



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

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REVISED AGENDA

SAFETY AND HEALTH CODES

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

Thursday, November 8, 2018

10:00 a.m.

1. Call to Order
2. Approval of Agenda
3. Approval of Minutes for Board Meeting of June 14, 2018
4. Election of Officers
5. Opportunity for the Public to Address the Board on the issues pending before the Board today, as well as any other topics that may be of concern to the Board and within its scope of authority.

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

6. **Old Business**

None

7. **New Business**

- a) Revising Beryllium Standard for General Industry, §1910.1024; Direct Final Rule (DFR); and Confirmation of Effective Date

Presenter – Ron Graham

- b) Occupational Exposure to Beryllium in General Industry, §1910.1024 (o)(2); Final Rule; Limited Extension of Select Compliance Dates

Presenter – Ron Graham

- c) Amendment to the Cotton Dust Standard for General Industry, §1910.1043 – CFR Correction

Presenter – Ron Graham

- d) Amendment to the Flammable Liquids Standard for General Industry, §1910.106 – CFR Correction

Presenter – Ron Graham

- e) Report of Periodic Review of Certain Existing Regulations, Departmental Review and Findings

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

Presenter – Holly Raney

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
PUBLIC HEARING AND MEETING MINUTES
THURSDAY, June 14, 2018

BOARD MEMBERS PRESENT: Mr. John Fulton
Dr. Caroline "Carrie" Holsinger
Ms. Anna Jolly
Mr. Courtney Malveaux
Mr. David Martinez, Vice Chair
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez
Mr. Chuck Stiff

BOARD MEMBERS ABSENT: Mr. Jerome Brooks
Mr. Lou Cernak, Jr.
Mr. Travis Parsons, Chair
Mr. Tommy Thurston

STAFF PRESENT: Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, OPP & OWP
Mr. Ron Graham, Director, VOSH Health Compliance
Mr. Ed Hilton, Director, Boiler Safety Compliance Management
Ms. Jennifer Rose, Director, VOSH Safety Compliance
Ms. Diane Duell, Director, Legal Support
Ms. Holly Raney, Regulatory Coordinator
Mr. John Crisanti, Manager, Office of Policy and Planning
Ms. Regina Cobb, Senior Management Analyst
Ms. Deonna Hargrove, Richmond Regional Health Director
Mr. Eric Miller, CSHO Apprentice
Ms. Mariah Gardner, Compliance Safety and Health Officer
Mr. Kevin Foster, IH Compliance Officer Apprentice
Mr. John McGuinness, Summer Intern
Mr. Wade Williams

OTHERS PRESENT: Ms. Beverly Crandell, Safety Program Coordinator, Tidewater
Community College
Joshua Laws, Esq., Assistant Attorney General, OAG
Mr. Robert R. Payne
Mr. Johnny D. Nugent, DHRM
Mr. Sam Revenson, Armbiz
Mr. Curtis White
Ms. Lisa Wright, Court Reporter, Chandler & Halasz, Stenographic Court
Reporters

ORDERING OF AGENDA

In the absence of Board Chair Travis Parsons, Vice Chair David Martinez called the Public meeting to order at 10:00 a.m. A quorum was present.

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

APPROVAL OF MINUTES

Mr. Martinez asked the Board for a motion to approve the Minutes from the November 30, 2017 Board meeting. A motion was made and properly seconded. The Minutes were approved by unanimous voice vote.

PUBLIC COMMENTS

Mr. Martinez opened the floor for comments from the public. Mr. Robert R. Payne of Manassas, VA addressed the Board regarding his Petition to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, 16VAC25-60-120. B. He informed the Board that this was an academic exercise, and he was unaware that VOSH had regulations regarding temporary and permanent variances.

Mr. Payne introduced himself as a graduate student at the University of Alabama, Birmingham, School of Engineering, in advanced safety, engineering and management, and a private citizen. He thanked Mr. Withrow for responding to his petition. He informed the Board that, on his job he encounters situations where they use equipment, but the owner's manuals say you have to do things a certain way. He said there was no way to work around the manufacturer without either getting rid of the piece of equipment or not using it. He stated that he appreciates knowing now that there is a way to possibly deal with the need to adjust a manufacturer's requirements and it is through the State's variance process.

Mr. John Crisanti, Manager, Office of Policy and Planning, welcomed to the Board Dr. Caroline Holsinger as the Representative for Dr. Marissa Levine, Commissioner of the Virginia Health Department.

OLD BUSINESS

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

Mr. Jay Withrow, Director, Legal Support, VPP, ORA, OPP and OWP, for the Department of Labor and Industry, began by explaining that this agenda item is just a briefing package and no action is being requested of the Board. He reminded the Board that, at the November 30, 2017 Board meeting, an "indefinite" delay of enforcement of the Beryllium Standard for Construction and Shipyards by OSHA was presented to the Board. He explained that on June 27, 2017, OSHA issued a proposed rule to make changes to the Beryllium Standard for Shipyards and Construction (§§1915.1024 and 1926.1124) that would remove the "ancillary" provisions from the standards, leaving only the new PELs and STELs in place. He further explained that VOSH does not have jurisdiction over private sector workers in Maritime/Shipyards, but it does have jurisdiction over state and local government workers in those

employment sectors. He added that the Department is unaware of any such covered employees in Virginia that would be covered by the Beryllium Standard for Shipyards. As such, Mr. Withrow informed the Board that the main focus of the briefing package was to address employee exposure to beryllium in the construction industry.

Mr. Withrow stated that, at the November 30, 2017 meeting, the Board decided not to adopt OSHA's "indefinite" delay of enforcement, but stayed enforcement of the regulation until August 1, 2018, to give the Department the opportunity to research the following issues:

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

Mr. Withrow responded that the short answer is "no". He cited as current guidance, the VOSH Administrative Regulations on OSHA administrative stays, which can be found in §16VAC25-60-180. Response to judicial action. He stated that VOSH federal identical regulations are adopted under the authority of Va. Code §2.3-4006.A.4.c. Mr. Withrow added that for Virginia to maintain its State Plan for occupational safety and health, it is required to be "at least as effective as" OSHA, and specifically, in regard to the adoption of safety and health standards, he referred to §18(c)(2) of the OSH Act of 1970 (29 USC 667(c)(2)).

He informed the Board that the Department "informally" reviewed the language in §18(c)(2) of the OSH Act of 1970 (29 USC 667(c)(2)) with the Office of the Attorney General and both parties agreed that the proper reading of §18(c)(2) and Va. Code §2.2-4006.A.4.c, as they apply to OSHA's indefinite delay/administrative stay of enforcement, is that any Board failure to adopt an administrative stay would mean that Virginia's Beryllium Standards in Construction and Shipyards no longer meets the APA exemption criteria in §2.2-4006.A.4.c., and could only become legally effective if the standards went through the full notice, comment and adoption requirements of the APA. In other words, once OSHA issues an administrative stay for a standard that makes the standard temporarily unenforceable, Virginia's federal identical counterpart standard is "no longer necessary to meet the requirements of federal law or regulation" under Va. Code §2.2-4006.A.4.c. He further explained that for this or any other administrative stay issued by OSHA, contrary to the current wording of §16VAC25-60-180 of the VOSH Administrative Regulations, the administratively stayed federal standard cannot be enforced by the Commissioner, even if the federal stay has not been reviewed or adopted by the Board.

He stated that the Department will propose at a future Board meeting a Notice of Intended Regulatory Action (NOIRA) to amend §16VAC25-60-180 to address this issue. In the interim, the Board will still be asked to review and adopt OSHA administrative stays and the lifting of administrative stays. The Board will continue to be able to use its discretion regarding the dates for adoption and lifting of such stays.

2. If the answer to Question # 1 is "no", would the Department research whether there was sufficient evidence in the OSHA administrative record that would enable the Board to use the OSHA record to support a full regulatory rulemaking in accordance with the Virginia Administrative Process Act?

Mr. Withrow stated that the short answer is "maybe".

He stated that Va. Code §40.1-22(5) contains the requirements that must be met by the Board in setting VOSH regulations. He informed the Board that a majority of the information needed to support a regulatory rulemaking for a unique Virginia Beryllium Standard for Shipyards (state and local

government only) and Construction is contained in the preamble to the original standards in the *Federal Register*, 82 FR 2470; and the preamble to the propose regulation that would eliminate the “ancillary” provisions from §§1915.1024 and 1926.1124. He added that these documents also allow for calculation of the number of construction employees likely impacted in Virginia, the average annualized cost per employee for compliance and the average annualized benefit per employee achieved with full compliance. He explained how Virginia derives its figures based on OSHA’s figures that appear in a standard’s preamble.

He also mentioned the primary difficulties in gathering data and information that will fully support a Virginia unique regulation.

In discussing Virginia unique rulemaking for standards, Mr. Withrow advised that the Board delay consideration of a unique regulation until it has the benefit of OSHA’ final conclusions on the central issue of retaining the new PELs and STELs and eliminating the “ancillary” provisions.

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

Mr. Jay Withrow, requested that the Board consider for adoption federal OSHA’s stay of compliance dates for the Occupational Exposure to Beryllium Standard for General Industry, §1910.1024.

