



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

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AGENDA

SAFETY AND HEALTH CODES BOARD MEETING

**Main Street Centre
600 East Main Street
Richmond, Virginia**

12th Floor Conference Room - South

Thursday, March 5, 2020

10:00 a.m.

1. Call to Order
2. Approval of Agenda
3. Approval of Minutes for Board Meeting of September 17, 2019
4. Opportunity for the Public to Address the Board on issues pending before the Board today, as well as any other topics that may be of concern to the Board and within its scope of authority.

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

5. **Old Business**
None
6. **New Business**

a) Respiratory Protection Standard, **§1910.134**; Revisions to Appendix A—Additional Ambient CNC Quantitative Fit Testing Protocols

Presenter – *Ronald Graham*

b) Final Regulation to Amend **16VAC-25-260**, Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, Miscellaneous Changes

Presenter – *Princy Doss*

c) Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Adopt a Regulation on Heat Illness Prevention

Presenter – *Jay Withrow*

d) Notice of Periodic Review for 2020

1. **16 VAC 25-11** Public Participation Guidelines
2. **16 VAC 25-180** Virginia Field Sanitation Standard, Agriculture

Presenter – *Princy Doss*

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
SEPTEMBER 17, 2019**

BOARD MEMBERS PRESENT: Mr. Travis Parsons, Interim Chair
Mr. John Fulton
Ms. Anna Jolly
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez
Mr. Louis J. Cernak, Jr.

BOARD MEMBERS ABSENT: Mr. David Martinez, Newly Elected Chair
Mr. Charles Stiff, Newly Elected Vice Chair
Dr. Dwight Flammia
Ms. Tina Hoover
Mr. Courtney Malveaux
Mr. Jerome Brooks
Mr. Phil Glaize

STAFF PRESENT: Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry
Mr. William P. Burge, Assistant Commissioner
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, and OWB
Ms. Princy R. Doss, Director, Policy, Planning, & Public Information
Mr. Ron Graham, Director, VOSH Health Compliance
Ms. Jennifer Rose, Director, VOSH Safety Compliance
Ms. Diane Duell, Director, Legal Support
Ms. Holly Trice, Senior Staff Attorney
Mr. Edward G. Hilton, Director of Boiler Safety
Mr. James Garrett, VOSH
Ms. Deonna Hargrove, Regional Director

OTHERS PRESENT: Mr. Joshua Laws, Attorney General's Office
Mr. Sam Revenson, Associated Risk Management
Ms. Marquita Edmonds, Hourigan Construction
Ms. Monica Vannoy, Virginia Department of Corrections
Ms. Lisa Wright, Court Reporter, Chandler & Halasz, Stenographic Court Reporters

ORDERING OF AGENDA

Interim Chair Travis Parsons called the Public meeting to order at 10:00 a.m. A quorum was present.

REMEMBERENCE OF DAVID MARTINEZ

Commissioner Davenport took a moment to reflect on David Martinez's service as a board member and asked for a moment of silence.

APPROVAL OF AGENDA

Interim Chair Parsons requested a motion to amend the agenda to strike the election of officers and to accept the amended Agenda. A motion to accept the amended Agenda was made, properly seconded, and carried by unanimous voice vote.

APPROVAL OF MINUTES

Interim Chair Parsons asked the Board for a motion to approve the Minutes from the March 19, 2019 Board meeting. A motion was made and properly seconded. The Minutes were approved by unanimous voice vote.

OLD BUSINESS

Ms. Princy R. Doss, Director of Policy, Planning, & Public Information for the Department introduced herself to the board, before proceeding with the periodic review of four regulations.

She stated that the Administrative Process Act §2.2-4017 of the Code of Virginia and Executive Order 14 (2018) (Amended), entitled "Development and Review of State Agency Regulations" governs the periodic review of existing regulations. This Executive Order requires that agencies conduct a periodic review of regulations every four years. There were four regulations the Board identified for review in 2019: Regulation Concerning Certified Lead Contractors Notification, Lead Project Permits and Permit Fees, 16 VAC 25-35; Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors, 16 VAC 25-55; and Regulation Applicable to Tree Trimming Operations, 16 VAC 25-73; Telecommunications, General, Approach Distances, 16 VAC 25-75.

The Safety and Health Codes Board authorized the Department of Labor and Industry ("Department") to begin reviewing the above-noted regulations at the March 19, 2019 meeting. On April 2, 2019, the Department filed Notices of Periodic Review in the *Virginia Register*. The Office of the Attorney General ("OAG") certified the statutory authority for the four regulations on April 4, 2019. A public comment period of 21 days began on April 29, 2019 and closed on May 20, 2019. The Department received no comments on any of the regulations. Following the comment period, the Department staff reviewed the regulations and prepared the following recommendations for the Board's consideration at this meeting.

Regulation Concerning Certified Lead Contractors Notification, Lead Project Permits and Permit Fees, 16 VAC 25-35, mandates that all contractors who perform lead related activities which require such contractors to be licensed by the Virginia Board of Asbestos, Lead, and Home Inspectors are to notify the Department of Labor and Industry of any lead project before beginning any lead project. The regulation provides the identification of certain lead abatement projects and the tracking of active projects. This inspection ensures protection of the health of the workers and also the health of the general public by controlling the release of lead into the environment or residence. It also provides a concise procedure for the notification and payment of fees associated with lead projects. The fees cover the costs that area associated with compliance inspections conducted by the Department.

The Department recommended that the regulation be retained as is, and asked if there were any questions. Mr. Parsons asked if the Board had any discussion, but none indicated in the affirmative.

