COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

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AGENDA

SAFETY AND HEALTH CODES

Main Street Centre
600 East Main Street
12th Floor Conference Room - South
Richmond, Virginia

Thursday, June 14, 2018

10:00 a.m.

1. Call to Order

2. Approval of Agenda

3. Approval of Minutes for Board Meeting of November 30, 2018

4. Opportunity for the Public to Address the Board on these issues pending before the Board today or any other topics that may be of concern to the Board or within the scope of authority of the Board.

   This will be the only opportunity for public comment at this meeting. Please limit remarks to 5 minutes in consideration of other wishing to address the Board.

5. **Old Business**

a) Va. Code 2.2-4006.A.4.c. of the Virginia Administrative Process Act; 16VAC25-60-180. of the VOSH Administrative Regulations

Presenter – Jay Withrow

b) Occupational Exposure to Beryllium for General Industry, §1910.1024; Stay of Certain Compliance Dates; Adoption of Certain Compliance Dates

Presenter – Jay Withrow

c) Occupational Exposure to Beryllium for the Shipyard Industry, §1915.1024, and the Construction Industry, §1926.1124; Stay of Certain Compliance Dates; Adoption of Certain Compliance Dates

Presenter – Jay Withrow

6. **New Business**

a) Petition to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program; 16VAC25-60-120.B

Presenter – Jay Withrow

b) Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness; Final Rule

Presenter – Jay Withrow

c) Vinyl Chloride, §1910.1017, CFR Correction

Presenter – Ron Graham

d) Methylenedianiline, §1926.60, CFR Correction

Presenter – Ron Graham

e) Notice of Periodic Review of Certain Existing Regulations

16VAC25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry

Presenter – Holly Raney

7. Items of Interest from the Department of Labor and Industry

8. Items of Interest from Members of the Board

9. Meeting Adjournment

DRAFT
SAFETY AND HEALTH CODES BOARD
PUBLIC HEARING AND MEETING MINUTES
THURSDAY, November 30, 2017

BOARD MEMBERS PRESENT:
Mr. Jerome Brooks
Mr. Lou Cernak, Jr.
Mr. John Fulton
Mr. Chris Gordon
Ms. Anna Jolly
Mr. David Martinez, Vice Chair
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez
Mr. Chuck Stiff
Mr. Tommy Thurston

BOARD MEMBERS ABSENT:
Mr. Courtney Malveaux
Mr. Travis Parsons, Chair

STAFF PRESENT:
Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry
Mr. Bill Burge, Assistant Commissioner
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, OPP & OWP
Mr. Ed Hilton, Director, Boiler Safety Compliance Management
Mr. Ron Graham, Director, VOSH Health Compliance
Ms. Diane Duell, Director, Legal Support
Mr. John Crisanti, Manager, Office of Policy and Planning
Ms. Regina Cobb, Senior Management Analyst
Ms. Deonna Hargrove, Richmond Regional Health Director
Mr. Dennis Edwards, Manager, Consultation Services

OTHERS PRESENT:
Mr. Charles Stricker, VMLIP
Mr. Johnny Nugent, DHRM
Mr. Sam Revenson, Armbiz
Ms. Lisa Wright, Court Reporter, Chandler & Halasz, Stenographic Court Reporters
Ms. Monica Vanney, DHRM/LCI

ORDERING OF AGENDA

In the absence of Board Chair Travis Parsons, Vice Chair, David Martinez, called the Public meeting to order at 10:0 a.m. A quorum was present.

Mr. Martinez requested a motion to approve the Revised Agenda. A motion to accept the Revised Agenda was made and properly seconded. The Revised Agenda was approved, as submitted, and the motion was carried by unanimous voice vote.

APPROVAL OF MINUTES

Mr. Martinez asked the Board for a motion to approve the Minutes from the July 27, 2017 Board meeting and the October 26, 2017 Public Hearing. A motion was made and properly seconded. Both Minutes were approved by unanimous voice vote.

PUBLIC COMMENTS

Mr. Martinez opened the floor for comments from the public, however, there were no comments.

OLD BUSINESS

Final Regulatory Action to Amend 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations

Mr. Ed Hilton, Director, Boiler Safety Compliance Management, began by requesting that the Board consider for adoption as a final regulation of the Board amendments to 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations, pursuant to §40.1-51.6 of the *Code of Virginia*.

He summarized the amendments as additional terms defined for improved clarity, which appear in 16VAC25-50-10, and updated editions of several "Forms" and "Documents Incorporated by Reference (DIBR).

He informed the Board that the purpose of the final regulatory action is to conform to the most current editions of the ASME, NBIC, and NFPA Safety and Inspection Codes.

He stated that there would be little impact on employers as a result of the ASME, NBIC, and NFPA code updates since companies that utilize these codes are already required to have and work to the current editions of these codes. As such, there is no financial burden for them to purchase the most recent editions of the codes. He informed the Board that a major change would be the requirement in the NBIC for signage and metering for CO_2 tank installations.

He stated that any impact on the Department would be minimal as the Department already has copies of, and follows, the most recent editions of the NBIC and ASME when performing reviews of manufacturers and repair shops.

He added that no comments were received during the July 27, 2017 through September 22, 2017 proposed stage public comment period.

Mr. Hilton, on behalf of the Boiler Safety Compliance Program, recommended that the Board adopt the amendments to 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations, as a final regulation of the Board, as authorized by §40.1-51.6 of the *Code of Virginia*.

A motion to accept the Department's recommendation was made and properly accepted. The motion was approved unanimously by voice vote.

16VAC25-60, et seq., Final Amendments to the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program; State and Local Government Penalties

Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, OPP & OWP, requested that the Board consider for adoption, as a final regulation of the Board, language to amend 16VAC25-60, *et seq.,* Administrative Regulation for the VOSH Program, State and Local Government Penalties.

Next, he summarized the rulemaking process of this regulation.

Mr. Withrow then summarized the issues under consideration for amendment by stating that the final amendment establishes procedures for the application of penalties for state and local government employers in accordance with §40.1-2.1 of the *Code of Virginia*. He added that, in 2016, the Virginia General Assembly passed and Governor McAuliffe signed into law legislation allowing the Board to authorize the Commissioner to issue penalties to state and local government employers.

Mr. Withrow then presented the Department's response to Public Comments received during the Public Comment period. The first commenter asked that the Board adopt and implement a penalty reduction system similar to the current program in place for application with private businesses, and allow public entities the same manner of consideration when determining final penalty assessments and recording of citations.

The Department responded that it generally agreed with the commenter's request. Mr. Withrow continued by stating that the Department intends to apply the same penalty calculation procedures o state and local government employers as it does to private sector employers, with the exception noted that penalties will not be issued for other-than-serious violations and "non-high gravity" serious violations as was represented to the General Assembly during the legislative process to amend Va. Code §40.1-2.1, whose purpose was to introduce a more serious deterrent effect to significantly reduce occupationally-related accidents, injuries and illnesses in the public sector.

The second commenter opposed this proposal because he feared that the only penalties that would be felt are with those small agencies and municipalities who can ill-afford pre-determined monetary penalties in lieu of penalties in the form of percentages relative to a portion of a select budget of the violator. He also expressed concerns about a culture being created whereby specific violations are ignored in favor of those identified. His final concern was that agency departments with large, geographically separated departments would be penalized for remote violations occurring outside their department and how might municipalities respond after large penalties are assessed. He asked if citizens are expected to pay more taxes because of a public manager's negligence. Lastly, he asked if there are laws that would prevent increased fees and taxes after such penalties.

On behalf of the Department, Mr. Withrow responded addressing each issue of concern. First, he stated that the Department's current penalty calculation procedures from private employers take into account the size of the employer, the history of violations and the good faith of the employer. State and local government employers, in certain situations, may be able to take advantage of some of these reductions.

Next, Mr. Withrow responded that the Code of Virginia contains statutory maximums for penalties that can be issued on a per violation basis (Va. Code §40.1-49.4), which serves to cap the amount of penalties that can be issued in any one case. He added that the Department also uses an informal settlement

conference process with state and local government employers that can be used to take into account the cost associated with correcting violation toward the final penalty levels agreed upon. Then, he stated that the Code of Virginia does not currently allow for a penalty calculation process that would assess penalties relative to a portion of a selected budget of the violator.

With respect to the Commenter's concern that certain violations will be ignored in favor of those identified, Mr. Withrow responded that there is nothing unique in the final regulation that would treat state and local government employers any differently.

With respect to geographically separated worksites, Mr. Withrow explained that the primary purpose of introducing penalties to state and local government employers is to encourage positive and proactive approaches to providing safe and healthy workplaces, particularly in instances where worksites are geographically separated.

The third and last commenter stated that he was in favor of this amendment because the amendment includes penalties on only infractions that have been repeated or are considered "high gravity". He stated that repeated offenses must be rectified and serious infractions dealt with in an appropriate manner. This commenter recommended the creation of a separate fund that these funds are place into so that the money can be appropriated to help disadvantaged workers who cannot afford the medical bills associated with a "high gravity" injury, resulting from the state or local government failing to adequately secure a safe working environment.

Mr. Withrow responded that a separate fund to help disadvantaged workers would have to be set up through a statutory change. He added that state and local government employees injured on the job are covered by workers' compensation which should serve to cover some of the medical bills associated with the injury.

With respect to impact on employers, Mr. Withrow mentioned that penalties from VOSH were increased, effective July 1, and that the Department tried to estimate the number of violations and penalties the Department would issue. He stated that penalties assessed can be reduced during settlement negotiations or vacated if the employer has a legitimate legal defense.

Mr. Withrow stated that the impact of this regulation on Virginia state and local government employees will be positive since there will be fewer fatalities, injuries and illnesses. He added that the injury rate is 79 percent higher for public sector workers than it is for private sector workers.

With respect to impact on the Department, Mr. Withrow indicated that no significant impact on agency operations is anticipated. He added that it is only anticipated that approximately 21 (corrected to 22) violations per year will carry a penalty for state and local government employers.

A motion to accept the Department's recommendation was amended by the Board and properly accepted. The motion was approved unanimously by voice vote.

NEW BUSINESS

Occupational Exposure to Beryllium for the Shipyard Industry (Part 1915) and the Construction Industry (Part 1926); Delay of Compliance Date

Mr. Ron Graham, Director of Occupational Health Compliance for the Department, explained that the matter before the Board is a delay of the compliance date. He requested the Board to consider for adoption federal OSHA's indefinite delay of compliance dates for the Occupational Exposure to Beryllium for the Shipyard Industry, Part 1915, and the Construction Industry, Part 1926, as published in 82 FR 14439 on March 21, 2017. OSHA will not enforce the January 9, 2017 Shipyard and Construction standards, without further notice, while it determines whether to amend the January 9, 2017 rule.

He stated that, with the delay of the enforcement for Beryllium in these two industries, VOSH seeks re-adoption of the prior PELs of 0.002 mg/m^3 (2 $\mu g/m^3$) for the Shipyard sector listed in Table Z of §1915.1000, and for the Construction sector listed in Appendix A of §1926.55. The proposed effective date is February 15, 2018.

Mr. Graham reminded that Board of its adoption of federal OSHA's final Beryllium Standard for General Industry, Shipyard Industry and the Construction Industry on February 16, 2017. He informed the Board that the current proposal does not impact the General Industry sector – only the shipyard and construction sectors. He reviewed the history of the delays of the effective dates for this regulation, and stated that on March 21, 2017, federal OSHA finalized a delay of the effective date for Beryllium, but only for the Shipyard and Construction Industries.

He explained that OSHA wants to retain the original lower exposure permissible limits because Occupational Exposure to Beryllium can cause some significant health issues. He added that this places VOSH in a quandary because when the Board adopted the Beryllium Final Rule, the compliance dates for the permissible exposure limit and some of the requirements for the ancillary provisions of the proposed Beryllium regulation (82 FR 19182, June 27, 2017) were to commence on March 2018. He added that the Department does not know, at this point, when an actual decision will come about as a result of federal OSHA's proposal. Rather than the Department having a requirement that is more stringent than federal OSHA's, the Department decided to bring the decision, to consider delaying the actual compliance dates for the permissible exposure limits (as well as the changes to the ancillary provisions resulting from OSHA's proposed Beryllium regulation), to the Board.

He continued by stating that if, the Department does not remove these compliance dates, then we are in a similar situation with the silica standard where federal OSHA delayed it and the Department was unable to convene a Board meeting in order to go back in and extend the compliance dates. He suggested that, to make sure that the employees, who are exposed to Beryllium in Shipyards and Construction, are adequately protected, the Department wants the Board to readopt the prior permissible exposure limits to make sure that there is an enforceable standard for exposed employees in the industry sectors.

With respect to impact from the adoption of the delay of the compliance date for the Shipyard and Construction industries, Mr. Graham stated that no impact is anticipated on employers, employees and the Department because there will be the old PEL for employers to comply with, and hopefully, that will at least provide employees the protection that they had before the new standard was published.

When asked if the Department is going back to the old standard, Mr. Graham responded that federal OSHA did not address what level they would be enforcing during this proposal period, and that he wants to make sure that the Department, at least, had something in place.

When asked if there is an impact on the Department for sticking with the lower limit, Mr. Withrow responded that when federal OSHA adopted the Beryllium standard with the lower limits it was to cover the General Industry primarily, before OSHA decided to expand the scope of the regulation to include Construction and Shipyards and the U.S. Department of Solicitor's Office was told that OSHA could do it that way. The construction and shipyard industries were caught off-guard and they have sued about expanding the scope of the regulation and the way it was done. He added that when the Board adopts these federal identical regulations, the Board does not have to go through the normal Administrative Process Act procedures and notice and comments in Virginia.

Mr. Withrow continued by stating that, if the Board wanted to keep the lower level and keep the regulation in effect, construction and public sector shipyard in Virginia, the Attorney General's office should be contacted about the Board's ability to leave this federal-identical standard in place without going through a notice and comment process. Mr. Withrow added that he can recall only one other time this has happened and it was a long time ago when the Hazard Communication standard was adopted only for the general industry. He stated that the Board at that time wanted to expand the standard to cover all employers, construction specifically, and decided to do so at the Board meeting. The Attorney General's office later informed them that they could not do that. He went on to inform the Board that, if they wanted to keep the construction and shipyard regulation, the full notice and comment process would be necessary.

He explained that what federal OSHA has done here is administratively stayed the construction and shipyard regulations by issuing a proposed regulation to mean indefinitely. Mr. Withrow informed the Board that the Board could adopt a stay for a year, and then re-visit it rather than making it indefinite. He stated that this should be run by the Attorney General's Office, if the Board wants to make the stay indefinite.

After much discussion, the Board prepared a motion which reads as follows: "The Board recommends that the Safety and Health adopt federal OSHA's delay of compliance date until August 1, 2018, for the Occupational Exposure to Beryllium for the Shipyards Industry, Part 1915, and the Construction Industry, Part 1926, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2018." The Board also moved to accept staff's recommendation that the Board adopt, during the delay of the enforcement for Beryllium in these two industries, the previous PELs of 0.002 mg/m^3 (2 $\mu g/m^3$) for the Shipyard sector listed in Table Z of §1915.1000, and for the Construction sector listed in Appendix A of §1926.55.

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 with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

A motion to accept the Department's recommendation was made and properly accepted. The motion was approved unanimously by voice vote.

Improve Tracking of Workplace Injuries and Illnesses, §1904.41; Final Rule – Delay of Electronic Filing

Mr. Withrow requested the Safety and Health Codes Board to consider for adoption federal OSHA's delay of the date of compliance for the revision of §1904.41 in the 2016 final rule to Improve Tracking of Workplace Injuries and Illnesses, as published on 24 November 2017 in 82 FR 55761.

The proposed effective date is 15 February 2018.

Mr. Withrow explained that this is the online reporting system for OSHA 300 data, which was adopted in May of 2016, for certain companies. He continued by stating that the plan was for federal OSHA to develop an online reporting system by February 2017, and employers were required to enter the data online no later than July 1, 2017. However, OSHA had trouble developing the IT system, which did not go online until August. OSHA is basically asking us for a delay because of how long it will take to get it published in the Virginia Register and the 30 days beyond that, since the delay cannot take effect until February 15, 2018. Virginia employers, instead of having to meet the December 15th deadline, will have a few extra months to do so.