Mr. Withrow mentioned two memoranda from Director Thomas Galassi of OSHA’s Directorate of Enforcement Programs. In the March 2, 2018 memorandum, OSHA stayed the compliance date of March 12, 2018 for 60 days until May 11, 2018, for all sections of the Beryllium Standard for General Industry, §1910.1024; however, the compliance date for paragraphs (i)(2) for change rooms, (i)(3) for showers, and (f) for engineering controls remained unchanged.

In Mr. Galassi’s second memorandum (May 2, 2018), the compliance date for all sections of the Beryllium Standard for General Industry, §1910.1024, was stayed until June 25, 2018, except for the following paragraphs: (c), Permissible exposure limits; (d), exposure assessment; (g), respiratory protection; (k), medical surveillance; and (l), medical removal. Compliance dates for paragraphs (i)(2), (i)(3), and (f) of §1910.1024 remained unchanged. The proposed compliance date for (c), (d), (g), (k), and (l) of §1910.1024, and the stay of the remaining paragraphs of §1910.1024 is September 15, 2018.

Mr. Withrow also informed the Board that the compliance date for certain other ancillary provisions could be stayed until December 12, 2018.

Mr. Withrow stated that these actions to stay compliance dates are to accommodate settlement agreements reached by OSHA with litigants challenging the standard and allow time to complete other ongoing rulemaking proceedings. He added that the Beryllium Standard for General Industry went into effect nationally on May 20, 2017, following stays of the original federal effective date of March 10, 2017, and became effective on May 15, 2017 in Virginia; however, compliance in Virginia was not scheduled to begin until March 12, 2018.

With respect to impact of this standard, Mr. Withrow stated that the stay of compliance dates will not have a negative impact on employers and will provide them with additional time in which to comply with certain provisions (paragraphs (e), (f), (h), (i), (j), (m), and (n) which are stayed until June 25, 2018. Mr. Withrow stated that the soon-to-be effective provisions will immediately provide substantial new

protections for employees in the areas of significantly lower permissible exposure limits, exposure assessment, respiratory protection, medical surveillance and medical removal. He added that the compliance date for most remaining portions of the standard is stayed until June 25, 2018, and certain of the ancillary provisions could be stayed until December 12, 2018.

He stated that no impact on the Department is anticipated from the adoption of the stay of compliance date. The stay will provide additional time for internal training on inspection procedures.

Mr. Withrow concluded by recommending, on behalf of the Department, that the Board adopt federal OSHA's stay of compliance dates for the Occupational Exposure to Beryllium for General Industry, 1910.1024, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

He also recommended that the Board adopt a compliance date for §§1910.1024(c), (d), (g), (k), and (l), as summarized in the briefing package in section I. Action Requested, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

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

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

Mr. Withrow requested that the Board consider for adoption federal OSHA's indefinite stay of compliance dates for the "ancillary" provisions of the Occupational Exposure to Beryllium for the Shipyard Industry, §1915.1024, and the Construction Industry, §1926.1124. He informed the Board that on March 2, 2018, a memorandum from Director Thomas Galassi of the OSHA Directorate of Enforcement Programs, set a compliance date of May 11, 2018, for §§1915.1024(c) and 1926.1124(c), the new permissible exposure limits (PEL) and short term exposure limits (STEL) for the Beryllium Standards for Shipyards and Construction, respectively.

He stated that the proposed compliance date for §§1915.1024(c) and 1926.1124(c) is September 15, 2018. Also, he stated that the proposed effective date for the indefinite stay of the remaining "ancillary" provisions of §§1915.1024 and 1926.1124 is August 1, 2018.

Mr. Withrow informed the Board that the new Beryllium standards went into effect nationally on May 20, 2017, following the stays of the original federal effective date of March 10, 2017, and became effective on May 15, 2017 in Virginia. He added that compliance obligations both nationally and in Virginia were not scheduled to begin until March 12, 2018.

He stated that OSHA decided not to enforce the "ancillary" provisions of the January 9, 2017 Shipyard and Construction Standards, staying them indefinitely, and has proposed a new rulemaking for the Shipyard and Construction Standards that would remove the "ancillary" provisions of those standards, but maintain the new PELs and STELs. The indefinite stay of the compliance dates for those ancillary provisions remain in place while the proposed rulemaking is underway. OSHA began enforcing the new PELs and STELs for Beryllium in Shipyards and Construction on May 11, 2018.

Mr. Withrow reviewed the proposed ancillary provisions that OSHA has proposed to remove that appeared in the January 9, 2017 final rule. He also listed other shipyard and construction standards that can be used to provide protections to employees that are comparable to the ancillary provisions that OSHA proposes to remove from these standards.

Mr. Withrow informed the Board that the indefinite stay of the “ancillary” provisions of the Shipyard and Construction Standards provides OSHA with additional time for further review of its proposed rule and public comment period that are currently underway.

He stated that the indefinite stay of compliance dates for the “ancillary” provisions of the Shipyard and Construction standards will not have a negative impact on employers, employees, or the Department. VOSH is unaware of any state and local government employers or employees that are covered by the Beryllium Standard for Shipyards at this time. Construction employers will have to comply with current VOSH general standards, e.g., ventilation, PPE, respiratory protection, hazard communication, etc. Construction employees will immediately benefit from the enforcement of the new lower PELs and STELs for Beryllium in Shipyards and Construction, as they will provide substantial protections for exposed employees from the significant health effects of chronic beryllium disease and lung cancer.

Mr. Withrow listed current construction standards that OSHA and VOSH have identified that can be used to address many of the issues for which the “ancillary” provisions were designed.

Mr. Withrow concluded by recommending, on behalf of the Department, that the Board adopt federal OSHA’s indefinite stay of compliance dates for the “ancillary” provisions of the Occupational Exposure to Beryllium for the Shipyards Industry, Part 1915, and the Construction Industry, Part 1926, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

He added that the Department also recommends that the Board adopt a compliance date for §§1915.1024(c) and 1926.1124(c), as summarized in the briefing package in Section I. Action Requested, and as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

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

NEW BUSINESS

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

Mr. Withrow began his summarization of the Petition to Amend Process by informing the Board that on December 8, 2017, Robert R. Payne, University of Alabama at Birmingham, had submitted to the Department a petition to amend 16VAC25-60-120.B, pursuant to Va. Code §2.2-4007. He continued by explaining that the Department’s initial response to the petition was filed on the Regulatory Town Hall on December 18, 2017, and was published in the Virginia Register of Regulations on January 8, 2018, with a 21-day comment period, ending on January 28, 2018. No comments were received.

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

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

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

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

Mr. Withrow then summarized the Petitioner’s Rationale for the Proposed Amendment: that an employer operating a process safety management (PSM) work site may be negatively impacted by 16VAC25-60-120.B. since the VOSH regulations do not provide an option for employers to vary from the requirements of 16VAC25-60-120.B.

Mr. Withrow also explained the Department’s recommendation and rationale for the Board’s denial of the petition by stating that the VOSH Administrative Regulations Manual describes procedures for employers to seek variances from VOSH regulations. He continued by explaining that the variance procedures provide employers the opportunity to apply to the Commissioner for either an interim order and/or a permanent variance from an existing VOSH regulation (see VOSH ARM §§190-220).

He also explained that Va. Code §40.1-22(5) provides that, in deciding whether to adopt or amend a regulation, the Safety and Health Codes Board shall take into consideration “experiences gained under this and other health and safety laws.” Mr. Withrow continued by stating that based on the “experiences gained” under §1910.119 and 16VAC25-60-120.B, it does not appear that a significant enough number of PSM employers/employees are impacted negatively in Virginia by 16VAC25-60-120.B to warrant the undertaking of a potentially costly and time consuming regulatory amendment process. He added that the Department would reconsider its recommendation on this petition to amend if the Department ultimately receives a significant number of variance requests on this issue.

On behalf of the Department, Mr. Withrow recommended that the Board deny the petition to amend 16VAC25-60-120.B for the reasons stated in the presentation before the Board and in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act, §2.2-4000, *et seq.* He added that it is further recommended that the Board direct the Department to draft a written decision to the Petitioner to be signed by the Board Chair within 14 days of this meeting.

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

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

Mr. Withrow, on behalf of the VOSH Program, requested that the Board consider for adoption federal OSHA's Final Rule on the Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness, as published on May 3, 2017 in 82 FR 20548.

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

He explained that the most recent amendments generally restored the affected recordkeeping regulations to the pre-clarification rule, i.e., prior to the December 19, 2016 final rule, which was effective nationally on January 18, 2017, and in Virginia on May 15, 2017. This amendment removed any references to an employer's continuing obligation to make and maintain an accurate record of each recordable injury and illness. The sections affected were: 1904.0, Purpose; 1904.4, Recording criteria; 1904.29, Forms; 1904.32, Annual Summary, 1904.33, Retention and updating; 1904.34, Change in business ownership; 1904.35, Employee involvement; heading for Subpart E; and 1904.40, Providing records to government representatives.

