



COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

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REVISED AGENDA

SAFETY AND HEALTH CODES BOARD

Wednesday, April 21, 2004

**State Corporation Commission
Tyler Building
1300 East Main Street, Second Floor
Richmond, Virginia**

Courtroom A

Following Public Hearing which begins at 10:00 a.m.

- 1. Call to Order**
- 2. Approval of Agenda**
- 3. Approval of Minutes of November 5, 2003**
- 4. Opportunity for the Public to Address the Board on the issues pending before the Board today or on any other topic that may be of concern to the Board or within the scope of authority of the Board.**

*****This will be the only opportunity for public comment at this meeting.*****

[Please limit remarks to 5 minutes in consideration of others wishing to address]

B. Old Business

Initial Review of the Bylaws of the Safety and Health Codes Board

Presenter – TBA

6. New Business

- a) **Revocation of Final Rule for Respiratory Protection for M. Tuberculosis, §1910.139; and Application of Respiratory Protection Standard, §1910.134, for Tuberculosis**

Presenter - Ronald Graham

- b) **16 VAC 25-90-1910.401 and 16 VAC 25-90-1910.402, Commercial Diving Operations, §§1910.401 and 1910.402; and Appendix C to Subpart T of Part 1910**

Presenter - Glenn Cox

- c) **Periodic Review of Regulations**

Presenter - Jennifer Cavedo

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

8. Items of Interest from Members of the Board

9. Adjournment



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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR APRIL 21, 2004

**Revocation of the Final Rule for Respiratory Protection for M. Tuberculosis, §1910.139;
and the
Application of Respiratory Protection Standard, General Industry, §1910.134, to
Respiratory Protection against Tuberculosis**

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for repeal the final rule for Respiratory Protection for M. Tuberculosis, §1910.139, as published in 68 FR 75776 on December 31, 2003, with a proposed effective date of July 1, 2004.

The Board is also requested to apply the General Industry Respiratory Protection Standard, §1910.134, to respiratory protection against Tuberculosis, with a proposed effective date of July 1, 2004, and with a six-month delay of effective date ending on December 31, 2004, for employer compliance with additional requirements of §1910.134.

II. Summary of the federal Action.

On December 31, 2003, OSHA withdrew its 1997 Tuberculosis proposal and revoked §1910.139, Respiratory Protection for M. Tuberculosis, which was intended to apply only pending the conclusion of the Tuberculosis rulemaking. With the withdrawal of the Tuberculosis proposal and revocation of §1910.139, OSHA will begin applying the general industry respiratory protection standard for protection, 29 CFR 1910.134, against Tuberculosis on July 1, 2004. (68 FR 75767)

The new requirements in the revised respiratory protection standard, §1910.134, include the following:

- IV. updating the facility's respirator program;
- V. complying with amended medical evaluation requirements;
- VI. annual fit testing of respirators; and
- VII. training and recordkeeping provisions.

NOTE: On January 14, 2004, federal OSHA issued an announcement that it will delay until July 1, 2004, enforcing several provisions of the respiratory protection standard for establishments required to provide respirators for protection from potential exposure to Tuberculosis.

The six-month phase-in period will allow affected employers to come into compliance with the additional requirements of OSHA's respiratory protection standard, such as conducting annual respirator fit testing and performing medical evaluations for covered employees and annual training for respirator use.

For those establishments required to provide respirators due to potential exposure to Tuberculosis, OSHA will allow them up to 6 months to come into compliance with these sections. During the six-month phase-in period, OSHA will not cite these new requirements for establishments with workers exposed only to tuberculosis. All elements of the revoked rule continue to be enforced under the corresponding elements of the current respiratory protection standard.

The federal delay does not affect establishments already covered under the respiratory protection rule where there is exposure to hazardous substances other than tuberculosis. All provisions of the rule will continue to be applied to those employers.

III. Basis, Purpose and Impact of the Action.

A. Basis.

On October 17, 1997, OSHA published a Proposed Rule on Occupational Exposure to Tuberculosis. (62 FR 54160) In the proposal, OSHA made a preliminary determination that workers in hospitals, nursing homes, hospices, correctional facilities, homeless shelters, and certain other work settings faced a significant risk of incurring Tuberculosis infection while caring for their patients and clients or performing certain procedures. At that time, OSHA also concluded that this significant risk can be minimized or eliminated using infection prevention and control measures that have been demonstrated to be highly effective in reducing or eliminating job-related Tuberculosis infections. These protective measures included the use of respiratory protection when performing certain high-hazard procedures on infectious individuals. (68 FR 75776)

On January 8, 1998, OSHA revised its 1971 General Industry Standard for Respiratory Protection (63 FR 1152). Because the 1997 Tuberculosis proposal included all of the respiratory protection provisions that OSHA believed would be applicable to respirator use for Tuberculosis protection, it did not require this use to comply with the new §1910.134 during the rulemaking proceedings on the Tuberculosis proposal.

On December 31, 2003, federal OSHA published a notice in the *Federal Register* of its

revocation of Respiratory Protection for M. Tuberculosis (29 CFR 1910.139) and of its application of the more protective General Industry Respiratory Protection Standard (29 CFR 1910.134) for respiratory protection against Tuberculosis, effective December 31, 2003.

In a separate action also published on December 31, 2003, OSHA withdrew its proposed Tuberculosis standard because the risk of occupationally exposed workers has declined as the incidence of Tuberculosis in the population as a whole has declined. (68 FR 75767) More specifically, OSHA does not believe a standard would substantially reduce the occupational risk of Tuberculosis infection and that a standard is unlikely to be more effective than the Centers for Disease Control and Prevention (CDC) guidelines in eliminating this risk (68 FR 75769). Based on the success of the CDC guidelines, OSHA believes that it is appropriate to let the CDC continue the successful work it is doing, and OSHA will focus its resources on reducing workplace hazards that are not being addressed through other control efforts.

B. Purpose.

Federal OSHA revoked 29 CFR 1910.139 because this section was intended to apply only during the pendency of the Tuberculosis rulemaking, and that rulemaking has now been terminated. The standard revoked by federal OSHA was a recodification of OSHA's 1971 General Industry Respiratory Protection standard, 29 CFR 1910.134, which was revised in 1998.

At the time of the revision, OSHA decided that it would allow compliance with the previous respirator standard for Tuberculosis protection until completion of the Tuberculosis rulemaking because the Tuberculosis proposal, issued three months earlier, included a self-contained respiratory protection provision.

With this termination of the Tuberculosis rulemaking, federal OSHA will begin applying the revised General Industry Respiratory Protection Standard, 29 CFR 1910.134, for protection against Tuberculosis. (68 FR 75776)

C. Impact on Employers.

The scope of this action is limited to establishments in the health services industry (SIC 80) that follow the CDC guidelines and provide respiratory protection for employees potentially exposed to tuberculosis. These establishments are primarily hospitals. Some patients with active tuberculosis may be treated in other health services facilities, i.e., nursing homes, correctional facilities, or substance abuse treatment facilities. (68 FR 75777)

Nationally, an estimated 6,500 establishments are potentially affected by this action. (68 FR 75779) In Virginia, there are an estimated 163 establishments potentially affected by this action.

Section 1910.134 of the respiratory protection rule, which was revised in 1998, provides employers with additional guidance as to what constitutes an appropriate and effective program, giving employers a better road map to follow when relying on respiratory protection in the workplace. Although including Tuberculosis-related respirator use in §1910.134, OSHA has imposed some new requirements on employers who require their employees to use respirators

for this purpose, but OSHA does not deem such action to be significant.

D. Impact on Employees.

The employees impacted by the repeal of §1910.139 are those using respirators for protection against occupational exposure to Tuberculosis. No data exists which enumerates approximately how many persons use respirators as protection against occupational exposure to tuberculosis. Based on OSHA's use of U.S. Department of Labor Bureau of Labor Statistics (BLS) analysis to estimate the number of persons using filtering face piece respirators in the health care sector, OSHA estimates that there are approximately 638,000 affected employees nationwide. (68 FR 75779) In Virginia, it is estimated that there are approximately 16,000 affected employees. By including respirator users in unaffected sectors and by including employees using respirators for reasons other than occupational exposure to Tuberculosis, OSHA believes that the BLS numbers for respirator users for Tuberculosis are overestimates.

Section 1910.134 provides more detailed requirements regarding employee training to help secure that the training provided is appropriate and more effective than §1910.139.

E. Impact on the Department of Labor and Industry.

There will be no impact on the Department of Labor and Industry since all facilities that use respirators for any purpose other than Tuberculosis protection are already required to comply with the revised respiratory protection standard.