Mr. Withrow closed by recommending that the Safety and Health Codes Board adopt the delay to the Final Rule to Improve Tracking of Workplace Injuries and Illnesses for §1904.41, with an effective date of 15 February 2018.

A motion to accept the Department's recommendation was made and properly accepted. The motion was approved unanimously by voice vote.

Cranes and Derricks in Construction: Operator Certification Extension of Deadline, §1926.1427 (k); Final Rule

Ms. Jennifer Rose, Director of Occupational Safety Compliance for the Department, requested the Safety and Health Codes Board to consider for adoption federal OSHA's one-year additional extension of its deadline for Operator Certification, §1926.1427(k), for the Final Rule on Cranes and Derricks in Construction, as published in *82 FR 79 51986* on November 9, 2017.

The proposed effective date is February 15, 2018.

Ms. Rose began by explaining that OSHA adopted this delay to further extend by one year the employer duty to ensure the competency of craned operators involved in construction work. She informed the Board that previously this duty was schedule to terminate for federal OSHA and VOSH on November 10, 2017, but now continues for an additional year until November 10, 2018. She added that OSHA is also further delaying the deadline for crane operator certification for one year from November 10, 2017, to November 10, 2018.

Ms. Rose stated that the 2010 federal Final Rule for Cranes and Derricks was adopted by the Board in 2011. She noted that several entities had informed OSHA that crane operators' certification was insufficient for determining whether an operator could operate their equipment safely on a construction site. She explained that the extension was necessary to give OSHA time to address the issues regarding crane operation raised after the publication of the crane standard.

She concluded by recommending that the Board adopt the Extension of Deadline for Operator Certification, §1926.1427(k) of the Final Rule for Cranes and Derricks in Construction, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2018.

A motion to accept the Department's recommendation was made and properly accepted. The motion was approved unanimously by voice vote.

Items of Interest from the Department of Labor and Industry

Commissioner Ray Davenport mentioned that, during the 2017 General Assembly session, Governor McAuliffe and the General Assembly provided $650,000 of additional funding for 3 consultants and 3 VPP Coordinators, which became available on July 1st. He stated that those positions have been filled; however, due to a resignation in consultation, the Department will be recruiting to fill that vacancy in the future. He expressed concern that the Department was not successful in securing funding for the 12 unfunded CSHO on the compliance side of the House during the last General Assembly session.

Commissioner Davenport mentioned that OSHA commonly uses statistics to show one CSHO for every 59,000 workers and in Virginia, the ration is currently approximately one CSHO per 80,000 workers. He stated that, adding the 12 unfunded CSHOs would improve the ratio to one CSHO per 63,100 workers. He added that the Department continues to seek help in securing the needed funding for these positions.

Commissioner Davenport informed the Board that year-to-date VOSH has investigated 32 fatalities, which is a little behind last year's numbers at this time. He stated that the Department completed the calendar year of 2016 with more than a 35% increase in fatal workplace accidents over the previous two years.

He closed by congratulating the following recently re-appointed Board members: Anna Jolly, Courtney Malveaux, Kenny Richardson, and Milly Rodriguez. Commissioner Davenport expressed his sincere appreciation to all members of the Board for their commitment to safety and health.

Items of Interest from Members of the Board

Mr. Chuck Stiff moved to draft a letter to the Governor-elect and the Board members' delegates in the General Assembly in support of the additional funding for the Department to fill the 12 needed vacant CSHO positions. It was determined that Mr. Stiff and Ms. Rodriguez would draft the letter to be signed by the Board Chair.

Mr. Stiff reminded the Board that the Chair needs to appoint a Secretary.

Meeting Adjournment

There being no further business, a motion was properly made and seconded to adjourn the meeting. The motion was carried unanimously by voice vote. The meeting adjourned at 11:50 a.m.

COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

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COMMISSIONER

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Virginia Safety and Health Codes Boarc

BRIEFING PACKAGE

For June 14, 2018

Va. Code 2.2-4006.A.4.c. of the Virginia Administrative Process Act

16VAC25-60-180. of the VOSH Administrative Regulations

I. Background

At the November 30, 2017 Safety and Health Codes Board meeting an "indefinite" delay of enforcement by OSHA of its Beryllium Standard for Construction and Shipyards was presented to the Board. This constituted an OSHA "administrative stay" of the standard as referenced in 16VAC25-60-180 (see below).

http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+16VAC25-60-180

OSHA also issued a proposed rule on June 27, 2017, to make changes to the Beryllium Standard for Shipyards and Construction (§§1915.1024 and 1926.1124) which would remove the "ancillary" provisions from the standards, leaving only the new PELs and STELs in place:

https://www.federalregister.gov/documents/2017/06/27/2017-12871/occupational-exposure-to-beryllium-and-beryllium-compounds-in-construction-and-shipyard-sectors

https://www.osha.gov/Publications/OSHA3915.pdf

VOSH does not have jurisdiction over private sector workers in Maritime/Shipyards. It does have jurisdiction over state and local government workers in those employment sectors. The Department is not aware of any such covered employees in Virginia that would be covered by the Beryllium Standard for Shipyards.

Therefore, the main focus of this briefing package will address employee exposure to beryllium in the construction industry. Almost exclusively, employee exposure to beryllium in the construction industry occurs in abrasive blasting operations.

At the November 30, 2017, meeting the Board decided to not adopt OSHA's "indefinite" delay of enforcement, but did stay enforcement of the regulation until August 1, 2018, to give the Department the opportunity to research some issues. The Board asked the Department to look into the following:

1. If the Board chose not to adopt OSHA's indefinite stay, would the federal identical standards for Construction and Shipyards (in state and local government) be enforceable in Virginia?

2. If the answer to Question one, above, is no, would the Department research whether there was sufficient evidence in the OSHA administrative record that would enable the Board to use the OSHA record to support a full regulatory rulemaking in accordance with the Virginia Administrative Process Act?

II. <u>If the Board chose not to adopt OSHA's indefinite delay, would the federal identical standards for Construction and Shipyards (in state and local government) be enforceable in Virginia?</u>

The short answer is "no".

Current guidance in the VOSH Administrative Regulations on OSHA administrative stays is contained in §16VAC25-60-180. Response to judicial action:

> A. Any federal occupational safety or health standard, or portion of them, adopted as rule or regulation by the Board either directly, or by reference, and subsequently stayed by an order of any federal court will not be enforced by the commissioner until the stay has been lifted. **Any federal standard which has been administratively stayed by OSHA will continue to be enforced by the commissioner until the stay has been reviewed by the Board. The Board will consider adoption or rejection of any federal administrative stay and will also subsequently review and then consider adoption or rejection of the lifting of such stays by federal OSHA.** (*Emphasis added*).

VOSH federal identical regulations are adopted under the authority of Va. Code §2.2-4006.A.4.c:

> § 2.2-4006. Exemptions from requirements of this article.
>
> A. The following agency actions otherwise subject to this chapter and § 2.2-4103 of the Virginia Register Act **shall be exempted from the operation of this article**:
>
> ….
>
> 4. Regulations that are:
>
> ….
>
> c. **Necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation**, and the Registrar has so determined in writing. Notice of the proposed adoption of these regulations and the Registrar's determination shall be published in the Virginia Register not less than 30 days prior to the effective date of the regulation. (*Emphasis added*).

In order for Virginia to maintain its State Plan for occupational safety and health, it is required to be "at least as effective as" OSHA, and specifically in regard to the adoption of safety and health standards, §18(c)(2) of the OSH Act of 1970 (29 USC 667(c)(2)) provides:

> (c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgement --
>
> ….
>
> (2) provides for the **development and enforcement of safety and health standards** relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be **at least as effective** in providing safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.
>
> https://www.osha.gov/laws-regs/oshact/section_18)

The Department "informally" reviewed the above language with the Office of the Attorney General and both parties agreed that the proper reading of the language in §18(c)(2) and Va. Code §2.2-4006.A.4.c, as they apply to OSHA's indefinite delay/administrative stay of enforcement, is that any Board failure to adopt an administrative stay would mean that Virginia's Beryllium Standards in Construction and Shipyards no longer meets the APA exemption criteria in §2.2-4006.A.4.c., and could only become legally effective if the standards went through the full notice, comment and adoption requirements of the Virginia APA.

In other words, once OSHA issues an administrative stay for a standard that makes the standard temporarily unenforceable, Virginia's federal identical counterpart standard is "no longer necessary to meet the requirements of federal law or regulation" under Va. Code §2.2-4006.A.4.c.

This means that for this or any other administrative stay issued by OSHA, contrary to the current wording of §16VAC25-60-180 of the VOSH Administrative Regulations, the administratively stayed federal standard **cannot** be enforced by the Commissioner, even if the federal stay has not been reviewed or adopted by the Board.

The Department will be proposing at a future Board meeting a Notice of Intended Regulatory Action (NOIRA) to amend §16VAC25-60-180 to address this issue.

In the interim, the Board will still be asked to review and adopt OSHA administrative stays and the lifting of administrative stays. The Board will continue to be able to use its discretion regarding the dates for adoption and lifting of such stays.

III. If the answer to Question One is no, would the Department research whether there was sufficient evidence in the OSHA administrative record that would enable the Board to use the OSHA record to support a full regulatory rulemaking in accordance with the Virginia Administrative Process Act?

The short answer is "maybe".

Va. Code § 40.1-22(5) contains the requirements that must be met by the Board in setting VOSH regulations:

(5) The Board, with the advice of the Commissioner, is hereby authorized 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 Occupational Safety and Health Act of 1970 (P.L. 91-596), and as may be necessary to carry out its functions established under this title. The Commissioner shall enforce such rules and regulations. All such rules and regulations shall be designed to **protect and promote the safety and health of such employees**. 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 Occupational Safety and Health 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 experience gained under this and other health and safety laws.** Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired. Such standards when applicable to products which are distributed in interstate commerce shall be the same as federal standards unless deviations are required by compelling local conditions and do not unduly burden interstate commerce. (*Emphasis added*.)

A large majority of the information needed to support a regulatory rulemaking for a unique Virginia Beryllium Standard for Construction and Shipyards (state and local government only) is contained in the preamble to the original standards in the *Federal Register*, 82 FR 2470; and the preamble to the proposed regulation that would eliminate the "ancillary" provisions from 1915.1024 and 1926.1124.

For instance, in both of the above preambles, OSHA has confirmed that the new lower PELs and STELs for the industries are well-supported by scientific research and OSHA has already begun enforcement of those exposure levels in Shipyards and Construction as of May 11, 2018.

Those documents also allow for calculation of the number of construction employees likely impacted in Virginia (227), the average annualized cost per employee for compliance ($1,196.30) and the average annualized benefit per employee achieved with full compliance ($9,083.41). The total cost in construction on an annual basis in Virginia can be estimated at $271,560, and the annualized benefit to employees can be estimated at $2,061,934.

However, there appear to be at least two primary difficulties in gathering data and information that will fully support a Virginia unique regulation:

A. Although OSHA has proposed eliminating the "ancillary" provisions for the Beryllium Standard for Shipyards and Construction, the proposed rule that was published on June 27, 2017, also asks:

- Whether the proposal provides adequate protection to workers in construction and shipyards;
- Should OSHA keep any or all of the ancillary provisions from the original final rule;
- What is the incremental benefit if OSHA keeps the medical surveillance requirements from the original final rule;
- Alternatively, should OSHA keep some of the medical surveillance requirements and not others from the original final rule, and if so, which ones.

Some of the above questions leave the impression that OSHA may still decide to retain some of the "ancillary" provisions that they are proposing to eliminate. If OSHA continues to move as expeditiously on the proposed rule as they have on other issues associated with the Beryllium Standards, it may be advisable for the Board to delay consideration of a unique regulation so that it can have the benefit of final OSHA action to review and consider prior to initiating the regulatory promulgation process under the APA.

B. In any Virginia unique rulemaking for these standards, the Board will very likely run into conflicting information and conclusions drawn by federal OSHA between the original rulemaking record and that being developed for the proposed regulation. Such conflicts will necessarily pose difficulties and provide potential fodder should there be any legal challenges to the Board's actions.

For instance, in the preamble to the original final rule, OSHA analyzed alternatives to the final rule, including one that would have retained the new PELs and STELs and eliminated the "ancillary" provisions (Alternative 7), as is contemplated in the proposed rule. OSHA concluded that the:

> "Ancillary provisions such as personal protective clothing and equipment, regulated areas, medical surveillance, hygiene areas, housekeeping requirements, and hazard communication all serve to reduce the risks to beryllium exposed workers beyond that which the final TWA PEL could achieve alone." (82 FR 2619).

On the other hand, the following statement appears in the preamble to the proposed regulation for Shipyards and Construction:

"OSHA has preliminarily concluded that there are limited to no forgone benefits (due to reducing the number of cases of CBD) as a result of revoking the ancillary provisions of the beryllium final standards for Construction and Shipyards because, based on the proposed baseline compliance estimates presented in section V.B. of the PEA, the benefits attributed to the ancillary provisions in those sectors were overestimated." (82 FR 29216).

As the above is a "preliminary" conclusion, it may be advisable for the Board to delay consideration of a unique regulation until it has the benefit of OSHA's final conclusions on this central issue.

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COMMONWEALTH of VIRGINIA

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Virginia Safety and Health Codes Boarc

BRIEFING PACKAGE

For June 14, 2018

Occupational Exposure to Beryllium
for General Industry, §1910.1024
Stay of Certain Compliance Dates
Adoption of Certain Compliance Dates

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board consider for adoption federal OSHA's stay of compliance dates for the Occupational Exposure to Beryllium Standard for General Industry, §1910.1024.

On March 2, 2018, by memorandum from Director Thomas Galassi of the OSHA Directorate of Enforcement Programs , the compliance date of March 12, 2018 for all sections of the Beryllium Standard for General Industry, §1910.1024, except for paragraphs (i)(2) for change rooms, (i)(3) for showers and (f) for engineering controls was **stayed for 60 days to May 11, 2018**. The compliance dates for paragraphs (i)(2), (i)(3), and (f) were unchanged.

On May 2, 2018, by memorandum from Director Thomas Galassi of the OSHA Directorate of Enforcement Programs (*See Attachment A*), the compliance date for all sections of the Beryllium Standard for General Industry, §1910.1024, **except** for the following paragraphs was **stayed until June 25, 2018**:

1910.1024(c), permissible exposure limits
1910.1024(d), exposure assessment
1910.1024(g), respiratory protection
1910.1024(k), medical surveillance
1010.1024(l), medical removal

The compliance dates for paragraphs (i)(2), (i)(3) and (f) of §1910.1024 are unchanged.

The proposed compliance date for §§1910.1024(c), (d), (g), (k), and (l) is September 15, 2018.

The proposed effective date for the stay of the remaining sections of 1910.1024 is September 15, 2018.

It is also possible that the compliance date for certain of other ancillary provisions listed below in section C. could be stayed until December 12, 2018. No specific guidance from OSHA has been provided at this time on which paragraphs in the standard could be impacted.

II. Summary

These actions to stay compliance dates of the Beryllium Standard for General Industry are to accommodate settlement agreements reached by OSHA with litigants challenging the standard and allow time to complete other ongoing rulemaking proceedings:

Direct Final Rule and request for comment concerning §1910.1024 (83 FR 19936)
OSHA is adopting a number of clarifying amendments to address the application of the standard to materials containing trace amounts of beryllium.
https://www.gpo.gov/fdsys/granule/FR-2018-05-07/2018-09306

Proposed Rule concerning §1910.1024 (83 FR 19989) (containing the text of the Direct Final Rule)
https://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=2018-09307&packageId=FR-2018-05-07&acCode=FR&collectionCode=FR

The new Beryllium Standard for General Industry went into effect nationally on May 20, 2017, following the stays of the original federal effective date of March 10, 2017, and became effective on May 15, 2017 in Virginia. However, compliance obligations both nationally, where federal OSHA has direct enforcement authority, and for VOSH in Virginia were not scheduled to begin until March 12, 2018.

