



# *COMMONWEALTH of VIRGINIA*

## DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport  
COMMISSIONER

Main Street Centre  
600 East Main Street, Suite 207  
Richmond, Virginia 23219  
PHONE (804) 371-2327  
FAX (804) 371-6524

### AGENDA

#### SAFETY AND HEALTH CODES BOARD

Main Street Centre  
600 East Main Street  
12<sup>th</sup> Floor Conference Room - South  
Richmond, Virginia

Thursday, October 29, 2015

10:00 a.m.

1. Call to Order
2. Approval of Agenda
3. Approval of Minutes for Board Meeting of July 9, 2015
4. Opportunity for the Public to Address the Board on these issues pending before the Board today or on 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 others wishing to address the Board.*

5. **Old Business**

a) Virginia Unique Regulations:

- 1) Notice of Intended Regulatory Action (NOIRA): Request to Amend the Administrative Regulation for the VOSH Program;

*Presenter – Jay Withrow*

6. **New Business**

a) Federal-identical Regulation:

CONFINED SPACES IN CONSTRUCTION, 29 CFR Part 1926, Subpart AA, §§1926.1200 – 1926.1213; and Other Related Provisions: §1926.953, Enclosed Spaces; and §1926.968, Definitions; Excavations, 29 CFR Part 1926.650 through 29 CFR Part 1926.652; and Underground Construction, 29 CFR Part 1926.800

Repeal of:

Virginia Confined Space Standard for the Construction Industry, 16VAC25-140-10, *et seq.*;  
Underground Construction Standard, Construction Industry, 16VAC25-150-10, *et seq.*; and  
Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.*

*Presenter – Ron Graham*

b) Report on Periodic Review of Certain Existing Regulations

- 1) Financial Responsibility of Boiler & Pressure Vessel Contract Fee Inspectors, 16VAC25-55;
- 2) Regulation Applicable to Tree Trimming Operations, 16VAC25-73; and
- 3) Telecommunications, General, Approach, Distances, 16VAC25-75

*Presenter – Reba O'Connor*

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

9. Items of Interest from Members of the Board

10. Meeting Adjournment

**DRAFT**

**SAFETY AND HEALTH CODES BOARD  
MEETING MINUTES  
THURSDAY, July 9, 2015**

**BOARD MEMBERS PRESENT:** Mr. Jerome Brooks  
Mr. Lou Cernak, Jr.  
Mr. John Fulton  
Ms. Anna Jolly  
Mr. Travis Parsons  
Mr. Courtney Malveaux  
Mr. David Martinez  
Ms. Milagro Rodriguez, Chair  
Mr. Tommy Thurston

**BOARD MEMBERS ABSENT:** Ms. Rebecca LePrell  
Mr. Kenneth Richardson, II  
Mr. Chuck Stiff, Vice 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. Paul Schilinski, Director, Occupational Safety Compliance  
Mr. Ron Graham, Director, Occupational Health Compliance  
Ms. Reba O'Connor, Regulatory Coordinator  
Mr. John Crisanti, Manager, Office of Policy and Planning  
Mr. Ed Hilton, Director, Boiler Safety  
Ms. Regina Cobb, Senior Management Analyst  
Mr. Mario Suarez, Safety & Health Compliance Officer, Norfolk  
Ms. Jessica Steeves, Safety & Health Compliance Officer, Norfolk  
Mr. Kwame Acquah, Safety & Health Compliance Officer,  
Richmond

**OTHERS PRESENT:** Ms. Barbie O'Hanlan, Court Reporter, Halasz Reporting &  
Videoconference  
Ms. Beverly Crandell, Safety Program Coordinator, Tidewater  
Community College  
Ms. Veronica Haynes, SHIM  
Mr. Scott Shahan, Virginia State Police  
Samuel R. Brumberg, Esq., Ass'n of Electric Cooperatives, Glen  
Allen, VA  
Mr. Bobby Glenn, SMM

## **ORDERING OF AGENDA**

Chair Milly Rodriguez called the meeting to order at 10:08 a.m. A quorum was present.

Ms. Rodriguez requested a motion to approve the Agenda. Mr. Travis Parsons moved to accept the Agenda, and Mr. Tommy Thurston properly seconded the motion. The Agenda was approved, as submitted, and the motion was carried by unanimous voice vote.

## **APPROVAL OF MINUTES**

Ms. Rodriguez asked the Board for a motion to approve the Minutes from the December 11, 2014, Board meeting. On proper motion by Mr. Thurston and seconded by Mr. Martinez, the Minutes were approved by unanimous voice vote.

## **ELECTION OF OFFICERS**

Ms. Rodriguez, who informed the Board that elections are held each year during the first Board meeting after July first, asked for nominations for the office of Chair. Ms. Rodriguez was nominated to continue as Chair and the nomination was properly seconded. There were no other nominations. By voice vote, the Board unanimously elected Ms. Rodriguez to serve a second consecutive term as Chair.

Next, Ms. Rodriguez asked for nominations for Vice Chair. Mr. Chuck Stiff was nominated to continue as Vice Chair, and the nomination was properly seconded. There were no other nominations. Mr. Stiff was unanimously elected to serve a second consecutive term as Vice Chair by voice vote.

## **PUBLIC COMMENTS**

Ms. Rodriguez opened the floor for comments from the public, however, there were no comments.

## **OLD BUSINESS**

None

## **NEW BUSINESS**

### ***Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, 16VAC25-85-1904.2 and 16VAC25-85-1904.39***

Mr. Jay Withrow, Director of Legal Support, VPP, ORA, OPP & OWP for the Department of Labor and Industry, requested, on behalf of the Department, that the Board consider for adoption federal OSHA's Amendments to the Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, 16VAC25-85-1904.2 and 16VAC25-85-1904.39, as published in 79 FR 56129 on September 18, 2014.

Mr. Withrow began by stating that Virginia, as a state plan state, is normally required to adopt federal – identical regulation within six months of the publication of the federal regulation. He added that Virginia is past the six months' time limit because it had to wait for a general assembly action on the part of the recording and reporting requirements. He noted that the proposed effective date for the

regulation is September 15, 2015.

In summarizing the changes to the recording and reporting requirements in Part 1904, he explained that there are three different sections to be discussed. He stated that the first change involved an update to non-mandatory Appendix A to Subpart B of Part 1904 - Partially Exempt Industries. He informed the Board that the OSHA 300 log is required to be completed by industries that primarily are considered to be high hazard and there is a list of industries that are low hazard that are not required to complete the OSHA 300 on an annual basis. He added that OSHA used to track industries by Standard Industrial Classification or SIC code, but in the '90's there was a switch to the North American Industrial Classification System (NAICS) coding. The switch is not a one-to-one switch from SIC to NAICS codes so a significant number of industries were impacted as to whether they fell into this low hazard area or not.

He continued by stating that the second area has to do with reporting requirements. He informed the Board that under the old Virginia statute and under OSHA's old regulations, employers were required to report fatal accidents to the department with eight hours, any catastrophes defined as involving the hospitalization of three or more workers, were required to be reported with eight hours. OSHA changed some of their reporting requirements. Fatality reporting requirements are state-identical at eight hours. The hospitalization of an employee, as a result of an accident, changed from three people down to one person. The revised standard changed the definition of what hospitalization meant.

Mr. Withrow mentioned that two new categories for reporting -- amputations and loss of an eye-- were added for reporting. Loss of an eye does not mean going blind; it means actually losing an eye. He continued by stating that the Department had the statute on the books and could not adopt a regulatory change until the Department changed the statute, so the Department made a legislative amendment. Mr. Withrow apologized to the Board because there was a drafting error by the Department in the recently adopted revision to §40.1-51.1.D. The VOSH proposed regulation is not identical to the federal OSHA requirement to report in-patient hospitalizations, amputations and loss of an eye within 24 hours. The Virginia statute mistakenly requires an 8-hour reporting period across the board for everything.

As a result, the statute went through the general assembly as being the same as the federal OSHA requirements because that was the Department's intent. Mr. Withrow added that to address this issue, the Department had to actually change the federal regulation to match the statute since a statute trumps a regulation. Mr. Withrow explained that now the Department has to return to the General Assembly in 2016 to bring the statute into conformity with the OSHA regulation. Once the statute is amended, VOSH will file another proposed regulation with the Board to bring the VOSH regulation into conformity as well.

Ms. Anna Jolly questioned what this means for enforcement. Mr. Withrow responded that the Department has developed an enforcement policy that already appears on the Department's website. The enforcement policy tells employers that if they do not meet the eight hour reporting requirement for hospitalization, amputation, and loss of an eye, but they do meet the 24-hour requirement in the federal regulation, the violation would be considered, a *de minimus* violation of the statute.

Mr. Withrow stated that the VOSH statute has a provision that says the commissioner can establish procedures for determining what a *de minimus* violation of a regulatory requirement would be. He added that *de minimus* basically means that the violation does not have any direct impact on employee safety and health because the reporting requirement is something that occurs post-accident; thus,

missing the eight hour requirement and meeting the 24 hour requirement has no direct impact on the safety and health of that employee. He added that a *de minimus* violation does not go on an employer's record nor appear in any database and there is no penalty associated with it.

Mr. Withrow mentioned that the third area of changes included some definitions for safety meetings, definition of "amputation" and an additional method that employers could use to report these kinds of incidents. In addition to telephoning the Department directly, coming to one of the Department's offices, using OSHA's toll free hotline, and now OSHA has also added an electronic submission form online.

Mr. Withrow referred to the Basis, purpose and Impacts. With respect to impact, he stated that changing from SIC to NAICS, slightly increases the number of establishments required to report injury and illnesses. Also, he added that the amendment will result in a four percent increase in and over establishments engaged in recordkeeping and a two percent increase for all establishments with more than ten employees.

Mr. Withrow informed the Board that for many years the Department has been getting weekly reports from Virginia Workers' Compensation Commission about certain types of accidents and injuries, including amputations, the Department has identified to them as being of interest to the Department.

Mr. Withrow referred to page eight of the briefing package which shows the estimations on the number of establishments impacted nationwide and then Virginia's numbers. With respect to "Benefits", Mr. Withrow stated that OSHA does believe that the revised rule addresses a number of previous shortfalls in the 1904 regulation. There is obvious benefit to employers who are going from having to do some of the recordkeeping and now they don't because they are now at a low hazard. The amendment should allow the Department to use resources more effectively; find out about very serious injuries more quickly, get in and make sure things get corrected so that incidents do not recur.

With respect to costs, he stated that OSHA estimated the costs at nine million dollars, which is equated to \$242,500 for Virginia. The standard is both technologically and economically feasible.

He concluded by recommending that the Board adopt the amendments to Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, 16VAC25-85-1904.2 and 16VAC25-85-1904.39, as authorized by Virginia Code §§ 40.1-22(5), 40.1-51.1.D., and 2.2-4006.A.4(c), with an effective date of September 15, 2015.

A motion was properly made and properly seconded. The Department's recommendation was approved unanimously by voice vote.

***Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program***

Mr. Withrow announced that the next two NOIRAs are for unique regulations so they will have to go through a full promulgation process with notice and comment periods which can take from 12 to 18 months.

He then requested the Board to authorize the Department to initiate the regulatory process to amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program by filing

a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

He began by listing the following sections that are to be reviewed:

- Applicability of anti-retaliation safeguards to public sector employees, *16VAC25-60-30*.
- Application of Commonwealth's Attorney to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30*, which primarily has to do with the Department's authority to get a warrant if we went into a local government situation and the Department's inspectors were refused entry. Mr. Withrow stated that the Department has not yet had a problem in this area, but we need to know that we could get in to inspect if we needed to.
- Allowance for the Commissioner to petition the Cabinet Secretary and then the Executive regarding resolution of anti-retaliation violations with a state agency, *16VAC25-60-30.G*. Mr. Withrow stated that this is another whistleblower situation involving state employees.
- Virginia Freedom of Information Act requirements in regard to the Voluntary Protection Program, *16VAC25-60-90*.
- Change of section title(s) to reflect recent terminology changes in occupational discrimination or anti-retaliation cases, *16VAC25-60-110*.
- Provision of penalties for occupational discrimination or anti-retaliation cases at the litigation stage, *16VAC25-60-110*.
- Title update to reflect prior statutory changes, *16VAC25-60-245*. Mr. Withrow stated that this section allows the commissioner to take and reserve testimony and administer oaths to individuals that we're trying to interview who are being uncooperative.
- "Burden of Proof" in VOSH court cases to be specified as "preponderance of the evidence", *16VAC25-60-260*.
- Burden for proving an affirmative defense to a citation lies with the defendant, *16VAC25-60-260*.
- Applicability of anti-retaliation safeguards to public sector employees, *16VAC25-60-30*.
- Application of Commonwealth's Attorney to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30*.

He next briefly reviewed the Basis, Purpose and Impact of this NOIRA. With respect to impact on employers, employees and the Department, Mr. Withrow stated that it is unknown at this time. He also briefly explained the regulatory process involved – the Board adopts the NOIRA, which gets published in the Virginia Register of Regulations, the NOIRA goes out for notice and a 30-day comment period. Afterwards, the Department develops a proposed regulation for the Board to adopt. If the Board decides to go forward with the proposed regulation, it gets published again and then the Board holds a public

hearing, followed by a 60-day comment period. The Department reviews and responds to all comments received during this comment period. The Department then develops a final regulation for the Board to adopt, amend, or the Board may decide not to adopt anything.

In conclusion, Mr. Withrow recommended that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to amend the Administrative Regulation for the VOSH Program by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

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

***Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Adopt a Virginia Voluntary Protection Program (VPP) Regulation***

Mr. Withrow requested the Board to authorize the Department to initiate the Department to initiate the regulatory process to adopt a Virginia Voluntary Protection Program (VPP) Regulation by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

He informed the Board that VPP is a recognition program for employers who adopt and implement exemplary safety and health management systems. VPP is designed to recognize the "best of the best" of employers.

Mr. Withrow explained that there is a list of issues that the Department is looking at with respect to this NOIRA: categories of participation; ways to participate; site-based, mobile workforce, VPP corporate; application requirements; requirements for a comprehensive safety and health management system; certification process; on-site evaluation process; annual submissions; recertification process; and withdrawal or termination.

He informed the Board that in Virginia there are two types of VPP participation: Star sites and Merit sites. Star sites have met all requirements of VPP; and Merit sites have demonstrated the potential and willingness to achieve Star status and are implementing planned actions to fully meet the VPP Star requirements.

