as a second person to be held liable for the citations." In support of his opposition, Mr. Ledbetter also stated "We also expect all individuals on our jobs – and I believe most of my other general contractors here today [do as well] – that if you come on our site, you have to obey and follow our safety regulations and rules, which meet or in many cases, ours do exceed the OSHA and the VOSH requirements."

Agency Response:

The Virginia State Plan is required by federal regulation to establish either the "same" standards, procedures, criteria and rules as federal OSHA or alternative ones that are "as effective as" those of federal OSHA, so Virginia is required to have a multi-employer worksite policy. Based on information received from federal OSHA, all state plan states have a multi-employer worksite policy. **[SEE AGENCY RESPONSE TO COMMENTER 2 FOR ADDITIONAL DETAIL.]**

Although adoption of the proposed language in §260.F. will allow the VOSH program to again issue citations to general contractors as "controlling employers," there is proposed language in § 260.F.2.b. which is different than federal OSHA's multi-employer citation policy. That section will allow VOSH to pursue citations against a prime subcontractor in its roll as a "controlling employer" (e.g. the main framing contractor has subcontracted framing work out to another subcontractor who creates a hazard, and the main framing contractor knew or should have known of the hazard and was responsible by contract or through actual practice for that area of the worksite). As related to the Safety and Health Codes Board at its September 15, 2005 meeting on this proposed regulation, this new provision will in some cases result in the general contractor avoiding citation, and thereby

address some of Mr. Ledbetter's concerns. **[SEE AGENCY RESPONSE TO COMMENTER 2 FOR ADDITIONAL DETAIL.]**

Commenter 2: Steve Vermillion, Chief Executive Office, Associated General Contractors

Mr. Vermillion expressed his organization's concern about the multi-employer policy, noting that the policy is "a gray area" and that although the policy is a requirement at the federal level, it is not a federal regulation. He inquired whether the VOSH Program had to have such a policy or regulation to be "as effective as" federal OSHA. Mr. Vermillion stated that "I can look at the policy and say in a lot of cases it's the right thing to do, and I could look at other cases where it's totally unfair to cite the general contractor in these cases." Mr. Vermillion observed that the construction industry has changed tremendously in the last few years and noted that the general contractor is not always the controlling contractor on job sites as they used to be where you just had a general contractor, subcontractors and suppliers. Now you have situations where you have "subs to the subs to the subs" and the general contractor may hardly know about all the different subcontractors on site. Mr. Vermillion stated the multi-employer policy before the court case [the Summit decision referenced above] caused too much confusion and had too much unfairness built into the system.

Agency Response:

With regard to Mr. Vermillion's question about whether the VOSH Program has to have a multi-employer worksite policy to be "as effective as" federal OSHA, see the following selected excerpts from federal OSHA regulations regarding the establishment and maintenance of state plans for occupational safety and health:

Selected Excerpts from 29 CFR 1902, Indices of Effectiveness

1902.4(a)

General. In order to satisfy the requirements of effectiveness under 1902.3(c)(1) and (d)(1), the State plan shall:

1902.4(a)(1)

Establish the same standards, procedures, criteria and rules as have been established by the Assistant Secretary under the Act, or:

1902.4(a)(2)

Establish alternative standards, procedures, criteria, and rules which will be measured against each of the indices of effectiveness in paragraphs (b) and (c) of this section to determine whether the alternatives are at least as effective as the Federal program with respect to the subject of each index. For each index the State must demonstrate by the

presentation of factual or other appropriate information that its plan is or will be at least as effective as the Federal program.

1902.4(c)(2)(xi)

Provides effective sanctions against employers who violate State standards and orders, such as those prescribed in the Act.

As the above excerpts indicate, the Virginia State Plan is required by federal regulation to establish either the "same" standards, procedures, criteria and rules as federal OSHA or alternative ones that are "as effective as" those of federal OSHA, so Virginia is required to have a multi-employer worksite policy. Based on information received from federal OSHA, all state plan states have a multi-employer worksite policy.

With regard to Mr. Vermillion's comments about recent changes in the construction industry and the example of a general contractor having to deal with situations where there is a "sub to a sub to a sub," the VOSH program has noted the same changes in the industry. In part as a response to those changes and as a reflection of actual VOSH citation practices, there is proposed language in § 260.F.2.b. which is different than federal OSHA's multi-employer citation policy which allows VOSH to pursue citations against a prime subcontractor in its roll as a "controlling employer" (e.g. the main framing contractor has subcontracted framing work out to another subcontractor who creates a hazard, and the main framing subcontractor knew or should have known of the hazard and was responsible by contract or through actual practice for that area of the worksite). Section 260.F.2.B. provides that citations may be issued to an employer who is not a general contractor, but is:

> "responsible, by contract or through actual practice for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected."

The facts from an actual VOSH accident inspection involving such a business arrangement was related to the Safety and Health Codes Board at its September 15, 2005, meeting when it considered the proposed regulation. The accident involved a truss collapse during the construction of an 8 unit townhouse, and the general contractor had hired a framing subcontractor, who then subcontracted the truss installation to a second subcontractor. The trusses were not braced in accordance with the manufacturer's instructions and they collapsed. After reviewing the specific facts of the case, the VOSH program issued citations related to the accident to the framing subcontractor and its subcontractor, but not to the general contractor.

Facts that are looked at in such a case to determine which companies will receive citations include, but are not limited to: contractual rights and responsibilities, actual work practices on the site, whether the individual employers knew or should have known

of the hazard (i.e. employer knowledge), whether employers had provided adequate safety and health programs and trained their employees, whether employers had complied with VOSH standards requiring frequent and regular inspections of the job site; what was the level of technical expertise and experience of the employers involved; how long the hazard was in existence before the accident occurred, etc.

Although adoption of the proposed language in §260.F. will allow the VOSH program to again issue citations to general contractors as "controlling employers," the proposed language in § 260.F.2.B. will also allow VOSH to pursue prime subcontractors as well, which in some cases will result in the general contractor avoiding citation and thereby address some of Mr. Vermillion's concerns.

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Recommended Action

Staff of the Department of Labor and Industry recommends 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 (VOSH) Program, as authorized by Virginia Code, §40.1-22(5), with an effective date of June 1, 2006.

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation.