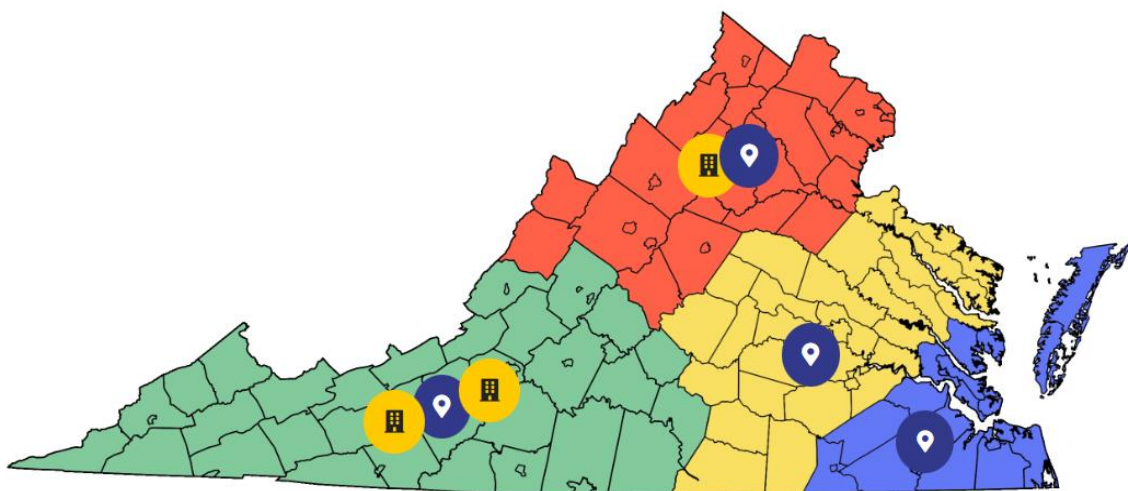




Virginia Occupational Safety and Health
(VOSH)

Field Operations Manual (FOM)

VOSH PROGRAM DIRECTIVE: 09-001

ISSUED: September 1, 2025

Subject: Purpose: VOSH Field Operations Manual (FOM) – Version September 1, 2025

Purpose: This Directive officially issues revision 3.8 of VOSH Field Operations Manual (FOM) which was last revised in September 2025 into the Program Directive System and establishes the effective date for its usage.

This Program Directive is an internal manual, not a statutory or regulatory rule or guidance document, and is intended to provide instructions to VOSH Personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Virginia Administrative Process Act; it does not have general application or the force of law.

Scope: This Directive applies VOSH-wide

References: OSHA Instruction CPL 02-00-159, Field Operations Manual (October 1, 2015)
OSHA Instruction CPL 02-00-160, Field Operations Manual (August 2, 2016)

Cancellation: VOSH Program Directive 09-001 (August 1, 2025), VOSH Program Directive 09-001 (August 1, 2024), VOSH Program Directive 09-001 (August 1, 2023) VOSH Program Directive 09-001 (August 1, 2022) VOSH Program Directive 09-001 (August 1, 2021) VOSH Program Directive 09-001 (August 1, 2020) VOSH Program Directive 09-001 (August 1, 2019) VOSH Program Directive 09-001 (November 1, 2017) VOSH Program Directive 02-001G (October 1, 2013) VOSH Program Directive 02-001I (August 2, 2017)

Effective Date: September 1, 2025

Action: The Directors and Managers shall assure that the change contained in this revision to the VOSH FOM is adhered to by VOSH personnel. NOTICE: Virginia Code § 40.1-49.4.P provides that: “the Commissioner annually shall adjust the maximum civil penalties stated in subsections G through J each year by the percentage increase, if any, in the United States Average Consumer Price Index for all Urban Consumers (CPI-U), as published by the Bureau of Labor Statistics of the United States Department of Labor, from its monthly average for the previous calendar year. The amount of each adjustment to the maximum civil penalties shall be rounded to the nearest whole dollar. The adjustments to the maximum civil penalties shall be effective on each August 1.” (Emphasis added).

The maximum penalty provisions of the above-named directive are enforceable by the VOSH Program under the terms of Virginia Code § 40.1 49.4.P on August 1, 2025, and apply to all VOSH inspections opened on or after August 1, 2025.

Expiration Date: Not Applicable

Commissioner: Gary G. Pan Commissioner

Summary of Changes in this update by type and form:

❖ **Non-substantive Changes:** There are also a number of typographical and housekeeping corrections, grammatical rewrites, as well as other changes of formatting, reordering, or relocation of text within or between chapters. There are also corrections for continuity throughout the document. These changes, if notable, may be highlighted in **yellow**; however, they are not listed on the document revision log.

❖ **VOSH Substantive Procedural Changes:** There are VOSH initiated procedural updates throughout this update. Such revisions are highlighted in **pink** throughout the document for ease of use and are also listed on the document revision log on the next page.

❖ **OSHA Required Substantive Changes:** If there are federal OSHA required changes in this update, such revisions are highlighted in **blue** for ease of use and are also listed on the document revision log on the next page.

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Chapter 1: General Responsibilities and Administrative Procedures

Chapter 2: Complaint and Referral Processing

Chapter 3: Program Planning

Chapter 4: Inspection Preparation and Inspection Procedures

Chapter 5: Industry Sectors

Chapter 6: Fatality and Catastrophe, Rescue Operations and Emergency Response

Chapter 7: Case File Preparation and Documentation

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General Responsibilities and Administrative Procedures

CHAPTER- 1

**Chapter 1: GENERAL RESPONSIBILITIES AND
ADMINISTRATIVE PROCEDURES**

I. Mission Statement

VOSH's mission is to make Virginia a better place in which to live, work and conduct business. We achieve this goal by promoting safe, healthy workplaces, and best employment practices.

II. Order of Priority

If any policy, procedure or other instruction covered in this *VOSH Field Operations Manual* (FOM) is found to be in conflict with the *VOSH Administrative Regulation Manual* (ARM), the ARM shall take precedence. If there is any conflicting information between the FOM and a program directive, the program directive is to take precedence over the FOM.

Law Hierarchy	
Federal Constitution	Commerce Clause
State Constitution	State Police Power
Federal Statutes	OSH Act 4(b)(1) and 18(e)
State Statutes	Code of Virginia Title 40.1
Federal Standards/State Regulations	Virginia Administrative Code Title 16 Agency 25 (ARM)
OSHA Instructions/VOSH Directives and Interpretations	
VOSH Field Operations Manual (FOM)	

III. General Responsibilities

The following positions within the Department of Labor and Industry (DOLI) have designated authority and responsibility for ensuring compliance with the Virginia State Plan for the enforcement of occupational safety and health in accordance with the Federal Occupational Safety and Health Act of 1970 (P. L. 91-596) and Title 40.1 of the *Code of Virginia*. The *VOSH Administrative Regulation Manual* contains detailed information on the rules, regulations and procedures under which the Department carries out this mandate. This document empowers DOLI personnel to make decisions as situations warrant with the ability to act efficiently to enforce the Occupational Safety and Health Act. Employees should refer to their employee work profile for individual job responsibilities. Employee work profiles may be obtained through the employee's supervisor or from the Office of Human Resources.

- A. Assistant or Deputy Commissioner Overseeing VOSH Program.** It is the duty of the Assistant or Deputy Commissioner to provide strategic program guidance and management decision making, direct overall operational policies and procedures, approve program-wide strategies, goals, and objectives; establish performance standards for all VOSH operations, and to monitor VOSH program activity and performance as reviewed by federal OSHA. The Assistant or Deputy Commissioner reports to the Commissioner.
- B. Managing Director VOSH Compliance Programs-** The Managing Director of VOSH Compliance programs is tasked with implementing and overseeing operational policies and procedures related to compliance activities. This role includes the development of goals, objectives, and performance standards for VOSH field operations, as well as the monitoring of program activities and performance. Furthermore, the Managing Director provides comprehensive direction and guidance on all programmatic and technical matters related to regional activities. The Managing Director of VOSH Compliance reports directly to the Assistant or Deputy Commissioner overseeing the VOSH Program.
- B. Director of the Occupational Health Compliance Program.** The Director of Occupational Health Compliance is responsible for establishing and overseeing operational policies and procedures related to health compliance activities. This role involves developing goals, objectives, and performance standards for VOSH health-related field operations, as well as monitoring program activities and performance. Additionally, the Director provides comprehensive direction and guidance on all programmatic and technical health matters to Regional Health Directors. The Director of the Occupational Health Compliance Program reports to the Managing Director of VOSH Compliance Programs.
- D. Statewide Compliance Manager.** The Statewide Compliance Manager is responsible for supporting Program and Regional Directors through comprehensive case file reviews, quality assurance, and maintaining control over the records management system. This role ensures consistency in case documentation, prepares VOSH contested case reviews, and provides recommendations for negotiation and settlement agreements. The manager briefs Program and Regional Directors on the progress of CSHO casework, advises CSHOs on documentation requirements, and serves as the Fatality Team Chief. Additionally, the Statewide Compliance Manager leads teams and employees without direct organizational authority and reports to the Safety Program Director.
- E. VOSH Regional Safety Directors.** It is the duty or mission of the VOSH Regional Safety Directors to:

1. Implement VOSH's field programs within their delegated area of responsibility of the Regional Office and within the policy and procedure parameters established by the Program Directors for the VOSH Program.
2. Have first level supervisory responsibility over the safety CSHOs in the discharge of their duties and to review their cases. They may also conduct compliance inspections as needed. They also ensure technical and programmatic adequacy in applying the policies and procedures in effect in the Department for the compliance programs. They also have responsibility for implementation of a quality assurance system suitable to their individual work group. VOSH Regional Safety Directors are supervised by and report directly to the Director of Occupational Safety Compliance. They also receive support as needed from the Director of Occupational Health Compliance on health technical, programmatic and non-administrative issues.

F. VOSH Regional Health Directors. It is the duty or mission of the VOSH Regional Health Directors to:

1. Implement VOSH's field programs within their delegated area of responsibility of the Regional Office and within the policy and procedure parameters established by the Program Directors for the VOSH Program.
2. Have first level supervisory responsibility over the health CSHOs in the discharge of their duties and to review their cases. They may also conduct compliance inspections as needed. They also ensure technical and programmatic adequacy in applying the policies and procedures in effect in the Department for the compliance programs. They also have responsibility for implementation of a quality assurance system suitable to their individual work group. VOSH Regional Health Directors are supervised by and report directly to the Director of the Occupational Health Compliance Program. They also receive direct guidance and support as needed from the Director of Occupational Safety Compliance.

G. Compliance Safety and Health Officer (CSHO). The primary responsibility of the CSHO is to carry out the mandate of the Commissioner and the Department of Labor and Industry "to assure so far as possible every working man and woman in the Commonwealth have safe and healthful working conditions...." To accomplish this mandate the VOSH program uses a wide variety of programs and initiatives, one of which is enforcement of regulatory standards through effective workplace inspections to determine whether, as required by §40.1-51.1.A. of the *Code of Virginia*, employers are:

- Furnishing places of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees, and

- Complying with all safety and health requirements, standards, and other related regulations promulgated under the law.

Through inspections and other employee/employer contact, the CSHO can help ensure that hazards are identified and abated to protect workers.

During these processes, the CSHO must use professional judgment to adequately document hazards in the case file as required by the policies and procedures in effect for VOSH. The CSHO will be responsible for the technical adequacy of each case file. Individual inspections may vary in scope and detail, depending upon the circumstances in each case.

1. **Personal Conduct and Activities.** All CSHOs must adhere to the agency's Code of Ethics, and to certain rules, regulations and requirements that apply particularly to them as CSHOs. The following sections set forth certain regulations and requirements which are particularly concerned with the conduct of CSHOs.
 - i. **Courtesy to the Public.** The Department of Labor and Industry emphasizes that the proper and courteous discharge of duties and responsibilities by staff is essential to the enforcement and administration of the VOSH program. The CSHO is the primary representative of the Department of Labor and Industry during inspection activities. The ultimate success of the compliance program depends upon the CSHO's knowledge and understanding of the VOSH program and regulations, as well as upon their courtesy and tact in dealing with employers and employees. CSHOs represent the Commissioner and must at all times conduct themselves in such a manner as to reflect that responsibility. They must never allow themselves to indulge in conduct or statements unbecoming their position, even when such conduct or statements are invited or incited by those with whom they are dealing.
 - ii. **Acceptance of Gratuities.** It is illegal for a State official or an employee to solicit any gift. It shall be considered unethical and is illegal for any State official or employee to accept, seek, solicit, or take directly or indirectly, any gift or benefit of more than insignificant economic value, including money, any service, gratuity, fee, property, loan, promise or anything else of more than insignificant economic value from or on behalf of any individual or entity who is doing or is seeking to do business of any kind with the State or whose activities are regulated or controlled in any way by the State. No gift shall be accepted under circumstances from which the official or employee could reasonably have inferred that the gift or benefit was intended to influence or gives the appearance of influencing such official or employee in the performance of official duties and under circumstances from which it is reasonable to assume that the official

or employee would be influenced in the performance of official duties. Additional guidance shall be provided by the Maryland Public Ethics Law.

IV. Administrative Procedures

A. Subpoena Served on CSHO or other VOSH Personnel

1. **General.** Subpoenas, which require appearance in court, are occasionally received by CSHOs. Failure to comply with subpoenas may result in contempt of court. However, requests to appear which are outside the normal course of the CSHO's work may be appropriately voided so that CSHO does not have to appear.
2. **Receipt of Subpoenas.** No employee shall accept service of process or a subpoena for any other employee, except as specified below:
 - a. Subpoenas addressed to the Commissioner, or the Department may only be accepted by the Commissioner or the Commissioner's Executive Assistant. In the Commissioner's absence, the acting Commissioner may accept such subpoenas. The Division of Hearing and Legal Services (*DHLS*), and the Assistant Attorney General shall be immediately notified regarding the subpoena.
 - b. Subpoenas addressed to any other employee which initiates a lawsuit against the individual in his capacity as an employee of the Department may only be accepted by the employee named on the subpoena.
 - c. All other subpoenas concerning VOSH business for the appearance as a witness or for production of documents may only be accepted by the employee named on the subpoena, the employee's immediate supervisor, or a supervisor higher in the employee's chain of command.
 - d. The employee receiving a subpoena shall immediately notify the Division of Hearing and Legal Services.

- B. Subpoena Procedures.** If a subpoena concerns a VOSH case in which the CSHO was involved and in which the Department is a party, it must be complied with after contact with the Division of Hearing and Legal Services. The Department shall attempt to quash, i.e., void, all other subpoenas dealing with cases in which VOSH is not a party. Early contact with the Division of Hearing and Legal Services is essential to ensure that the subpoena can be avoided so the VOSH employee does not have to testify.

- C. Testifying in Court.** CSHOs may be called upon to testify in a variety of situations. They may have to testify in a court proceeding in defense of an inspection that resulted in issued citations. The CSHO shall be mindful of this fact when recording observations during inspections. The case file shall reflect the conditions observed in the workplace as accurately as possible. If the CSHO is called upon to testify, the case file will be invaluable as a means of recalling actual conditions. This type of testimony is a logical extension of the compliance process and is necessary. However, CSHOs may also be called upon to testify in what are known as “third party” cases. These will involve situations in which the CSHO performed an inspection or investigation, and attorneys for either the employee or another entity such as the manufacturer or general contractor want the CSHO to testify regarding the citation. CSHOs may also be asked by attorneys for either side to spend time explaining the case, or what their testimony will be.

It is the policy of the Department that unnecessary involvement in third-party cases is not an effective use of employee resources and unnecessarily takes CSHOs away from their primary duties. Further, the Division of Hearing and Legal Services will seek to limit CSHO involvement in third party litigation.

Therefore, CSHOs are directed to only participate in third party cases to the extent required by a subpoena for either a “Notice of Oral Examination” i.e., deposition, or for testimony in a court trial.

- D. Type of Testimony Given.** If a CSHO has been subpoenaed to testify as described above, an issue often arises as to what type of testimony will be given. There are two types of testimony: “expert testimony” and “factual testimony.” Expert testimony involves giving one’s opinion as to certain issues. For example, expert testimony could involve stating that you believe a certain practice to be unsafe. Factual testimony, on the other hand, is limited to explaining facts without embellishing these facts with any opinions. For example, a CSHO could explain that certain documents appear to be accurate photocopies of their work notes, or the Citation and Notice issued following their inspection. Other examples of factual testimony would include stating “yes, these are the photographs that I took” or “yes, I recommended citing a violation of (*standard number*).”

CSHOs shall provide only factual testimony, not expert testimony, in cases where the Department is not a party to the action.

Neither side in a lawsuit should be provided free expert testimony by the State. Again, this is not an efficient use of state resources. The Division of Hearing and Legal Services will coordinate with the Office of the Attorney General, as the circumstances dictate.

- E. **Disposition of Inspection Records.** “Inspection Records” are any records made by a CSHO that concern, relate to, or are part of any inspection or that concern, relate to, or are part of the performance of any official duty. Such original material and all copies shall be included in the case file. These records are the property of the Commonwealth and a part of the case file. Inspection records are not the property of the CSHO and are not to be retained or used for any private purpose under any circumstances.

NOTE: Copies of photos from the case file may be used by staff during safety and health training sessions.

- F. **Release of Inspection Information.** The information obtained during inspections is confidential and is to be determined as disclosable or non-disclosable on the basis of criteria established in the Virginia Freedom of Information Act (FOIA).
- G. **Freedom of Information Act (FOIA) Request.** All FOIA requests concerning case files or program statistics are to be processed by the Division of Hearing and Legal Services. With the exception of media requests, all such requests should be referred to the Director of the Division of Hearing and Legal Services, in accordance with Chapter 8, Rescue Operations, Emergency Response and Public Information Policy.
- H. **Seizure of Evidence and Chain of Custody.** Occasionally, VOSH will seek to obtain, or otherwise preserve, evidence during an investigation. This may range from documentary evidence such as drawings or pictures taken by the employer, digital data and other e-documents to physical evidence such as extension cords or compressors. Our need for such items ranges from testing to preservation of the items for trial.

Evidence is considered to be in VOSH custody when it is in the CSHO’s physical custody and no longer that of the employer. The chain of custody begins at this time, i.e., when an item is collected by VOSH, and the chain is maintained until the evidence is returned to the employer. VOSH must be able to prove the legal integrity and continuity of possession of all physical items, data, or samples to be tested, which are used in VOSH’s investigation, or in the case of subsequent litigation, introduced into evidence in court.

The chain of custody tracks the possession, handling, and location of such items from the time of collection, assures this continuous accountability, and acts as a guard against unauthorized removal or tampering. This means it is also necessary to have an accurate written chronological record of those individuals who have had custody of the evidence from its initial acquisition, through the closing of the casefile, and its ultimate return to the employer. (*Use the Evidence Collection Chain of Custody form VOSH-CoC/2012 in Appendix “B” of this FOM*). Once it is collected, such evidence shall be kept in a secured area, with access restricted to one authorized individual, i.e., the CSHO who obtained it,

or if custody is turned over, to the regional office staff person functioning as the office evidence custodian.

While industrial hygiene samples for lab testing have other existing procedures (*see Section II, Chapter 1 Appendix II: 1-6 through 1-9 of the OSHA Technical Manual*) for this purpose, in the case of documents, digital data or e-documents, and physical items, these chain of custody procedures provide the required security and verification of possession. This is necessary as there is no absolute way to know in advance all the items or data that may be involved in the issuance of violations or subsequent litigation.

For all cases except industrial hygiene test sample evidence, to prove the chain of custody for documents, digital data and e-documents, or physical objects, use VOSH form “VOSH-CofC/2012”, which details how items are to be handled such as:

- Who is collecting the evidence?
- What is the evidence? (*include a description*)
- When was it collected by VOSH?
- Where was it when it was collected by VOSH?
- How and/or from whom did you get it?
- Who has handled it other than the person who collected it?
- Why did that person handle it?
- When did they handle it?
- Where has it traveled? and,
- Where was it stored and secured?

The following procedures will govern the handling of such items:

1. **Documentary Evidence.** Documentary evidence will be kept by VOSH until the case file is closed. If the employer makes a written request for return of the evidence, VOSH will return the evidence after making a copy for the file.
2. **Physical and Digital Evidence.** Physical and digital evidence will be kept by VOSH while the case is open. When the case is closed, VOSH shall return the item and obtain a written receipt from the individual receiving the item. The receipt shall contain the following minimum information: (1) a description of the item returned, (2) the signature of the person receiving the item, (3) the date, (4) the signature of the VOSH employee returning the item, and (5) the inspection name and inspection number.
 - a. **Refusal of Access to Physical Evidence.** If an employer refuses to provide or give access to items needed as physical or digital

evidence, the CSHO shall follow the refusal of entry procedures contained in this FOM. If local or State Police are on site, the CSHO may request their assistance in obtaining physical evidence.

- b. Testing of Physical or Digital Evidence.** When some pieces of physical digital evidence require testing or evaluation, the Regional Safety or Health Director shall contact the appropriate Program Director who, in consultation with the Director of the Division of Hearing and Legal Services, shall select the appropriate testing facility to assure proper testing procedures and chain of custody.
- c. Return of Physical Evidence.** After the inspection is completed or closed, the Regional Safety or Health Director will return the item(s) to the employer.

If the case is contested or under litigation, then the Regional Health or Safety Director will consult with the Division of Hearing and Legal Services to determine if the evidence is relevant to the case. If DHLS determines that the evidence is relevant to the case, the evidence will be maintained at the regional office until DHLS confirms that it is no longer needed.

V. VOSH Cooperative Programs Overview

VOSH offers several avenues for businesses and organizations to work cooperatively with the Agency. CSHOs should discuss the various cooperative programs with employers.

- A. Voluntary Protection Program (VPP).** The Voluntary Protection Program (VPP) is designed to recognize and promote effective safety and health management. A hallmark of VPP is the principle that management, labor, and VOSH can work together in pursuit of a safe and healthy workplace. A VPP participant is an employer that has successfully designed and implemented a health and safety management system at its worksite and has undergone an onsite audit by a VPP audit team. Successful VPP programs are designated STAR worksites and are exempted from VOSH General Schedule programmed inspections during their time as VPP participants.
- B. Onsite Consultation Programs.** VOSH onsite consultation programs are available in the Commonwealth under §§21(d) and 23(g) agreements for the operation of State plans approved by OSHA.

 - 1. The VOSH Onsite Consultation Program offers a variety of services at no cost to employers. These services include assisting in the

development and implementation of an effective safety and health management system and offering training and education to the employer and employees at the worksite. Smaller businesses in high hazard industries or those involved in hazardous operations receive priority.

2. As per federal requirement, the VOSH Onsite Consultation Program is separate from VOSH's enforcement efforts. Under onsite consultation programs, no citations are issued, nor are penalties proposed. Employers are required to abate all hazards at their worksites.

- C. **Safety and Health Achievement Recognition Program (SHARP).** Another program that recognizes employers' efforts to create a safe workplace and exempts them from specific inspections is the Safety and Health Achievement Recognition Program (SHARP). This program is administered by the Commonwealth's State Onsite Consultation Program but is funded under §21(d) of the federal Occupational Safety and Health Act.

SHARP is designed to provide incentives and support those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from VOSH General Schedule programmed inspections for a specific period of time.

NOTE: See VOSH Program Directive 03-001E, CSP 02-00-005, [Consultation Policies and Procedures Manual](#), for additional information.

- D. **Strategic Partnerships.** Organizations can enter into Strategic Partnerships with VOSH to address specific safety and health issues. In these partnerships, VOSH enters into extended, voluntary, cooperative relationships with groups of employers, employees, and employee representatives (sometimes including other stakeholders and sometimes involving only one employer) in order to encourage, assist, and recognize efforts to eliminate serious hazards and to achieve a high level of employee safety and health.
- E. **Alliance Programs.** Through an alliance, VOSH may work with groups committed to safety and health, including businesses, trade or professional organizations, unions and educational institutions, to leverage resources and expertise to develop compliance assistance tools and resources and share information with employers and employees to help prevent injuries, illnesses and fatalities in the workplace. VOSH and the organization sign a formal agreement with goals that address training and education, outreach and communication, and promote the national dialogue on workplace safety and health. Refer to 13-075, and 13-xxx series VOSH Program Directives for all alliance agreements.

NOTE: See Chapter 3 on Program Planning for Enforcement Scheduling and Interface with Cooperative Program Participants, for additional information.

Appendix A



**EVIDENCE COLLECTION
CHAIN OF CUSTODY FORM**

Inspection #:	Inspection Date:	CSHO ID #:
Employer Name:	Employer Address:	
EVIDENCE COLLECTION		
Description of Property (<i>Provide Serial #, Make, Model, Color, etc.</i>): _____ <i>separate form for each item.</i>		Item #: ____ of ____ <i>Use a</i>
Evidence Removed From (Location):		
Evidence Removed From (Person/Employee):	Job Title:	
Receipt given to Employee for Evidence: ☐ YES	<i>If NO, explain why:</i> 	

☐ NO		
Item Collected By (CSHO Printed Name):	Item Collection Date:	Item Collection Time: ☐ AM ☐ PM
CSHO Signature:		
CHAIN OF CUSTODY		
How Was Item Secured (<i>Description of container and sealing process</i>):		
Storage Location:	Storage Date:	Storage Time: ☐ AM ☐ PM
Custodian (<i>Person and job title if other than self</i>):		

Page 2

Released By: 	Released To: 	Reason:
Printed Name 	Printed Name 	
Signature 	Signature 	Date:

Released By: 	Released To: 	Reason:
Printed Name 	Printed Name 	
Signature 	Signature 	Date:

Released By: 	Released To: 	Reason:
Printed Name 	Printed Name 	
Signature 	Signature 	Date:

Released By: _____ Printed Name _____ Signature	Released To: _____ Printed Name _____ Signature	Reason: _____ _____ _____ Date: _____

Released By: _____ Printed Name _____ Signature	Released To: _____ Printed Name _____ Signature	Reason: _____ _____ _____ Date: _____

Released By: _____ Printed Name _____ Signature	Released To: _____ Printed Name _____ Signature	Reason: _____ _____ _____ Date: _____

Appendix B

EVIDENCE COLLECTION CHAIN OF CUSTODY FORM (SAMPLE)



Inspection #: Click or tap here to enter text.	Inspection Date: Click or tap here to enter text.	CSHO ID: Click or tap here to enter text.
Employer Name: Click or tap here to enter text.		Employer Address: Click or tap here to enter text.
EVIDENCE COLLECTION		
Description of Property (Provide Serial #, Make, Model, Color, etc.): Use a separate form for each item Item # Click or tap here to enter text. of Click or tap here to enter text.		
Click or tap here to enter text.		
Evidence Removed From (Location): Click or tap here to enter text.		
Evidence Removed From (Person/Employee): Click or tap here to enter text.	Job Title: Click or tap here to enter text.	
Receipt Given to Employee for Evidence: ☐ Yes ☐ No	If No, explain why: Click or tap here to enter text.	
Item Collected by (CSHO Name): Click or tap here to enter text.	Item Collection Date: Click or tap here to enter text.	Item Collection Time: Click or tap here to enter text. ☐ AM ☐ PM
CSHO Signature:		
CHAIN OF CUSTODY		

How was item secured (Description of container and sealing process): Click or tap here to enter text.		
Storage Location: Click or tap here to enter text.	Storage Date: Click or tap here to enter text.	Storage Time: Click or tap here to enter text. ☐ AM ☐ PM
Custodian (Person and Job Title if other than self): Click or tap here to enter text.		

Released By:	Released By:	Released By:
Printed Name:	Printed Name:	Printed Name:
Signature:	Signature:	Signature:

Released By:	Released By:	Released By:
Printed Name:	Printed Name:	Printed Name:
Signature:	Signature:	Signature:
Released By:	Released By:	Released By:
Printed Name:	Printed Name:	Printed Name:

Signature:	Signature:	Signature:

Released By:	Released By:	Released By:
Printed Name:	Printed Name:	Printed Name:
Signature:	Signature:	Signature:

Released By:	Released By:	Released By:
Printed Name:	Printed Name:	Printed Name:
Signature:	Signature:	Signature:

Released By:	Released By:	Released By:
Printed Name:	Printed Name:	Printed Name:
Signature:	Signature:	Signature:

Complaint and Referral Processing

CHAPTER- 2

Chapter 2: COMPLAINT AND REFERRAL PROCESSING

I. Safety and Health Complaints and Referrals

A. General. All complaint or referral processing shall be reviewed, evaluated, and entered into OIS by the Regional Director or designee.

B. Definitions

- 1. Complaint.** Notice of an alleged safety or health hazard (over which VOSH has jurisdiction), or a violation of title 40.1. There are two types: formal and non-formal.

Formal Complaint. Complaint made by a current employee or a representative of employees that meets all the following requirements:

- Asserts that an imminent danger, a violation of title 40.1, or a violation of a VOSH standard exposes employees to a potential physical or health harm in the workplace;
- Is reduced to writing, or submitted online; and
- Is signed by at least one current employee or employee representative.

Non-formal Complaint. Any complaint alleging a safety or health violation(s) that does not meet all the requirements of a formal complaint identified above and does not come from one of the sources identified under the definition of Referral, below.

- 2. Referral.** An allegation of a potential workplace hazard or violation received from one of the sources listed below:
 - a. CSHO referral** – information based on the direct observation of a CSHO.
 - b. Safety and health agency referral** – from sources including, but not limited to: NIOSH, state programs, consultation, and state or local health departments, as well as safety and/or health professionals in other federal agencies.
 - c. Discrimination or Whistleblower complaint referral** – made by a whistleblower investigator when an employee alleges that he or she was retaliated against for complaining about safety or health conditions in the workplace, refusing to do an allegedly imminently dangerous task, engaging in other activities related to occupational safety or health or for raising concerns under

any of the federal anti-retaliation statutes that OSHA enforces.
See the Whistleblower Statutes Desk Aid for more information.

- d. **Other government agency referral** – made by other federal, state, or local government agencies or their employees, including local police and fire departments.
 - e. **Media report** – either news items reported in the media or information reported directly to VOSH by a media source.
 - f. **Employer/Employee Representative report** – of accidents other than fatalities and catastrophes.
3. **Representative of Employees.** For the purpose of submitting a complaint, a representative of employees is any of the following:
- a. An **authorized representative** of the employee bargaining unit, such as a certified or recognized labor organization;
 - b. A **lawyer acting on behalf of the employee.**
 - c. Any other person acting in a **bona fide representative** capacity, including, but not limited to, members of the clergy, social workers, spouses and other family members, and government officials or nonprofit groups and organizations acting upon specific complaints and injuries from individuals who are employees.

NOTE: The representative capacity of the person filing complaints on behalf of another should be ascertained unless it is already clear. In general, the affected employee should have requested, or at least approved, the filing of the complaint on his or her behalf.

4. **Inspection.** An on-site inspection of an employer's worksite conducted by a VOSH compliance officer, initiated as the result of a complaint or referral, and meeting at least one of the criteria identified in Section D.1, Criteria Warranting an Inspection, below.
5. **Investigation.** (Phone, Email Rapid Response Inquiry) A process conducted in response to a complaint or a referral that does not meet one of the identified inspection criteria as listed in Section D.1. It does not involve an on-site inspection of the workplace but, rather, the

employer is notified of the alleged hazard(s) or violation(s) by telephone, fax, email, or by letter, if necessary. The employer is then requested to provide a response, and as applicable, VOSH will notify the complainant of that response through appropriate means.

6. **Permanently Disabling Injury or Illness.** An injury or illness that has resulted in permanent disability, work-related injury, or an illness that is chronic or irreversible. Permanently disabling injuries or illnesses include, but are not limited to: amputation, blindness, a standard threshold shift in hearing, lead or mercury poisoning, paralysis or third-degree burns.

C. **Complaint Processing Procedures.**

1. **VOSH Electronic Complaint Processing Procedure.**

- a. **Submission & Forwarding.** Electronic complaints submitted through the OSHA public website are automatically forwarded via email to VOSH. VOSH then forwards the complaint to the appropriate regional office within the Commonwealth.
- b. **Complaint Mailbox Management.** Each Regional Office maintains a "Complaints" mailbox, which is monitored daily. Incoming complaints are reviewed to determine jurisdiction.
- c. **Jurisdiction Review & Processing.** If the complaint falls within VOSH's jurisdiction, it is entered into OIS and processed accordingly. If the complaint belongs to another agency, the Regional Director forwards it to the appropriate entity.
- d. **Documentation & Tracking.** A written complaint is completed for all received complaints. To facilitate tracking, the electronic complaint number should be entered in the Receipt/Activity Info tab, when applicable.
- e. **Formal Complaints.** If a current employee has provided their name and selected the option "This constitutes my electronic signature", the complaint is classified as formal and processed accordingly.
- f. **Validity Assessment & Timeline.** All electronically received complaint-related materials should be evaluated for validity. The date of validation marks the start of the six-month processing period.

- 2. Electronic Complaints Received through OSHA's Public Website.** All complaints submitted via OSHA's public website are initially considered non-formal and are automatically forwarded by email to VOSH and then forwarded to the appropriate Regional Office.
- a. Each Regional Office manages a "Complaints" mailbox and processes electronic complaints according to internal complaint processing procedures. The complaints mailbox is monitored daily and every incoming complaint is reviewed for jurisdiction.
 - i. If the complaint falls within the jurisdiction of VOSH, then the complaint is entered into OIS and processed as usual.
 - ii. If the complaint falls within the jurisdiction of another agency, the Regional Director shall forward the complaint to the appropriate entity.
 - b. In order to facilitate the tracking of electronic complaints, please enter the electronic complaint number in the Receipt/Activity Info tab when applicable.
 - c. Electronic complaints where a current employee has provided their name and checked the "This constitutes my electronic signature" box shall be considered as a formal complaint and processed accordingly.
 - d. All complaint-related material received electronically should be evaluated to determine validity. The date that the complaint is determined to be valid will serve as the start of the six-month period.
- 3. Information Received by Telephone.**
- a. While speaking with the caller, VOSH personnel will attempt to obtain the following information:
 - *Whether the caller is a current employee or an employee representative.*
 - *The exact nature of the alleged hazard(s) and the basis of the caller's knowledge. The individual receiving the information must determine, to the extent possible, whether the information received describes an apparent violation of VOSH standards.*

- *The employer's name, address, email address, telephone and fax numbers, as well as the name of a contact person at the worksite.*
- *The name, address, telephone number, and email address of any union and/or employee representative at the worksite.*

As appropriate, VOSH personnel will provide the caller with the following information:

- *Describe the complaint process, and if appropriate, the concepts of "inquiry" and "inspection," as well as the relative advantages of each.*
- *If the caller is a current employee or a representative of employees, explain the distinction between a formal complaint and a non-formal complaint, and the rights and protections that accompany filing a formal complaint.*

These rights and protections include the following:

- *The right to request an on-site inspection;*
 - *notification in writing if an inspection is deemed unnecessary because there are no reasonable grounds to believe that a violation or danger exists; and*
 - *the right to obtain review of a decision not to inspect by submitting a request for review in writing.*
- b. Information received by telephone from a current employee is considered a non-formal complaint until that individual provides a signed copy of the information. The employee can mail, email, or fax a signed copy of the information, or submit the information in person at the Regional Office. Normally a complainant has five (5) working days to formalize an electronic complaint.
- c. If appropriate, inform the complainant of **rights to confidentiality** in accordance with 16VAC25-60-90 of the Virginia Administrative Code, and ask whether the complainant wishes to exercise this right. When confidentiality is requested, the identity of the complainant is protected regardless of the formality of the complaint.

Explain §40.1 rights to employees and the Whistleblowers Protection Act.

4. Procedures for Handling Complaints Filed in Multiple Regional Offices.

- a. When a Regional Office determines that multiple offices within the State have received the same complaint, the Regional Office should contact the Program Director(s).
- b. The Program Director(s) will query all Regional Offices to determine whether similar complaints were filed in multiple offices.
- c. If multiple Regional Offices have received the same complaint, then the Program Director(s) will address the complaint with the employer.
- d. Regional Offices should indicate in OIS that these complaints have been transferred to the DOLI Headquarters.

D. Inspections. An inspection is conducted by a CSHO at the employer's worksite.

1. **Criteria Warranting an Inspection.** An inspection is initiated when information received is classified as a complaint or a referral, and at least one of the conditions below is met.
 - a. A valid formal complaint is submitted. Specifically, the complaint must be: reduced to writing or submitted online), be signed by a current employee or representative of employees, state the reason for the inspection request with reasonable particularity, reasonable grounds to believe that a violation of the VOSH standards that exposes employees to physical harm exists, or that an imminent danger of death or serious injury exists, is from a current employee or employee representative that alleges a recordkeeping deficiency that indicates the existence of a potentially serious safety or health violation.
 - b. Allegations of an imminent danger situation, a violation of a VOSH standard exists, that exposes employees to a potential serious physical or health hazard in the workplace.
 - c. The information concerns an establishment and an alleged hazard covered by a local, regional, or national emphasis program.
 - d. The employer fails to provide an adequate response to an inquiry, or the individual who provided the original information provides further evidence that the employer's response is false or does not adequately address the

hazard(s). The evidence must be descriptive of current or recurring hazardous conditions.

- e. The establishment that is the subject of the information has a history of egregious, willful, failure-to-abate, or repeated citations within the Regional Office's jurisdiction during the past five (5) years or is an establishment or related establishment in the Severe Violator Enforcement Program. However, if the employer has previously submitted adequate documentation for these violations, demonstrating that they were corrected and that programs have been implemented to prevent a recurrence of hazards, then the Regional Director(s) will normally determine that an inspection is not necessary.
- f. The Whistleblower Protection Program requests that an inspection be conducted in response to an employee's allegation that the employee was discriminated against for complaining about safety or health conditions in the workplace, refusing to perform an allegedly dangerous job or task, or engaging in other activities related to occupational safety or health.
- g. If an inspection is scheduled or has begun at an establishment and a complaint or referral that would normally be handled through inquiry is received, then this complaint or referral can, at the Regional Director's discretion, be incorporated into the scheduled or ongoing inspection. If such a complaint is formal, then the complainant must receive a written response that addresses the complaint items.
- h. If the information gives reasonable grounds to believe that an employee under 18 years of age is exposed to a serious violation of a safety or health standard or a serious hazard, then an on-site inspection will be initiated if the information relates to construction, manufacturing, maritime, agriculture, or other industries as determined by the Regional Director(s). Limitations placed on VOSH's activities in agriculture by Appropriations Act provisions will be observed. See VOSH Program Directive 02-003X, VOSH Procedures to comply with OSHA Enforcement Exemptions and Limitations under the Appropriations Act, May 28, 1998. A referral to Wage and Hour should also be initiated.