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

F. Technology Feasibility

Compliance with the requirements of this action can be achieved with methods and measures that have already been developed and implemented in many establishments already under the respirator protection standard. (68 FR 75779)

The provisions of the respiratory protection program require only technology that is currently and readily available and widely in use. There is no barrier to applying these technologies in a health care setting. In fact, the requirements added by this action are already applicable to and have already been implemented in many of the affected health care establishments to the extent that any use of respirator protection is occurring for purposes other than protection from occupational exposure to tuberculosis.

G. Benefits

The reduction in risk achieved through compliance with the requirements of the revised §1910.134 will result in reductions in the numbers of infections, active disease cases, and fatalities occurring among the covered workers. (68 FR 75779) OSHA concluded that overall,

moving from full compliance with §1910.139 to full compliance with §1910.134 would reduce exposures by 27 % on average across all employees covered by the respiratory protection program. OSHA estimates that this action will have similar effects in reducing the number of infections, active disease cases, and fatalities occurring among covered workers.

H. Costs of Compliance

Based on information by BLS (which OSHA believes probably overestimated the number of affected employees), federal OSHA estimates the total annualized costs for this action to be \$11.7 million nationally. The largest component of the costs is comprised of the requirements associated with employee fit-testing and training, which account for about 92 % of the total costs. (68 FR 75779)

In Virginia, the estimated total annualized costs will be approximately \$293,000 and the cost associated with employee fit-testing and training is estimated to be approximately \$268,000. Costs associated with revising respirator programs and with the recordkeeping requirements have an estimated national annualized cost of about \$1 million; in Virginia, this estimated cost will be approximately \$25,000.

The affected establishments face more significant increases in costs or reductions in revenues on a continuing basis, through changes in rent, labor costs, utility costs, and costs of other resources purchased, through changes in levels of donations and contributions provided, and through changes in government funding levels.

I. Highlights of revised §1910.134

The revised respiratory protection rule provides employers with additional guidance on what constitutes an appropriate and effective program, giving employers a better road map to follow when relying on respiratory protection in the workplace. The revised standard specifies how a systematic approach to evaluating workplace conditions, selecting the appropriate respirator, ensuring the respirator fits, and maintaining the respirator properly is to be implemented in the workplace. (68 FR 75777)

Section 1910.139 required medical evaluation, but did not set forth the components of the evaluation, or how it was to be accomplished. The medical evaluation provisions of the revised §1910.134 set forth the minimum requirements employers must implement to determine if employees are medically qualified to wear respirators in their places of work.

The medical evaluation provisions of revised §1910.134 are significantly better than the repealed standard, §1910.139. They ensure that the healthcare professional, the employee, and the employer are aware of the factors that must be considered in evaluating an employee's respiratory protection needs, and provide the tools to ensure appropriate decisions are made. (68 FR 75777)

The revised §1910.134 requires employers to provide effective training to employees who are required to use respirators. The training must be comprehensive, understandable and recur at least annually.

OSHA believes that the provisions of revised §1910.134 represent its assessment of the best information available at the time that rule was issued to ensure that respiratory protection in the workplace is effective. To extend similar protection to workers exposed to Tuberculosis in the workplace, OSHA will apply all of the provisions of §1910.134, including annual fit testing to Tuberculosis exposures. (68 FR 75778)

Contact person:

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board repeal Respiratory Protection for M. Tuberculosis, §1910.139, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of July 1, 2004.

Staff of the Department of Labor and Industry also recommends that the Safety and Health Codes Board approve the application of 16 VAC 25-90-1910.134, Respiratory Protection Standard, General Industry, §1910.134, to respiratory protection against Tuberculosis, with an effective date of July 1, 2004, and a six-month delay of effective date ending on December 31, 2004.

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

Respiratory Protection Standard, General Industry, §1910.134

As Adopted by the
Safety and Health Codes Board

Date: _____



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16 VAC 25-90-1910.134, Respiratory Protection, General Industry, §1910.134

When the regulations, as set forth in the revised final rule for the application of 16 VAC 25-90-1910.134, Respiratory Protection, General Industry, §1910.134, to Respiratory Protection against Tuberculosis, 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

December 31, 2003

July 1, 2004

Implementation Schedule of §1910.134 based on six-month delay of effective date

July 1, 2004

December 31, 2004

To review standard, please click on the following: http://www.osha.gov/FedReg_oshapdf/FED20031231.pdf



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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR APRIL 21, 2004

**COMMERCIAL DIVING OPERATIONS, §§1910.401 - 1910.402, and
APPENDIX C OF SUBPART T OF PART 1910;
REVISED FINAL RULE**

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 revised final rule for Commercial Diving Operations, Subpart T, §§1910.401 and 1910.402, and Appendix C to Subpart T of Part 1910, as published in 69 FR 7351 on February 17, 2004.