III. Basis, Purpose and Impacts

A. Basis and Background

On January 9, 2017, federal OSHA published in the *Federal Register* its final rule on the Occupational Exposure to Beryllium and Beryllium Compounds for three industries: General Industry (1910), Shipyard (1915) and Construction (1926) (82 FR 2470). Federal OSHA concluded that employees exposed to beryllium and beryllium compounds at the preceding permissible exposure limits (PELs) were at significant risk of material impairment of health, specifically chronic beryllium disease and lung cancer. OSHA concluded that the new 8-hour time-weighted average (TWA) PEL of 0.2 µg/m^3 reduced this significant risk to the maximum extent feasible.

Subsequently, in accordance with the January 20, 2017, Presidential directive entitled "Regulatory Freeze Pending Review", federal agencies were directed to consider for delay,

beyond the initial 60-day period, the effective date for regulations that had not yet taken effect. OSHA reviewed the Beryllium standards, which were scheduled to become effective on March 10, 2017 (see 82 FR 8346, January 24, 2017).

In compliance with the Presidential directive, on February 1, 2017, OSHA published a final rule in the *Federal Register*, which temporarily stayed the effective date for the Beryllium Standards for the Construction and Shipyards industries until March 21, 2017. The Beryllium Standard for General Industry was not included in the stay of the effective date. This stay gave OSHA the opportunity for review and consideration of new regulations, as required by the Presidential directive (see 82 FR 8901).

On February 16, 2017, the Safety and Health Codes Board adopted federal OSHA's final rule on the Occupational Exposure to Beryllium for Parts 1910, 1915, and 1926, with an effective date of May 15, 2017, and compliance dates identical to federal OSHA's. Commencement of all obligations of these standards were scheduled for March 12, 2018, except for requirements to provide change rooms and showers which would be March 11, 2019, and engineering controls which would be March 10, 2020.

On March 21, 2017, after considering all comments received, OSHA finalized a stay of the effective date for the final rule on Beryllium in the *Federal Register* (82 FR 14439) for the Construction and Shipyard industries only. The General Industry Standard effective date was not included and remained the same until OSHA's recent actions discussed above.

B. Purpose

These actions to stay compliance dates of the Beryllium Standard for General Industry are to accommodate settlement agreements reached by OSHA with litigants challenging the standard and allow time to complete other ongoing rulemaking proceedings.

C. Impact on Employers

The stay of the compliance dates for the Beryllium Standard for General Industry will not have a negative impact on employers, and will provide them with additional time in which to come into compliance with certain provisions of the General Industry Standard which are stayed until June 25, 2018:

1910.1024(e), work areas and regulated areas
1910.1024(f), methods of compliance (e.g., written exposure control plan)
1910.1024(h), personal protective clothing and equipment
1910.1024(i), hygiene areas and practices
1910.1024(j), housekeeping
1910.1024(m), communication of hazards
1910.1024(n), recordkeeping

D. Impact on Employees

Those portions of the Beryllium Standard for General Industry which will soon be effective will immediately provide substantial new protections for employees in the areas of a significantly lower permissible exposure limit, exposure assessment, respiratory protection, medical surveillance and medical removal. The compliance date for most remaining portions of the standard is stayed until June 25, 2018, although it is possible that the compliance date for certain of the ancillary provisions listed above could be stayed until December 12, 2018.

Employees could be negatively impacted if certain ancillary provisions are stayed until December 12, 2018. No specific guidance from OSHA has been provided at this time on which paragraphs in the standard could be impacted.

E. Impact on the Department of Labor and Industry

No impact on the Department is anticipated from the adoption of the stay of the compliance date for the Beryllium Standards for General Industry. The stay will provide additional time for internal training on inspection procedures.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six months of the occurrence of a federal program change, to adopt identical changes or promulgate equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting this stay of the compliance dates for the Beryllium Standard for General Industry will allow Virginia to conform to the federal program change.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt federal OSHA's stay of compliance dates for the Occupational Exposure to Beryllium for General Industry, Part 1910.1024 as summarized in section I. Action Requested, above, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt a compliance date for §§1910.1024(c), (d), (g), (k), and (l), as summarized in section I. Action Requested, above, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

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 with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

ATTACHMENT A: March 2, 2018, Memorandum from Director Thomas Galassi of the Directorate of Enforcement Programs Entitled “Interim Enforcement Memorandum and Notice of Delay in Enforcement for Certain Provisions of the Beryllium Standards

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

MAY 09 2018

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
STATE PLAN DESIGNEES

THROUGH: RICHARD MENDELSON
Acting Deputy Assistant Secretary

FROM: THOMAS GALASSI, Director
Directorate of Enforcement Programs

SUBJECT: Interim Enforcement Memorandum and Notice of Delay in Enforcement for Certain Provisions of the Beryllium Standards

This memorandum provides interim guidance for federal enforcement of the Beryllium Standards, 29 CFR 1910.1024, 29 CFR 1926.1124, and 29 CFR 1915.1024, beginning May 11, 2018. This memorandum will expire when superseded or when the compliance directive becomes effective and available to the field.

As you know, on January 9, 2017, OSHA published its final rule, *Occupational Exposure to Beryllium*, in the Federal Register (82 FR 2470-2757). The rule contained expanded standards for general industry, construction, and shipyards, and included a lower 8-hour time weighted average (TWA) and permissible exposure limit (PEL), a new short term exposure limit (STEL), and an action level at half of the 8-hour TWA PEL. Additionally, on June 27, 2017, OSHA issued a Notice of Proposed Rulemaking, *Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors*, to revoke the ancillary provisions of the construction and shipyard standards, but retain the PELs (see 82 FR 29182). All obligations, besides the ancillary provisions of the construction and shipyard standards, were to begin on March 12, 2018; except for the general industry requirements for change rooms and showers in paragraphs (i)(2) and (i)(3) that will not start until March 11, 2019; and the requirements for engineering controls in paragraph (f) that will not begin until March 10, 2020.

Previously, in a memorandum dated March 2, 2018, OSHA delayed enforcing the general industry standard, and construction and shipyard PELs, until May 11, 2018. However, under the terms of settlement agreements reached with petitioners challenging the rule, the Agency will propose to extend the compliance dates of certain requirements until December 12, 2018. To allow time to complete that and other ongoing rulemaking proceedings, on May 11, 2018 OSHA will begin enforcing **only** the:

- PELs in the general industry, construction, and shipyard standards at §1910.1024(c), §1926.1124(c), and §1915.1024(c), respectively;
- General industry exposure assessment at §1910.1024(d);

- General industry respiratory protection §1910.1024(g);
- General industry medical surveillance §1910.1024(k); and
- General industry medical removal at §1910.1024(l).

Unless it provides notice, OSHA will not enforce any other provisions contained in §1910.1024 until June 25, 2018. And, unless it provides notice OSHA will not enforce any other provisions contained in §1926.1124 or §1915.1024.

Please see the attached procedures with specific interim enforcement guidance for the provisions listed above. Please take note that until May 11, 2018, if an employer fails to meet the new PEL, but meets the old PEL, then OSHA will inform the employer of the exposure levels and offer assistance to assure that the employer understands the findings and compliance requirements.

Thank you for your attention to this matter. If you have any questions, please contact Larry McGowan or Bill Matarazzo in the Office of Health Enforcement, (202) 693-2190.

Attachment

Attachment: Interim Enforcement Guidance for the Beryllium Standards

General Information:

§1910.1024; §1926.1124; §1915.1024. Applies to occupational exposure to beryllium (Be) in all forms, compounds, and mixtures in general industry, construction, and shipyards, respectively, except those articles and materials exempted by paragraphs (a)(2) and (a)(3) of their respective standard.

- §1910.1024(b) *Action level* means a concentration of airborne beryllium of 0.1 micrograms per cubic meter of air ($\mu g/m^3$) calculated as an 8-hour time-weighted average (TWA).
- §1910.1024(c)(1); §1926.1124(c)(1); §1915.1024(c)(1) establishes an 8-hour TWA PEL of 0.2 $\mu g/m^3$.
- §1910.1024(c)(2); §1926.1124(c)(2); §1915.1024(c)(2) establishes a STEL of 2.0 $\mu g/m^3$ over a 15-minute sampling period.
- §1910.1024:
  - Contains several other ancillary provisions;
  - The compliance date for change rooms and showers [§1910.1024(i)(2) and (i)(3)] is March 11, 2019; and
  - The compliance date for engineering control requirements [§1910.1024(f)] is March 10, 2020.
- §1926.1124; §1915.1024:
  - Current rulemaking (82 FR 29183) proposes to rescind the ancillary provisions but retain the PEL and STEL.

Paragraph (a)(3). The standards do not apply to materials containing less than 0.1% beryllium by weight where employers have objective data demonstrating that employee exposures will remain below the action level (AL) as an 8-hour TWA under any foreseeable conditions.

NOTE: The exception does not apply where exposures below 0.1$\mu g/m^3$ as an 8-hour TWA PEL are expected or achieved only because engineering or other controls are being used to limit exposures. When using the phrase "any foreseeable conditions," OSHA is referring to situations that can reasonably be anticipated. For example, annual maintenance of equipment during which exposures could exceed the action level would be a situation that is generally foreseeable. [*See also* 82 FR 2643-2644].

Inspection Guidance: Obligations for Compliance by May 11, 2018.

Permissible Exposure Limits
Applies to §1910.1024(c), §1926.1124(c), and §1915.1024(c)

- General
  - Reduces the PEL for beryllium to 0.2 $\mu g/m^3$, averaged over 8-hours.
  - Establishes a new STEL for beryllium of 2.0 $\mu g/m^3$, over a 15-minute sampling period.
  - NOTE: Until May 11, 2018, if an employer fails to meet the new PEL, but meets the old PEL, then OSHA will inform the employer of the exposure levels and offer assistance to assure that the employer understands the findings and compliance requirements.

INSPECTION GUIDANCE

- NOTE: A new analytical method for beryllium is under development. The personal breathing zone sampling media and procedures for the new method are identical to those for OSHA Method ID 125G, and the previous method can be consulted for guidance. However, wipe samples for beryllium should only be collected using smear tabs. If additional guidance is needed contact the Salt Lake Technical Center (SLTC), through the regional office (if required), and request guidance specific to beryllium.
- Be prepared to collect one or more personal breathing zone samples on the first day of the inspection, in accordance with the OSHA Technical Manual (OTM), Section II, Chapter 1, and using required methods for beryllium sampling as found on the OSHA Chemical Sampling Information (CSI) Web page.
- When placing a sampling cassette for monitoring abrasive blasting exposures where an employee is wearing an abrasive blast respirator with hood/helmet, place the cassette outside of the helmet/hood, i.e., outside the abrasive blasting shroud, but as near as practicable to the employee's breathing zone.
- When collecting an air sample on a welder wearing a protective helmet, position the sampling cassette inside the helmet. If the free space inside the helmet precludes the use of a 37-mm diameter cassette and filter, 25-mm diameter sampling filters and cassettes can be used instead. In some cases, a welder's helmet may be integrated into a respirator, such as a hooded, powered air purifying respirator (PAPR). If this is the case, position the sampling cassette outside the helmet and respirator assembly.

CITATION GUIDANCE

- Overexposures will be characterized as serious violations.
- Until the compliance date for engineering controls becomes effective in the general industry standard, if overexposure is measured, OSHA will consider employers to be in compliance with the PELs as long as employers are in compliance with §1910.134

and employees are being provided with, and use, appropriate respiratory protection, without first attempting to use engineering controls.

- When employees are overexposed to both Be and any other air contaminant(s) generated from the same process or operation, cite each PEL violation as serious and propose separate penalties.

Exposure Assessments under §1910.1024(d) (DOES NOT APPLY TO CONSTRUCTION OR SHIPYARDS)

- General
  - General industry employers must assess the airborne exposure of each employee who is, or may reasonably be expected to be, exposed to airborne beryllium in accordance with either the performance option or the scheduled monitoring option.
  - All air monitoring samples must be evaluated by a laboratory that can measure beryllium to an accuracy of plus or minus 25% within a 95% statistical confidence level for airborne concentration levels at or above the AL.
  - The employer must reassess airborne exposure whenever a change in the production, process, control equipment, personnel, or work practices may reasonably be expected to result in new or additional airborne exposure at or above the AL or STEL, or when the employer has any reason to believe that new or additional airborne exposure at or above the AL or STEL has occurred.
  - Within 15 working days after completing an exposure assessment, the employer must notify each employee of the results in writing or post the results in an accessible location. Whenever the exposure is above the TWA PEL or STEL, the employer must describe in the written notification the corrective action being taken to reduce airborne exposure.

- Performance Option
  - Provides some flexibility; the burden is on the employer to demonstrate the data fully complies with the requirements.
  - Allows employers to assess the 8-hour TWA exposure for each employee on the basis of any combination of air monitoring data (i.e., historical data) or objective data sufficient to accurately characterize employee exposures to beryllium:
    - Data must reflect worker exposure on each shift, each job classification, and in each work area.
  - Objective data relied upon must be recorded and maintained by the employer, as well as made available in accordance with OSHA's Access to Employee Exposure and Medical Records Standard (§1910.1020), including the following information:
    - The data relied upon;
    - The beryllium-containing material in question;
    - The source of the objective data;
    - A description of the process, task, or activity on which the objective data were based;
    - Other data relevant to the process, task, activity, material, or airborne exposure on which the objective data were based.

- NOTE: Under the performance option, objective data meeting the PEL may rely solely on control by an effective ventilation system. Such data can be used to satisfy the employer's responsibility for an exposure assessment. However, this data is not appropriate as objective data for determining coverage under the scope provision, (a)(3). Coverage under the standard is determined without regard to the use of engineering controls. [*See* note, above, under General Information].

- Scheduled Monitoring Option
  - Requires both initial and periodic monitoring:
    - Employers must perform initial monitoring as soon as work begins to determine exposure levels and where to implement control measures;
    - Employers must conduct periodic monitoring at specified intervals based on most recent monitoring results;
    - Employees must be notified (in writing or results may be posted) within 15 working days after completing an exposure assessment; and
    - For airborne concentration exposures above the TWA PEL or STEL, employers must describe (in the written notification) the corrective action being taken to reduce exposure to or below the exceeded exposure limits where feasible corrective actions exist but had not yet been implemented when the monitoring occurred.
  - Monitoring must assess exposures for each employee on the basis of one or more personal breathing zone air samples that reflect the exposures on each shift, each job classification, and work area:
    - Where several employees perform the same tasks on the same shift and in the same work area, the employer may sample a representative group of employees to meet this requirement. Representative sampling must be of the employee(s) who are expected to have the highest exposure to beryllium.
  - Employers must perform periodic monitoring in accordance with §1910.1024(d)(3)(iv)-(viii).
  - Employers must reassess airborne exposures whenever a change in the production, process, control equipment, personnel, or work practices may reasonably be expected to result in new or additional exposures at or above the AL or STEL, or when employers have any reason to believe that new or additional airborne exposures at or above the AL or STEL has occurred in accordance with §1910.1024(d)(4).

- Observation of Monitoring
  - Employers must provide an opportunity for each affected employee, and their employee representative, a chance to observe the monitoring if their airborne exposure is measured or represented by the monitoring.
  - When observation requires entry into an area where the use of personal protective clothing or equipment (including respirators) is required, the employer must provide to each observer at no cost, and ensure that each observer uses such clothing or equipment.
  - Employers will ensure all observers follow all other applicable safety and health procedures.

INSPECTION GUIDANCE

- If the employer has conducted an exposure assessment, review the assessment to determine what levels might be expected before entering the work area.
- Determine whether employers have accurately characterized the exposure of each employee to Be.
- Review the employer's sampling data, and interview employees to determine whether the sample times were representative of the work hours, whether samples were collected in the employee's breathing zone, and whether employees were notified of the results.
- Whether an employer used the scheduled monitoring option or the performance option, verify that the employer has performed a new exposure assessment required by §1910.1024(d)(4) whenever a change in the production, process, control equipment, personnel, or work practices may have resulted in or a have a reasonable expectation of new or additional exposure at or above the AL or STEL.