NOTE: The information does not need to allege that a child labor law has been violated.

2. Scheduling an Inspection of an Employer in an Exempt Industry. In order to schedule an inspection of an employer in an exempt industry classification as specified by Appropriations Act provisions (See VOSH Program Directive 02-003X, VOSH Procedures to comply with OSHA Enforcement Exemptions and Limitations under the Appropriations Act, May 28, 1998), one of the following conditions must be met:

- a. The information must come directly from a current employee; OR
- b. It must be determined and documented in the case file that the information came from a representative of the employee (see Section 1.B.3 of this chapter, Representative of Employees), with the employee's knowledge of the representative's intended action.

3. Companion Complaint. If an inspection is scheduled or has begun at an establishment and a complaint that would generally be investigated by telephone/fax/email is received, that complaint may, at the Regional Director's discretion, be scheduled for inspection as a companion complaint.

4. Procedures for an Inspection.

- a. Upon receipt of a complaint or referral, the Regional Director(s) or designee will evaluate all available information to determine whether there are reasonable grounds to believe that a violation or hazard exists.
 - i. If necessary, reasonable attempts will be made to contact the individual who provided the information to obtain additional details or to clarify issues raised in the complaint or referral.
 - ii. The Regional Director can determine not to inspect a facility if he has a substantial reason to believe that the condition in the complaint is being or has been abated.
- b. Despite the existence of a complaint, if the Regional Director determines that there are no reasonable grounds to believe that a violation or hazard exists, then no inspection or investigation will be conducted.
 - i. Where a formal complaint has been submitted, the complainant will be notified in writing of VOSH's intent not to conduct an inspection, the reasoning behind the determination, and the right to dispute the determination. The justification for not inspecting will be noted in the case file.
 - ii. In the event of a non-formal complaint or referral, if possible, the individual providing the information will be notified by appropriate means of VOSH's intent not to conduct an inquiry or inspection. The

justification for not inspecting or conducting an inquiry will be noted in the case file.

- c. If the information contained in the complaint or referral meets at least one of the inspection criteria listed in Section D.1 of this chapter, Criteria Warranting an Inspection, and there are reasonable grounds to believe that a violation or hazard exists, the Regional Office is authorized to conduct an inspection.
 - i. If appropriate, then the Regional Office will inform the individual who has provided the information that an inspection will be scheduled and that he or she will be advised of the results.
 - ii. After the inspection, the Regional Office will send the complainant a letter addressing each information item, with reference to the citation(s) or a sufficiently detailed explanation for why a citation was not issued.
- c. If an inspection is warranted, it will be initiated as soon as resources permit. Inspections resulting from formal complaints of serious hazards will normally be initiated within five (5) working days.
- d. Generally, the scope of a complaint/referral inspection must bear an appropriate relationship to the alleged violative conditions. The CSHO must have probable cause to expand the inspection beyond the violations alleged in the complaint/referral. See Chapter 4, Section 1.B, Inspection Procedures, for more information.

E. Procedures for an Investigation.

- 1. If the complaint or referral does not meet the criteria for initiating an onsite inspection, then an investigation will be conducted. VOSH will promptly notify the employer about the complaint or referral and its allegation(s), and fax or email a confirming letter.
- 2. If a non-formal complaint is submitted by a current employee or a representative of employees that does not meet any of the inspection criteria, then the complainant can be given five (5) working days to make the complaint formal.
 - a. The complainant can come into the Regional Office and sign the complaint, or mail, email, or fax a signed complaint letter to VOSH.
 - b. If the complaint is not made formal after five (5) working days, after making a reasonable attempt to inform the complainant of the decision, VOSH will proceed with the investigation process.

3. The employer will be advised of what information is needed to answer the investigation and encouraged to respond by fax or email. Employers are encouraged to do the following:
 - a. Immediately investigate and determine whether the complaint or referral information is valid and make any necessary corrections or modifications.
 - b. Advise the Regional Director(s) either in writing by email or fax within five (5) working days of the results of the investigation into the alleged complaint or referral information. At the discretion of the Regional Director(s) and depending on the circumstances, the response time can be longer or shorter than five (5) working days. Also, although the employer is requested to respond within the above time frame, the employer may not be able to complete abatement action during the above time frame, the employer should be encouraged to do so.
 - c. Provide the Regional Director(s) with supporting documentation of the findings, including any applicable measurements or monitoring results, and photographs and/or videos that the employer believes would be helpful, as well as a description of any corrective action that the employer has taken or is in the process of taking.
 - d. Post a copy of the letter from VOSH where it is readily accessible for review by all employees.
 - e. Return a copy of the signed Certificate of Posting to the Regional Office.
 - f. If there is a recognized employee union or safety and health committee in the facility, provide them with a copy of VOSH's letter and the employer's response.
4. As soon as possible after contacting the employer, a notification letter will be faxed to the employer or mailed where no fax is available. Sample letters to complainants and employers are provided in OIS.
5. If no employer response or an inadequate employer response is received after the allotted five (5) working days, additional contact with the employer can be made before an inspection is scheduled. If the employer provides no response or an inadequate response, or if VOSH determines from other information that the condition has not been or is not being corrected, then an inspection will be scheduled.
6. The complainant will be advised of the employer's response, as well as the complainant's rights to dispute that response and, if the alleged hazard persists, of the right to request an inspection. When VOSH receives an adequate response

from the employer and the complainant does not dispute or object to the response, an onsite inspection normally will not be conducted.

7. If the complainant is a current employee or a representative of employees and wishes to dispute the employer's response, the disagreement must be submitted in writing and signed, thereby making the complaint formal.
 - a. If the employee disagreement takes the form of a written and signed formal complaint, then see Section D.4 of this chapter, Procedures for an Inspection.
 - b. If the employee disagreement does not take the form of a written and signed formal complaint, then some discretion is allowed in situations where the information does not justify an on-site inspection. In such situations, the complainant will be notified of VOSH's intent not to conduct an inspection and the reasoning behind the determination. This decision should be thoroughly documented in the case file.
8. If a signed complaint is received after the complaint investigation process has begun, then the Regional Director(s) will determine whether the alleged hazard is likely to exist based on the employer's response and by contacting the complainant. The complainant will be informed that the investigation has begun and that the complainant retains the right to request an on-site inspection if he disputes the results and believes that the hazard still exists.
9. The complaint must not be closed until VOSH verifies that the hazard has been abated.
10. The justification for not conducting an investigation will be noted in the case file.

F. Recording in OIS.

Information about complaint and referral inspections or investigations must be recorded in OIS following the current instructions outlined in the FOM. Referrals reported by the employer will be recorded in OIS following current instructions given in the OIS manual.

G. Complainant Protection.

1. **Identity of the Complainant.**
 - a. Upon request of the complainant, their identity will be withheld from the employer. No information will be given to the employer that would allow the employer to identify the complainant.
 - b. Generally, names and other personally identifiable information of employees will not be included in the warrant application. Where employees' names or other personally identifiable information appear in affidavits and other

supporting documents attached to the warrant application, such information must be redacted. Where inclusion of the employee's name is necessary, Regional Offices should consult with Program Directors about filing the warrant application under seal.

2. Whistleblower Protection.

- a. §40.1 of the *Code of Virginia* provides protection for employees who believe that they have been the subject of an adverse employment action in retaliation for engaging in activities related to workplace safety or health. Any employee who believes that they have been discharged or otherwise retaliated against by any person as a result of engaging in such activities can file a whistleblower complaint. The complaint must be filed within sixty (60) days from the date of the alleged discrimination violation, starting the day after the alleged discrimination occurred.
- b. Complainants should always be advised of their §40.1 rights and protections upon initial contact with VOSH and whenever appropriate in subsequent communications.

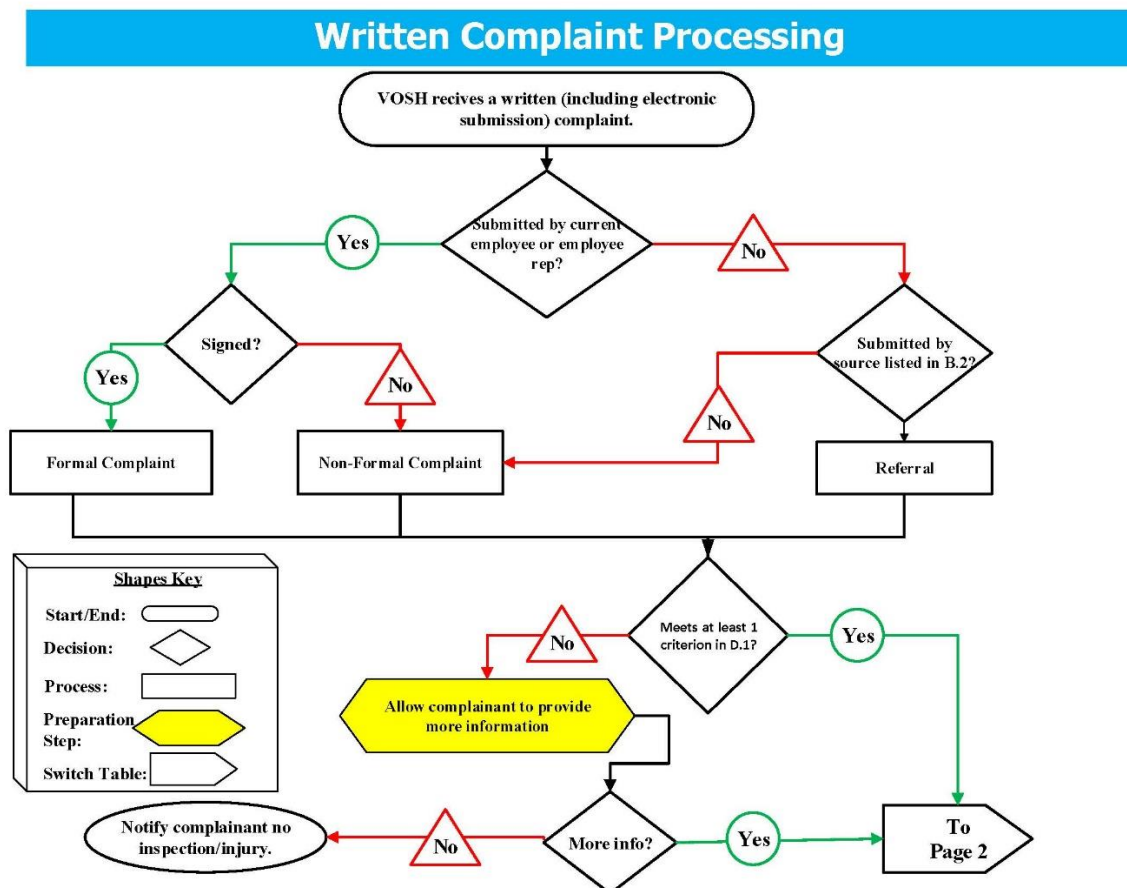
H. Whistleblower Complaints.

1. VOSH enforces the whistleblower or anti-retaliation provisions of §40.1. These anti-retaliation statutes protect employees who report violations of workplace safety and health laws. The statutes generally prohibit employers from discharging or otherwise retaliating against their employees for exercising their rights under these statutes. These rights include filing a VOSH complaint, participating in an inspection or talking to an inspector, seeking access to employer exposure and injury records, reporting an injury, and raising a safety or health complaint with the employer.
2. In the context of a VOSH enforcement action or a consultation activity, the complainant will be:
 - advised of the protection against retaliation afforded by §40.1;
 - informed of the procedure for filing a complaint;
 - given the telephone number and address of the Whistleblower Investigator;
 - advised that discrimination complaints must be filed within sixty (60) days from the date the alleged discrimination violation occurs;
 - advised that if the discrimination is of a continuing nature, such as harassment or blacklisting, the time period begins on the date the most recent act of discrimination occurs.

3. A whistleblower complaint can be in any form, including an oral complaint made to a CSHO. Thus, if a person alleges that they have suffered an adverse action because of activity protected under §40.1, CSHOs will record that person's identifying information and the date and time of this initial contact and immediately forward it to the Whistleblower Investigator for intake. The date of filing must be promptly recorded.
4. Employees can file occupational safety and health retaliation complaints with Federal OSHA, VOSH, or both. Federal OSHA normally refers such complaints to VOSH for investigation. VOSH's Whistleblower Investigations Manual outlines the Agency's referral/deferral policies for such complaints.

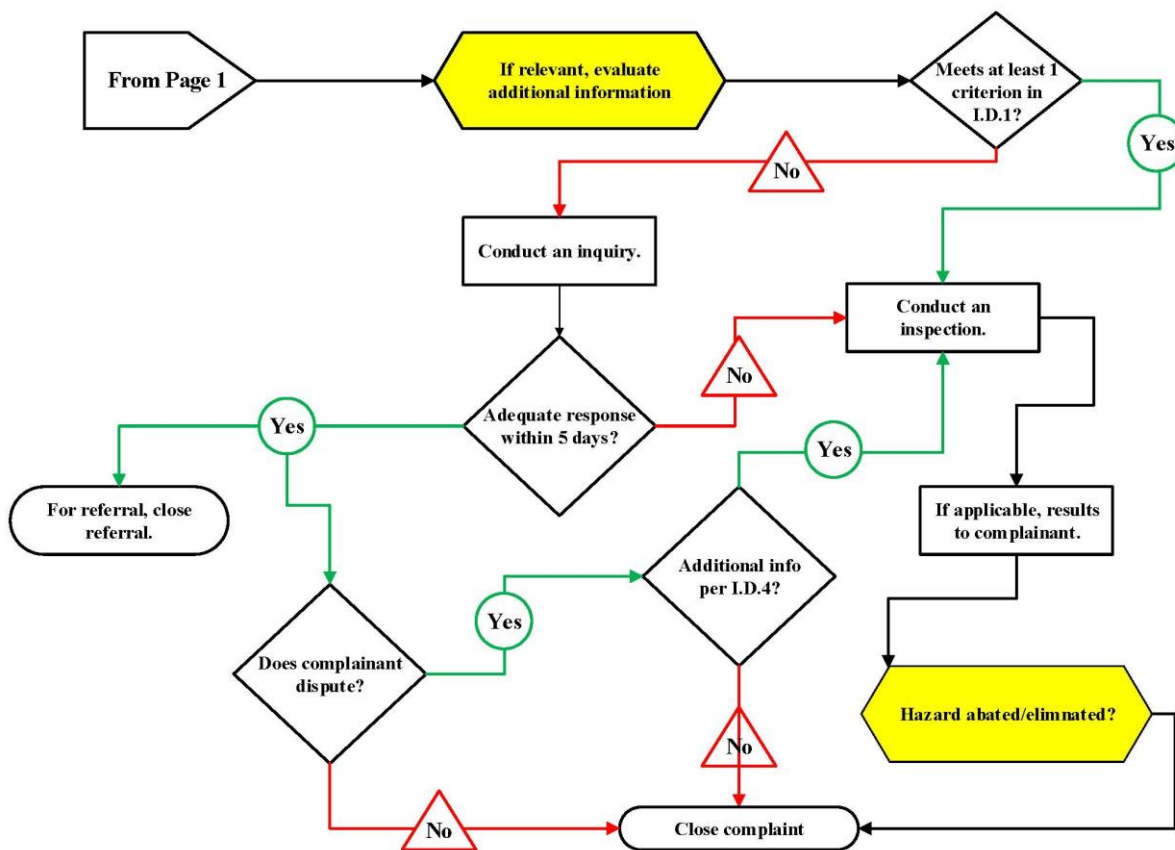
I. Decision Trees.

1. See decision tree for VOSH enforcement action or consultation activity when information is obtained in writing.
2. See decision tree for VOSH enforcement action or consultation activity when information is obtained orally.



Written Complaint Processing

Page 2



Complaint Questionnaire

Obtain information from the caller by asking the following questions, where relevant.

For All Complaints:

1. What is the specific safety or health hazard?
2. Has the hazardous condition been brought to the employer's attention? If so, when? How?
3. How are employees exposed to this hazard? Describe the unsafe or unhealthful working conditions; identify the location.
4. What work is done in the unsafe/unhealthful area? Identify, as well as possible, the type and condition of equipment in use, the materials (e.g., chemicals) being used, the process/operation involved, and the kinds of work being done near the hazardous area. Have there been any recent chemical spills, releases, or incidents?
5. What frequency are employees doing the task that leads to the exposure? Continuously? Every day? Every week? Rarely? For how long at one time? How long has the condition existed (so far as can be determined)? Has it been brought to the employer's attention? Have any attempts been made to correct the condition, and, if so, who took these actions? What were the results?
6. How many shifts are there? What time do they start? On which shift does the hazardous condition exist?
7. What personal protective equipment (e.g., hearing protection, gloves, or respirators) is required by the employer relevant to the alleged exposure? Is it used by employees? Include all PPE and describe it as specifically as possible. Include the manufacturer's name and any identifying numbers.
8. How many people work in the establishment? How many are exposed to the hazardous conditions? How near do they get to the hazard?
9. Is there an employee representative or a union in the establishment? Include the name, address, and telephone number of the union and/or the employee representative(s).

For Health Hazards:

10. Has the employer administered any tests to determine employee exposure levels to the hazardous conditions or substance? Describe these tests. Can the employees get the results (as required by the standard)? What were the results?
11. What engineering controls are in place in the area(s) in which the exposed employees work? For instance, are there any fans or acoustical insulation in the area which can reduce exposure to the hazard?
12. What administrative or work practice controls has the employer put in place?
13. Do any employees have any symptoms that could have been caused by exposure to hazardous substances? Have any employees ever been treated by a physician for a work-related disease or condition? What was it?
14. Have there been any "near-miss" incidents?
15. Are respirators worn to protect against health hazards? If so, what kind? What exposures are they protecting against?
16. If the complaint is related to noise, what, if any, hearing protection is provided and worn by the employees?
17. Do employees receive audiograms on a regular basis?

For Safety Hazards:

18. Under what adverse or hazardous conditions are employees required to work? This should include conditions contributing to stress and "other" probability factors.

19. Have any employees been injured as a result of this hazardous condition? Have there been any "near-miss" incidents?

Program Planning

CHAPTER- 3

Chapter 3: PROGRAM PLANNING

I. Enforcement Program Scheduling

- A. **Purpose.** This Chapter provides general guidelines to Program Directors and Regional Directors in planning compliance operations and related activities and instructions for their implementation.

The primary consideration in conducting compliance operations is the attainment of maximum effective inspection coverage. To achieve this goal, the guidelines in this chapter shall be used for scheduling compliance operations.

VOSH Public Sector Coverage. VOSH regulatory authority over public sector establishments is equivalent to its authority over private sector. Section 16VAC25-60-30 of the Administrative Regulations Manual states that “All occupational safety and health standards adopted by the board shall apply to public employers and their employees in the same manner as to private employers. states that “All occupational safety and health standards adopted by the board shall apply to public employers and their employees in the same manner as to private employers.

B. Inspection/Investigation Types

1. **Unprogrammed.** Unprogrammed Inspections scheduled in response to alleged hazardous working conditions that have been identified at a specific worksite are unprogrammed. This type of inspection responds to imminent danger, fatalities, catastrophes (where alleged hazardous working conditions have been identified), complaints and referrals. It also includes follow-up and monitoring inspections. All public sector unprogrammed inspections are processed and conducted in the same manner as for the private sector. identified at a specific worksite are unprogrammed. This type of inspection responds to imminent danger, fatalities, catastrophes (where alleged hazardous working conditions have been identified), complaints and referrals. It also includes follow-up and monitoring inspections. All public sector unprogrammed inspections are processed and conducted in the same manner as for the private sector.

NOTE: This category includes all employers directly affected by the subject of the unprogrammed activity.

Unprogrammed Related Inspections of employers at multi-employer worksites. Unprogrammed related Inspections of employers at multi-employer worksites whose operations are not directly affected by the subject of the conditions identified in the complaint, accident or referral

are unprogrammed related. An example would be a trenching inspection conducted at the unprogrammed worksite, where the trenching hazard was not identified in the complaint, accident report or referral.

2. **Programmed Inspections of worksites which have been scheduled.** Programmed inspections of worksites which have been scheduled based upon objective or neutral selection criteria are programmed. The worksites are selected according to the Planning Guide for safety and health national, state or local emphasis programs. been scheduled based upon objective or neutral selection criteria are programmed. The worksites are selected according to the Planning Guide for safety and health national, state or local emphasis programs.

Fatality/Catastrophe inspections where we initially cannot determine whether hazardous working conditions exist, shall be classified as programmed inspections. (See Table 3-1 concerning order of priorities for compliance inspections.)

3. **Programmed Related.** Inspections of employers on multi-employer worksites whose activities were not included in the programmed assignment, e.g., a low injury rate employer at a worksite where programmed inspections are being conducted for all high injury rate employers. (See employer worksites whose activities were not included in the programmed assignment, e.g., a low injury rate employer at a worksite where programmed inspections are being conducted for all high injury rate employers. (See Chapter 4 Inspection Procedures)
4. The inspection, either programmed or unprogrammed, may fall into one of two categories depending on the scope:
 - a. **Comprehensive.** A substantially complete inspections of the potentially high hazard areas of the establishment. An inspection may be considered comprehensive even though, as a result of the exercise of professional judgement, not all potentially hazardous conditions, operations and practices within those areas are inspected. Substantially complete inspections of the potentially high hazard areas of the establishment. An inspection may be considered comprehensive even though, as a result of the exercise of professional judgement, not all potentially hazardous conditions, operations and practices within those areas are inspected. A programmed public sector inspection generally is a comprehensive inspection of the worksite but may be limited as necessary in view of resource availability and other enforcement priorities. (Low-hazard areas, such as office space,

may be excluded from inspection without affecting the comprehensiveness of the inspection.)

- b. **Partial.** An inspection that is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment. is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment. Every "partial" inspection, whether programmed or unprogrammed, shall include:
1. The principal focus (e.g., imminent danger or complaint investigation);
 2. A review of injury and illness records;
 3. An assessment of the employer's hazard communication, 1910.1200, lockout/tagout programs, 1910.147, confined space, 1910.146, and bloodborne pathogens, 1910.1030; and
 4. An evaluation of the employer's safety and health management program. (See Chapter 4 Inspection Procedures)

Follow-up inspections may be excepted from this rule.

- c. The CSHO shall use the information gathered during the review and investigation of the principal focus in recommending whether the scope of the inspection should be expanded. The Regional Director shall make the decision on expanding the scope of an inspection in accordance with:
Section C. below Chapter 4 on Citations, Inspection Procedures, and Imminent Danger

- C. Expanding the Scope of the Inspection.** Programmed and unprogrammed inspections which were initiated as partial scope inspections may be expanded under any of the following circumstances which shall be documented in the case file initiated as partial scope inspections may be expanded under any of the following circumstances which shall be documented in the case file.
- D. Inspection Priority Criteria.** Generally, priority of accomplishment and of assigning staff resources for inspection categories is as shown in Table 3-1 below:

Table 3-1

<i>Priority</i>	<i>Category</i>
First	Imminent Danger as defined in the VOSH <i>Administrative Regulation Manual</i> (ARM).
Second	Fatality Inspections (<i>regardless of whether our inspection is in response to specific evidence of hazardous conditions or not</i>).
Third	Accident / First Report of Accident Inspections.
Fourth	Complaints / Referrals.
Fifth	Follow-up / Monitoring.
Sixth	Programmed Inspections, i.e., General Schedule, Construction Schedule, National & Local Emphasis Programs AND unprogrammed inspections in response to alleged hazardous working conditions that would normally be classified as Other-Than-Serious.

1. **Efficient Use of Resources.** Deviations from this priority list are allowed so long as they are justifiable, lead to the efficient use of resources, and promote effective employee protection. An example of such a deviation would be when the Agency or Regional Director commits a certain percentage of resources to programmed Special Emphasis Program (SEP) inspections, such as a National Emphasis Program (NEP), or a Local Emphasis Program (LEP). Inspection scheduling deviations must be documented in the case file.
2. **Follow-up Inspections.** In cases where follow-up inspections are necessary, they shall be conducted as promptly as resources permit. In general, follow-up inspections shall take priority over all programmed inspections and any unprogrammed inspection in which the hazards are anticipated to be other-than-serious. Generally, follow-up inspections should not be conducted within the fifteen (15) working day contest period.
3. **Monitoring Inspections.** When a monitoring inspection is necessary, the priority is the same as for a follow-up inspection.
4. **Employer Information Requests.** Contacts for technical information initiated by employers or their representatives will not trigger an inspection, nor will such employer inquiries protect the requesting employer against inspections conducted pursuant to existing policy, scheduling guidelines and inspection programs established by the Agency.

5. Reports of Imminent Danger, Hospitalizations, Fatality, Amputations, Accidents, Referrals or Complaints.

The Regional Director or designee will act in accordance with established inspection priority procedures.

***NOTE:** See Section II. of this Chapter, Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling, for additional information.*

E. Effect of Contest

If an employer has contested a citation and/or a penalty from a previous inspection at a specific worksite, and the case is still pending, the following guidelines apply to additional inspections of the employer at that worksite:

1. Penalty Only

If the employer has contested the penalty only, the inspection will be scheduled as if there were no contest;

2. Citation

If the employer has contested the citation itself or any items thereon, then the following apply:

a. Unprogrammed Inspections. Inspections conducted in response to alleged hazardous conditions at a worksite are considered unprogrammed inspections. Unprogrammed inspections shall be scheduled in accordance with the guidelines in section II. of this chapter. The scope of such an inspection in most cases shall be partial. All areas related to items under contest shall be excluded from the inspection unless a potential imminent danger is involved.

b. Programmed Inspections. Programmed inspections may be carried over to the next register in certain situations (e.g., process not active, etc.). Such inspections may continue to be carried over until the case is no longer before the courts. If the inspection is done, all items under contest shall be excluded from inspection unless a potential imminent danger is involved.

c. Programmed Inspections vs. Issued Citations. On rare occasions, when warranted by the particular circumstances involved, programmed safety inspections may be carried over to the next register when the employer has contested a previously issued health citation. The same is true for programmed health inspections when the employer has contested a previously issued safety citation. The decision to carry such an inspection over shall be made by the Regional Director.

F. Enforcement Exemptions and Limitations

1. **Federal Mandated Restrictions Exist.** In providing funding for OSHA and VOSH, Congress has consistently placed restrictions on enforcement activities for two categories of employers: small farming operations and small employers in low-hazard industries. Congress may place exemptions and limitations on VOSH activities through the annual Appropriations Act. Congressional exemptions do not apply when VOSH elects to use 100% state funds. This most often occurs when VOSH decides to inspect a small farm operation or a small employer in a low hazard industry, e.g., VOSH investigates occupationally related farm fatalities, regardless of the size of the farm.
2. **Prior to Inspection Determine If Prohibition Applies.** Before initiating an inspection of an employer in these categories, the Regional Office will evaluate whether the Appropriations Act for the fiscal year would prohibit the inspection. *Refer to the latest annual version of VOSH Program Directive 02-003.* Where this determination cannot be made beforehand, the CSHO will determine the status of the small farming operation or a small employer in a low-hazard industry upon arrival at the workplace.

If the prohibition applies, the inspection shall immediately be discontinued, unless approval is received from the respective enforcement director.

G. Determination of Preemption by a Federal Agency or Other State Agency

1. **Preemption or Jurisdiction by Another Agency – Generally.** The Regional Director shall always be alert to potential jurisdictional conflicts with other agencies. The determination of preemption is, in many cases, a highly complex matter. To preclude as much as possible any misunderstanding with other agencies and to avoid any consequent adverse actions by employers or other agencies, the Regional Director shall observe the following guidelines whenever a situation arises involving a possible preemption of jurisdiction question:
 - a. The VOSH Program does not have jurisdiction over working conditions over which federal agencies, or another state agency exercises statutory responsibility to prescribe standards for safety and health.
 - b. If a question arises, usually upon receipt of a complaint, referral, or other inquiry, the Regional Director shall consult the list of Memorandums of Understanding (MOUs) or Memoranda of Agreements (MOAs) in Section 13 of the VOSH Program

Directive system to determine if the jurisdictional issue has been previously addressed with the other agency involved. A MOU or MOA is an agreement created to address/resolve coverage issues and to improve the working relationships between DOLI (VOSH and federal or other state agencies and organizations regarding employee safety and health).

- c. At times, an inspection may have already begun when the jurisdictional question arises. In such cases, the CSHO shall interrupt the inspection and contact the Regional Director or designee for guidance as soon as such questions arise and shall be dealt with on a case-by-case basis. If the Regional Office is unable to clarify the issue, it shall be referred to the applicable Program Director who shall contact the Division of Hearing and Legal Services (DHLS).

2. **Determining Jurisdiction Regarding Federal Lands.** The issue of when VOSH has jurisdiction for inspection purposes over private employers and civilian contractors working on federally owned land within the Commonwealth of Virginia is complex and raises difficult legal jurisdictional issues.

The courts have generally concluded that if the State of Virginia has ceded exclusive jurisdiction to the United States over a parcel of land, then there is no VOSH jurisdiction on that land. If the State has only granted the U.S. partial or concurrent jurisdiction, then there may be VOSH jurisdiction.

Because it will often be unclear before starting an inspection whether the State has ceded exclusive jurisdiction or has concurrent jurisdiction, it is recommended that the Regional Director contact the applicable Program Director who shall contact DHLS for advice regarding the status of the federal lands in question.

3. **VOSH Does Have Jurisdiction - Inspection Procedures.** Once a determination is made that VOSH does indeed have jurisdiction, the policies and procedures for inspection of private employers and civilian contractors working on federally owned land are the same as those followed in the private sector. When an inspection is scheduled at a federally administered facility, the CSHO shall first contact the federal manager in charge to inform her or him of VOSH's presence at the facility, to request permission to inspect a contractor, and to invite appropriate participation.
4. **VOSH Does Not Have Jurisdiction-Referral to Appropriate Agency.** If it is determined that VOSH does not have jurisdiction, the case shall be referred to the appropriate agency, if any, where VOSH

has reason to believe that violations of such agency's laws and regulations may exist.

H. United States Postal Service

1. **Federal Jurisdiction.** Federal OSHA retains authority to cover the U.S. Postal Service nationwide. Federal coverage in State Plan States encompasses U.S. Postal Service employees and contract employees engaged in U.S. Postal Service mail operations. Coverage includes contractor-operated facilities engaged in mail operations and postal stations in public or commercial facilities.
2. **VOSH Jurisdiction on Non-Federal Property.** Where the U.S. Postal Service rents or leases space for its operations in a privately owned building or facility, i.e., the building is not owned by United States Government, the U.S. Postal Service, or other federal agency, authority or instrumentality, VOSH shall exercise jurisdiction over all other private sector contractors working on such U.S. Postal Service sites who are not engaged in U.S. Postal Service mail operations, such as building maintenance and construction employees.

***NOTE:** See the Final Rule on State Plans Coverage of the U.S. Postal Service (Federal Register, June 9, 2000 (65 FR 36618))*

3. **Citation and Penalty under VOSH Jurisdiction.** Violations documented by VOSH during inspections on private sector contractors who are not engaged in U.S. Postal Service mail operations, such as building maintenance and construction employees, working at a U.S. Postal Service site will be cited with penalties in accordance with the FOM and other applicable VOSH policies for the private sector.

I. Home-Based Worksites

1. The VOSH Program will not perform any inspections of employees' home offices. A home office is defined as office work activities in a home-based setting/worksites, e.g., filing, keyboarding, computer research, reading, and/or writing, and may include the use of office equipment, such as a telephone, facsimile machine, computer, scanner, copy machine, desk, and/or file cabinet.
2. VOSH will only conduct inspections of other home-based worksites, such as home manufacturing operations, when it receives a complaint or referral alleging that a violation of a safety or health standard exists that threatens physical harm, that an imminent danger is present, or that there was a work-related fatality. (See VOSH PD 02-214, *Home-Based Worksites*, dated 01 October 2000, for additional information.)

J. Inspection/Investigation Types

1. **Unprogrammed.** This category includes all employers/employees directly affected by the subject of the unprogrammed inspection activity and is especially applicable on multi-employer worksites. All public sector unprogrammed inspections are processed and conducted in the same manner as for the private sector.
 - a. Inspections scheduled in response to alleged hazardous working conditions identified at a specific worksite are classified as unprogrammed. This type of inspection responds to:
 - (1) Imminent Dangers;
 - (2) *Fatalities (where the alleged hazardous working conditions have been identified);*
 - (3) Accidents.
 - (4) *Complaints and Referrals (Not all complaints and referrals qualify for an inspection. See Chapter 2 on Complaint and Referral Processing, for additional information.); and,*
 - b. Follow-up and monitoring inspections scheduled by the Regional Office. *(Refer to VOSH ARM §260 F. for additional information.)*
2. **Unprogrammed Related.** Inspections of employers at multi-employer worksites whose operations are not directly addressed by the subject of the conditions identified in a complaint, accident, or referral are designated as unprogrammed related.

Example: A trenching inspection opened at the unprogrammed worksite where the trenching hazard was not mentioned in the complaint, accident report, or referral.
3. **Programmed.** Inspections of worksites which have been scheduled based upon objective or neutral selection criteria are programmed inspections. The worksites are selected according to VOSH's General Schedule for Safety and Health in General Industry; the Construction Schedule for safety in the Construction Industry; or under local (LEP), regional (REP), and national (NEP) special emphasis programs.
4. **Program Related.** Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment, such as a low injury rate employer at a worksite where

programmed inspections are being conducted for all high-rate employers.

II. Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling

Enforcement procedures relating to unprogrammed activity are located in subject specific chapters of this manual:

- **Imminent Danger**, Chapter on Fatality Catastrophe, Rescue Operation and Emergency Response.
- **Fatality**, Chapter on Fatality Catastrophe, Rescue Operation and Emergency Response.
- **Emergency Response**, Chapter on Fatality Catastrophe, Rescue Operation and Emergency Response.
- **Complaint/Referral Processing**, Chapter on Complaint and Referral Processing.
- **Whistleblower Complaints**, see Chapter on Complaint and Referral Processing.
- **Follow-ups and Monitoring**, see Chapter on Program Planning.

III. Programmed Inspections

A. General Schedule Inspections. Programmed inspections in the VOSH Program are primarily inspections of high hazard worksites which have been scheduled based upon objective or random selection criteria. These worksites are selected according to their respective General Schedules for safety or health in General Industry, the Construction Industry, or under national, special or local emphasis programs.

B. Programmed Inspections

1. **Comprehensive Inspection.** A programmed inspection, generally, is a comprehensive inspection of the worksite. However, it may be limited as necessary in view of resource availability and other enforcement priorities such as focused inspections. Low hazard areas, such as office space, may be excluded from inspection without affecting the comprehensiveness of the inspection.

Low-hazard areas, such as office space, may be excluded from inspection without affecting the comprehensiveness of the inspection.

- (A) General Policy.** There are certain fundamental general policy considerations specific to private sector and public sector inspections in regard to the implementation of VOSH's targeting system:

- (1) **Private Sector.** It is VOSH policy that programmed private sector inspections should primarily come from "high hazard" sectors of employment.
- (a) In the area of safety, the agency considers a "high hazard" industry to be one within a North American Industry Classification System (NAICS) code with an excessive lost workday injury rate.
 - (b) In the area of health, the agency considers a "high hazard" NAICS code to be one with a previous history of serious VOSH or OSHA health citations.
 - (c) Where site specific injury and/or illness data is available in the area of safety or health, the agency considers a high hazard work site to be one with an excessive lost workday injury and/or illness rate.
 - (d) For the purpose of scheduling programmed inspections, all construction is considered to be a category of high hazard employment.
 - (e) Other specific industries, such as logging and work around overhead high voltage lines, are also high hazard industries and are frequently scheduled for inspection as national or local emphasis programs.
 - (f) Fatality inspections where it cannot initially be determined whether hazardous working conditions exist shall be classified as programmed inspections. (See order of priorities for compliance inspections.)
- (2) **Public Sector.** Public sector programmed safety and health inspections are scheduled using the following guidelines and procedures. The scheduling system is based upon a multi-step process. Public sector programmed safety and health inspections for OIS purposes, are classified as a "Local Emphasis Program."
- (a) The annual field operations program plan projections are made at the VOSH Division Office level. These projections control the initial amount of public sector programmed inspections selected.
 - (b) Four categories of employment activities will be considered for public sector programmed inspections:

construction, manufacturing, non-manufacturing, and agriculture operations. Within the categories of manufacturing, non-manufacturing, and agriculture, Local Emphasis Programs are developed using the procedures contained in this Chapter.

(B) Description. Both programmed safety inspections and programmed health inspections are scheduled based upon a multiple-step process:

- (1) The initial selection of a particular programmed inspection, e.g., high hazard general industry, construction, or high hazard health, is made in accordance with the annual projections made by the Directors of Occupational Safety and Health Compliance.
- (2) Within a category, establishments are selected for inspection from the inspection register for that category and placed in an inspection register and inspection cycles established; or in the case of an inspection schedule established by a VOSH Program Directive, e.g., national or local emphasis programs, selection and assignment of worksites shall be made in accordance with procedures contained in the VOSH Directive.
- (3) In such cases where no regional establishment inspection registers are provided by the Director of Occupational Safety Compliance Program or the Director of the Health Compliance Program, the affected Regional Director shall coordinate with the applicable Program Director on how to establish a list locally, if appropriate.
- (4) Within an inspection register, establishments shall be inspected in descending order of sequence number; however, establishments may be inspected out of sequence (i.e., moved up the list only) to promote efficient use of resources. All establishments in a cycle must be inspected, with only limited exceptions, before a new register is begun.