With respect to impact on employers, Mr. Withrow stated that VPP is a voluntary program so the impact is self-imposed by the employer. It helps employers to identify and correct occupational hazards in a proactive and cooperative approach. VPP sites set up various committees to address all kinds of things from accident investigation, to ergonomics, to lockout/tagout, and confined space. Employees are directly involved in those committee meetings.

He added that VPP sites nationwide average about 50 percent below their injury incident rates for their industry, and in Virginia, it's 65 percent below the national average. He highlighted a success story in Virginia which has two facilities of the Department of Corrections facilities (Augusta and Lunenburg) in VPP.

He continued by stating that VPP sites have lots of subcontractors that work on their sites. Those subcontractors also are required to comply with the VPP requirements when they come onto the sites.



VPP extends beyond the site and impacts construction contractors and temporary labor agencies, too. Mr. Withrow mentioned that the Department has another strategic partnership with the Associated General Contractors (AGC) to get into the construction arena.

He concluded by recommending, on behalf of the Department, that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to develop a regulation that provides for the operation of Virginia's Voluntary Protection Program (VPP), as required by §40.1-49.13 of the Code of Virginia, and pursuant to the Virginia Administrative Process Act (§2.2-4007).

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

#### ***Notice of Periodic Review of Certain Existing Regulations***

Ms. Reba O'Connor, Regulatory Coordinator for the Department of Labor and Industry, requested the Board's permission to proceed with the periodic review process for the following three regulations:

1. 16VAC25-55, Financial Responsibility of Boiler & Pressure Vessel Contract Fee Inspectors;
2. 16VAC25-73, Regulation Applicable to Tree Trimming Operations; and
3. 16VAC25-75, Telecommunications, General, Approach, Distances.

She explained that, in accordance with 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. She continued by stating that the Executive Order requires that state agencies conduct a periodic review of regulations every four years.

Ms. O'Connor stated that if the Board grants approval for the Department to proceed, the process of periodic review begins with publication of the Notice of Periodic Review in the Virginia Register, which starts a public comment period of at least 21 days, but no more than 90 days. The Department will review the regulations and any public comments, then prepare recommendations for the Board's consideration.

Ms. O'Connor concluded by recommending that the Board approve the publication of a Notice of Periodic Review in the Virginia Register for the above-mentioned regulations.

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

#### **Items of Interest from the Department of Labor and Industry**

Department of Labor and Industry Commissioner, Ray Davenport, congratulated Madam Chair on continuing in the chairmanship position. He commented on the legislation to codify Virginia's Voluntary Protection Program (VPP) and the bipartisan support for Virginia's VPP. He thanked Board member, Courtney Malveaux, for his assistance with the Manufacturing Association. He thanked the State Chamber of Commerce and the current VPP sites that stepped forward and help shepherd this legislation through. He added that the Governor held a ceremonial bill signing for VPP on June 3, 2015.

He noted that in attendance at the bill signing were Department staff, many VPP sites, both management and labor employees, the Virginia Manufacturing Association (VMA), represented by Mr. Malveaux, the Virginia AFL-CIO, and the State Chamber of Commerce.

Next, Commissioner Davenport called the Board's attention to the pamphlets which were distributed entitled "Preventing Employee Misclassification." He stated that the Governor issued Executive Order 24 on August 14, 2014, that brought the taskforce together to address employee misclassification. He stated that the taskforce is ongoing in its work. He informed the Board that the Department has issued a policy memorandum to its employees on how we are going to handle VOSH inspections regarding employee misclassification, e.g., requesting subcontractors report licensing requirements when a VOSH inspection is conducted. He added that the policy is available on the Department's website as well as the press release. He cautioned that Employee Misclassification can lead to payroll fraud, reduce Workers' Compensation and unemployment insurance protections, impact tax laws, etc.

Commissioner Davenport informed the Board that Mr. Danny Sutton, Employer Representative for the Agriculture Industry, has resigned from the Board – being unable to attend meetings. He added that the Department would be seeking someone to fill this vacant position.

Commissioner Davenport then thanked Department staff for their hard work in preparation for the Board meeting. In closing, he thanked the Board for taking time and giving their expertise to serve on this Board.

#### **Items of Interest from the Board**

Mr. Travis Parsons asked about Virginia's plan to adopt the new OSHA Confined Spaces in Construction Standard. Mr. Ron Graham, Director of Health Compliance for the Department, responded that this new standard will be on our next Board meeting Agenda as a replacement for the Virginia Unique Confined Spaces Standard in the Construction Industry because the current Virginia unique Confined Space Standard in Construction is not as effective as the new federal OSHA standard.

Mr. Graham mentioned that today OSHA had issued a 60-day temporary enforcement policy for the Confined Spaces in Construction Standard.

#### **Adjournment**

There being no further business, a motion was made, and properly seconded to adjourn the meeting. The motion was carried unanimously by voice vote. The meeting adjourned at 11:40 a.m.



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport  
COMMISSIONER

Main Street Centre  
600 East Main Street, Suite 207  
Richmond, Virginia 23219  
PHONE (804) 371-2327  
FAX (804) 371-6524

### VIRGINIA SAFETY AND HEALTH CODES BOARD

Briefing Package

October 29, 2015

-----

REVISED

### Request to Initiate Notice of Intended Regulatory Action (NOIRA) To Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program

#### I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to authorize the Department to initiate the regulatory process to amend the Administrative Regulation for the VOSH Program by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, § 2.2-4007 of the *Code of Virginia*.

#### II. Summary of the Issues Under Consideration for Amendment

This request to authorize a NOIRA is to accommodate several issues in regard to the Administrative Regulation of the VOSH Program. Such sections to be considered for review include, but based on any comments from the public should this request go forward, may not be limited to, the following:

- NEW – Allowing VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (MUTCD) in any contract for construction, repair or maintenance between either the Commonwealth or one of its

local governments, which provides that the parties assure compliance with the VDOT Work Area Protection Manual.

- Applicability of anti-retaliation safeguards to public sector employees, *16VAC25-60-30*.
- Application of Commonwealth's Attorney to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30*.
- Allowance for the Commissioner to petition the Cabinet Secretary and then the Executive regarding resolution of anti-retaliation violations with a state agency, *16VAC25-60-30.G*.
- Virginia Freedom of Information Act requirements in regard to the Voluntary Protection Program, *16VAC25-60-90*.
- Change of section title(s) to reflect recent terminology changes in occupational discrimination or anti-retaliation cases, *16VAC25-60-110*.
- Provision of penalties for occupational discrimination or anti-retaliation cases at the litigation stage, *16VAC25-60-110*.
- Title update to reflect prior statutory changes, *16VAC25-60-245*.
- "Burden of Proof" in VOSH court cases to be specified as "preponderance of the evidence", *16VAC25-60-260*.
- Burden for proving an affirmative defense to a citation lies with the defendant, *16VAC25-60-260*.

### III. **Basis, Purpose and Impact of the Proposed 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 accommodate statutory changes to the Code of Virginia, strengthen anti-retaliation or “whistleblower” protections for both public and private sector employees, and to specify the burden of proof threshold for VOSH cases which go to Circuit Court.

**C. Impact on Employers**

At this stage in the regulatory process, the potential impact on employers from suggested areas for amendment are as yet undefined. Specific language covering the scope and range of each proposed change has yet to be developed and will be based on further review and analysis by VOSH staff as well as the input from the public during the initial 30-day public comment period.

**D. Impact on Employees**

At this stage in the regulatory process, the potential impact on employees from suggested areas for amendment are as yet undefined. Specific language covering the scope and range of each proposed change has yet to be developed and will be based on further review and analysis by VOSH staff as well as the input from the public during the initial 30-day public comment period.

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

As specific regulatory language has not yet been developed, the potential impact on the Department from suggested areas for amendment are as yet undefined.

**Contact Person:**

Mr. Jay Withrow  
Director, Legal Support, VPP, ORA, OPP and OWP  
(804) 786-9873  
[withrow.jay@dol.gov](mailto:withrow.jay@dol.gov)

## RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to amend the Administrative Regulation for the VOSH Program by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, § 2.2-4007 of the *Code of Virginia*.

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 at any time with respect to reconsideration or revision of any regulation under the purview of the Board.



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport  
COMMISSIONER

Main Street Centre  
600 East Main Street, Suite 207  
Richmond, Virginia 23219  
PHONE (804) 371-2327  
FAX (804) 371-6524

### VIRGINIA SAFETY AND HEALTH CODES BOARD

#### BRIEFING PACKAGE

For OCTOBER 29, 2015

-----  
**Adoption of:**

**Confined Spaces in Construction, 29 CFR Part 1926, Subpart AA, §1926.1200 – 1926.1213; and  
Other Related Provisions: §1926.953, Enclosed Spaces; and §1926.968, Definitions;**

**Excavations, 29 CFR Part 1926.650 through 29 CFR Part 1926.652; and  
Underground Construction, 29 CFR Part 1926.800.**

**Repeal of:**

**Virginia Confined Space Standard for the Construction Industry, 16VAC25-140-10 *et seq.*,  
Virginia Underground Construction, Construction Industry, 16VAC25-150-10, *et seq.*; and  
Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.*,**

**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 Confined Spaces in Construction, Subpart AA, §§1926.1200 – 1926.1213, and Other Related Provisions, as published on May 4, 2015 in *80 FR 25365*. Concurrently, VOSH is also requesting that the Board also consider the repeal the Virginia Unique Standard for Confined Spaces in Construction, 16VAC25-140-10 *et seq.*; which would be supplanted by the new federal Confined Spaces in Construction standard.

In addition, VOSH also requests the repeal of the following existing unique Virginia standards which would be impacted by the above change:

- Virginia Underground Construction Standard, 16VAC25-150-10, *et seq.*, and
- Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.*

Each of these two existing unique state standards, mandate that the requirements of the Virginia Confined Space Standard for the Construction Industry, that are more stringent than corresponding requirements each contains, shall apply to underground construction areas which also meet the definition of "confined space" in Construction.

The Board is also requested to adopt the existing federal identical versions of the Underground Construction Standard, §1926.800, and the Excavation Standard, §1926.650 made necessary by the repeal of the unique Virginia Confined Space Standard so as to enable the VOSH Program to continue to meet the federal requirement to remain "as effective as" the federal enforcement program itself.

The proposed effective date is January 1, 2016.

## II. Summary of the Federal Identical Confined Space in Construction Final Rule

### A. General

The new Construction Confined Spaces standard requires employers to ensure that their workers are informed about the existence, location, and dangers posed by each permit-required confined space, and that they may not enter such spaces without authorization.

Like the definition in the General Industry standard, a "confined space" is any space that has limited means of entry and/or exit, is large enough for a worker to enter it, and is not intended for regular/continuous occupancy. Such examples would include: the need to use a ladder, a doorway that is too small to exist while walking upright, no ventilation or lighting, and lacks sufficient room to work or maneuver about.

Additionally, a space may also be a permit-required confined space if it has a hazardous atmosphere, has the potential for engulfment or suffocation, has a layout that might trap a worker through converging walls or a sloped floor, or contains any other recognized serious safety or health hazard.

Employers shall train workers involved in permit-required confined space operations so that they can perform their duties safely and understand the hazards in permit spaces and the methods used to isolate, control or protect workers from these hazards. Workers not authorized to perform entry rescues shall be trained on the dangers of attempting such rescues.

The final rule is similar in content to the general industry confined spaces standard, §1910.146, and reflects that standard's organization, language, and most substantive requirements. Some of the aspects of construction industry activity that are not present in general industry work are addressed by modifications, including:

- information exchange requirements to ensure that multiple employers have shared vital safety information;
- addressing the heightened need, on constantly evolving construction worksites for communication, worksite evaluation; and
- training for confined spaces in construction.



Due to the differences between construction work and general industry, there are several regulatory provisions in this new construction standard which differ from the existing general industry standard. Provisions in the new construction standard:

- address construction-specific issues;
- account for advancements in technology and equipment that allow for continuous monitoring of hazards, and improve the enforceability of the requirements;
- address concerns raised by the regulated community during the federal OSHA comment period and at the federal OSHA public hearing; or
- reflect improvements in clarity of language and enforcement considerations that have been addressed in interpretations of the general industry standard.

Section 1926.1201(a) makes it clear that the focus of the final standard is on the type of work performed, and whether such work could produce, and expose employees to, confined space hazards.

There are two important points in the new final rule that also are true for the general industry standard:

- All employers engaged in construction have a duty to ensure that their employees do not enter a confined space except in accordance with the requirements of the standard, and the presence of a confined space on the worksite triggers this duty rather than the type or work the employer is performing;
- Certain critical components of this standard, such as information sharing and coordination of work, that apply to certain employers who, regardless of whether their employees are authorized to enter a confined space, have information necessary for the protection of employees working inside confined spaces, or are engaged in activities that could, either alone or in conjunction with activities inside the confined space, endanger the employees working inside a confined space.

**B. Types of Confined Spaces That May Be Found on Construction Sites**

- Manholes, i.e., sewer, storm drain, electrical, communication, or other utility;
- Water mains; lift stations;
- Tanks, i.e., fuel, chemical, water or other liquid, solid or gas;
- Pits, i.e., elevator, escalator pump, valve or other equipment;
- Bins; boilers; incinerators; scrubbers; concrete pier columns; transformer vaults; heating, ventilation, and air conditioning (HVAC) ducts;
- Precast concrete and other pre-formed manhole units;
- Drilled shafts; enclosed beams; vessels; digesters; cesspools; silos;
- Air receivers; sludge gates; air preheaters; turbines; chillers; and
- Bag houses; mixers/reactors; crawl spaces; attics; and basements, before steps are installed.

**C. Common Hazards**

- Acute atmospheric (respirable) hazards, e.g., hydrogen sulfide, carbon monoxide, low oxygen, excessive oxygen, and other toxic gases and particulates (not chronic or long term, such as lead or asbestos exposure);
- Explosive hazards, including flammable gases in concentrations above 10% of the lower explosive limit (LEL), combustible dusts, and other explosive/flammable materials; and
- Physical hazards, including tripping hazards, fall hazards, struck-by hazards, and electrical hazards.