CITATION GUIDANCE

- If no monitoring records exist and the employer does not have objective data, and employees are exposed to Be, cite §1910.1024(d)(1).
- If it is determined that the employer's assessment of an employee's full shift exposure is inadequate because of insufficient sampling time and/or insufficient documentation, or inaccurate analysis, cite a violation of the corresponding exposure determination provision.
- If the employer is using the performance option and it is determined that significant differences exist between the objective data and current conditions which could cause the employee(s) exposure(s) to be underestimated, cite a violation of §1910.1024(d)(2).
- If there has been a change in the workplace that could result in new or additional Be exposures, and the employer has not performed additional exposure determinations, cite §1910.1024(d)(4).
- If employees have not seen their exposure determination results within 15 working days, and the employer does not have a dated copy of the letter or posting of the results, cite §1910.1024(d)(6)(i). If the employer's written notification of exposures exceeding a PEL did not explain corrective action being taken, cite §1910.1024(d)(6)(ii).

Respiratory Protection under §1910.1024(g) (DOES NOT APPLY TO CONSTRUCTION OR SHIPYARDS)

- General
  - Employers must provide respiratory protection at no cost to the employee, and ensure that each employee uses respiratory protection in accordance with the written respiratory protection program:

- During periods necessary to install or implement feasible engineering and work practice controls where airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL;
- During operations for which an employer has implemented all feasible engineering and work practice controls when such controls are not sufficient to reduce airborne exposure to or below the TWA PEL or STEL;

NOTE: Employer obligations for engineering controls in §1910.1024(f) do not become enforceable until March 10, 2020.

- During emergencies; and
- When an employee who is eligible for medical removal under paragraph [§1910.1024(l)(1)] chooses to remain in a job with airborne exposure at or above the AL, as permitted by §1910.1024(l)(2)(ii).

- Respiratory Protection Program
  - When the use of respiratory protection is required under §1910.1024(g), then employer must ensure the selection and use of such respiratory protection is in accordance with the Respiratory Protection Standard (§1910.134).
  - Employers must provide (at no cost) a powered air-purifying respirator (PAPR) instead of a negative pressure respirator when all of the following conditions are met:
    - Respiratory protection is required by this standard;
    - An employee entitled to such respiratory protection requests a PAPR; and
    - The PAPR provides adequate protection to the employee in accordance with §1910.1024(g)(2).

INSPECTION GUIDANCE

- If the employer has determined that respirator use is required, verify that the employer has established and implemented an appropriate respiratory protection program, in accordance with OSHA's Respiratory Protection Standard §1910.134, that contains all of the required elements. Verify compliance with the program through a review of the written program, visual observation(s) during a walk-around, and employee interviews.
- Evaluate the adequacy of respiratory protection when the employer requires respirator use and when the employer has made an exposure determination (or the compliance officer has measured an exposure) exceeding the PEL or STEL. The assigned protection factor of the respirator must be high enough to maintain the employee's exposure to beryllium at or below the maximum use concentration (i.e., the product of multiplying the APF of the respirator by the PEL for Be). [See §1910.134(d)(3)(i)(B)(1)].
- Review medical examination results that are authorized under the Respiratory Protection Standard, §1910.134, and conduct interviews to determine whether there are any employees wearing respirators who should not be. For guidance on inspection procedures for §1910.134, refer to the *Inspection Procedures for the Respiratory Protection Standard*, Enforcement and Compliance Directive (CPL 02-00-158).

- Although the Beryllium Standard does not address the voluntary use of respirators, if employees are voluntarily using respirators to protect themselves from Be exposures, cite the applicable provisions of §1910.134 after evaluating in accordance with CPL 02-00-158.

CITATION GUIDANCE

- If the employer does not provide appropriate respiratory protection for employees in the above situations, cite the applicable subparagraph of §1910.1024(g) for general industry and group with the appropriate PEL violation, §1910.1024(c), as applicable.
- If the employer does not provide an adequate respiratory protection at no cost, cite the applicable subparagraph of §1910.1024(g) for general industry.
- If employees are required to wear respirators, then the employer must have a respiratory protection program. If the employer has not implemented the program or elements of it are deficient or missing, cite §1910.1024(g)(2). Additionally, if elements are deficient or missing, violations should be grouped where appropriate and cite the applicable subparagraphs under §1910.134. For example, when the employer has provided a respirator with an APF that does not maintain an employee's exposure to Be at or below the maximum use concentration, cite §1910.1024(g)(2) and group with a violation of §1910.134(d)(3)(i)(B)(1).
- If there is a discrepancy between the written program and implemented work practices at the worksite, cite §1910.1024(g)(2) and group with a violation of the paragraph under §1910.134 that requires the work practice.
- If violations are found with employees voluntarily using respirators to protect themselves from Be exposures, cite the applicable voluntary use provisions of §1910.134.

Respiratory Protection under §1910.134 As related to §1926.1124(c) and §1915.1024(c) only

- General
  - OSHA will continue to enforce the Respiratory Protection Standard (§1910.134) where the PEL is exceeded in the construction and shipyard industries.

INSPECTION GUIDANCE

- Verify that the employer has established and implemented an appropriate respiratory protection program, in accordance with OSHA's Respiratory Protection Standard §1910.134, that contains all of the required elements. Verify compliance with the program through a review of the written program, visual observation(s) during a walk-around, and employee interviews.

CITATION GUIDANCE

- If the employer does not provide appropriate respiratory protection, or has not established and implemented an appropriate respiratory protection program, cite the

applicable subparagraph of §1910.134, for overexposures, group with the appropriate PEL violation, §1926.1124(c) or §1915.1024(c), as applicable.

Medical Surveillance under §1910.1024(k) (DOES NOT APPLY TO CONSTRUCTION OR SHIPYARDS)

- General
  - Employers must make medical surveillance required by §1910.1024(k) available at no cost to the employee, and at a reasonable time and place for each employee:
    - Who is, or is reasonably expected to be, exposed at or above the AL for more than 30 days per year;
    - Who shows signs or symptoms of chronic beryllium disease (CBD) or other beryllium-related health effects;
    - Who is exposed to beryllium during an emergency; and
    - Whose most recent written medical opinion required by §1910.1024(k)(6)-(7) recommends periodic medical surveillance.
  - Employers must ensure that all medical examinations and procedures required by §1910.1024(k) are performed by, or under the direction of, a licensed physician.
  - NOTE: Employers may rely on the following definitions that OSHA plans to propose in an upcoming rulemaking:
    - CBD diagnostic center means a medical diagnostic center that has a pulmonologist or pulmonary specialist on staff and on-site facilities to perform a clinical evaluation for the presence of chronic beryllium disease (CBD). The CBD diagnostic center must have the capacity to perform pulmonary function testing (as outlined by the American Thoracic Society criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy. The CBD diagnostic center must also have the capacity to transfer BAL samples to a laboratory for appropriate diagnostic testing within 24 hours. The pulmonologist or pulmonary specialist must be able to interpret the biopsy pathology and the BAL diagnostic test results;
    - Chronic beryllium disease (CBD) means a chronic granulomatous lung disease caused by inhalation of airborne beryllium by an individual who is beryllium-sensitized; and
    - Confirmed positive means the person tested has two abnormal [beryllium lymphocyte proliferation] BeLPT test results, an abnormal and a borderline test result, or three borderline test results obtained within the 30-day follow-up test period required after a first abnormal or borderline BeLPT test result. It also means the result of a more reliable and accurate test indicating a person has been identified as having beryllium sensitization.
- Frequency
  - Employers must provide medical exams:
    - Within 30 days if;
      - An employee meets the criteria of paragraph §1910.1024(k)(1)(i)(A), unless the employee has received a medical examination (in accordance §1910.1024) within the last two years, or
      - An employee meets the criteria of §1910.1024(k)(1)(i)(B) or (C).

- NOTE: OSHA plans to propose a change to this provision so that an employee who meets the criteria of §1910.1024(k)(1)(i)(C), i.e., exposed to beryllium in an emergency, must be provided a medical exam within at least one year but no more than two years. Employers complying with the expected revision should be considered to be making a good faith effort to comply with the current provision.
  - At least every two years thereafter for each employee who continues to meet the criteria of §1910.1024(k)(1)(i)(A), (B), or (D); and
  - At the termination of employment for each employee who meets any of the criteria of §1910.1024(k)(1)(i) at the time the employee's employment is terminated, unless an examination has been provided in accordance with this standard during the six months prior to the date of termination.

- Contents of Examination
  - Employers must ensure that the physician or other licensed health care professional (PLHCP) conducting the examination advises the employee of the risks and benefits of participating in the medical surveillance program and the employee's right to opt out of any or all parts of the medical examination.
  - Employers must ensure that the employee is offered a medical examination that includes the contents at §1910.1024(k)(3)(ii)(A)-(G).
- Information provided to the PLHCP
  - Employers must ensure that the examining PLHCP and the agreed-upon CBD diagnostic center, if an evaluation is required under §1910.1024(k)(7), has a copy of this standard and must provide information under §1910.1024(k)(4)(i)-(iv), if known.
- Licensed physician's written medical report for the employee
  - Employers must ensure that the employee receives a written medical report from the licensed physician within 45 days of the examination, including any follow-up BeLPT required under §1910.1024(k)(3)(ii)(E), and that the PLHCP explains the results of the examination to the employee. The written medical report must contain the requirements under §1910.1024(k)(5)(i)-(v).
  - The employer must ensure compliance with other provisions specified at §1910.1024(k)(5).
- Licensed physician's written medical opinion for the employer
  - Employers must obtain a written medical opinion from the licensed physician within 45 days of the medical examination, including any follow-up BeLPT required under §1910.1024(k)(3)(ii)(E). The written medical opinion must contain only the information specified at §1910.1024(k)(6)(i)(A)-(D), unless the employee provides written authorization to include information at §1910.1024(k)(6)(ii)-(v).
  - The employer must ensure compliance with other provisions specified at §1910.1024(k)(6).
- CBD diagnostic center
  - The employer must provide an evaluation at no cost to the employee at a CBD diagnostic center that is mutually agreed upon by the employer and the employee. The examination must be provided within 30 days of:
    - The employer's receipt of a physician's written medical opinion to the employer that recommends referral to a CBD diagnostic center; or

- The employee presenting to the employer a physician's written medical report indicating that the employee has been confirmed positive or diagnosed with CBD, or recommending referral to a CBD diagnostic center.

- The employer must ensure compliance with other provisions specified at §1910.1024(k)(7).
- NOTE: OSHA plans to propose a change to this provision so that the employer must provide a consultation with a CBD diagnostic center within 30 days but may provide the examination within a reasonable time thereafter. Employers complying with the expected revision should be considered to be making a good faith effort to comply with the provision.

INSPECTION GUIDANCE

- If the employer has determined that medical surveillance is needed for employees, verify compliance with the program through a review of the written program, visual observation(s) during a walk-around, and employee interviews to ensure that the employer has included the appropriate employees. For example, review the employer's exposure assessment and interview employees to determine whether the employer provided a medical exam and required tests (Note: this is also a good time to inquire about respirator use and selection):
  - Ask employees when their examinations took place and if it was prior to or within 30 days of beginning their Be work assignments;
  - Ask employees if examinations, including CBD diagnostic centers (if necessary) are offered at no cost, if employees are paid for time spent taking examinations, if the employer pays the cost of travel (if any), and if medical testing is offered at reasonable times and places; and
  - Ask employees if the PLHCP explained the results of their examination and if they were provided with a written medical report either from the employer or from the PLHCP within 45 days.
- Employers have to make and maintain records for each employee covered by medical surveillance - these records must include a copy of the licensed physician's written medical opinion as required by §1910.1024(k)(6). These records should include any exposure limitations and referrals for follow-up testing, including to a CBD diagnostic center, if necessary. If an employee was referred to a CBD diagnostic center, verify the employee exam was conducted within 30 days of the PLHCP's referral and that the CBD's diagnostic center written medical opinion was received by the employer within 30 days of the exam and is compliant with all provisions under §1910.1024(k)(7). Request copies of the medical surveillance records including the medical opinions.
- Whenever reviewing medical reports or opinions, follow OSHA Instruction CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*.
- For assistance with obtaining a medical access order (MAO), contact the Office of Occupational Medicine and Nursing in the National Office. Consider issuing a subpoena for those records, if necessary.

CITATION GUIDANCE

- If medical surveillance was not made available at no cost to the employee(s) or at a reasonable time and place, cite appropriate subparagraph(s) under §1910.1024(k)(1). NOTE: Cite §1910.1024(k)(7) if an eligible employee is not provided an evaluation at a CBD diagnostic center at no cost to the employee(s) or at a reasonable time and place. Do not cite if the employer has made a reasonable attempt to provide a consultation with the CBD diagnostic center within 30 days of meeting the criteria in §1910.1024(k)(7)(i) and provided a medical examination within a reasonable time thereafter.
- Cite §1910.1024(k)(1)(i)(A) if no medical surveillance was provided when employees were exposed at or above the action level for 30 or more days a year beginning May 11, 2018 (unless the employee was provided an exam within the last two years).
- Cite the appropriate paragraph §1910.1024(k)(2) if initial medical examinations were not provided within 30 days after determining eligibility, unless the employer made a reasonable attempt to provide a medical examination by the 30th day of eligibility.
- Cite paragraph §1910.1024(k)(2)(ii) if the employer did not make periodic examinations available at least every two years, or more frequently if recommended by a PLHCP.
- Cite the appropriate paragraphs §1910.1024(k)(3) if the employer did not ensure the PLHCP provided the appropriate procedures and tests as part of the employee's periodic examination.
- Cite the appropriate paragraph under §1910.1024(k)(4) if the examining PLHCP was not provided the required information by the employer.
- Cite paragraph §1910.1024(k)(5) if employees were not given a written medical report from the PLHCP within 45 days of an examination or if the employer did not ensure the PLHCP explained the results to the employee with the required elements.
- Cite the employer under the appropriate paragraph of §1910.1024(k)(6) for failing to obtain a written medical opinion which contained only the specified information from the PLHCP or if the opinion was not received within 45 days of an examination.
- If any information is missing from the PLHCP reports or opinions, cite the appropriate paragraphs under §1910.1024(k)(5) for reports provided to the employee, or §1910.1024(k)(6) for reports provided to the employer.

Medical Removal under §1910.1024(l) (DOES NOT APPLY TO CONSTRUCTION OR SHIPYARDS)

- General
  - An employee is eligible for medical removal if the employee works in a job with airborne exposure at or above the AL and either:
    - The employee provided the employer with:
      - A written medical report indicating a confirmed positive finding or CBD diagnosis, or
      - A written medical report recommending removal from airborne exposure to beryllium in accordance with §1910.1024(k)(5)(v) or (k)(7)(ii).

- The employer receives a written medical opinion recommending removal from airborne exposure to beryllium in accordance §1910.1024(k)(6)(v) or (k)(7)(iii).

- If an employee is eligible for medical removal, the employer must provide the employee with the employee's choice of:
  - Removal as described in §1910.1024(l)(3); and
  - Remaining in a job with airborne exposure at or above the AL, provided that the employer provides, and ensures that the employee uses, respiratory protection that complies with §1910.1024(g) of this standard whenever airborne exposures are at or above the AL.
- If the employee chooses removal:
  - If a comparable job is available where airborne exposures to beryllium are below the AL, and the employee is qualified for that job or can be trained within one month, the employer must remove the employee to that job. The employer must maintain for six months from the time of removal the employee's base earnings, seniority, and other rights and benefits that existed at the time of removal;
  - If comparable work is not available, the employer must maintain the employee's base earnings, seniority, and other rights and benefits that existed at the time of removal for six months or until such time that comparable work described in §1910.1024(l)(3)(i) becomes available, whichever comes first.
- The employer's obligation to provide medical removal protection benefits to a removed employee must be reduced to the extent that the employee receives compensation for earnings lost during the period of removal from a publicly or employer-funded compensation program, or receives income from another employer made possible by virtue of the employee's removal.