2. **Guidelines and Procedures.** Establishments which appear on both the safety and health inspection registers shall be scheduled for a joint safety/health inspection whenever possible. Programmed inspections may also be conducted jointly by both safety and health personnel whenever resources are available and it is likely, based on experience in inspecting similar workplaces, both safety and health hazards exist to a significant degree. If an inspection begins as safety only or as health only but the CSHO determines during the course of the inspection that

it should be expanded, the CSHO shall contact the Regional Director. A decision will then be made as to whether the inspection should be expanded and, if so, to what extent. The decision may also be, based on resource availability, to handle the information as a CSHO referral for inspection at a later time.

- a. **Inspection Scheduling for General Industry (Safety and Health)** Safety and health programmed inspections of private and public sector establishments shall be selected and assigned in accordance with this chapter or the appropriate VOSH Directive (*please refer to VOSH Program Directive 02-105A, or its successor, for private sector safety Construction Schedule inspections*).

NOTE: *Public Sector Program targeted inspections, targeted assistance visits, and on-site evaluations have a priority at least equal to that of private sector general industry programmed inspections.*

- (1) **Establishment Registers.** The Directors of Occupational Safety and Health Compliance will provide a series of establishment registers for use by VOSH in programming inspections.

NOTE: *Establishments which are NOT in the current year's annual top 200 High Hazard NAICS codes which are listed as having ten or fewer employees unless they are part of a larger employer are to be deleted from establishment registers.*

- (2) **Adjustments to Establishment Lists.** Prior to the use of the establishment lists provided by the Directors of Occupational Safety and Health Compliance for scheduling purposes, the Regional Director shall make appropriate additions and deletions as administrative guidelines permit.

- (3) **Review of Federal Appropriations Act Exemptions & Limitations.** CSHOs shall determine if the employer is covered by any exemptions or limitations noted in the latest version of VOSH PD 02-003 which updates the Directive to the latest federal Appropriations Act changes.

3. **Scheduling for Construction Inspections.** Due to the mobility of the construction industry, the transitory nature of construction worksites and the fact that construction worksites frequently involve more than one employer, inspections are scheduled from a register of construction worksites rather than construction employers. OSHA will provide

VOSH, either directly or through a third party, a randomly selected register of construction projects for each region from identified or known covered active projects. This register will contain the projected number of sites which the field office has reported it plans on inspecting during the next month. Projects are selected in accordance with the inspection schedule for construction.

NOTE: See VOSH Program Directive 02-105A (or successor) - *Inspection Scheduling for Construction*, (01 July 2013).

- C. **Shipyard, Maritime, Marine Cargo, and Shipbreaking Inspections.** Federal OSHA exercises jurisdiction over such private sector maritime related inspections. VOSH retains jurisdiction over public sector maritime inspections.
- D. **Special Emphasis Programs.** Special Emphasis Programs which VOSH chooses to implement are of two types:
- **National Emphasis Programs (NEPs)**
 - **Local Emphasis Programs (LEPs)**

Their purpose is to provide for programmed inspections of establishments in industries or other worksites with potentially high injury or illness rates that are not covered by other programmed inspection scheduling systems or, if covered, where the potentially high injury or illness rates are not addressed to the extent considered adequate under the specific circumstances. Special Emphasis Programs are also based on potential exposure to health hazards. Special emphasis programs may also be used to develop and implement alternative scheduling procedures or other departures from national procedures.

1. **Identification of a Special Emphasis Program.** The description of the particular Special Emphasis Program shall be identified by one or more of the following characteristics:
 - Specific industry;
 - Trade/craft;
 - Substance or other hazard;
 - Type of workplace operation;
 - Type/kind of equipment; and
 - Other identifying characteristic.

NOTE: See VOSH Program Directive 01-010 for procedures for approval of Local Emphasis Programs

2. **Special Emphasis Program Scope.** The reasons for and the scope of a Special Emphasis Program shall be described; and may be limited by

geographic boundaries, size of worksite, or other considerations as listed in Section 1 above.

- E. National (NEPs) & Regional Emphasis Programs.** These programs are developed by Federal OSHA for nationwide implementation in the case of NEPs, or by the federal Region III OSHA Office in Philadelphia when the need is to focus outreach efforts and inspections on specific workplace hazards in Region III that the Region has determined require special attention. Such federal regional emphasis programs which VOSH chooses to adopt are developed as VOSH Local Emphasis Programs.
- F. Local Emphasis Programs (LEPs)**
1. LEPs are types of special emphasis program in which one or more VOSH regions participate. LEPs are generally based on knowledge of local industry hazards or local industry injury/illness experience. VOSH originated LEPs and those based on Region III OSHA regional programs must be developed and approved by headquarters when one or more of the four VOSH regions targets inspections to specific industries, hazards, or other workplace characteristics, e.g., as part of, or in conjunction with, a local initiative or problem-solving project.
 2. A list of all current NEPs and LEPs used by VOSH may be found in the 14-xxx series of VOSH Program Directives as well as on the last page of the VOSH Program Directives Table of Contents. The 14-xxx series of VOSH Program directives include topic specific scheduling procedures in addition to the general information provided in this section.
- G. Pilot Programs and Other Special Programs.** National, Region III OSHA, or local VOSH pilot programs may also be established under Special Emphasis Programs. Such programs may be conducted for the purpose of assessing the actual extent of suspected or potential hazards, determining the feasibility of new or experimental compliance procedures or for any other reason deemed appropriate by Headquarters. VOSH may develop other special programs to cover certain categories of inspections which are not covered under the regular planned inspection programs or under a specific LEP.
- H. Inspection Scheduling and Interface with Cooperative Program Participants**
1. **Determination of Cooperative Program Participation.** Employers who participate in voluntary compliance programs and have received a comprehensive onsite consultation may be exempt from programmed inspections and eligible for inspection deferrals or other enforcement incentives for the twelve (12) month period following the consultation visit. The Regional Director or designee will determine whether the

employer is actively participating in a Cooperative Program that would impact inspection and enforcement activity at the worksite being considered for inspection. Where possible, this determination should be made prior to scheduling the inspection.

2. Regional Scheduling Coordination

- a. Consultants will confer with the Regional Director to check the general schedule and mark "CS" and the date for scheduled for the Consultation Survey next to the name of any employer that has a consultation visit scheduled within 45 days. However, the Consultation Survey may be deferred for no greater than ninety (90) calendar days (comprised of one forty-five-day period and extension of an additional forty-five (45) days) from request to visit. Should the employer cancel the appointment, the consultant will mark through the initials on the general schedule. Only general schedule inspections should be deferred if consultation visits are scheduled. **It is the responsibility of the consultant to confer with the Regional Director to check the general schedule listing.** All such establishments selected for a Consultation Survey shall be moved to the bottom of the current inspection cycle.
- b. **Onsite Coordination.** Upon arrival at the inspection site the CSHO shall determine whether an onsite consultation visit has recently been conducted or is in progress. An on-site consultative visit is considered "in progress" in relation to working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions.
- c. **Abatement Coordination with VOSH Consultant.** If the employer has received a limited-service onsite consultation visit, or if an unprogrammed compliance inspection will be conducted, the CSHO shall determine whether the VOSH Consultant has established any abatement date(s) which has not yet expired for any serious hazard(s). The compliance inspection may not include any item covered by the VOSH Consultant's abatement plan.
- d. **Sharp Worksites.** Newly certified SHARP worksites will be exempt from Programmed Inspections for one (1) year. Recertified SHARP worksites will be exempt from Programmed Inspections for two (2) years. The Consultation Program Manager will notify Regional Directors of SHARP worksites.

- e. **STAR Worksites.** Virginia Voluntary Protection Program (VPP) Star worksites are exempt from Programmed Inspections as long as they maintain their VVPP status. The VVPP Coordinator is responsible for notifying Regional Directors by forwarding a copy of the letter scheduling the pre-evaluation on-site review. Should a site not be recommended for VVPP status, or should it be removed or withdraw from the program, the VVPP Coordinator will inform appropriate Regional Directors in writing.
3. **Removal From List.** Employers who meet all Consultation Program requirements for recognition and exemption will have the names of their establishments removed from VOSH's Programmed Inspection Schedule.

***NOTE:** The Consultation Program Manager will notify Regional Directors of businesses that qualify for twelve (12) month deferral of general schedule inspections.*

4. **Information Availability.** Information regarding a facility's participation in the following programs should be made available to the Regional Director prior to scheduling inspection activity:
- VPP Program;
 - Pre-SHARP and SHARP Participants;
 - OSHA VOSH Strategic Partnerships; and
 - Consultation ninety (90) Day Deferrals.
5. **Voluntary Protection Program**
- a. **VPP Coordinator Manager Responsibilities.** The VPP Coordinator must keep the Regional Director or his/her designee informed regarding VPP applicants and the status of participants in the VPP. This will prevent unnecessary scheduling of programmed inspections at VPP sites and ensure efficient use of resources. The Regional Director or his/her designee should be informed:
 - (1) That the site can be removed from the programmed inspection register.
 - (2) Such removal may occur no more than seventy-five (75) days prior to the onsite evaluation;
 - (3) Of the site's approval for the VPP program;

- (4) Of the site's withdrawal or termination from the VPP program; and
 - (5) If the VPP Coordinator is the first person notified by the site of an event requiring enforcement, the VPP Coordinator must instruct the site to contact the appropriate Regional Office.
- b. **Programmed Inspections and VPP Participation**
 - (1) **Inspection Deferral.** Approved sites must be removed from any programmed inspection registers for the duration of participation, unless a site chooses otherwise. The applicant worksite will be deferred starting no more than seventy-five (75) calendar days prior to the commencement of its scheduled pre-approval onsite review.
 - (2) **Inspection Exemption.** The exemption from programmed inspections for approved VPP sites will continue for as long as they continue to meet VPP requirements. Sites that have withdrawn or have been terminated from VPP will be returned to the programmed inspection register, if applicable, at the time of the next inspection cycle.
- c. **Unprogrammed Enforcement Activities at VPP Sites.** When Regional Office receives a complaint, or a referral other than from the VOSH VPP onsite team or is notified of a fatality or other event requiring an enforcement inspection at a VPP site, the Regional Director or designee must initiate the inspection following normal VOSH enforcement procedures.
 - (1) The Regional Office must immediately notify the VPP Coordinator Manager of any fatalities or other accidents or incidents occurring at a VPP worksite that require an enforcement inspection; as well as of a referral or complaint that concerns a VPP worksite, including complaint inquiries that would receive a letter response. If the VPP is a national VPP worksite, the OSHA Region III Office should be notified.
 - (2) If the VPP Coordinator is the first person notified by the site of an event requiring an enforcement inspection, the VPP Coordinator must instruct the site to contact the appropriate Regional Office, the appropriate VOSH Program Director

and the National Office if the fatality is on a National VPP site.

- (3) The inspection will be limited to the specific issue of the unprogrammed activity. If citations are issued as a result of the inspection, a copy of the citation will be sent to the VPP Coordinator. See *OSHA CSP 03-01-003 Voluntary Protection Programs (VPP): Consultation Policies and Procedures Manual*, (18 April 2008), VOSH PD 03-007 (or successor).
- (4) The Regional Director or designee will send the VPP Coordinator Manager a copy of any report resulting from an enforcement case.

6. Consultation

a. Consultation Visit in Progress

- (1) If an onsite consultation visit is in progress, it will take priority over VOSH programmed inspections. An onsite consultation visit will be considered "in progress" in relation to the working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions thereof. Onsite Consultation visits will be terminated when a Compliance Inspection is initiated for the following:

- Imminent danger inspection;
- Fatality inspection;
- Complaint inspections; and/or
- Other critical inspections, as determined by the Commissioner.

NOTE: Other "such critical inspections" may include, but are not limited to, referrals as defined in Chapter 2, Complaint and Referral Processing. Following an evaluation of the hazards alleged in a referral, if the Commissioner determines that enforcement action is required prior to the end of an abatement period established by the state consultation project, the consultation visit in progress shall be immediately terminated to allow for an enforcement inspection.

- (2) For purposes of efficiency and expediency, an employer's worksite shall not be subject to concurrent consultation and enforcement-related visits. Refer to the following excerpts from CSP 02-00-002 (01/18/08), VOSH Program Directives 03-001B (or successor), Consultation Policies and Procedures Manual (10/01/08) and 03-007 (or successor), Consultation Policies and Procedures, Chapter 7: Relationship to Enforcement, Hazard Correction and Verification (05/15/07), to clarify the interface between enforcement and consultation activity at the worksite:

(a) Full-Service On-Site Consultation Visits.

While a worksite is undergoing a full-service onsite consultation visit for both safety and health, programmed enforcement activity may not occur until after the end of the worksite's visit "In progress" status.

(b) Full-Service Safety or Health On-Site Consultation Visits.

An onsite consultation visit is discipline-related, whether for safety or health; programmed enforcement activity may not proceed until after the end of the worksites visit "In progress" status and is limited to the discipline which was not examined by the Consultant, either safety or health.

(c) Limited-Service On-Site Consultation Visits.

If a worksite is undergoing a limited service onsite consultation visit, whether focused on a particular type of work process or a hazard, programmed enforcement activity may not proceed while the consultant is at the worksite. The re-scheduled enforcement activity must be limited only to those areas that were not addressed by the scope of the consultative visit (posted List of Hazards).

(d) Enforcement Follow-Up and Monitoring

Inspections. If an enforcement follow-up or monitoring inspection is scheduled while a worksite is undergoing an onsite consultation visit, the inspection shall not be deferred; however, its scope shall be limited only to those areas required to be covered by the follow-up or monitoring inspection. In such instances, the consultant must halt the onsite visit until the enforcement inspection is completed. In the event VOSH issues a citation(s) as a result of the follow-up or monitoring inspection, an onsite consultation visit

may not proceed until the citation(s) becomes a final order(s).

b. On-Site Consultation and Ninety (90) Day Deferral

- (1) If an establishment has requested an initial full-service comprehensive consultation visit for safety or health from the Consultation Program, and that visit has been scheduled, a general schedule inspection may be deferred for no greater than ninety (90) calendar days (one 45 day period and extension of an additional 45 days) from the date of the notification by the Consultation Program to the Regional Office. No extension of the deferral beyond the ninety (90) calendar days is possible, unless the consultation visit is “in progress.”
- (2) VOSH may, however, in exercising its authority to schedule inspections, assign a lower priority to worksites where consultation visits are scheduled.

NOTE: Refer to VOSH Program Directives 03-001E (or successor), Consultation Policies and Procedures Manual (29 Sept 2023) and 03-007 (or successor), Consultation Policies and Procedures, Chapter 7: Relationship to Enforcement, Hazard Correction and Verification (15 May 2007), for additional information.

7. Pre-Safety and Health Achievement Recognition Program (Pre-SHARP) Status

- a. Those employers who do not meet the SHARP requirements, but who exhibit a reasonable promise of achieving agreed-upon milestones and time frames for SHARP participation, may be granted Pre-SHARP status. Pre-SHARP participants receive a full service, comprehensive consultation visit that involves a complete safety and health hazard identification survey, including a comprehensive assessment of the worksite’s safety and health management system.
- b. Upon achieving Pre-SHARP status, employers may be granted a deferral from VOSH program inspections. The deferral time frame recommended by the Consultation Project Manager must not exceed a total of eighteen (18) months from the expiration of the latest hazard correction due date(s), including extensions. Upon achieving Pre-SHARP status, employers may be granted a deferral from VOSH programmed inspections. The following

types of incidents can trigger a VOSH enforcement inspection at Pre-SHARP sites:

- **Imminent danger;**
- **Fatality and**
- **Signed employee complaints.**

8. Safety and Health Achievement Recognition Program (SHARP).

SHARP is designed to provide support and incentives to those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from VOSH programmed inspections, see §1908.7(b) (4).

a. **Duration of SHARP Status.** All initial approvals of SHARP status will be for a period of one year, commencing with the date the commissioner approves an employer's SHARP application. After the initial approval, all SHARP renewals will be for a period of two (2) years.

b. **VOSH Inspection(s) at SHARP Worksites.** As noted above, employers that are granted SHARP status will have the names of their establishments deleted from VOSH's Programmed Inspection Schedule. However, pursuant to §1908.7(b)(4)(ii), the following types of incidents can trigger a VOSH enforcement inspection at SHARP sites:

- **Imminent danger;**
- **Fatality and**
- **Signed employee complaints.**

***NOTE:** Refer to VOSH PD 03-001E (or successor), Consultation Policies and Procedures Manual, Chapter 8: OSHA's Safety and Health Achievement Recognition Program (SHARP) and Pre-SHARP, dated 29 September 2023, for additional information.*

9. Strategic Partnership Programs. VOSH strategic partnership programs impact on inspection scheduling and/or interface with Cooperative Program Participants. Consult applicable VOSH Directives establishing individual strategic partnerships to determine enforcement procedures.

NOTE: Some VOSH Strategic Partnerships may include inspection deferrals or exemptions.

10. **Alliances.** Unlike VOSH's VPP and SHARP programs, Alliances do not require applications, data collection, verification, or evaluation. Alliances also do not offer incentives, such as focused inspections or inspection deferral, to their signatories.

IV. Inspection Procedures for Follow-up and Monitoring Inspections

Follow-up inspections are conducted primarily to determine if previously cited violations have been corrected.

Monitoring inspections may be conducted when hazard correction takes place over a lengthy period of time. The purpose of monitoring inspections is to make sure the process of hazard correction is taking place and that employees are protected during this process.

Follow-up inspections or monitoring inspections may be conducted when there has been an issuance of willful violations. Follow-up or monitoring inspections would not generally be conducted when evidence of abatement is provided by the employer or employee representatives. However, when, for example, failure to abate notifications and/or citations related to imminent danger situations are issued, follow-up or monitoring inspections are appropriate.

If deemed necessary, follow-up inspections may be conducted within thirty (30) days following the latest abatement date and shall take priority over (1) programmed inspections and (2) unprogrammed inspections classified as Other-than-Serious. Follow-up inspections should not be conducted within the fifteen (15) working day contest period unless high gravity Serious violations are involved.

A. **When a Follow-up Inspection is Required.**

A follow-up inspection may be required when any of the following exist:

1. **Willful violations;**
2. **Fatalities;**
3. When the **employer fails to respond to a request for notification of abatement** action by letter or other means after having been contacted several times; and
4. Whenever the **Regional Director believes that particular circumstances, e.g., the number or the type of violations, past history of the employer, complex engineering controls, etc., indicate the need for a follow-up.**

There shall be no additional inspection activity unless, in the judgment of the CSHO, there have been significant changes in the workplace.

These changes, in addition to inspection modifications, must be fully documented.

B. Initial Follow-up. The initial follow-up is the first follow-up inspection after issuance of the citation.

1. If a violation is found not to have been abated, the CSHO shall inform the employer that the employer is subject to both a Notification of Failure to Abate Alleged Violation and to additional daily penalties that are proposed as long as such failure or violation continues.
2. Failure to comply with enforceable interim abatement dates involving multi-step abatement shall be subject to a Notification of Failure to Abate Alleged Violation.
3. Where the employer has implemented some controls, but other technology was available which would have brought the levels of airborne concentrations or noise to within the regulatory requirements, a Notification of Failure to Abate Alleged Violation shall generally be issued. If the employer has exhibited good faith, a late request for extension of abatement date for extenuating circumstances may be considered.
4. Where an apparent failure to abate by means of engineering controls is found to be due to technical infeasibility, no Failure to Abate notice shall be issued; however, if proper administrative controls, work practices or personal protective equipment are not utilized, a Notification of Failure to Abate Alleged Violation shall be issued.
5. There may be times during the initial follow-up when, because of an employer's flagrant disregard of a citation, an item on a citation, or other factors, it would be appropriate to bring action for an injunction under §40.1-49.4.F. of the *Code of Virginia*. The Regional Director shall notify the DHLS of all the particular circumstances of the case for referral to the Assistant Attorney General and appropriate Commonwealth's Attorney.

C. Second Follow-up.

Any subsequent follow-up after the initial follow-up dealing with the same violations is a second follow-up.

1. **After the Notification of Failure to Abate Alleged Violation has been issued**, the Regional Director shall allow a reasonable time for abatement of the violation before conducting a second follow-up. If the employer contests the proposed additional daily penalties, a follow-up inspection shall still be scheduled to ensure correction of the original violation.

2. **If a second follow-up inspection reveals that the employer still has not corrected the original violations,** the Regional Director shall immediately contact the DHLS in writing, detailing the circumstances so that the matter can be referred to the Assistant Attorney General and to the appropriate Commonwealth's Attorney for action in accordance with §40.1-49.4.F. of the *Code of Virginia*.
3. **Violation Recurs After Abatement.** If it is determined that the originally cited violation was abated but then recurred, a citation for a Repeated violation may be appropriate. A "Repeated violation" means that the violation has recurred after a successful abatement. See Chapter 8 on Violations, for more information on Repeated Violation versus Failure to Abate.

D. Follow-up and Monitoring Reports. A photocopy of the original Violation Worksheet form shall be used for documenting correction of willful, repeated and serious violations and failure-to-correct items during the follow-up inspections. If violation items were appropriately grouped in the Violation Worksheet in the original case file, they may be grouped for the follow-up inspection; if not, individual copies of the original Violation Worksheet forms shall be used for each item. The correction of other-than-serious violations may be documented in the narrative portion of the case file.

1. **Proper Documentation.** The correction circumstances observed by the CSHO shall be specifically described in the Violation Worksheet, including any applicable dimensions, materials, specifications, personal protective equipment, engineering controls, measurements or readings, or other conditions. Brief summations such as "corrected" or "in compliance" will not be accepted as proper documentation for violations which are corrected. When appropriate, this written description shall be supplemented by a videotape or a photograph to illustrate correction circumstances.
2. **Sampling.** The CSHO conducting a follow-up inspection to determine compliance with violations of air contaminants and noise standards shall decide whether sampling is necessary, and if so, what kind; i.e., spot sampling, short-term sampling, or full-shift sampling. If there is reasonable probability of an issuance of a Notification of Failure to Abate Alleged Violation, full-shift sampling is required.
3. **Narrative.** The CSHO shall include in the narrative the findings of the inspection, along with recommendations for action. In order to reach a valid conclusion when recommending action, it is important to have all the pertinent factors available in an organized manner.
4. **Failure to Abate.** In the event that any item has not been abated, complete documentation shall be included on a Violation Worksheet.

- E. Follow-up Files.** A copy of the follow-up inspection reports shall be included with the original (parent) case file.
- F. Conduct of Monitoring Inspection (Extensions of Abatement and Long-term Abatement)**
1. **General.** An inspection shall be classified as a monitoring inspection when a safety and health inspection is conducted for one or more of the following purposes:
 - a. To determine the progress an employer is making toward final abatement;
 - b. To ensure that the target dates of a multi-step abatement plan are being met;
 - c. To ensure that an employer's petition for the modification of abatement dates is made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible;
 - d. To ensure that the employees are being properly protected until final controls are implemented;
 - e. To ensure that the terms of a permanent variance are being met;
 - f. To provide abatement assistance for items under citation;
 - g. To ensure that the terms of a corporate-wide settlement agreement are being carried out;
 2. **Specifics**
 - a. Monitoring visits shall be conducted for requests for modification of abatement dates on serious, willful and repeated violations which would extend the final abatement date by more than one year from the citation issuance date.
 - (1) These inspections shall be conducted as soon as possible after first contact with the employer but no later than fifteen (15) working days following the receipt of certification of posting, unless an extension is requested from and granted by the Commissioner.
 - (2) Such inspections shall have a priority equal to that of serious complaints. The seriousness of the hazards requiring

abatement shall determine the priority among monitoring inspections.

- b. Monitoring visits in response to requests for modifications of abatement date for other-than-serious violations or for serious, willful or repeated violations which would result in a final abatement date of one year or less from the citation issuance date shall be scheduled at the discretion of the Regional Director, based on the gravity of the violation and on resource availability.
 - (1) These inspections shall be conducted as soon as possible after first contact with the employer, but no later than fifteen (15) working days following the receipt of certification of posting, unless an extension is requested from and granted by the Commissioner or his designee.
 - (2) Such inspections shall have a priority equal to that of Serious complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.
- c. Monitoring visits shall be scheduled to check on progress made on long-term or multi-step abatement plans whenever abatement dates extend beyond one year from the issuance date of the citation.
 - (1) These inspections shall be scheduled every six (6) months, counted from the citation date until final abatement has been achieved for all cited violations. If the case has been contested, the final order date, rather than the citation date, shall be used as a starting point. A settlement agreement may specify an alternative monitoring schedule.
 - (2) If the employer is submitting satisfactory quarterly progress reports and if, after careful review, that these reports reflect adequate progress on implementation of control measures and adequate interim protection for employees, a monitoring inspection may be conducted every twelve (12) months counted from the date of the final order.
 - (3) Such inspections shall have a priority equal to that of serious complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.
- d. Monitoring visits shall be scheduled to verify compliance with the terms of granted variances.

- (1) The Regional Director shall review each variance annually to determine if an inspection is warranted based on:
 - (a) Significant differences from standards;
 - (b) No monitoring for current and two (2) previous fiscal years; or
 - (c) Employer not in compliance with terms on previous inspections.
 - (2) Such inspections shall have a priority equal to that of a serious complaint.
 - (3) A report on the results of these monitoring visits shall be sent by the Regional Director to the DHLS through the appropriate Program Director.
- e. Monitoring visits shall be scheduled to verify compliance with the terms of corporate-wide settlement agreements.
 - f. Monitoring visits may also be made for other reasons, as outlined elsewhere in this chapter.
3. **Procedures.** Monitoring inspections shall be conducted in the same manner as follow-up inspections described above.

Inspection Preparation and Inspection Procedures

CHAPTER- 4

Chapter 4: Inspection Preparation and Inspection Procedures

Inspection Preparation

- I. **General.** The conduct of effective inspections requires professional judgment by the CSHO in the identification, evaluation and accurate reporting of the safety and health conditions and practices in the workplace. The Regional Safety and Regional Health Director will make a determination as to the most appropriate CSHO to assign to the inspection, e.g., a new apprentice should not be assigned to complete a comprehensive inspection of a large, complex manufacturing or other similar type facility or worksite.

A programmed inspection is generally a comprehensive inspection of the worksite, but may be limited as necessary in view of resource availability and other compliance priorities. Therefore, inspections may vary considerably in scope and detail, depending upon the circumstances in each case. For example, low-hazard areas, such as office space, may be excluded from inspection without affecting the comprehensiveness of the inspection.

- II. **Inspection Planning.** It is important that the CSHO adequately prepare for each inspection. Due to the wide variety of industries and associated hazards likely to be encountered, pre-inspection preparation is essential to the conduct of a quality inspection. CSHOs shall plan individual schedules in advance in coordination with their Regional Safety or Health Director, reflecting inspection priorities.

- A. **Background Review.** Due to the wide variety of industries and associated hazards likely to be encountered, to ensure the conduct of a quality inspection, the CSHO, together with the Regional Safety or Health Director, if appropriate, shall carefully review:

1. **Specific Information.** All pertinent information contained in the establishment file and appropriate reference sources to become knowledgeable in the potential hazards and industrial processes that may be encountered and shall identify the personal protective equipment necessary for protection against these anticipated hazards.
2. **Appropriate Standards and Sampling Methods.** Based on experience and information concerning the establishment, select the instruments that will be needed for the inspection and prepare them according to the standard methods of sampling and calibration.
3. **Review of Previous Citations.** During review of previous inspection case files, CSHOs shall note those citations that were issued and their abatement status as documented in the case file, especially those deemed high gravity serious and willful.

B. Review of Inspection History

1. **Pre-inspection Data Review.** CSHOs will carefully review data available at the Regional Office for information relevant to the establishment scheduled for inspection. This may include inspection files and source reference material relevant to the industry. CSHOs will also conduct an establishment search by accessing the OIS database. CSHOs should use name variations and address-matching in their establishment search to maximize their efforts due to possible prior incorrect OIS entry, company name changes, and corporate status, e.g., LLC, Inc.
2. **Previous Federal or Other State Plan State Citations.** If an establishment has an inspection history that includes citations received while performing work in a state under direct federal OSHA enforcement or another State Plan State, CSHOs should be aware of this information. This inspection history may be used to document an employer's heightened awareness of a hazard and/or standard in order to support the development of a willful citation and may be considered in determining eligibility for the history penalty reduction. However, a federal OSHA direct enforcement citation, a citation by a state plan program of another state, or a VOSH citation from a different VOSH region may not be used to support a repeat violation. In certain circumstances it may be used as proof of prior knowledge to support issuance of a willful violation.

C. Review of Cooperative Program Participation. Refer to Chapter 3, Program Planning, for Review of Voluntary Compliance Programs.**D. Coordination with VOSH Consultant.** The CSHO shall determine whether an onsite consultation visit has recently been conducted or is in progress. If the employer has received a limited service onsite consultation visit, or if an **unprogrammed compliance inspection** will be conducted, the CSHO shall determine whether the VOSH Consultant has established any abatement date(s) which has not yet expired for any serious hazard(s). The compliance inspection may not include any item covered by the VOSH Consultant's abatement plan. *(Refer to Chapter 3, Program Planning.)*

NOTE: *An employer who has received a comprehensive onsite consultation visit MAY BE EXEMPT from programmed inspections for the twelve month period following the consultation visit.*

E. Safety and Health Issues Relating to CSHOs

1. **Hazard Assessment.** If the employer has a written certification that a hazard assessment has been performed pursuant to §1910.132(d), the CSHO shall request a copy. If the hazard assessment itself is not in writing, the CSHO shall ask the person who signed the certification to

describe all potential workplace hazards and then select appropriate personal protective equipment (PPE). If there is no hazard assessment, the CSHO will determine potential hazards from sources such as the OSHA 300 Log of injuries and illnesses and shall select personal protective equipment accordingly.

2. **Inspection Materials and Equipment.** The CSHO shall have all report forms in sufficient quantity to conduct the inspection, all assigned personal protective equipment available for use in serviceable condition, and appropriate handouts, if available.
 - a. **Unassigned PPE.** If, based on the pre-inspection review or upon facts discovered at the worksite, the need for unassigned personal protective equipment (PPE) is identified, the Regional Safety or Health Director shall ensure that any required equipment is provided prior to entry into the facility or worksite. Prior to the inspection, the Regional Safety or Health Director shall ensure that the CSHO has been trained in the uses and limitations of such equipment.
 - b. **Hard Hats, Safety Glasses and Safety Shoes.** The Regional Safety or Health Director shall assure that appropriate PPE is provided to and used by CSHOs. This includes training on the proper use and limitations of the equipment. At a minimum, approved hard hats, approved safety glasses with permanently or rigidly attached side shields, and approved safety shoes shall be worn by CSHOs on the walkaround phase of the onsite visit, unless the CSHO determines that the visit is being conducted at a worksite where no overhead hazards, eye hazards, and/or foot hazards are present. This will set an example for industry and provide minimum acceptable protection for the CSHO. The Regional Safety or Health Director may consult with the appropriate Health or Safety Program Director as necessary.
 - c. **Special or Additional Equipment.** If there is a need for special or additional equipment, the Regional Safety or Health Director shall be consulted to ensure that training in the use, and limitation, of such equipment has been accomplished prior to the inspection. The Regional Safety or Health Director shall ensure that a review or recheck in the use of all equipment is given to the CSHO at least once a year.
3. **Respiratory Protection.** Inspections involving the use of negative pressure respirators shall not be assigned without a determination, using

guidelines established by a physician, that the CSHO may use a respirator. Also, the CSHO has to have had an adequate quantitative fit test within the last year. Since respirators with tight-fitting face pieces require the skin to be clean shaven at the points where sealing occurs, CSHOs assigned to conduct inspections which involve the use of such respirators shall not have facial hair which interferes with the face to facepiece seal or function of the respirator valve(s).

CSHOs must wear respirators when and where required, and must care for and maintain respirators in accordance with the training provided.

- a. **Pre-inspection Evaluation.** CSHOs shall conduct a pre-inspection evaluation for potential exposure to chemicals. If hazardous chemicals are identified during the pre-inspection evaluation then, prior to entering any hazardous areas, the CSHO shall identify those work areas, processes, or tasks that require respiratory protection.

The hazard assessment requirement in §1910.132(d) does not apply to respirators; see VOSH PD 09-004, Respiratory Protection Manual, dated 15 February 2000. CSHOs shall review all pertinent information contained in the establishment file and appropriate reference sources to become knowledgeable with the industrial processes and potential respiratory hazards that may be encountered.

During the opening conference, a list of hazardous substances shall be obtained or identified, along with any air monitoring results. CSHOs shall determine if they have the appropriate respirator to protect against chemicals present at the work site. The CSHO shall not enter any areas of the worksite where there is a potential for respiratory hazards until the appropriate respirator and/or other personal protective equipment is available.

- b. **Notification.** CSHOs must notify their supervisor or the respiratory protection program administrator if:
 - (1) A respirator no longer fits well. In such cases, a CSHO should request a replacement that fits properly; or
 - (2) CSHOs encounter any respiratory hazards during inspections or on-site visits that they believe have not been previously or adequately addressed during the site visit; or

- (3) There are any other concerns regarding the program.
4. **Safety and Health Rules and Practices.** CSHOs must comply with all appropriate safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by VOSH standards or by the employer for the protection of employees. Where the employer requires the CSHO to wear PPE which goes beyond the requirements of the VOSH standards the employer must provide the PPE.
5. **Restrictions.** CSHOs will not enter any area where special entrance restrictions apply until the required precautions have been taken. It shall be the Regional Safety or Health Director's responsibility to determine that an inspection may be conducted without exposing the CSHO to hazardous situations and to procure whatever materials and equipment are needed for the safe conduct of the inspection.
6. **Workplace Violence – CSHO Training and Workplace Violence Prevention Programs**
- a. **CSHO Training.** Prior to conducting an inspection in response to a complaint of workplace violence, the CSHO must review OSHA CPL 02-01-058: Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence.
- b. **Establishment Workplace Violence Prevention Programs.** If the employer is in an industry VOSH has identified as a high risk for workplace violence (such as late-night retail, social service and health-care settings, and correctional facilities) the CSHO should inquire about the existence of a workplace violence prevention program. If such a program exists, the CSHO shall ask the person responsible for the program to describe all the potential workplace hazards. If there is no workplace violence prevention plan, the CSHO will determine potential workplace violence hazards from sources such as the OSHA 300 log of injuries and illnesses and other relevant records.

NOTE: If training is provided to staff members on workplace violence, the CSHO should conduct the inspection with a staff member who has received the training. If the CSHO does not deem that the existing protections are sufficient, the CSHO should not enter the facility or area within the facility that he or she considers dangerous.

- c. **CSHOs must notify their supervisor if they experience or witness any incident of workplace violence.**

F. Advance Notice

1. Policy

- a. **General Prohibition.** Section 40.1-51.3:1 of the *Code of Virginia* and §230 of the *VOSH Administrative Regulation Manual* contain a general prohibition against the giving of advance notice of inspections. The VOSH Program regulates many conditions that are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, unauthorized advance notice is prohibited unless specifically exempted in each case by the applicable VOSH Program Director. The penalty for giving unauthorized advanced notice ranges between \$100 and \$1,000 and/or imprisonment for not more than six months. (*See §40.1-51.3:1 of the Code of Virginia.*)
- b. **Exceptions to Advance Notice.** There may be occasions when advance notice is necessary to conduct an effective investigation. These occasions are narrow exceptions to the statutory prohibition against advance notice. As per §230 of the *VOSH Administrative Regulation Manual*, advance notice of inspections may be given only with the authorization of the applicable VOSH Program Manager or designee and only in the following situations:
 - (1) In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible;
 - (2) When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary;
 - (3) To ensure the presence of employer and employee representatives or other appropriate personnel who are needed to aid in the inspection; and
 - (4) When giving advance notice would enhance the probability of an effective and thorough inspection; e.g., in complex fatality investigations.

In cases of apparent imminent danger, advance notice may be given by the CSHO without such authorization if the VOSH Program Manager or designee is not immediately available.

- c. **Delays.** Advance notice exists whenever the Regional Office sets up a specific date or time with the employer for the CSHO to begin an inspection. Any delays in the conduct of the inspection shall be kept to an absolute minimum. Lengthy or unreasonable delays shall be brought to the attention of the Regional Safety or Health Director or designee. Advance notice generally does not include non-specific indications of potential future inspections.

In unusual circumstances, the Regional Safety or Health Director or designee may decide that a delay is necessary. In those cases the employer or the CSHO shall notify affected employee representatives, if any, of the delay and shall keep them informed of the status of the inspection.

- (1) **Delay Approved.** Although advance notice generally does not exist after the CSHO has arrived at the worksite, presented credentials and announced the inspection, many causes can serve to delay or interrupt the continued conduct of the inspection. For example, the employer representative on site may request a delay of entry pending the return of the president or some other higher ranking official.
- (a) Such delays shall be as short as possible. If a request for delay by an employer or an employee representative appears reasonable, the CSHO may delay or interrupt the inspection for up to an hour. The Regional Safety or Health Director shall be contacted if the delay lasts or is anticipated to last longer than one hour.
- (b) The Regional Safety or Health Director shall decide whether the circumstances justify a delay of more than one hour and, if so, for how long. If the delay appears reasonable, the inspection may be delayed or interrupted for the time judged necessary, but in no case for longer than five (5) working days.
- (c) The inspection shall be resumed as soon as reasonably possible. Delays or interruptions of less than five (5) working days shall not require implementation of advance notice procedures.