The regulation concerning **Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors, 16VAC25-55**, authorizes the Department to promulgate regulations requiring contract fee inspectors as a condition of their doing business in the Commonwealth, to demonstrate financial responsibility sufficient to comply with the requirements of this chapter. By requiring contract fee inspectors to provide annual proof of indemnification, this regulation protects small business owners of boiler and pressure vessels by providing proof that contract fee inspectors have indemnified these owners against losses caused by negligent inspection and certification. Contract fee inspectors will have to invest a small portion of time in copying and mailing a certificate of insurance or proof of other indemnification. This regulation is not overly complex. It has no negative impact on the regulated community and does not overlap, duplicate, or conflict with federal or state law.

The Department recommended that the Board retain the regulation as is, and asked if there were any questions. None indicated in the affirmative.

Regulation Applicable to Tree Trimming Operations, 16VAC25-73, mandates that the Board adopts standards that most adequately assure employee safety and health in places of employment over which it has jurisdiction. This regulation addresses non-logging, tree-trimming, and cutting operations on residential and commercial work sites. The regulation was adopted at the request and in consultation with representatives of the tree care industry. It is designed to eliminate or reduce injuries, illnesses, and fatalities associated with tree trimming hazards. This regulation is the least burdensome alternative for the protection of employees working in tree trimming occupations. No alternatives were considered for this regulation because there were no viable alternatives. Prior to the adoption of this regulation, VOSH applied the Logging Standard, which did not apply to tree trimming activities where a tree was not "felled" or cut down, so there was no specific regulation to address hazards associated specifically with tree trimming.

The Department recommended that the Board retain the regulation as is, and asked if there were any questions. Mr. Parsons asked the Board if there were questions or discussion, but none indicated in the affirmative.

Telecommunications, General, Approach Distances, 16 VAC 25-75, makes telecommunications requirements identical to Federal Identical General Industry Standards, and provides safety protections for telecommunications workers equal to those afforded general industry electrical transmission and distribution workers. There is a continued need for this regulation because it ensures uniformity of the regulation for general industry, construction, and telecommunications workers who perform the same type of electrical transmission work. It provides safety protections for telecommunications workers equal to those afforded general industry electrical transmission and distribution workers. No alternatives were considered because in the past the establishment of less stringent compliance requirements directly resulted in fatal electrocution hazards for employees.

The Department recommended that the Board retain the regulation as is, and asked if there were any questions for discussion. None indicated in the affirmative.

Mr. Parsons thanked Ms. Doss and asked if the Board heard the review and the Department's recommendations. He asked if there should be a discussion or if the Board had any questions. None indicated in the affirmative. Mr. Parsons asked if there was a motion to accept, and Mr. Richardson made a Motion to accept. Ms. Jolly seconded the motion. Mr. Parsons asked for all those in favor of the motion to please signify by saying aye, and all indicated aye. None opposed. The motion was carried.

NEW BUSINESS

Federal OSHA Standards Improvement Project - Phase IV; Final Rule

Mr. Withrow, the Director of Legal Support for the Department discussed the Federal OSHA Standards Improvement Project - Phase IV; Final Regulation. He stated that the action requested from the Department, the VOSH Program requests the Safety and Health Codes Board to consider for adoption federal OSHA's final rule for the Standards Improvement Project - Phase IV, as published in the Federal Register on May 14, 2019. This is a federal identical regulation. As a state plan, Virginia is required to adopt federal identical regulations for our own unique regulation within six months of any action taken by federal OSHA. The proposed effective date is November 15, 2019.

The Summary of the Amended Standards, OSHA is making 14 revisions to existing standards in recordkeeping, general industry, maritime, and construction standards. The revisions include an update to the consensus standards incorporated by reference for signs and devices used to protect workers near automobile traffic, a revision to roll-over protective structures to comply with the current consensus standards, updates for storage of digital x-rays, and the methods of calling emergency services to allow for use of current technology in the construction industry. OSHA is also revising a few standards to align with current medical practice in the area of employee x-rays. To protect employee privacy and prevent identity, OSHA is also removing from a number of standards a requirement that employers include an employee's Social Security number on exposure monitoring, medical surveillance, and other records.

The first revision regarding the Recordkeeping Regulation, added a cross reference from one regulation to another, and made three revisions concerning standards for Asbestos, Inorganic Arsenic, Cadmium, Coke Oven Emissions, and Acrylonitrile in both general industry and construction and maritime. Those revisions concern x-rays and the use of them as a screen for lung cancer. The regulation moves the requirement for periodic screening because studies indicated that its effectiveness or usefulness to detect lung cancer was proven not to be beneficial. This change was supported by both employers and labor representatives because it reduced lifetime exposure of employees to x-rays.

The second revision allows employers to use digital radiography and other reasonably-sized standard films for x-rays instead of the very specific language in those regulations.

The third revision updates terminology and references to the International Labour Organization guidelines for x-rays included in the Asbestos Standards concerning updates to lung function testing requirements in the Cotton Dust Standard. This brings the regulation in accordance with current medical practice.

The fourth revision removes the term "feral cat" from the definition of vermin that was contained in the Maritime Standard.

The fifth revision updates the construction standard 1926.50, concerning first aid and medical services, to change 911 service posting requirements for job sites where you would not be able to have normal phone connections for calls to call for medical assistance.

The sixth revision clarifies 1926.55, the OSHA Occupational Health and Environmental Controls standard for gases, vapors and fumes, dusts and mists. It changes "threshold limit values" to "permissible exposure limits," which is used in all other OSHA regulations.

The seventh revision takes out the 31 pages of regulatory text concerning Process Safety Management of Highly Hazardous Chemicals in the PSM Construction Standard and cross references it to identical wording in the General Industry Standard.