**D. Activities Excluded from Confined Spaces in Construction Standard**

The Confined Spaces standard applies to construction work performed in confined spaces, except for certain construction activities that are subject to confined space provisions in other OSHA construction standards. The activities excluded from this standard are:

- Diving – regulation by Part 1926, Subpart Y;
- Excavations – regulation by Part 1926, Subpart P; and
- Underground Construction, Caissons, Cofferdams and Compressed Air – regulated by Part 1926, Subpart S.

**III. New Requirements of the Confined Spaces in Construction Standard**

**A.** The final standard for confined spaces in construction bears important distinctions from the general industry standard due to:

1. It provides advances in safety systems, for example, monitoring procedures that detect increases in atmospheric hazards, as required in §1926.1204(c)(5);
2. Unique conditions associated with construction, such as greater emphasis on assessing hazards at sewer worksites and the need for information exchange in a complex multi-employer environment;
3. It allows greater flexibility for employers, such as permitting employers to enter a confined space under the alternative procedures, specified by final §1926.1203(e), if they isolate physical hazards within a space, or permitting employers to suspend a permit, rather than cancelling it, in response to certain temporary changes in conditions; and
4. Improvements in language for clarity and enforcement considerations.

**B.** The new final rule contains five (5) new requirements for confined spaces in construction, which include:

1. It provides more detailed provisions requiring coordinated activities when there are multiple employers at the worksite. This will ensure hazards are not introduced into a confined space by workers performing tasks outside the space. An example would be a generator running near the entrance of a confined space causing a buildup of carbon monoxide within the space.

2. Before work begins, it requires a competent person to evaluate the work site and identify confined spaces, including permit spaces. When there are changes in use or configuration to the non-permit space, the competent person shall also reevaluate the space and reclassify it, if necessary.
  3. It requires continuous atmospheric monitoring whenever possible.
  4. It requires continuous monitoring of engulfment hazards. For example, when workers are performing work in a storm sewer, a storm upstream from the workers could cause flash flooding. An electronic sensor or observer posted upstream from the work site could alert workers in the space at the first sign of the hazard, giving the workers time to evacuate the space safely.
  5. It allows for the suspension of a permit, instead of cancellation, in the event of changes from the entry conditions list on the permit or an unexpected event requiring evacuation of the space. The space shall be returned to the entry conditions listed on the permit before re-entry.
- C. OSHA also added provisions to the new rule that clarify existing requirements in the General Industry standard, §1910.146. These include:
1. "Alternate Procedures" - Requiring that employers who direct workers to enter a space without using a complete permit system prevent workers' exposure to physical hazards through elimination of the hazard or isolation methods, such as lockout/tagout;
  2. Requiring that employers who are relying on local emergency services for emergency services arrange for responders to give the employer advance notice if they will be unable to respond for a period of time because they are responding to another emergency, attending department-wide training, etc.; and
  3. Requiring employers to provide training in a language and vocabulary that the worker understands.
- D. Several important defined terms are added in Section 1926.1202:
- "Entry employer" directs workers to enter a space and informs the controlling contractor of the program followed and hazards encountered in permit spaces;
  - "Controlling contractor", i.e., the general contractor, has overall responsibility for construction at the worksite, and is responsible for coordinating entry operations when there is more than one entry employer, and when other activities on the site could foreseeably result in a hazard in the permit space. The controlling contractor is required to pass information, if available, about permit confined spaces at the worksite;
  - "Host employer" owns or manages the property where the construction work is taking place. Where the host employer has information about permit space hazards on the site, it shall share that information with the controlling contractor, who is then responsible for sharing it with the other employers on the site. This would exclude homeowners where there are no employees;
  - "Entry" – similar to the general industry standard at 1910.146, but regardless of the events or actions that caused the entry, such as the employee falling into the confined space.

- “Entry rescue” was added to clarify the differences in the types of rescue employers can use.

#### **IV. General Requirements for Confined Spaces**

##### **A. General Requirements for Confined Spaces include the following:**

1. Site evaluation which is a two-step process:
  - a. Before work begins, each employer shall ensure that a competent person identifies all confined spaces and permit-required confined spaces.
    - (1) The competent person shall evaluate whether there are any actual or potential hazards in the confined space; and
    - (2) The competent person shall identify any confined space that is a permit-required confined space through consideration and evaluation of the space and requiring testing if necessary to assess the hazard(s).
  - b. An employer identifying a permit space shall inform exposed employees by posting danger signs at or near the entry to permit spaces or by any other effective means
  - c. An employer who is directing employees to enter a permit space shall have a written permit space program.
  - d. An employer shall train all workers who are exposed to permit space hazards, including hazards of unauthorized rescue.

##### **B. Section 1926.1204 - Permit Required Confined Space Written Program**

A permit-required confined space program for entry employers shall be written and shall be available for inspection by employees or their representatives prior to and during entry operations and shall comply with §1926.1204. The Plan for safe entry operations, including procedures to:

1. Implement measures to prevent unauthorized entry
2. Identify hazards in permit spaces
3. Control atmospheric hazards
4. Address physical hazards
5. Prepare for air testing and monitoring
6. Control access into the space
7. Provide equipment (air testing, ventilation, communications, PPE, lighting, etc.)
8. Provide attendants for permit spaces
9. Coordinate entry operations for multiple employers
10. Have procedures for rescue
11. Alternate procedures for entry, if physical hazards within a space are isolated

C. **Sections 1926.1205/1926.1206 - Permitting Process**

Before entry is authorized, each entry employer shall document the completion of measures required by §1926.1204(c) by preparing a written entry permit which shall identify:

1. Permit space to be entered
2. Purpose of the entry
3. Date and authorized duration of the entry permit
4. Authorized entrants within the permit space
5. Means of detecting an increase in atmospheric hazard levels
6. Name and signature of supervisor authorizing entry
7. Known hazards in the space
8. Measures taken to isolate permit spaces and to eliminate or control space hazards
9. Acceptable entry conditions
10. Test results, date and time of test(s) and tester's signature or initials
11. Name and telephone numbers of rescue and emergency services and means to be used to contact them;
12. Communication procedures and equipment to maintain contact during entry
13. Special equipment and procedures, including PPE and alarm systems

The Entry Supervisor shall cancel entry permits and keep all canceled entry permits for at least one year.

D. **Section 1926.1207 – Training**

Before the initial work assignment begins, the employer shall provide training, at no cost to each employee whose work is regulated by this standard, and ensure that the employee understands such training by providing the training in both a language and vocabulary the employee can understand. The training shall establish employee proficiency in the duties required. The employer shall maintain training records with pertinent information, i.e., names of both employees and trainers and the dates of training.

E. **Entrants, Attendants, and Entry**

There are three categories of workers who have specific duties whenever work is performed in a permit space:

- **“Authorized entrant”** – authorized by the entry supervisor to enter a permit space; and must know space hazards; use appropriate personal protective equipment; shall stay in communication with attendants to monitor entrant's status; and shall alert attendant when a prohibited condition exists. **Section 1926.1208**
- **“Attendant”** – a worker stationed outside one or more permit spaces who monitors conditions within the space(s) and prevents unauthorized entry. Attendant shall remain outside the permit space during entry operations; perform non-entry rescues; know existing and potential hazards; maintain communication with workers entering the permit space; assess conditions inside and outside the permit space; summon rescue

and other services during an emergency; ensure unauthorized people stay away from the permit space; and perform no other duties that interfere with the attendant's primary duties. **Section 1926.1209**

- **“Entry supervisor”** – qualified person, i.e., employer, foreman, or crew chief, who is responsible for overseeing entry operations. He must know space hazards; verify entry conditions are satisfied; terminate entry and cancel or suspend permits when entry operations are completed; verify that rescue services are available; take appropriate measures to remove unauthorized entrants; and ensure that entry operation remain consistent with the entry permit. **Section 1926.1210**

**F. Section 1926.1211 - Rescue and Emergency Services**

The employer of the members of the designated rescue team whether entry or non-entry, shall ensure that the team members have received the training required for authorized entrants and also have been trained to perform their assigned rescue duties. All rescuers shall be trained in first aid and CPR.

**V. Basis, Purpose and Impact of the Final Rule**

**A. Basis.**

On March 25, 1980, federal OSHA published an Advanced Notice of Proposed Rulemaking (ANPR) on confined spaces for the construction industry (*45 FR 19266*). Although OSHA received many comments, it took no further action on this regulatory initiative at that time. In 1987, in the absence of federal proposed rulemaking that adequately protected workers from atmospheric, mechanical and other hazards, the Safety and Health Codes Board (the “Board”) led development of, and subsequently approved, a Virginia unique confined space standard applicable to both general industry and construction, as well as telecommunications. On January 14, 1993, federal OSHA issued the general industry confined spaces standard (*58 FR 4462*), which did not apply to the construction industry. (*80 FR 25369*) The Board adopted an identical version of this federal standard on June 21, 1993, with an effective date of September 1, 1993, and amended the Virginia Confined Space Standard by deleting the applicability of the Virginia standard to general industry, thereby restricting its applicability to the construction industry and telecommunications. On November 28, 2007, OSHA published a proposed rule for confined spaces in Construction (*72 FR 67351*), which reflected input from stakeholder meetings, the Advisory Committee for Construction Safety and Health (ACCSH), and the Small Business Regulatory Enforcement Fairness Act (SBREFA) review process. Ultimately, differences in employee and worksite characteristics between the construction industry and general industry led OSHA to develop a final rule for confined spaces in the construction industry.

**B. Purpose.**

The new standard will provide construction workers with protections similar to those which manufacturing and general industry workers have had for more than two decades, with some differences tailored to the construction industry, such as requirements to ensure that multiple employers share vital safety information and continuously monitor hazards, which is a safety option made possible by technological advances that occurred after the manufacturing and

general industry standards were created.

C. **Other VOSH Standards Impacted By Adoption of the New Confined Space Standard for the Construction Industry and Required Action**

There are impacts or revisions to other existing standards of the Board which will be necessitated by the Board's adoption of the new Subpart AA for Confined Spaces in Construction.

1. **Existing Federal Identical Standards Impacted**

Federal OSHA removed paragraph (b)(6) of §1926.21, Safety Training and Education, which requires all employees entering into confined or enclosed spaces to be instructed by their employer as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of the protective and emergency equipment required.

OSHA also amended Subpart V of Part 1926 – Power Transmission and Distribution – which governs construction work involving power transmission, generation, and distribution, to replace references to the general industry confined spaces standard with references to this final construction rule, because OSHA specifically tailored this final rule to construction work, making the confined spaces in this construction rule more appropriate than the general industry standard for construction work addressed by Subpart V.

OSHA amended paragraphs §1926.953(a) and (g) of Subpart V by replacing each reference to “§1910.146” with a reference to “Subpart AA”, so that the appropriate construction standards apply, rather than a general industry standard. Additionally, OSHA added a sentence to paragraph 1926.953(a) to clarify that employers may comply with the requirements of §1926.953 “in lieu of” most of the requirements in new Subpart AA when the entry into the enclosed space is a routine entry for Subpart V work and there is no hazardous atmosphere in the space. The purpose of this clarifying sentence is to help avoid any employer confusion as to which standard applied.

The note to the definition of “enclosed space” in paragraph (x) of §1910.269, Electric Power Generation, Transmission, and Distribution, states that enclosed spaces expected to contain a hazardous atmosphere meet the definition of “permit spaces” in §1910.146, and entry into them shall conform to that standard. In §1926.968, Definitions, federal OSHA added a note to the definition of “enclosed space” that corresponds to the note in paragraph §1910.269(x), replacing the reference to “§1910.146” with a reference to “Subpart AA.”

2. **Existing Virginia Unique Standards Impacted**

a. The adoption of the new comprehensive final rule for Confined Spaces in Construction will necessitate the repeal of the unique Virginia Confined Space Standard in Construction, 16VAC25-140-10, et seq., because it is being replaced by the new federal rule.

b. This repeal will then necessitate the repeal of two other standards: the unique

Virginia Underground Construction Standard, 16VAC25-150-10, et seq., and the unique Virginia Excavation Standard, 16VAC25-170-10, et seq., as these two standards reference Virginia Confined Space in Construction Standard being repealed.

- c. The repeal of the two other Virginia standards noted in section b. above, will then necessitate the adoption of federal identical versions of the Underground Construction Standard, 29 CFR Part 1926.800, and the Excavation Standard, 29 CFR Part 1926.650 in order for the VOSH Program to retain its “as effective as” status required by the federal OSHA enforcement program.

**D. Affected Industries**

The standard will primarily impact firms that perform construction work involving: buildings, highways, bridges, utility lines; and other related types of projects. The final rule affects establishments in 15 six-digit NAICS codes:

<u>NAICS</u>	<u>INDUSTRY</u>
221310	Water Supply and Irrigation Systems
236115	New Single-Family Housing Construction (except Operative Builders)
236116	New Multifamily Housing Construction (except Operative Builders)
236210	Industrial Building Construction
236220	Commercial and Institutional Building Construction
237110	Water and Sewer Line and Related Structures Construction
237130	Power and Communication Line and Related structures Construction
237310	Highway, Street, and Bridge Construction
237990	Other Heavy and Civil Engineering Construction
238190	Other Foundation, Structure, and Building Exterior Contractors
238210	Electrical Contractors and Other Wiring Installation Contractors
238220	Plumbing, Heating, and Air-Conditioning Contractors
238310	Drywall and Insulation Contractors
238910	Site Preparation Contractors

**E. Impact on Employers**

OSHA recognizes that the differences between the general industry standard §1910.146 and this new final rule can make it more complicated for employers to comply with two different sets of procedures if they perform maintenance and construction work at the same time in the same confined space. In order to ease the compliance burden on these employers, OSHA will consider compliance with this final rule as compliance with §1910.146. OSHA’s record indicated that, by issuing a final rule that is similar to §1910.146, it is not drastically changing industry practice for addressing confined-space hazards. Also potentially affected are general



contractors, as well as specialty-trade construction contractors and employers engaged in some types of residential construction work. The new final rule requires that all employers engaged in construction work:

- Identify confined spaces at their worksites;
- Establish a written program;
- Issue entry permits for qualifying confined spaces;
- Exchange information on the hazards of permit spaces with other affected employers;
- Train affected employees;
- Provide for rescue and emergency services; and
- Assign duties to authorized entrants, attendants, and supervisors.