- (2) **Delay Not Approved.** If the employer or the employee representative requests a delay which the Regional Safety or Health Director believes is unreasonable or without sufficient justification, e.g., too long, not good faith, or otherwise without merit, the CSHO shall inform the requester that VOSH policy does not allow for such a delay. If the employer representative continues to insist on the delay, the situation shall be treated as a refusal of entry.
- (3) **Other Circumstances.** In unusual circumstances, the Regional Safety or Health Director, in consultation with the appropriate program director may decide that a delay of more than five (5) working days is necessary; e.g., compliance personnel may not be available in the Regional or Branch Office because of higher priority demands. Any situation, except a delay after the initial walkaround is completed, involving a delay of more than five (5) working days, whatever the justification, shall be handled as advance notice and must be approved by the appropriate program director.

2. Documentation and Procedures for Advance Notice

- a. **Case File Documentation.** The conditions requiring advance notice shall be specified and the procedures followed shall be detailed in the case file.
- b. **Lead Time.** If it is decided that advance notice will be given, the CSHO shall do so by telephone or in person. No advance notice may be given more than 24 hours before the inspection except in unusual circumstances that justify such notice. Documentation of the conditions requiring advance notice and the procedures followed shall be included in the case file.
- c. **Construction or Multi-Employer Worksites.** If advance notice is to be given at a construction or other multi-employer worksite, the CSHO shall contact the general contractor. If there are two or more general contractors, all shall be contacted. The general contractor shall be instructed to advise all subcontractors on the site of the inspections.

- d. **Initial Employer Contact.** During telephone contact with the employer, the CSHO shall identify himself, explain the purpose of the inspection, state when the inspection is expected to be conducted, find out the employer's normal business hours and whether special protective equipment or precautions are required. If security clearances or immunizations are necessary, the Regional Safety or Health Director shall be notified.
- e. **Employer and Employee Representatives.** An important purpose of advance notice is to make arrangements for the presence of employer and employee representatives to aid in conducting an effective and thorough inspection. A responsible management official shall be requested to assist in the inspection.

The CSHO shall advise the employer that §40.1-51.2(d) of the *Code of Virginia* and §230 of the *VOSH Administrative Regulation Manual* require that an employee representative be given an opportunity to participate in the inspection.
- f. **Determination of Employee Labor Organizations.** The CSHO shall determine if employees at the establishment are represented by a labor organization(s) and if there is a safety committee with employee representatives. When advance notice is given, the CSHO shall advise the employer to promptly notify the authorized employee representative(s).
- g. **Subcontractor Notification by the General Contractor.** If a general contractor is contacted, the CSHO will tell the contractor to instruct each subcontractor to notify employee representatives of the inspection promptly.
- h. **CSHO Notification to Employee Representative.** When requested by an employer who furnishes the identity of the representative, the CSHO shall promptly inform the employee representative of the inspection and shall provide any other information necessary in accordance with §230 of the *VOSH Administrative Regulation Manual*.
- i. **Employee Notification - Other.** The advance notice requirement for employees applies only if there is a known representative authorized by employees, such as a labor organization or a safety committee with employee representatives. If there is no authorized employee representative or if it cannot be determined with reasonable certainty who the representative is, the CSHO shall consult with a reasonable

number of employees during the inspection to determine the impact or possible adverse effects of the advance notice.

G. Pre-Inspection Compulsory Process

1. **Inspection Warrants.** Generally, warrants are sought if there is evidence that: 1) an employer is likely to refuse entry, i.e., a history of denied entry in previous inspections; or 2) that a job will only last a short time; or 3) that job processes will be changing rapidly.

- a. **Authorization.** Virginia Code §§40.1-49.9, *et seq.*, authorizes the agency to seek a warrant in advance of an attempted inspection if circumstances are such that “pre-inspection process (is) desirable or necessary.”

- b. **Procedure.** The Regional Safety or Health Director or designee may, after consultation with the Program Director, may authorize the Division of Hearings and Legal Services to seek an inspection warrant in advance of an attempt to inspect or investigate whenever circumstances indicate the desirability of such warrants such as:

Previous denial of entry for past inspections;

- Knowledge that a job will only last a short time; or
- Job processes will be changing rapidly.

2. **Pre-Inspection Interrogatories**

- a. **Authorization.** Section 40.1-6 of the *Code of Virginia* authorizes the Commissioner to issue interrogatories and to require records and information necessary for inspections be made available to the CSHO.

- b. **Timing of Issuance.** Interrogatories may also be issued prior to any attempt to contact the employer or other person for evidence related to a VOSH inspection or investigation.

H. Security Clearance

1. **Personal Security Clearance**

Some establishments have areas which contain material or processes which are classified by the U. S. Government in the interest of national security.

2. **Obtaining Entry.** If VOSH has difficulty obtaining entry into a classified area, the CSHO shall thoroughly document the facts - including the type of security clearance necessary, the areas that are classified, the controlling employer representative and, if possible, the type of work being performed. The inspection shall be continued in all other areas not classified.
3. **Provide Information.** The information concerning the classified areas shall be called in to the Regional Safety or Health Director as soon as possible, either during or at the conclusion of the walkaround, and the telephoned information shall be recorded in the case diary log of the case file.
4. **Federal Involvement.** If the Regional Safety or Health Director determines that further action must be taken regarding the classified areas he shall consult with the appropriate Program Director who may, if he deems it necessary, refer that part of the inspection to the federal OSHA Regional Office for possible federal action. The Regional Safety or Health Director shall be informed of this action.
5. **Classified and Trade Secret Information.** Any classified or trade secret information and/or personal knowledge of such information by VOSH personnel shall be handled in accordance with the regulations of §40.1-51.4:1 of the *Code of Virginia* which protects the confidentiality of trade secret information during the course of a VOSH inspection.
The collection of such information, and the number of personnel with access to it, shall be limited to the minimum necessary for the conduct of compliance activities. The CSHO shall identify classified and trade secret information as such in the case file. (*See also Chapter 5, V. E.*)

If classified or trade secrets are identified by the employer, the CSHO will explain that VOSH is required by law to preserve the confidentiality of all information which might reveal a trade secret in accordance with §40.1-51.4:1 of the *Code of Virginia* and §250 of the *VOSH Administrative Regulation Manual*.

I. Use of Expert Assistance.

1. **Determination of Need.** The decision about the need for expert assistance to aid in the conduct of the investigation shall be made as soon as possible after the CSHO has arrived at the site. That decision shall be made by the Regional Safety or Health Director in consultation with the Program Director upon the recommendation of the CSHO. The appropriate program Director shall arrange for a specialist from within VOSH or a qualified outside consultant to assist in an inspection or investigation when the need for such expertise is identified.

2. Expert Selection

- a. Choice of Experts. Experts to be used are listed in priority order for selection:
- (1) **VOSH Personnel.** VOSH personnel shall generally be the first choice as experts, rather than individuals external to the VOSH Program. Any available VOSH 21(d) consultation personnel shall be called upon as experts whenever appropriate.
 - (2) **OSHA/ NIOSH.** If no VOSH experts are available, then, federal OSHA Regional/National Office personnel or NIOSH personnel, in that order, are second in order of preference.
 - (a) If OSHA personnel are to be used, the Program Director shall contact the OSHA Region III Administrator, who will make the arrangements.
 - (b) Arrangements for NIOSH experts shall be made through the OSHA Region III Administrator with the NIOSH Regional or National Office, as appropriate.
 - (3) **Other Virginia State Agency.** If the required expertise is determined to be unavailable internally from VOSH, OSHA, or NIOSH but is available through an expert from another Virginia state agency, the appropriate Program Director shall contact the appropriate office of the other agency to request and coordinate such assistance. If necessary, a letter to the appropriate state agency requesting such assistance shall be prepared for the signature of the Commissioner to confirm the interagency staff discussions regarding the request for such assistance. The letter shall be forwarded to the other agency following the Commissioner's signature.
 - 4) **External Consultants.** In general, a consultant or "outside expert" is a person from the private sector or academia who is paid a fee for their special expertise. A consultant or outside expert will normally be selected only when no other qualified individual is available from sources in items (1)-(3) above. Use of a consultant or an

outside expert shall be approved by the Program Director and Assistant Commissioner prior to contacting the individual. Contractual arrangements shall be coordinated through the Program Director, Director of Administrative and Financial Services, and the Assistant Commissioner.

3. **Implementation.** Expert assistance may be necessary during inspections for the implementation of engineering or administrative controls involving, but not limited to, noise, air contaminants, complicated machine guarding and construction.
4. **Performance.** VOSH, or OSHA personnel acting as specialists or experts may accompany the CSHO or they may perform their tasks separately. NIOSH personnel or external consultants must be accompanied by the CSHO. All specialists and outside consultants shall be briefed on the purpose of the inspection and the personal protective equipment to be utilized. Outside consultants must be accompanied by a CSHO. Outside consultants will work within the specifications of the contract developed by the Division of Legal Support and approved by the Office of the Attorney General, when required.
5. **Reporting.** All data, conclusions, findings, and/or recommendations from the assigned specialists or experts defined in subsections 1- 4 above shall be made as part of the inspection report, including information on any actions taken by the employer in response to any such recommendations.

INSPECTION PROCEEDURES

I. Inspection Scope.

- A. **Categories.** Inspections, either programmed or unprogrammed, fall into one of two categories depending on the scope of the inspection:

1. **Comprehensive.** A comprehensive inspection is a substantially complete and thorough inspection of all potentially hazardous areas of the establishment.

A programmed public sector inspection is generally a comprehensive inspection of the worksite but may be limited, as necessary, in view of resource availability and other compliance priorities.

An inspection may be deemed comprehensive even though, as a result of professional judgment, not all potentially hazardous conditions or

practices within those areas are inspected. In those cases where not all of the hazardous conditions or practices are inspected, it shall be noted and documented in the case file. Low-hazard areas, such as office space, may be excluded from inspection without affecting the comprehensiveness of the inspection.

2. **Partial.** A partial inspection, as would normally result from a complaint or referral, is one whose focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment.

Based on the investigation, the CSHO shall recommend whether the scope of the inspection should be expanded based on the investigation to their Regional Director who shall make the decision in accordance with the guidelines in paragraph.

Every partial inspection, whether programmed or unprogrammed, shall include:

- a. The principal focus, e.g., imminent danger or complaint investigation;
- b. A review of injury and illness records; and
- c. An evaluation of the employer's safety and health management program. Follow-up inspections may be exempt from this rule.

B. Expanding the Scope of an Inspection. The method of expanding the scope detailed below does not entail expansion of the scope to comprehensive. This type of expansion is only to cover certain limited additional areas of the worksite which were identified as having hazardous conditions or potential violations in plain view. Programmed and unprogrammed inspections which were initiated as partial scope inspections may be expanded under any of the following circumstances which shall be documented in the case file:

1. **Listed on the Current Inspection Schedule.** The establishment is listed on the current regional office safety or health inspection schedule and the deletion criteria here or in the Planning Guide for Programmed Inspections do not apply;
2. **No Complete Construction Inspection in Last Three (3) Months.** A substantially complete inspection of a construction establishment has not been conducted within the preceding three (3) months;
3. **Documentation of a History of Significant Violation.** VOSH or OSHA inspection records or injury and illness records for the establishment or for the employer in the case of a mobile worksite, indicate a history of significant violations;

4. **Allegations Indicate Potential Hazards.** The allegations providing the basis for the unprogrammed inspection indicate the existence of potential hazards which can be identified by expanding the inspection;
5. **High Hazard Establishment Not on Current Inspection Schedule.** For good cause, as is determined by the Regional Director. e.g., the establishment is not on the current regional office safety or health inspection schedule but the establishment or its NAICS code is on the regional office safety or health high hazard establishment list or high hazard NAICS code list;
6. **Expansion of Partial Inspection.** Partial inspections may be further expanded to cover serious hazardous conditions observed in plain view and which were not part of the original inspection;
7. **Expansion Due to Violations Found.** Inspections may be expanded if serious violations are found within the original scope of the inspection.

II. Conduct of Inspection.

The CSHO shall enter the establishment to be inspected with an attitude reflecting a professional, balanced, and thorough concern for the safety and health of employees and employers. The conduct of effective workplace inspections requires professional judgment by the CSHO in the identification, evaluation and accurate reporting of safety and health conditions and practices. Inspections may vary considerably in scope and detail depending on the circumstances of each case.

***NOTE:** CSHOs should be prepared to take photographs or to record video of any violations they see in plain view prior to entry on site. See applicable sections for more information.*

A. Time of Inspection.

1. **Regular Working Hours.** Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise.
2. **Necessity of Alternate Work Schedules for Special Circumstances.** The Regional Director or designee and the CSHO shall determine if alternate work schedules are necessary regarding entry into an inspection site during other than normal working hours. Permission for entry during non-working hours should be sought from the Regional Director.

B. Presenting Credentials.

1. **Locate Who Is in Charge.** At the beginning of the inspection, the CSHO shall locate the owner representative, operator or agent in charge

at the workplace and present credentials. On construction sites this will most often be the representative of the general contractor.

2. **Copying of Credentials.** CSHOs shall not allow their credentials to be copied, digitized, scanned, or to otherwise have the images or text captured or otherwise reprographically reproduced. In such circumstances where this is requested by the employer or other person in charge, the CSHO shall advise them that they may look and review the credentials and write down any information from the credentials, but that the credentials may not be electronically or photographically recorded or reproduced. Should the employer persist in the request, the CSHO shall contact the applicable Regional Director for guidance.

***Exception:** Credentials may be copied by the CSHO for submission to the Virginia Department of Health (VDH) to facilitate acquisition of a death certificate as part of a fatality investigation.*

3. **Request for Employer Representative.** When neither the person in charge nor a management official is present, contact may be made with the employer to request the presence of the owner, operator or management official. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. Generally, this delay should not exceed one (1) hour.

On occasions when the CSHO is waiting for the employer representative, the workforce may begin to leave the jobsite. In this situation the CSHO should contact the Regional Director or designee for guidance.

If the person in charge at the workplace cannot be determined, record the extent of the inquiry in the case file and proceed with the physical inspection.

On multi-employer sites, the superintendent, project manager or other representative of the general or prime contractor shall be asked to identify the subcontractors or other contractors on the site, together with the names of the individuals in charge of their operations.

- a. **Assemble subcontractors.** The CSHO shall then request that these individuals be contacted and asked to assemble in the general contractor's office or other suitable location, together with their employee representatives, if any.

- b. **No Postponement.** The inspection shall not be postponed or unreasonably delayed because of the unavailability of one or more representatives.
 - c. **Contact Any Federal Onsite Representative.** If a Federal contracting agency representative is onsite, the general contractor shall be asked to contact the representative, advising him of the inspection and extending an invitation to attend the opening conference and to participate in the inspection.
- C. **Employer Interference or Refusal to Permit Inspection.** Section 40.1-49.8 of the *Code of Virginia* provides that CSHOs may enter without delay and at reasonable times any establishment covered under the law for the purpose of conducting an inspection with the consent of the owner, operator, or agent in charge of such workplace or with an appropriate order or warrant if no consent is provided.

Unless the circumstances constitute a recognized exception to the warrant requirement, i.e., consent, third party consent, plain view, open field, or exigent circumstances, an employer has the constitutional right to require that the CSHO seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.

NOTE: *It should be noted that on multi-employer worksites, valid consent can be granted by the owner, or another employer with employees at the worksite, for site entry.*

1. Refusal of Entry or Inspection

- a. **Do Not Argue.** The CSHO shall not engage in argument concerning refusal. When the employer refuses to permit entry upon being presented proper credentials or allows entry but then refuses to permit or hinders the inspection in some way, a tactful attempt shall be made to obtain as much information as possible about the establishment. (*See Appendix B., VOSH Refusal of Entry Form VOSH-ROE*).
- b. **Leave and Report.** If the employer refuses to allow an inspection of the establishment to proceed, the CSHO shall leave the premises and immediately report the refusal to the Regional Director who shall notify the DHLS.
- c. **Inspect Where Able and Report Partial Refusal.** If the employer raises no objection to the inspection of certain

portions of the workplace, but objects to inspection of other portions, the CSHO, after informing the Regional Director of the partial refusal, shall continue the inspection avoiding the portions of the workplace about which the employer has raised objections.

- d. **Advise the Employer That Refusal Will Be Reported.** In either case the CSHO shall advise the employer that the refusal will be reported to the Regional Director and that the agency may take further action, including obtaining an administrative search warrant.
 - e. **Answer Reasonable Questions.** The CSHO may answer reasonable questions presented by the employer; e.g., the scope of the inspection, purpose, anticipated length. The CSHO shall avoid giving any impression of unyielding insistence or intimidation concerning the right to inspect.
 - f. **State Property and Private Contractor.** If the refusal of entry is made by a private contractor working on state property, the CSHO shall immediately report the refusal to the Regional Director. The CSHO shall remain in the area of the site while the Regional Director contacts the DHLS Director to determine if consent to inspect the premises can be obtained within a reasonable length of time from the State as owner of the property. The Regional Director shall inform the CSHO as soon as possible whether or not permission may be received within a reasonable period of time.
 - g. **Report Refusal on Private Property.** If the refusal of entry is made by a private contractor working on private property, the CSHO shall immediately report the refusal to the Regional Director. If the Regional Director believes the private owner may give permission to enter, he will inform the Safety or Health Program Director, contact the DHLS, and then attempt to get the owner's consent to inspect.
2. **Questionable Refusal.** When permission to enter or inspect is not clearly given, the CSHO shall make an effort to clarify the employer's intent.

- a. **Report Any Questionable Permission.** If there is doubt as to whether the employer intends to permit an inspection, the CSHO shall not proceed but shall contact the Regional Director immediately.
 - b. **Regional Director to Determine Status of Permission.** When the employer hesitates or leaves for a period of time so that permission is not clearly given within one hour of initial entry, the CSHO shall contact the Regional Director, who shall decide whether or not permission is being refused.
 - c. **Clarification of Employer Intent.** When the employer's intent is clarified the CSHO shall either conduct the inspection or proceed as outlined.
3. **Employer Interference with Conduct of Inspection or Other Official Duties.** Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the CSHO shall immediately contact the Regional Director for instructions on whether to consider this action as a refusal.
4. **Examples of interference are** refusals to permit the walkaround, the examination of records essential to the inspection, the taking of essential photographs and/or video the inspection of a particular part of the premises, private employee interviews, or the refusal to allow attachment of sampling devices. *(See §40.1-49.8 of the Code of Virginia).*

In cases of partial interference, the Regional Director may permit the inspection to continue without resorting to a warrant, if the refusal does not interfere with essential portions of the inspection.

5. **Forcible Interference Against the CSHO.** Although the employer is legally entitled to refuse permission to conduct an inspection without a warrant, the law does not permit forcible conduct against the CSHO. Section 40.1-10, *Code of Virginia*, makes it a criminal offense to obstruct, in any manner, a CSHO while engaged in the performance of his official duties.

- a. **Types of Forcible Interference.** The following illustrates the type of forcible conduct or interference which shall be reported to the Regional Director immediately:
- (1) Anyone physically holding, grabbing, pushing, shoving, or in any way limiting the CSHO's or other VOSH employee's freedom of action or choice of action. The threat of any action which limits freedom of action or choice of action is included.
 - (2) Anyone striking, kicking, or in any way inflicting or attempting to inflict injury, pain or shock on the CSHO or other VOSH employee. The threat of such actions is included as is oral abuse which menaces or causes concern for the official's or employee's personal safety.
 - (3) Anyone assaulting or threatening the CSHO or other VOSH employee with a weapon of any kind. The handling or display of weapons in a menacing manner is included.
- b. **Response to Forcible Interference.** Whenever a CSHO or other VOSH employee encounters forcible resistance, opposition, interference, etc., or is assaulted or threatened with assault while engaged in the performance of official duties, all investigation activity shall cease. The CSHO shall depart the facility/site immediately. The Regional Director shall be advised as soon as possible and shall consult with the applicable Program Director, and the DHLS to determine an appropriate course of action.
- c. **Applicable *Code of Virginia* Statutes**
§40.1-10. Offenses in regard to examinations, inspections, etc.
- “...if any person in charge of any business establishment...obstructs in any manner the inspection or investigation of such establishment or the proper performance of the authorized duties of the Commissioner or any of his representatives, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding

\$100 or less than \$25 or imprisoned in jail not exceeding 90 days, or both.”

§18.2-416. Punishment for using abusive language to another.

“If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person...under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a Class 3 misdemeanor.”

§18.2-57. Assault and battery

“Any person who shall commit a simple assault or assault and battery shall be guilty of a Class 1 misdemeanor.”

§18.2-460. Obstructing justice; penalty.

- §18.2-460.A. “If any person without just cause knowingly obstructs a(n)...attorney for the Commonwealth, witness, any law-enforcement officer...in the performance of his duties...shall be guilty of a Class 1 misdemeanor.”
- §18.2-460.B. “Except as provided in subsection C, any person who, by threats or force, knowingly attempts to intimidate or impede a(n)...attorney for the Commonwealth, witness, any law-enforcement officer,...lawfully engaged in his duties as such...is guilty of a Class 1 misdemeanor.”
- §18.2-460.C. “If any person by threats of bodily harm or force knowingly attempts to intimidate or impede a(n)...attorney for the Commonwealth, witness, any law-enforcement officer, lawfully engaged in the discharge of his duty...shall be guilty of a Class 5 felony.”

6. **Employer Failure to Produce Records, Documents, or Other Evidence and the Use of Interrogatories.** Whenever there is a reasonable need for records, documents, testimony or other supporting evidence necessary for completing an inspection or an investigation, the following procedures apply:

- a. **Proceed Without Records.** If a CSHO seeking access to injury or illness records to review them for sufficiency is denied access to those records, the CSHO shall proceed as for any other case of refused entry.

***NOTE:** An employer is required to keep illness and injury records by §40.1-6, Code of Virginia, as well as 16VAC25-60-60, (otherwise referred to as §60 of the VOSH Administrative Regulation Manual.)*

- b. Notify DHLS.** Upon receipt of notification of an employer's refusal to produce injury or illness records required by VOSH, the Regional Director shall notify the DHLS as soon as possible.
- c. DHLS to Notify OAG.** The DHLS shall consult with the Office of the Attorney General (OAG) to determine an appropriate course of action. Should the determination be to seek an inspection warrant under §40.1-49.8 or to initiate legal proceedings under §40.1-10, the DHLS shall request the Assistant Attorney General and the appropriate Commonwealth's Attorney to take steps to obtain appropriate action through the circuit court.
- d. Interrogatories Served.** Should the determination be to seek action under §40.1-6(4), the DHLS shall contact the applicable Safety or Health Program Director and the Deputy Commissioner for Regulatory Program to begin the process of serving interrogatories.
- e. Method of Delivery.** When proceeding under §40.1-6(4) interrogatories may be served personally, certified mail with return receipt requested, or professional courier/parcel delivery service.
- f. The Person Who is Served.** The person served may comply with the interrogatories by making his answers available immediately to the CSHO upon service. He may also comply by contacting the Regional Director and arranging for an acceptable method of delivery of the required information or by mailing the answers to the interrogatories to the Regional or Branch Office.
- g. Timeliness.** Compliance with the interrogatories must be within thirty (30) days of the receipt of the interrogatories.
- h. Interrogatories Answered by Person Served.** If the person who has been served answers the interrogatories, the inspection or other investigation shall proceed as usual.

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- c. **Physical Resistance Anticipated.** To determine an appropriate course of action if physical resistance or interference by the employer is anticipated, the Regional Director shall consult with the applicable Program Director who shall inform DHLS.
- 9. **Refused Entry or Interference with an Inspection Warrant.** When an apparent refusal to permit entry or inspection is encountered upon presenting the inspection warrant, the CSHO shall specifically inquire whether the employer is refusing to comply with the inspection warrant.
 - a. **CSHO Procedure.** If the employer refuses to comply or if consent is not clearly given (e.g., the employer expresses an objection to the inspection), the CSHO shall not attempt to conduct the inspection but shall leave the premises and contact the Regional Director concerning further action. The CSHO shall make notations (including all possible witnesses to the refusal or interference) and fully report all relevant facts.
 - b. **DHLS Consulted by Regional Director.** The Regional Director shall consult with the DHLS about procedures to be followed in obtaining forcible entry in accordance with §40.1-49.11 of the *Code of Virginia*, including returning to the worksite with a Sheriff's Deputy or other law enforcement official, as directed by the Court.
 - c. **§40.1-49.11 of the *Code of Virginia*.** No warrant shall be executed in the absence of the owner, operator or agent in charge of the particular place, things or persons unless specifically authorized by the issuing judicial officer upon showing that such authority is reasonably necessary to affect the purposes of a law or regulation being enforced.

An entry pursuant to this warrant shall not be made forcibly, except that the issuing officer may expressly authorize a forcible entry (i) where facts are shown sufficient to create a reasonable suspicion of an immediate threat to an employee's health or safety, or (ii) where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. If forcible entry is authorized, the warrant shall be issued jointly to the Commissioner and to a law-enforcement officer who shall accompany the Commissioner's representative during the execution.

D. Employee Participation. CSHOs shall advise employers that §40.1-51.2(d) of the *Code of Virginia* and §240.3 of the VOSH *ARM* require that an employee representative be given an opportunity to participate in the inspection.

1. **Determine Worker Representation.** CSHOs shall determine as soon as possible after arrival whether the employees at the inspected worksite are represented and, if so, shall ensure that employee representatives are afforded the opportunity to participate in all phases of the inspection.
2. **Employer Interference.** If an employer resists or interferes with participation by employee representatives in an inspection and the interference cannot be resolved by the CSHO, the resistance shall be construed as a refusal to permit the inspection, and the Regional Director or designee shall be contacted.

NOTE: *For the purpose of this manual, the term "employee representative" refers to:*

- *A representative of the certified or recognized bargaining agent, or, if none;*
- *An employee member of a safety and health committee who has been chosen by the employees (employee committee members or employees at large) as their VOSH representative; or,*
- *An individual employee who has been selected as the walkaround representative by the employees of the establishment. Refer to the VOSH Administrative Regulation Manual.*

E. Release for Entry

1. **CSHO Not to Sign Waivers.** CSHOs shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information. If the employer requires that a form or release be signed or that the CSHO agree to a waiver before entering the establishment, the CSHO shall inform the employer of the Commissioner's authority under §40.1-49.8, *Code of Virginia*. If the employer still insists on the signing of a form or release, the CSHO shall suspend the inspection and report the matter promptly to the Regional Director who shall decide if the situation is to be treated as a refusal of entry.
2. **Allowable Authorizations.** CSHOs may obtain a pass or sign a visitor's register, or any other book or form used by the establishment to control the entry and movement of persons upon its premises. Such

signature shall not constitute any form of a release or waiver of prosecution for liability under Title 40.1 of the *Code of Virginia*.

F. Bankrupt or Out of Business.

1. **Out of Business.** If the establishment scheduled for inspection is found to have ceased business and there is no known successor, the CSHO shall report the facts to the Regional Director or designee.
2. **Operating in Bankruptcy.** If an employer, although bankrupt, is continuing to operate on the date of the scheduled inspection, the inspection shall proceed.
3. **Requirement to Comply.** An employer must comply with Title 40.1 of the *Code of Virginia* until the day the business actually ceases to operate.

G. Employee Responsibilities.

1. **Employee Code Requirements.** Section 40.1-51.2(a) of the *Code of Virginia* states: “It shall be the duty of each employee to comply with all occupational safety and health rules and regulations issued pursuant to this chapter and any orders issued thereunder which are applicable to his own action and conduct.” It does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
2. **Employee Refusal.** In cases where CSHOs determine that employees are systematically refusing to comply with a standard applicable to their own action and conduct, the matter shall be referred to the Regional Director who shall consult with the applicable VOSH Safety or Health Program Director.
3. **CSHO to Avoid Labor-management Disputes. CSHO to Avoid Labor Union Issues.** Under no circumstances are CSHOs to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. CSHOs are expected to obtain sufficient information to assess whether the employer is using its authority to ensure employee compliance with §40.1-51.2(a) of the *Code of Virginia*. Concerted refusals to comply by employees will not bar the issuance of a citation if the employer has failed to exercise its control to the maximum extent reasonable, including discipline and discharge.

H. Strike or Labor Dispute. Plants or establishments may be inspected regardless of the existence of labor disputes, such as work stoppages, strikes or picketing. If the CSHO identifies an unanticipated labor dispute at a proposed

inspection site, the Regional Director or designee shall be consulted before any contact is made.

1. **Programmed Inspections.** Programmed inspections may be deferred during a strike or labor dispute, either between a recognized union and the employer or between two unions competing for bargaining rights in the establishment.
2. **Unprogrammed Inspections.**
 - a. **Assessment.** Unprogrammed inspections (complaints, fatalities, referrals, etc.) will be performed during strikes or labor disputes. However, the credibility and veracity of any complaint shall be thoroughly assessed by the Regional Director or designee prior to scheduling an inspection.
 - b. **Picket Line.** If there is a picket line at the establishment, CSHOs shall attempt to locate and inform the appropriate union official of the reason for the inspection prior to initiating the inspection.
 - c. **Nonpartisan.** During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute.
- I. **Variances.** The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in §190 of the VOSH *ARM*. The CSHO shall inform the Regional Director who shall contact DHLS if there is a need to determine the validity of an employer's claim of having a VOSH variance to a particular standard.
 1. **No Citation Issued If in Compliance.** An employer will not be subject to citation if the observed condition is in compliance with an existing variance issued to that employer.
 2. **Citation Issued If Not in Compliance.** In the event that an employer is not in compliance with the requirement(s) of the issued variance, a violation of the applicable standard shall be cited with a reference in the citation to the variance provision that has not been met.
- J. **Severe Weather Conditions.** If severe weather conditions encountered during an inspection cause workplace activities to shut down, the inspection shall be continued at a later time as soon as weather permits.
 1. **Inspection Terminated.** If work continues during adverse conditions but the CSHO decides that the weather interferes with the effectiveness

of the inspection or personal safety, it shall be terminated and continued when conditions improve.

2. **Inspection Not Terminated.** If work continues and the CSHO decides to continue the inspection in spite of bad weather, hazardous conditions created by the weather shall be noted since they may be the subject of later citation.

- K. **No Inspection.** If a scheduled inspection cannot be conducted, the CSHO shall document the reasons for not conducting the inspection. The case file shall include the names of persons contacted, if any.

III. Opening Conference

- A. **General.** CSHOs shall attempt to inform all affected employers of the purpose of the inspection, provide a copy of the complaint if applicable, and include any employee representatives, unless the employer objects. The CSHOs shall obtain the employer's consent to include participation of an employee representative, as defined, when appropriate.

The CSHO shall briefly indicate that VOSH shares the employer's and employee's common goal of reducing workplace injuries and illnesses; that the agency is developing a variety of different cooperative approaches which are designed to assist the employer in achieving this goal; and that a more detailed discussion will take place during the closing conference.

1. **Attendance at Opening Conference.**
 - a. **Joint.** CSHOs shall conduct a joint opening conference with employer and employee representatives unless either party objects.
 - b. **Separate.** If there is objection to a joint conference, the CSHO shall conduct separate conferences with employer and employee representatives.
2. **Brevity.** The opening conference shall be kept as brief as possible, generally no longer than one (1) hour so that the CSHO may quickly proceed to the walkaround.

***NOTE:** An abbreviated opening conference shall be conducted whenever the CSHO believes that the circumstances at the worksite dictate that the walkaround begin as promptly as possible. In such cases the opening conference shall be limited to the bare essentials; identification, purpose of visit, and a request for employer and employee representatives. The other elements shall be fully addressed after completion of the walkaround or in the closing conference.*

3. **Notification of Rights and Opportunity to Participate.** At the start of the opening conference, CSHOs will provide both the employer and the employee representative(s) copies of their rights during the inspection, including the opportunity to participate in the physical inspection of the workplace. Pursuant to [§240 of the VOSH Administrative Regulation Manual](#), the employer and the employee representatives shall be informed of the opportunity to participate in the physical inspection of the workplace.
4. **Handouts and Additional Items.** During the opening conference the CSHO, if needed, may provide the employer and employee representatives with copies of the [VOSH poster](#) and with blank [OSHA-300 Forms](#), and [informational handouts and materials](#). The CSHO shall also inform the employer and employee representatives of procedures for obtaining additional copies of any materials of which the CSHO may not have a sufficient quantity on hand.
5. **Hazard Assessment Certification.** Conditions of the worksite shall be noted upon arrival, as well as any changes that may occur during the opening conference. CSHOs shall request a copy of the written certification that a hazard assessment has been performed by the employer in accordance with [§1910.132\(d\)](#). CSHOs should then ask about any potential worksite exposures and select appropriate personal protective equipment.
6. **Purpose of Inspection.** CSHOs shall outline in general terms the scope of the inspection, including the need for private employee interviews, physical inspection of the workplace and records, possible referrals, rights during an inspection, discrimination complaints, and the closing conference(s). The CSHO shall inform the employer of the purpose of the inspection as follows:
 - a. **Imminent Danger Situations.** When responding to an alleged imminent danger situation, the CSHO is required to get to the location of the alleged hazard(s) as quickly as possible. Under these circumstances, an expedited opening conference shall be conducted by limiting activities to presenting credentials and explaining the nature, scope, and purpose of the inspection.
 - (1) Potential safety and health hazards that may be encountered during the inspection shall be identified and appropriate steps shall be taken to provide for personal protection.

- (2) The presence of employer and employee representatives shall be requested; however, the inspection shall not be unreasonably delayed to await their arrival.
 - (3) The employer shall be told that, because of the shortened nature of the opening conference, there will be a more extensive discussion either after the walkaround or at the closing conference.
 - (4) Unreasonable delays shall be reported immediately to the Regional Director.
- b. Fatality Inspections.** The employer shall be informed that an investigation will be conducted and extensive interviews with witnesses will be necessary. The CSHO shall explain that the purpose of an accident investigation is to determine:
- (1) The cause of the accident.
 - (2) Whether a violation of VOSH safety or health standards related to the accident occurred.
 - (3) What effect the standard violation had on the occurrence of the accident.
- c. Complaint Inspections.** For a complaint inspection, the CSHO shall provide a copy of the complaint(s) to the employer and the employee representative at the beginning of the opening conference.
- NOTE:** The CSHO shall insure that the employer does not discover the identity of the complainant. The Regional Director shall delete complainant's name before giving the complaint to the CSHO. In conversations with the employer, the CSHO shall be careful not to reveal any information which could lead to the identity of the complainant.*
- d. Referral Inspections.** During the opening conference of a referral inspection, the CSHO shall inform the employer that the inspection is a result of a referral (e.g., from another agency, from a previous VOSH inspection or in response to specific evidence of probable violations at a worksite).
- e. Follow-up Inspections.** The CSHO shall explain that any item that had been previously cited will be evaluated for complete abatement of the hazard.

- f. Monitoring Inspections.** The CSHO shall review the cited items with the employer to determine the progress of abatement and explain to the employer the reason for the monitoring visit; e.g., request for modification of abatement date, corporate-wide settlement agreement, variance and multi-step abatement.
- g. Programmed Inspections.** The CSHO shall briefly explain the scheduling system used to select the establishment for inspection, e.g., Safety or Health General Schedule, Local Emphasis Program, etc.
- h. Inspections with Potential Health/Chemical Hazards.** During a health inspection or, as appropriate, during a safety inspection when evaluating potential health/chemical hazards, the CSHO should use the following procedures in the opening conference:

 - (1) Request process flow charts and plant layouts relevant to the inspection. If the plant layout process flow charts are not available, sketch a plant layout as necessary during the course of the initial walkaround, identifying the operations and the approximate dimensions of the work area. Distribution of major process equipment, including engineering controls in use, shall also be included on the sketch.
 - (2) Make a brief examination of all workplace records pertinent to the inspection.

 - (a) If detailed review is necessary, the CSHO may wish to proceed with the initial walkaround and return later to examine the records more thoroughly.
 - (b) An examination of records, those required and other types, can provide many valuable insights (e.g., symptomatology which may relate to workplace exposure, frequency of injuries or illnesses, dermatitis, monitoring data, audiometric test results, ventilation tests, process flow charts and a list of hazardous raw, intermediate, and final product materials) to ensure a more effective inspection.
 - (c) In some plants, sampling for obvious health hazards can be initiated soon after the opening

conference. Details of the walkaround can be accomplished while collecting the samples.

7. **Video/Audio Recording.** CSHOs shall inform participants that portions of the walkaround and/or interviews may be recorded and that these recordings will be used in the same manner as handwritten notes and photographs in VOSH inspections. (See also *VOSH Program Directive 02-053C* or successor.)

NOTE: If an employer clearly refuses to allow recording during an inspection, CSHOs shall contact the Regional Director to determine if recording is critical to documenting the case. If it is, this may be treated as a denial of entry.

8. **Employees of Other Employers.** During the opening conference, the CSHO shall determine whether the employees of any other employers are working at the establishment.
 - a. **Inclusion of Other Employers.** If there are such employees and any questions arise as to whether their employers should be included in the inspection, the CSHO shall contact the Regional Director to determine whether additional inspections shall be conducted and what limitations there may be to such inspection activity.(1) All high hazard employers potentially present at any scheduled worksite shall be included within the scope of the inspection, except as indicated in (2) and (3) below. For example, all construction contractors scheduled for inspection are to be included in the inspection assignment.
 - (2) When the referral criteria are met, a CSHO referral may be made and an inspection conducted under the guidelines for referrals.
 - (3) When a construction operation is too large to be efficiently handled during the inspection of the programmed manufacturing establishment, the operation shall be treated as a referral for inspection at a later time, in accordance with referral inspections.
 - b. **Additional Inspection Opening Conference Invitation.** If additional inspections are authorized, both employer and employee representatives of the other employers shall be invited to the opening conference. The inspection shall not be delayed

to wait for these employer and employee representatives longer than would be reasonably necessary for either to arrive.

- c. **Multi-Employer Worksite Provider of Common Services.** If the site is a multi-employer site such as a construction site, the CSHO shall determine during the opening conference who is responsible for providing common services available to all employees on site; e.g., sanitation, temporary electricity, first aid, handrails, etc.