The proposed effective date is July 1, 2004.

II. Summary of the Amendment.

Federal OSHA has amended its Commercial Diving Operations (CDO) standard to allow employers of recreational diving instructors and diving guides to comply with an alternative set of requirements instead of the decompression-chamber requirements in the current CDO standards.

In §1910.401, Scope and Application, federal OSHA added a new paragraph (a)(3) covering alternative requirements for recreational diving instructors and diving guides. In §1910.402, Definitions, new definitions for "dive-guiding operations" and "recreational diving instruction" were added. (69 FR

7351) OSHA also added a new mandatory Appendix C to Subpart T of Part 1910 entitled, “Alternative Conditions Under §1910.401(a)(3) for Recreational Diving Instructors and Diving Guides.” This mandatory appendix specifies the conditions under which employers may use this alternative to decompression chambers as required under §1910.423(b)(2) or (c)(3) or §1910.426(b)(1).

The final amendment applies only when diving instructors and diving guides engage in recreational diving instruction and diving-guide duties; use an open circuit, a semi-closed-circuit, or a closed-circuit self-contained underwater-breathing apparatus (SCUBA) supplied with a breathing gas that has a high percentage of oxygen mixed with nitrogen; dive to a maximum depth of 130 feet of sea water; and remain within the no-decompression limits specified for the partial pressure of nitrogen in the breathing-gas mixture. These alternate requirements essentially are the same as the terms of a federal variance granted by OSHA to Dixie Divers, Inc. in 1999. (69 FR 7351)

III. Basis, Purpose and Impact of the Amendment.

A. Basis.

In 1999, federal OSHA published an order granting a permanent variance to Florida-based Dixie Divers, Inc. (“Dixie Divers”). This variance exempted Dixie Divers from OSHA’s decompression chamber requirements specified at §1910.423(b)(2) and (c)(3)(iii), and §1910.426(b)(1), when its recreational diving instructors and diving guides engage in underwater instructional and guiding operations.

In issuing the permanent variance, federal OSHA noted that compliance would provide divers with a level of protection that met or exceeded the level of protection they would receive if they had access to a decompression chamber at the dive site as required by §1910.423(b)(2) and (c)(3)(iii), and §1910.426(b)(1). (69 FR 7351)

B. Purpose.

Federal OSHA is issuing an amendment to its Commercial Diving Operations standards to enable recreational diving instructors and diving guides to extend their diving operations while minimizing their risk of decompression sickness (DCS) and arterial gas embolism (AGE). This amendment provides recreational diving instructors and diving guides with an alternative to having an on-site decompression chamber. (69 FR 7351)

Under the existing standard, a decompression chamber must be made available and ready for use at a dive site to treat decompression sickness (DCS) and arterial gas embolism (AGE). DCS may occur from breathing air or mixed gases at diving depths and durations that require decompression, while AGE may result from over-pressurizing the lungs, usually following a rapid ascent to the surface during a dive without proper exhalation.

On January 10, 2003, federal OSHA proposed to amend its Commercial Diving Operations (“CDO”) standards to incorporate the terms and conditions of the Dixie Divers variance as an appendix to the CDO standards. Instead, OSHA issued a final revised rule on February 17, 2004 to amend the CDO standards based on this proposal. (69 FR 7351-52)

C. Impact on Employers.

This amendment, if adopted by the Board, would provide employers with an alternative to the decompression chamber requirements of the existing Commercial Diving Operations standards. It does not impose additional requirements on employers. According to federal OSHA, the final rule requires no additional expenditures by either public or private employers. OSHA believes that when employers comply with the conditions specified in this final rule, the amendment will likely reduce employers' compliance burdens by eliminating the requirement and associated cost of having a decompression chamber at the dive site. (69 FR 7362)