Mr. Withrow informed the Board that, although there were many revisions, the new rule did retain the requirement for employers to continuously update the OSHA 300 Log throughout the five year storage period the Board previously adopted 16VAC25-60-260.A.2, VOSH Administrative Regulation, effective September 21, 2006, and that the changes to the federal regulation as a result of the Congressional action have no impact on Virginia's regulation at 16VAC25-60-260.A.2, which was in existence prior to the December 19, 2016, recordkeeping rule changes.

Mr. Withrow explained that the purpose of these amendments was to restore the pre-December 19, 2016 Recordkeeping rules. He stated that no new or additional impact on employers, employees or the Department is anticipated. He added that, under this new final rule, an employer's obligations remain the same as they had been prior to the December 19, 2016 clarifying amendment. He stated that the changes to the federal regulation, resulting from the Congressional action, have no impact on Virginia's regulation at 16VAC25-60-260.A.2, which existed prior to the December 19, 2016 recordkeeping rule changes. He noted that there is concern that employers might under-report injuries and illnesses which would, in turn, undermine safety and health and put workers in danger.

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

A motion to accept the Department's recommendation was made and properly accepted. The motion was approved by voice vote, with Mr. Malveaux voting nay.

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

Mr. Ron Graham, Director of Occupational Health Compliance for the Department, requested the Board to consider for adoption federal OSHA's revision to the existing Final Rule for the Standard for Vinyl Chloride in General Industry, as published in 32 FR 11413 on March 15, 2018.

Mr. Graham explained that this amendment requires employers to notify affected employees within 15 days of their receipt of vinyl chloride monitoring results and the associated steps being taken to reduce exposures with the permissible exposure limit (PEL). He informed the Board that this amendment reinstates subparagraph (n) of the Standard which was inadvertently deleted in the July 1, 2017 revision of the Federal Register covering OSHA Standards, volume 29 CFR 1910.1000 to End.

With respect to impact, he stated that no impact on employers, employees and the Department is anticipated with the re-adoption of subparagraph (n) of the standard, as compliance with this paragraph has been a requirement since 1993.

Lastly, he added that the actions placed on the employer by subparagraph (n) are both technologically and economically feasible.

On behalf of the Department, Mr. Graham recommended that the Board adopt the Amendment to the Vinyl Chloride Standard for General Industry, §1910.1017, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

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

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

Mr. Graham requested that the Board consider for adoption federal OSHA's revision to the existing Final Rule for the Methylenedianiline Standard for the Construction Industry, as published in 83 FR 15499 on April 11, 2018.

He explained that this action removes subparagraph (o)(8)(ii) of §1926.60 which specifies procedures for employee record retention in the event an employer ceases to do business and there is no successor. He further explained that the purpose of this change is to discontinue the requirement whereby an employer who ceases to do business, and there is no successor to receive and retain the employee records, is required to notify the Director of the National Institute for Occupational Safety and Health (NIOSH), U.S. Department of Health and Human Services, or their designee, at least 90 days prior to disposal and, upon request, transmit them to the NIOSH Director.

Mr. Graham stated that employers would no longer be required to complete the extra step of notifying and forwarding records to NIOSH, but would follow the requirements of §1910.1020(h), nor would employers experience any additional costs. He added that no impact on employees and the Department is anticipated with this corrective action.

He concluded by recommending, on behalf of the Department, that the Board adopt the amendment to the Methylenedianiline Standard for the Construction Industry, §1926.60 – Correction, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018. A motion to accept the Department’s recommendation was made and properly accepted. The motion was approved unanimously by voice vote.

Notice of Periodic Review of Certain Existing Regulations

Ms. Holly Raney, Regulatory Coordinator for the Department of Labor and Industry, requested authorization to proceed with the periodic review process of regulations, pursuant to §2.2-4017 of the *Code of Virginia* and Executive Order 17 (2014). The regulation for review is as follows:

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

Ms. Raney explained that, following the Board’s approval, the periodic review process begins with publication of a Notice of Periodic Review in the Virginia Register, which begins a public comment period of at least 21 days, but not longer than 90 days. She concluded by informing the Board that the Department of Labor and Industry will post a report on the Regulatory Town Hall website indicating whether the regulation would be retained “as is”, repealed or amended.

Ms. Raney concluded by recommended that the Board approve the publication of a Notice of Periodic Review in the Virginia Register for 16VAC25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry.

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

Items of Interest from the Department of Labor and Industry

Commissioner Ray Davenport reminded the Board that he had mentioned at two previous meetings that the Department was unsuccessful in securing funding on the compliance side of the House of Delegates during the last several General Assembly sessions. He informed the Board of the Department’s continuing concern about the 12 unfunded CSHO vacancies on the compliance sided.

Commissioner Davenport mentioned that OSHA commonly uses statistics to show that there is one CSHO for every 59,000 workers nationally and in Virginia, the ration is currently approximately one CSHO per 80,000 workers. He stated that in Virginia, adding the 12 unfunded CSHOs would improve the ratio to one CSHO per 63,100 workers.

He thanked the Board and Mr. Chuck Stiff for their letter addressing the funding issues following the November 2017 meeting. He noted that, due to the timing of late appointments of committee members, it was decided that timing may not have been right to send the letter of support to the money committee members. Commissioner Davenport added that the Department continues to seek the Board’s assistance in securing the needed funding for these positions and welcomes the Board’s support.

Commissioner Davenport informed the Board that year-to-date, VOSH has investigated 20 fatalities and, as of the week ending June 8th, the Department almost doubled where it was last year at this time – 20

vs. 11 this same time in 2017. He added that there was more than a 35% increase in fatal workplace accidents over the previous two years.

He informed the Board that during calendar year 2017, VOSH investigated 34 fatalities. He noted one trend in the recent fatalities was that 10 of the fatalities this year involved struck-by equipment, objects, vehicles or trees. He added that the Department will continue to monitor this and may in the near future design an outreach or press release to stakeholders calling their attention to these hazards.

He closed by thanking each Board member for their commitment to safety and health.

Items of Interest from Members of the Board

There were no items of Interest from Members of the Board.

Meeting Adjournment

There being no further business, a motion was properly made and seconded to adjourn the meeting. The motion was carried unanimously by voice vote. The meeting adjourned at 12:26 p.m.



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For November 8, 2018

**Revising the Beryllium Standard for General Industry, §1910.1024; Direct Final Rule (DFR);
and Confirmation of Effective Date**

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 Direct Final Rule on the Beryllium Standard for General Industry, as published on May 7, 2018 in 83 FR 19936, and federal OSHA's confirmation of the effective date for the Beryllium Standard for General Industry; Direct Final Rule, as published on July 3, 2018 in 83 FR 31045.

The proposed effective date is February 15, 2019.

II. Summary of the Direct Final Rule

On May 7, 2018, federal OSHA published a direct final rule (DFR) that amended the text of the Beryllium standard for General Industry. The DFR applies to general industry processes, operations, and other areas where workers are at risk of exposure to materials containing trace amounts of beryllium, less than 0.1 percent of beryllium by weight. The DFR adjusts the regulatory text of the general industry beryllium standard to clarify OSHA's intent with respect to certain terms in the initial standard, including the following revised definitions:

- Beryllium Work Area (BWA),
- emergency, and
- dermal contact and beryllium contamination

It also clarified OSHA's intent with respect to provisions for disposal and recycling and with respect to provisions that OSHA intends to apply only where skin can be exposed to materials containing at least 0.1% beryllium by weight.

The DFR adjusted the regulatory text of the general industry beryllium standard to clarify that OSHA does not intend for requirements that primarily address dermal contact to apply in

processes, operations, or areas involving only materials containing less than 0.1% beryllium by weight. These clarifications are made through changes to the definition of beryllium work area; the addition of definitions of dermal contact, beryllium-contaminated, and contaminated with beryllium; clarification of certain hygiene provisions with respect to beryllium contamination; and the clarifications to provisions for disposal and recycling.

In addition, because under these changes it is possible to have a regulated area that is not a beryllium work area, this DFR makes changes to certain housekeeping provisions to ensure they apply in all regulated areas.

Finally, this DFR also includes a change to the definition of “emergency”, adding detail to the definition so as to clarify the nature of the circumstances OSHA intends to be considered an “emergency” for the purposes of the standard.

In an effort to clarify OSHA’s intent, the DFR clarifies the following definitions in the beryllium standard for general industry:

a) **“Beryllium work area”** means any work area:

- 1) containing a process or operation that can release beryllium and that involves materials that contain at least 0.1% beryllium by weight; and
- 2) where employees are, or can reasonably be expected to be, exposed to airborne beryllium at any level or where there is the potential for dermal contact with beryllium.

The DFR’s clarification to the definition of “beryllium work area” means that it is possible for a work area to be a regulated area, but not a beryllium work area. This would occur when processes that involve only materials containing less than 0.1% beryllium by weight create airborne beryllium exposures at or above the TWA PEL or STEL.