- (1) All contractors shall be advised that, apart from any arrangements that may have otherwise been made, each employer remains responsible for his or her own employees. The CSHO should request copies of any contractual arrangements concerning common services.
- (2) If it cannot be established which contractor is responsible for common services, the CSHO will determine which employer is the exposing, creating, or enforcing employer, whenever violations are noted.

9. **Immediate Abatement.** CSHOs should explain to employers the advantages of immediate abatement, including that there are no certification requirements for violations quickly corrected during the inspection. See Chapter on Abatement Verification.

10. **Recordkeeping Rule.**

- a. The recordkeeping regulation at §1904.40(a) states that once a request is made, an employer must provide copies of the required recordkeeping records within four (4) business hours.
- b. Although the employer has four (4) business hours to provide injury and illness records, the CSHO is not required to wait until the records are provided before beginning the walkaround portion of the inspection. As soon as the opening conference is completed, the CSHO is to begin the walkaround portion of the inspection.

***NOTE:** Part 1904 and §40.1-51.1.D of the Code of Virginia have requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The rule also updates the list of employers partially exempt from OSHA record-keeping requirements. (See 79 FR 56129, Occupational Injury and Illness Recording and*

*Reporting Requirements – NAICS Update and Reporting Revisions,
September 18, 2014.)*

B. Review Screening for Process Safety Management (PSM) Coverage.

CSHOs shall request a list of the chemicals on site and their respective maximum intended inventories. CSHOs shall review the list of chemicals and quantities and determine if there are highly hazardous chemicals (HHCs) listed in §1910.119, **Appendix A** or flammable liquids or gases at or above the specified threshold quantity. CSHOs may ask questions, conduct interviews, or a walkaround to confirm the information on the list of chemicals and maximum intended inventories.

C. Highly Hazardous Chemicals. If there is an HHC present at or above threshold quantities, CSHOs shall use the following criteria to determine if any exemptions apply:

a. Determine Exemption. CSHOs shall confirm that the facility is not a retail facility, oil or gas well drilling or servicing operation, or normally unoccupied remote facility (§1910.119(a)(2)). If the facility is one of these types of establishments, PSM does not apply.

b. Documentation of Exemption. If management believes that the process is exempt, CSHOs shall ask the employer to provide documentation or other information to support that claim.

1. Exempt Process. Exempt Process. According to §1910.119 (a)(1)(ii), a process could be exempt if the employer can demonstrate that the covered chemical(s) are:

- a. Hydrocarbon fuels used solely for workplace consumption as a fuel, e.g., propane used for comfort heating, gasoline for vehicle refueling, if such fuels are not a part of a process containing another highly hazardous chemical covered by the standard, or
- b. Flammable liquids stored in atmospheric tanks or transferred, which are kept below their normal boiling point without the benefit of chilling or refrigeration.

D. Review of Voluntary Compliance Programs. Employers who participate in selected voluntary compliance programs, i.e., VPP and SHARP, may be exempted from programmed inspections. CSHOs shall determine whether the employer falls under such an exemption during the opening conference. *(Refer to Chapter 3 on Program Planning, for a detailed discussion of Cooperative Program exemptions.)*

1. VOSH On-Site Consultation Visits.

- a. Consultation Visit in Progress.** CSHOs shall ask the employer at the opening conference whether a VOSH funded consultation visit is in progress. A consultation “visit in progress” extends from the beginning of the opening conference to the end of the correction due dates (including extensions).
- b.** An on-site consultation “visit in progress” has priority over programmed inspections except for imminent danger investigations, fatality investigations, complaint investigations, and other critical inspections as determined by the Assistant Commissioner.

2. Safety and Health Achievement Recognition Program (SHARP)

- a. Removal from Inspection Schedule.** Upon verifying that the employer is a current participant, the CSHO shall notify the Regional Director or designee so that the company can be removed from the VOSH General Programmed Inspection Schedule for the approved exemption period, which begins on the date the Commissioner approves the employer’s participation in SHARP.
- b. Exemption Period.** The initial exemption period is one year. The renewal exemption period is two (2) years, based on the recommendation of the Consultation Program Manager.

- 3. Voluntary Protection Program (VPP).** Inspections at a VPP site may be conducted in response to referrals, signed employee complaints, and reports of amputations, loss of an eye, inpatient hospitalizations of one or more employees, and fatalities.

NOTE: *A CSHO who was previously a VPP on-site team member cannot conduct an enforcement inspection at that VPP site for the following two (2) years or until the site is no longer a VPP participant, whichever occurs first.*

- E. Disruptive Conduct.** CSHOs may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection. See §240.7 of the *VOSH Administrative Regulation Manual*. The employee representative shall be advised that during the inspection matters unrelated to the inspection shall not be discussed with employees. Supporting documentation should be included in the inspection narrative and the Regional Director should be made aware of the dismissal and the justification thereof.

- F. Classified Areas.** During any inspection of a private sector employer or non-federal public sector employer, where the CSHO encounters any areas containing information classified by an agency of the U.S. Government, the inspection should be discontinued and the CSHO shall contact the Regional Director and the inspection referred to federal OSHA.
- G. Forms Completion.** The CSHO shall obtain available information for the OIS Inspection Report and other appropriate forms and complete applicable sections during the opening conference. Other forms related to VOSH inspection procedures shall be completed in accordance with specific instructions given in this FOM.
- H. Posting.** The CSHO shall determine if posting requirements are met in accordance with Part 1904 (*16VAC25-85-1904*), including, but not limited to:
1. VOSH Occupational Safety and Health Poster informing employees of their rights and obligations under the law;
 2. Log and summary of Occupational Injuries and Illnesses during the period 01 February through 30 April.
 3. Current citations, if any;
 4. Requests for Modification of Abatement Date;
 5. Variances.

IV. Review of Records

A. Injury and Illness Records

1. **Collection of Data.** The CSHO shall review the employer's injury and illness records for three (3) prior calendar years when applicable. This shall be done for all general industry, construction, public sector maritime, and agriculture inspections and investigations.

The CSHO shall comply with the records review procedures that follow for all inspections, programmed or unprogrammed, of employers required to keep the records in question. Findings shall be documented in the case file.

If unsound employer safety incentive policies are discovered, the CSHO and the Regional Director should consult with the appropriate Program Director. OSHA guidance on this issue can be found at "*Employer Safety Incentive and Disincentive Policies and Practices*" (March 12, 2013) at:

<http://www.osha.gov/as/opa/whistleblowermemo.html>.

2. Information to Be Obtained

- a. OSHA-300 Logs.** CSHOs shall request copies of the OSHA-300 Logs, the total hours worked and the average number of employees for each year, and a roster of current employees.

***NOTE:** The CSHO shall not request access to the Bureau of Labor Statistics survey questionnaire or even ask if the employer has participated in the survey.*

- b. OSHA-301 Forms.** If CSHOs have questions regarding a specific case on the log, they shall request the OSHA-301s or equivalent form for that case.

- c. Check for Medical Treatment Locations.** CSHOs shall check if the establishment has an on-site medical facility and/or the location of the nearest emergency room where employees may be treated.

***NOTE:** The total hours worked and the average number of employees for each year can be found on the OSHA-300A for all past years.*

- B. Recording Criteria.** Employers must record new work-related injuries and illnesses that meet one or more of the general recording criteria or meet the recording criteria for specific types of conditions:

1. Death;
2. Days Away from Work;
3. Restricted Work;
4. Transfer to another job;
5. Medical treatment beyond first aid;
6. Loss of consciousness;
7. Diagnosis of a significant injury or illness; or
8. Meet the recording criteria for Specific Cases noted in §1904.8 through §1904.11.

- C. Recordkeeping Deficiencies.** All injury and illness records required by law shall be examined.

1. **Deficiencies Suspected.** If recordkeeping deficiencies are suspected, the CSHO and the Regional Director or designee may request

assistance from the applicable Program Director. If there is evidence that the deficiencies or inaccuracies in the employer's records impairs the ability to assess hazards, injuries and/or illnesses at the workplace, a comprehensive records review shall be performed.

2. **Other Records to Be Reviewed.** Other information related to this topic:
 - a. **Medical Records.** See [VOSH PD 09-104A, Recordkeeping Policies and Procedures Manual, \(or successor\)](#); and [VOSH PD 02-022A Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records 01 Nov 2009 \(or successor\)](#).
 - b. **Specific Standard or Specific Program Requirements.** For all safety and health inspections the CSHO shall determine if the employer is covered by other VOSH programs and/or required records. This review will include hazard communication, lockout/tagout, emergency evacuation and personal protective equipment. Additional programs will be reviewed as necessary. The CSHO shall ensure that the applicable requirements of the specific standards or programs have been met and that the program is effective.
 - c. **Any Other Records Relating to the Scope of the Inspection.** Any other records which fall within the scope of the inspection, and which are related directly to the purpose of the inspection shall be examined. These may include, but are not limited to:
 - (1) Required certification records properly completed and any available equipment inspection and maintenance records;
 - (2) Medical surveillance or monitoring records, employee exposure records and other medical records not falling under any of these items above.
 - (3) Safety committee minutes, checklists, records of inspection conducted by plant safety and health committees, insurance companies, or consultants, if voluntarily supplied by the employer.
 - (4) Documentation for any variances granted by VOSH or by federal OSHA which may be applicable in VOSH jurisdiction.

- d. **Additional Specific Instructions.** Many standard-specific directives provide additional instruction to CSHOs requesting certain records and/or documents at the opening conference.

V. Walkaround Inspection.

The main purpose of the walkaround inspection is to identify potential safety and/or health hazards in the workplace. CSHOs shall conduct the inspection in such a manner to avoid personal exposure to hazards.

When an apparent violation is observed by the CSHO prior to the walkaround, it shall be noted and photographed or recorded, if possible. All such apparent violations shall be examined during the walkaround and cited, if appropriate. When possible, serious violations shall be inspected and documented immediately at the commencement of the walkaround.

- A. **Walkaround Evaluation and General Procedures.** It is essential during the walkaround portion of every inspection for the CSHO to:

- 1. **On the Initial Walkaround.** Become familiar with site processes, collect information on hazards, observe employees' activities and interview them as appropriate. The initial walkaround shall survey existing engineering controls and, when appropriate, collect screening samples to determine the need for full-scale sampling.
 - a. **Full Shift Sampling.** If screening reveals potentially high exposure levels, a full shift sampling shall be conducted.
 - b. **Inform Employer of Lab Analysis.** If screening samples must be sent to the laboratory for analysis, the employer shall be so informed.
 - c. **Full Scale Sampling.** If the laboratory results show that potentially high employee exposure levels exist, full-scale sampling of the potentially hazardous areas will be conducted.
 - d. **Negative Results.** If the results are negative, no full-scale sampling will be conducted.
- 2. **Follow-up of Previous Citations.** Identify locations and conditions that received citations during a previous inspection to ensure proper abatement or to determine abatement progress, if the citations are a final order of the Commissioner.

Follow-up and monitoring activities do not constitute a separate inspection when they are conducted as part of another investigation. No separate OIS Inspection Report should be submitted.

- a. Record all facts pertinent to an apparent failure to abate or repeated or willful violation on the appropriate compliance worksheets.
- b. Determine if a letter of abatement previously received from the employer accurately described the correction of a previously cited violation.
- c. Apparent violations shall be brought to the attention of employer and employee representatives at the time they are documented.

B. Walkaround Representatives. Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives and will generally include those designated by the employer and employee. At establishments where more than one employer is present or in situations where groups of employees have different representatives, it is acceptable to have a different employer/employee representative for different phases of the inspection.

More than one employer and/or employee representative may accompany the CSHO throughout or during any phase of an inspection if the CSHO determines that such additional representatives will aid, and not interfere with, the inspection. (*See VOSH Administrative Regulation Manual §240*).

1. **Limited Number of Employers.** Whenever appropriate, in order to avoid a large group, the CSHO shall encourage multiple employers to agree upon and choose a limited number of representatives for walkaround accompaniment purposes. If necessary, during the inspection, employer representatives not on the walkaround shall be contacted to participate in different phases, as appropriate.

As an alternative, the CSHO shall divide a multi-employer inspection into separate phases; e.g., excavation, steel erection, mechanical, electrical, etc., and encourage different employer representatives to participate in different phases, as appropriate.

2. **Disruptive Conduct or Interference.** The CSHO may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection, in accordance with §240 of the *VOSH Administrative Regulation Manual*. If disruption or interference occurs, the CSHO shall use professional judgment as to whether to suspend the walkaround or take other action. The Regional Director shall be consulted if the walkaround is suspended. The employee representative shall be advised that, during the inspection, matters unrelated to the inspection shall not be discussed with employees.

3. **Employees Represented by a Certified or Recognized Bargaining Agent.** During the opening conference, the highest ranking union official or union employee representative onsite shall designate who will participate in the walkaround. VOSH *Administrative Regulation Manual* §240.3 and §240.7 give the CSHO the authority to resolve all disputes as to whom the representative is authorized by the employer and employees. Section §240.3 states that the representative authorized by the employees shall be an employee of the employer. If in the judgment of the CSHO, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany CSHOs during the inspection.
 4. **No Certified or Recognized Bargaining Agent.** Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for VOSH inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on the walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.
 5. **Labor Relations Disputes.** The CSHO shall not become involved in labor relations disputes either between a recognized union and the employer or between two or more unions competing for bargaining rights. However, if there is a recognized union, the highest ranking official available will designate the authorized walkaround representative despite the fact that another union may be seeking recognition.
 6. **Expired Collective Bargaining Agreement.** When a union contract has expired, the CSHO shall assume that the incumbent union remains as the bargaining agent unless that union is decertified, officially replaced, or has given up bargaining agent status.
 7. **Safety Committee.** Employee members of an established plant safety committee or employees at large may designate an employee representative for VOSH inspection purposes.
- C. **Evaluation of Employer's Safety and Health System.** The employer's safety and health system shall be evaluated to determine its good faith for the

purposes of penalty calculation. *(See Chapter on Penalties.)* The effectiveness of the employer's safety and health program, whether written or not, shall be determined as follows:

1. **Employer Awareness of Potential Hazards.** Determine the degree to which the employer is aware of potential hazards present in the workplace and what methods he uses to control them:
 - a. What plans and schedules does the employer have to institute upgrade and maintain engineering and administrative controls?
 - b. What is the employer's safety and health work practices program? (Examples include education and training; procedures for hazard communication, ergonomics program, incident reporting and investigation, PPE program, and regular safety inspections.
2. **Employer Safety and Health System Effectiveness.** Determine employee knowledge of any hazards which existed in the establishment and the extent to which the employer's program covers the precautions to be taken by considering the following Safety Management System elements:

Elements	Description
Management Commitment	Leadership actively supports safety initiatives
Safety Policy and Objectives	Clear policies guide safety efforts
Safety Risk Management	Systematic identification and control of risks
Safety Assurance	Verifies effectiveness of safety controls
Safety Promotion	Builds awareness and engagement
Safety Reporting	Encourages incident and hazard reporting
Safety Analysis	Investigates incidents to find root causes
Performance Monitoring	Tracks safety metrics and trends
Continuous Improvement	Uses data to refine safety practices
Training and Education	Equips staff with safety knowledge
Safety Communication	Ensures safety info flows across the organization
Safety Planning	Develops emergency and contingency plans

3. **Specific Program Elements to Evaluate.** The following specific elements of the establishment safety and health program shall be evaluated in detail appropriate to the circumstances of the inspection:
- a. **Comprehensiveness.** Evaluate the degree to which the employer's safety and health program addresses the full range of hazards ordinarily encountered in the employer's operations. This is an overall evaluation and shall take into account the evaluations of the remaining categories. Indicate whether the program is written.
 - b. **Communication.** Evaluate the employees' awareness of and access to the safety and health program, taking into account the principal means by which the program is communicated to them, e.g., oral instructions, booklets, memorandums, posters, etc. Consider whether safety meetings are held by the employer, their frequency and the persons conducting them, e.g., crew foreman, intermediate level supervisors, safety director, etc. The

effectiveness of these means shall be considered in the evaluation.

- c. **Compliance.** Compliance with the training requirements of any applicable safety or health standard shall be determined. Evaluate the degree to which safety and health rules are actually enforced, taking into account the principal methods used, e.g., warnings, written reprimands, disciplinary action, discharge, etc., and the effectiveness of these methods. Determine whether there is a staff or one specific person with assigned safety and health responsibilities and consider effectiveness of the staff's performance.
- d. **Safety/Health Training Program.** Evaluate separately any safety and health training programs the employer has. Factors to be considered include the need for special training in view of the hazards likely to be encountered or of specific requirements for such training and the need for ongoing or periodic training or retraining of employees. Determine how training and preparation is handled for non-routine tasks.
- e. **Investigations.** Evaluate the employer's efforts to investigate accidents, injuries, and illnesses; and indicate whether adequate corrective and preventive actions are taken as a result. Review of this evaluation of employer's effort is done prior to citation issuance.

D. Record All Facts Pertinent to a Violation. Apparent violations shall be brought to the attention of the employer and employee representatives at the time they are documented.

- 1. **Establish the Violation.** To establish the existence of a VOSH violation, a CSHO must document four elements during an inspection. These elements are:
 - a. **Applicable standard.** A standard, regulation, or statute applies to the hazard in question;
 - b. **Violation.** The employer has violated the standard, statute, or regulation in question;
 - c. **Knowledge.** The employer has actual knowledge or should have known of the violative condition;
 - d. **Exposure.** An employee of the cited employer is exposed to the violative condition.

2. **Documentation.** All notes, observations, analyses, and other information shall be documented in the case file.
 - a. **Required for Each Instance.** The CSHO shall normally use one worksheet to describe each instance as it is noted.
 - b. **Treatment as a Single Instance.** If identical violations of the same standard or of several related standards are noted in one general location in the establishment and if the documentation is essentially the same, all of those violations may be treated as a single instance description.
 - c. **Attachments to Be Referenced.** Photographs, video, audio, sketches, and descriptions are part of the inspection record and shall be included in the file. The original field notes, as basic documentation of the violation, shall be retained in the case file.
3. **Record Violation Facts on the Violation Worksheet.** As detailed in Chapter on Case File Documentation, record all facts pertinent to an apparent violation.
 - a. **Notification Upon Documentation.** Safety and health violations shall be brought to the attention of employer and employee representatives at the time they are documented.
 - b. **Recording Requirements.** CSHOs shall record, at a minimum, the identity of the exposed employee(s), the hazard to which the employee(s) was exposed, the employee's proximity to the hazard, the employer's knowledge of the condition, and the manner in which important measurements were obtained and how long the condition has existed.
 - c. **Documenting of Interview Statements.** CSHOs will document interview statements in a thorough and accurate manner; including names, dates, times, locations, type of materials, positions of pertinent articles, witnesses, etc.

***NOTE:** If employee exposure to hazards is not observed, the CSHO shall document facts on which the determination is made that an employee has been or could be exposed. See Chapter on Violations and Chapter on Case File Documentation.*

- E. **Testifying in Hearings.** CSHOs may be required to testify in hearings on VOSH's behalf and shall be mindful of this fact when recording observations

during inspections. The case file shall reflect conditions observed in the workplace as accurately and detailed as possible.

F. Trade Secrets. A trade secret, as referenced in Section 40.1-51.4.4:1 of the *Code of Virginia* and §250 of the *VOSH Administrative Regulation Manual* includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. See §40.1-6 (10) of the *Code of Virginia*. If trade secrets are identified, the CSHO will explain that VOSH is required by law to preserve the confidentiality of all information which might reveal a trade secret, in accordance with the above *Code of Virginia* and *VOSH Administrative Regulation Manual* sections.

1. **Policy.** It is essential to effective VOSH enforcement that CSHOs and DOLI personnel preserve the confidentiality of all information and investigations which might reveal a trade secret.
2. **Restriction and Controls.** When the employer identifies an operation or condition as a trade secret, it shall be treated as such. Information obtained in such areas, including all negatives, photographs, video, and VOSH documentation forms, shall be labeled:

"ADMINISTRATIVELY CONTROLLED INFORMATION"

"RESTRICTED TRADE INFORMATION"

Trade secret information shall be kept in a separate envelope and placed in a locked file cabinet/desk. The CSHO or other VOSH employee shall only remove the trade secret envelope from the locked file cabinet/desk when actually working on the file. Trade secret information shall in no event be left unattended. The envelope must be in the VOSH employee's possession or in the locked cabinet/desk or a locked office. Once the case is closed the information may be returned to the company and a note put in the file where the trade secret information is located.

- a. **Confidentiality.** Under §40.1-51.4.4:1 of the *Code of Virginia*, all information reported to or obtained by CSHOs in connection with any inspection or other activity which contains, or which might reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other VOSH officials concerned with the enforcement of the VOSH Program or, when relevant, in any proceeding under Title 40.1. This statutory mandate applies to all State employees. Disclosure of such information violates State Employees Standards of Conduct.

1. **Determination of Need for Sampling.** CSHOs shall determine early in the inspection whether sampling such as, but not limited to, air sampling and surface sampling is required, by utilizing the information collected during the walk around and from the pre-inspection review.
2. **Summary of Sampling to Be Provided.** After first consulting with the Regional Health Director, summaries of sampling results shall be provided as soon as possible upon request from any of the following:
 - the employer,
 - the employee representative, or
 - the employees exposed, likely to have been exposed, or likely to be exposed to the hazard.

1. **Photos/Video Recording.** Photographs and/or video recordings shall be taken to document safety and health violations and other unsafe physical

conditions on all inspections, and both methods shall be used in fatality inspections. (See also *VOSH Prog. Directive 02-053C* or successor.)

- a. CSHOs should take video or photographs of any violations they see in plain view prior to entry on site.
- b. Hard copies of photographs and video still image captures which also specifically support cited violations shall be printed and included as part of the case file. (See also *Chapter on Case File Documentation*)
- c. Panoramic videos should be taken in certain situations, such as on construction sites (for example, exterior shots of the lack of perimeter guarding) and general industry settings when a large operation or piece of machinery is involved. The CSHO should be careful to assure that the proper camera angle is being used to document the specific hazard (e.g., to document an excavation violation for no shoring or sloping, a video of an excavation taken at right angles to the line of the trench would document the absence of shoring but would not provide a clear picture of the failure to slope. A picture should be taken down the line of the trench to document the failure to trench).

NOTE: *The CSHO shall ensure that using flash or spark-producing equipment will not be hazardous and that employees are not unexpectedly startled by the use of flash equipment. Any individual whose words may be recorded shall be advised of the fact that video recordings also capture sound.*

2. **Audio Recording.** Audio recordings may also be made during any inspection at the discretion of the CSHO. However, the use of an audio recorder during an inspection may inhibit discussion and the free exchange of information between employer or employee and the CSHO. Therefore, the CSHO shall exercise prudent and sound judgement in the decision to make such recordings.
 - a. Audio recorders may be used by the CSHO during an inspection to preserve employer and employee statements during the conferences and interviews and as a note taking device during the walkaround.
 - b. The CSHO shall explain that the audio recorder is being used to speed up the inspection process by eliminating much of the required note taking and that the audio recording will better preserve what actually occurred during the inspection. If the employer, employer representative, affected employees, or any

other witnesses object to recording their statements during any part of the investigation, that part of the inspection shall be continued without the use of the audio recorder.

- c. The use of an audio recorder(s) by the employer is at the discretion of the employer.

3. Use in Case File

- a. All photograph, video, or audio files that support cited violations or other unsafe physical conditions and are not classified as confidential or trade secret shall be included on a compact disc (CD) that becomes part of the case file.
- b. Labeling of video, still photographs, or audio files once transferred to the compact disc (CD) shall be labeled with the Inspection Number and CSHO ID Number. Hard copies of photographs or video captures that support cited violations shall be properly labeled and may be attached to the appropriate cited item. Video shall be used during case file review and informal conferences without the need for photos, screen shots, or screen captures to be included in the case file.
- c. The CSHO shall ensure that any photographs, video, or audio relating to confidential or trade secret information are identified as such and are kept separate from other evidence in accordance with the procedures in Section V.E. of this FOM chapter.
- d. All video, still photograph, and audio digital files created during the inspection shall be transferred to a compact disc (CD). This CD shall permanently become part of the case file and shall be shredded with the case file after the normal scheduled three (3) year period following the final order date for the case.
- e. Upon completion of the preparation of the case file, no video, still photograph, or audio digital files created as part of a VOSH inspection shall be digitally transferred elsewhere or remain on any computer, network server, or other external method of media storage except for those files resident on CD as discussed herein.
- f. Upon completion of the preparation of the case file, no hard copy captures shall exist of the digital material created as part of a VOSH inspection except for what is contained in the case file to support cited violations. g. For more information regarding guidelines for case file documentation with video,

audio, and other digital media, refer to [VOSH PD 02-053C](#) (*or its successor*), and any other VOSH directives, instructions, or memos related to photographs, digital image, video and audio retention.

I. Immunization

1. **Areas Requiring Immunization.** If a non-immunized CSHO encounters an area requiring immunization, the CSHO shall not enter that area but shall note a description of the area, the immunization required, the employees exposed, the location and other pertinent information in the case file.
2. **Non-immunized CSHO.** The CSHO shall consult with the Regional Director about scheduling a properly immunized CSHO for an immediate or later inspection, as applicable. The CSHO shall then complete the inspection of all other areas of the establishment.
3. **Non-immunized Walkaround Representative.** If, during an inspection, a properly immunized CSHO finds that walkaround representatives of employers and employees are not properly immunized and, therefore, not authorized in the area, a reasonable number of employees and the supervisor of that area shall be consulted concerning workplace health and safety.

J. Seizure of Evidence and Chain of Custody. *Refer to Chapter 1, General Responsibilities and Administrative Procedures.*

K. Violation of Other Laws. If a CSHO observes apparent violations of laws enforced by other government agencies, such cases shall be referred to the appropriate agency. Referrals shall be made using appropriate VOSH procedures.

L. Interview of Non-Managerial Employees. A free and open exchange of information between CSHOs and employees is essential to an effective inspection. Interviews provide an opportunity for employees to supply valuable factual information concerning hazardous conditions, including information on how long workplace conditions have existed, the number and extent of employee exposure(s) to a hazardous condition, and the actions of management regarding correction of a hazardous condition.

1. Background

- a. Section 40.1-49.8(2) of the *Code of Virginia* authorizes CSHOs to question any employee privately during regular working

hours or at other reasonable times during the course of a VOSH inspection. The purpose of such interviews is to obtain whatever information CSHOs deem necessary or useful in carrying out inspections effectively. The mandate to interview employees in private is VOSH's right.

- b. Employee interviews are an effective means to determine if an advance notice of inspection has adversely affected the inspection conditions, as well as to obtain information regarding the employer's knowledge of the workplace conditions or work practices in effect prior to, and at the time of, the inspection. During interviews with employees, CSHOs should ask about these matters.
 - c. CSHOs should also obtain information concerning the presence and/or implementation of a safety and health system to prevent or control workplace hazards, and the employer's training program, or lack thereof.
 - d. If an employee refuses to be interviewed, the CSHO shall use professional judgment, in consultation with the Regional Director or designee, in determining the need for the statement. *(See Chapter on Legal Issues [Take and Preserve Testimony], for procedures obtaining statements from unwilling individuals).*
2. **Employee Right of Complaint.** CSHOs may consult with any employee who desires to discuss a potential violation. Upon receipt of such information, CSHOs shall investigate the alleged hazard, where possible, and record the findings.
 3. **Time and Location of Interview.** CSHOs are authorized to conduct interviews during regular working hours and at other reasonable times, and in a reasonable manner at the workplace. Interviews often occur during the walkaround but may be conducted at any time during an inspection. If necessary, interviews may be conducted at locations other than the workplace. CSHOs should consult with the Regional Director if an interview is to be conducted someplace other than the workplace.

If requested by the employee and considered necessary by the CSHO, a continued interview shall be scheduled at a mutually convenient time with preference being given to employee breaks or off-time. In retail or service establishments, or in continuous production operations (e.g.,

assembly line), interviews shall be scheduled, when possible, to afford minimum interference with the employee's duties and the employer's business operation.

4. Conducting Interviews of Non-Managerial Employees in Private.

CSHOs shall inform employers that interviews of non-managerial employees will be conducted in private. CSHOs are entitled to question such employees in private regardless of employer preference. If an employer or an employer's attorney interferes with a CSHOs ability to do so, the CSHO should request that the Regional Director consult with the DHLS or designee to determine appropriate legal action. Interference with a CSHO's ability to conduct private interviews with non-managerial employees includes, but is not limited to, attempts by management officials, attorneys or other employer representatives to be present during interviews.

5. Minimum Requirements

- ✓ Interview statements of employees or other individuals shall be obtained to adequately document a potential violation.
- ✓ Written and signed interview statements of at least one non-managerial employee and one supervisor or manager shall be obtained.
- ✓ With rare exception, statements shall be in writing, and the individual shall be encouraged to sign and date the statement. In such instances, where written and signed statements are not obtained, the CSHO shall document in the case file the reason written statements are not included, e.g., witness refused to sign the statement.
- ✓ If written and signed statements are not obtained, the CSHO shall make a written record and document in quotation marks the verbal statements made by employees or supervisors that support one or more of the four elements of proving a violation, e.g., regulation or law applies to the hazard, violation of law or regulation, employee exposure and employer knowledge.
- ✓ During managerial interviews, CSHOs are encouraged to document verbatim, contemporaneous quotes whenever possible as these tend to be more credible than later general recollections.

The VOSH IW-1 Inspection Worksheet / Employer Interview Sheet will be used by the CSHO to take verbatim quotes of the

management representative during the opening conference, walkaround, and closing conference. CSHOs shall always obtain written statements when:

- a. There is an actual or potential controversy as to any material facts concerning a violation.
- b. A conflict or difference among employee statements as to the facts arises.
- c. There is a potential willful, repeated or failure-to-abate violation.
- d. The inspection concerns a fatal accident or imminent danger situation (*See Chapter 6 on Fatality and Catastrophe, Rescue Operation and Emergency Response, for further guidance on written interview statements in fatality inspections*)

When attempting to determine if potential violations existed at the time of the accident, in non-fatal accident inspections.

5. **Conducting Employee Interviews.** Employees selected for interviewing shall include individuals judged knowledgeable about the area or process being inspected.

- a. **General Protocols**

- (1) At the beginning of the interview CSHOs should identify themselves to the employee by showing their credentials and provide the employee with a business card. This allows employees to contact CSHOs if they have further information at a later time.
 - (2) CSHOs should explain to employees that the reason for the interview is to gather factual information relevant to a safety and health inspection. It is not appropriate to assume that employees already know or understand the agency's purpose. Particular sensitivity is required when interviewing a non-English speaking employee. In such instances, CSHOs should initially determine whether the employee's comprehension of English is sufficient to permit conducting an effective interview. If the CSHO determines that an interpreter is needed, the CSHOs

should contact the Regional Director to attempt to arrange for an interpreter.

- (3) Every employee should be asked to provide his or her name, home address and phone number. CSHOs should request identification and make clear the reason for asking for this information.
 - (4) CSHOs shall inform employees that VOSH has the right to interview them in private and of the protections afforded under §40.1-51.2:1 of the *Code of Virginia*.
 - (5) In the event an employee requests that a representative of the union be present, CSHOs shall make a reasonable effort to honor the request.
 - (6) If an employee requests that his/her personal attorney be present during the interview, CSHOs should honor the request and, before continuing with the interview, consult with the Regional Director for guidance.
 - (7) Rarely, an attorney for the employer may claim that individual employees have also authorized the attorney to represent them. Such a situation creates a potential conflict of interest. CSHOs should consult with the Regional Director, who will contact the DHLS for guidance.
- b. Conducting the Interview.** The CSHO shall assure the employee that the Commissioner will not release the statement to anyone unless VOSH is compelled by a court to do so. Following are some examples of situations to address during interviews:
- (1) When there is an actual or potential controversy between the employer and employee regarding a material fact concerning a violation;
 - (2) When there is a conflict or difference among employee or supervisory statements regarding the facts;
 - (3) In accident investigations, when attempting to determine if apparent violation(s) existed at the time of the accident.
 - (4) To document employer knowledge of the violation.

- (5) To document whether training requirements under a specific standard have been met.
- (6) When the CSHO suspects the employer may raise an affirmative defense to the violation, such as employee misconduct.
- (7) When there is a multi-employer question as to which employer created the hazard and which employer had control of the workplace.

c. Other Interview Issues. Any changes or corrections to the statement shall be initialed by the individual. Statements shall not otherwise be changed or altered in any manner.

- (1) Statements shall include the words, “I request that my statement be held confidential to the extent allowed by law” and end with the following: “I have read the above, and it is true to the best of my knowledge.” The individual, however, may waive confidentiality.
- (2) If the person making the declaration refuses to sign, the CSHO shall note the refusal on the statement. The statement shall, nevertheless, be read back to the person in an attempt to obtain agreement and noted in the case file.

Any necessary changes should then be made and initialed by the CSHO to ensure accuracy. If, after that, the individual still will not sign, a note should then be added to the statement that the individual refused to sign but indicated the statement was accurate.

- (3) A transcription of any recorded statement shall be made then necessary to the case.

d. The Informer’s Privilege

- (1) The informer’s privilege allows the government to withhold the identity of individuals who provide information about the violation of laws, including VOSH rules and regulations. CSHOs shall inform employees that their statements will remain confidential to the extent permitted by law. However, each employee giving a statement should be informed that disclosure of

his or her identity may be necessary in connection with enforcement or court actions.

***NOTE:** Whenever CSHOs make an assurance of confidentiality as part of an investigation (i.e. informs the person giving the statement that their identity will be protected), the pledge shall be reduced to writing and included in the case file.*

- (2) The privilege also protects the contents of statements to the extent that disclosure may reveal the witness's identity.
- (3) Where the contents of a statement will not disclose the identity of the informant (i.e., does not reveal the witness' job title, work area, job duties, or other information that would tend to reveal the individual's identity), the privilege does not apply. Interviewed employees shall be told that they are under no legal obligation to inform anyone, including employers, that they provided information to VOSH.

Interviewed employees shall also be informed that if they voluntarily disclose such information to others, it may impair the agency's ability to invoke the privilege.

M. Other Issues.

1. **Multi-Employer Worksites.** On multi-employer worksites, in all industry sectors, both construction and non-construction, more than one employer may be cited for a hazardous condition that violates a VOSH standard. Citations generally shall be issued to employers whose employees are exposed to hazards, i.e., the **exposing employer**. An exposing employer has an affirmative defense to a citation discussed below in B.7.c. (see VOSH *Administrative Regulation Manual* §260.G).

- a. **Additional Categories of Employers.** Additionally, the following construction and non-construction employers normally shall be cited, whether or not their own employees are exposed (see VOSH *Administrative Regulation Manual* §260.F.):

- (1) The employer who actually creates the hazard, i.e., **creating employer**;

- (2) The employer who is either:
 - (a) responsible contractually, or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected, i.e., **general contractor controlling employer**; or
 - (b) responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected, i.e., **prime sub-contractor controlling employer**;
 - (3) The employer who has the responsibility for actually correcting the hazard, i.e., **correcting employer**.
- b. Knowledge of Hazardous Condition.** It must be shown that each employer to be cited has knowledge of the hazardous condition or could have had such knowledge with the exercise of reasonable diligence.
- c. Legitimate Defense to Citation.** The multi-employer worksite defense is now codified in VOSH *Administrative Regulation Manual* §260.G. and it provides as follows:
- “A citation issued under §260.F, to an exposing employer who violates any VOSH law, standard, rule or regulation, shall be vacated if such employer demonstrates that:
- (1) The employer did not create the hazard;
 - (2) The employer did not have the responsibility or the authority to have the hazard corrected;
 - (3) The employer did not have the ability to correct or remove the hazard;
 - (4) The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees were exposed;

- (5) The employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;
- (6) Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; and
- (7) When extreme circumstances justify it, the exposing employer shall have removed his employees from the job.”

***NOTE:** All of these items must be documented in the case file.*

- d. Determination of Which Employer(s) to Cite.** On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates a VOSH standard. A two-step process must be followed in determining whether more than one employer is to be cited.

Step 1: The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs (1) - (4) below explain and give examples of each. Remember that an employer may have multiple roles. Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate.

***NOTE:** Only exposing employers can be cited for General Duty Clause violations.*

Step 2: If the employer falls into one of these categories, it has obligations with respect to VOSH requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies.

Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an

employer with respect to protecting its own employees.

(1) Creating Employer

Step 1: Definition - The employer that caused a hazardous condition that violates a VOSH standard.

Step 2: Actions Taken: Employers must not create violative conditions. An employer that does so is citable even if the only employees exposed are those of other employers at the site.

Example 1: The owner/operator of a factory contracts with Employer S to service machinery. The owner fails to cover drums of a chemical despite Employer S's repeated requests that it do so. This results in airborne levels of the chemical that exceed the permissible exposure limit (PEL).

Analysis

Step 1: The owner is a creating employer because it caused employees of Employer "S" to be exposed to the air contaminant above the PEL.

Step 2: The owner failed to implement measures to prevent the accumulation of the air contaminant. It could have met its obligation by implementing the simple engineering control of covering the drums. Having failed to implement a feasible engineering control to meet the PEL, the owner is citable for the hazard.

Example 2: On a construction site, Employer "M" hoists materials onto the 8th floor, damaging perimeter guardrails. Neither its own employees nor employees of other employers are exposed to the hazard. It takes effective steps to keep all employees, including those of other employers, away from the unprotected edge, e.g., warning lines and warning signs cordoning off the area of damaged guard rails, and informs the controlling employer of the problem. Employer "M" lacks authority to fix the guardrails itself.

Analysis

Step 1: Employer “M” is a creating employer because it caused a hazardous condition by damaging the guardrails.

Step 2: While it lacked the authority to fix the guardrails, it took immediate and effective steps to keep all employees away from the hazard and notified the controlling employer of the hazard. Employer “M” is not citable since it took effective measures to prevent employee exposure to the fall hazard.