If an employer knows that a permit space is present at its worksite, he shall inform his workers of the location and danger posed by each space by posting warning signs. Where an employer's workers have no work to do in the space, that employer shall ensure that its workers stay out of the space by making sure workers recognize permit space warning signs and understand their significance. OSHA estimates that there are approximately 500,000 establishments with nearly 5,000,000 employees nationwide that are affected by the final rule. In Virginia, it is estimated that there are 13,000 establishments with approximately 134,000 employees affected by the final rule.

**F. Impact on Employees**

The new standard will provide construction workers with new additional protections similar to those that have been provided to manufacturing and general industry workers for more than two decades. OSHA estimates that it will also reduce the number of related fatalities.

Since confined spaces can present conditions that are immediately dangerous to life and health (IDLH) of workers if not properly identified, evaluated, tested, and controlled, the new Confined Spaces standard requires employers to ensure that their workers know about the existence, location, and dangers posed by each permit-required confined space, and that they may not enter such spaces without authorization.

OSHA believes that employees need this information to understand the seriousness of potential hazards in permit-required confined spaces. Compliance with this requirement will ensure that exposed employees who are not authorized entrants receive the information necessary to prevent them from entering the spaces.

Employees involved in permit-required confined space operations shall be trained so that they can perform their duties safely and understand the hazards in permit spaces and the methods used to isolate, control, or protect workers.

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

No additional costs to the Department are anticipated in adopting this new federal rule and the related changes because VOSH has been enforcing the unique Virginia Confined Space Standard covering the Construction Industry since January 1, 1988.

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.

#### H. **Benefits**

Federal OSHA expects the final rule to improve the safety of workers who encounter confined spaces in construction. The programmatic approach of the final rule helps to assure the safety of workers, who must work in the vicinity of confined spaces, includes provisions for the following:

- Identifying confined spaces and the hazards they may contain;
- Allowing employers to organize the work to avoid entry into a potentially hazardous space;
- Removing hazards prior to entry to avoid employee exposure;
- Restricting entry through a permit system where employers cannot remove the hazard;
- Providing appropriate testing and equipment when entry is required; and
- Arranging for rescue services to remove entrants from a confined space when necessary.

Federal OSHA determined that this final rule will facilitate a 96% reduction nationally, in the average number of fatalities and injuries in confined spaces covered by this standard. However, this does not assume the impacts of a pre-existing state standard, albeit less comprehensive than the new federal rule as is the case in Virginia.

#### I. **Costs**

The federally estimated costs of compliance with this new final rule represent the additional costs necessary for employers to achieve full compliance where no prior compliance with these same or similar requirements already exist.

The estimates do not include costs for employers who are already in compliance with the new requirements imposed by the final rule; nor do they include costs employers must incur to achieve full compliance with existing applicable requirements.

It is anticipated that the actual costs of compliance for Virginia employers will be significantly less than the costs listed below for Virginia which are based on those federal estimates and assumed no preexisting state unique standard. VOSH has been enforcing a confined space standard for the construction industry since 1988.

OSHA believes that applying an average monetary value of \$62,000 per prevented injury and a value of \$8.7 million per prevented fatality (value of statistical life) results in estimated monetized benefits of \$93.6 million nationwide annually annualized (\$93.6 million in benefits minus \$60.3 million in costs).

Virginia has approximately 1/37<sup>th</sup> (~02.685 %) of the national workforce. Costs of Compliance with the final rule by provisions are estimated (rounded for convenience) in the chart below:

Provisions	Estimated National Cost	Estimated Virginia Cost (~02.685 %)*
Evaluation, Classification, Information Exchange and Notification	\$ 12.4 Million	\$ 333,000 *
Written Program, Issue Permits Verify Safety, Review Procedures	\$ 4.2 Million	\$ 113,000 *
Ventilation & Isolate Hazards	\$ 2.8 Million	\$ 75,000 *
Atmospheric monitoring	\$ 11.4 Million	\$ 306,000 *
Attendant	\$ 3.6 Million	\$ 97,000 *
Rescue Capability Rescue Capability	\$ 8.2 Million	\$ 220,000 *
Training	\$ 11.3 Million	\$ 303,000 *
Other Requirements	\$ 6.4 Million	\$ 172,000 *
<b>TOTAL</b>	<b>\$ 60.3 Million</b>	<b>\$ 1,619,000 *</b>

\* It is anticipated that the actual costs of compliance for Virginia employers will be significantly less than the costs listed for Virginia which are based on federal estimates which assumed no preexisting state unique standard. VOSH has been enforcing a confined space standard for the construction industry since 1988.

#### J. Technological Feasibility

OSHA believes that employers can achieve compliance with all of the requirements of the final standard with readily and widely available technologies, or through the use of human observers. There are several factors supporting OSHA's determination regarding the technological feasibility of the final rule. OSHA concluded that compliance with the existing the General Industry Standard, §1910.146, was technologically feasible when it promulgated those standards in 1993, and that conclusion held true over OSHA's two decades of experience with that standard. This also holds true with respect to provisions in the final rule that OSHA based on the existing general industry standard.

The provisions simply require observation of hazards, training, and communication among all parties, including employees and all employers at a worksite – all of which are clearly feasible. None of these requirements, including the new requirements which are not in §1910.146, present any technological feasibility concerns.

**K. Economic Feasibility**

Based on its analysis of economic impacts, federal OSHA concluded that compliance with the requirements of the final rule is economically feasible in every affected industry sector.

**Contact Person**

Mr. Ron Graham  
Director, Occupational Health Compliance  
(804) 786-0574  
[Graham.ron@dol.gov](mailto:Graham.ron@dol.gov)

## RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt federal OSHA's new final rule:

- Confined Spaces In Construction, 29 CFR Part 1926, Subpart AA, §1926.1200 – 1926.1213; and Other Related Provisions: §1926.953, Enclosed Spaces; and §1926.968, Definitions;

Staff also requests the Board also adopt the existing federal identical construction industry standards for:

- Excavations, 29 CFR Part 1926.650 through 29 CFR Part 1926.652; and
- Underground Construction, 29 CFR Part 1926.800.

As a necessary part of the above action staff also recommends that the Board act to repeal:

- Virginia Confined Space Standard for the Construction Industry, 16VAC25-140-10 *et seq.*;
- Virginia Underground Construction, Construction Industry, 16VAC25-150-10, *et seq.*; and
- Virginia Excavation Standard, Construction Industry, 16VAC25-170-10, *et seq.*

These above actions are authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of January 1, 2016.

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.



**CONFINED SPACES IN CONSTRUCTION**

**Part 1926, Subpart AA, §§1926.1200 – 1926.1213; Final Rule; and Other Related Provisions:  
§1926.953, Enclosed Spaces; and§1926.968, Definitions**

**EXCAVATIONS**

**29 CFR Part 1926.650 through 29 CFR Part 1926.652;**

**UNDERGROUND CONSTRUCTION,  
29 CFR Part 1926.800**

As Adopted by the

Safety and Health Codes Board

Date: \_\_\_\_\_



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: \_\_\_\_\_

16VAC25-175-1926.1200 – 1926.1213

16VAC25-175-1926.953,

16VAC25-175-1926.968,

16VAC25-175-1926.650

16VAC25-175-1926.651

16VAC25-175-1926.652

16VAC25-175-1926.800

When the regulations, as set forth in the aforesaid regulations 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

August 3, 2015 January 1, 2016



the enclosed space do not endanger the life of an entrant or interfere with an entrant's escape from the space, this section applies in lieu of the permit-space entry requirements contained in §§ 1926.1204 through 926.1211.

\* \* \* \* \*

(g) *Hazardous atmosphere.* Employees may not enter any enclosed space while it contains a hazardous atmosphere, unless the entry conforms to the confined spaces in construction standard in subpart AA of this part.

\* \* \* \* \*

**Note to § 1926.953.** Entries into enclosed spaces conducted in accordance with the permit space entry requirements of subpart AA of this part are considered as complying with this section.

■ 5. Amend § 1926.968 by adding a note to the definition for "Enclosed spaces" to read as follows:

**§ 1926.968 Definitions.**

\* \* \* \* \*

*Enclosed space.* \* \* \*

**Note to the definition of "Enclosed space".** The Occupational Safety and Health Administration does not consider spaces that are enclosed but not designed for employee entry under normal operating conditions to be enclosed spaces for the purposes of this subpart. Similarly, the Occupational Safety and Health Administration does not consider spaces that are enclosed and that are expected to contain a hazardous atmosphere to be enclosed spaces for the purposes of this subpart. Such spaces meet the definition of permit spaces in subpart AA of this part, and entry into them must conform to that standard.

\* \* \* \* \*

■ 6. Subpart AA is added to read as follows:

**Subpart AA—Confined Spaces in Construction**

Sec.	
1926.1200	[Reserved]
1926.1201	Scope.
1926.1202	Definitions.
1926.1203	General requirements.
1926.1204	Permit-required confined space program.
1926.1205	Permitting process.
1926.1206	Entry permit.
1926.1207	Training.
1926.1208	Duties of authorized entrants.
1926.1209	Duties of attendants.
1926.1210	Duties of entry supervisors.
1926.1211	Rescue and emergency services.
1926.1212	Employee participation.
1926.1213	Provision of documents to Secretary.

**Amendments to Standards**

For the reasons stated in the preamble of this rule, the Agency is amending 29 CFR part 1926 as follows:

**PART 1926—[AMENDED]**

**Subpart C—General Safety and Health Provisions**

**§ 1926.21 [Amended]**

■ 2. In § 1926.21, paragraph (b)(6) is removed.

**Subpart V—Electric Power Transmission and Distribution**

■ 3. The authority citation for subpart V of part 1926 continues to read as follows:

**Authority:** 40 U.S.C. 3701 *et seq.*; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 1-2012 (77 FR 3912); and 29 CFR part 1911.

■ 4. Amend § 1926.953 by revising paragraphs (a) and (g) and the note at the end of the section to read as follows:

**§ 1926.953 Enclosed spaces.**

(a) *General.* This section covers enclosed spaces that may be entered by employees. It does not apply to vented vaults if the employer makes a determination that the ventilation system is operating to protect employees before they enter the space. This section applies to routine entry into enclosed spaces. If, after the employer takes the precautions given in this section and in § 1926.965, the hazards remaining in the enclosed space endanger the life of an entrant or could interfere with an entrant's escape from the space, then entry into the enclosed space must meet the permit space entry requirements of subpart AA of this part. For routine entries where the hazards remaining in

**§ 1926.1200 [Reserved]****§ 1926.1201 Scope.**

(a) This standard sets forth requirements for practices and procedures to protect employees engaged in construction activities at a worksite with one or more confined spaces, subject to the exceptions in paragraph (b) of this section.

**Note to paragraph (a).** Examples of locations where confined spaces may occur include, but are not limited to, the following: Bins; boilers; pits (such as elevator, escalator, pump, valve or other equipment); manholes (such as sewer, storm drain, electrical, communication, or other utility); tanks (such as fuel, chemical, water, or other liquid, solid or gas); incinerators; scrubbers; concrete pier columns; sewers; transformer vaults; heating, ventilation, and air-conditioning (HVAC) ducts; storm drains; water mains; precast concrete and other pre-formed manhole units; drilled shafts; enclosed beams; vessels; digesters; lift stations; cesspools; silos; air receivers; sludge gates; air preheaters; step up transformers; turbines; chillers; bag houses; and/or mixers/reactors.

(b) **Exceptions.** This standard does not apply to:

- (1) Construction work regulated by subpart P of this part (Excavations).
  - (2) Construction work regulated by subpart S of this part (Underground Construction, Caissons, Cofferdams and Compressed Air).
  - (3) Construction work regulated by subpart Y of this part (Diving).
- (c) Where this standard applies and there is a provision that addresses a confined space hazard in another applicable OSHA standard, the employer must comply with both that requirement and the applicable provisions of this standard.

**§ 1926.1202 Definitions.**

The following terms are defined for the purposes of this subpart only:

**Acceptable entry conditions** means the conditions that must exist in a permit space, before an employee may enter that space, to ensure that employees can safely enter into, and safely work within, the space.

**Attendant** means an individual stationed outside one or more permit spaces who assesses the status of authorized entrants and who must perform the duties specified in § 1926.1209.

**Authorized entrant** means an employee who is authorized by the entry supervisor to enter a permit space.

**Barrier** means a physical obstruction that blocks or limits access.

**Blanking or blinding** means the absolute closure of a pipe, line, or duct by the fastening of a solid plate (such as a spectacle blind or a skillet blind) that

completely covers the bore and that is capable of withstanding the maximum pressure of the pipe, line, or duct with no leakage beyond the plate.

**Competent person** means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has the authorization to take prompt corrective measures to eliminate them.

**Confined space** means a space that:

- (1) Is large enough and so configured that an employee can bodily enter it;
- (2) Has limited or restricted means for entry and exit; and
- (3) Is not designed for continuous employee occupancy.

**Control** means the action taken to reduce the level of any hazard inside a confined space using engineering methods (for example, by ventilation), and then using these methods to maintain the reduced hazard level. Control also refers to the engineering methods used for this purpose. Personal protective equipment is not a control.

**Controlling Contractor** is the employer that has overall responsibility for construction at the worksite.

**Note to the definition of "Controlling Contractor".** If the controlling contractor owns or manages the property, then it is both a controlling employer and a host employer.

**Double block and bleed** means the closure of a line, duct, or pipe by closing and locking or tagging two in-line valves and by opening and locking or tagging a drain or vent valve in the line between the two closed valves.

**Early-warning system** means the method used to alert authorized entrants and attendants that an engulfment hazard may be developing. Examples of early-warning systems include, but are not limited to: Alarms activated by remote sensors; and lookouts with equipment for immediately communicating with the authorized entrants and attendants.

**Emergency** means any occurrence (including any failure of power, hazard control or monitoring equipment) or event, internal or external, to the permit space that could endanger entrants.

**Engulfment** means the surrounding and effective capture of a person by a liquid or finely divided (flowable) solid substance that can be aspirated to cause death by filling or plugging the respiratory system or that can exert enough force on the body to cause death by strangulation, constriction, crushing, or suffocation.

**Entry** means the action by which any part of a person passes through an opening into a permit-required confined

space. Entry includes ensuing work activities in that space and is considered to have occurred as soon as any part of the entrant's body breaks the plane of an opening into the space, whether or not such action is intentional or any work activities are actually performed in the space.