Housekeeping (paragraph (j)) requirements continue to apply in regulated areas, even if the processes or operations in these areas involve materials with only trace beryllium. Operations or processes involving trace beryllium materials must generate extremely high dust levels in order to exceed the TWA PEL or STEL. Following the housekeeping methods required by paragraph (j) will help to protect workers against resuspension of surface beryllium accumulations from extremely dusty operations and limit workers’ airborne exposure to beryllium.

This DFR also rearranges the regulatory text of paragraph (f)(2) to make clear that the hierarchy of controls will continue to apply in regulated areas that are not beryllium work areas.

b) **“Emergency”** means any occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment, which may or does result in an uncontrolled and unintended release of airborne beryllium that presents a significant hazard. (1910.1024 (b))

This change clarifies the circumstances under which the provisions associated with emergencies should apply, including the requirements that employers provide and ensure employee use of respirators and that employers provide medical surveillance to employees exposed in an emergency.

c) **“Dermal Contact”** with beryllium means skin exposure to:

1) soluble beryllium compounds containing beryllium in concentrations greater than or equal to 0.1 percent by weight;

2) solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight; or

3) dust, fumes, or mists containing beryllium in concentrations greater than or equal to 0.1 percent by weight.

The definition clarifies that paragraph (h)(1)(ii), which requires an employer to provide and ensure the use of personal protective clothing and equipment where there is a reasonable expectation of dermal contact with beryllium, applies only where contact may occur with materials containing at least 0.1% beryllium by weight.

This definition also clarifies that the requirements related to dermal contact in the written exposure control plan, washing facilities, medical examinations, and training provisions only apply where contact may occur with materials containing at least 0.1% beryllium by weight.

d) **“Beryllium Contamination”** means contaminated with dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight. (See §1910.1024 (j)(2)(iii), (j)(2)(iv))

The definition of “Beryllium Contamination” further clarifies OSHA’s intent that the standard’s requirements, aimed at reducing the effect of dermal contact with beryllium, should not apply to areas where there are no processes or operations involving materials containing at least 0.1% beryllium by weight.

The DFR adds the terms to certain provisions in the standard’s requirements for hygiene areas and disposal and recycling. (19939) The affected provisions, which apply where clothing, hair, skin, or work surfaces are beryllium-contaminated, do not apply where the contaminating material contains less than 0.1% beryllium by weight. (See paragraphs (h)(2)(i) – (iv))

This DFR also added the term, “beryllium-contaminated” to certain requirements pertaining to eating and drinking areas to clarify that hygiene requirements in these areas apply only where materials containing more than 0.1% beryllium by weight may contaminate such areas.

This DFR also clarifies OSHA’s intent with respect to provisions for disposal and recycling and with respect to provisions that OSHA intends to apply only where skin can be exposed to materials containing at least 0.1% beryllium by weight. (1910.1024 (j)(3))

This DFR limits previous requirements for disposal of materials contaminated by beryllium to “materials that contain beryllium in concentrations of 0.1 percent by weight or more or are contaminated with beryllium”.

This DFR does not affect the construction and shipyard standards which will be addressed in a separate rulemaking.

In the May 7, 2018, Beryllium Standard for General Industry, DFR, federal OSHA stated that the DFR would become effective on July 6, 2018, unless one or more significant adverse comments were submitted by June 6, 2018 (83 FR 19936). Since federal OSHA did not receive significant adverse comments on its DFR, on July 3, 2018, federal OSHA confirmed the effective date of July 6, 2018 for its General Industry Beryllium DFR (83 FR 31045) for jurisdictions under federal OSHA control.

III. Use of Direct Final Rulemaking

In direct final rulemaking, OSHA, like other federal agencies, will publish a direct final rule (DFR) in the *Federal Register* with a statement that the rule will go into effect unless significant adverse comment is received within a specified period of time. The agency may publish an identical concurrent Notice of Preliminary Rulemaking (NPRM), which is what federal OSHA has done with the Beryllium DFR.

The comment period for the NPRM runs concurrently with that of the DFR. OSHA will treat comments received on the companion NPRM as comments also regarding the DFR. Also, OSHA will consider a significant adverse comment, submitted to the DFR, as a comment to the companion NPRM.

A significant adverse comment for purposes of this DFR is one that explains why the amendments to OSHA’s beryllium standard would be inappropriate. In determining whether a comment necessitates withdrawal of the DFR, OSHA will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process. OSHA will not consider a comment recommending an additional amendment to this rule to be a significant adverse comment unless the comment states why the DFR would be ineffective without the addition.

If OSHA had received a significant adverse comment on either the DFR or the NPRM, it would have withdrawn the DFR and proceeded with the companion NPRM. If the agency receives no significant adverse comment in response to the DFR, as was the case here, the rule goes into effect.

IV. Basis, Purpose and Impact of the Amendment

A. Basis

On January 9, 2017, federal OSHA adopted comprehensive standards addressing exposure to beryllium and beryllium compounds in general industry, construction, and shipyards. (82 FR 2470) OSHA concluded that employees exposed to beryllium and beryllium compounds at the preceding permissible exposure limits (PELs) were at

significant risk of material impairment of health, specifically chronic beryllium disease and lung cancer.

OSHA concluded that the new 8-hour time-weighted average (TWA) PEL of $0.2 \mu\text{g}/\text{m}^3$ reduced this significant risk to the maximum extent feasible. OSHA issued the final rule for three separate standards – general industry, shipyards, and construction. In addition to the revised PEL, the final rule established a new short-term exposure limit (STEL) of $2.0 \mu\text{g}/\text{m}^3$ over a 15-minute sampling period and an action level of $0.1 \mu\text{g}/\text{m}^3$ as an 8-hour TWA, along with a number of ancillary provisions intended to provide additional protections to employees, such as requirements for exposure assessment, methods for controlling exposure, respiratory protection, personal protective clothing and equipment, housekeeping, medical surveillance, hazard communication, and recordkeeping similar to those found in other OSHA health standards.

During the last rulemaking, OSHA addressed the issue of trace amounts of beryllium. In its notice of proposed rulemaking, OSHA proposed to exempt from its beryllium standard materials containing less than 0.1% beryllium by weight on the premise that workers in exempted industries are not exposed at levels of concern. However, OSHA noted evidence of high airborne exposures in some of those industries, in particular the primary aluminum production and coal-fired power generation industries.

OSHA, therefore, proposed for comment several regulatory alternatives, including an alternative that would “expand the scope of the proposed standard to also include all operations in general industry where beryllium exists only as a trace contaminant.” (80 FR 47730) After receiving comment, OSHA adopted in the final rule an alternative limiting the exemption for materials containing less than 0.1% beryllium by weight to where the employer has objective data demonstrating the employee exposure to airborne beryllium will remain below the action level (AL) of $0.1 \mu\text{g}/\text{m}^3$, measured as an 8-hour TWA, under any foreseeable conditions. In so doing, OSHA noted that the AL exception ensured that workers with airborne exposures of concern were covered by the standard.

As is evidenced in the regulatory history, OSHA intended to protect employees working with trace beryllium only when it caused airborne exposures of concern. OSHA did not intend for provisions aimed at protecting workers from the effects of dermal contact to apply in the case of materials containing only trace amounts of beryllium. Since the publication of the final rule, however, stakeholders have suggested that an unintended consequence of the final rule’s revision of the trace exemption is that provisions designed to protect workers from dermal contact with beryllium-contaminated material could be read as applying to materials with only trace amounts of beryllium.

Following publication of the 2017 rule, stakeholders informed OSHA that the final rule’s definition of “beryllium work area” could be unintentionally read as applying to materials with only trace amounts of beryllium. OSHA agreed that this was not the intention of the 2017 rule.

After several delays, OSHA determined that the subject of this rulemaking was suitable for direct final rulemaking because this amendment to the beryllium standard is clarifying in nature and does not adversely impact the safety or health of employees;

and the revisions did not impose any new costs or duties. For these reasons, OSHA did not anticipate objections from the public to this rulemaking.

On March 2, 2018, by memorandum from Director Thomas Galassi of the OSHA Directorate of Enforcement Programs, the compliance date of March 12, 2018 was stayed for 60 days to May 11, 2018, for all sections of the Beryllium Standard for General Industry, §1910.1024, except for paragraphs (i)(2) for change rooms, (i)(3) for showers and (f) for engineering controls. The compliance dates for these paragraphs remained unchanged – March 11, 2019 for §1910.1024 (i)(2), change rooms and (i)(3), showers; and March 10, 2010 for §1910.1024(f), engineering controls.

On May 2, 2018, again by memorandum from Director Galassi, the compliance date for all sections of the Beryllium Standard for General Industry, §1910.1024, was stayed until June 25, 2018, except for the following paragraphs:

1910.1024(c), permissible exposure limits

1910.1024(d), exposure assessment

1910.1024(g), respiratory protection

1910.1024(k), medical surveillance

1910.1024(l), medical removal

The compliance dates for the following paragraphs remained the same:

§1910.1024 (i)(2), change rooms and (i)(3), showers – March 11, 2019; and §1910.1024(f), engineering controls – March 10, 2020.