The eighth revision changes the minimum breaking strength in safety belts, lifelines, and lanyards in 1926-104(c) from 5,400 to 5,000 pounds for consistency between the OSHA construction standards.

The ninth revision, changes 1926(g) of the Construction Standards to update the incorporation by reference to Part 6 of the manual on Uniform Traffic Control Devices, the national standard that is used for construction work zones. Virginia has a unique regulation in 1926, 16VAC25-60 referred to as the Administrative Regulations Manual, that references the old Part 6 of the MUTCD 1988 Edition. The requires updating in order for the Department to enforce the Virginia Department of Transportation's Work Area Protection Manual which is VDOT's version of the Part 6 of the manual on Uniform Traffic Control Devices.

Revision 10 makes changes to 1926.250(a)(2) which requires posting of maximum safe load limits in buildings. OSHA is removing a reference to single-family residential structures and wood-framed multifamily residential structures from that regulation.

Revision 11 amended 1926.800 regarding underground construction, changing references to the sections from the Mine Safety and Health Administration regulations that were incorporated by reference. OSHA needed to update this regulation to match a revision made to the MSHA regulation a few years ago. OSHA eliminated the reference to equipment used in deep-surface mines because OSHA Underground Construction Standard and the work processes were similar to the kinds of equipment that are used in metal and nonmetal mines, not in coal mines.

Revision 12 removed the provisions that specify the test procedures and performance requirements found under the Construction Asbestos Standards and replaced those revisions with references to the underlying National Consensus Standards from which they were derived.

Revision 13 deleted Coke Oven Emissions in Construction regulation because there is no coke oven emissions exposure in construction, only general industry. This revision removes the construction provision.

The last revision removed the need for employers to provide employee Social Security number with medical testing required by a number of different health standards. This change provides more secure protection of employee Social Security numbers.

The Standard Improvement Project IV is the fourth in a series of rulemaking actions aimed at improving readability and eliminating inconsistencies and confusion where possible to make the regulations

understandable to employers without reducing employee protections. OSHA estimates this final rule will result in annual cost savings to employers a little over \$6 million nationally. In Virginia the cost is estimated to be a little bit over \$160,000 annually.

Mr. Withrow concluded his presentation, and Mr. Parsons asked if the Board had any questions. Mr. Withrow recommended that the Board adopt the final rule for Standards Improvement Project - Phase IV as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of November 15, 2019. The Department also recommended that the Board state in any motion it may make to amend this regulation that it will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

Mr. Parsons gave the Board an opportunity to discuss or ask questions and then asked if there was a motion to accept. Mr. Fulton made a motion to accept, and Mr. Richardson seconded that motion. Mr. Parsons asked for all those in favor, to please signify by saying aye, and all indicated aye. Mr. Parsons asked all those opposed, and none opposed. Mr. Parsons thanked the Board and the Department.

Mr. Davenport provided a brief update informing the Board that the Department was not successful in securing funding on the compliance side of the house in the last several general assembly sessions for compliance officer positions. Governor Northam did include full funding for 12 unfunded compliance officer vacancies on our compliance side in his proposed budget last December. Unfortunately, that was not looked favorably on by both the house and the senate and it did not end up in the final budget. The Department has moved forward and are again pursuing the funding for these 12 compliance officer vacancies this cycle. If included in the governor's budget, the Department hopes that the budget decision items will be looked at more favorably both by the House of Delegates and the Senate of Virginia. We believe that a full complement of compliance officers helps to prevent fatalities in the workplace. Year to date, VOSH investigated 31 fatalities. At the time of the last meeting, the Department had investigated seven fatalities. While all fatalities are tragic and preventable, one of the fatalities was a 16-year-old child that was working in an unprotected trench who died in Fairfax County. This fatality is currently under investigation by VOSH, the Department of Labor and Industry's Labor Law Division, and the Fairfax County Police Department. The Department has also been in contact with the local Commonwealth Attorney's Office. The Department completed calendar year 2016 with more than a 35 percent increase in fatal workplace accidents, that was over the previous two years. For calendar year 2017 VOSH investigated 34 fatalities. For calendar year 2018 VOSH investigated 35 fatalities. Unfortunately, if things continue as they have this year, the Department projects to investigate more than 35 fatalities for the year. We think we can do much better in Virginia.

Mr. Davenport continued to report the Department held its 24th Annual Occupational Safety and Health Conference in Virginia Beach last week. The conference had more than 400 participants attend, two general sessions, one keynote session, 41 concurrent sessions at the conference, and 33 vendors who participated in the conference. In closing, Mr. Davenport thanked each of the Board members for their service and commitment to safety and health and their service to the Safety and Health Codes Board of the Commonwealth.

Items of Interest from Members of the Board

Mr. Parsons asked the Board if there were items of interest from the Members Ms. Jolly brought up a concern about the hand washing regulation in Virginia. Mr. Withrow addressed Ms. Jolly and the Board

by providing background and also note that this particular regulation, which is the Construction Sanitation Regulation, is up for periodic review in 2020. Mr. Withrow concluded that this was something the Department can look into for the periodic review in 2020, and when the Department publishes the notice and asks for comment, can ask questions to address this particular issue. The Department can prepare questions for the Board to review at the next Board meeting, and the Department can reach out to stake holders in the construction industry to get their input. Mr. Parsons recommended the Department to look into the science to see if there are any changes in hand sanitizers. Mr. Parsons added another concern he had was regarding hexavalent chromium, especially on construction sites where employees are handling concrete. Mr. Withrow stated that the Department could consult with federal OSHA on the issue in the interim.