(2) Exposing Employer

Step 1: Definition - An employer whose own employees are exposed to the hazard. *Refer to applicable VOSH FOM section for a discussion of what constitutes exposure.*

Step 2: Actions taken. If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it:

- (a) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition; and,
- (b) failed to take steps consistent with its authority to protect its employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following:
 - (i) ask the creating and/or controlling employer to correct the hazard;
 - (ii) inform its employees of the hazard; and
 - (iii) take reasonable alternative protective measures. In extreme circumstances, e.g., imminent danger situations, the exposing

employer is citable for failing to remove its employees from the job to avoid the hazard.

Example 3: Subcontractor “S” is responsible for inspecting and cleaning a work area in a factory around a large, permanent hole at the end of each day. A VOSH standard requires guardrails. There are no guardrails around the hole and Subcontractor “S” employees do not use personal fall protection, although it would be feasible to do so. Subcontractor “S” has no authority to install guardrails. However, it did ask the owner/operator of the plant to install them. The owner refused to install guardrails.

Analysis

Step 1: Subcontractor “S” is an exposing employer because its employees are exposed to the fall hazard.

Step 2: While Subcontractor “S” has no authority to install guardrails, it is required to comply with VOSH requirements to the extent feasible. It must take steps to protect its employees and ask the employer that controls the hazard - the owner/operator of the factory - to correct it. Although Subcontractor “S” asked for guardrails, since the hazard was not corrected, Subcontractor “S” was responsible for taking reasonable alternative protective steps, such as providing personal fall protection. Because that was not done, Subcontractor “S” is citable for the violation.

Example 4: On a construction site, unprotected rebar on either side of an access ramp presents an impalement hazard. Subcontractor “E”, an electrical subcontractor, does not have the authority to cover the rebar. However, several times Subcontractor “E” asked the general contractor to cover the rebar. In the meantime, Subcontractor “E” instructed its employees to use a different access route that avoided most of the uncovered rebar and required them to keep as far from the rebar as possible.

Analysis

Step 1: Since Subcontractor “E” employees were still exposed to some unprotected rebar, Subcontractor “E” is an exposing employer.

Step 2: Subcontractor “E” made a good faith effort to get the general contractor to correct the hazard and took feasible measures within its control to protect its employees. Subcontractor “E” is not citable for the rebar hazard.

(3) Correcting Employer

Step 1: Definition - An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard.

This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.

Step 2: Actions taken: The correcting employer must exercise reasonable care in preventing and discovering violations and meet its obligations of correcting the hazard.

Example 5: Subcontractor “C”, a carpentry contractor, is hired to erect and maintain guardrails throughout a large, 15-story project. Work is proceeding on all floors. Subcontractor “C” inspects all floors in the morning and again in the afternoon each day. It also inspects areas where material is delivered to the perimeter once the material vendor is finished delivering material to that area. Other subcontractors are required to report damaged/missing guardrails to the general contractor, who forwards those reports to Subcontractor “C”, who regularly repairs any damaged guardrails immediately after finding them and immediately after they are reported.

On this project, few instances of damaged guardrails have occurred other than where material has been delivered. Shortly after the afternoon inspection of the

6th floor, workers moving equipment accidentally damage a guardrail in one area. No one tells Subcontractor C of the damage and Subcontractor “C” has not seen it. A VOSH inspection occurs at the beginning of the next day, prior to the morning inspection of the 6th floor.

None of Subcontractor “C”'s own employees are exposed to the hazard, but employees of other subcontractors are exposed.

Analysis

Step 1: Subcontractor “C” is a correcting employer since it is responsible for erecting and maintaining fall protection equipment.

Step 2: The steps Subcontractor “C” implemented to discover and correct damaged guardrails were reasonable in light of the amount of activity and size of the project. It exercised reasonable care in preventing and discovering violations; therefore, it is not citable for the damaged guardrail since it could not reasonably have known of the violation.

(4) Controlling Employer

(a) *VOSH Administrative Regulation Manual* §260.F.2. provides that citations can issue against a general contractor as a controlling employer, as well as a prime subcontractor in its role as a controlling employer, when their own employees are not exposed to the hazardous condition:

- (i) **General Contractor.** Responsible, by contract or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected; or
- (ii) **Prime Subcontractor.** Responsible, by contractor through actual practice for safety and health conditions for a specific area of the worksite, or specific work

practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected.

Step 1: Definition – An employer who has **general supervisory authority** over the worksite, including the power to correct safety and health violations itself or require others to correct them; **or** who has responsibility, by contract or through actual practice for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. Descriptions and examples of different kinds of controlling employers are given below.

Step 2: Actions Taken – A **general contractor controlling employer** must exercise reasonable care to prevent and detect violations on the entire site. A prime subcontractor controlling employer must exercise reasonable care to prevent and detect violations for the specific area, specific work practice or specific phase of the project for which it is responsible. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. In the case of a general contractor controlling employer, this means that it is not normally required to inspect for hazards as frequently or to have the same

level of knowledge of the applicable standards or of trade expertise as the employer it has hired. In the case of a prime subcontractor controlling employer, this means that it is not normally required to inspect for hazards as frequently as the employer it has hired.

(b) Factors Relating to Reasonable Care

Standard Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:

- (i) The scale of the project;
- (ii) The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;
- (iii) How much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise.
- (iv) More frequent inspections are generally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer had never before worked with this other employer and does not know its compliance history.
- (v) Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of

compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.

- (c) **Evaluating Reasonable Care** In evaluating whether a controlling employer has exercised reasonable care in preventing and discovering violations, consider questions such as whether the controlling employer:
- (i) Conducted periodic inspections of appropriate frequency (frequency should be based on the factors listed above);
 - (ii) Implemented an effective system for promptly correcting hazards;
 - (iii) Enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.

(d) **Types of General Contractor Controlling Employers**

- (i) Control Established by Contract

In this case, the employer has a specific contract right to control safety. To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

Example 6: An owner/operator of a plant contracts with Employer “S” to do

abrasive blasting at the plant. Some of the work is regularly scheduled maintenance and so is general industry work; other parts of the project involve new work and are considered construction. Respiratory protection is required. Further, the contract explicitly requires Employer “S” to comply with safety and health requirements.

Under the contract, the owner has the right to take various actions against Employer “S” for failing to meet contract requirements, including the right to have non-compliance corrected by using other workers and back-charging for that work.

Employer “S” is one of two employers under contract with the owner at the work site, where a total of five employees work. All work is done within an existing building.

The number and types of hazards involved in Employer “S”'s work do not significantly change as the work progresses. Further, the owner has worked with Employer “S” over the course of several years. Employer “S” provides periodic and other safety and health training and uses a graduated system of enforcement of safety and health rules. Employer “S” has consistently had a high level of compliance at its previous jobs and at this site.

The owner monitors Employer “S” by a combination of weekly inspections, telephone discussions and a weekly review of Employer “S”'s own inspection reports. The owner has a system of graduated enforcement that it has applied

to Employer “S” for the few safety and health violations that had been committed by Employer “S” in the past few years. Further, due to respirator equipment problems Employer “S” violates respiratory protection requirements two days before the owner's next scheduled inspection of Employer “S”. The next day there is a VOSH inspection. There is no notation of the equipment problems in Employer “S”'s inspection reports to the owner and Employer “S” made no mention of it in its telephone discussions.

Analysis

Step 1: The owner/operator is a controlling employer because it has general supervisory authority over the worksite, including contractual authority to correct safety and health violations.

Step 2: The owner has taken reasonable steps to try to make sure that Employer “S” meets safety and health requirements.

Its inspection frequency is appropriate in light of the low number of workers at the site, lack of significant changes in the nature of the work and types of hazards involved, the owner's knowledge of Employer “S”'s history of compliance and its effective safety and health efforts on this job. The owner has exercised reasonable care and is not citable for this condition.

Example 7: On a construction site, the general contractor contracts with Employer “P” to do painting work. The general contractor has the same contract authority over Employer “P” as the

owner/operator had in Example 6. The general contractor has never before worked with Employer “P”. The general contractor conducts inspections that are sufficiently frequent in light of the factors listed above. Further, during a number of its inspections, the general contractor finds that Employer “P” has violated fall protection requirements. It points the violations out to Employer “P” during each inspection but takes no further actions.

Analysis

Step 1: The general contractor is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over Employer “P”.

Step 2: The general contractor took adequate steps to meet its obligation to discover violations. However, it failed to take reasonable steps to require Employer “P” to correct hazards since it lacked a graduated system of enforcement. A citation to the general contractor for the fall protection violations is appropriate.

Example 8: On a construction site, the general contractor contracts with Subcontractor “E”, an electrical sub-contractor.

The general contractor has full contract authority over Subcontractor “E”, as in Example 6. Subcontractor “E” installs an electric panel box exposed to the weather and implements an assured equipment grounding conductor program, as required under the contract. It fails to

connect a grounding wire inside the box to one of the outlets.

This incomplete ground is not apparent from a visual inspection. Further, the general contractor inspects the site with a frequency appropriate for the site in light of the factors discussed above. It saw the panel box but did not test the outlets to determine if they were all grounded because Subcontractor “E” represents that it is doing all of the required tests on all receptacles. The general contractor knows that Subcontractor “E” has implemented an effective safety and health program. From previous experience, it also knows Subcontractor “E” is familiar with the applicable safety requirements and is technically competent.

The general contractor had asked Subcontractor “E” if the electrical equipment is OK for use and was assured that it was.

Analysis

Step 1: The general contractor is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over Subcontractor “E”.

Step 2: The general contractor exercised reasonable care. It had determined that Subcontractor “E” had technical expertise, safety knowledge and had implemented safe work practices. It conducted inspections with appropriate frequency. It also made some basic inquiries into the safety of the electrical equipment.

Under these circumstances, the general contractor was not obligated to test the outlets itself to determine if they were all grounded. It is not citable for the grounding violation.

(ii) Control Established by a Combination of Other Contract Rights.

Where there is no explicit contract provision granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be a controlling employer. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job. Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety.

NOTE: Citations should only be issued in this type of case after consulting with the DHLS.

Example 9: Construction Management Firms - Construction Manager “M” is contractually obligated to: set schedules and construction sequencing, require subcontractors to meet contract specifications, negotiate with trades, resolve disputes between sub-contractors, direct work and make purchasing decisions which affect safety.

However, the contract states that Construction Manager “M” does not have a right to require compliance with safety and health requirements.

Further, Subcontractor “S” asks Construction Manager “M” to alter the schedule so that Subcontractor “S” would not have to start work until Subcontractor “G” has completed installing guardrails. Construction Manager “M” is contractually responsible for deciding whether to approve Subcontractor “S”’s request.

Analysis

Step 1: Even though its contract states that Construction Manager “M” does not have authority over safety, the combination of rights actually given in the contract provides broad responsibility over the site and results in the ability of Construction Manager “M” to direct actions that necessarily affect safety.

For example, Construction Manager “M”’s contractual obligation to determine whether to approve Subcontractor “S”’s request to alter the schedule has direct safety implications. Construction Manager “M”’s decision relates directly to whether Subcontractor “S”’s employees will be protected from a fall hazard. Construction Manager “M” is a controlling employer.

Step 2: In this example, if Construction Manager “M” refused to alter the schedule, it would be citable for the fall hazard violation.

Example 10: Employer “ML”’s contractual authority is limited to

reporting on subcontractors' contract compliance to the owner/developer and making contract payments. Although it reports on the extent to which the subcontractors are complying with safety and health infractions to the owner, Employer "ML" does not exercise any control over safety at the site.

Analysis

Step 1: Employer "ML" is not a controlling employer because these contractual rights are insufficient to confer control over the subcontractors and Employer "ML" did not exercise control over safety. Reporting safety and health infractions to another entity does not, by itself (or in combination with these very limited contract rights), constitute an exercise of control over safety.

Step 2: Since it is not a controlling employer, it had no duty under VOSH laws and regulations to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is, therefore, no need to go to Step 2.

(iii) Architects and Engineers

Architects, engineers, and other entities are controlling employers only if the breadth of their involvement in a construction project is sufficient to bring them within the parameters discussed above.

Example 11: Architect "A" contracts with the owner to prepare contract drawings and specifications, inspect the work, report to the owner on contract

compliance, and to certify completion of work. Architect “A” has no authority or means to enforce compliance, no authority to approve/reject work and does not exercise any other authority at the site, although it does call the general contractor's attention to observed hazards noted during its inspections.

Analysis

Step 1: Architect “A”'s responsibilities are very limited in light of the numerous other administrative responsibilities necessary to complete the project. It is little more than a supplier of architectural services and conduit of information to the owner. Its responsibilities are insufficient to confer control over the subcontractors, and it did not exercise control over safety. The responsibilities it does have are insufficient to make it a controlling employer. Merely pointing out safety violations did not make it a controlling employer.

NOTE: *In circumstances such as this, it is likely that broad control over the project rests with another entity.*

Step 2: Since Architect “A” is not a controlling employer, it had no duty under VOSH laws and regulations to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is, therefore, no need to go to Step 2.

Example 12: Engineering Firm “E” has the same contract authority and functions as in Example 9.

Analysis

Step 1. Under the facts in Example 9, Engineering Firm “E” would be considered a controlling employer.

Step 2. The same type of analysis described in Example 9 for Step 2 would apply here to determine if Engineering Firm “E” should be cited.

- (iv) **Control Without Explicit Contractual Authority.** Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site (*refer to Example 9*).

NOTE: Citations should only be issued in this type of case after consulting with the DHLs.

Example 13: Construction Manager “M” does not have explicit contractual authority to require subcontractors to comply with safety requirements, nor does it explicitly have broad contractual authority at the site. However, it exercises control over most aspects of the subcontractors' work anyway, including aspects that relate to safety.

Analysis

Step 1: Construction Manager “M” would be considered a controlling employer since it exercises control over most aspects of the subcontractor's work, including safety aspects.

Step 2: The same type of analysis on reasonable care described in Examples #6, #7, and #8 of would apply to

determine if a citation should be issued to this type of controlling employer.

(v) **Multiple Roles**

- a. **Creating, Correcting or Control-ling Employers.** These employers will often also be an exposing employer. Consider whether the employer is an exposing employer before evaluating its status with respect to these other roles.
- b. **Exposing, Creating & Controlling Employers.** These employers can also be correcting employers if they are authorized to correct the hazard.

(e) **Prime Subcontractor Controlling Employers**

VOSH *Administrative Regulation Manual* §260.F.2. B. provides that citations may be issued to an employer who is not a general contractor, but is:

“...responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected, i.e., **the prime contractor controlling employer;**

NOTE: An example of a prime subcontractor controlling employer would be where the main framing contractor has subcontracted framing work out to another subcontractor who creates a hazard, and the main framing subcontractor knew or should have known of the hazard and was responsible

by contract or through actual practice for that area of the worksite.

There will be instances where the individual facts of a case warrant citing both a general contractor and a prime subcontractor as *controlling* employers, but in many cases, due to recent changes in construction industry business practices, it will be more appropriate to cite a prime subcontractor in lieu of the general contractor as the *controlling* employer on the site, e.g., recent VOSH inspections have found instances where an accident was caused by a “sub of a sub of a sub” where the general contractor had not even been made aware of the subcontractor’s presence on the worksite by their initial subcontractor.

The following facts are from an actual VOSH accident inspection involving such a business arrangement:

The accident involved a truss collapse during the construction of an eight (8) unit townhouse, and the general contractor had hired a reputable framing subcontractor, who then subcontracted the truss installation to a second subcontractor who was not experienced in the particular type of truss system being used. The trusses were not braced in accordance with the manufacturer’s instructions, and they collapsed. After reviewing the specific facts of the case, the VOSH program issued citations related to the accident to the framing subcontractor and its subcontractor, but not to the general contractor.

Facts that are looked at in such a case to determine which companies will receive citations include, but are not limited to:

- contractual rights and responsibilities;
- actual work practices on the site;

- whether the individual employers knew or should have known of the hazard i.e., employer knowledge;
- whether employers had provided adequate safety and health programs and trained their employees;
- whether employers had complied with VOSH standards requiring frequent and regular inspections of the job site;
- what was the level of technical expertise and experience of the employers involved; and
- how long the hazard was in existence before the accident occurred, etc.

2. Employees vs. Independent Contractors. Determining whether a worker is an employee or an independent contractor is often important, especially when that person is the only one exposed to the hazard. When an employer asserts that the worker is not an employee, but an independent contractor, the CSHO should determine the answers to the following questions:

- (1) Who has the responsibility to control the workers?
- (2) Does the alleged employer have power to control the workers?
- (3) Who pays the workers' wages?
- (4) Whom do the workers consider their employer?
- (5) Does the alleged employer have the power to hire, fire or modify the employment condition of the workers?
- (6) Does the ability of the workers to increase their income depend on efficiency rather than on initiative, judgment or foresight?
- (7) How are the workers' wages established?

NOTE: *The existence of signed releases, tax forms, or other documents does not necessarily determine workers' status under the VOSH program. The key is examining the workers' relationship to the employer, using the questions above.*

Consult with the DHLS in all cases when questions arise regarding who an employee is and who is an independent contractor.

3. **Employer/Employee Responsibilities**

- a. **Employee Duty.** Section 40.1-51.2(a), *Code of Virginia*: “It shall be the duty of each employee to comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this chapter which are applicable to his own actions and conduct.”
 - (1) The law does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
 - (2) Although the employer is not the absolute guarantor or insurer of all employee actions, reasonable steps must be taken by the employer to protect employees from hazards that may result from failure to comply with the standards, e.g., informing employees of hazards and how to protect themselves, enforcing safety and health rules, and the like.
- b. **Employee Refusal to Comply.** In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Regional Director, who shall consult with the applicable Program Director, for discussion and advice. Under no circumstances is the CSHO to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. The CSHO is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with VOSH laws, standards and regulations. However, concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge, to ensure compliance with the law.
- c. **Employer Exercise of Authority.** Under no circumstances is the CSHO to become involved in an *on-site* dispute involving

labor/management issues or interpretation of collective-bargaining agreements. The CSHO is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with VOSH laws, standards and regulations. Concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge.

4. **Affirmative Defenses**

- a. **Definition.** An affirmative defense is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proven by VOSH.
- b. **Burden of Proof.** Although affirmative defenses must be proven by the employer at the time of the hearing, VOSH must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. The CSHO shall keep in mind the potential affirmative defenses that the employer may make and, during the inspection, shall attempt to gather contrary evidence.
- c. **Common Affirmative Defenses.** The following are explanations of the more common affirmative defenses with which the CSHO shall become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.
 - (1) **Unpreventable Employee Misconduct or “Isolated Event.”**
 - (a) The employer has established work rules designed to prevent the violation;
 - (b) It has adequately communicated these rules which were effectively communicated and uniformly enforced;
 - (c) It has taken steps to discover the violation; and
 - (d) It has effectively enforced the work rules when violations have been discovered.

- (2) **Investigation of Employee Misconduct.** The following example illustrates the questions to be asked about employee misconduct situations.

Example: An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts which the CSHO shall document may include:

- (a) Who removed the guard and why?
- (b) Did employer know guard had been removed?
- (c) How long or how often had the saw been used without guards?
- (d) Did the employer have a work rule that the saw guards not be removed?
- (e) How was the work rule communicated?
- (f) Was the work rule enforced?
- (g) Were there written training procedures?
- (h) Were there training records?
- (i) Were there disciplinary policies?
- (j) Was the disciplinary policy enforced?

- (3) **Impossibility.** In some instances, compliance is impossible. In this case, compliance with the requirements of a standard would:

- (a) be functionally impossible or would prevent performances of required work; and
- (b) necessitate that there are no alternative means of employee protection.

EXAMPLE: During the course of the inspection an unguarded table saw is observed. The employer states that the nature of its work makes a guard unworkable. Facts which the CSHO shall document may include: Would a guard make performance of the work impossible or merely more difficult? Could a guard be used part of the time? Has the employer attempted to

use guards? Has the employer considered alternative means or methods of avoiding or reducing the hazard?

- (4) **Greater Hazard.** Compliance with a standard would result in greater hazards to employees than non-compliance and:

- (a) There are no alternative means of employee protection; and
- (b) An application of a variance would be inappropriate.

EXAMPLE: The employer indicates that a saw guard had been removed because it caused particles to be thrown into the operator's face. Facts which the CSHO shall consider may include: Was the guard used properly? Would a different type of guard eliminate the problem? How often was the operator struck by particles and what kind of injuries resulted? Would safety glasses, a face mask, or a transparent shelf attached to the saw prevent injury? Was operator technique at fault and did the employer attempt to correct it? Was a variance sought?

NOTE: DHLS is responsible for processing all variance requests.

- (5) **Documentation Requirements.** When it is reasonable to assume an affirmative defense may be an issue, the CSHO shall make efforts to gather and record facts relevant to the defense. Closing conferences are often a good opportunity to examine employee misconduct questions. The CSHO shall bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the Regional Director. Where it appears that every element of an affirmative defense is present, the Regional Director may decide, after consultation with the Program Manager and the DHLS, that a citation shall not be issued.

N. Employer Abatement Assistance

1. **Policy.** CSHOs shall offer appropriate abatement assistance during the walkaround as to how workplace hazards might be eliminated. The information shall provide guidance to the employer in developing acceptable abatement methods or in seeking appropriate professional assistance. CSHOs shall not imply VOSH endorsement of any product through use of specific product names when recommending abatement measures. The issuance of citations shall not be delayed.
2. **Disclaimers.** The employer shall be informed that:
 - a. The employer is not limited to the abatement methods suggested by VOSH;
 - b. The methods explained are general and may not be effective in all cases; and
 - c. The employer is responsible for selecting and carrying out an effective abatement method and maintaining the appropriate documentation.
3. **Type of Assistance.** The type of abatement assistance provided will depend on the needs of the employer and the complexity of the hazard. Where standards specify abatement methods such as guarding of belts and pulleys, the CSHO shall, at a minimum, ensure that the employer is aware of the specifications. For more complex problems, the CSHO shall offer general information on types of controls or procedures commonly used to abate the hazard. Alternative methods shall be provided whenever possible.
4. **Procedures.** Information provided by VOSH to assist the employer in identifying possible methods of abatement for alleged violations shall be provided to the employer as it becomes available or necessary. The issuance of citations shall not be delayed.
 - a. **Assistance Provided During an Inspection.** CSHOs shall utilize their knowledge and professional experience in providing the employer with abatement assistance during the inspection.
 - (1) Before leaving an inspection site and, preferably, during the walkaround when an apparent violation is noted, CSHOs shall determine whether the employer

wishes to discuss possible means of abating apparent violations. The discussion may continue at the closing conference.

- (2) CSHOs shall briefly document abatement information provided to the employer or the employer's negative response to the offer of assistance.

- b. **Assistance Provided After an Inspection.** If a CSHO cannot provide assistance during an inspection or if the employer has abatement questions after the inspection, the Regional Director shall ensure that additional information, if available, is obtained and provided to the employer as soon as possible. Any communications with the employer shall be documented in the case file and the case diary log.

VI. Closing Conference

- A. **Participants.** At the conclusion of an inspection, CSHOs shall conduct a closing conference with the employer and the employee representatives, jointly or separately, as circumstances dictate. The closing conference may be conducted on-site or by telephone as CSHOs deem appropriate. If the employer refuses to allow a closing conference, the circumstances of the refusal shall be documented in the narrative, and the case shall be processed as if a closing conference had been held.

***NOTE:** When conducting separate closing conferences for employers and labor representatives, where the employer has declined to have a joint closing conference with employee representatives, CSHOs shall normally hold the conference with employee representatives first, unless the employee representative requests otherwise. This procedure will ensure that worker input is received before employers are informed of violations and proposed citations.*

B. Discussion Items

1. **Apparent Violations.** CSHOs shall discuss the apparent violations and indicate the applicable section(s) of standards which may have been violated, and other pertinent issues found during the inspection and note relevant comments for use on the Violation Worksheet, including

input for establishing correction dates. When describing the apparent violation, no mention shall be made of the potential classification or penalty.

2. **Closing Conference Guide Content.** CSHOs will normally give employers the publication, VOSH Closing Conference Guide. They shall then briefly discuss the information in the booklet and answer any questions. All matters discussed during the closing conference shall be documented in the case file, including a note describing printed materials distributed.
3. **Employer's Safety and Health Program.** CSHOs shall discuss the strengths and weaknesses of the employer's occupational safety and health system and any other applicable programs and advise the employer of the benefits of an effective program(s) and provide information, such as, federal OSHA's website, describing program elements.
4. **Representatives Right to Participate.** Both the employer and employee representatives shall be advised of their rights to participate in any subsequent conferences, meeting or discussions, and their contest rights. Any unusual circumstances noted during the closing conference shall be documented in the case file.
5. **Second Conference.** Since CSHOs may not have all pertinent information at the time of the first closing conference, a second closing conference may be held by telephone or in person. For example, if the CSHO does not have sampling results prior to the first closing conference, a second closing conference shall be held by telephone or in person to inform the employer and the employee representatives whether the establishment is in compliance.
 - a. If the results indicate noncompliance, then apparent violations, correction procedures, and interim methods of control shall be discussed.
 - b. Even if the employer is in compliance, sample results which equal or exceed 50 per cent of the permissible exposure limit and any recommendations of the CSHO on good safety and health practices shall be discussed with the employer and the employee representatives.
 - c. When closing conferences are delayed pending receipt of sampling data or for any other reason, the employee representative shall be afforded an opportunity to participate in such delayed conferences.

6. **Additional Issues.** The CSHO shall advise the employee representatives that:
- a. Under §40.1-49.4.E, *Code of Virginia*, if the employer contests, the employees have a right to elect "party status" before the Court.
 - b. They must be notified by the employer if a notice of contest is filed.
 - c. They have rights under §40.1-51.2:2, *Code of Virginia*, dealing with discrimination.
 - d. They have a right to contest the abatement date. Such contest must be in writing and must be filed within fifteen (15) working days after receipt of the citation.

C. Advice to Attendees

1. The CSHO shall advise those attending the closing conference that a request for an informal conference with the Regional Director is encouraged as it provides an opportunity to:
 - a. Resolve disputed citations and penalties without the need for litigation which can be time consuming and costly;
 - b. Obtain a more complete understanding of the specific safety or health standards which apply;
 - c. Discuss ways to correct the violations;
 - d. Discuss issues concerning proposed penalties;
 - e. Discuss proposed abatement dates;
 - f. Discuss issues regarding employee safety and health practices; and
 - g. Learn more of other VOSH programs and services available.
2. If a citation is issued, an informal conference or the request for one does not extend the fifteen (15) working-day period in which the employer or employee representatives may contest.
3. Verbal disagreement with, or intent to, contest a citation, penalty or abatement date during an informal conference does not replace the required written Notice of Intent to Contest.

4. Employee representatives have the right to participate in informal conferences or negotiations between the Regional Director and the employer in accordance with the guidelines given in the subsection on Informal Conferences.

D. Penalties. CSHOs shall explain that penalties must be paid within 15 working days after the employer receives a citation and notification of penalty. If, however, an employer contests the citation and/or the penalty, penalties need not be paid for the contested items until the final order date.

E. Feasible Administrative, Work Practice and Engineering Controls. Where applicable, the CSHO shall discuss control methodology with the employer during the closing conference.

1. Definitions

a. Engineering Controls. Engineering controls consist of substitution, isolation, ventilation, and equipment modification.

(1) Substitution may involve process change, equipment replacement or material substitution.

(2) Isolation results in the reduction of the hazard by providing a barrier around the material, equipment, process or employee. This barrier may consist of a physical separation or isolation by distance.

(3) Ventilation controls are more fully discussed in the OSHA Technical Manual.

(4) Equipment modification will result in increased performance or change in character, such as the application of sound absorbent material.

b. Administrative Controls. Any procedure which significantly limits daily exposure by control or manipulation of the work schedule or manner in which work is performed is considered a means of administrative control. The use of personal protective equipment is *not* considered a means of administrative control. Employee rotation as an administrative control shall not be used as a method of complying with the permissible exposure limits of carcinogens.

c. Work Practice Controls. Work practice controls are a type of administrative control by which the employer modifies the manner in which the employee performs assigned work. Such

modification may result in a reduction of exposure through such methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job.

- d. **Feasibility.** Abatement measures required to correct a citation item are feasible when they can be accomplished by the employer. The CSHO, following current directions and guidelines, shall inform the employer, where appropriate, that a determination will be made as to whether engineering or administrative controls are feasible.
 - (1) **Technical Feasibility.** Technical feasibility is the existence of technical know-how as to materials and methods available or adaptable to specific circumstances which can be applied to cited violations with a reasonable possibility that employee exposure to occupational hazards will be reduced. The Regional Director is responsible for making determinations that engineering or administrative controls are feasible.
 - (a) Sources which can provide information useful in making this determination are the following:
 - 1 Similar situations where adequate engineering controls do, in fact, reduce employee exposure.
 - 2 Written source materials or conference presentations that indicate that equipment and designs are available to reduce employee exposure in similar situations.
 - 3 Studies by a qualified consulting firm, professional engineer, industrial hygienist, or insurance carrier that show engineering controls are technically feasible.
 - 4 Studies and materials collected and prepared by VOSH or OSHA's Directorate of Compliance Programs, the Directorate of Technical Support or the

Assistant Regional Administrator for
Technical Support.

- 5 Equipment catalogs and suppliers that indicate engineering controls are technically feasible and are available.
- 6 Information provided by other government agencies when their regulations apply to the operations involved and which may affect or limit the design or type of controls that may be used for abatement.

- (b) VOSH's experience indicates that feasible engineering or administrative controls exist for most hazardous exposures.

(2) **Economic Feasibility.** Economic feasibility means that the employer is financially able to undertake the measures necessary to abate the citations received. The CSHO shall inform the employer that, although the cost of corrective measures to be taken will not usually be considered as a factor in the issuance of a citation, it will be considered during an informal conference or during settlement negotiations.

- (a) If the cost of implementing effective engineering, administrative, or work practice controls or some combination of such controls, would seriously endanger the employer's financial condition so as to result in the probable shut down of the establishment or a substantial part of it, an extended abatement date shall be set when postponement of the capital expenditures would have a beneficial effect on the financial performance of the employer.
- (b) If the employer raises the issue that the company has other establishments or other locations within the same establishment with equipment or processes which, although not cited as a result of the present inspection, nevertheless would require the same abatement measures as those under citation, the economic feasibility determination shall not be limited to the cited items above. In such cases, although the employer will

be required to abate the cited items within the time allowed for abatement, the opportunity to include both the cited and the additional items in a long-range abatement plan shall be offered. This can be accomplished by a corporate wide settlement agreement. *Contact the DHLS for information on settlement agreements.*

- (c) When additional time cannot be expected to solve the employer's financial infeasibility problem, the applicable Program Director shall refer the problem to the Commissioner for a decision in accordance with the guidelines.
- (d) Requirements that would threaten the economic viability of an entire industry cannot be considered economically feasible.

***NOTE:** If an employer's level of compliance lags significantly behind that of their industry, allegations of economic infeasibility will not be accepted.*

F. Long-Term Abatement Date for Implementation of Feasible Engineering Controls. Long-term abatement is abatement which will be completed more than one year from the citation issuance date.

1. **Discussion of Issues with Employer.** In situations where it is difficult to set a specific abatement date when the citation is originally issued; e.g., because of extensive redesign requirements consequent upon the employer's decision to implement feasible engineering controls and uncertainty as to when the job can be finished, the CSHO shall discuss the problem with the employer at the closing conference and consult with the Regional Director following the inspection.
2. **VOSH Determination of Abatement Date.** The CSHO and the Regional Director shall use their best judgment as to a reasonable abatement date. A specific date for final abatement shall, in all cases, be included in the citation. The employer shall not be permitted to propose their own abatement date in the abatement plan. (See Chapter on Abatement Verification for more information on abatement plans.) If necessary, an appropriate application may be submitted later by the employer to modify the abatement date. *(Refer to Chapter 11 on Post Citation Procedures for more information on Petitions for Modification of Abatement [PMA]).*

3. **Employer Abatement Plan Submission.** The employer is required to submit an abatement plan outlining the anticipated long-term abatement procedures.
- a. Such a plan may be submitted for consideration by the Regional Director before setting the citation abatement date.
 - (1) In that case, the citation may be delayed for a brief period with a notation explaining the delay placed in the case file.
 - (2) If it appears that the citation might be delayed beyond 6 months from the date of the alleged violation, the citation shall be issued prior to full consideration of the plan; but the employer shall be given the opportunity to provide as much input as possible in the setting of the abatement period.
 - b. Whether or not a plan is submitted before issuing a citation, an abatement plan shall be provided for in the citation in addition to a final abatement date.
 - c. When the plan is submitted, if the engineering or administrative corrections proposed by the employer appear to be all that are feasible based on the current technology, this fact may be agreed to between VOSH and the employer.
 - (1) Such an agreement shall permit assurances in advance to the employer that the establishment will be in compliance where the provisions of the plan are fully implemented.
 - (2) It shall be made clear in the agreement that the employer is not relieved from instituting further engineering (or administrative) controls as they become technically feasible, if it is likely that such further controls will lower employee exposure in such instances where without personal protective equipment (PPE) employee exposure remains over the PEL.

- (3) In all situations where an agreement is proposed, the advice of the DHLS shall be sought on the legal implications.
 - (4) If the agreement is acceptable, the DHLS shall be requested to draft the agreement.
 - d. A statement agreeing to provide the affected Regional Office with written periodic progress reports shall be part of the long-term abatement plan.
- G. Reducing Employee Exposure.** Employers shall be advised that, whenever feasible, engineering, administrative or work practice controls must be instituted, even if they are not sufficient to eliminate the hazard (or to reduce exposure to or below the permissible exposure limit). They are required in conjunction with personal protective equipment to further reduce exposure to the lowest practical level.
- H. Abatement Verification.** During the closing conference the CSHO should thoroughly explain to the employer the abatement verification requirements (certification plus documentation). See Chapter on Abatement Verification.
 - 1. Abatement Certification.** Abatement certification is required for all citation item(s) which the employer received except for those citation items which are identified as “Corrected During Inspection.”
 - 2. Corrected During Inspection (CDI).** The violation(s) that will reflect on-site abatement and will be identified in the citations as “Corrected during inspection” shall be reviewed at the closing conference. CSHO's shall document on-site abatement action in the case file narrative and/or the appropriate VOSH 1-B form.
 - 3. Abatement Documentation.** Abatement documentation, the employer's physical proof of abatement, is required to be submitted along with each willful, repeat and designated serious violation. To minimize confusion, the distinction between abatement certification and abatement documentation should be discussed.
 - 4. Placement of Abatement Verification Tags.** The required placement of abatement verification tags or the citation must also be discussed at the closing conference, if it has not been discussed during the walkaround portion of the inspection. Refer to §307 of the VOSH *Administrative Regulation Manual*.
 - 5. Requirements for Extended Abatement Periods.** Where extended abatement periods are involved, the requirements for abatement plans and progress reports shall be discussed.

- I. *De Minimis* Violations.** The CSHO shall discuss all conditions noted during the walkaround considered to be *de minimis*, indicating that such conditions are subject to review by the Regional Director in the same manner as apparent violations but, if finally classified as *de minimis*, will not be included on the citation.

In addition, the CSHO shall explain to the employer and the employee representatives that a condition is considered to be *de minimis* when:

- * It has no direct or immediate relationship to employee safety and health;
- * It is apparent that the employer is complying with the clear intent of the standard but deviates in a minor, technical or trivial way; or
- * An employer's workplace is "state of the art" which is technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

Employer comments shall be noted in the Narrative.

- J. *Prohibition Against Employee Discrimination.*** The CSHO shall emphasize that the Act prohibits employers from discharging or discriminating in any way against an employee who has exercised any right under Title 40.1 of the *Code of Virginia*, including the right to make safety or health complaints or to request a VOSH inspection.

VII. Special Inspection Procedures

A. Follow-up and Monitoring Inspections

- 1. Purpose.** The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected. Monitoring inspections are conducted to ensure that hazards are being abated and employees protected, whenever a long period of time is needed for an establishment to come into compliance (or to verify compliance with the terms of granted variances). Issuance of willful, repeated and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations are examples of prime candidates for follow-up or monitoring inspections. These types of inspections will not generally be conducted when evidence of abatement is provided by the employer or employee representatives.

Refer to Chapter 3 on Program Planning, for inspection procedures for follow-up and monitoring inspections.

2. **Failure to Abate.** A failure to abate exists when a previously cited violation continues unabated and the abatement date has passed or the abatement date is covered under a settlement agreement, or the employer has not complied with interim measures within the allotted time specified in a long-term abatement plan.
 - a. A Follow-up Inspection must be conducted before a Failure to Abate Citation can be issued.
 - b. If previously cited items have not been corrected, a Notice of Failure to Abate Alleged Violation shall generally be issued. If a subsequent inspection indicates the condition has still not been abated, the DHLS shall be consulted for further guidance.

***NOTE:** If the employer has demonstrated a good faith effort to comply, a late Petition for Modification of Abatement (PMA) may be considered in accordance with Chapter on Post-Citation Procedures.*

- c. If an originally cited violation has at one point been abated but subsequently recurs, a citation for a repeated violation may be appropriate.
3. **Reports.**
 - a. For any items found to be abated, a copy of the previous Violation Worksheet or citation can be notated with "corrected" written on it, along with a brief explanation of the abatement measures taken. This information may alternately be included in the narrative of the investigative file.
 - b. In the event that any item has not been abated, complete documentation shall be included on a Violation Worksheet.
4. **Follow-up Files.** Follow-up inspection reports shall be included with the original (parent) case file.

B. Construction Inspections

1. **Standards Applicability.** The federal identical OSHA standards for Construction which are used by VOSH are found at 16VAC25-175-1926 as they have been adopted as state regulations. These occupational safety and health standards are authorized under Title 40.1 of the *Code of Virginia*. In addition, a number of Virginia unique standards exist for Construction. These are also regulations and are

listed as various other chapters under 16VAC25. All such standards shall apply to every employment and place of employment of every employee engaged in construction work, including non-contract construction under VOSH's jurisdiction.