At its meeting on June 14, 2018, the Safety and Health Codes Board adopted the following compliance dates: September 15, 2018 for §1910.1024 (c), (d), (g), (k), and (l), listed above, as well as the stay of the remaining paragraphs of §1910.1024. The compliance dates for §1910.1024 (i)(2), (i)(3) and (f) remained unchanged.

B. Purpose

In this DFR, federal OSHA adopted clarifying amendments to address the application of the standard to materials containing trace amounts of beryllium. This DFR amends the text of the beryllium standard for general industry to clarify OSHA's intent with respect to certain terms in the standard, including the definitions of "Beryllium Work Area" ("BWA") and "emergency", and the meaning of the terms "dermal contact" and "beryllium contamination".

This DFR amends the 2017 general industry beryllium standard to clarify its applicability to materials containing trace amounts of beryllium and to make related changes.

C. Impact on Employers

The amendment to the standard is clarifying in nature and does not impose any new costs or duties on employers.

Federal OSHA certifies that this DFR would not have a significant impact on a substantial number of small entities.

D. Impact on Employees

The amendment to the standard is clarifying in nature and does not adversely impact the safety or health of employees. Because OSHA previously determined that the beryllium standard substantially reduces a significant risk, it is unnecessary for the Agency to make additional findings on risk for the minor changes and clarifications being made to the standard.

E. Impact on the Department of Labor and Industry

No additional impact on the Department is anticipated.

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

F. Benefits

This DFR clarifies aspects of the 2017 general industry beryllium standard to address unintended consequences regarding the applicability of provisions designed to protect workers from dermal contact with beryllium-containing materials and trace amounts of beryllium.

According to federal OSHA, the revisions in this DFR, which are focused on dermal contact, do not have any impact on OSHA's previous benefit estimates. This DFR clarifies that OSHA did not, and does not, intend to apply the provisions aimed at protecting workers from the effects of dermal contact to industries that only work with beryllium in trace amounts where there is limited or no airborne exposure.

G. Costs and Cost Savings

The 2017 final economic analysis (FEA) supporting OSHA's Beryllium standard made no distinction between trace and non-trace beryllium when determining the cost of requirements triggered by dermal contact with beryllium. OSHA has determined that this was an oversight. The cost savings generated by the 2017 FEA are a result of correcting these oversights.

According to OSHA, the revisions in this DFR do not impose any new costs for employers. OSHA annualized the present value of net cost savings over ten years and the result is an annualized net cost savings of \$0.36 million per year at discount rate of three percent per year for 10 years, or \$0.37 million per year at a discount rate of seven percent per year for 10 years. In Virginia, the estimated net cost savings over ten years translate into approximately \$9,700 per year and \$9,900 per year, respectively.

OSHA estimates that this DFR will result in a net cost savings for employers in primary aluminum production and coal-fired utilities. These are the only industries in General Industry covered by the 2017 Beryllium Final Rule that OSHA identified as having

operations involving materials containing only trace beryllium, less than 0.1% beryllium by weight. The cost savings in this DFR reflect savings only for provisions covered by the changes in this DFR. OSHA excluded certain familiarization costs, which had been included in the 2017 Beryllium standard, because those costs have already been incurred by affected employers.

OSHA estimated no cost savings for the permissible exposure limits (PEL), respiratory protection, exposure assessment, regulated areas, medical surveillance, medical removal protection, written exposure control plan, or training provisions because the DFR made no changes of substance to those provisions.

H. **Technological and Economic Feasibility**

OSHA determined that these minor changes and clarifications are technologically and economically feasible because this DFR does not impose any new requirements or costs and has the net impact of removing a small amount of cost.

Contact Person

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Director, Occupational Health Compliance
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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the Direct Final Rule on Revising the Beryllium Standard for General Industry, §1910.1024, and the Confirmation of the Effective date of the Direct Final Rule, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2019.

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

**Revising the Beryllium Standard for General Industry, §1910.1024; Direct Final Rule; and
Confirmation of Effective Date of the Direct Final Rule**

As Adopted by the
Safety and Health Codes Board

Date: _____



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16VAC25-90-1910.1024, Beryllium, §1910.1024

When the regulations, as set forth in the Direct Final Rule on Revising the Beryllium Standard for General Industry, § 1910.1024, and the Confirmation of the Effective date of the Direct Final Rule, 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

July 6, 2018

February 15, 2019

**PART 1910—OCCUPATIONAL SAFETY
AND HEALTH STANDARDS**

**Subpart Z—Toxic and Hazardous
Substances**

- 2. Amend § 1910.1024 as follows:

- a. Revise the definition of "Beryllium work area" in paragraph (b);
- b. Add definitions for "Contaminated with beryllium and beryllium-contaminated" and "Dermal contact with beryllium" in alphabetical order in paragraph (b);
- c. Revise the definition of "Emergency" in paragraph (b);
- d. Revise paragraph (f)(2);
- e. Revise paragraph (h)(3)(ii);
- f. Revise paragraphs (i)(3)(i)(B), (i)(3)(ii)(B), (i)(4)(i) and (ii); and
- g. Revise paragraphs (j)(1)(i), (j)(2)(i) and (ii), and (j)(3).

The revisions and additions read as follows:

§ 1910.1024 Beryllium.

(b) * * *
Beryllium work area means any work area:

- (1) Containing a process or operation that can release beryllium and that involves material that contains at least 0.1 percent beryllium by weight; and
- (ii) Where employees are, or can reasonably be expected to be, exposed to airborne beryllium at any level or where there is the potential for dermal contact with beryllium.

Contaminated with beryllium and beryllium-contaminated mean contaminated with dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight.

Dermal contact with beryllium means skin exposure to:

- (i) Soluble beryllium compounds containing beryllium in concentrations greater than or equal to 0.1 percent by weight;
- (ii) Solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight; or
- (iii) Dust, fumes, or mists containing beryllium in concentrations greater than or equal to 0.1 percent by weight.

Emergency means any occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment, which may or does result in an uncontrolled and unintended release of airborne beryllium that presents a significant hazard.

- (f) * * *
(2) *Engineering and work practice controls.* (i) The employer must use engineering and work practice controls to reduce and maintain employee airborne exposure to beryllium to or below the PEL and STEL, unless the

employer can demonstrate that such controls are not feasible. Wherever the employer demonstrates that it is not feasible to reduce airborne exposure to or below the PELs with engineering and work practice controls, the employer must implement and maintain engineering and work practice controls to reduce airborne exposure to the lowest levels feasible and supplement those controls using respiratory protection in accordance with paragraph (g) of this standard.

(ii) For each operation in a beryllium work area that releases airborne beryllium, the employer must ensure that at least one of the following is in place to reduce airborne exposure:

- (A) Material and/or process substitution;
- (B) Isolation, such as ventilated partial or full enclosures;
- (C) Local exhaust ventilation, such as at the points of operation, material handling, and transfer; or
- (D) Process control, such as wet methods and automation.

(iii) An employer is exempt from using the controls listed in paragraph (f)(2)(ii) of this standard to the extent that:

- (A) The employer can establish that such controls are not feasible; or
- (B) The employer can demonstrate that airborne exposure is below the action level, using no fewer than two representative personal breathing zone samples taken at least 7 days apart, for each affected operation.

- (h) * * *
(3) * * *
(ii) The employer must ensure that beryllium is not removed from beryllium-contaminated personal protective clothing and equipment by blowing, shaking, or any other means that disperses beryllium into the air.

- (i) * * *
(3) * * *
(i) * * *
(B) Employee's hair or body parts other than hands, face, and neck can reasonably be expected to become contaminated with beryllium.
- (ii) * * *
(B) The employee's hair or body parts other than hands, face, and neck could reasonably have become contaminated with beryllium.
- (4) * * *

- (i) Beryllium-contaminated surfaces in eating and drinking areas are as free as practicable of beryllium;
- (ii) No employees enter any eating or drinking area with beryllium-contaminated personal protective

clothing or equipment unless, prior to entry, surface beryllium has been removed from the clothing or equipment by methods that do not disperse beryllium into the air or onto an employee's body; and

- (j) * * *
(1) * * *
(i) The employer must maintain all surfaces in beryllium work areas and regulated areas as free as practicable of beryllium and in accordance with the written exposure control plan required under paragraph (f)(1) and the cleaning methods required under paragraph (j)(2) of this standard; and

(2) * * *
(i) The employer must ensure that surfaces in beryllium work areas and regulated areas are cleaned by HEPA-filtered vacuuming or other methods that minimize the likelihood and level of airborne exposure.

(ii) The employer must not allow dry sweeping or brushing for cleaning surfaces in beryllium work areas or regulated areas unless HEPA-filtered vacuuming or other methods that minimize the likelihood and level of airborne exposure are not safe or effective.

(3) *Disposal and recycling.* For materials that contain beryllium in concentrations of 0.1 percent by weight or more or are contaminated with beryllium, the employer must ensure that:

- (i) Materials designated for disposal are disposed of in sealed, impermeable enclosures, such as bags or containers, that are labeled in accordance with paragraph (m)(3) of this standard; and
- (ii) Materials designated for recycling are cleaned to be as free as practicable of surface beryllium contamination and labeled in accordance with paragraph (m)(3) of this standard, or place in sealed, impermeable enclosures, such as bags or containers, that are labeled in accordance with paragraph (m)(3) of this standard.