INSPECTION GUIDANCE

- If an employee is determined to be eligible for medical removal, document each instance where an employee should have been removed. Verify the employee was removed by reviewing the employer's medical records (document any PLHCP recommendations or confirmed positive or CBD diagnosis), employer's removal records (in accordance with §1910.1024(l)(1), air sampling data (at or above the action level) for the area(s) where the employee(s) were removed, and conduct employee interviews.
- If an employee was eligible for removal, verify that the employee was provided with a choice of his or her preference in accordance with §1910.1024(l)(2)(ii).
- If the employee chose to remain in the job with Be exposures at or above the AL, verify and document that the employer provided, and that the employee uses, respiratory protection.
- Ensure records and recordkeeping are compliant CPL 02 00-135, OSHA *Recordkeeping Policies and Procedures Manual*.

CITATION GUIDANCE

- If an employee was determined to be eligible for medical removal, but was not given a choice to be either removed, re-assigned/trained, or remain in existing job, cite the appropriate paragraph under cite §1910.1024(l)(2).
- If an employee was eligible for medical removal, but remained in the current job at or above the AL, and the appropriate respiratory protection was not provided to and used by the employee, cite the applicable subparagraph of §1910.1024(l)(2) and group with the appropriate Respiratory Protection violation, §1910.134, as applicable.
- If an employee chooses removal, cite the appropriate paragraph under §1910.1024(l)(3) if the employer failed to provide or maintain earning, seniority or other pay and benefits for a period of at least 6 months.

Medical Exams for OSHA Personnel

Regional Administrators and Area Directors are responsible for implementing the OSHA medical examination programs in accordance with all OSHA Instructions and policies. These medical evaluations may be more stringent than what is required by the Beryllium or Respiratory Protection Standards. If you have a question regarding medical exams, please contact the Directorate of Technical Support and Emergency Management – Office of Occupational Medicine and Nursing.

CSHO Protection

CSHOs who are required to wear any respiratory protection must be medically cleared via the medical eligibility examination procedures as described in CPL 02-02-054, *Respiratory Protection Program Guidelines*. They must also wear other appropriate personal protective equipment (PPE) for potential hazardous dermal exposures (e.g., gloves, disposable coveralls, booties) as required. CSHOs must not enter a beryllium regulated area, or other area where exposures are likely to exceed the PEL or STEL, unless it is absolutely necessary and then only if using appropriate PPE. For inspection and air sampling activities, use remote operations when practical. Be conservative about time spent in areas where high concentrations of beryllium exist or are suspected.

COMMONWEALTH of VIRGINIA

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Virginia Safety and Health Codes Boarc

REVISED BRIEFING PACKAGE

For June 14, 2018

Occupational Exposure to Beryllium
for the Shipyard Industry, §1915.1024, and
the Construction Industry, §1926.1124
Stay of Certain Compliance Dates
Adoption of Certain Compliance Dates

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board consider for adoption federal OSHA's indefinite stay of compliance dates for the "ancillary" provisions of the Occupational Exposure to Beryllium for the Shipyard Industry, §1915.1024, and the Construction Industry, §1926.1124.

On March 2, 2018, a memorandum from Director Thomas Galassi of the OSHA Directorate of Enforcement Programs, set a compliance date of May 11, 2018 for §§1915.1024(c) and 1926.1124(c), the new permissible exposure limits (PEL) and short term exposure limits (STEL) for the Beryllium Standards for Shipyards and Construction respectively.

The proposed compliance date for §§1915.1024(c) and 1926.1124(c) is September 15, 2018.

The proposed effective date for the indefinite stay of the remaining "ancillary" provisions of §§1915.1024 and 1926.1124 is August 1, 2018.

II. Summary

This action indefinitely stays the compliance dates for the "ancillary" provisions of the Beryllium Standard for Shipyards, §1915.1024 and Construction, §1926.1124.

The new Beryllium Standards went into effect nationally on May 20, 2017, following the stays of the original federal effective date of March 10, 2017, and became effective on May 15, 2017 in Virginia. However, compliance obligations both nationally, where federal OSHA has direct enforcement authority, and for VOSH in Virginia were not scheduled to begin until March 12, 2018.

OSHA has decided not to enforce the "ancillary" provisions of the January 9, 2017 Shipyard and Construction standards, staying them indefinitely; and has proposed a new rulemaking for the Shipyard and Construction Standards that would remove the "ancillary" provisions of those standards, but maintain the new PELs and STELs. The indefinite stay of the compliance dates for those ancillary provisions remain in place while the proposed rulemaking is underway.

OSHA began enforcing the new PELs and STELs for Beryllium in Shipyards and Construction on May 11, 2018.

III. Basis, Purpose and Impacts

A. Basis and Background

On January 9, 2017, federal OSHA published in the *Federal Register* its final rule on the Occupational Exposure to Beryllium and Beryllium Compounds for three industries: General Industry (1910), Shipyard (1915) and Construction (1926) (82 FR 2470). Federal OSHA concluded that employees exposed to beryllium and beryllium compounds at the preceding permissible exposure limits (PELs) were at significant risk of material impairment of health, specifically chronic beryllium disease and lung cancer. OSHA concluded that the new 8-hour time-weighted average (TWA) PEL of 0.2 $\mu g/m^3$ reduced this significant risk to the maximum extent feasible.

Subsequently, in accordance with the January 20, 2017, Presidential directive entitled, "Regulatory Freeze Pending Review," federal agencies were directed to consider for delay, beyond the initial 60-day period, the effective date for regulations that had not yet taken effect. OSHA reviewed the Beryllium Standards, which were scheduled to become effective on March 10, 2017 (see 82 FR 8346, January 24, 2017).

In compliance with the Presidential directive, on February 1, 2017, OSHA published a final rule in the *Federal Register*, which temporarily stayed the effective date for the Beryllium Standards for the Construction and Shipyards industries until March 21, 2017. This delay gave OSHA the opportunity for review and consideration of the new regulations, as required by the Presidential directive (see 82 FR 8901).

On February 16, 2017, the Safety and Health Codes Board adopted federal OSHA's Final Rule on the Occupational Exposure to Beryllium for Parts 1910, 1915, and 1926, with an effective date of May 15, 2017, and with compliance dates identical to federal OSHA's.
Commencement of all obligations of the standards were scheduled for March 12, 2018, except for requirements to provide change rooms and showers which would be March 11, 2019, and engineering controls which would be March 10, 2020.

On March 21, 2017, after considering all comments received, OSHA finalized a stay of the effective date for the final rule on Beryllium in the *Federal Register* (82 FR 14439) for the Construction and Shipyard industries until May 20, 2017, to further review concerns of commenters.

On June 27, 2017, federal OSHA published in the *Federal Register* (82 FR 29182) a proposed rule that indefinitely stayed the compliance date of March 12, 2018 for the Beryllium Standards for Shipyards and Construction until further notice.

This proposed rule also would modify the standards for Shipyards and Construction significantly. OSHA maintained the new lower requirements for permissible exposure limits (PELs) of 0.2 $\mu g/m^3$ and short-term exposure limits (STEL) of 2.0 $\mu g/m^3$.

However, OSHA has proposed to remove the following ancillary provisions from the Shipyard and Construction sectors that appeared in the January 9, 2017 Final Rule:

- exposure monitoring;
- regulated areas (and competent person in construction);
- a written exposure plan;
- protective equipment and work clothing;
- hygiene areas and practices;
- housekeeping;
- medical surveillance;
- medical removal; and
- worker training

In lieu of the above, OSHA believes that there are other shipyard and construction standards applicable to these operations which can be used to provide comparable protections to employees, including:

- Ventilation standard in the **construction** industry (§1926.57)
- Criteria for personal protective equipment (PPE) standard in **construction** (§§1926.95 and 1926.28)[1]
- Respiratory Protection standard in general industry, applicable to shipyards and **construction** industry (§1910.134)
- Hazard Communication standard in general industry, applicable to shipyards and **construction** industry (§1910.1200)
- Mechanical paint removers standard in shipyards (§1915.34)
- Ventilation and protection in welding, cutting and heating in shipyards (§1915.51)
- Hand and body protection standard in shipyards (§1915.157)
- Confined and enclosed spaces standards in shipyards (Part 1915 Subpart B)

[1] Added by VOSH

- Ventilation standard in general industry for exhaust ventilation and housekeeping, applicable to shipyards (§1910.94(a)(4), (a)(7))

VOSH has identified the following additional current standards that can be used to provide protections to employees in the construction industry:

- Food handling, washing facilities, eating and drinking areas and change rooms in **construction** (§1926.51(d), (f), (g) and (i))
- Housekeeping in **construction** (§1926.25(c))
- Accident prevention and competent person inspections in **construction** (§1926.20)
- Worker training in **construction** (§1926.21)

On August 24, 2017, OSHA noted on its website that it would not enforce the "ancillary" provisions of the Shipbuilding and Construction Standards until further notice, but did not state whether it would enforce the PELs and STELs.

On November 30, 2017, the Safety and Health Codes Board adopted a stay until August 1, 2018 of the compliance obligations of the Occupational Exposure to Beryllium regulation for the Shipyard and Construction industries, 16VAC25-100-1915.1024 and 16VAC25-175-1926.1124. The existing PELs that were in place prior to the January 9, 2017 final rule for Shipyards and Construction were retained for the period of the Board's stay.

OSHA began enforcing the new lower PELs and STELs for Beryllium in Shipyards and Construction on May 11, 2018, §§1915.1024(c) and 1926.1124(c), respectively.

B. Purpose

Beginning enforcement of the new PELs and STELs for Beryllium in Shipyards and Construction will provide substantial protections for exposed employees from the significant health effects of chronic beryllium disease and lung cancer.

The indefinite stay of the "ancillary" provisions of the Shipyard and Construction Standards provides OSHA with additional time for further review of its proposed rule and public comment period currently underway.

C. Impact on Employers

The indefinite stay of the compliance dates for the "ancillary" provisions of the Shipyard and Construction Standards will not have a negative impact on employers, as they will not be required to comply with those provisions.

VOSH is not aware of any state and local government employers or employees that are covered by the Beryllium Standard for Shipyards, §1915.1024, at this time.

Construction employers will be required to take measures to assure that employees are not exposed to beryllium in excess of the new PEL and STEL in the Beryllium Standard for Construction. Construction employers will also have to comply with current VOSH general standards previously identified, e.g., ventilation, PPE, respiratory protection, hazard communication, etc.

D. Impact on Employees

VOSH is not aware of any state and local government employers or employees that are covered by the Beryllium Standard for Shipyards, §1915.1024, at this time.

Construction employees will immediately benefit from the enforcement of the new lower PELs and STELs for Beryllium in Shipyards and Construction, §§1915.1024(c) and 1926.1124(c), respectively, as they will provide substantial protections for exposed employees from the significant health effects of chronic beryllium disease and lung cancer.

An indefinite stay of the compliance dates for the "ancillary" provisions of the Beryllium Standards for Shipbuilding and Construction will mean that certain unique aspects of the original final rule will not be available to provide additional protections to employees:

- a written exposure plan;
- medical surveillance; and
- medical removal

However, OSHA and VOSH have identified current **construction** standards that can be used to address many of the issues for which the "ancillary" provisions were designed:

- Ventilation standard in construction (§1926.57)
- Criteria for personal protective equipment standard in construction (§§1926.95 and 1926.28)[2]
- Respiratory Protection standard in general industry, applicable to shipyards and construction industry (§1910.134)
- Hazard Communication standard in general industry, applicable to shipyards and construction industry (§1910.1200)
- Food handling, washing facilities, eating and drinking areas and change rooms in construction (§1926.51(d), (f), (g) and (i))
- Housekeeping in construction (§1926.25(c))
- Accident prevention and competent person inspections in construction (§1926.20)
- Worker training in construction (§1926.21)

[2] Added by VOSH

E. **Impact on the Department of Labor and Industry**

No impact on the Department is anticipated from the adoption of the delay of the compliance date for the "ancillary" provisions of the Beryllium Standards for the Shipyard and Construction industries.

While some training on the new Beryllium Standard for Shipyards and Construction has been provided to VOSH personnel, additional training is anticipated along with the development of inspection and citation procedures for those portions of the standards that are in effect.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six months of the occurrence of a federal program change, to adopt identical changes or promulgate equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting these changes for the compliance dates for the Beryllium Standards for Shipyards and Construction will allow Virginia to conform to the federal program change.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt federal OSHA's indefinite stay of compliance dates for the "ancillary" provisions of the Occupational Exposure to Beryllium for the Shipyards Industry, Part 1915, and the Construction Industry, Part 1926, as summarized in section I. Action Requested, above, and as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of August 1, 2018.

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt a compliance date for §§1915.1024(c) and 1926.1124(c) as summarized in Section I. Action Requested, above, and as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

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 with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

COMMONWEALTH of VIRGINIA

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE ON PETITION TO AMEND VOSH REGULATION 16VAC25-60-120.B

June 14, 2018

REVISED Petition to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program; 16VAC-25-60-120.B

I. Action

The Virginia Occupational Safety and Health (VOSH) Program request the Safety and Health Codes Board review the attached petition to amend 16VAC25-60-120.B, Administrative Regulation for the VOSH Program and Department response.

II. Summary of the Petition to Amend Process.

On December 8, 2017, Robert R. Payne, University of Alabama at Birmingham, submitted to the Department of Labor and Industry a petition to amend 16VAC25-60-120.B, (*see Attachment "A")* pursuant to Va. Code §2.2-4007 (*see Attachment " B"*).

The Department of Labor and Industry's initial response to the petition was filed on the Virginia Regulatory Townhall on December 18, 2017. The agency's plan to address the petition states as follows:

> "In accordance with Va. Code §2.2-4007.B, the petition has been filed with the Register of Regulations and will be published on January 8, 2018. Comment on the petition may be sent by email, regular mail or posted on the Virginia Regulatory Townhall at www.townhall.virginia.gov.
>
> Comments will be requested until January 28, 2018. Following receipt of all comments on the petition to amend the regulation, the Safety and Health Codes Board will decide whether to make any changes to the regulatory language. This matter will be on the Board's agenda for its next regularly scheduled meeting following the end of the comment period. The Board does not currently have a meeting scheduled. The Board will issue a written decision on the petition within 90 days of the close of the comment period, or within 14 days of its next meeting should the Board not meet within the initial 90 day period."

The petition was published in the Virginia Register of Regulations on January 8, 2018 with a 21-day comment period ending January 28, 2018. **No comments were received.**

http://register.dls.virginia.gov/vol34/iss10/v34i10.pdf

The Board will issue a written decision on the petition within 90 days of the close of the comment period, or **within 14 days of its next meeting** should the Board not meet within the initial 90 day period.

III. Summary of the Petition

The petition seeks to amend 16VAC25-60-120.B, which provides as follows:

> 16VAC25-60-120.B, General industry standards.
>
> B. The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.

The petition asks that the following language be added to 16VAC25-60-120.B:

> Any employer who is using machinery, vehicles, tools, materials or equipment as part of a Process Safety Management (PSM) covered process, as defined in 29 CFR (Code of Federal Regulations) 1910.119, may adjust the operation, training, use, installation, inspection, testing, repair or maintenance after completion of the following:
>
> - Documenting the adjustment from the Manufacturer's Specifications and Limitations (MS&L) in the Process Safety Information (PSI)
> - Completing the Management of Change (MOC) requirement described in 29 C.F.R. 1910.119 (l) and
> - Certification from a company executive that they have examined this adjustment and that to the best of their knowledge the information is true, accurate and complete.

The Petitioner also raises a number of concerns about the regulatory promulgation process that are unrelated to the action of the petition to amend the regulation and, therefore, are not addressed herein.