Mr. Parsons stated that the last time the Board met, Mr. Withrow provided a really good report on heat illness that was very informative, and this hazard is increasing. Mr. Parsons stated that he would personally like to see Virginia, DOLI, pursue a state standard on heat illness or a possible Special Emphasis Program in lieu of a regulation, although the regulation was his preference. Mr. Withrow provided information on how the board could move forward with creating a regulation, and Mr. Parsons put forth a motion for VOSH to pursue a state standard on heat illness. Mr. Parsons, asked the Department to consider the February 28, 2019, OSHA review commission case between Secretary of Labor and A.H. Sturgill Roofing, which was a 5 A 1 case that was basically reversed for heat illness. The results of that case setting a precedent that 5 A 1, which was being used in the past in lieu of a standard, may not be able to be used successfully because of the outcome of this case. Mr. Parsons directed the Department to review that case and determine what those applications might have on a Virginia standard. Mr. Parsons then made a motion that Virginia should consider a state program for heat illness prevention for all workers. Ms. Jolly seconded the motion. Mr. Parsons asked if the Board would like to discuss the motion, but none indicated in the affirmative. A motion to accept was made and properly seconded. Mr. Parsons asked for all those in favor to please signify by saying aye, and all indicated aye. None opposed.

Mr. Withrow stated that by the next Board meeting, the Department should be able to have a notice of intended regulatory authority or NORA. If the Board adopts the notice of intended regulatory action, it will be published with a 30-day comment period, and then the next step would be a proposed regulation. There are requirements that we have to follow under the Virginia Administrative Process Act and the executive order that every governor signs about the regulatory promulgation process. Mr. Withrow reminded the Board that with every action they take, that action has to be reviewed, usually by the Attorney General's Office, Department of Planning and Budget, Secretary of Commerce and Trade, then the Governor's Office. It is expected that the process will take 12 to 18 months, and the Department will begin working on this.

Meeting Adjournment

Mr. Parsons asked the Board if there is a motion to adjourn? Ms. Rodrigues motioned to adjourn. Ms. Jolly seconded that motion. Mr. Parsons adjourned the meeting of the Safety and Health Codes Board at 11:03 a.m., on September 17.



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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For March 5, 2020

Respiratory Protection Standard, §1910.134; Revisions to Appendix A—Additional Ambient CNC Quantitative Fit Testing Protocols

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 final rule for the Additional Ambient CNC Quantitative Fit Testing Protocols: Respiratory Protection Standard as published in 84 FR 50739 on September 26, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-09-26/pdf/2019-20686.pdf>

The proposed effective date is March 31, 2020.

II. Summary of the Amended Standards

Federal OSHA is approving two additional quantitative fit testing protocols for inclusion in appendix A of the Respiratory Protection Standard. They are

- The modified ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol for full-facepiece and half-mask elastomeric respirators and
- The modified ambient aerosol CNC quantitative fit testing protocol for filtering facepiece respirators. The protocols apply to employers in general industry, shipyard employment, and the construction industry.

Prior to the publishing of this final rule, Appendix A of OSHA's Respiratory Protection Standard (29 CFR 1910.134) contained four quantitative fit testing protocols:

- Generated aerosol;
- Ambient aerosol condensation nuclei counter (CNC);
- Controlled negative pressure (CNP); and
- Controlled negative pressure REDON. This final rule allows for two more options for testing protocols

Brief History of Respiratory Protection Protocols in Appendix A

TSI Incorporated (“TSI”) proposed the ambient aerosol CNC protocol—often called the PortaCount® protocol after the CNC instrument manufactured by TSI—in 1987. OSHA allowed the ambient aerosol CNC protocol for fit testing under a compliance interpretation published in 1988. OSHA eventually incorporated that protocol into appendix A of the Respiratory Protection Standard when it revised the standard in 1998.

In 2006, TSI submitted two additional quantitative fit testing protocols to OSHA for approval and inclusion in appendix A of the Respiratory Protection Standard. These protocols were modified, abbreviated versions of the original ambient aerosol CNC protocol already approved by OSHA and listed in appendix A.

OSHA published a notice of proposed rulemaking (NPRM) on January 21, 2009 (74 FR 3526) to include the two protocols in its Respiratory Protection Standard, but later concluded that they were not sufficiently accurate or reliable. OSHA withdrew the proposed rule without prejudice on January 27, 2010 (75 FR 4323), and invited the developers to resubmit the two protocols after addressing the issues of concern listed in the withdrawal notification.

In July 2014, TSI submitted an application requesting that OSHA approve three new quantitative fit testing protocols for inclusion in appendix A of OSHA’s Respiratory Protection Standard (OSHA–2015–0015–0003). These three protocols were modified, abbreviated versions of the original ambient aerosol CNC protocol approved by OSHA and listed in appendix A, but different from the ones submitted to OSHA by TSI in 2006.^a

The three new protocols submitted by TSI in July 2014 included one for full facepiece elastomeric respirators (the Fast-Full method), one for half-mask elastomeric respirators (the Fast-Half method), and one for filtering facepiece respirators (FFRs) (the Fast-FFR method).

OSHA consolidated the Fast-Full and Fast-Half methods into a single protocol for approval: The modified ambient aerosol condensation nuclei counter (CNC) quantitative

^a TSI’s application included three peer reviewed articles (“the Richardson studies”) describing the accuracy and reliability of TSI’s proposed protocols.^a The application letter also included a copy of the 2010 ANSI/AIHA (American National Standards Institute/American Industrial Hygiene Association) Z88.10 “Respirator Fit Testing Methods” standard (“the ANSI standard”), which contains “Annex A2: Criteria for Evaluating New Fit Test Methods” (“the ANSI annex”) (OSHA–2015–0015–0007). TSI also submitted two white papers: One describing TSI’s analysis of its talking exercise data and the second describing TSI’s process and rationale behind the fit test exercises that were employed in the Richardson studies (OSHA–2015–0015–0001, OSHA–2015–0015–0008).

fit testing protocol for full-facepiece and half-mask elastomeric respirators. OSHA further proposed to approve the Fast-FFR protocol as the modified ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol for filtering facepiece respirators.