DEPARTMENT OF LABOR**Occupational Safety and Health
Administration****29 CFR Part 1910**

[Docket No. OSHA-2018-0003]

RIN 1218-AB76

**Revising the Beryllium Standard for
General Industry****AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.**ACTION:** Final rule; confirmation of effective date.

SUMMARY: OSHA is confirming the effective date of its direct final rule (DFR) adopting a number of clarifying amendments to the beryllium standard for general industry to address the application of the standard to materials containing trace amounts of beryllium. In the May 7, 2018, DFR, OSHA stated that the DFR would become effective on July 6, 2018, unless one or more significant adverse comments were submitted by June 6, 2018. OSHA did not receive significant adverse comments on the DFR, so by this document the agency is confirming that the DFR will become effective on July 6, 2018.

DATES: The DFR published on May 7, 2018 (83 FR 19936), becomes effective on July 6, 2018. For purposes of judicial review, OSHA considers the date of publication of this document as the date of promulgation of the DFR.

ADDRESSES: For purposes of 28 U.S.C. 2112(a), OSHA designates the Associate Solicitor of Labor for Occupational Safety and Health as the recipient of petitions for review of the direct final rule. Contact the Associate Solicitor at the Office of the Solicitor, Room S-4004, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-5445.

FOR FURTHER INFORMATION CONTACT:

Press inquiries: Mr. Frank Meilinger, OSHA Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-1999; email: meilinger.francis2@dol.gov.

General information and technical inquiries: Mr. William Perry or Ms. Maureen Ruskin, Directorate of Standards and Guidance, Room N-3718, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-1950; fax: (202) 693-1678.

Copies of this Federal Register document and news releases: Electronic copies of these documents are available

at OSHA's web page at <http://www.osha.gov>.

SUPPLEMENTARY INFORMATION:

I. Confirmation of Effective Date

On May 7, 2018, OSHA published a DFR in the **Federal Register** (83 FR 19936) amending the text of the beryllium standard for general industry to clarify OSHA's intent with respect to certain terms in the standard, including the definition of Beryllium Work Area (BWA), the definition of emergency, and the meaning of the terms dermal contact and beryllium contamination. It also clarifies OSHA's intent with respect to provisions for disposal and recycling and with respect to provisions that the agency intends to apply only where skin can be exposed to materials containing at least 0.1% beryllium by weight. Interested parties had until June 6, 2018, to submit comments on the DFR.

The agency stated that it would publish another document confirming the effective date of the DFR if it received no significant adverse comments. OSHA received seven comments in the record from Materion Brush, Inc., Mead Metals Inc., National Association of Manufacturers, Airborn, Inc., Edison Electric Institute, and two private citizens (Document IDs OSHA-2018-0003-0004 thru OSHA-2018-0003-0010). The seven submissions contained comments that were either supportive of the DFR or were considered not to be significant adverse comments. (Document IDs OSHA-2018-0003-0004 thru OSHA-2018-0003-0010). Three of these submissions also contained comments that were outside the scope of the DFR and OSHA is not considering the portions of those submissions that are outside the scope (OSHA-2018-0003-0004 thru OSHA-2018-0003-0006).

OSHA has determined this DFR will maintain safety and health protections for workers while reducing employers' compliance burdens. As the agency did not receive any significant adverse comments, OSHA is hereby confirming that the DFR published on May 7, 2018, will become effective on July 6, 2018.



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For November 8, 2018

**Occupational Exposure to Beryllium in General Industry, §1910.1024 (o)(2);
Final Rule; Limited Extension of Select Compliance Dates**

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 on the Limited Extension of Select Compliance Dates for Occupational Exposure to Beryllium in General Industry, as published on August 9, 2018 in 83 FR 39351.

The proposed effective date is February 15, 2019.

II. Summary of the Amendment

Federal OSHA has revised §1910.1024 (o)(2) of the Beryllium Standard for General Industry to extend the compliance deadline to **December 12, 2018** for certain ancillary provisions to allow time for OSHA to respond to the concerns of stakeholders, to allow OSHA sufficient time to draft and publish the Notice of Preliminary Rulemaking (NPRM), and to give employers sufficient time to comply. Sections affected include the following:

- Methods of compliance, §1910.1024(f);
- Beryllium work areas and regulated areas, §1910.1024(e);
- Personal protective clothing and equipment, §1910.1024(h);
- Hygiene areas and practices, §1910.1024(i);
- Housekeeping, §1910.1024(j);
- Communication of hazards, §1910.1024(m); and
- Recordkeeping, §1910.1024(n)

Provisions not affected by this amendment:

- new permissible exposure limits (PELs) for general industry, §1910.1024(c), construction, §1926.1124(c) and shipyards, §1915.1024(c);
- exposure assessment, §1910.1024(d);
- respiratory protection, §1910.1024(g);
- medical surveillance, §1910.1024(k); and
- medical removal, §1910.1024(l)

OSHA began enforcing the above sections on May 11, 2018, and Virginia began enforcing them on **September 15, 2018**.

Certain compliance dates outlined in this final rule remain unchanged. Enforcement of the general industry requirements for change rooms and showers will begin for OSHA and VOSH on **March 11, 2019**; and requirements for engineering controls for OSHA and VOSH will begin on **March 10, 2020**.

Finally, this amendment **does not affect** the applicability of:

- Paragraph (a), Scope and applicability
- Paragraph (b), Definitions

III. Basis, Purpose and Impact of the Amendment

A. Basis

On January 9, 2017, federal OSHA published in the *Federal Register* its final rule on the Occupational Exposure to Beryllium and Beryllium Compounds for three industries: General Industry (1910), Shipyard (1915) and Construction (1926) (82 FR 2470). Federal OSHA concluded that employees exposed to beryllium and beryllium compounds at the preceding permissible exposure limits (PELs) were at significant risk of material impairment of health, specifically chronic beryllium disease and lung cancer. OSHA concluded that the new 8-hour time-weighted average (TWA) PEL of 0.2 µg/m³ reduced this significant risk to the maximum extent feasible.

The general industry standard became effective on March 10, 2017, and the compliance date for most of the standard's provisions was March 12, 2018. However, on March 2, 2018, federal OSHA issued a memorandum stating that no provisions of the general industry standard would be enforced until May 11, 2018, except for paragraphs (i)(2) for change rooms, (i)(3) for showers – compliance date remains March 11, 2019, and (f) for engineering controls – compliance date remains March 10, 2020. Two subsequent enforcement delays followed – the first, on May 9, 2018, delayed enforcement until June 25, 2018, of some of the general industry standard's ancillary provisions (related to methods of compliance, beryllium work areas, regulated areas, personal protective clothing and equipment, hygiene areas and practices, housekeeping, communication of hazards, and recordkeeping). The second delay, on June 21, 2018, postponed enforcement of those provisions until August 9, 2018.

Following promulgation of the final rule in January 2017, several general industry employers, including Materion Corporation, challenged the rule in federal court. As part of a settlement agreement with Materion, OSHA is planning to propose revisions to certain provisions in the general industry standard and to rely on its de minimis policy while the rulemaking is pending so that employers may comply with the proposed revisions to the standard without risk of a citation. The revisions OSHA plans to propose under the settlement agreement are generally designed to clarify the standard in response to stakeholder questions or to simplify compliance, while in all cases maintaining a high degree of protection from the adverse health effects of exposure to beryllium.

In the proposal, OSHA requested comments from the public on the duration and scope of the proposed compliance date extension. OSHA received comments which generally focused on three issues arising from the proposed extension: 1) whether to extend the compliance date, 2) the scope of any extension, and 3) the appropriate duration of any extension.

1) Extension of the Compliance Date for Certain Ancillary Provisions in the General Industry Standard

While some commenters supported OSHA's proposed extension of the compliance date for ancillary provisions affected by OSHA's forthcoming Notice of Proposed Rulemaking (NPRM), others argued that the extension would be unnecessary and unjustified, and would delay the implementation of important protections for workers. In response, OSHA believes that until it releases its planned NPRM, employers may lack clarity regarding how to implement and comply with the beryllium standard. Therefore, OSHA has decided to adopt the proposed extension of compliance dates to allow time for the preparation and publication of the NPRM.

2) Scope of Extension

Some commenters objected to the scope of the proposed compliance-date extension, arguing that the underlying settlement agreement only “affects beryllium products whose content is less [than] 1% by weight, but which does not generate exposures above the PEL.” Others argued that OSHA should not extend the compliance date for only certain portions of affected paragraphs. OSHA decided that an extension of compliance dates that differentiated between individual subparagraphs of the affected ancillary provisions would create substantial confusion. According to OSHA, the substantive changes it intends to propose to the Beryllium Standard for General Industry *do* apply to processes that generate exposures above the PEL, and are not limited to products whose beryllium content is less than one percent by weight. OSHA’s extension of compliance dates applies to all general industry workplaces within the scope of the beryllium standard, including those where beryllium exposures may exceed the PEL. Additionally, OSHA confirmed that the final extension of compliance dates applies only to paragraphs affected by the upcoming, substantive NPRM.