**Entry Employer** means any employer who decides that an employee it directs will enter a permit space.

**Note to the definition of "Entry Employer".** An employer cannot avoid the duties of the standard merely by refusing to decide whether its employees will enter a permit space, and OSHA will consider the failure to so decide to be an implicit decision to allow employees to enter those spaces if they are working in the proximity of the space.

**Entry permit (permit)** means the written or printed document that is provided by the employer who designated the space a permit space to allow and control entry into a permit space and that contains the information specified in § 1926.1206.

**Entry rescue** occurs when a rescue service enters a permit space to rescue one or more employees.

**Entry supervisor** means the qualified person (such as the employer, foreman, or crew chief) responsible for determining if acceptable entry conditions are present at a permit space where entry is planned, for authorizing entry and overseeing entry operations, and for terminating entry as required by this standard.

**Note to the definition of "Entry supervisor".** An entry supervisor also may serve as an attendant or as an authorized entrant, as long as that person is trained and equipped as required by this standard for each role he or she fills. Also, the duties of entry supervisor may be passed from one individual to another during the course of an entry operation.

**Hazard** means a physical hazard or hazardous atmosphere. See definitions below.

**Hazardous atmosphere** means an atmosphere that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (that is, escape unaided from a permit space), injury, or acute illness from one or more of the following causes:

- (1) Flammable gas, vapor, or mist in excess of 10 percent of its lower flammable limit (LFL);
- (2) Airborne combustible dust at a concentration that meets or exceeds its LFL;

**Note to paragraph (2) of the definition of "Hazardous atmosphere".** This concentration may be approximated as a condition in which the combustible dust obscures vision at a distance of 5 feet (1.52 meters) or less.

(3) Atmospheric oxygen concentration below 19.5 percent or above 23.5 percent;

(4) Atmospheric concentration of any substance for which a dose or a permissible exposure limit is published in subpart D of this part (Occupational Health and Environmental Control), or in subpart Z of this part (Toxic and Hazardous Substances), and which could result in employee exposure in excess of its dose or permissible exposure limit;

**Note to paragraph (4) of the definition of "Hazardous atmosphere".** An atmospheric concentration of any substance that is not capable of causing death, incapacitation, impairment of ability to self-rescue, injury, or acute illness due to its health effects is not covered by this definition.

(5) Any other atmospheric condition that is immediately dangerous to life or health.

**Note to paragraph (5) of the definition of "Hazardous atmosphere".** For air contaminants for which OSHA has not determined a dose or permissible exposure limit, other sources of information, such as Safety Data Sheets that comply with the Hazard Communication Standard, § 1926.59, published information, and internal documents can provide guidance in establishing acceptable atmospheric conditions.

**Host employer** means the employer that owns or manages the property where the construction work is taking place.

**Note to the definition of "Host employer".** If the owner of the property on which the construction activity occurs has contracted with an entity for the general management of that property, and has transferred to that entity the information specified in § 1926.1203(h)(1), OSHA will treat the contracted management entity as the host employer for as long as that entity manages the property. Otherwise, OSHA will treat the owner of the property as the host employer. In no case will there be more than one host employer.

**Hot work** means operations capable of providing a source of ignition (for example, riveting, welding, cutting, burning, and heating).

**Immediately dangerous to life or health (IDLH)** means any condition that would interfere with an individual's ability to escape unaided from a permit space and that poses a threat to life or that would cause irreversible adverse health effects.

**Note to the definition of "Immediately dangerous to life or health".** Some materials—hydrogen fluoride gas and cadmium vapor, for example—may produce immediate transient effects that, even if severe, may pass without medical attention, but are followed by sudden, possibly fatal collapse 12–72 hours after exposure. The

victim "feels normal" after recovery from transient effects until collapse. Such materials in hazardous quantities are considered to be "immediately" dangerous to life or health.

**Inerting** means displacing the atmosphere in a permit space by a noncombustible gas (such as nitrogen) to such an extent that the resulting atmosphere is noncombustible.

**Note to the definition of "Inerting".** This procedure produces an IDLH oxygen-deficient atmosphere.

**Isolate or isolation** means the process by which employees in a confined space are completely protected against the release of energy and material into the space, and contact with a physical hazard, by such means as: Blanking or blinding; misaligning or removing sections of lines, pipes, or ducts; a double block and bleed system; lockout or tagout of all sources of energy; blocking or disconnecting all mechanical linkages; or placement of barriers to eliminate the potential for employee contact with a physical hazard.

**Limited or restricted means for entry or exit** means a condition that has a potential to impede an employee's movement into or out of a confined space. Such conditions include, but are not limited to, trip hazards, poor illumination, slippery floors, inclining surfaces and ladders.

**Line breaking** means the intentional opening of a pipe, line, or duct that is or has been carrying flammable, corrosive, or toxic material, an inert gas, or any fluid at a volume, pressure, or temperature capable of causing injury.

**Lockout** means the placement of a lockout device on an energy isolating device, in accordance with an established procedure, ensuring that the energy isolating device and the equipment being controlled cannot be operated until the lockout device is removed.

**Lower flammable limit or lower explosive limit** means the minimum concentration of a substance in air needed for an ignition source to cause a flame or explosion.

**Monitor or monitoring** means the process used to identify and evaluate the hazards after an authorized entrant enters the space. This is a process of checking for changes that is performed in a periodic or continuous manner after the completion of the initial testing or evaluation of that space.

**Non-entry rescue** occurs when a rescue service, usually the attendant, retrieves employees in a permit space without entering the permit space.

**Non-permit confined space** means a confined space that meets the definition

of a confined space but does not meet the requirements for a permit-required confined space, as defined in this subpart.

**Oxygen deficient atmosphere** means an atmosphere containing less than 19.5 percent oxygen by volume.

**Oxygen enriched atmosphere** means an atmosphere containing more than 23.5 percent oxygen by volume.

**Permit-required confined space (permit space)** means a confined space that has one or more of the following characteristics:

- (1) Contains or has a potential to contain a hazardous atmosphere;
- (2) Contains a material that has the potential for engulfing an entrant;
- (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or
- (4) Contains any other recognized serious safety or health hazard.

**Permit-required confined space program (permit space program)** means the employer's overall program for controlling, and, where appropriate, for protecting employees from, permit space hazards and for regulating employee entry into permit spaces.

**Physical hazard** means an existing or potential hazard that can cause death or serious physical damage. Examples include, but are not limited to: Explosives (as defined by paragraph (n) of § 1926.914, definition of "explosive"); mechanical, electrical, hydraulic and pneumatic energy; radiation; temperature extremes; engulfment; noise; and inwardly converging surfaces. Physical hazard also includes chemicals that can cause death or serious physical damage through skin or eye contact (rather than through inhalation).

**Prohibited condition** means any condition in a permit space that is not allowed by the permit during the period when entry is authorized. A hazardous atmosphere is a prohibited condition unless the employer can demonstrate that personal protective equipment (PPE) will provide effective protection for each employee in the permit space and provides the appropriate PPE to each employee.

**Qualified person** means one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his ability to solve or resolve problems relating to the subject matter, the work, or the project.

**Representative permit space** means a mock-up of a confined space that has

entrance openings that are similar to, and is of similar size, configuration, and accessibility to, the permit space that authorized entrants enter.

*Rescue* means retrieving, and providing medical assistance to, one or more employees who are in a permit space.

*Rescue service* means the personnel designated to rescue employees from permit spaces.

*Retrieval system* means the equipment (including a retrieval line, chest or full body harness, wristlets or anklets, if appropriate, and a lifting device or anchor) used for non-entry rescue of persons from permit spaces.

*Serious physical damage* means an impairment or illness in which a body part is made functionally useless or is substantially reduced in efficiency. Such impairment or illness may be permanent or temporary and includes, but is not limited to, loss of consciousness, disorientation, or other immediate and substantial reduction in mental efficiency. Injuries involving such impairment would usually require treatment by a physician or other licensed health-care professional.

*Tagout* means:

(1) Placement of a tagout device on a circuit or equipment that has been deenergized, in accordance with an established procedure, to indicate that the circuit or equipment being controlled may not be operated until the tagout device is removed; and

(2) The employer ensures that:

(i) Tagout provides equivalent protection to lockout; or

(ii) That lockout is infeasible and the employer has relieved, disconnected, restrained and otherwise rendered safe stored (residual) energy.

*Test or testing* means the process by which the hazards that may confront entrants of a permit space are identified and evaluated. Testing includes specifying the tests that are to be performed in the permit space.

**Note to the definition of "Test or testing".** Testing enables employers both to devise and implement adequate control measures for the protection of authorized entrants and to determine if acceptable entry conditions are present immediately prior to, and during, entry.

*Ventilate or ventilation* means controlling a hazardous atmosphere using continuous forced-air mechanical systems that meet the requirements of § 1926.57 (Ventilation).

#### § 1926.1203 General requirements.

(a) Before it begins work at a worksite, each employer must ensure that a competent person identifies all confined spaces in which one or more of the

employees it directs may work, and identifies each space that is a permit space, through consideration and evaluation of the elements of that space, including testing as necessary.

(b) If the workplace contains one or more permit spaces, the employer who identifies, or who receives notice of, a permit space must:

(1) Inform exposed employees by posting danger signs or by any other equally effective means, of the existence and location of, and the danger posed by, each permit space; and

**Note to paragraph (b)(1).** A sign reading "DANGER—PERMIT-REQUIRED CONFINED SPACE, DO NOT ENTER" or using other similar language would satisfy the requirement for a sign.

(2) Inform, in a timely manner and in a manner other than posting, its employees' authorized representatives and the controlling contractor of the existence and location of, and the danger posed by, each permit space.

(c) Each employer who identifies, or receives notice of, a permit space and has not authorized employees it directs to work in that space must take effective measures to prevent those employees from entering that permit space, in addition to complying with all other applicable requirements of this standard.

(d) If any employer decides that employees it directs will enter a permit space, that employer must have a written permit space program that complies with § 1926.1204 implemented at the construction site. The written program must be made available prior to and during entry operations for inspection by employees and their authorized representatives.

(e) An employer may use the alternate procedures specified in paragraph (e)(2) of this section for entering a permit space only under the conditions set forth in paragraph (e)(1) of this section.

(1) An employer whose employees enter a permit space need not comply with §§ 1926.1204 through 1206 and §§ 1926.1208 through 1211, provided that all of the following conditions are met:

(i) The employer can demonstrate that all physical hazards in the space are eliminated or isolated through engineering controls so that the only hazard posed by the permit space is an actual or potential hazardous atmosphere;

(ii) The employer can demonstrate that continuous forced air ventilation alone is sufficient to maintain that permit space safe for entry, and that, in the event the ventilation system stops working, entrants can exit the space safely;

(iii) The employer develops monitoring and inspection data that supports the demonstrations required by paragraphs (e)(1)(i) and (ii) of this section;

(iv) If an initial entry of the permit space is necessary to obtain the data required by paragraph (e)(1)(iii) of this section, the entry is performed in compliance with §§ 1926.1204 through 1926.1211;

(v) The determinations and supporting data required by paragraphs (e)(1)(i), (ii), and (iii) of this section are documented by the employer and are made available to each employee who enters the permit space under the terms of paragraph (e) of this section or to that employee's authorized representative; and

(vi) Entry into the permit space under the terms of paragraph (e)(1) of this section is performed in accordance with the requirements of paragraph (e)(2) of this section.

**Note to paragraph (e)(1).** See paragraph (g) of this section for reclassification of a permit space after all hazards within the space have been eliminated.

(2) The following requirements apply to entry into permit spaces that meet the conditions set forth in paragraph (e)(1) of this section:

(i) Any conditions making it unsafe to remove an entrance cover must be eliminated before the cover is removed.

(ii) When entrance covers are removed, the opening must be immediately guarded by a railing, temporary cover, or other temporary barrier that will prevent an accidental fall through the opening and that will protect each employee working in the space from foreign objects entering the space.

(iii) Before an employee enters the space, the internal atmosphere must be tested, with a calibrated direct-reading instrument, for oxygen content, for flammable gases and vapors, and for potential toxic air contaminants, in that order. Any employee who enters the space, or that employee's authorized representative, must be provided an opportunity to observe the pre-entry testing required by this paragraph.

(iv) No hazardous atmosphere is permitted within the space whenever any employee is inside the space.

(v) Continuous forced air ventilation must be used, as follows:

(A) An employee must not enter the space until the forced air ventilation has eliminated any hazardous atmosphere;

(B) The forced air ventilation must be so directed as to ventilate the immediate areas where an employee is or will be present within the space and must

continue until all employees have left the space;

(C) The air supply for the forced air ventilation must be from a clean source and must not increase the hazards in the space.

(vi) The atmosphere within the space must be continuously monitored unless the entry employer can demonstrate that equipment for continuous monitoring is not commercially available or periodic monitoring is sufficient. If continuous monitoring is used, the employer must ensure that the monitoring equipment has an alarm that will notify all entrants if a specified atmospheric threshold is achieved, or that an employee will check the monitor with sufficient frequency to ensure that entrants have adequate time to escape. If continuous monitoring is not used, periodic monitoring is required. All monitoring must ensure that the continuous forced air ventilation is preventing the accumulation of a hazardous atmosphere. Any employee who enters the space, or that employee's authorized representative, must be provided with an opportunity to observe the testing required by this paragraph (e)(2)(vi).

(vii) If a hazard is detected during entry:

(A) Each employee must leave the space immediately;

(B) The space must be evaluated to determine how the hazard developed; and

(C) The employer must implement measures to protect employees from the hazard before any subsequent entry takes place.

(viii) The employer must ensure a safe method of entering and exiting the space. If a hoisting system is used, it must be designed and manufactured for personnel hoisting; however, a job-made hoisting system is permissible if it is approved for personnel hoisting by a registered professional engineer, in writing, prior to use.

(ix) The employer must verify that the space is safe for entry and that the pre-entry measures required by paragraph (e)(2) of this section have been taken, through a written certification that contains the date, the location of the space, and the signature of the person providing the certification. The certification must be made before entry and must be made available to each employee entering the space or to that employee's authorized representative.

(f) When there are changes in the use or configuration of a non-permit confined space that might increase the hazards to entrants, or some indication that the initial evaluation of the space may not have been adequate, each entry employer must have a competent person

reevaluate that space and, if necessary, reclassify it as a permit-required confined space.