The original ambient aerosol CNC protocol consists of eight test exercises, performed in the following order: Normal breathing, deep breathing, turning head side-to-side, moving head up-and-down, talking, grimace, bending over, and normal breathing again. The modified ambient aerosol CNC protocol for full-facepiece and half-mask elastomeric respirators differs as follows:

- It includes only three of the eight original test exercises (bending over, head side-to-side, and head up and-down);
- it adds jogging-in-place as a new exercise; and
- it reduces the total test duration from 7.2 to 2.5 minutes.

The modified ambient aerosol CNC protocol for FFRs differs from the original ambient aerosol CNC protocol as follows:

- It includes only four of the eight original test exercises (bending over, talking, head side-to-side, and head up-and-down) and
- it reduces the total test duration from 7.2 to 2.5 minutes.

Federal OSHA concluded the two proposed modified ambient aerosol CNC quantitative fit testing protocols were supported by peer-reviewed studies that were conducted according to accepted experimental design practices and principles that produced results that were properly, fully and fairly presented and interpreted.

As such federal OSHA published its final rule on September 26, 2019, amending Appendix A of the Respiratory Protection Standard to include modified ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol for full-facepiece and half-mask elastomeric respirators and modified ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol for filtering facepiece respirators.

III. Basis, Purpose and Impact of the Amended Standards

A. Basis

Part II of Appendix A of the Respiratory Protection Standard specifies, in part, the procedure individuals must follow to submit new fit testing protocols for OSHA's consideration. The criteria OSHA uses for determining whether to propose adding a fit testing protocol to the Respiratory Protection Standard include:

- (1) a test report prepared by an independent government research laboratory; or
- (2) an article published in a peer reviewed industrial hygiene journal describing the protocol and explaining how the test data support the protocol's accuracy and reliability.

TSI's 2014 application for the approval of three new quantitative fit testing protocols met the second criterion. (See *Brief History of Respiratory Protection Protocols in Section II.*)

B. Purpose

The purpose of the new quantitative fit-testing protocols is to give employers alternatives to the four existing quantitative fit testing protocols already listed in appendix A of the Respiratory Protection Standard and will maintain safety and health protections for workers while providing additional flexibility and reducing compliance burdens.

C. Impact on Employers

OSHA states that these additional testing protocols will benefit employers because they will provide them with the flexibility to use the compliance option that best serves their needs while maintaining the same level of protection.

D. Impact on Employees

Federal OSHA has determined that the additional modified ambient aerosol CNC protocols provide employees with protection that is comparable to the protection afforded them by the existing fit testing provisions. The additional modified ambient aerosol CNC protocols do not replace existing fit testing protocols, but instead are alternatives to them. Therefore, OSHA finds that the final standard does not directly increase or decrease the protection afforded to employees.

E. Impact on the Department of Labor and Industry

It is anticipated that any impact on the Department resulting from adoption of these standards would be negligible. Any such costs would be related to training VOSH compliance staff on the standard.

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 Code of Virginia reiterates this requirement in § 40.1-22(5). Adopting these revisions will allow Virginia to conform to the federal program change.

F. Technological Feasibility

OSHA believes that the final rule is technologically feasible for employers because it provides flexibility to employers by adding additional optional testing protocols to the existing standards.

G. Benefit/Cost

This final rule imposes no additional costs on any private- or public-sector entity. This rulemaking increases employers' flexibility in choosing fit testing methods for employees, and the final rule does not require an employer to update or replace its current fit testing method(s) if the fit testing method(s) currently in use meets existing standards.

Furthermore, because the rule offers additional options that employers would be expected to select only if those options did not impose any net cost burdens on them, the rule will not have a significant impact on a substantial number of small entities.

OSHA concludes that the final rule does not impose costs of any significance on employers, providing primarily cost savings, and therefore the agency concludes that this rule is economically feasible.

Contact Person:

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the final rule for Additional Ambient Aerosol CNC Quantitative Fit Testing Protocols: Respiratory Protection Standard, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of March 31, 2020.

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

Additional Ambient Aerosol CNC Quantitative Fit Testing Protocols: Respiratory Protection Standard; Final Rule

As Adopted by the
Safety and Health Codes Board

Date: _____



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16VAC25-90-1910.134, Appendix A to Respiratory Protection Standard

When the regulations, as set forth in the Final Rule for Standards Improvement Project – Phase IV, 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

September 26, 2019

March 31, 2020

Authority and Signature

Loren Sweatt, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, authorized the preparation of this document pursuant to Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), 29 CFR part 1911, and Secretary's Order 1-2012 (77 FR 3912).

Signed at Washington, DC, on September 19, 2019.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

Amendments to the Standard

For the reasons stated in the preamble, the agency amends 29 CFR part 1910 as follows:

PART 1910—[AMENDED]

Subpart I—[Amended]

■ 1. Revise the authority citation for subpart I of part 1910 to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), 5-2007 (72 FR 31160), 4-2010 (75 FR 55355), or 1-2012 (77 FR 3912), as applicable, and 29 CFR part 1911.

■ 2. Amend Part I in appendix A to § 1910.134 as follows:

- a. Revise Section A.14(a) introductory text;
- b. In Section C.3:
 - i. Revise the introductory text; and
 - ii. Remove the terms "Portacount™" and "Portacount" and add in their place the term "PortaCount®";
- c. Redesignate Sections C.4 and 5 of as Sections C.6 and 7;
- d. Add new Sections C.4 and 5; and

- e. In newly redesignated Section C.7:
 - i. Revise paragraph (a) and paragraph (b) introductory text; and
 - ii. Redesignate Table A-1 as Table A-3; and

The revisions and additions read as follows:

§ 1910.134 Respiratory protection.