3) Duration of the Extension

OSHA received very few comments expressing an opinion on the duration of the proposed compliance date extension; however, it did receive some comments in favor of a longer extension of time to prevent confusion of an uncertain date which could deny general industry workers certain protections afforded to them under the affected ancillary provisions, and unnecessary potential increase in costs. OSHA decided to extend the proposed compliance date to December 12, 2018, because that duration of time appropriately balances the concerns raised by stakeholders, will provide OSHA sufficient time to draft and publish the NPRM, and will give employers sufficient time to comply.

B. Purpose

OSHA believes that a comprehensive standard is critically important for the protection of workers exposed to beryllium in general industry settings. However, the benefits of a comprehensive standard may not be fully realized where employers do not clearly understand, and have trouble implementing, its requirements.

OSHA determined that this limited, short-term extension of the compliance date for certain ancillary requirements of the standard will give the agency the time necessary to issue a planned NPRM that will affect the parts of the standard that are covered by this compliance-date extension before that compliance date is reached, thus ensuring that employers have clear direction on how to protect workers exposed to beryllium.

C. Impact on Employers

OSHA believes that safety and health programs can be ineffective if employers and other stakeholders are unclear about OSHA requirements. By addressing stakeholder questions and concerns, the planned rulemaking will make it more likely that the regulated community will realize the full benefits of the rule.

Employers are, and will remain, obligated to label hazardous chemicals containing beryllium, ensure that safety data sheets are readily available, and train workers on the hazards of beryllium in accordance with the Hazard Communication Standard. OSHA encourages employers to review their hazard communication programs, employee training, and other hazard communication practices, such as workplace labeling, to ensure continued compliance with the Hazard Communication Standard.

Additionally, this amendment does not impose any new requirements or costs on employers.

D. Impact on Employees

OSHA will continue to maintain essential safety and health protections for workers through ongoing enforcement of many of the beryllium standard's key provisions. Enforcement of other OSHA standards, such as the Hazard Communication Standard, §1910.1200, and Access to Employee Exposure and Medical Records, §1910.1020, will also provide other important protections for workers in general industry.

E. Impact on the Department of Labor and Industry

No impact on the Department is anticipated. This limited, short-term extension of the compliance date for certain ancillary requirements of the standard will give VOSH the time necessary to ensure that employers have clear direction on how to protect workers exposed to beryllium.

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

F. Benefits

The planned rulemaking to revise the general industry beryllium standard is intended to be responsive to questions and concerns expressed by stakeholders regarding ancillary provisions of the rule. Safety and health programs can be ineffective if employers and other stakeholders are unclear about OSHA requirements. By addressing stakeholder questions and concerns, the planned rulemaking will make it more likely that the regulated community will realize the full benefits of the rule, as estimated in the 2017

final economic analysis. OSHA believes that the short-term loss of benefits associated with this extension of initial compliance dates will be more than offset in the long term by the benefits resulting from OSHA's effort to clarify the rule.

G. Costs savings

This amendment will result in cost savings for affected employers. OSHA believes that this amendment to extend the compliance date for certain ancillary provisions in the beryllium standard would result in cost savings which arise because a delay in incurred costs for employers would allow them to invest the funds (and earn an expected return at the going interest rate) that would otherwise have been spent to comply with the beryllium standard.

According to OSHA, the annualized cost savings of this final compliance date extension over ten years are \$1.65 million at a discount rate of 7 percent. For Virginia, this translates into annualized cost savings over ten years of approximately \$44,000 per year at a discount rate of 7 percent.

The cost savings described reflect savings only for provisions covered by the compliance date extension. OSHA did not estimate cost savings for the PELs, exposure assessment, respiratory protection, medical surveillance, or medical removal provisions (as they are not covered by the extension), or for any provisions for which the rule already establishes compliance dates in 2019 (change rooms/showers) or 2020 (engineering controls).

OSHA certifies that this amendment does not have a significant impact on a substantial number of small entities.

H. Technological Feasibility

OSHA determined that this amendment is technologically feasible because it does not change any of the rule's substantive requirements and, if adopted, would simply give employers more time to comply with some of the rule's ancillary requirements.

I. Economic Feasibility

OSHA determined that this amendment is economically feasible since it does not require employers to implement any additional protective measures and does not impose any additional costs on employers, and results in cost savings.

RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt federal OSHA's Limited Extension of Select Compliance Dates for the Occupational Exposure to Beryllium in General Industry, §1910.1024(o)(2), as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2019.

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

**Occupational Exposure to Beryllium in General Industry, §1910.1024 (o)(2);
Limited Extension of Select Compliance Dates**

As Adopted by the
Safety and Health Codes Board

Date: _____



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16VAC25-90-1910.1024, Occupational Exposure to Beryllium, General Industry, §1910.1024

When the regulations, as set forth in OSHA's Final Rule on the Limited Extension of Select Compliance Dates for the Occupational Exposure to Beryllium in General Industry, §1910.1024(o), 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 9, 2018

February 15, 2019

Amendments to Standards

For the reasons stated in the preamble of this final rule, OSHA amends 29 CFR part 1910 as follows:

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS**Subpart Z—Toxic and Hazardous Substances**

- 2. Amend § 1910.1024 by revising paragraph (o)(2) to read as follows:

§ 1910.1024 Beryllium.

* * * * *

(o) * * *

(2) *Compliance dates.* (i) Obligations contained in paragraphs (c), (d), (g), (k), and (l) of this standard: March 12, 2018;

(ii) Change rooms and showers required by paragraph (i) of this standard: March 11, 2019;

(iii) Engineering controls required by paragraph (f) of this standard: March 10, 2020; and

(iv) All other obligations of this standard: December 12, 2018.

* * * * *

[FR Doc. 2018–17106 Filed 8–8–18; 8:45 am]

BILLING CODE 4510-26-P



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For November 8, 2018

Amendment to the Cotton Dust Standard for General Industry, §1910.1043 – CFR Correction

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests that the Safety and Health Codes Board consider for adoption federal OSHA's revision to the existing Final Rule for the Cotton Dust Standard for General Industry, §1910.1043, as published in 83 FR 30035 on June 27, 2018.

The proposed effective date is February 15, 2019.

II. Summary of the Amendment

The Code of Federal Regulations (CFR) is the codification of the general and permanent rules and regulations published in the Federal Register by the executive departments and agencies of the federal government of the United States. CFR Title 29 contains the principal set of rules and regulations issued by federal agencies regarding labor. Virginia Occupational Safety and Health standard, §1910.1043 is equivalent to 29 CFR 1910.1043.

Paragraph (i)(1) of §1910.1043 requires the employer to train each employee exposed to cotton dust, in accordance with the requirements of the section, and to institute a training program

and ensure employee participation in the program. This amendment removes subparagraph (i)(1)(i)(A) through (F) of §1910.1043, which detailed the components for the employer's education and training program for employees exposed to cotton dust, including the following:

- (A) Acute and long term health hazards associated with cotton dust;
- (B) Names and descriptions of jobs and processes which could result in exposure to cotton dust at or above the PEL;
- (C) Measures, including work practices necessary to protect the employee from exposures in excess of the permissible exposure limit;
- (D) Purpose, proper use and limitations of respirators as required by §1910.1043(f);
- (E) Purpose for and a description of the medical surveillance program, required by §1910.1043(h), and
- (F) Other information in the standard and its appendices to aid exposed employees in understanding the hazards of cotton dust exposure.

III. **Basis, Purpose and Impact of the Amendment**

A. **Basis**

This amendment removes subparagraph (i)(1)(i)(A) through (F) from the Cotton Dust Standard for General Industry, §1910.1043, that was inadvertently included in the July 1, 2017 revision of the *Federal Register*, covering OSHA Standards 29 CFR 1910.1000 to end of Part 1910.

B. **Purpose**

The purpose of this amendment is to remove the specific criteria of the training program that appeared in subparagraphs (i)(1)(i)(A) through (F), but continue the employer's responsibility to train each employee exposed to cotton dust in accordance with the requirements throughout §1910.1043.

C. **Impact on Employers**

This amendment removes the specific requirements of the training program that were found in §1910.1043 (i)(1)(i)(A) through (F), but §1910.1043(i) continues an employer's responsibility to train each employee exposed to cotton dust, in accordance with the requirements of this section, and to institute a training program, and ensure employee participation in the program.

D. Impact on Employees

No impact on employees is anticipated. Employers will still be responsible for training each employee exposed to cotton dust, in accordance with the requirements of §1910.1043 (i), and includes instituting a training program and ensure employee participation in the program.

E. Impact on the Department of Labor and Industry

No impact on the Department is anticipated.

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

F. Economic and Technological Feasibility

The specific training requirements formerly found in §1910.1043(i)(1)(A) through (F) are currently required by other paragraphs of §1910.1043; therefore, the removal of subparagraphs (i)(1)(A) through (F) of §1910.1043 is economically and technologically feasible.

G. Costs

No additional costs or cost savings are anticipated for employers, employees, or the Department resulting from the removal of §1910.1043(i)(1)(A) through (F).

RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the Amendment to the Cotton Dust Standard for General Industry, §1910.1043, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2019.

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

Amendment to the Cotton Dust Standard for General Industry, §1910.1043 – CFR Correction

As Adopted by the
Safety and Health Codes Board

Date: _____



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16VAC25-90-1910.1043, Cotton Dust Standard for General Industry, §1910.1043

When the regulations, as set forth in the Amendment to the Cotton Dust standard for General Industry, §1910.1043, 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

June 27, 2018

February 15, 2019



DEPARTMENT OF LABOR

**Occupational Safety and Health
Administration**

29 CFR Part 1910

**Occupational Safety and Health
Standards**

CFR Correction

§ 1910.1043 [Amended]

■ In Title 29 of the Code of Federal Regulations, Part 1910 (§ 1910.1000 to end of part 1910), revised as of July 1, 2017, on page 297, paragraphs § 1910.1043(i)(1)(i)(A) through (F) are removed.

[FR Doc. 2018-13909 Filed 6-26-18; 8:45 am]

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For November 8, 2018

Amendment to the Flammable Liquids Standard for General Industry, §1910.106 – CFR Correction

I. Action Requested

The Virginia Occupational Safety and Health (VOSH) Program requests that the Safety and Health Codes Board consider for adoption federal OSHA's amendment to the Standard for Flammable Liquids for General Industry, as published on in 83 FR 30539 on June 29, 2018.

The proposed effective date is February 15, 2019.

II. Summary of the Amendment

The Code of Federal Regulations (CFR) is the codification of the general and permanent rules and regulations published in the Federal Register by the executive departments and agencies of the federal government of the United States. CFR Title 29 contains the principal set of rules and regulations issued by federal agencies regarding labor. Virginia Occupational Safety and Health standard, §1910.106 is equivalent to 29 CFR 1910.106.

Section 1910.106 (d)(2)(iii) addresses the design, construction, capacity and size of storage containers and portable tanks for flammable liquids. Previously, the introductory text of that paragraph read as follows:

...

Size. Flammable and combustible liquid containers shall be in accordance with Table H-12, except that glass or plastic containers of no more than 1-gallon capacity may be used for a Category 1 or 2 flammable liquid if:...

The introductory text has been revised by removing the words “and combustible” between “Flammable” and “liquid” to currently read as follows:

...

Size. Flammable liquid containers shall be in accordance with Table H-12, except that glass or plastic containers of no more than 1-gallon capacity may be used for a Category 1 or 2 flammable liquid if:...

III. **Basis, Purpose and Impact of the Amendment**

A. **Basis**

This amendment reflects revisions to the introductory text of subparagraph (d)(2)(iii) of §1910.106, revised as of July 1, 2017, in the *Code of Federal Register*, covering OSHA Standards, 29 CFR 1910 to §1910.999.

B. **Purpose**

The purpose of this revision is to more accurately characterize as “flammable” or “combustible” storage containers of a certain capacity that are used to hold liquids that can burn. The main difference between “flammable” and “combustible” liquids is that “flammable” liquids have flash points below 100 degrees F, and are more dangerous than “combustible” liquids that have flash points at or above 100 degrees F. In other words, “flammable” liquids can catch fire and burn easily at normal working temperatures, whereas “combustible” liquids require higher than normal temperatures to ignite.

C. **Impact on Employers**

No impact on employers is anticipated.

D. **Impact on Employees**

No impact on employees is anticipated.

E. Impact on the Department of Labor and Industry

No impact on the Department is anticipated.

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

F. Economic and Technological Feasibility

The revision of the introductory text in paragraph (d)(2)(iii) of §1910.106 by removing the words “and combustible” is economically and technologically feasible.

G. Costs

No additional costs or cost savings are anticipated for employers, employees, or the Department as a result of the adopting the amendment to §1910.106(d)(2)(iii).

RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the Amendment to the Flammable Liquids Standard for General Industry, §1910.106 – Correction, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2019.

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

Amendment to the Flammable Liquids Standard for General Industry, §1910.106 – CFR Correction

As Adopted by the
Safety and Health Codes Board

Date: _____



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16VAC25-90-1910.106, Flammable Liquids Standard for General Industry, §1910.106

When the regulations, as set forth in the Amendment to the Flammable Liquids Standard for General Industry, §1910.106, CFR Correction, 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

June 29, 2018

February 15, 2019

DEPARTMENT OF LABOR

**Occupational Safety and Health
Administration**

29 CFR Part 1910

**Occupational Safety and Health
Standards**

CFR Correction

In Title 29 of the Code of Federal Regulations, Parts 1910 to § 1910.999, revised as of July 1, 2017, on page 247, in § 1910.106, paragraph (d)(2)(iii) introductory text is revised to read as follows:

§ 1910.106 Flammable liquids.

* * * * *

(d) * * *

(1) * * *

(2) * * *

(iii) *Size.* Flammable liquid containers shall be in accordance with Table H-12, except that glass or plastic containers of no more than 1-gallon capacity may be used for a Category 1 or 2 flammable liquid if:

* * * * *

[FR Doc. 2018-14144 Filed 6-28-18; 8:45 am]

BILLING CODE 1301-00-D



COMMONWEALTH of VIRGINIA

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For November 8, 2018

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

I. Background and Basis

The Administrative Process Act, section 2.2-4007.1 D of the *Code of Virginia*, states that regulations of executive branch agencies:

“shall be reviewed every four years to determine whether they should be continued without change or be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact on small businesses in a manner consistent with the stated objectives of applicable law.”

The Administrative Process Act, section 2.2-4017 of the *Code of Virginia*, provides authority to the Governor to mandate through executive order a procedure for periodic review of regulations of executive branch state agencies. This periodic review is subject to Governor McAuliffe’s Executive Order 17 (2014), “Development and Review of State Agency Regulations.”

One (1) regulation of the Safety and Health Codes Board (Board) was eligible for review in 2018:

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

II. Current Status and Process

At the June 14, 2018 meeting, the Safety and Health Codes Board authorized the Department of Labor and Industry (“Department”) to begin reviewing the above-noted regulation. In accordance with §§ 2.2-4006 through 2.2-4017 of the *Code of Virginia*, the Department filed a Notice of Periodic Review in the *Virginia Register* on July 23, 2018. The statutory authority of the regulation was certified by the Office of the Attorney General (“OAG”). A public comment period of 21 days began on July 23, 2018, and closed on August 17, 2018. The Department received no comments.

III. Review and Analysis

Pursuant to § 2.2-4007.1 D and E of the *Code of Virginia*, a periodic review of an existing regulation shall 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.

Section 40.1-22(5) of the *Code of Virginia* states that “...the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. However, such standards shall be at least as stringent as the standards promulgated by the Federal Occupational Safety and Health Act of 1970 (P.L. 01-596).”

The Board adopted **16 VAC 25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry**, in 2004 as a Virginia unique regulation. While the regulation closely mirrors the federal OSHA requirements, there are three material differences:

1. Virginia requires fall protection at heights of 10 or more feet above a lower-level. The federal regulation requires fall protection at 15 or more feet above a lower-level.

The Board determined that a more stringent requirement for fall protection in steel erection operations is imperative to protect the health, safety, and welfare of Virginia workers. Between 1993 and 2003, Virginia investigated at least 18 fatalities in the construction industry caused by falls under 15 feet. Between 1983 and 2003, over 50% of VOSH inspections of steel erection operations resulted in serious, repeat, or willful violations and 20% resulted in violations cited under §1926.28(a) fall protection, and §1926.105(a) safety nets.

2. Virginia provides Connectors the option of utilizing personal fall arrest systems when connecting steel which is lifted in the air.

Although a personal fall arrest system can protect workers from the harm of a fall, it can also limit the range of movement of a worker. This can become a hazard when steel is being lifted in the air, as a worker is better protected when afforded the freedom of movement to avoid accidental contact with structural pieces. The federal regulation does not provide such flexibility. The Board determined that a more stringent requirement for fall protection in steel erection operations is imperative to protect the health, safety, and welfare of Virginia workers.

3. Virginia prohibits the use of controlled decking zones (CDZ).

A controlled decking zone, as defined by federal OSHA, would allow certain steel workers to be exposed to fall hazards without fall protection. Virginia experienced a number of fatalities and injuries related to such work zones. Controlling access to a CDZ is very challenging for an employer and positions employees for exposure to hazards. The Board determined that prohibition of a CDZ is imperative to protect the health, safety, and welfare of Virginia workers.

Determination: The Safety Standards for Fall Protection in Steel Erection, Construction Industry, protect the safety, health, and welfare of the public by limiting worker exposure to hazards. This regulation is not overly complex and is clearly written. There is no negative impact on the regulated community and the regulation does not overlap, duplicate, or conflict with federal or state law or regulation. As a result of this periodic review, the agency determines that the regulation has no negative economic impact on small business.

IV. **Recommended Action**

At this time, the Department of Labor and Industry recommends to the Safety and Health Codes Board that this regulation be retained as is. The Department requests that the Safety and Health Codes Board vote to retain with no changes.

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