IV. Summary of Petitioner's Rationale for the Proposed Amendment.

The following excerpts from the Petition to Amend (*see Attachment A*) are provided to summarize the rationale for the proposed amendment to 16VAC25-60-120.B:

> [Pages 4-5]

"The 16 VAC 25-60-120 amendment of 2006 was quite comprehensive in prescribing all aspects of the MS&L be followed regarding operation, training, use, installation, inspection, testing, repair and maintenance (OTUIITRM) for all machinery, vehicles, tools, materials and equipment, hereafter referred to as "Devices." Should an employer encounter a situation where they need to use a Device in contradiction to the MS&L, there was no option to vary from the OTUIITRM requirements. Even if an employer performs an engineering and/or legal analysis looking at a new application for a Device, they cannot use it in the new application if the MS&L prohibits it. This is quite disturbing for many employers who have an engineering staff that work with Devices and can safely implement these Devices to fit different applications as they have been doing for years. The 2006 Amendment should have had an option for employers with engineering staff who understands MS&L. I contend that PSM-covered processes are robust enough to allow for these adjustments/options."

[Page 6]
These [PSM] employers spend a considerable amount of resources in designing, documenting and implementing a safe process to prevent a catastrophic release of highly hazardous chemicals. The fourteen elements take a large amount of time and people to run and maintain. Key players in the PSM program include technically-competent employees such as chemical engineers, mechanical engineers, manufacturing engineers, electrical engineers and/or safety engineers. These key employees require a significant amount of knowledge, education and experience. Most PSM -affected companies employ multiple engineers to carry out the execution of the fourteen elements. In essence, PSM-programs have competent people to run the program.

[Page 7]
PSM is not a low level approach to making sure the process works safely. There is very little in the way of Devices used in the PSM process that do not get vetted and analyzed. Even though a Device used in the PSM process may have been designed for another purpose carrying out of the elements of PSM helps assure it is unlikely for unsafe equipment to be used in the process.

There are situations where PSM-covered processes involve unique manufacturing techniques that Device manufacturers typically don't market to. In these situations, the employers must obtain Devices intended for one application but used in a separate unrelated application. When the MS&L forbids use of that Device for the employer's intended application they are hamstrung by the 2006 Amendment. The employer should have an option to adapt Devices to their use without getting the manufacturer's permission.

V. Basis for Board Authority and Department Response to the Petition to Amend.

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."

B. <u>Department Response to the Petition to Amend.</u>

The Department recommends that the petition to amend 16VAC25-60-120.B be denied by the Safety and Health Codes Board for the following reasons:

1. While the Petitioner has identified one or more scenarios where an employer operating a process safety management (PSM) work site may be negatively impacted by 16VAC25-60.120.B, he is incorrect in stating that VOSH regulations do not provide an option for employers to vary from the requirements of 16VAC25-60.120.B.

   The VOSH Administrative Regulations Manual describes procedures for employers to seek variances from VOSH regulations to address exactly the kind of situations described by the Petitioner (*see Attachment C*):

   16VAC25-60-190. General provisions.
   16VAC25-60-210. Permanent variances.
   16VAC25-60-220. Interim Order.

   The variance procedures provide employers the opportunity to apply to the Commissioner for either an interim order and/or a permanent variance from an existing VOSH regulation. The application requires no special form. The information can be forwarded by letter with attachments, e.g., written procedures, photographs, videos, diagrams, manufacturer's specifications, etc.

   VOSH ARM §§190-220 explain the different forms of variances and describe the process for obtaining an interim order from the Commissioner of Labor and Industry. Permanent variances are addressed in §210. Temporary variances are addressed in §200, but are only used in special instances where an employer is unable to comply with a standard <u>before</u> its effective date.

   Interim orders are addressed in §220 and can be obtained for a limited amount of time without going through the full notice and comment procedures required for a permanent variance. Because interim orders are not subject to public comment and

receive expedited review by the Commissioner, the burden of proof for the employer in support of its interim order request is higher than for a permanent variance (see §220.C. which requires "clear and convincing evidence" that employees will be protected).

The variance application must address the general requirements contained in §190.B.1 to §190.B.3 concerning notification to employees and this Department, and then specify the type of variance requested: permanent variance, temporary variance and/or interim order.

The application must also address each of the documentation requirements listed in either §210.B. for permanent variances and the requirements in §§220.B and 220.C. for interim orders.

Once the Commissioner issues a decision on the variance request, any party may, within 15 days, file a notice of appeal with the Safety and Health Codes Board.

2. Va. Code §40.1-22(5) provides that in deciding whether to adopt or amend a regulation the Safety and Health Codes Board shall take into consideration "experiences gained under this and other health and safety laws."

   The Process Safety Management of Highly Hazardous Chemicals (PSM) Standard, 1910.119, was originally adopted by OSHA and the Safety and Health Codes Board in 1992. Section 16VAC25-60-120.B was adopted by the Board in 2006 after multiple notice and comment periods and a public hearing. To the knowledge of Department staff no Virginia employer responsible for operating a PSM covered work site has ever applied for a variance from 16VAC25-60-120.B; or requested an interpretation of 16VAC25-60-120.B and its application to a PSM covered work site in Virginia. Nor does the Petitioner identify a specific PSM work site in Virginia negatively impacted by 16VAC25-60-120.B.

   Based on the "experiences gained" under 1910.119 and 16VAC25-60-120.B, it does not appear that a significant enough number of PSM employers/employees are impacted negatively in Virginia by 16VAC25-60-120.B to warrant the undertaking of a potentially costly and time consuming regulatory amendment process; particularly when VOSH variance procedures discussed above may be used by PSM employers on a case-by-case basis to address the situations described by the Petitioner. Should the Department ultimately receive a significant number of variance requests on this issue, it will reconsider its recommendation on this petition to amend.

3. While the Department has not researched in depth the ramifications of an amendment to 16VAC25-60-120.B that would permit an employer to violate manufacturer's specifications and limitations without first contacting the manufacturer and/or a governing body, such as the VOSH Program, it would appear that there would be significant legal and liability ramifications and complexities involved in any proposed rulemaking that could affect such a potentially broad range of manufactured items. PSM facilities by their very nature also involve the handling of large amounts of highly hazardous chemicals, and in the event of a failure can result in catastrophic consequences for the worksite, its employees and potentially the surrounding community and the environment. The advantages of addressing the Petitioner's concerns with employers on a case-by-case basis through a relatively stream-lined process, and one which includes the opportunity for interaction with the manufacturer, as well as notice and comment to affected employees and the general public, are apparent.

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RECOMMENDED ACTION

The staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board deny the petition to amend 16VAC25-60-120.B for the reasons stated in this presentation and in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act §2.2-4000, *et seq.*

It is further recommended that the Board direct the Department to draft a written decision to the Petitioner to be signed by the Board Chair within 14 days of this meeting.

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

ATTACHMENT A:

PETITION TO AMEND ADMINISTRATIVE REGULATIONS MANUAL

Robert R. Payne

University of Alabama at Birmingham

This petition is being submitted as a requirement of ASEM-616: Public Policy in Prevention Through Design. The University of Alabama at Birmingham; School of Engineering Master of Engineering in Advanced Safety Engineering and Management.

Correspondence concerning this petition should be addressed to Robert R. Payne, 9327 Waterford Dr. Manassas, VA 20110. Contact: rpayne17@gmail.com

Abstract

Beginning in 2006 the Administrative Regulation Manual of the Virginia Occupational Safety and Health Program mandated compliance to the manufacturer's specifications and limitations for every machine, vehicle, tool, material and equipment. This petition seeks the ability for employers to adjust the operation, training, use, installation, inspection, testing, repair or maintenance for Process Safety Management covered processes. Employers affected by Process Safety Management take a more comprehensive approach to managing their processes. This should give them the ability to adjust manufacturer's requirements after a thorough review.

I am requesting the Virginia Safety and Health Codes Board to amend the Administrative Regulation Manual for the Virginia Occupational Safety and Health Program Part III Occupational Safety and Health Standards 16 VAC 25-60-120.

The Virginia Safety and Health Codes Board, hereafter referred to as the "Board," is authorized by the Code of Virginia (2017) § 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 Occupational Safety and Health Act of 1970 (P.L. 91-596), and as may be necessary to carry out its functions established under this title.

I am requesting that the amendment to the Administrative Regulation Manual (ARM) be done in accordance with the Code of Virginia (2017) § 2.2-4007(A).

Proposed Amendment to the ARM

Existing Amendment and Requested Addition

In 2006, the following paragraph, hereafter referred to as the "2006 Amendment," was added to 16 VAC 25-60-120 General Industry Standards

> The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation (22:25 VA.R. 3882 August 21, 2006).

The regulatory process of adding the 2006 amendment is documented on the Virginia Townhall Regulatory website at http://townhall.virginia.gov/l/ViewAction.cfm?actionid=1693

I am requesting the following statement, hereafter referred to as the "Addition", be added to the end of this regulation

Any employer who is using machinery, vehicles, tools, materials or equipment as part of a Process Safety Management (PSM) covered process, as defined in 29 CFR(Code of Federal Regulations) 1910.119, may adjust the operation, training, use, installation, inspection, testing, repair or maintenance after completion of the following:

- Documenting the adjustment from the Manufacturer's Specifications and Limitations (MS&L) in the Process Safety Information (PSI)
- Completing the Management of Change (MOC) requirement described in 29 C.F.R. 1910.119 (l) and
- Certification from a company executive that they have examined this adjustment and that to the best of their knowledge the information is true, accurate and complete.

Rationale for the addition

Comprehensive without options

The 16 VAC 25-60-120 amendment of 2006 was quite comprehensive in prescribing all aspects of the MS&L be followed regarding operation, training, use, installation, inspection, testing, repair and maintenance (OTUIITRM) for all machinery, vehicles, tools, materials and equipment, hereafter referred to as "Devices." Should an employer encounter a situation where they need to use a Device in contradiction to the MS&L, there was no option to vary from the OTUIITRM requirements. Even if an employer performs an engineering and/or legal analysis looking at a new application for a Device, they cannot use it in the new application if the MS&L prohibits it. This is quite disturbing for many

employers who have an engineering staff that work with Devices and can safely implement these Devices to fit different applications as they have been doing for years. The 2006 Amendment should have had an option for employers with engineering staff who understands MS&L. I contend that PSM-covered processes are robust enough to allow for these adjustments/options.

Process Safety Management

OSHA's Process Safety Management (PSM) Standard was promulgated in 1992 for "preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals. (OSHA 29 C.F.R. 1910.119)." The PSM standard requires employers to take a comprehensive approach to hazard control and risk mitigation. Employers, who have PSM-covered processes, must incorporate the following fourteen elements in their management of the process:

1. Employee participation
2. Contractor Vetting and Control
3. Pre-Startup Safety Reviews
4. Hot work process
5. Management of Process Changes (MOC)
6. Process Safety Information (PSI)
7. Operating Procedures
8. Training
9. Mechanical Integrity (MI)
10. Incident Investigation
11. Emergency Planning
12. Process Hazard Analysis (PHA)
13. Compliance Audits
14. Trade Secrets

These employers spend a considerable amount of resources in designing, documenting and implementing a safe process to prevent a catastrophic release of highly hazardous chemicals. The fourteen elements take a large amount of time and people to run and maintain. Key players in the PSM program include technically-competent employees such as chemical engineers, mechanical engineers, manufacturing engineers, electrical engineers and/or safety engineers. These key employees require a

significant amount of knowledge, education and experience. Most PSM -affected companies employ multiple engineers to carry out the execution of the fourteen elements. In essence, PSM-programs have competent people to run the program.

PSM Elements Most Pertinent to 2006 Amendment

Devices are used throughout the PSM process. The 2006 Amendment most often affects the following PSM elements:

- Process Safety Information (PSI)
- Operating Procedures
- Training
- Mechanical Integrity (MI)
- Process Hazard Analysis (PHA)
- Compliance Audits

The PSI consists of 3 parts - the hazards of the highly hazardous chemicals, the technology of the process, and the process equipment. Operating procedures must describe how to operate the process equipment during startup, normal operation, upset and emergency conditions. All operators have to be trained prior to operating PSM equipment. The equipment used in a PSM process must be included in a mechanical integrity (MI) program. The MI program is much more comprehensive than a "preventive maintenance" program. The PHA is a multidisciplinary activity culminating in identifying the hazards of the process and determining the consequences of failure of administrative or engineering controls. Any deficiencies identified during a PHA must be resolved by management in a closed loop system. Lastly, the PSM process must be audited every 3 years.

PSM is not a low level approach to making sure the process works safely. There is very little in the way of Devices used in the PSM process that do not get vetted and analyzed. Even though a Device used in the PSM process may have been designed for another purpose carrying out of the elements of PSM helps assure it is unlikely for unsafe equipment to be used in the process.

There are situations where PSM-covered processes involve unique manufacturing techniques that Device manufacturers typically don't market to. In these situations, the employers must obtain Devices intended for one application but used in a separate unrelated application. When the MS&L forbids use of that Device for the employer's intended application they are hamstrung by the 2006 Amendment. The employer should have an option to adapt Devices to their use without getting the manufacturer's permission.

Transferal of Incorporation by Reference

By adopting the 2006 amendment the Virginia Safety and Health Codes Board effectively bypassed the Incorporation by Reference (IBR) process in favor of the MS&L. The IBR process requires Virginia Occupational Safety and Health (VOSH) to publish proposed new safety standards in the Virginia Register and allow the public and employers to comment on the proposed rulemaking. Congress intended for the Occupational Safety and Health Administration (OSHA) to promulgate new standards with public input. Blosser (1992) writes

> OSHA is required by the OSH Act to involve the general public in standards-setting through notice-and-comment rulemaking. The agency must publish a proposed rule in the Federal Register and allow at least 30 days for public comment (29 C.F.R. § 655(b) (2)). (p.19)

Bypassing the normal IBR leads to a transfer of the IBR process to the manufacturer. The manufacturer now becomes the rulemaking regulator. This precludes comments on the MS&L from anyone except the manufacturer. This doesn't seem to comply with the Public Participation Guidelines of the Administrative Process Act (Code of Virginia (2017) § 2.2-4007.02) if the manufacturer can issue or revise his safety requirements without public review. The legislature intended for the public to comment on the regulations they will have to comply with in the course of business. By transferring the

safety and health regulations from VOSH to the manufacturer, the employer is not given the option of commenting on MS&L.

Changes in MS&L

The 2006 amendment did not address the issue of changes to the MS&L. In federal safety regulations the revision of a consensus standard at the time it is IBR becomes the required version. OSHA cannot adopt a future revision of a standard without going through the rulemaking process (29 C.F.R. 1910.6(a) (3)). Since the 2006 amendment did not address the issue of revisions, I am uncertain whether newer MS&L apply to older Devices.

For example, if an employer purchased a Device in 2010 and the MS&L was updated in 2013 is the employer required to comply with the 2010 MS&L or the 2013 MS&L? Suppose the employer bought a Device in 2010 and another one in 2013. Could the employer use the 2010 Device in accordance with the 2010 MS&L and the 2013 Device in accordance with the 2013 MS&L? Or, would the employer be required to adopt the 2013 MS&L for the 2013 Device and the 2010 Device also? The 2006 amendment did not make it clear. So the question becomes what version of the MS&L is the employer required to comply with?

Bypassing Consensus Standards

Another consequence of the 2006 Amendment was its defaulting to the MS&L in lieu of new consensus standards. Consensus standards serve to compliment the safety and health regulation making process by allowing OSHA to incorporate them and give them the "force of law" (Code of Virginia (2017) § 2.2-4001). Consensus standards can save OSHA time in the rulemaking process. With the passage of the 2006 amendment, I do not see any reason to incorporate new consensus standards for the Devices. Why would VOSH have to? Let the manufacturer do all the incorporating and updating.

But I think it's a precedent that robs the consensus standards organizations of participation in the safety and health regulation making process. The role of consensus standards in the OSHA rulemaking process is firmly established at the federal level. OSHA list their many incorporated consensus standards at 29 C.F.R. 1910.6. Consensus standards improve safety and health regulations. In fact, the American Society of Safety Engineers (ASSE, 2005) found that consensus standards have several advantages over governmental regulations including

- Fewer procedural burdens;
- Consensus method;
- Voluntary nature allows users to adapt provisions to meet unusual circumstances;
- Much lower development cost.