* * * * *

APPENDIX A to § 1910.134—FIT TESTING PROCEDURES (MANDATORY)

Part I. OSHA—Accepted Fit Test Protocols

A. Fit Testing Procedures—General Requirements

* * * * *

14. Test Exercises. (a) Employers must perform the following test exercises for all fit testing methods prescribed in this appendix, except for the two modified ambient aerosol CNC quantitative fit testing protocols, the CNP quantitative fit testing protocol, and the CNP REDON quantitative fit testing protocol. For the modified ambient aerosol CNC quantitative fit testing protocols, employers shall ensure that the test subjects (*i.e.*, employees) perform the exercise procedure specified in Part I.C.4(b) of this appendix for full-facepiece and half-mask elastomeric respirators, or the exercise procedure specified in Part I.C.5(b) for filtering facepiece respirators. Employers shall ensure that the test subjects (*i.e.*, employees) perform the exercise procedure specified in Part I.C.6(b) of this appendix for the CNP quantitative fit testing protocol, or the exercise procedure described in Part I.C.7(b) of this appendix for the CNP REDON quantitative fit testing protocol. For the remaining fit testing methods, employers shall ensure that the test exercises are performed in the appropriate test environment in the following manner:

C. Quantitative Fit Test (QNFT) Protocols

* * * * *

3. Ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol.

The ambient aerosol condensation nuclei counter (CNC) quantitative fit testing (PortaCount®) protocol quantitatively fit tests respirators with the use of a probe. The probed respirator is only used for quantitative fit tests. A probed respirator has a special sampling device, installed on the respirator, that allows the probe to sample the air from inside the mask. A probed respirator is required for each make, style, model, and size that the employer uses and can be obtained from the respirator manufacturer or distributor. The primary CNC instrument manufacturer, TSI Incorporated, also provides probe attachments (TSI mask sampling adapters) that permit fit testing in an employee's own respirator. A minimum fit factor pass level of at least 100 is necessary for a half-mask respirator (elastomeric or filtering facepiece), and a minimum fit factor pass level of at least 500 is required for a full-facepiece elastomeric respirator. The entire screening and testing procedure shall be explained to the test subject prior to the conduct of the screening test.

* * * * *

4. Modified ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol for full-facepiece and half-mask elastomeric respirators.

(a) When administering this protocol to test subjects, employers shall comply with the requirements specified in Part I.C.3 of this appendix (ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol), except they shall use the test exercises described below in paragraph (b) of this protocol instead of the test exercises specified in section I.C.3(a)(6) of this appendix.

(b) Employers shall ensure that each test subject being fit tested using this protocol follows the exercise and duration procedures, including the order of administration, described in Table A-1 of this appendix.

TABLE A-1—MODIFIED AMBIENT AEROSOL CNC QUANTITATIVE FIT TESTING PROTOCOL FOR FULL FACEPIECE AND HALF-MASK ELASTOMERIC RESPIRATORS

Exercises ¹	Exercise procedure	Measurement procedure
Bending Over	The test subject shall bend at the waist, as if going to touch his/her toes for 50 seconds and inhale 2 times at the bottom. ²	A 20 second ambient sample, followed by a 30 second mask sample.
Jogging-in-Place	The test subject shall jog in place comfortably for 30 seconds	A 30 second mask sample.
Head Side-to-Side	The test subject shall stand in place, slowly turning his/her head from side to side for 30 seconds and inhale 2 times at each extreme. ²	A 30 second mask sample.
Head Up-and-Down	The test subject shall stand in place, slowly moving his/her head up and down for 30 seconds and inhale 2 times at each extreme. ²	A 30 second mask sample followed by a 9 second ambient sample.

¹ Exercises are listed in the order in which they are to be administered.

² It is optional for test subjects to take additional breaths at other times during this exercise.

5. Modified ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol for filtering facepiece respirators.

(a) When administering this protocol to test subjects, employers shall comply with the requirements specified in Part I.C.3 of this appendix (ambient aerosol condensation

nuclei counter (CNC) quantitative fit testing protocol), except they shall use the test exercises described below in paragraph (b) of this protocol instead of the test exercises specified in section I.C.3(a)(6) of this appendix.

(b) Employers shall ensure that each test subject being fit tested using this protocol follows the exercise and duration procedures, including the order of administration, described in Table A-2 of this appendix.

TABLE A-2— MODIFIED AMBIENT AEROSOL CNC QUANTITATIVE FIT TESTING PROTOCOL FOR FILTERING FACEPIECE RESPIRATORS

Exercises ¹	Exercise procedure	Measurement procedure
Bending Over	The test subject shall bend at the waist, as if going to touch his/her toes for 50 seconds and inhale 2 times at the bottom ² .	A 20 second ambient sample, followed by a 30 second mask sample.
Talking	The test subject shall talk out loud slowly and loud enough so as to be heard clearly by the test conductor for 30 seconds. He/she will either read from a prepared text such as the Rainbow Passage, count backward from 100, or recite a memorized poem or song.	A 30 second mask sample.
Head Side-to-Side	The test subject shall stand in place, slowly turning his/her head from side to side for 30 seconds and inhale 2 times at each extreme ² .	A 30 second mask sample.
Head Up-and-Down	The test subject shall stand in place, slowly moving his/her head up and down for 39 seconds and inhale 2 times at each extreme ² .	A 30 second mask sample followed by a 9 second ambient sample.