For employers in all states whose divers provide recreational diving instruction and dive-guiding services, this amendment will provide an opportunity to safely perform nitrox diving operations without the expense involved in purchasing and maintaining a decompression chamber at the dive site. By providing regulatory flexibility to these employers, the final rule may reduce their operating costs and increase productive time. (69 FR 7361)

D. Impact on Employees.

Adoption of this amendment will provide recreational divers with a level of protection that met or exceeded the level of protection they would receive if they had access to a decompression chamber at the site. The revision does not change requirements for other types of commercial divers. (69 FR 7352)

E. Impact on the Department of Labor and Industry.

No impact on the Department is anticipated by this action. This amendment does not replace the existing requirements, but instead provides an alternative method to achieving the same results. (69 FR 7361)

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.

Contact Person:

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the revised final rule to Commercial Diving Operations, Subpart T, §§1910.401 - 1910.402, and Appendix C to Subpart T of Part 1910, as authorized by Virginia Code, §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of July 1, 2004.

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

**16 VAC 25-90-1910.401 - 16 VAC 25-90-1910.401, COMMERCIAL DIVING OPERATIONS,
§§1910.401 - 1910.402 and
APPENDIX C OF SUBPART T OF PART 1910;
REVISED 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: _____

16 VAC 25-90-1910.401, Scope and Application, and 16 VAC 25-90-1910.402, Definitions, Commercial Diving Operations, Subpart T

When the regulations, as set forth in the revised final rule for 16 VAC 25-90-1910.401 - 16 VAC 25-90-1910.402, Commercial Diving Operations, Subpart T, §§1910.401 - 1910.402, and Appendix C of Subpart T of Part 1910, 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

March 18, 2004

July 1, 2004

To review standard, please click on the following: http://www.osha.gov/FedReg_osha_pdf/FED20040217.pdf



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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR APRIL 21, 2004

PERIODIC REVIEW OF EXISTING REGULATIONS

I. Background and Process

Governor Warner issued Executive Order Number 21 (02), "Development and Review of Regulations Proposed by State Agencies." This executive order governs the periodic review or re-evaluation of existing regulations and the regulatory process to promulgate new regulations or amend current regulations.

All of the regulations promulgated by the Safety and Health Codes Board including the federal identical VOSH regulations are included in the periodic review process. Each regulation is to be reviewed at least once every four years. The review is to include (i) a review by the Attorney General to ensure statutory authority for regulations and (ii) a determination by the Governor whether the regulations are necessary for the protection of public health, safety and welfare and clearly written and easily understandable. A determination will be made as to whether the regulations reviewed should be amended, repealed or retained and a written report will be prepared of the findings.

II. Current Status

Eleven regulations were identified for review in 2004. A notice of periodic review will be published in the Virginia Register on May 3, for the regulations to be reviewed. The notice will request public comment for a period from May 3 until May 25, 2004, for these regulations as follows:

16 VAC 25-20-10, Regulation Concerning Licensed Asbestos Contractor Notification, Asbestos Project Permits and Permit Fees

16 VAC 25-30-10, Regulations for Asbestos Emissions Standards for Demolition and Renovation Construction Activities and the Disposal of Asbestos-Containing Construction Wastes-Incorporation by Reference, 40 CFR 61.140 through 61.156

16 VAC 25-35-10 et. seq., Regulation Concerning Licensed Lead Contractors Notification, Lead Project Permits, and Permit Fees

16 VAC 25-40-10, Standard for Boiler and Pressure Vessel Operators Certification

16 VAC 25-70-10 et seq., Virginia Confined Space Standard for the Telecommunications Industry

16 VAC 25-80-10, Access to Employee Exposure and Medical Records

16 VAC 25-140-10 et seq., Virginia Confined Space Standard for Construction Industry

16 VAC 25-150-10, Underground Construction, Construction Industry

16 VAC 25-160-10 et seq., Construction Industry Standard for Sanitation

16 VAC 25-170-10 et seq., Virginia Excavation Standard, Construction Industry

16 VAC 25-180-10, Virginia Field Sanitation Standard, Agriculture Industry

Final reports will be due to the Secretary of Commerce and Trade and the Department of Planning and Budget no later than August 25, 2004.

II. Next Stage of Review

The staff of the Department of Labor and Industry will be reviewing these regulations and will prepare the reports with recommendations to be presented for approval at the next board meeting.

III. Action Requested

None at this time. Approvals on periodic review reports will be requested at future board meetings.

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