2. **Definition.** The term “construction work” is defined in §16VAC25-60-130 of the VOSH *Administrative Regulation Manual*:

"For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer.

Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation, grading or similar work upon real property.

Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work.

Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure."

For the purposes herein, construction work also includes:

- The dismantling or moving of buildings or other structures and all related operations;
- The fabrication, alteration, and repair of sewers, caissons, conduits, culverts, pipelines, and all related operations;
- the construction, alteration, repair, or removal of wharves, docks, bridges, trestles, piers, abutments or any other construction, alteration, repair or removal work related to these items.

If any question arises as to whether an activity is deemed to be construction for purposes of law and the regulation of occupational safety and health, the applicable Program Director and DHLS shall be consulted.

3. **Inspection Procedures.** *Refer to Chapter 5 on Industry Sectors, for inspection procedures in Construction.*

C. Agricultural Inspections

1. **Standards Applicability.** The standards at §16VAC25-190-1928 have been adopted as occupational safety and health standards under Title 40.1 of the *Code of Virginia*. They shall apply to every employment and place of employment of every employee engaged in agricultural operations, including non-contract construction under VOSH's jurisdiction.
2. **Definition.** Agricultural Operations is defined in §16VAC25-60-140 of the *VOSH Administrative Regulation Manual*:

“**Agricultural operations** shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in §130. A. of this regulation; nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.”

If any question arises as to whether an activity is deemed to be part of an agricultural operation for purposes of law and the regulation of occupational safety and health, the applicable Program Director and DHLS shall be consulted.

3. **Inspection Procedures.** *Refer to Chapter 5 on Industry Sectors, for inspection procedures in Agriculture.*
- D. **Public Sector Inspections.** Policies and procedures for public sector employers are, with some exceptions, similar to those followed in the private sector. *Refer to §§30, 280, 290, and 300 of the VOSH Administrative Regulation Manual for additional guidance.*

Industry Sectors

CHAPTER-5

Chapter 5: Industry Sectors

- I. Construction Industry Inspections.** CSHO responsibilities for construction inspections are the same as for general industry inspections (Chapter n Inspection Procedures). Special situations arising in the construction industry are discussed in this section.
- A. Standards Applicability.** Except for the Virginia unique standards which take precedence, the federal OSHA standards published at 29 C.F.R. Part 1926 have been adopted as Virginia Occupational Safety and Health standards at 16VAC25-175 by the Safety and Health Codes Board. They shall apply to every employer and the place of employment of every employee engaged in construction work, including non-contract construction work.
- B. Definition of Construction Work.** The term "construction work" means work for construction, alteration, or repair, including painting and decorating. These terms are discussed in 16VAC25-60-130 (C) of the Administrative Regulations Manual. If any question arises as to whether an activity is deemed to be construction for purposes of the law, the Office of Policy and Planning shall be consulted. See also Chapter 12 on Legal Considerations for clarification of construction work.
- 1. Part 1910 Standards Applicable to Construction.** Many Part 1910 standards such as those listed in VOSH Program Directive 02-072B or its replacement have been identified as being applicable to construction work. The Regional Director shall ensure that they are enforced as appropriate, consistent with their scope and definitions.
- a. Among the identified Part 1910 standards are all health standards in Subpart z, except for:
- (1) Exposure limits contained in Tables z-1, z-2, and Z-3 in 1910.1000. The applicable exposure limits for construction are referenced in 1926.55(a).
- (2) 1910.1001. The applicable standard regulating occupational exposure to asbestos, tremolite, anthophyllite, and actinolite in construction employment is 1926.55.
- (3) 1910.1025, Lead.
- b. 1910.1020, Access to Employee Exposure and Medical Records, has been identified as applicable to construction.
- c. 1910.1200, Hazard Communication.
- d. 1910.146, Permit-required Confined Space.

- e. The Regional Director shall not cite a 1910 standard other than one identified in VOSH Program Directive 02-072B or a subsequent formal notification document from the Director of Enforcement Policy as applicable to construction work without the approval of the Deputy Commissioner for Regulatory Programs. The Deputy Commissioner shall notify the Commissioner and the Assistant Attorney General of such approval and give supporting rationale.

C. Employer Worksite.

1. **General.** Inspections of employers in the construction industry are not easily separable into distinct worksites. The worksite is generally the site where the construction is being performed (e.g., the building site, the dam site). Where the construction site extends over a large geographical area (e.g., road building), the entire job will be considered a single worksite. In cases where such large geographical areas overlap between regional offices, generally only operations of the employer within the jurisdiction of any regional office will be considered to be the worksite of the employer.
2. **Beyond Single Regional Office.** When a construction worksite extends beyond a single regional office and the CSHO wants to extend the inspection, the Regional Safety or Health Director shall consult with the Regional Safety or Health Director for approval of such an extension.
3. **Administrative Convenience.** The definition of worksite in this chapter is only for administrative convenience and has no effect upon the issuance of failure to abate notifications or repeat citations which are governed by other chapters. For instructions regarding multi-employer worksites, see the guidelines regarding multi-employer worksites.

D. Advance Notice.

1. **General.** The same general policies and procedures on advance notice set forth in Chapter VI, B. are applicable to construction inspections. Thus, in general, advance notice will be given only where it will enhance the effectiveness of the inspection.
2. **Authorized.** When advance notice is authorized, the CSHO shall contact the general contractor's office by telephone. If there is more than one general contractor (e.g., if two or more general contractors have formed a joint venture for purposes of the job in question), the CSHO shall attempt to ascertain the identity of all such general

contractors and contact each of them. The general contractor(s) shall be told to advise all subcontractors working on the job that the inspection will take place. The general contractor shall also be asked to advise the labor organizations representing employees and to instruct each subcontractor to take similar action, in accordance with the requirement of 1903.6. Where there are no labor organizations or other representatives of employees, advance notice need not be given to the employees.

E. Entry of the Workplace.

1. **Severe weather conditions.** If severe weather conditions are encountered during an inspection that cause construction activities to shut down, the inspection shall be continued when the weather permits. If the work continues and the weather creates hazardous working conditions, these facts shall be reported, since they may be the subject of citations and proposed penalties based on a specific standard or, if no such standard is applicable, the general duty clause.
2. **Opening Conference.** In conducting the opening conference, the CSHO shall follow the procedures regarding opening conferences. Upon arrival at the construction site, the CSHO shall contact the “prime” or general contractor’s representative in charge of the job; usually this will be the superintendent or project manager. The CSHO shall tell this individual that the purpose of this visit is to inspect the worksite in order to determine compliance with VOSH requirements, and the reason for initiating the inspection (Complaints, Referrals, Scheduled Inspections, or Programmed Inspections). In addition, authorized representatives of employees for each contractor and subcontractor, if any, shall be informed of the inspection and invited to the opening conference. Please note that such a conference shall be a joint conference with employers unless either party requests a separate conference. *Please see section 1.E.5., below, for details regarding selection of representatives.*
 - a. **Other Agency.** The CSHO shall determine whether there is a representative of a state or local government, e.g., VDOT, Henrico County Public Works, etc., contracting agency at the worksite. If one is on site, the CSHO shall contact the government agency representative, advise him of the inspection, and request that he attend the opening conference.

- b. **Subcontractors.** Normally, there will be several subcontractors at the site. In such cases, the individual in charge shall be asked to identify them and to provide the name of the individual in charge of each subcontractor's operations at the site. This person shall also be requested to notify such individuals of the inspection immediately and to ask them to assemble in the general contractor's office or some other suitable place to discuss the inspection with the CSHO. Although the inspection shall not be postponed or substantially delayed because of the unavailability of one (or more) representatives, a subcontractor who has not been notified at all of the inspection of his premises shall be made aware of the inspection on the walkaround and included in the inspection. A brief opening conference will be held with the subcontractor in question and the walkaround continued covering all areas.
 - c. **Employee Representatives.** Authorized representatives of employees for each contractor and subcontractor, if any, shall be informed of the inspection and invited to an opening conference. That conference shall be a joint conference with employers at either party requests or a separate conference.
- 3. **Common Services.** At the opening conference or at some other suitable time during the inspection, the CSHO shall ascertain who is responsible for providing such common services as sanitation, eating facilities, first- aid, et., and where these services have been made available to all employees on the worksite. Although arrangements may have been made for one subcontractor or for the general contractor to provide common services, each employer is responsible for his own employees in this regard. Any or all of the employers can be cited for lack of such services.
- 4. **Complaints** If the inspection is being conducted as a result of a complaint, a copy of the complaint is to be furnished as follows:
 - a. A copy of every complaint, including complaints against subcontractors, shall be provided to the general contractor.
 - b. A copy of every complaint against the general contractor shall, if possible, be provided to every subcontractor whose employees may be exposed to the alleged hazard.

- c. A copy of every complaint against a subcontractor shall be provided to that subcontractor, and, if possible, to others whose employees may be exposed to the alleged hazard.
- d. Care shall be taken to protect the identity of the complainant, including the typing of handwritten complaints and the covering of all signatures.

5. Selecting Employer and Employee Representatives. The CSHO shall conduct a walkaround inspection in accordance with the provisions of other walkaround procedures.

- a. **Authorized Representative.** Each employer is entitled to select an authorized representative to accompany the CSHO during the inspection. Similarly, the employees of each employer have the right to select an authorized representative for this purpose. If the job is unionized, then the labor organization representing the employees shall select the authorized employee representative. If there is no representative, the CSHO shall interview a reasonable number of employees to determine whether hazards exist. A reasonable number of employees shall include at least some employees of each employer and of each craft on the job.
- b. **Too Many Representatives.** The CSHO shall conduct the inspection accompanied by the representatives designated by the employers and employees. However, if during the inspection, the CSHO determines that, because of the large number of persons involved, the inspection is not being conducted in an effective manner or that work is being unduly disrupted, the participants shall be advised that walkaround representation will be discontinued. Instead, a reasonable number of employees will be interviewed.

If the participants then agree to a limited number of representatives for accompaniment purposes, the CSHO shall resume the inspection with such representatives.

- c. **Employee Interviews.** Pursuant to §240 of the VOSH *Administrative Regulation Manual*, during the walkaround, the

CSHO shall consult with individual employees as well as the employee representative concerning working conditions, as judged appropriate by the CSHO.

- d. **Walkaround Provisions.** The main difficulty in implementing the walkaround provisions on construction sites derives from the fact that in the usual situations, there will be numerous employers on the job. If all employers and groups of employees selected a different representative to accompany the CSHO on the inspection, the group participating in the inspection could be so large that work on the worksite might be disrupted and the effectiveness of the inspection would be diminished.

1. An attempt to encourage employers and employees to select a limited number of representatives for the walkaround shall be made. It shall be pointed out by the CSHO that this arrangement makes an effective inspection possible without diminishing the accompaniment rights. If any matter comes up during the inspection that requires special knowledge, the representative of the appropriate employer or employees shall be called in to participate in that phase of the inspection.
2. The CSHO may also divide the inspection into separate phases, e.g., excavation work followed by electrical work, and so forth. If this procedure is followed, the number of employer/employee representatives for each phase of the inspection can be limited to those immediately involved. The CSHO shall avoid inspecting the same areas of the worksite more than once.

6. **Special Walkaround Provisions for Accident Prevention Programs.**

- a. An evaluation of each employer's accident prevention program shall be conducted during every construction inspection.
- b. The two key factors in evaluating an effective program are:
 - (1) Safety and health conditions found on the jobsite; and

- (2) The degree of knowledge which the designated competent person has of site-specific safety and health hazards.
- c. Effective evaluation of accident prevention programs requires solid investigatory techniques. The CSHO shall ask well directed, open ended questions which require more than a yes or no answer.
- d. The fact that there were other violations shall not be used as the sole justification for citing an employer for a deficient accident program. However, if a CSHO finds violations but no deficiencies in the accident prevention program, a detailed explanation shall be placed in the case file.
- e. Programs shall be evaluated using the outline contained in [Appendix “A”](#) as a guide. Questions set out in the Appendix and the answers to them shall be incorporated into the narrative. Employee awareness, acceptance and participation in the program shall also be evaluated.
- f. CSHOs should encourage employers to implement a formal safety and health program. The employer should be advised to incorporate their accident prevention directly into the overall management of the worksite.
- g. Employers who fail to meet all requirements of §§1926.20, 1926.21 and 1926.23 shall be issued citations. Violations of these sections shall normally be grouped. In most cases, violations of §§1926.20 and 1926.21 should also be grouped with the most significant serious violation.
- h. Violations of §1926.20(b)(2) often occur because employers do not understand the meaning of the term “competent person.” CSHOs should advise employers that “competent person,” as set forth in §1926.23, means:

“...one capable of identifying existing and predictable hazards in the surrounding or working conditions which are unsanitary, hazardous or dangerous to employees, and who has

authorization to take prompt corrective measures to eliminate them.”

On a multi-employer work site, a single competent person may be designated for the entire worksite.

- i. Employers with deficient accident prevention programs shall be offered abatement assistance. Model language for informal settlement agreements is contained in VOSH-ISA form in Appendix B. Particular emphasis should be placed on assisting small employers. A checklist for this purpose has been included.

F. Closing Conference

1. **General.** Upon completion of the inspection, the CSHO shall confer with the general contractors and all appropriate subcontractors or their representatives, together or separately, at their option, and advise each one of all the apparent violations disclosed by the inspection to which each one’s employees were exposed, or violations which the employer created or controlled. The closing conference with each general contractor and subcontractor may be a joint conference with the employer and employee representatives.
2. **Contractor Names and Addresses.** Before leaving the worksite, the CSHO shall be sure to get the names and addresses of the general contractor and all other employers at the worksite who may be cited for violations.

G. Citations and Penalties.

1. **Mailing.** Upon the completion of citations and notifications of penalties, the original citations for each employer shall be sent to the employer’s permanent address.
2. **Where to Post Citations.** At many construction sites, the employer (whether prime contractor or subcontractor) provides a trailer or other worksite office. Where such a facility is provided and employees are likely to be in the vicinity of the facility on a daily basis, the citation shall be posted at that location.
 - a. **Other Locations.** A copy of the citation shall also be posted at any other location of the employer where employees are required to report daily. In some situations, such a location would be the employer’s main or branch office; in other

situations, such as highway construction, the location would be the place where the employees actually work.

- b. **No Place to Post Citation.** When no obvious place for posting the citations exists (such as, in highway construction where the trailer may be a considerable distance away and employees do not report to the trailer), the employer shall be required to furnish a suitable object on which to post the citation in a conspicuous location or immediately adjacent to the worksite. In any case, when the citation will be exposed to rain or snow, the citation shall be protected from the elements.

H. Manufacturer's Specifications and Limitations for the Operation, Training, Use, Installation, Inspection, Testing, Repair and Maintenance of all Machinery, Vehicles, Tools, Materials and Equipment used for Construction.

1. **Enactment.** Adopted by the Virginia Safety and Health Codes Board in 2006, *VOSH Administrative Regulation Manual*, §16 VAC 25-60-130, provides:

“The employer shall comply with the manufacturer’s specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment; unless specifically superseded by a more stringent corresponding requirement in Part 1926. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.”

2. **Purpose of the Provision.** The purpose of *VOSH Administrative Regulation Manual* §16 VAC 25-60-130 is to clarify an employer’s current responsibility under the "general duty clause" to comply with manufacturer’s specifications and limitations, as well as allow the use of the new provision to address "other-than-serious" hazards before they can become serious in nature. The provision can also be used to address training issues, provided that the manufacturer requires training in its specifications and limitations.

The above provision adds regulatory authority for the VOSH Program to issue citations and penalties for an employer’s failure to comply with the applicable manufacturer’s specifications and limitations for the

operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment. Use of any non-compliant item is prohibited. This new provision applies unless specifically superseded by a more stringent corresponding requirement in Parts 1928 or 1910.

As with the general duty clause, §16VAC25-60-130 of the VOSH *Administrative Regulation Manual* cannot be used to enforce manufacturer's recommendations which use non-mandatory wording such as "should" or "may."

II. Agriculture Inspections

- A. **"Agricultural Operations" Defined.** Current VOSH standards for Agriculture use the term "agricultural operations" but do not specifically define the term. The VOSH *Administrative Regulation Manual*, §16 VAC 25-60-140, Agriculture standards, adopted by the Virginia Safety and Health Codes Board in 2006, clarifies the meaning of "Agricultural Operations." Paragraph 2 of 16 VAC 25-60-140, provides that:

"Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in §130.A. of this regulation; nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture."

The new language provides further guidance to VOSH personnel, employers and employees concerning the applicability, and in certain cases the non-applicability, of the Agriculture Standards contained in Part 1928. The new language reflects longstanding VOSH and OSHA enforcement policy and is based in part on the definition of "farming operation" contained in Federal OSHA Instruction CPL 02-00-051 updated to include NAICS:

A **"farming operation"** means any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations. These are employers engaged in businesses that have the following NAICS Codes:

NAICS CODE	FARMING OPERATION
111110-111998	Oilseed and Grain Farming, Vegetable and Melon Farming, Fruit and Tree Nut Farming, Greenhouse, Nursery, and Floriculture Production, Other Crop Farming
112111-112990	Agricultural Production - Livestock & Animal Specialties
115112	Soil Preparation, Planting, & Cultivating
115113	Crop Harvesting, Primarily by Machine
115115	Farm Labor Contractors and Crew Leaders
115116	Farm Management Services.

Based on OSHA interpretations, both the following industries are considered agricultural operations:

- Aquaculture (*reference: 28 Sept. 1982 OSHA letter of Interpretation*);
and
- Reforestation (*reference: 06 Nov. 1989 OSHA letter of Interpretation*).

B. Public Sector Employees. State and local government employees who may be present on agricultural work sites for purposes of conducting inspections or providing assistance to farmers, e.g., Virginia Department of Agriculture and Consumer Services (VDACS), are covered by the General Industry Standards in Part 1910.

Exemptions and Limitations on Agricultural Enforcement Inspections under the Federal Appropriations Act - Restrictions on Using Federal Matching Funds.

*Note: However, the **federal Appropriations Act** limitations do not apply where VOSH chooses to use 100% state funds for the enforcement activity. Refer to [VOSH Program Directive 02-003X](#), or its successor and OSHA Instruction [CPL 02-00-051](#).*

- 1. Enforcement Guidance for Small Farming Operations.** In providing funding for OSHA and the state plans, Congress has placed significant restrictions on enforcement activities regarding two categories of employers: small farming operations and small employers in low-hazard industries.

The federal Appropriations Act prohibits the use of federal funds for any enforcement activities in small farming operations under the Occupational Safety and Health Act. Since these federal 23g grant funds are passed through from OSHA to the State Program, VOSH is held to the same restrictions and limits imposed on federal OSHA for [use of federal funds](#).

A farming operation is generally exempt from all VOSH activities if it:

- a. Employs ten (10) or fewer employees currently and at all times during the last twelve (12) months (*Family members of farm employers are not counted when determining the number of employees*); **AND**
 - b. Has not had an active temporary labor camp during the preceding 12 months.
2. **Ten or Fewer Employees with a Temporary Labor Camp.** A farming operation with ten (10) or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months is **NOT EXEMPT** from inspection.
 3. **Use of 100% State Funding.** VOSH reserves the right to conduct activities limited or prohibited under the directive by paying for those activities with 100% 23g grant state matching funds.

Approval to conduct and pay for such activities must be received IN ADVANCE from the applicable VOSH Program Director.

VOSH will conduct and pay for with 100% state funds, fatal accident investigations on farms with 10 or fewer employees and no temporary labor camp activity within the previous 12 months.

On a case-by-case basis, VOSH may decide to use 100% state funds to conduct certain non-fatal inspections on small farming operations *e.g., a field sanitation complaint inspection could be authorized* if the complaint concerns lack of adequate drinking water - see below discussion of the unique Virginia Standard on Field Sanitation.

CSHOs who are approved to perform such 100% state funded inspections shall keep a record of their time spent on such activities which must be entered as a separate line entry on the CSHO's weekly Cardinal Time Sheet.

Step 1: Add a Chart field

Step 2: Click Search Speed Type button

Step 3: Type "807" and click on magnifying glass

Step 4: Click on the blue 807 (23g Non-Grant Activities)

Step 5: Click select at bottom of window.

Step 6: Click OK

Step 7: Input hours worked per day on 23g Non-Grant Activities.

Refer to VOSH Program Directive 02-003X (29 May 2024 or successor) - VOSH Procedures to comply with OSHA Enforcement Exemptions and Limitations under the Federal Appropriations Act, - Appendix "A" Revision. A sample FLSA Individual Time Sheet for TAL is provided in the Directive.

D. Federal Identical Standards

1. In accordance with Part 1928.21(a), the following standards in part 1910 shall apply to agricultural operations:

1910 Standard	Agricultural Operation
1910.142	Temporary Labor Camps
1910.111(a)&(b)	Storage and Handling of Anhydrous Ammonia
1910.145	Slow-moving Vehicles
1910.266	Logging Operations
1910.1027	Cadmium
1910.1200	Hazard Communication
1910.1201	Retention of DOT Markings, Placards and Labels

2. In accordance with Part 1928.21(b), except to the extent specified in paragraph 1928.21(a), the standards contained in Subparts B through T and Subpart Z of part 1910 of this title do not apply to agricultural operations.
3. The following standards in Part 1928 apply to agricultural operations:

1928 Standard	Agricultural Operation
1928.51	Roll-over protective Structures (ROPS) for tractors used in agricultural operations;

1928.52	Protective frames for wheel-type agricultural tractors;
1928.53	Protective enclosures for wheel-type agricultural tractors;
1928.57	Guarding of farm field equipment, farmstead equipment and cotton gins;
1928.1027	Cadmium (<i>refer to 1910.1027 Cadmium</i>);
1926 Subpart C, Appendix A	Employee operating instructions;
1926 Subpart C, Appendix B	Figures C-1 through C-16.

E. Unique Virginia Field Sanitation Standard, §1928.110. The Virginia Field Sanitation Standard is identical to the federal standard with the exception that the potable drinking water requirement in §1928.110(c)(1) applies to all agricultural establishments regardless of the number of employees. The federal standard is not used by VOSH and only applies to agricultural establishments where eleven (11) or more employees are engaged on any given day in hand-labor operations in the field.

F. Training Issues. From OSHA Training Policy Statement, April 28, 2010:

“Many OSHA standards require that employees receive training so that work will be performed in a safe and healthful manner. Some of these standards require ‘training’ or ‘instruction,’ others require ‘adequate’ or ‘effective’ training or instruction, and still others require training ...in a manner or in a language... that is understandable to employees. It is the Agency's position that, regardless of the precise regulatory language, the terms ‘train’ and ‘instruct,’ as well as other synonyms, mean to present information in a manner that employees receiving it are capable of understanding.”

“OSHA has a long and consistent history of interpreting its standards and other requirements to require employers to present information in a manner that their employees can understand. *See, e.g.,* CPL 2-2.38(D)(1998) "...[i]f the employees receive job instructions in a language other than English, then training and information to be conveyed under the ‘...hazard communication standard...’ will also need to be conducted in a foreign language”; letter from Russell B. Swanson to Chip MacDonald (1999) "...instruction that employers

must provide under §1926.21 must be tailored to the employees' language and education.... and courts and the Commission have agreed with OSHA that an employer may not take advantage of ‘...an adequately communicated work rule...’ when it did not communicate that rules to a non-English speaking employee in a language that employee could understand.” (See, e.g., *Modern Continental Construction Company, Inc. v. OSHRC*, 305 F.3d 43, 52 (1st Cir. 2002)); (*Star Brite Construction Co.*, 19 (BNA) OSHC 1687, 1695 n.12 (N.95-0343, 2001)).”

In essence, the above referenced material means that if an employee does not speak or comprehend English, an employer must instruct its employees using both a language and vocabulary that the employees do understand. For example, while instruction must be provided in a language the employee can understand, if the employee's vocabulary is limited, the training must account for that limitation. Similarly, if employees are not literate, telling them to read training materials will not satisfy the employer's training obligation.

In general, employers are expected to realize that if they customarily need to communicate work instructions or other workplace information to employees at a certain vocabulary level or in a language other than English, they will also need to provide safety and health training to employees in the same manner. Of course, employers may also provide instruction in learning the English language to non-English speaking employees. Over time, this may lessen the need to provide OSH Act training in other languages.

(Refer to 28 April 2010 Memorandum to OSHA Regional Administrators from David Michaels, PhD, MPH regarding OSHA Training Standards Policy Statement).

G. Manufacturer’s Specifications and Limitations for the Operation, Training, Use, Installation, Inspection, Testing, Repair and Maintenance of all Machinery, Vehicles, Tools, Materials and Equipment used for Agriculture

1. **Enactment.** Adopted by the Virginia Safety and Health Codes Board in 2006, paragraph 3 of the *VOSH Administrative Regulation Manual*, §16 VAC 25-60-140, provides:

“The employer shall comply with the manufacturer’s specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in Part 1928 or Part 1910.

The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.”

2. **Purpose of the Provision.** The purpose of VOSH *Administrative Regulation Manual* §16 VAC 25-60-140 is to clarify an employer’s current responsibility under the "general duty clause" to comply with manufacturer’s specifications and limitations, as well as allow the use of the new provision to address "other-than-serious" hazards before they can become serious in nature. The provision can also be used to address training issues, provided that the manufacturer requires training in its specifications and limitations.

The above provision adds regulatory authority for the VOSH Program to issue citations and penalties for an employer’s failure to comply with the applicable manufacturer’s specifications and limitations for the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment. Use of any non-compliant item is prohibited. This new provision applies unless specifically superseded by a more stringent corresponding requirement in Parts 1928 or 1910.

As with the general duty clause, §16VAC25-60-140 of the VOSH *Administrative Regulation Manual* cannot be used to enforce manufacturer’s recommendations which use non-mandatory wording such as “should” or “may.”

Appendix A

Construction Safety and Health Checklist

The following checklist is a brief overview of common hazards found on a construction site. It is not comprehensive and should be used to supplement necessary hazard recognition by the safety designee which is site specific.

- A. **General.** Are the employees exposed to unsafe conditions during their travel to and from their work stations and at their work stations?

- Housekeeping (tripping) hazards;
- Overhead hazards;
- Improper storage of materials or flammable substances;
- Electrical hazards;
- Open sided floors;
- Floor openings or holes;
- Unsafe or improperly installed stairs;
- Inadequate illumination.

B. **Personal Protective Equipment.** Are employees wearing required personal protective equipment?

- Hard hat;
- Safety glasses;
- Safety shoes;
- Hearing protectors.

C. **Electrical.** Are employees protected from electrical hazards?

- exposed live electrical parts;
- GFCI provided or alternatively an assured equipment grounding program implemented; ungrounded electrical equipment;
- unprotected electrical cords.
-

F. **Compressed Gases.** Are compressed gases stored and properly handled?

- oxygen stored at least 20 feet from fuel gases;
- cylinders equipped with caps;
- fuel gases not stored inside a building;
- compressed cylinders secured and protected from damage.

G. **Tools .** Are tools used properly and maintained in a safe condition?

- hand tools in safe condition;
- electrical power tools equipped and used with guards;
- pneumatic tools and compressors equipped with proper safety devices.

H. **Ladders.** Are ladders properly used and maintained?

- no broken rungs or missing steps;
- properly secured and erected;
- metal ladders not used for electrical work;
- job-made ladders properly constructed.

I. **Scaffolds.** Are scaffolds properly erected and guarded?

- fully planked;
- equipped with guardrails;
- set on sound rigid footing.
-

J. **Material Storage.** Are materials properly handled and stored?

- stored in tiers and secured;
- not stored in aisle ways.

K. **Material Hoists and Personnel Hoists.** Are hoists properly erected, enclosed and used?

L. **Motor Vehicles and Mechanized Equipment.**

1. Are vehicles with obstructed view(s) equipped with a back-up alarm or is an observer used to guide them?
2. Is mechanized equipment kept at least ten feet from overhead power lines?

EMPLOYER'S SAFETY AND HEALTH PROGRAM

A. **Management Commitment and Leadership**

1. There is a policy statement that has goals established, issued, and communicated to employees.
2. Program revised annually.
3. Participation in safety meetings, inspections: agenda item in meetings.
4. Commitment of resources is adequate.
5. Safety rules and procedures incorporated into site operations.
6. Management observes safety rules.

B. **Assignment of Responsibility.**

1. Safety designee on site, knowledgeable, and accountable.
2. Supervisors (including foremen) safety and health responsibilities understood.
3. Employees adhere to safety rules.

C. Identification and Control of Hazards.

1. Periodic site safety inspection program involves supervisors.
2. Preventative controls in place (PPE, maintenance, engineering controls).
3. Action taken to address hazards.
4. Safety Committee, where appropriate.
5. Technical references available.
6. Enforcement procedures by management.

D. Training and Education.

1. Supervisors receive basic training.
2. Specialized training taken when needed.
3. Employee training program exists, is ongoing, and is effective.

E. Recordkeeping and Hazard Analysis.

1. Records maintained of employee illnesses/injuries, and posted.
2. Supervisors perform accident investigations, determine causes and propose corrective action.
3. Injuries, near misses, and illnesses are evaluated for trends, similar causes; corrective action initiated.

F. First Aid and Medical Assistance.

1. First aid supplies and medical service available.
2. Employees informed of medical results.
3. Emergency procedures and training, where necessary.

SAFETY AND HEALTH PROGRAM EVALUATION

During all construction inspections the answers to the following questions, at a minimum, shall be obtained and specifically documented in the case file.

- Does the employer claim to have a safety and health program?
- Who is designated to deal with safety and health matters at this worksite?
- How often does this person conduct inspections of the worksite?
- When was the last inspection conducted?

- What hazards were observed during the last inspection?
- What actions were taken to eliminate the observed hazards?
- What hazards (Indicate how many) were noted during the VOSH inspection that a competent person as defined in 1926.32(f) should have recognized?
 - If a violation of 1926.20(b)(2) is contested a listing of each individual violation and the approximate date it was created shall be included in the case file.
- How many of these hazards were in existence at the time of the last inspection?
 - If a violation of 1926.20(b)(2) is contested a listing of each individual violation and the approximate date it was created shall be included in the case file.
- What explanation was given for the continued existence of these hazards? (Be specific and indicate who provided the explanation)
- If hazards were created after the last inspection how often should inspections be performed? (Explain the response in detail)

Fatality and Catastrophe, Rescue Operations and Emergency Response

CHAPTER-6

Chapter 6: FATALITY AND CATASTROPHE, RESCUE OPERATION AND EMERGENCY RESPONSE

I. Fatality Investigations

A. General

1. Policy. All job-related fatalities, however reported to the Department, shall be investigated as thoroughly and promptly as possible, including during times that are normally non-working hours for Department staff, such as evenings, weekends, and holidays. Procedures to follow when reports are received during non-working hours, and procedures to follow when a fatality is *potentially* job-related, are explained in sections I.B.3. and I.E.

NOTE: Part 1904 and §40.1-51.1.D of the *Code of Virginia* have requirements for reporting work-related fatalities, hospitalizations, amputations, or losses of an eye. (See 88 FR 47254-47349, *Occupational Injury and Illness Recording and Reporting Requirements – Improving Tracking of Workplace Injuries and Illnesses*; Final Rule, 21 July 2023.)

2. Definitions. The following definitions apply for purposes of this chapter:

1. **Fatality.** An employee death resulting from a work-related incident or exposure; in general, from an accident or illness caused by or related to a workplace hazard.
2. **Hospitalizations.** When an employee is admitted as an inpatient to a hospital or equivalent medical facility for examination or treatment. The UPA will be entered as an Employer Referral.

NOTE: If an incident results in a hospitalization, the employer will be notified by the investigating CSHO that if the victim's status changes to death while hospitalized, they are required to follow the reporting instructions for a work-related fatality. Once VOSH is notified of the passing, the UPA will be updated to reflect FAT/CAT. If the victim passes after thirty (30) days of the event, VOSH has no jurisdiction.

3. **Reporting by Employers.** Under §40.1-51.1.D. of the Code of Virginia, all employers must report any work-related incident resulting in a fatality of an employee within eight (8) hours.

Section 40.1-51.1.D of the Code of Virginia, all employers must report with in twenty-four (24) hours any work-related incident resulting in any of the following:

- a. inpatient hospitalization of one (1) or more employees, where there is a formal admission to the inpatient service of a hospital for care or treatment, not just for observation or diagnosis;
- b. any work-related amputation or the loss of an eye.

If the Regional Office becomes aware of an incident required to be reported through some means other than an employer report, prior to the elapse of the eight-hour reporting period, a citable violation for failure to report does not exist.

4. **Reporting by Law Enforcement Agencies**

- a. During regular working hours, law enforcement agencies will be requested to inform the Regional Office of any workplace fatality which occurs within their jurisdictions.
- b. After regular work hours and on weekends and holidays, law enforcement agencies will be requested to notify the Regional Director(s) of any workplace fatality.

5. **Reporting Within the Department.** The Regional Director(s) shall inform the Program Directors and Compliance Manager of all job-related fatalities as soon as they become aware of them in accordance with the instructions given in I.A.5.a. below. Other regional staff who receive reports of job-related fatalities which may result in high media attention or have statewide implications (and that appear to be within VOSH's jurisdiction), shall immediately notify the Regional Director(s), the Program Directors and Compliance Manager of all job-related fatalities as soon as they become aware of them in accordance with the instructions given in section I.G.1.

- a. **Informing Headquarters Personnel.** The Program Directors will inform the Deputy Commissioner for Regulatory Programs of the fatality and provide all pertinent information. Such notification will be immediate in any case where significant publicity or atypical circumstances may be present. In the case where initial notification is to the Headquarters, the Program

Directors will notify the affected Regional Director and the VOSH Communications Manager. All inquiries by the press will be referred to and responded to by the VOSH Communications Manager.

B. Pre-investigation

1. **Gathering Information.** In cases where the employer's physical location is in a region different from the one where the accident occurs, the Regional Director in the region where the accident occurs will be contacted to coordinate the inspection. The Regional Director, upon notification of an accident involving a fatality shall gather as much information as is available prior to scheduling an inspection. If possible, this shall be done immediately through discussion with the person reporting the accident. If knowledge of the accident is received through the media or sources other than an employer representative, the employer shall be contacted as soon as possible to obtain additional information whenever the Regional Director believes that such contact will result in a more effective inspection. Such contact shall be considered advance notice and the procedures for advance notice shall be followed (*see Chapter 3 on Program Planning*).

For special information needed when a fatality is potentially job-related, see section I.E. of this Chapter.

First reports by telephone or email notifications to the Regional Director and/or the Program Directors shall provide the required information listed on the "Fatality, Amputation, Loss of Eye, and Hospitalization" Intake Report in Appendix B. The form will be updated as more information is received.

2. **Working Hour Notification and Forms.** If the fatality appears to require a VOSH investigation (i.e., it is or may be occupationally related and VOSH's jurisdiction is not pre-empted), the CSHO shall report the event to the Regional Director, who shall inform the Program Director in accordance with section I.B. of this chapter, as soon as it is verified that the fatality has occurred. The Regional Director shall ensure that the required forms and data information are entered into OIS and coded appropriately.

NOTE: The UPA Accident Report is a pre-inspection document and shall be completed for every fatality, injury or hospitalization the Department is notified of.

3. **Reports Received During Non-working Hours.** When notification of a workplace fatality is received during what are normally non-working hours, such as evenings, weekends, or holidays, as much information as possible regarding the incident shall be obtained. The Regional Director shall then carefully and thoroughly evaluate the information to determine whether the investigation should begin immediately.

In situations where delay could adversely affect the accident investigation, or other cases where the Regional Director has determined that an investigation should begin promptly, a CSHO(s) shall be assigned and sent to the incident scene as soon as possible, without regard for the time of day or day of the week. Examples of situations where the investigation should not be delayed until normal working hours resume, include but are not limited to, an active scene being held by an explosion or fire where the scene could change quickly, or a case where an employer with continuous operations has ceased operations until a VOSH investigation is conducted. In cases where the Regional Director has decided to delay the investigation, a CSHO shall be assigned no later than the next workday.

***NOTE:** In cases where the CSHO arrives at the scene of an active crime, fire or fatality, it is imperative to minimize interference and to avoid unsafe conditions for the CSHO. CSHOs shall not enter a crime or fire scene until the law enforcement officer, fire control officer, or other incident commander with active control over the scene indicates they can do so. The CSHO may conduct interviews or use other methods that do not require immediate entry to the site provided they do not interfere with activities at the scene.*

4. **Contact with the Employer.** Upon initial contact, the employer shall be informed that an investigation will be conducted and extensive interviews with witnesses will be necessary. The purpose of an accident investigation shall be explained; to gather information for the Fatality intake form.
5. **Careful reparations.** The primary objective of a fatality or accident investigation is to determine the cause of the event. Given the severity of a fatality or accident, proper pre-investigation preparation is essential to conduct a complete and professional investigation. Future lives and safety may depend on how effectively the VOSH investigation is performed. For this reason, and because it is likely that the VOSH investigation will be the object of external review and public scrutiny during this time of emergency, it is imperative that the

investigation be handled properly and professionally from the beginning.

Upon determination of the cause of the events, it is imperative to determine whether a violation(s) of VOSH safety or health standards related to the accident has occurred and how this may, or may not, have contributed to the accident. The following procedures will ensure the quality and effectiveness of the investigation.

7. **Need for Additional Resources.** If resources beyond those available within the Regional Office or within VOSH, are deemed to be necessary for a proper or expeditious investigation, such external resources or experts will be required for the investigation, the Program Director and the Regional Director shall make the necessary arrangements to obtain such resources. *Refer to Chapter 4 on Inspection Preparation and Inspection Procedures, regarding selection and use of expert assistance.*
8. **Equipment.** Prior to leaving for the accident scene the team or CSHO, as applicable, shall select the test equipment and the personal protective equipment necessary to support the investigation. Emergency testing equipment or special accident investigation instruments or protective clothing need not be set aside in Regional Offices for emergency or accident investigation use only. All equipment shall be available for regular use at any time provided it is available if needed for fatality investigations.
9. **Other Agency.** If another Federal or State agency is responsible for or participating in the investigation, the Regional Director shall ensure that the CSHO(s) are fully instructed in VOSH's relationship with the other agency and each agency's areas of responsibility.