¹ Exercises are listed in the order in which they are to be administered.
² It is optional for test subjects to take additional breaths at other times during this exercise.

* * * * *

7. Controlled negative pressure (CNP) REDON quantitative fit testing protocol.

(a) When administering this protocol to test subjects, employers must comply with the requirements specified in paragraphs (a) and (c) of part I.C.6 of this appendix ("Controlled negative pressure (CNP) quantitative fit testing protocol.") as well as use the test exercises described below in paragraph (b) of this protocol instead of the test exercises specified in paragraph (b) of part I.C.6 of this appendix.

(b) Employers must ensure that each test subject being fit tested using this protocol follows the exercise and measurement procedures, including the order of administration described in Table A-3 of this appendix.

* * * * *

[FR Doc. 2019-20686 Filed 9-25-19; 8:45 am]
 BILLING CODE 4510-26-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2019-0756]

RIN 1625-AA00

Safety Zone, Wilmington River, Savannah, GA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters on the Wilmington River 1,000 feet on the north and south side of the Islands Expressway Bridge in Savannah, GA. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the placement of multiple spans for the new Islands Expressway Bridge. Entry of vessels or persons into this zone is

prohibited unless specifically authorized by the Captain of the Port (COTP) Savannah or a designated representative.

DATES: This rule is effective without actual notice from September 26, 2019 to 2:00 p.m. on October 22, 2019. For the purposes of enforcement, actual notice will be used from 8:00 a.m. on September 18, 2019 through September 26, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG-2019-0756 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MST1 Rachel Crowe, Marine Safety Unit Savannah Office of Waterways Management, Coast Guard; telephone 912-652-4353, extension 243, or email Rachel.M.Crowe@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
 DHS Department of Homeland Security
 FR Federal Register
 NPRM Notice of proposed rulemaking
 § Section
 U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C.

553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. Immediate action is needed to respond to the potential safety hazards created by the placement of multiple spans for the new Islands Expressway Bridge. The Coast Guard received information on August 27, 2019 regarding the operations beginning on September 18, 2019. The operation would begin before the rulemaking process would be completed. Because of the dangers posed by the placement of multiple spans, the safety zone is necessary to provide for the safety of persons, vessels, and the marine environment in the event area.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with the construction and placement of multiple spans.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The COTP Savannah has determined that potential hazards associated with the placement of multiple spans for the new Islands Expressway Bridge starting September 18, 2019, will be a safety concern for anyone within 1,000 feet of the north and south side of the Islands Expressway Bridge. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during bridge construction.

IV. Discussion of the Rule

This rule establishes a safety zone from 8:00 a.m. on September 18, 2019



COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

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VIRGINIA SAFETY AND HEALTH CODES BOARD

Briefing Package

March 5, 2020

Final Regulation to Amend 16VAC-25-260, Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, Miscellaneous Changes

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption, as a **final** regulation of the Board, the following VOSH proposal to amend the Administrative Regulation for the VOSH Program, 16VAC25-260.A.3., pursuant to §§2.2-4006.A.3.

II. Summary of the Rulemaking Process.

Action by the General Assembly during the 2016 Session amended §40.1-51.1.D of the *Code of Virginia*, to match the federal OSHA regulatory changes to 29CFR1904.39(a)(2) which required employers:

“Within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.”

Governor McAuliffe signed the legislation with an effective date of July 1, 2016. The legislation mirrors the language contained in 29CFR1904.39:

“§ 40.1-51.1. Duties of employers.

....

D. Every employer shall report to the Virginia Department of Labor and Industry within eight hours any work-related incident resulting in a fatality or within 24 hours any work-related incident resulting in (i) the inpatient hospitalization of one or more persons, (ii) an amputation, or (iii) the loss of an eye, as prescribed in the rules and regulations of the Safety and Health Codes Board.”

VOSH’s Administrative Regulation contained one reference to §40.1-51.1.D which has never been updated to reflect the 2016 legislative change:

“16VAC25-60-260. Issuance of citation and proposed penalty.

....

A.

....

3. Notwithstanding subdivision 1 of this subsection, if an employer fails to notify the commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence as required by § 40.1-51.1 D of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.” (Emphasis added).

III. Summary of Final Regulation.

The final regulation, 16VAC25-260.A.3, will be amended to reflect the 2016 legislative change to §40.1-51.1.D as follows:

3. Notwithstanding subdivision 1 of this subsection, if an employer fails to notify the commissioner *within eight hours* of any work-related incident resulting in a fatality or *within 24 hours of any work-related incident resulting in (i) the in-patient hospitalization of ~~three~~ one or more persons, (ii) an amputation, or (iii) the loss of any eye,* ~~within eight hours of such occurrence~~ as required by § [40.1-51.1](#) D of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.

IV. Basis, Purpose and Impact of the Final Rulemaking.

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. Purpose

The purpose of amending the Administrative Regulation is to update regulatory language to reflect a legislative change that took effect on July 1, 2016.

C. Impact on Employers

No impact on employers is anticipated.

D. Impact on Employees

No anticipated impacts on employees.

E. Impact on the Department of Labor and Industry.

Other than training DOLI employees on the changes to the regulation, no additional fiscal or other programmatic impacts are anticipated for the Department if the final regulation is adopted.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board consider for adoption, as a final regulation of the Board, the attached final amendments to 16VAC25-60-260.A.3, Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, Duties of employers, 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.*

**16VAC25-60-260, Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program, Miscellaneous Changes**

As Adopted by the
Safety and Health Codes Board

Date:



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date:

**16VAC25-60-260, Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program**

Part VI
Citation and Penalty

16VAC25-60-260. Issuance of citation and proposed penalty.