(g) A space classified by an employer as a permit-required confined space may only be reclassified as a non-permit confined space when a competent person determines that all of the applicable requirements in paragraphs (g)(1) through (4) of this section have been met:

(1) If the permit space poses no actual or potential atmospheric hazards and if all hazards within the space are eliminated or isolated without entry into the space (unless the employer can demonstrate that doing so without entry is infeasible), the permit space may be reclassified as a non-permit confined space for as long as the non-atmospheric hazards remain eliminated or isolated;

(2) The entry employer must eliminate or isolate the hazards without entering the space, unless it can demonstrate that this is infeasible. If it is necessary to enter the permit space to eliminate or isolate hazards, such entry must be performed under §§ 1926.1204 through 1926.1211. If testing and inspection during that entry demonstrate that the hazards within the permit space have been eliminated or isolated, the permit space may be reclassified as a non-permit confined space for as long as the hazards remain eliminated or isolated;

**Note to paragraph (g)(2).** Control of atmospheric hazards through forced air ventilation does not constitute elimination or isolation of the hazards. Paragraph (e) of this section covers permit space entry where the employer can demonstrate that forced air ventilation alone will control all hazards in the space.

(3) The entry employer must document the basis for determining that all hazards in a permit space have been eliminated or isolated, through a certification that contains the date, the location of the space, and the signature of the person making the determination. The certification must be made available to each employee entering the space or to that employee's authorized representative; and

(4) If hazards arise within a permit space that has been reclassified as a non-permit space under paragraph (g) of this section, each employee in the space must exit the space. The entry employer must then reevaluate the space and reclassify it as a permit space as appropriate in accordance with all other applicable provisions of this standard.

(h) *Permit space entry communication and coordination.* (1) Before entry operations begin, the host employer must provide the following information, if it has it, to the controlling contractor:

(i) The location of each known permit space;

(ii) The hazards or potential hazards in each space or the reason it is a permit space; and

(iii) Any precautions that the host employer or any previous controlling contractor or entry employer implemented for the protection of employees in the permit space.

(2) Before entry operations begin, the controlling contractor must:

(i) Obtain the host employer's information about the permit space hazards and previous entry operations; and

(ii) Provide the following information to each entity entering a permit space and any other entity at the worksite whose activities could foreseeably result in a hazard in the permit space:

(A) The information received from the host employer;

(B) Any additional information the controlling contractor has about the subjects listed in paragraph (h)(1) of this section; and

(C) The precautions that the host employer, controlling contractor, or other entry employers implemented for the protection of employees in the permit spaces.

(3) Before entry operations begin, each entry employer must:

(i) Obtain all of the controlling contractor's information regarding permit space hazards and entry operations; and

(ii) Inform the controlling contractor of the permit space program that the entry employer will follow, including any hazards likely to be confronted or created in each permit space.

(4) The controlling contractor and entry employer(s) must coordinate entry operations when:

(i) More than one entity performs permit space entry at the same time; or

(ii) Permit space entry is performed at the same time that any activities that could foreseeably result in a hazard in the permit space are performed.

(5) After entry operations:

(i) The controlling contractor must debrief each entity that entered a permit space regarding the permit space program followed and any hazards confronted or created in the permit space(s) during entry operations;

(ii) The entry employer must inform the controlling contractor in a timely manner of the permit space program followed and of any hazards confronted or created in the permit space(s) during entry operations; and

(iii) The controlling contractor must apprise the host employer of the information exchanged with the entry entities pursuant to this subparagraph.

**Note to paragraph (h).** Unless a host employer or controlling contractor has or will have employees in a confined space, it is not required to enter any confined space to collect the information specified in this paragraph (h).

(i) If there is no controlling contractor present at the worksite, the requirements for, and role of, controlling contractors in this section must be fulfilled by the host employer or other employer who arranges to have employees of another employer perform work that involves permit space entry.

**§ 1926.1204 Permit-required confined space program.**

Each entry employer must:

(a) Implement the measures necessary to prevent unauthorized entry;

(b) Identify and evaluate the hazards of permit spaces before employees enter them;

(c) Develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including, but not limited to, the following:

(1) Specifying acceptable entry conditions;

(2) Providing each authorized entrant or that employee's authorized representative with the opportunity to observe any monitoring or testing of permit spaces;

(3) Isolating the permit space and physical hazard(s) within the space;

(4) Purging, inerting, flushing, or ventilating the permit space as necessary to eliminate or control atmospheric hazards;

**Note to paragraph (c)(4).** When an employer is unable to reduce the atmosphere below 10 percent LFL, the employer may only enter if the employer inertes the space so as to render the entire atmosphere in the space non-combustible, and the employees use PPE to address any other atmospheric hazards (such as oxygen deficiency), and the employer eliminates or isolates all physical hazards in the space.

(5) Determining that, in the event the ventilation system stops working, the monitoring procedures will detect an increase in atmospheric hazard levels in sufficient time for the entrants to safely exit the permit space;

(6) Providing pedestrian, vehicle, or other barriers as necessary to protect entrants from external hazards;

(7) Verifying that conditions in the permit space are acceptable for entry throughout the duration of an authorized entry, and ensuring that employees are not allowed to enter into, or remain in, a permit space with a hazardous atmosphere unless the employer can demonstrate that personal protective equipment (PPE) will provide

effective protection for each employee in the permit space and provides the appropriate PPE to each employee; and

(8) Eliminating any conditions (for example, high pressure) that could make it unsafe to remove an entrance cover.

(d) Provide the following equipment (specified in paragraphs (d)(1) through (9) of this section) at no cost to each employee, maintain that equipment properly, and ensure that each employee uses that equipment properly:

(1) Testing and monitoring equipment needed to comply with paragraph (e) of this section;

(2) Ventilating equipment needed to obtain acceptable entry conditions;

(3) Communications equipment necessary for compliance with §§ 1926.1208(c) and 1926.1209(e), including any necessary electronic communication equipment for attendants assessing entrants' status in multiple spaces;

(4) Personal protective equipment insofar as feasible engineering and work-practice controls do not adequately protect employees;

**Note to paragraph (d)(4).** The requirements of subpart E of this part and other PPE requirements continue to apply to the use of PPE in a permit space. For example, if employees use respirators, then the respirator requirements in § 1926.103 (Respiratory protection) must be met.

(5) Lighting equipment that meets the minimum illumination requirements in § 1926.56, that is approved for the ignitable or combustible properties of the specific gas, vapor, dust, or fiber that will be present, and that is sufficient to enable employees to see well enough to work safely and to exit the space quickly in an emergency;

(6) Barriers and shields as required by paragraph (c)(4) of this section;

(7) Equipment, such as ladders, needed for safe ingress and egress by authorized entrants;

(8) Rescue and emergency equipment needed to comply with paragraph (i) of this section, except to the extent that the equipment is provided by rescue services; and

(9) Any other equipment necessary for safe entry into, safe exit from, and rescue from, permit spaces.

(e) Evaluate permit space conditions in accordance with the following paragraphs (e)(1) through (6) of this section when entry operations are conducted:

(1) Test conditions in the permit space to determine if acceptable entry conditions exist before changes to the space's natural ventilation are made, and before entry is authorized to begin, except that, if an employer demonstrates that isolation of the space is infeasible

because the space is large or is part of a continuous system (such as a sewer), the employer must:

(i) Perform pre-entry testing to the extent feasible before entry is authorized; and,

(ii) If entry is authorized, continuously monitor entry conditions in the areas where authorized entrants are working, except that employers may use periodic monitoring in accordance with paragraph (e)(2) of this section for monitoring an atmospheric hazard if they can demonstrate that equipment for continuously monitoring that hazard is not commercially available;

(iii) Provide an early-warning system that continuously monitors for non-isolated engulfment hazards. The system must alert authorized entrants and attendants in sufficient time for the authorized entrants to safely exit the space.

(2) Continuously monitor atmospheric hazards unless the employer can demonstrate that the equipment for continuously monitoring a hazard is not commercially available or that periodic monitoring is of sufficient frequency to ensure that the atmospheric hazard is being controlled at safe levels. If continuous monitoring is not used, periodic monitoring is required with sufficient frequency to ensure that acceptable entry conditions are being maintained during the course of entry operations;

(3) When testing for atmospheric hazards, test first for oxygen, then for combustible gases and vapors, and then for toxic gases and vapors;

(4) Provide each authorized entrant or that employee's authorized representative an opportunity to observe the pre-entry and any subsequent testing or monitoring of permit spaces;

(5) Reevaluate the permit space in the presence of any authorized entrant or that employee's authorized representative who requests that the employer conduct such reevaluation because there is some indication that the evaluation of that space may not have been adequate; and

(6) Immediately provide each authorized entrant or that employee's authorized representative with the results of any testing conducted in accordance with this section.

(f) Provide at least one attendant outside the permit space into which entry is authorized for the duration of entry operations:

(1) Attendants may be assigned to more than one permit space provided the duties described in § 1926.1209 can be effectively performed for each permit space.

(2) Attendants may be stationed at any location outside the permit space as long as the duties described in § 1926.1209 can be effectively performed for each permit space to which the attendant is assigned.

(g) If multiple spaces are to be assigned to a single attendant, include in the permit program the means and procedures to enable the attendant to respond to an emergency affecting one or more of those permit spaces without distraction from the attendant's responsibilities under § 1926.1209;

(h) Designate each person who is to have an active role (as, for example, authorized entrants, attendants, entry supervisors, or persons who test or monitor the atmosphere in a permit space) in entry operations, identify the duties of each such employee, and provide each such employee with the training required by § 1926.1207;

(i) Develop and implement procedures for summoning rescue and emergency services (including procedures for summoning emergency assistance in the event of a failed non-entry rescue), for rescuing entrants from permit spaces, for providing necessary emergency services to rescued employees, and for preventing unauthorized personnel from attempting a rescue;

(j) Develop and implement a system for the preparation, issuance, use, and cancellation of entry permits as required by this standard, including the safe termination of entry operations under both planned and emergency conditions;

(k) Develop and implement procedures to coordinate entry operations, in consultation with the controlling contractor, when employees of more than one employer are working simultaneously in a permit space or elsewhere on the worksite where their activities could, either alone or in conjunction with the activities within a permit space, foreseeably result in a hazard within the confined space, so that employees of one employer do not endanger the employees of any other employer;

(l) Develop and implement procedures (such as closing off a permit space and canceling the permit) necessary for concluding the entry after entry operations have been completed;

(m) Review entry operations when the measures taken under the permit space program may not protect employees and revise the program to correct deficiencies found to exist before subsequent entries are authorized; and

**Note to paragraph (m).** Examples of circumstances requiring the review of the

permit space program include, but are not limited to: Any unauthorized entry of a permit space, the detection of a permit space hazard not covered by the permit, the detection of a condition prohibited by the permit, the occurrence of an injury or near-miss during entry, a change in the use or configuration of a permit space, and employee complaints about the effectiveness of the program.

(n) Review the permit space program, using the canceled permits retained under § 1926.1205(f), within 1 year after each entry and revise the program as necessary to ensure that employees participating in entry operations are protected from permit space hazards.

**Note to paragraph (n).** Employers may perform a single annual review covering all entries performed during a 12-month period. If no entry is performed during a 12-month period, no review is necessary.

#### § 1926.1205 Permitting process.

(a) Before entry is authorized, each entry employer must document the completion of measures required by § 1926.1204(c) by preparing an entry permit.

(b) Before entry begins, the entry supervisor identified on the permit must sign the entry permit to authorize entry.

(c) The completed permit must be made available at the time of entry to all authorized entrants or their authorized representatives, by posting it at the entry portal or by any other equally effective means, so that the entrants can confirm that pre-entry preparations have been completed.

(d) The duration of the permit may not exceed the time required to complete the assigned task or job identified on the permit in accordance with § 1926.1206(b).

(e) The entry supervisor must terminate entry and take the following action when any of the following apply:

(1) Cancel the entry permit when the entry operations covered by the entry permit have been completed; or

(2) Suspend or cancel the entry permit and fully reassess the space before allowing reentry when a condition that is not allowed under the entry permit arises in or near the permit space and that condition is temporary in nature and does not change the configuration of the space or create any new hazards within it; and

(3) Cancel the entry permit when a condition that is not allowed under the entry permit arises in or near the permit space and that condition is not covered by paragraph (e)(2) of this section.

(f) The entry employer must retain each canceled entry permit for at least 1 year to facilitate the review of the permit-required confined space program

required by § 1926.1204(n). Any problems encountered during an entry operation must be noted on the pertinent permit so that appropriate revisions to the permit space program can be made.

#### § 1926.1206 Entry permit.

The entry permit that documents compliance with this section and authorizes entry to a permit space must identify:

- (a) The permit space to be entered;
- (b) The purpose of the entry;
- (c) The date and the authorized duration of the entry permit;
- (d) The authorized entrants within the permit space, by name or by such other means (for example, through the use of rosters or tracking systems) as will enable the attendant to determine quickly and accurately, for the duration of the permit, which authorized entrants are inside the permit space;

**Note to paragraph (d).** This requirement may be met by inserting a reference on the entry permit as to the means used, such as a roster or tracking system, to keep track of the authorized entrants within the permit space.

(e) Means of detecting an increase in atmospheric hazard levels in the event the ventilation system stops working;

(f) Each person, by name, currently serving as an attendant;

(g) The individual, by name, currently serving as entry supervisor, and the signature or initials of each entry supervisor who authorizes entry;

(h) The hazards of the permit space to be entered;

(i) The measures used to isolate the permit space and to eliminate or control permit space hazards before entry;

**Note to paragraph (i).** Those measures can include, but are not limited to, the lockout or tagging of equipment and procedures for purging, inerting, ventilating, and flushing permit spaces.

(j) The acceptable entry conditions;

(k) The results of tests and monitoring performed under § 1926.1204(e), accompanied by the names or initials of the testers and by an indication of when the tests were performed;

(l) The rescue and emergency services that can be summoned and the means (such as the equipment to use and the numbers to call) for summoning those services;

(m) The communication procedures used by authorized entrants and attendants to maintain contact during the entry;

(n) Equipment, such as personal protective equipment, testing equipment, communications equipment, alarm systems, and rescue equipment, to

be provided for compliance with this standard;

(o) Any other information necessary, given the circumstances of the particular confined space, to ensure employee safety; and

(p) Any additional permits, such as for hot work, that have been issued to authorize work in the permit space.