By mandating that the employer follow the MS&L there will be little impetus to consider using consensus standards because the rulemaking process can be complicated and resource-draining. But this is no reason to bypass consensus standards. Bremer (2013) wrote that "although the process may be burdensome, notice-and-comment ensures that affected parties and members of the public have the opportunity to participate in the adoption of regulatory standards" (p. 191).

The ASSE is one of many safety standards-generating organizations that may get passed over by the 2006 amendment. Other organizations include the American National Standards Institute (ANSI), National Fire Protection Association (NFPA), American Petroleum Institute (API), etc. OSHA has made a commitment to ANSI to "continue to cooperate and assist the ANSI Federation in its mission in a manner consistent with OSHA policy" (OSHA 2001). If the VOSH regulations settle for just the MS&L in generating new regulations this could be detrimental to the existence of these non-governmental standards setting organizations. When a consensus standard gets IBR it increases the revenue stream for the organization and helps keep it viable. To bypass the IBR process, the standards setting organization

no longer gets the exposure it needs to continue to generate standards. It could be the slow fade of organizations like ANSI or NFPA as they search for new sources of revenue.

Unintended Consequences

If every employer in the Commonwealth understood the full import of the 2006 Amendment, I see a changing landscape for MS&L. I see employers reviewing the MS&L **prior** to purchasing a new Device and pressuring the manufacturer to revise their MS&L or not complete the sale. Once purchased, very few Device manufacturers are will revise or omit some safety requirement their legal department wants added. It's another story before the sale. This pressure exerted on manufacturers would empower the employer (i.e., buyers) to get MS&L revised to meet the employer's requirements. This may not be best practices for safety. Is this what the Virginia Safety and Health Codes Board wants? I think not.

Will all employers do this? Maybe not, but I know for expenditures on expensive Devices it behooves the purchaser to attempt to sway the manufacturer and later the MS&L if the manufacturer wants to complete the sale.

Restatement of the request

I am requesting the Virginia Safety and Health Codes Board to include the Addition to the 2006 Amendment so that the full requirement will read and be updated in the ARM as

> The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or

operation. An employer who is using machinery, vehicles, tools, materials or equipment as part of a Process Safety Management (PSM) covered process, as defined in 29 CFR 1910.119, may adjust the operation, training, use, installation, inspection, testing, repair or maintenance after completion of the following:

- Documenting the adjustment from the MS&L in the PSI
- Completing the Management of Change (MOC) requirement described in 29 C.F.R. 1910.119 (l) and
- Certification from a company executive that they have examined this adjustment and that to the best of their knowledge the information is true, accurate and complete.

I am not a lawyer so the statement may not pass legal review, but I am open to modifications as long as the gist of the Addition is kept. The gist being allowing well thought out and analyzed adjustments to MS&L on some basis other than getting the manufacturer's permission.

Conclusion

Amending the ARM to allow employers with PSM-covered processes to adjust OTUIITRM would be a step in the right direction. The adjustment would allow these employers the option to use Devices after analyzing and documenting the impact of the change on safety and health. I adjure the Board to carefully consider implementing my request.

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ATTACHMENT B

§ 2.2-4007. Petitions for new or amended regulations; opportunity for public comment.

A. Any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation. The petition shall state (i) the substance and purpose of the rulemaking that is requested, including reference to any applicable Virginia Administrative Code sections, and (ii) reference to the legal authority of the agency to take the action requested.

B. Within 14 days of receiving a petition, the agency shall send a notice identifying the petitioner, the nature of the petitioner's request and the agency's plan for disposition of the petition to the Registrar for publication in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 2.2-4031.

C. A 21-day period for acceptance of written public comment on the petition shall be provided after publication in the Virginia Register. The agency shall issue a written decision to grant or deny the petitioner's request within 90 days following the close of the comment period. However, if the rulemaking authority is vested in an entity that has not met within that 90-day period, the entity shall issue a written decision no later than 14 days after it next meets. The written decision issued by the agency shall include a statement of its reasons and shall be submitted to the Registrar for publication in the Virginia Register of Regulations. Agency decisions to initiate or not initiate rulemaking in response to petitions shall not be subject to judicial review.

ATTACHMENT C

VOSH ADMINISTRATIVE REGULATIONS MANUAL, Sections 16VAC25-60-190, 16VAC25-60-210, AND - 16VAC25-60-220.

Variances

16VAC25-60-190. General provisions.

A. Any employer or group of employers desiring a permanent or temporary variance from a standard or regulation pertaining to occupational safety and health may file with the commissioner a written application which shall be subject to the following policies:

1. A request for a variance shall not preclude or stay a citation or bill of complaint for violation of a safety or health standard;

2. No variances on record keeping requirements required by the U.S. Department of Labor shall be granted by the commissioner;

3. An employer, or group of employers, who has applied for a variance from the U.S. Department of Labor, and whose application has been denied on its merits, shall not be granted a variance by the commissioner unless there is a showing of changed circumstances significantly affecting the basis upon which the variance was originally denied;

4. An employer to whom the U.S. Secretary of Labor has granted a variance under OSHA provisions shall document this variance to the commissioner. In such cases, unless compelling local circumstances dictate otherwise, the variance shall be honored by the commissioner without the necessity of following the formal requirements which would otherwise be applicable. In addition, the commissioner will not withdraw a citation for violation of a standard for which the Secretary of Labor has granted a variance unless the commissioner previously received notice of and decided to honor the variance; and

5. Incomplete applications will be returned within 30 days to the applicant with a statement indicating the reason or reasons that the application was found to be incomplete.

B. In addition to the information specified in 16VAC25-60-200 A and 16VAC25-60-210 A, every variance application shall contain the following:

1. A statement that the applicant has informed affected employees of the application by delivering a copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with 16VAC25-60-40, a summary of the application which indicates where a full copy of the application may be examined;

2. A statement indicating that the applicant has posted, with the summary of the application described above, the following notice: "Affected employees or their representatives have the right to petition the Commissioner of Labor and Industry for an opportunity to present their views, data, or arguments on the requested variance, or they may submit their comments to the commissioner in writing. Petitions for a hearing or written comments should be addressed to the Commissioner of Labor and Industry, Main Street Centre, 600 East Main Street, Suite 207, Richmond, VA 23219. Such petitions will be accepted if they are

received within 30 days from the posting of this notice or within 30 days from the date of publication of the commissioner's notice that public comments concerning this matter will be accepted, whichever is later."

3. A statement indicating whether an application for a variance from the same standard or rule has been made to any federal agency or to an agency of another state. If such an application has been made, the name and address of each agency contacted shall be included.

C. Upon receipt of a complete application for a variance, the commissioner shall publish a notice of the request in a newspaper of statewide circulation within 30 days after receipt, advising that public comments will be accepted for 30 days and that an informal hearing may be requested in conformance with subsection D of this section. Further, the commissioner may initiate an inspection of the establishment in regard to the variance request.

D. If within 30 days of the publication of notice the commissioner receives a request to be heard on the variance from the employer, affected employees, the employee representative, or other employers affected by the same standard or regulation, the commissioner will schedule a hearing with the party or parties wishing to be heard and the employer requesting the variance. The commissioner may also schedule a hearing upon his own motion. The hearing will be held within a reasonable time and will be conducted informally in accordance with §§ 2.2-4019 and 2.2-4021 of the Code of Virginia unless the commissioner finds that there is a substantial reason to proceed under the formal provisions of § 2.2-4020 of the Code of Virginia.

E. If the commissioner has not been petitioned for a hearing on the variance application, a decision on the application may be made promptly after the close of the period for public comments. This decision will be based upon the information contained in the application, the report of any variance inspection made concerning the application, any other pertinent staff reports, federal OSHA comments or public records, and any written data and views submitted by employees, employee representatives, other employers, or the public.

F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either 16VAC25-60-200 B 4 or 16VAC25-60-210 B 4.

1. The commissioner shall advise the employer in writing of the decision and shall send a copy to the employee representative if applicable. If the variance is granted, a notice of the decision will be published in a newspaper of statewide circulation.

2. The employer shall post a copy of the commissioner's decision in accordance with 16VAC25-60-40.

G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time and place that the board will consider the appeal. Any party that submitted written or oral views or participated in the hearing concerning the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of 16VAC25-60-40.

H. The board shall sustain, reverse, or modify the commissioner's decision based upon consideration of the evidence in the record upon which the commissioner's decision was made and the views and arguments presented as provided above. The burden shall be on the party filing the appeal to designate and demonstrate any error by the commissioner which would justify reversal or modification of the decision. The issues to be considered by the board shall be those issues that could be considered by a court reviewing agency action in accordance with § 2.2-4027 of the Code of Virginia. All parties involved shall be advised of the board's decision within 10 working days after the hearing of the appeal.

16VAC25-60-210. Permanent variances.

A. Applications filed with the commissioner for a permanent variance from a standard or regulation shall be subject to the requirements of 16VAC25-60-190 and the following additional requirements.

B. A letter of application for a permanent variance shall be submitted in writing by an employer or group of employers and shall contain the following information:

1. Name and address of the applicant;

2. Address of the place or places of employment involved;

3. Identification of the standard, or part thereof for which a permanent variance is sought; and

4. A description of the conditions, practices, means, methods, operations, or processes used and evidence that these would provide employment and a place of employment as safe and healthful as would be provided by the standard from which a variance is sought.

C. A permanent variance may be modified or revoked upon application by an employer, employees, or by the commissioner in the manner prescribed for its issuance at any time except that the burden shall be upon the party seeking the change to show altered circumstances justifying a modification or revocation.

16VAC25-60-220. Interim order.

A. Application for an interim order granting the variance until final action by the commissioner may be made by the employer prior to, or concurrent with, the submission of an application for a variance.

B. A letter of application for an interim order shall include statements as to why the interim order should be granted and shall include a statement that it has been posted in accordance with 16VAC25-60-40. The provisions contained in 16VAC25-60-190 A, B 1 and B 3 shall apply to applications for interim orders in the same manner as they do to variances.

C. The commissioner shall grant the interim order if the employer has shown by clear and convincing evidence that effective methods to safeguard the safety and health of employees have been implemented. No interim order shall have effect for more than 180 days. If an application for an interim order is granted, the employer shall be so notified and it shall be a condition of the order that employees shall be advised of the order in the same manner as used to inform them of the application for a variance.

D. If the application for an interim order is denied, the employer shall be so notified with a brief statement of the reason for denial.

COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For June 14, 2018

Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness; Final Rule

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests that the Safety and Health Codes Board consider for adoption federal OSHA's Final Rule on the Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness, as published on May 3, 2017 in 82 FR 20548.

The proposed effective date is September 15, 2018.

II. Summary of the Standard

Under the Congressional Review Act, Congress passed and the President signed Public Law 115-21, a resolution of disapproval of OSHA's final rule entitled, "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness," which was informally referred to as the "Volks" rule. The "Volks" rule affirmed longstanding OSHA policy by putting into regulation recordkeeping requirements stating that employers had a continuing obligation to maintain accurate injury and illness records and effectively gave OSHA the ability to issue citations to employers for failing to record work-related injuries and illnesses during the five-year retention period, (normally OSHA has a six-month statute of limitations to issue violations).

To that end, the most recent amendments generally restore the affected recordkeeping regulations to the pre-clarification rule, i.e., prior to the December 19, 2016 final rule, effective nationally on January 18, 2017, and in Virginia on May 15, 2017; and removed any references to an employer's continuing obligation to make and maintain an accurate record of each recordable injury and illness.

As a result of the Congressional resolution of disapproval of OSHA's recordkeeping clarification, OSHA's revisions are as follows:

a) §1904.0. Purpose.

Federal OSHA removed language, appearing in the December 19, 2016 final rule, concerning an employer's ongoing obligation to make and maintain an accurate record of each and every recordable fatality, injury, and illness continuing throughout the entire record retention period.

b) §1904.4. Recording criteria.

Federal OSHA removed the December 19, 2016 final rule language, concerning an employer's ongoing obligation to make and maintain an accurate record of each and every recordable fatality, injury, and illness continuing throughout the entire record retention period.

c) §1904.29. Forms.

Federal OSHA removed the December 19, 2016 final rule language, concerning failure to record within seven days not extinguishing an employer's continuing obligation to make a record of the injury or illness and to maintain accurate records of all recordable injuries and illnesses throughout the entire record retention period.

d) 1904.32. Annual Summary.

The heading of this section has been revised from "Year-end review and annual summary" to the earlier pre-December 19, 2016 heading, "Annual summary". In subsection (a), OSHA deleted language referencing all recordable injuries and illnesses during that year; and subsection (b)(1)- *"How extensively do I have to review the OSHA 300 Log at the end of the year?*- the following language was removed – "all recordable injuries and illnesses that occurred during the year, and make any additions or corrections necessary to ensure its accuracy".

e) 1904.33. Retention and updating.

The heading of this section has been changed from "Retention and maintenance of accurate records" back to the earlier pre-December 19, 2016 heading, "Retention and updating."

The question in paragraph (b)(1), Implementation, has been revised from "Other than the obligation identified in §1904.32, do I have further recording duties with respect to the OSHA 300 Logs and 301 Incident Reports during the five-year retention period?" to (1) *"Do I have to update the OSHA 300 Log during the five-year storage period?"* Unlike the most recent revisions, the December 19, 2016, final rule amendments required certain additions and corrections be made to the OSHA Log and Incident Reports during the five-year retention period. For example:

(1) OSHA Logs had to contain entries for all recordable injuries and illnesses occurring during the calendar year to which it relates;

(2) Each and every recordable injury and illness had to be recorded on an Incident Report; otherwise, the employer was under a continuing obligation to record the case on the Log during the five-year retention period; necessary additions and corrections to the OSHA Log must be made to accurately reflect any changes that had occurred in previously recorded injuries and illnesses; and

(3) Incident Report required for each and every recordable injury and illness, although making additions or corrections to Incident Reports during the five-year retention period was not required.

However, the new rule did retain the requirement for employers to continuously update the OSHA 300 Log throughout the five year storage period:

> *Do I have to update the OSHA 300 Log during the five-year storage period?* Yes, during the storage period, you must update your stored OSHA 300 Logs to include newly discovered recordable injuries or illnesses and to show any changes that have occurred in the classification of previously recorded injuries and illnesses. If the description or outcome of a case changes, you must remove or line out the original entry and enter the new information.

Prior to the Volks II decision (see below discussion), Virginia's policy was identical to that of OSHA that an employer had a continuing obligation to maintain an accurate record of its injuries and illnesses. In addition, the Board previously adopted effective September 21, 2006 §16VAC25-60-260.A.2, in the VOSH Administrative Regulations, which provides:

> 2. 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.

The changes to the federal regulation as result of the Congressional action have no impact on Virginia's regulation at §16VAC25-60-260.A.2, which was in existence prior to the December 19, 2016, recordkeeping rule changes.

f) §1904.34. Change in business ownership

This amendment would delete the following language that was added in the December 19, 2016 changes to the standard: "The new owner is not responsible for recording and reporting work-related injuries and illnesses that occurred before the new owner took ownership of the establishment."

g) §1904.35. Employee involvement

In response to the question *"(2) Do I have to give my employees and their representatives access to the OSHA injury and illness records?"* The proposed change to paragraph (b)(2) would remove the word "accurate" before "OSHA injury and illness records". The sentence currently reads: "Yes. Your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records.

Additionally, in paragraph (b)(2)(iii), in response to the question: *"If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it?"* the word "accurate" preceding" OSHA 300 Log(s) was deleted.

h) Subpart E – Reporting Fatality, Injury and Illness Information to the Government

The heading to Subpart E was changed from: "Reporting Accurate Fatality, Injury, and Illness Information to the Government" to "Subpart E – Reporting Fatality, Injury and Illness

Information to the Government."

i) §1904.40. Providing records to government representatives

In subsection (a), Basic requirement. The term "accurate" was deleted preceding the word, "records". The phrase, which formerly read: "…You must provide accurate records, or copies thereof,…", now reads: " … you must provide copies of the records…."