A. Each citation shall be in writing and describe with particularity the nature of the violation or violations, including a reference to the appropriate safety or health provision of Title 40.1 of the Code of Virginia or the appropriate rule, regulation, or standard. In addition, the citation must fix a reasonable time for abatement of the violation. The commissioner shall have authority to propose penalties for cited violations in accordance with § [40.1-49.4](#) of the Code of Virginia and this chapter. The citation will contain substantially the following: "NOTICE: This citation will become a final order of the commissioner unless contested within fifteen working days from the date of receipt by the employer." The citation may be delivered to the employer or his agent by the commissioner or may be sent by certified mail or by personal service to an officer or agent of the employer or to the registered agent if the employer is a corporation.

No citation may be issued after the expiration of six months following the occurrence of any alleged violation. The six-month timeframe is deemed to be tolled on the date the citation is issued by the commissioner, without regard for when the citation is received by the employer. For purposes of calculating the six-month timeframe for citation issuance, the following requirements shall apply:

1. The six-month timeframe begins to run on the day after the incident or event occurred or notice was received by the commissioner (as specified in subdivisions 1 through 5 of this subsection), in accordance with § [1-210](#) A of the Code of Virginia. The word "month" shall be construed to mean one calendar month in accordance with § [1-223](#) of the Code of Virginia.
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.
3. Notwithstanding subdivision 1 of this subsection, if an employer fails to notify the commissioner **within eight hours** of any work-related incident resulting in a fatality or **within 24 hours of any work-related incident resulting in (i) the in-patient hospitalization of three one or more persons, (ii) an amputation, or (iii) the loss of any eye,** ~~within eight hours of such occurrence~~ as required by § [40.1-51.1](#) D of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.

4. Notwithstanding subdivision 1 of this subsection, if the commissioner is first notified of a work-related incident resulting in an injury or illness to an employee or employees through receipt of an Employer's Accident Report (EAR) form from the Virginia Workers' Compensation Commission as provided in § [65.2-900](#) of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner actually receives the EAR form.

5. Notwithstanding subdivision 1 of this subsection, if the commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee or employees, through receipt of a complaint in accordance with [16VAC25-60-100](#) or referral, the six-month timeframe shall not be deemed to commence until the commissioner actually receives the complaint or referral.

B. A citation issued under subsection A of this section to an employer who violates any VOSH law, standard, rule or regulation shall be vacated if such employer demonstrates that:

1. Employees of such employer have been provided with the proper training and equipment to prevent such a violation;
2. Work rules designed to prevent such a violation have been established and adequately communicated to employees by such employer and have been effectively enforced when such a violation has been discovered;
3. The failure of employees to observe work rules led to the violation; and
4. Reasonable steps have been taken by such employer to discover any such violation.

C. For the purposes of subsection B of this section only, the term "employee" shall not include any officer, management official or supervisor having direction, management control or custody of any place of employment which was the subject of the violative condition cited.

D. The penalties as set forth in § [40.1-49.4](#) of the Code of Virginia shall also apply to violations relating to the requirements for recordkeeping, reports or other documents filed or required to be maintained and to posting requirements.

E. In determining the amount of the proposed penalty for a violation the commissioner will ordinarily be guided by the system of penalty adjustment set forth in the VOSH Field Operations Manual. In any event the commissioner shall consider the gravity of the violation, the size of the business, the good faith of the employer, and the employer's history of previous violations.

The commissioner shall have authority to propose civil penalties to public employers for willful, repeat, and failure-to-abate violations in accordance with subsections I and J of § [40.1-49.4](#), and for serious violations that cause death to an employee or are classified as high gravity in accordance with subsection H of § [40.1-49.4](#).

F. On multi-employer worksites for all covered industries, citations shall normally be issued to an employer whose employee is exposed to an occupational hazard (the exposing employer). Additionally, the following employers shall normally be cited, whether or not their own employees are exposed:

1. The employer who actually creates the hazard (the creating employer);
2. The employer who is either:
 - a. Responsible, by contract or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
 - b. Responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
3. The employer who has the responsibility for actually correcting the hazard (the correcting employer).

G. A citation issued under subsection F of this section to an exposing employer who violates any VOSH law, standard, rule or regulation shall be vacated if such employer demonstrates that:

1. The employer did not create the hazard;
2. The employer did not have the responsibility or the authority to have the hazard corrected;
3. The employer did not have the ability to correct or remove the hazard;
4. The employer can demonstrate that the creating, the controlling or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees were exposed;
5. The employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;
6. Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; and

- 7. When extreme circumstances justify it, the exposing employer shall have removed his employees from the job.
- H. The commissioner's burden of proving the basis for a VOSH citation, penalty, or order of abatement is by a preponderance of the evidence.
- I. The burden of proof in establishing an affirmative defense to a VOSH citation resides with the employer.



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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For March 5, 2020

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 14 (2018)(AMENDED), "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 regulations have been identified for review in 2020:

- 16 VAC 25-11 Public Participation Guidelines
- 16 VAC 25-180 Virginia Field Sanitation Standard, Agriculture

III. Current Status and Process

Three Safety and Health Codes Board regulations are subject to the periodic review process in calendar year 2020. 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 least 21 days but not longer than 90 days. Subsequently, the Department will review the regulations 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 regulations with no changes, or will begin a regulatory action to amend or repeal one or more regulations.

Contact Person:

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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 25-11, Public Participation Guidelines; 16 VAC 25-160, Construction Industry Standard for Sanitation; and 16 VAC 25-180, Virginia Field Sanitation Standard, Agriculture.

The Department also recommends that the Board state in any motion it may make regarding the periodic review of these 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 14 (2018)(AMENDED), "Development and Review of State Agency IRegulations".