#### § 1926.1207 Training.

(a) The employer must provide training to each employee whose work is regulated by this standard, at no cost to the employee, and ensure that the employee possesses the understanding, knowledge, and skills necessary for the safe performance of the duties assigned under this standard. This training must result in an understanding of the hazards in the permit space and the methods used to isolate, control or in other ways protect employees from these hazards, and for those employees not authorized to perform entry rescues, in the dangers of attempting such rescues.

(b) Training required by this section must be provided to each affected employee:

(1) In both a language and vocabulary that the employee can understand;

(2) Before the employee is first assigned duties under this standard;

(3) Before there is a change in assigned duties;

(4) Whenever there is a change in permit space entry operations that presents a hazard about which an employee has not previously been trained; and

(5) Whenever there is any evidence of a deviation from the permit space entry procedures required by § 1926.1204(c) or there are inadequacies in the employee's knowledge or use of these procedures.

(c) The training must establish employee proficiency in the duties required by this standard and must introduce new or revised procedures, as necessary, for compliance with this standard.

(d) The employer must maintain training records to show that the training required by paragraphs (a) through (c) of this section has been accomplished. The training records must contain each employee's name, the name of the trainers, and the dates of training. The documentation must be available for inspection by employees and their authorized representatives, for the period of time the employee is employed by that employer.

#### § 1926.1208 Duties of authorized entrants.

The entry employer must ensure that all authorized entrants:

(a) Are familiar with and understand the hazards that may be faced during entry, including information on the mode, signs or symptoms, and consequences of the exposure;

(b) Properly use equipment as required by § 1926.1204(d);

(c) Communicate with the attendant as necessary to enable the attendant to assess entrant status and to enable the attendant to alert entrants of the need to evacuate the space as required by § 1926.1209(f);

(d) Alert the attendant whenever:

(1) There is any warning sign or symptom of exposure to a dangerous situation; or

(2) The entrant detects a prohibited condition; and

(e) Exit from the permit space as quickly as possible whenever:

(1) An order to evacuate is given by the attendant or the entry supervisor;

(2) There is any warning sign or symptom of exposure to a dangerous situation;

(3) The entrant detects a prohibited condition; or

(4) An evacuation alarm is activated.

#### § 1926.1209 Duties of attendants.

The entry employer must ensure that each attendant:

(a) Is familiar with and understands the hazards that may be faced during entry, including information on the mode, signs or symptoms, and consequences of the exposure;

(b) Is aware of possible behavioral effects of hazard exposure in authorized entrants;

(c) Continuously maintains an accurate count of authorized entrants in the permit space and ensures that the means used to identify authorized entrants under § 1926.1206(d) accurately identifies who is in the permit space;

(d) Remains outside the permit space during entry operations until relieved by another attendant;

**Note to paragraph (d).** Once an attendant has been relieved by another attendant, the relieved attendant may enter a permit space to attempt a rescue when the employer's permit space program allows attendant entry for rescue and the attendant has been trained and equipped for rescue operations as required by § 1926.1211(a).

(e) Communicates with authorized entrants as necessary to assess entrant status and to alert entrants of the need to evacuate the space under § 1926.1208(e);

(f) Assesses activities and conditions inside and outside the space to determine if it is safe for entrants to remain in the space and orders the authorized entrants to evacuate the

permit space immediately under any of the following conditions:

(1) If there is a prohibited condition;

(2) If the behavioral effects of hazard exposure are apparent in an authorized entrant;

(3) If there is a situation outside the space that could endanger the authorized entrants; or

(4) If the attendant cannot effectively and safely perform all the duties required under this section;

(g) Summons rescue and other emergency services as soon as the attendant determines that authorized entrants may need assistance to escape from permit space hazards;

(h) Takes the following actions when unauthorized persons approach or enter a permit space while entry is underway:

(1) Warns the unauthorized persons that they must stay away from the permit space;

(2) Advises the unauthorized persons that they must exit immediately if they have entered the permit space; and

(3) Informs the authorized entrants and the entry supervisor if unauthorized persons have entered the permit space;

(i) Performs non-entry rescues as specified by the employer's rescue procedure; and

(j) Performs no duties that might interfere with the attendant's primary duty to assess and protect the authorized entrants.

#### § 1926.1210 Duties of entry supervisors.

The entry employer must ensure that each entry supervisor:

(a) Is familiar with and understands the hazards that may be faced during entry, including information on the mode, signs or symptoms, and consequences of the exposure;

(b) Verifies, by checking that the appropriate entries have been made on the permit, that all tests specified by the permit have been conducted and that all procedures and equipment specified by the permit are in place before endorsing the permit and allowing entry to begin;

(c) Terminates the entry and cancels or suspends the permit as required by § 1926.1205(e);

(d) Verifies that rescue services are available and that the means for summoning them are operable, and that the employer will be notified as soon as the services become unavailable;

(e) Removes unauthorized individuals who enter or who attempt to enter the permit space during entry operations; and

(f) Determines, whenever responsibility for a permit space entry operation is transferred, and at intervals dictated by the hazards and operations performed within the space, that entry



operations remain consistent with terms of the entry permit and that acceptable entry conditions are maintained.

**§ 1926.1211 Rescue and emergency services.**

(a) An employer who designates rescue and emergency services, pursuant to § 1926.1204(i), must:

(1) Evaluate a prospective rescuer's ability to respond to a rescue summons in a timely manner, considering the hazard(s) identified;

**Note to paragraph (a)(1).** What will be considered timely will vary according to the specific hazards involved in each entry. For example, § 1926.103 (Respiratory protection) requires that employers provide a standby person or persons capable of immediate action to rescue employee(s) wearing respiratory protection while in work areas defined as IDLH atmospheres.

(2) Evaluate a prospective rescue service's ability, in terms of proficiency with rescue-related tasks and equipment, to function appropriately while rescuing entrants from the particular permit space or types of permit spaces identified;

(3) Select a rescue team or service from those evaluated that:

(i) Has the capability to reach the victim(s) within a time frame that is appropriate for the permit space hazard(s) identified;

(ii) Is equipped for, and proficient in, performing the needed rescue services;

(iii) Agrees to notify the employer immediately in the event that the rescue service becomes unavailable;

(4) Inform each rescue team or service of the hazards they may confront when called on to perform rescue at the site; and

(5) Provide the rescue team or service selected with access to all permit spaces from which rescue may be necessary so that the rescue team or service can develop appropriate rescue plans and practice rescue operations.

(b) An employer whose employees have been designated to provide permit space rescue and/or emergency services must take the following measures and provide all equipment and training at no cost to those employees:

(1) Provide each affected employee with the personal protective equipment (PPE) needed to conduct permit space rescues safely and train each affected

employee so the employee is proficient in the use of that PPE;

(2) Train each affected employee to perform assigned rescue duties. The employer must ensure that such employees successfully complete the training required and establish proficiency as authorized entrants, as provided by §§ 1926.1207 and 1926.1208;

(3) Train each affected employee in basic first aid and cardiopulmonary resuscitation (CPR). The employer must ensure that at least one member of the rescue team or service holding a current certification in basic first aid and CPR is available; and

(4) Ensure that affected employees practice making permit space rescues before attempting an actual rescue, and at least once every 12 months, by means of simulated rescue operations in which they remove dummies, manikins, or actual persons from the actual permit spaces or from representative permit spaces, except practice rescue is not required where the affected employees properly performed a rescue operation during the last 12 months in the same permit space the authorized entrant will enter, or in a similar permit space. Representative permit spaces must, with respect to opening size, configuration, and accessibility, simulate the types of permit spaces from which rescue is to be performed.

(c) Non-entry rescue is required unless the retrieval equipment would increase the overall risk of entry or would not contribute to the rescue of the entrant. The employer must designate an entry rescue service whenever non-entry rescue is not selected. Whenever non-entry rescue is selected, the entry employer must ensure that retrieval systems or methods are used whenever an authorized entrant enters a permit space, and must confirm, prior to entry, that emergency assistance would be available in the event that non-entry rescue fails. Retrieval systems must meet the following requirements:

(1) Each authorized entrant must use a chest or full body harness, with a retrieval line attached at the center of the entrant's back near shoulder level, above the entrant's head, or at another point which the employer can establish presents a profile small enough for the

successful removal of the entrant.

Wristlets or anklets may be used in lieu of the chest or full body harness if the employer can demonstrate that the use of a chest or full body harness is infeasible or creates a greater hazard and that the use of wristlets or anklets is the safest and most effective alternative.

(2) The other end of the retrieval line must be attached to a mechanical device or fixed point outside the permit space in such a manner that rescue can begin as soon as the rescuer becomes aware that rescue is necessary. A mechanical device must be available to retrieve personnel from vertical type permit spaces more than 5 feet (1.52 meters) deep.

(3) Equipment that is unsuitable for retrieval must not be used, including, but not limited to, retrieval lines that have a reasonable probability of becoming entangled with the retrieval lines used by other authorized entrants, or retrieval lines that will not work due to the internal configuration of the permit space.

(d) If an injured entrant is exposed to a substance for which a Safety Data Sheet (SDS) or other similar written information is required to be kept at the worksite, that SDS or written information must be made available to the medical facility treating the exposed entrant.

**§ 1926.1212 Employee participation.**

(a) Employers must consult with affected employees and their authorized representatives on the development and implementation of all aspects of the permit space program required by § 1926.1203.

(b) Employers must make available to each affected employee and his/her authorized representatives all information required to be developed by this standard.

**§ 1926.1213 Provision of documents to Secretary.**

For each document required to be retained in this standard, the retaining employer must make the document available on request to the Secretary of Labor or the Secretary's designee.

[FR Doc. 2015-08843 Filed 5-1-15; 8:45 am]

BILLING CODE 4510-26-P





**COMMONWEALTH of VIRGINIA**  
**DEPARTMENT OF LABOR AND INDUSTRY**

**C. Ray Davenport**  
COMMISSIONER

Main Street Centre  
600 East Main Street, Suite 207  
Richmond, Virginia 23219  
PHONE (804) 371-2327  
FAX (804) 371-6524

**VIRGINIA SAFETY AND HEALTH CODES BOARD**

**BRIEFING PACKAGE**

**FOR OCTOBER 29, 2015**

-----

**Report of Periodic Review of Certain Existing Regulations  
Departmental Review and Findings**

**I. Background and Basis**

In accordance with the Administrative Process Act (§2.2-4017 of the *Code of Virginia*), Governor McAuliffe's 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. Three regulations of the Safety and Health Codes Board were identified for review in 2015.

1. Financial Responsibility of Boiler & Pressure Vessel Contact Fee Inspectors, 16VAC25-55;
2. Regulation Applicable to Tree Trimming Operations, 16VAC25-73; and
3. Telecommunications, General, Approach, Distances, 16VAC25-75.

**II. Current Status and Process**

Upon the approval of the Board to proceed, at the July 9, 2015 meeting, the process of periodic review by the Department of Labor and Industry (Department) began for the above-noted regulations with publication of a Notice of Periodic Review in the Virginia Register. At the July meeting, the Board approved the periodic review of these regulations, with a public comment period of the required 21 days. The public comment period began on August 10, 2015, when the Notice of Periodic Review was published, and closed on August 31, 2015. No comments were received for any of the regulations during the public comment period. Following the public comment period, Department staff reviewed the regulations and prepared

recommendations for the Board's consideration at this meeting. Based on the decision of the Board, the Department will post a report on the Town Hall website indicating for each regulation either that (1) the Board will retain the regulation as is, or (2) the Board will begin a regulatory action to amend the regulation.

### III. **Review and Analysis**

Pursuant to § 2.2-4007.1.E and F of the *Code of Virginia*, the Department is obligated to evaluate the economic impact of this regulation on small business. The Administrative Process Act (§ 2.2-4007.1 of the *Code of Virginia*) provides the following definition of "small business".

A. As used in this section, "small business" means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.

The analysis of the economic impact on "small business" must consider the following factors:

- the continued need for the regulation;
- the complexity of the regulation;
- the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and
- the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

As required, the discussion below includes the Department's determination as to whether the regulation should be amended, repealed, or retained consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses.

#### A. **Financial Responsibility of Boiler & Pressure Vessel Contact Fee Inspectors, 16VAC25-55**

The *Code of Virginia*, at § 40.1-51.9:2 authorizes the Department of Labor and Industry 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. Regulations governing the amount of any financial responsibility required by the contract fee inspector shall take into consideration the type, capacity and number of boilers or pressure vessels inspected or certified."

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. Although 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, the regulation is not overly complex and does not overlap, duplicate or conflict with federal or state law or regulation. Contract fee inspectors must also pay related copy and postage costs, but these are relatively small. This regulation

provides flexible options for contract fee inspectors and minimizes, to the greatest extent possible, the impact on the regulated community.

**Determination:** 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 or regulation. The Department last completed a Periodic Review of this regulation in 2011. As a result of the current periodic review, the Department has determined that this regulation remains consistent with the stated objectives of applicable law, and minimizes the economic impact of regulations on small businesses.

During the Public Comment Period, the Department received no comments on the Periodic Review of this Regulation.

**Recommendation:** The Department recommends that this regulation be retained with no changes.

**B. Regulation Applicable to Tree Trimming Operations, 16VAC25-73**

Section 40.1-22(5) of the *Code of Virginia* mandates that the Safety and Health Codes Board adopt standards that most adequately assure "...employee safety and health in places of employment over which it has jurisdiction...", and that the standards be at least as stringent as the standards promulgated by the federal Occupational Safety and Health Administration (OSHA), as required by the federal OSH Act of 1970 (P.L.91-596).

This regulation is based on the American National Standard's Institute (ANSI) Z133.1-2006, Safety Requirements for Arboricultural Operations (With Modifications), for Application to Tree Trimming Operations. The regulation addresses non-logging, tree-trimming and cutting operations on residential and commercial work sites.

**Determination:** It is the determination of the Department that the current 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 is no viable alternative to this regulation. Prior to adoption, VOSH applied the Logging Standard, 1910.266, to arborists/tree trimming operations anytime a tree was "felled," or cut down. The Logging Standard 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 trimming trees.