III. Basis, Purpose and Impact of the Amendment

A. Basis

The amendments, in the December 19, 2016, Recordkeeping amendments to the existing standard, were adopted in response to the *Volks II* decision of the United States Court of Appeals for the District of Columbia Circuit (*AKM LLC v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012)). In that case, a majority held, without discussion of the Commission precedent to the contrary, that the Occupational Safety and Health Act does not permit OSHA to impose a continuing recordkeeping obligation on employers. A concurring opinion, filed in this case, disagreed with this reading of the statute, but found that the text of OSHA's recordkeeping regulations did not impose continuing recordkeeping duties. OSHA disagreed with the majority's reading of the law, but agreed that its recordkeeping regulations were not clear with respect to the continuing nature of employers' recordkeeping obligations.

In response to the unfavorable ruling in the "*Volks"* decision, OSHA published amendments to its Recordkeeping rule on December 19, 2016, to "clarify that the duty to make and maintain an accurate record of an injury or illness continues for as long as the employer must keep and make available records for the year in which the injury or illness occurred. The duty does not expire if the employer fails to create the necessary records when first required to do so." These amendments became effective nationally on January 18, 2017. In Virginia, the Safety and Health Codes Board adopted these amendments on February 16, 2017, and they became effective on May 15, 2017.

Prior to the Volks decision, Virginia's policy was identical to that of OSHA that an employer had a continuing obligation to maintain an accurate record of its injuries and illnesses. In addition, the Board previously adopted effective September 21, 2006, §16VAC25-60-260.A.2 in the VOSH Administrative Regulations, which provides:

> 2. 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.

On March 1, 2017, the House of Representatives passed a resolution of disapproval (H.J. Res. 83) of the December 19, 2016 final rule under the Congressional Review Act (CRA)(5 U.S.C, 801 *et seq.*). The CRA allows for Congress to disapprove regulatory rules within the first 60 days of the rule being brought before Congress, excluding times when Congress is not in session. Once a rule is disapproved under the CRA, that rule cannot take effect, or if it has already taken effect, it will be as if it had never existed, and the agency that issued the rule is restricted from introducing any "substantially similar" rule, without subsequent statutory authorization.

On March 22, 2017, the Senate then passed H.J. Res. 83. On April 3, 2017, President Trump signed the resolution into law as Public Law 115-21, which invalidated the amendments promulgated by federal OSHA in its December 19, 2016 final rule and, as a result, OSHA removed the affected amendments to the recordkeeping regulations from the Code of Federal Regulations.

The changes to the federal regulation as result of the Congressional action have no impact on Virginia's regulation at §16VAC25-60-260.A.2, which was in existence prior to the December 19, 2016, recordkeeping rule changes.

B. Purpose

These amendments restore the pre-December 19, 2016 Recordkeeping rules.

C. Impact on Employers

No new or additional impact on employers is anticipated. There is no new requirement to review or reassess existing records over the course of the maintenance period and no additional costs are involved.

Under this new final rule, an employer's obligations remain the same as they had been prior to the December 19, 2016 clarifying amendment: to record injuries and illnesses within seven days of when the employer learns of them and update the stored OSHA 300 Logs to include newly discovered recordable injuries or illnesses and to show any changes that have occurred in the classification of previously recorded injuries and illnesses. If the description or outcome of a case changes, employers must remove or line out the original entry and enter the new information (*see 1904.33*).

The changes to the federal regulation as result of the Congressional action have no impact on Virginia's regulation at §16VAC25-60-260.A.2, which was in existence prior to the December 19, 2016, recordkeeping rule changes.

D. Impact on Employees

No new or additional impact on employees is anticipated, however, there is concern about employers under-reporting injuries and illnesses, which would, in turn, undermine safety and health and put workers in danger.

However, the changes to the federal regulation as result of the Congressional action have no impact on Virginia's regulation at §16VAC25-60-260.A.2, which was in existence prior to the December 19, 2016, recordkeeping rule changes.

E. Impact on the Department of Labor and Industry

No additional impact on the Department is anticipated from the adoption of this amendment. The changes to the federal regulation as result of the Congressional action have no impact on Virginia's regulation at §16VAC25-60-260.A.2, which was in existence prior to the December 19, 2016, recordkeeping rule changes.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six months of the occurrence of a federal program change, to adopt identical changes or promulgate

equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting these revisions will allow Virginia to conform to the federal program change.

F. Benefits

The current change results in no additional economic benefits to employers.

G. Costs

The revisions contained in this final rule impose no new cost burden because this final rule does not contain any new requirements for employers. Policies and regulations in existence in Virginia prior to December 19, 2016 continue to remain in effect.

H. Technological Feasibility

The revisions to the recordkeeping rules are technologically feasible because they do not require employers to perform any actions that they were not already required to perform under existing recordkeeping requirements.

I. Economic Feasibility

Because the revisions to the recordkeeping rules do not impose any additional compliance costs or regulatory burden for employers, whether large or small, the final rule is deemed to be economically feasible.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt federal OSHA's Final Rule for the Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

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 with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness; Final Rule

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16VAC25-85-1904.0, Purpose, §1904.0
16VAC25-85-1904.4 Recording Criteria, §1904.4
16VAC25-85-1904.29, Forms, §1904.29
16VAC25-85-1904.32, Annual Summary, §1904.32
16VAC25-85-1904.33, Retention and Updating, §1904.33
16VAC25-85-1904.34, Change in Business Ownership, §1904.34
16VAC25-85-1904.35, Employee Involvement, §1904.35
16VAC25-85-1904.40, Providing Records to Government Representatives, §1904.40

When the regulations, as set forth in the Final Rule for the Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
May 3, 2017	September 15, 2018

PART 1904—RECORDING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESSES

■ 2. Revise § 1904.0 to read as follows:

§ 1904.0 Purpose.

The purpose of this rule (part 1904) is to require employers to record and report work-related fatalities, injuries, and illnesses.

Note to § 1904.0: Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits.

Subpart C—Recordkeeping Forms and Recording Criteria

■ 3. Revise the heading of subpart C to read as set forth above.

■ 4. In § 1904.4, remove the note to § 1904.4(a) and revise paragraph (a) introductory text to read as follows:

§ 1904.4 Recording criteria.

(a) *Basic requirement.* Each employer required by this part to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness that:

* * * * *

■ 5. Revise § 1904.29(b)(3) to read as follows:

§ 1904.29 Forms.

* * * * *

(b) * * *

(3) *How quickly must each injury or illness be recorded?* You must enter each recordable injury or illness on the OSHA 300 Log and 301 Incident Report within seven (7) calendar days of receiving information that a recordable injury or illness has occurred.

* * * * *

■ 6. Revise the heading and paragraphs (a) and (b)(1) of § 1904.32 to read as follows:

§ 1904.32 Annual summary.

(a) *Basic requirement.* At the end of each calendar year, you must:

(1) Review the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified;

(2) Create an annual summary of injuries and illnesses recorded on the OSHA 300 Log;

(3) Certify the summary; and

(4) Post the annual summary

(b) * * *

(1) *How extensively do I have to review the OSHA 300 Log entries at the end of the year?* You must review the entries as extensively as necessary to make sure that they are complete and correct.

* * * * *

■ 7. Revise the heading and paragraph (b) of § 1904.33 to read as follows:

§ 1904.33 Retention and updating.

* * * * *

(b) *Implementation*—(1) *Do I have to update the OSHA 300 Log during the five-year storage period?* Yes, during the storage period, you must update your stored OSHA 300 Logs to include newly discovered recordable injuries or illnesses and to show any changes that have occurred in the classification of previously recorded injuries and illnesses. If the description or outcome of a case changes, you must remove or line out the original entry and enter the new information.

(2) *Do I have to update the annual summary?* No, you are not required to update the annual summary, but you may do so if you wish.

(3) *Do I have to update the OSHA 301 Incident Reports?* No, you are not required to update the OSHA 301 Incident Reports, but you may do so if you wish.

■ 8. Revise § 1904.34 to read as follows:

§ 1904.34 Change in business ownership.

If your business changes ownership, you are responsible for recording and reporting work-related injuries and illnesses only for that period of the year during which you owned the establishment. You must transfer the part 1904 records to the new owner. The new owner must save all records of the establishment kept by the prior owner, as required by § 1904.33 of this part, but need not update or correct the records of the prior owner.

■ 9. Revise paragraphs (b)(2) introductory text and (b)(2)(iii) of § 1904.35 to read as follows:

§ 1904.35 Employee involvement.

* * * * *

(b) * * *

(2) *Do I have to give my employees and their representatives access to the OSHA injury and illness records?* Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records, with some limitations, as discussed below.

* * * * *

(iii) *If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it?* When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant OSHA 300 Log(s) by the end of the next business day.

* * * * *

Subpart E—Reporting Fatality, Injury and Illness Information to the Government

■ 10. Revise the heading of subpart E to read as set forth above.

■ 11. Revise the heading and paragraph (a) of § 1904.40 to read as follows:

§ 1904.40 Providing records to government representatives.

(a) *Basic requirement.* When an authorized government representative asks for the records you keep under part 1904, you must provide copies of the records within four (4) business hours.

* * * * *

Signed at Washington, DC, on April 25, 2017.

Dorothy Dougherty,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2017–08754 Filed 5–2–17; 8:45 am]

BILLING CODE 4510–26–P

COMMONWEALTH of VIRGINIA

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For 14 June 2018

Amendment to the Vinyl Chloride Standard for General Industry, §1910.1017—CFR Correction

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption, federal OSHA's revision to the existing Final Rule for the Standard for Vinyl Chloride in General Industry as published in 83 FR 11413 on 15 March 2018.

The proposed effective date is 15 September 2018.

II. Summary of the Amendment

The amendment requires employers to notify affected employees within 15 days of their receipt of vinyl chloride monitoring results and the associated steps being taken to reduce exposures with the permissible exposure Limit (PEL).

III. Basis, Purpose and Impact of the Amendment

A. Basis and Purpose

This amendment reinstates subparagraph (n) of the Standard which was inadvertently deleted in the 01 July 2017 revision of Federal Register covering OSHA Standards 29 CFR 1910.1000 to End.

B. Impact on Employers

No impacts on employers are anticipated with the re-adoption of subparagraph (n) of the Standard as employers have been required to comply with these subparagraph (n) requirements since 1993.

C. Impact on Employees

No impact on employees is anticipated as compliance with subparagraph (n) has been a requirement since 1993.

D. Impact on the Department of Labor and Industry

No impact on the Department is anticipated.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six months of the occurrence of a federal program change, to adopt identical changes or promulgate equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting these revisions will allow Virginia to conform to the federal program change.

E. Technological and Economic Feasibility

The actions placed on the employer by subparagraph (n) are both technologically and economically feasible as employers have been required to comply with these requirements since 1993.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt Amendment to the Vinyl Chloride Standard for General Industry, §1910.1017, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of 15 September 2018.

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 with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

Amendment to the Vinyl Chloride Standard for General Industry, §1910.1017

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

When the regulations, as set forth in the forth in the Amendment to the Vinyl Chloride Standard for General Industry, 29 CFR 1910.1017, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
15 March 2018	15 September 2018

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Vinyl Chloride

CFR Correction

■ In Title 29 of the Code of Federal Regulations, Part 1910.1000 to End, revised as of July 1, 2017, on page 81, in § 1910.1017, paragraph (n) is reinstated to read as follows:

§ 1910.1017 Vinyl chloride.

* * * * *

(n) The employer must, within 15 working days after the receipt of the results of any monitoring performed under this section, notify each affected employee of these results and the steps being taken to reduce exposures within the permissible exposure limit either individually in writing or by posting the results in an appropriate location that is accessible to affected employees.

[FR Doc. 2018–05312 Filed 3–14–18; 8:45 am]

BILLING CODE 1301–00–D

COMMONWEALTH of VIRGINIA

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For 14 June 2018

Amendment to the Methylenedianiline Standard for the Construction Industry, §1926.60—Correction

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests that the Safety and Health Codes Board consider for adoption, federal OSHA's revision to the existing Final Rule for the Methylenedianiline Standard for the Construction Industry, as published in 83 FR 15499 on 11 April 2018.

The proposed effective date is 15 September 2018.

II. Summary of the Amendment

This action removes subparagraph, (o)(8)(ii) of Part 1926.60 which specifies procedures for employee record retention in the event of employer ceases to do business and there is no successor.

III. Basis, Purpose and Impact of the Amendment

A. Purpose

The purpose of this change is to discontinue the requirement whereby an employer who ceases to do business and there is no successor to receive and retain the employee records shall notify the Director of the National Institute for Occupational Safety and Health (NIOSH), U.S. Dept. of Health and Human Services or their designee at least 90 days prior to disposal and upon request, transmit them to the Director of NIOSH.

The requirement to comply with the transfer of records, in accordance with Part 1910.1020(h) as specified by Part 1926.60 (o)(8), would remain.

B. Impact on Employers

The impact on employers would be that they would no longer be required to complete the extra step of notifying and forwarding records to NIOSH, but follow the requirements of §1910.1020(h).

C. Impact on Employees

No impact on employees is indicated by OSHA with the incorporation of this change.

D. Impact on the Department of Labor and Industry

No impact on the Department is anticipated.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six months of the occurrence of a federal program change, to adopt identical changes or promulgate equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting these revisions will allow Virginia to conform to the federal program change.

E. Economic and Technological Feasibility

As the actions under Part 1926.60 (o)(8)(ii) are already required, their cessation is economically and technologically feasible.

F. Costs

No additional significant costs or cost savings are anticipated to employers, employees, or the Department by the elimination of the requirements of Part 1926.60 (o)(8)(ii).

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the amendment to the Methylenedianiline Standard for the Construction Industry, §1926.60—Correction, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of 15 September 2018.

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 with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

Amendment to the Methylenedianiline Standard for the Construction Industry, 1926.60—Correction

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16VAC25-175-1926.60, Methylenedianiline, §1926.60

When the regulations, as set forth in the forth in the Amendment to the Methylenedianiline Standard for the Construction Industry, 29 CFR 1926.60, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
11 April 2018	15 September 2018

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

Safety and Health Regulations for Construction

CFR Correction

■ In Title 29 of the Code of Federal Regulations, Part 1926, revised as of July 1, 2017, on page 88, in § 1926.60, remove paragraph (o)(8)(ii).

[FR Doc. 2018–07530 Filed 4–10–18; 8:45 am]

BILLING CODE 1301–00–D

COMMONWEALTH of VIRGINIA

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For June 14, 2018

Notice of Periodic Review of Certain Existing Regulations

I. Action Requested

The Department of Labor and Industry (the Department) requests authorization by the Board to proceed with the periodic review process of one Board regulation listed below.

II. Background and Basis

The Administrative Process Act (§2.2-4017 of the Code of Virginia) and Executive Order 17 (2014), "Development and Review of State Agency Regulations," governs the periodic review of existing regulations. This Executive Order requires that state agencies conduct a periodic review of regulations every four years. The following Safety and Health Codes Board regulation has been identified for review in 2018:

16 VAC 25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry.

III. Current Status and Process

One Safety and Health Codes Board regulations is subject to the periodic review process in calendar year 2018. This process begins with approval to proceed granted by the Board. The Department will then publish a Notice of Periodic Review to the *Virginia Register*, which opens a comment period of at elast 21 days but not longer than 90 days. Subsequently, the Department will review the regulation and related public comments, then prepare a brief with recommendations to be presented for the Board's consideration at the next meeting. Based on the decision of the Board, the Department of Labor and Industry will post a report on the Virginia Regulatory Town Hall website indicating whether the Board will retain the regulation as is, or will begin a regulatory action to amend or repeal the regulation.

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RECOMMENDED ACTION

The Department of Labor and Industry recommends that the Safety and Health Codes Board approve the publication of a Notice of Periodic Review in the Virginia Register for 16 VAC 25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry.

The Department also recommends that the Board state in any motion it may make regarding the periodic review of this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to the periodic review which will be conducted in accordance with the above-cited § 2.2-4017 of the Administrative Process Act and Executive Order 17 (2014), "Development and Review of State Agency Regulations".