In instances where the Logging Standard could not apply, VOSH had to use regulations of general application to address some hazards (e.g., 1910.95, Occupational Noise Exposure; 1910.132, Personal protective equipment; 1910.133, Eye and face protection; 1910.135, Head Protection; 1910.136, Foot protection; 1910.151, Medical services and first aid; 1910.67, Vehicle-mounted elevating and rotating work platforms; etc.), and the "general duty clause," § 40.1-51.1(a) of the *Code of Virginia*, which provides that:

It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees....

The arborist industry complained both locally and nationally about application of the Logging Standard to their industry, not only because their work is in residential neighborhoods and commercial areas, rather than in a forest, but also because they often use teams of workers in the directional felling of trees (with the use of ropes) and “piecing out” of trees, or cutting down trees in sections, while loggers usually do not operate in teams or piece out trees. The tree trimmers consider their work, and the hazards they face, to be fundamentally different from the hazards faced by loggers. The need for the regulation was very evident when fatality statistics were reviewed. For an industry of such relatively small size, the proportion of fatal accidents was quite high.

The 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 or regulation.

This regulation became final in 2011. Therefore, the current Periodic Review is the first such review of this regulation since it was promulgated. As a result of the current periodic review, the Department has determined that this regulation remains consistent with the stated objectives of applicable law and minimizes the economic impact of regulations on small businesses.

During the Public Comment Period, there were no online comments posted on the Regulatory Town Hall. There was one emailed comment with an attached letter from the Tree Care Industry Association, Inc. (TCIA), which expressed support for retaining the regulation and summarized the benefits provided by this regulation to employees and employers in the tree trimming industry. The Department responded with an email and attached letter thanking TCIA for the very positive comments concerning the Department’s Periodic Review of this regulation. Copies of both letters are included at the end of this briefing package.

**Recommendation:** The Department recommends that this regulation be retained with no changes.

**C. Telecommunications, General, Approach, Distances, 16VAC25-75**

There is a continued need for this regulation because it ensures uniformity of the regulations for General Industry, Construction, and Telecommunication workers who perform the same type of electrical transmission work. The regulation makes telecommunications requirements identical to 16VAC25-90-1910.269(1)(2)(i), General Industry Standard for Electric Power Generation Transmission and Distribution, and provides safety protections for telecommunications workers equal to those afforded general industry electrical transmission workers and construction industry workers (see 16VAC25-155), which simplifies compliance requirements for all workers performing the same or similar tasks regardless of the type of industry in which they work.

**Determination:** 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 or regulation. No alternatives were considered for this regulation because, in the past, the establishment of less stringent compliance requirements directly resulted in fatal electrocution hazards for employees. For the reasons noted above, this regulation is the least burdensome alternative available for achieving the purpose of the regulation.

The Department last completed a Periodic Review of this regulation in 2011. As a result of the current periodic review, the Department has determined that this regulation remains consistent with the stated objectives of applicable law and minimizes the economic impact of regulations on small businesses. Prior to the promulgation of this regulation, employers were already required to train telecommunication electrical transmission workers on methods of de-energizing, isolating, or insulating themselves from live electrical parts by using blankets or other protective measures listed in 16VAC 25-90-1910.268.

This regulation simplified compliance by making telecommunications requirements identical to 16VAC25-90-1910.269(l)(2)(i), General Industry Standard for Electric Power Generation Transmission and Distribution, and by providing safety protections for telecommunications workers equal to those afforded general industry electrical transmission workers and construction industry workers (see 16VAC25-155). In compliance with federal law, the regulation does not exempt small businesses from all or any part of these requirements. However, the language of the regulation was drafted in such a way as to minimize costs for regulated employers while still ensuring equivalent safety levels of electrical shock protection for telecommunications workers.

During the Public Comment Period, the Department received no comments on the Periodic Review of this Regulation.

**Recommendation:** The Department recommends that this regulation be retained with no changes.

#### IV. **Recommended Action**

At this time, the Department of Labor and Industry recommends that all of these regulations be retained with no changes. The Department requests that the Safety and Health Codes Board vote to retain these three regulations with no changes.

**Contact Person:**

Ms. Reba O'Connor  
Regulatory Coordinator  
804.371.2631  
[Oconnor.Reba@dol.gov](mailto:Oconnor.Reba@dol.gov)







**COMMONWEALTH of VIRGINIA**  
**DEPARTMENT OF LABOR AND INDUSTRY**

**C. Ray Davenport**  
COMMISSIONER

Main Street Centre  
600 East Main Street, Suite 207  
Richmond, Virginia 23219  
PHONE (804) 371-2327  
FAX (804) 371-6524

August 13, 2015

Mark Garvin, President and CEO  
Tree Care Industry Association, Inc.  
Londenderry, NH 03053

Dear Mr. Garvin,

The staff of the Department of Labor and Industry wish to thank you for your very positive comments concerning the Department's Periodic Review of 16 VAC 25-73, Regulation Applicable to Tree Trimming Operations. We are pleased to know that this regulation has benefitted both employers and employees who are engaged in the work of tree trimming.

Following the close of the Comment Period, the Department will prepare recommendations to present to the Safety and Health Codes Board at their next meeting. We will note your letter of comment in our report to the Board, and in the documentation of the result of the review.

If you have any questions, or if I can be of assistance, please feel free to contact me again.

Sincerely,

A handwritten signature in blue ink that reads 'Reba O'Connor'.

Reba O'Connor  
Regulatory Coordinator  
Virginia Department of Labor and Industry





**CHAIR OF THE BOARD**

Jack Guffey  
Carolina Tree Care, Inc.  
Concord, North Carolina  
704-788-8733  
jguffey@carolinatree.com

**VICE CHAIR**

Andrew Ross  
RTEC Treecare  
Falls Church, Virginia  
703-573-3029  
andy@rtectreecare.com

**SENIOR DIRECTOR**

Peter Sortwell  
Arborwell  
Hayward, California  
888-969-8733  
sortwell@arborwell.com

**DIRECTORS**

Phil Chambers  
Townsend Tree Service Co.  
Parker City, Indiana  
765-468-3007  
pchambers@thetownsendcorp.com

Bill Weber  
Arborwear, LLC  
Newbury, Ohio  
440-564-9264  
bweber@arborwear.com

Andrew Felix  
Tree Tech, Inc.  
Foxboro, Massachusetts  
508-543-5644  
andyfelix@treetechinc.net

Steven A. Marshall  
Davey Tree Expert Company  
Kent, Ohio  
800-445-8733  
steve.marshall@davey.com

Jeff Wilson  
Wachtel Tree Science & Service, Inc.  
Merton, Wisconsin  
262-538-1900  
jwilson@wachteltree.com

Alan H. Jones  
Bartlett Tree Experts  
Charlottesville, Virginia  
(434) 971-8086  
ajones@bartlett.com

Mundy Wilson Piper  
Chippers, Inc.  
Woodstock, VT  
802-457-5100  
mundy@chippersinc.com

**PRESIDENT & CEO**

Mark Garvin, CAE  
Tree Care Industry Association, Inc.  
Londonderry, New Hampshire  
603-314-5380  
mgarvin@tcia.org

August 12, 2015

Reba O'Connor, Regulatory Coordinator  
Virginia Department of Labor and Industry  
600 East Main Street  
Richmond, Virginia 23219

Dear Ms. O'Connor,

On behalf of approximately 75 member companies residing and/or working in the Commonwealth of Virginia, Tree Care Industry Association (TCIA) welcomes the opportunity to comment upon the VOSH unique rule for tree trimming operations, 16VAC-25-73.

We understand the purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. We heartily endorse retaining the rule and continuing to exploit it for "intervention" inspections with tree care employers.

TCIA believes: 1) the rule is necessary to protect the health and welfare of employees in the tree care profession; 2) the rule has minimal economic impact on small businesses and probably helps them to operate more safely and profitably; and 3) the rule is clearly written and easily understandable.

To prepare these comments, TCIA reviewed VOSH's enforcement and citation history among employers in NAICS code 561730 over the past six to seven years.

**16VAC-25-73 affords greater protection for affected workers than the "patchwork quilt" of standards it largely replaced.**

In enforcement activities since April 27, 2011 involving "planned" as well as "complaint" inspections, VOSH compliance officers conducted close to 350 "intervention" inspections of tree companies. Using 16VAC-25-73, VOSH compliance personnel were able to provide impacted employers with clear guidance on the following topics:

Orientation training  
General training requirements  
Re-training for violators  
Machinery, etc. must conform to manufacturer's specs.  
Proper use & inspection of tools  
Direct supervision  
Job briefing  
High-visibility safety apparel

Controlling pedestrian, vehicular traffic  
Emergency phone numbers  
First aid kits  
Emergency response and rescue training  
First aid training  
Personal protective equipment (PPE) general requirements  
Hard hats  
Face protection

Protective clothing & footwear  
Hearing protection  
Eye protection  
Chain saw protection (chaps)  
Instruct employees on direct v. indirect electrical contact  
Inspect for electrical hazards  
Only qualified persons assigned to electrical hazard work  
10 foot min. approach from conductors  
Daily visual inspection of equipment  
Safety devices on mobile equipment  
Manufacturers' required inspections & maintenance  
Fall prevention from lifts other than in operation  
PPE worn when using mobile equipment  
Safety chains crossed under tongue of towed equipment  
Damaged aerial devices removed from service  
Fall protection in lifts during use  
Don't violate MAD with aerial device  
Use outriggers per manufacturers' directions  
Warn and insure clearance before lowering aerial lift outriggers  
Look in direction the bucket is traveling  
Use correct hydraulic hoses  
Don't move elevated aerial lift with someone in bucket  
Maintain MAD when in aerial lift  
Instruction that lift doesn't provide insulating protection  
Remove damaged brush chippers from service  
Access panels closed and secured during operation  
Operational feed control lever on mechanical infeed chippers  
PPE with chippers  
Chocking chipper wheels when chipper is detached  
Chipper safety chains crossed  
Enclosures or guard on stump grinders  
Stump grinder operator must be aware of underground utilities  
Inspect cranes, loaders, slings, etc. prior to use  
Cranes must have working anti-two-block device  
Crane operators must remain at controls while hoisting  
Tree sections must be rigged correctly to avoid load shifting  
Before hoisting a climber, involved workers must meet and conduct job briefing  
Before hoisting a climber, operator must test adequacy of footing

Approved containers for flammables  
Consider all conductors potentially fatal  
Certify electrical hazards training in writing  
Follow manufacturers' instructions with portable power tools  
Remove damaged chain saws from service  
Chain saw safety devices must be working  
Hold chain saw with two hands, thumbs wrapped around handles  
Chain saw operator must have stable footing  
Stump grinder safety chains crossed  
Proper ladder use  
Visual hazard assessment (VHA) of tree before climbing  
VHA specifically of lower trunk and root flare  
Check climbing system components for defect  
Rope ends shall be finished to prevent raveling  
Store climbing equipment away from sharp tools and harmful substances  
Arborists shall have a climbing line and one other means of being secured.  
Arborist secured while ascending, etc.  
Tie-in point must not subject climber to uncontrolled swing  
Voice command and response in drop zone  
Use work line on pieces that cannot be dropped safely  
Don't exceed ratings on rigging equip.  
Clearly marked rigging vs. climbing equipment  
Establish work zone for rigging operations  
Keep workers clear of suspended loads  
Assess hazards and plan the felling operation  
Check removal tree for decay or weak spots  
Check removal tree for means to protect persons, property, and conductors  
Communicate removal work plan to all affected workers  
Planned escape route for saw operator  
Workers on a pull line must be clear by at least one tree length  
Uninvolved workers shall be at least two tree lengths away from tree being felled  
Correct notch and back cut must be used  
Provides specifications for notches  
Provide warning prior to making the back cut  
Brush shall not be allowed to become a hazard in work area  
Don't wear loosely fitted apparel while chipping  
PPE during chipping  
Training shall be provided on chipper operation  
Proper position of the chipper operator

Don't raise the chipper discharge chute when parts are still moving  
Don't place any part of body into the infeed chute during operation

Work plans for limbing and bucking must be communicated to all affected workers  
When more than one worker is limbing/bucking a tree, one cannot create a hazard for the other

We are sure you will agree; the preceding list is very long and very comprehensive. And that is the point. VOSH compliance officers are now able to describe with great specificity the hazards they find in the field, and employers are provided guidance to mitigate those hazards in language they cannot misconstrue. We are certain that the guidance VOSH is now providing will prevent accidents and tragedy, particularly when it can be provided in advance of an incident.

**16VAC-25-73 has had minimal economic impact on small business.**

VOSH conducted a very exhaustive economic justification and defense of this regulation when it was first proposed. We supported VOSH's findings then and now.

To our members, it is this simple: Safety pays. It is no coincidence that the safest tree care companies are also the most profitable ones, because all of the direct and indirect costs associated with an incident comprise a huge expense for a small business. It follows that guidance that helps an employer to be safer will only be beneficial to that employer in the long run.

Furthermore, 16VAC-25-73 was adapted from a consensus safety standard that has been in existence since 1972; ANSI Z133. Conscientious employers were already in compliance with Z133 when VOSH promulgated its standard, and thus there would have been little or no incremental cost associated with compliance.

Certainly, we have heard no complaints from our Virginia members about the cost of VOSH compliance.

**16VAC-25-73 is clearly written and easily understandable.**

VOSH has done, and is doing, a commendable job of educating stakeholders about 16VAC-25-73. Fundamentally, basing the regulation closely on ANSI Z133.1-2006 and adopting the definitions from that consensus standard insured the regulation was written in the vernacular of the industry it regulated.

VOSH's phased-in enforcement, its outreach and its local emphasis programs in support of the new regulation insured that affected parties received ample information on the new regulation.

Finally, the resources for this standard available on VOSH's web site, including a Spanish language version of the regulation, provide employers with ready access to everything they need to know to be in compliance with the regulation.

In summary, we believe the entire process VOSH used to bring this regulation forward – from the involvement of stakeholders, through the adoption of a consensus standard and culminating in its phased-in enforcement and outreach – was exemplary.

At some point 16VAC-25-73 will need to be reviewed and updated to remain current with changing equipment and practices, but we do not believe it is at the point of requiring revision yet. As you are probably aware, ANSI Z133 is revised about every five to six years. The current revision was published in 2012, and the next one is due to be published in 2017. We simply encourage VOSH to stay current on changes in the Z133 Standard.

Respectfully,

A handwritten signature in black ink, appearing to read "Mark Garvin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mark Garvin, President & CEO  
Tree Care Industry Association