NOTE: *Also refer to Section I.H., Special Situations, regarding preemption and cooperation.*

- C. **Investigation Procedures.** Every reasonable effort shall be made to determine the cause of the accident. The same general policies and inspection procedures contained in the Chapter on Inspection Procedures, are applicable for the investigation of fatalities, except as otherwise provided in this chapter.
 1. **Scope.** Fatality investigations shall include a complete investigation of the circumstances of the accident, consistent with the purposes outlined in section I.B.4., above. During investigations which involve potential for criminal violations, emphasis must be placed on the "willfulness" of

the violation. These investigations may be expanded at the discretion of the Regional Director.

2. **Inspection Strategy When a Comprehensive Inspection Is To Be Performed.** Whenever a fatality or catastrophic accident has occurred a comprehensive inspection may be conducted in conjunction with the fatality investigation at the discretion of the Regional Director. Other areas or operations in the establishment may have hazards similar to those that caused the accident; if so, they shall be brought to the employer's attention immediately.

Example: If the employer is on a target list, the Regional Director shall consult with the Program Director to determine if a comprehensive inspection may be conducted concurrently with or immediately after the accident investigation.

Note: Regional Directors shall consult Program Director(s) prior to opening a Comprehensive Inspection when the employer is on a target list.

3. **Special Emphasis Programs.** If a fatality or catastrophe investigation arises at an establishment that is also in the current inspection cycle to receive a programmed inspection under the VOSH General Schedules for safety and health enforcement, the investigation and the inspection can be conducted either concurrently or separately.

VOSH Program Directive 02-105A, Inspection Scheduling for Construction, is the inspection cycle defined for the construction industry.

4. **Abbreviated Opening Conference.** In most cases, investigations of fatalities require that the CSHO get to the location of the accident as promptly as possible. Therefore, the CSHO shall reduce the time spent in the opening conference by limiting remarks to the essentials of identification, the purpose of the visit, and the request for an escort by employee and employer representatives. In addition, a more extensive discussion of other opening conference topics will be conducted at the closing conference.
5. **Investigation Documentation.** All fatality investigations shall be documented and, where applicable, shall include:

- a. Personal Data of Victim:

- (1) Name

- (2) Address
- (3) Telephone number
- (4) Age
- (5) Sex
- (6) Job title
- (7) Date of employment
- (8) Time in position
- (9) Training for job being performed at time of accident
- (10) Employee deceased/injured
- (11) Nature of injury -- fracture, amputation, etc.
- (12) Prognosis of injured employee.

b. Accident Data:

- (1) How and why did the accident occur?
- (2) Physical layout
- (3) Sketches/drawings
- (4) Measurements
- (5) Video/photos - identifying sources.

c. Equipment Involved or Process:

- (1) Machine type
- (2) Manufacturer
- (3) Model
- (4) Manufacturer's instructions
- (5) Kind of process
- (6) Condition
- (7) Misuse

- (8) Maintenance program
- (9) Equipment inspection (logs, reports, etc.)
- (10) Warning devices (detectors)
- (11) Tasks performed
- (12) Energy sources and disconnecting means identified
- (13) Supervision or instruction provided to employees involved in accident.

d. Witnesses:

- (1) Public
- (2) Fellow employees
- (3) Management
- (4) Employees and management officials from other contractors on site in a multi-employer situation.

e. Safety and Health Program:

- (1) Does employer have a safety or health program?
- (2) Does the program address the type of hazard which resulted in the fatality?

NOTE: *If the fatality involves a trench, a soil sample shall be taken.*

f. **Behavioral Aspects Related to FAT/CAT:**

- (1) The extent of safety training provided to the employee prior to the accident;
- (2) The exact instructions provided to the employee concerning the task to be performed;
- (3) The degree of emphasis placed on occupational safety and health by the employer;

- (4) Prior events that contributed to the accident or document an employer's disregard for the safety and health of employees;
- (5) The contractual arrangements concerning safety responsibility between a prime and subcontractor;
- (6) The competence of foremen or supervisors and the scope of authority they exercised on behalf of an employer;
- (7) Project completion status;
- (8) Any decisions that contributed to the accident; who made them, and why;
- (9) Negligence on the part of the employer (including supervisory personnel) that contributed to or caused the accident;
- (10) Employer and supervisor knowledge of a hazard, of the requirements of applicable standards, and of standard operating procedures in the industry;
- (11) The PPE provided or not provided to the employee;
- (12) Misconduct by an employee that contributed to the accident, including evidence of misconduct.

g. Records Request:

Potential records to include in a records request include:

- (1) Disciplinary records.
- (2) Training records.
- (3) Injury and illness records.
- (4) Safety committee minutes.
- (5) Operator's manuals for machinery, vehicles, tools, materials and equipment.
- (6) Inspection and maintenance records.
- (7) Security video tapes.
- (8) Emails, documents, receipts, etc., concerning employer attempts to maintain, repair, fix, etc., machinery, vehicles, tools, materials and equipment.
- (9) Bulk and personal sampling results.
- (10) MSDS

h. Interview Procedures:

Identify and interview all persons with firsthand knowledge of the incident, including first responders, police officers, medical

responders, and management, as early as possible in the investigation. The sooner a witness is interviewed, the more accurate and candid the witness statement will be.

- (1) If an employee representative is actively involved in the inspection, he or she can serve as a valuable resource by assisting in identifying employees who might have information relevant to the investigation.
- (2) Conduct employee interviews privately, outside the presence of the employer. Employees are not required to inform their employer that they provided a statement to VOSH.
- (3) When interviewing:
 - Properly document the contact information of all parties because follow-up interviews with a witness are some-times necessary.
 - Use VOSH “FAT Employee Interview Questions” form
 - Request the witness sign the document. If a written statement of a particular witness is not obtained, the CSHO shall document in the case file the reason that person’s written statement is not included in the file, e.g., witness refused to sign the statement.
 - If a written statement is not obtained of a particular witness, the CSHO shall make every effort to note in quotation marks verbal statements made by that person which support one or more of the four elements of proving a violation, e.g., employee exposure, employer knowledge.
 - Read the statement to the witness and attempt to obtain agreement. Note any witnesses’ refusal to sign or initial his/her statement.
 - Ask the interviewee to initial any changes or corrections made to his/her statement.

- Advise interviewee of VOSH Discrimination protections.

***NOTE:** See Chapter 4 on Inspection Preparation and Inspection Procedures, for additional information on conducting interviews.*

- (4) **Confidentiality of Witness Statements.** Section 90.E of the VOSH *Administrative Regulation Manual* provides that the identity of and statements of an employee or employee representative are protected from disclosure under the Virginia Freedom of Information Act. Va. Code, §40.1-49.8(2) provides that the Commissioner can “question privately any such employer, owner, operator, agent or employee.”

6. **Victim’s Next of Kin.** The next of kin of employees involved in fatal occupational accidents or illnesses shall be contacted at an early point in the investigation by the Regional Director, given an opportunity to discuss the circumstances of the accident or illness, and shall be kept apprised of the general course of the investigation. In contacting the next of kin, the Regional Director shall take into account the family’s need to make funeral and other related arrangements (allow approximately ten (10) working days).

***NOTE:** Consistent with §90 of the VOSH Administrative Regulation Manual and Department Policy, there shall be no release of facts or findings to any non-VOSH personnel before the investigation and subsequent litigation is completed.*

***NOTE:** All of the following (subparagraphs a. through f.) require special tact and good judgment on the part of the CSHO. In some situations, these procedures should not be followed to the letter, e.g., in some small businesses, the employer, owner, or supervisor may be a relative of the victim. In certain circumstances, such steps as issuance of a form letter may not be appropriate without some editing.*

- a. **List of Victims and Next of Kin.** As soon as practicable after initiating the investigation, the CSHO shall attempt to compile a list of all of the accident victims and their current addresses, along with the name in the employer’s records, or by other means if necessary, of the single individual listed as next of kin, i.e., the single individual listed as closest family member, or the person listed to contact in the event of an emergency.

All contact by the Department shall be confined to the single individual who is determined to be next of kin of the deceased. Any requests for information from other than the next of kin shall be referred to the next of kin as the Department's single point of contact.

If a next of kin cannot be determined through the employer's records or employee interviews, the Regional Director shall be informed. The Regional Director shall then make a reasonable effort to identify the next of kin by searching police reports, hospital admission records, coroner's records, and news reports. When an additional search does not identify next of kin, the extent of the search shall be documented in the case file.

- b. Information Letter to Next of Kin.** The VOSH family information letter, located in Appendix "A" shall be sent to the one individual listed as next of kin and FAT/CAT Team Chief within ten (10) working days of the time their identities have been established.

***NOTE:** It is IMPERATIVE that the personal information, i.e., full legal name, relationship, and address, regarding the family member and the deceased be ACCURATE and be reflected in all correspondence.*

- (1) The issuance of the family information letter to the next of kin shall be documented in the case file diary and a copy of the letter shall be included in the case file and OIS diary log should be updated and the Next of Kin letter uploaded into OIS to document that the letter was sent.
 - (2) If the family information letter is returned as undeliverable, the letter and envelope shall be put in the case file and the date of the return entered in the case file.
- c. Interviews.** The CSHO, when taking a statement from a victim's family, shall explain that the interview will be kept confidential to the extent allowed by law (see Chapter on Inspection Procedures).

The greatest sensitivity and professionalism is required for such an interview. The information received must be carefully evaluated and corroborated during the investigation.

- d. **First Next of Kin Letter and Follow-up Contact.** The first NOK letter should be sent to the single individual listed as next of kin, so that the family of the victim can be kept up-to-date on the status of the investigation. Such contact can be by personal visit, telephone or letter, as requested by the next of kin. These contacts shall be made at appropriate times; e.g., after citation issuance, after an informal conference, after a contest, or closing of the case. The follow-up contact shall be documented on the fatality form, and if the next of kin requests to be updated on the investigation before a decision is made to issue citations.
- e. **Second NOK letter and Copy of Citations.** When a decision is made to issue citations, a second NOK letter shall be sent to the next of kin by the Regional Director informing them of the fact of citation issuance. The letter shall provide the name, address, phone number and email address of the VOSH FOIA Coordinator for the family member to contact to request a copy of the citation. If as a result of the citation letter, the next of kin requests copies of the citations issued, that request shall be considered to be under the provisions of the Virginia Freedom of Information Act (FOIA) and handled according to the Department's FOIA policy.

If requested, the victim's next of kin shall be provided a FOIA copy of all citations issued as a result of the accident investigation within five (5) working days of verification of receipt of the citation(s) by the employer.

NOTE: *As per Department policy, all FOIA requests must be handled by the Office of Policy and Planning within the above time frame.*

- f. **Release of Information to Next of Kin.**
 - (1) All VOSH staff are cautioned, not to mislead the family about the speed with which the next of kin can obtain a copy of the disclosable information prior to closing the case file. Staff are further cautioned that the employer's rights must be protected. There should be no premature release of facts or findings during any meeting with non-

VOSH personnel, before the investigation and any subsequent litigation are completed.

- (2) When a decision is made to not issue citations and close the case; or in the case where citations have been issued and the case is later settled prior to litigation, a second NOK letter shall be sent to the next of kin by the Regional Director informing them of the closure of the case. The letter shall provide the name, address, phone number and email address of the VOSH FOIA Coordinator for the next of kin to request a copy of the case file. If as a result of the case closed letter, the next of kin requests copies of the citations issued, that request shall be considered to be under the provisions of the Virginia Freedom of Information Act (FOIA) and handled according to the Department's FOIA policy.
- (3) If at any time during the inspection or post inspection process, the next of kin indicates that they don't wish any further contact from the Department concerning the outcome of the inspection, the next of kin's wishes will be noted in the case file diary/narrative and respected by the Department.
- (4) Once a case enters litigation, the next of kin will be entitled to a redacted version of the case file if during the course of litigation legal counsel for the employer is provided a copy of the file in response to a request for discovery, or to a third party in response to a subpoena duces tecum, in accordance with §90.D. of the VOSH *Administrative Regulation Manual*. In such cases, the Division of Hearing and Legal Services (DHLS) will notify the next of kin by letter that the case file is available and provide the name, address, phone number and email address of the VOSH FOIA Coordinator for the next of kin to contact to request a copy of the case file. If as a result of the litigation letter, the next of kin requests copies of the case file, that request shall be considered to be under the provisions of the Virginia Freedom of Information Act (FOIA) and handled according to the Department's FOIA policy.

- (5) If during litigation the case file is not released to the employer's attorney or a third party as the result of a subpoena duces tecum, and the case is settled or resolved at trial, DHLS will notify the next of kin by letter that the case file is available and follow the procedures in (4) above.

6. **Criminal Penalties.** Section 40.1-49.4.K., *Code of Virginia*, provides criminal penalties for an employer who is convicted of having willfully violated the law when that violation caused the death of an employee.

In an investigation of this type, therefore, the nature of the evidence available is of paramount importance. There shall be early and close liaison between the Regional Director, the Program Director, and the DHLS Director in developing any finding which might involve a violation of §40.1-49.4.K., *Code of Virginia*. CSHOs with criminal investigation training shall be assigned at an early stage to assist in developing the case.

- D. **Abatement Verification.** Because of the transient nature of many of the worksites where fatalities occur and because worksites may be destroyed by the catastrophic event, it is frequently impossible to conduct follow-up inspections. Therefore, the Regional Director shall obtain abatement information from the employer, along with assurance that appropriate safety and health programs have been put in place, to prevent the hazards from recurring. In addition, abatement language and safety and health program implementation language shall be included in the settlement agreement. Where the worksite continues to exist, a follow-up inspection shall be conducted, if serious citations have been issued. If a follow-up inspection is not conducted because the employer is no longer working at the site or the site is no longer active, the CSHO shall document in the case file the reason why a follow-up was not conducted. A follow-up inspection need not be conducted if the Regional Director has verified abatement during the inspection or if the employer has provided other proof of abatement. Refer to Chapter on Abatement Verification, and §307 of the *VOSH Administrative Regulation Manual*, regarding abatement verification.

- E. **Fatalities Potentially Work-Related**

1. **Traffic Accidents, Homicides, and Airplane Crashes.** In some circumstances, such as traffic accidents which occur during the course of employment on public roadways, or homicides at a work site, a law enforcement agency is the primary investigator. The Federal Aviation

Administration (FAA) is the primary investigator of airplane crashes. When these occur during the course of employment, the Regional Director shall initiate an RRI to obtain information about the circumstances of the fatality from the ER. Gather and request information from the investigating officer or a copy of the appropriate law enforcement report. The Regional Director shall use professional judgment to decide whether an inspection is necessary after reviewing the information collected. If an inspection is conducted, it shall include a determination of whether the employer has an effective accident prevention program addressing hazards relative to the type of employment in which the fatality occurred.

***NOTE:** Vehicle accidents which occur at an employer's worksite would not be considered "traffic accidents" and shall be investigated (e.g., employee at logging worksite run over by skidder; employee in construction work zone run over by dump truck).*

- 2. Heart Attacks/Natural Causes.** A UPA will be initiated for an RRI. The CSHO will ask the employer questions such as:

- What were the victim(s) doing prior to the incident?
- Where did this incident take place?
- Are there any potential chemical exposures within this area?

The RRI will allow the employer to respond with details leading up to the event. After a review of the employer's response, if, based on the employer response, it is determined that contributing factors may have led to the incident, an inspection will be initiated. Deaths which occur in the workplace and allegedly are due to heart attacks or other natural causes will require a VOSH inspection to search for additional contributing factors, such as electrical shock, falling objects, hazardous atmospheres, heat stress, poison, victim's location prior to death, victim's activities prior to death, etc.

If the death certificate, autopsy report, or pathologist later states that the death was due to natural causes and was not work-related, the fatality investigation may be concluded.

- F. Forms.** The CSHO shall complete the required OIS data entry specifically related to fatalities and the following VOSH forms using the applicable instructions.

- 1. VOSH-IW1, Inspection Worksheet and Accident Narrative.**
- 2. Immigrant Language Questionnaire (IMMLANG)**

- a. The IMMLANG Questionnaire is designed to allow the Agency to track fatalities among Spanish-speaking and other immigrant employees and to assess the impact of potential language barriers and training deficiencies on fatal incidents. Information for this questionnaire should be collected as early in the investigation as possible, as the availability of immigrant workers for questioning later in the process is often uncertain.
- b. The IMMLANG Questionnaire shall be completed before the conclusion of a fatality investigation according to the procedures outlined in the Memorandum on “*Change to the Interim Procedure for Fatality Investigations (IMMLANG)*”, for Regional Administrators from R. Davis Layne, Deputy Assistant Secretary, dated December 16, 2003. It should be completed only if “IMMLANG-Y” is indicated on the *Inspection (OSHA-1)* (N-10 Additional Codes). The Questionnaire is not to be completed if “IMMLANG-N” is indicated on the *Inspection (OSHA-1)*.
- c. The IMMLANG Questionnaire shall be submitted via OIS. A copy of the completed questionnaire should be printed and placed in the case file.

G. Reports.

1. **Notification of Headquarters.** The Regional Office shall notify the Program Directors and Compliance Manager at the Headquarters Office of all workplace fatalities, whether an inspection is conducted or not.
2. **Pertinent Information.** It is important that the Program Directors receive all pertinent information that can be obtained from newspapers or other sources as soon as possible. All the pertinent facts may not be available at the time of the initial notification. As more facts become available, they can be relayed in subsequent communications.
3. **Information to Be Provided.** First reports and subsequent follow-up calls shall provide as much of the following information as:
 - a. Name of company, location and type of business;
 - b. Date and Time of accident;
 - c. Type of accident (fire, explosion, building collapse, etc.);
 - d. Number of fatalities;

- e. Number of persons hospitalized;
- f. Names of victims and Social Security numbers (if available);
- g. Number of persons unaccounted for;
- h. When VOSH is expected to arrive at the scene; and,
- i. Identify who is in charge at scene (if immediately known).

H. Special Situations

1. **Preemption.** There may be situations where it is not clear whether VOSH's authority to investigate fatalities has been preempted. In such cases the guidelines given in the Chapter on Pre-Inspection Procedures shall be observed with the following special considerations:

- a. **General.** If it is reasonably certain that VOSH coverage has not been preempted, the Regional Director shall start the investigation at once and not let potential jurisdictional problems interfere with either notification or investigation.
 - (1) If the Regional Director cannot resolve a pre-emption problem at the local level, all pertinent information shall be relayed to the Program Director and DHLS, along with additional facts as they become available. A clear interpretation will be provided as soon as possible.
 - (2) If VOSH jurisdiction has been preempted only partially, the investigation shall be conducted as usual and all apparent violations shall be noted, including those for which jurisdiction has been preempted. A referral shall be made to the local office of the appropriate agency for such violations as soon as practicable.
 - (3) Where prior determinations have been made that VOSH authority is preempted, such as coal mine accidents, no investigation shall be conducted.
- b. **Agency Cooperation.** If other state or federal agencies will be involved and are on site, the CSHO(s) team shall work with the other agencies as closely as possible to:
 - (1) Obtain all available information concerning the fatality
 - (2) Assist each other in inspection of the accident site.

2. **Use of Expert Assistance.** The decision about the need for expert assistance to aid in the conduct of the investigation shall be made as soon as possible after the CSHO has arrived at the site. That decision shall be made by the Regional Director in consultation with the applicable Program Director upon the recommendation of the CSHO. The Program Director shall arrange for a specialist from within VOSH or a qualified outside consultant.

***NOTE:** The priority order for selection of such experts and the related implementation, performance, and reporting are detailed in Chapter 4 on Inspection Preparation and Inspection Procedures.*

3. **Implementation.** Expert assistance may be necessary during inspections for the implementation of engineering or administrative controls involving, but not limited to, noise, air contaminants, complicated machine guarding and construction.
4. **Performance.** VOSH, or OSHA personnel acting as specialists or experts may accompany the CSHO or they may perform their tasks separately. NIOSH personnel or external consultants must be accompanied by the CSHO. All specialists and outside consultants shall be briefed on the purpose of the inspection and the personal protective equipment to be utilized. Outside consultants will work within the specifications of the contract developed by DHLS and approved by the Office of the Attorney General when required.
5. **Reporting.** All data, conclusions, findings, and/or recommendations from the assigned specialists or experts defined in subsections 1- 4 above shall be made part of the inspection report, including information on any actions taken by the employer in response to any such recommendations.

II. Rescue Operations

A. VOSH Program Role in Rescue Operations

1. **No Authority to Direct Rescue Operations.** The VOSH Program has no authority to direct rescue operations. Direction of rescue operations is the responsibility of the employer and/or local political subdivisions or state agencies. The employer shall be encouraged to use the personnel and facilities of local fire and police departments for their specialized knowledge and training in rescue operations.

2. **Monitoring and Inspecting Working Conditions of Rescue Operations.** VOSH may monitor and inspect working conditions of covered employees engaged in rescue operations to ensure compliance with standards that protect rescuers, and to provide technical assistance where appropriate.
3. **Consultation.** VOSH shall be available for consultation to the responsible parties for directing rescue operations on the safest or most effective way to conduct such operations. This information, based on technical knowledge of competent VOSH personnel at the scene, shall be given freely, if requested.
4. **Operations.** If the Compliance Officer is aware that the employer intends to use some rescue procedure that may be in violation of a standard or the general duty clause and the Compliance Officer believes other, less hazardous procedures are more feasible, the employer shall be advised of this belief. The employer shall be advised and encouraged to use the personnel and facilities of local fire and police departments for their specialized knowledge and training in rescue operations.
5. **Application of Standards.** If rescue work is performed by the employer, VOSH standards are applicable. The employer is required to take such steps as are necessary to eliminate, if at all possible, or to minimize recognized hazards likely to cause death or serious physical harm, considering the urgency in a particular rescue operation.
6. **Emergency Situations.** Emergencies created by fatalities or accidents generally necessitate immediate rescue work, firefighting, etc., and any loss of time may increase the number of injuries and/or fatalities. Therefore, when nonstandard equipment; e.g., tractors, bulldozers, etc., without rollover protection, is available for use in an emergency situation, VOSH shall permit its use without citing the employer, rather than cause a delay in emergency operations waiting for equipment which meets VOSH standards. The use of such equipment by private employers shall be limited to the actual emergency situation of fighting fire, rescue work, etc. It should also be noted that the use of such nonstandard equipment in cleanup or reconstruction work (i.e., non-emergency situations), shall warrant the issuance of citations when appropriate.

- B. Voluntary Rescue Operations Performed by Employees .** VOSH recognizes that employees may choose to place themselves at risk to save the life of another person or person(s). The following provides guidance on VOSH citation policy

toward employers whose employees perform, or attempt to perform, rescues of individuals in life-threatening danger.

1. **Imminent Danger.** Citations will not be issued to an employer because of a rescue activity undertaken by an employee of that employer with respect to an individual in imminent danger (i.e., the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated) unless a. or b. or c. below applies:

a. Such employee is designated or assigned by the employer to have responsibility to perform or assist in rescue operations,

and

the employer fails to provide protection of the safety and health of such employee, including failing to provide

b. Such employee is directed by the employer to perform rescue activities in the course of carrying out the employee's job duties, and

the employer fails to provide protection of the safety and health of such employee, including failing to provide

c. Such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as operations where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water;

and

such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual;

and

the employer has failed to instruct employees not designated or assigned to perform or assist in rescue

2. **Citation for Voluntary Actions.** If an employer has not provided appropriate training and rescue equipment to its employees in accordance with applicable regulations, a citation will be issued for an employee's voluntary rescue actions, regardless of whether they are successful.

III. Emergency Operations

- A. **No Authority to Direct Emergency Operations.** The VOSH Program has no authority to direct emergency operations. However, VOSH policy is to respond as quickly as possible to significant events that may affect the health or safety of employees engaged in emergency operations to ensure compliance with standards, and to provide technical assistance where appropriate.
- B. **Catastrophic Events.** VOSH responds to catastrophic events promptly maintaining a visible but limited role during the initial response phase. It acts as an active and forceful protector of employee safety and health during the response, cleanup, removal, storage, and investigation phases of these incidents, while
- C. **VOSH Program Role for Emergency Response.**
 1. For inspections of an ongoing emergency response or post-emergency response operation where there has been a catastrophic event, or where VOSH and OSHA are acting under the National Emergency Management Plan (NEMP), the appropriate Program Manager in consultation with the Regional Administrator will determine the overall role that VOSH will play. See CPL 02-02-073, Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases, dated August 27, 2007.
 2. During an event that is covered by the NEMP, VOSH has a responsibility and authority to both enforce its regulations and, along with OSHA, provide technical advice and assistance to the federal on-scene coordinator.
 3. For details on VOSH's response to occupationally related incidents involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or potential employee injury that generates widespread media interest. See VOSH Directive 02-020, VOSH Response to Significant Events of Potentially Catastrophic Consequences, dated 15 January 1994 (*or its successor*).

- D. Incidents of National Significance.** For detailed procedures on how to proceed during incidents of national significance when federal OSHA has been designated as the primary federal agency for the coordination of technical assistance and consultation for emergency response and recovery worker health and safety, and the Assistant Secretary has activated the National Emergency Response Plan, see HSO 01-00-001 National Emergency Management Plan, *(dated December 18, 2003, and the National Response Framework) (Worker Safety and Health Support Annex)*.

Note: These documents apply when activated.

IV. Public Information Policy

The VOSH public information policy regarding response to fatalities and catastrophic events is to explain VOSH's presence and role to the news media. It, (the purpose of the public information policy), is not to provide a continuing flow of facts nor to issue periodic updates on the progress of the investigation.

- A. Regional Safety or Health Director.** The Regional Safety or Health Director shall refer all inquiries to the respective Safety or Health Program Director.
- B. Program Director.** The principal role of the Program Director is to brief reporters there that VOSH has responded and is investigating. If a rescue operation is required, the information officer shall state, "VOSH policy is to cooperate and assist wherever possible, but the direction of such operations will be left to those experienced in such matters."

NOTE: To fulfill this role, the Regional Safety or Health Director shall provide information updates periodically to ensure that any information provided by VOSH is correct and up to date. This will also include the signing of settlement agreements.

- C. Other Officials.** The respective Safety or Health Program Director shall inform the news media that the Commissioner of Labor and Industry and other appropriate officials are continually informed of developments.
- D. Releasable Information.** If a Compliance Officer is faced with media at an investigation, the Inspector should immediately refer the reporter to the respective Safety or Health Program Director. Before advising the Regional Safety or Health Director of the referral, the Compliance Officer should first contact the Program Director to alert them that the media was referred to them, and to provide the Program Director the following information:

1. Compliance Officer's name, cell phone or pager number.
2. Situation – complaint, fatality, accident, etc.
3. Employer's name.
4. The reporter's name and media outlet.

The Program Director will confirm to the media that VOSH is investigating, but details about the accident will have to be provided by another entity, such as the coroner's office or fire department. Information such as the identity of the victims will not be provided by the Department of Labor and Industry. If, for some reason, the Program Director is unreachable and the Compliance Officer must provide the media with initial information, such information shall be limited to:

1. Confirming that VOSH has initiated an investigation, and
2. Providing an explanation of VOSH's role in workplace safety and health, and if necessary, the general or common steps taken in a VOSH investigation including: interviewing management and workers, reviewing documents, training plans, accident prevention plans, etc.

During or following this provision of information, the Compliance Officer should always, again refer the reporter to the Program Director at some point during the initial contact because the Program Director will track the investigation and provide the media with the final report.

V. Virginia Freedom of Information Act (FOIA) Issues

- A. General Policy for Releasing Information.** In general, records from files that are part of an active Department inspection or investigation will not be released until the inspection or investigation is resolved.

However, as required by "Virginia Freedom of Information Act," Virginia Code §2.2-3700, et seq., any public records in our possession at the time of the request may be subject to being inspected by or disclosed to members of the public. In such circumstances, all identifiable exempted/privileged information will be removed in accordance with applicable laws and regulations prior to releasing the information (*see Va. Freedom of Information Act; Government Data Collection and Dissemination Practices Act; Virginia Code §40.1-11; and 16*

VAC 25-60-90 of the VOSH Administrative Regulation Manual).

Requests for public records or questions regarding obtaining records from the Department of Labor and Industry should be sent to:

Virginia Department of Labor and Industry
Division of Legal Support
Attn: FOIA Request
6606 W. Broad Street
Suite 500
Richmond, VA 23230

Telephone: 804.786.9933

Fax: 804.786.8418

Email: FOIACoordinator@doli.virginia.gov

In addition, the Freedom of Information Advisory Council is available to answer questions about FOIA. The Council may be contacted by email at foiacouncil@leg.state.va.us, or by phone at 804.255.3056 or by toll free and 1866.448.4100

B. Procedures Regarding FOIA Requests

1. FOIA requests need not be in writing, and do not have to mention the FOI Act to qualify as an FOIA request.
2. A “Public Record” is defined as:

“all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, Photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.”
3. Within five working days of receiving a request, VOSH must provide the requested records to the requester or make one of the following responses

in writing:

- a. The requested records are being entirely withheld because their release is prohibited by law, or the custodian has exercised his discretion to withhold the records in accordance with this chapter. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.
 - b. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law, or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.
 - c. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.
 - d. It is practically not possible to provide the requested records or to determine whether they are available within the five-work-day period. Such a response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven workdays in which to provide one of the four preceding responses.
4. VOSH may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, VOSH will make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

- C. **Reasonable Charges.** VOSH is allowed under the FOIA law to make reasonable charges up to, but not to exceed, its actual costs incurred in searching, accessing, duplicating, supplying and/or otherwise providing the requested records or information.

D. Other Legal Authority

1. **Code of Virginia - Title 40.1.** In regard to using or revealing information gathered, Section 40.1-11 of the *Code of Virginia* states that: “Neither the Commissioner nor any employee of the Department shall make use of or reveal any information or statistics gathered from any person, company or corporation for any purposes other than those of this title.”
2. **VOSH Administrative Regulation Manual.** Under Section 90 of the VOSH ARM, (16VAC25-60-90), Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas:
 - a. Pursuant to the Virginia Freedom of Information Act (FOIA) and with the exceptions stated in subsections B through H of this section, employers, employees and their representatives shall have access to information gathered in the course of an inspection.
 - b. Interview statements of employers, owners, operators, agents, or employees given to the commissioner pursuant to §40.1-49.8 of the *Code of Virginia* shall not be disclosed for any purpose, except to the individual giving the statement.
 - c. All file documents contained in case files which are under investigation, and where a citation has not been issued, are not disclosable until such time as:
 1. The decision has been made not to issue citations; or,
 2. Six months has lapsed following the occurrence of an alleged violation.
 - d. Issued citations, orders of abatement and proposed penalties are public documents and are releasable upon a written request. All other file documents in cases where a citation has been issued are not disclosable until the case is a final order of the commissioner or the court; except that once a copy of file documents in a contested case has been provided to legal counsel for the employer in response to a request for discovery, or to a third party in response to a subpoena duces tecum, such documents shall be releasable upon a written request, subject to the exclusions in this regulation and the Virginia Freedom of Information Act.

Information required to be kept confidential by law shall not be

disclosed by the commissioner or by any employee of the Department. In particular, the following specific information is deemed to be non-disclosable:

1. The identity of and statements of an employee or employee representative who has complained of hazardous conditions to the commissioner;
 2. The identities of employers, owners, operators, agents or employees interviewed during inspections and their interview statements;
 3. Employee medical and personnel records obtained during VOSH inspections. Such records may be released to the employee or his duly authorized representative upon a written, and endorsed request; and,
 4. Employer trade secrets, commercial, and financial data.
- e. The commissioner may decline to disclose a document that is excluded from the disclosure requirements of the Virginia FOIA, particularly documents and evidence related to criminal investigations, writings protected by the attorney-client privilege, documents compiled for use in litigation, and personnel records.
- f. An effective program of investigation and conciliation of complaints of discrimination requires confidentiality. Accordingly, disclosure of records of such complaints, investigations, and conciliations will be presumed to not serve the purposes of Title 40.1 of the *Code of Virginia*, except for statistical and other general information that does not reveal the identities of particular employers or employees.
- g. All information gathered through participation in Consultation Services or Training Programs of the Department shall be withheld from disclosure except for statistical data which does not identify individual employers.
- h. The commissioner, in response to a subpoena, order, or other demand of a court or other authority in connection with a proceeding to which the Department is not a party, shall not disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the approval of the Commissioner of Labor and Industry.

- i. The commissioner shall disclose information and statistics gathered pursuant to the enforcement of Virginia's occupational safety and health laws, standards, and regulations where it has been determined that such a disclosure will serve to promote the safety, health, and welfare of employees. Any person requesting disclosure of such information and statistics should include in his written request any information that will aid the commissioner in this determination.”

CASE FILE PREPARATION AND DOCUMENTATION

CHAPTER- 7

Chapter 7: CASE FILE PREPARATION AND DOCUMENTATION

- A. General.** These instructions are provided to help the Compliance Safety and Health Officers (CSHOs) in determining the minimum level of written documentation necessary to prepare an inspection case file. The single most important tool the CSHO uses is their ability to communicate accurate and complete information in writing.

Conducting a thorough investigation, by utilizing good interview techniques, gathering all pertinent facts and data, and properly analyzing the data is only as good as the CSHO's ability to relate that information to others in writing. All necessary information for documenting violations shall be obtained during the inspection, (including but not limited to notes, audio/video recordings, photographs, employer and employee interviews and employer-maintained records).

CSHOs and Regional Directors shall follow all consultation procedures, including those established by the Division of Hearings and Legal Services (HLS), when an inspection involves important or novel facts or presents potentially complex litigation issues. If consultation is necessary, it shall be conducted at the earliest possible stage of the inspection.

- B. Case File Development.** CSHOs are required to compile detailed information for the case file to clearly define the specific components of each violation. A concise and comprehensive written report is essential, as the success of the investigation hinges on its accuracy and completeness. Regardless of the inspection's depth or the investigative methods employed, an inadequate report undermines the entire process, rendering the effort ineffective. Clear documentation is the foundation for meaningful case analysis and subsequent actions.

Upon initiation of an investigation, the working case file will be immediately established and include the following:

- A case diary log will be maintained for all investigations. It shall record a concise, chronological account of all actions taken from the beginning of the investigation to the closing of the case. It will include, but not be limited to, all material contacts with the inspected company, the date, person contacted, and synopsis of the topic discussed or a reference to an exhibit elsewhere in the case file especially where it supports findings in the narrative. This log will be maintained on the appropriate VOSH form and will be used to prepare the narrative and other related documents.
- As evidence and documentation are gathered in support of investigative findings; these items will be tabbed, referenced in the case diary log, and filed in the case file folder. Required forms such as the OIS Inspection

Report, IW-1/EMPLOYER INTERVIEW SHEET, Sampling Forms, etc. will be included as they are completed.

- Upon completion of the investigation, the Compliance Officer having gathered sufficient documentation to finalize the findings and conclusion, the narrative shall be written. Once the narrative is written, the case file folder will be officially organized with all documents properly affixed in the prescribed order. The case diary log and narrative must be complete but may be handwritten legibly if the case is not significant.
- Significant cases (or become significant during the supervisory review), shall be filed in a properly labeled four-part folder.

C. Specifics of Case File Documentation. The report and case file play a pivotal role in ensuring informed decision-making regarding the case. It will be reviewed not only by the CSHO's immediate Regional Safety or Health Director but also by numerous stakeholders, including Program Directors, the Deputy Assistant Commissioner, Commissioner, Assistant Attorney General, Commonwealth's Attorney, and others involved in prosecuting the case or taking punitive actions. A well-structured and comprehensive report facilitates swift progression through the chain of command by avoiding delays caused by unanswered questions. Such efficiency is crucial in addressing the case effectively and without unnecessary delay.

During the inspection/investigation the CSHO is continuously gathering evidence and documents that will be incorporated in the case file. Documentation and collection/preservation of evidence is critical for all inspections/investigations. Every finding or fact must be supported by documentation. This documentation is vital to the defense of any actions taken by the Commissioner as a result of the Compliance Officer's findings. "Documentation" includes an inspector's firsthand observation as an eyewitness at the inspected site.

The nature and type of evidence/documentation needed varies with each case. Those reviewing the case file will want to picture exactly what the Compliance Officer saw and did at the time of the inspections/investigation. Therefore, documented evidence must be contained in the case file to allow the reviewer (whether it is the Regional Safety or Health Director, Commissioner, Commonwealth's Attorney, or Judge) to be aware of the situation that existed at the time of the Compliance Officer's inspection.

If VOSH violations are determined and citations are issued, the case file must contain evidence that:

1. A standard, regulation, or statute applies to the hazard in question;
2. The employer has violated the standard, statute or regulation in question;
3. The employer has actual or constructive knowledge of the violative condition;
4. An employee of the employer is exposed to the violative condition. Each cited standard is applicable to the employer.

The following represents examples of the types of documentation/evidence needed, if available and germane to the case:

- ✓ names, addresses, telephone numbers of all witnesses
- ✓ witness statements
- ✓ employee statements
- ✓ employer statements
- ✓ company investigative reports
- ✓ photographs
- ✓ sketches, diagrams of accident scene
- ✓ measurements
- ✓ sampling/test results
- ✓ medical reports
- ✓ autopsy reports
- ✓ police reports
- ✓ EMT reports
- ✓ involved personnel job descriptions
- ✓ personnel training records
- ✓ employer training or safety manuals
- ✓ pertinent management policies and procedures
- ✓ equipment specifications, identification numbers
- ✓ equipment parts

- ✓ equipment maintenance records or operating log
- ✓ equipment purchase or repair records
- ✓ manufacturer’s operator manuals for machinery, vehicles, tools, materials and equipment

Certain evidence must be properly protected once collected to ensure that it is not damaged, altered, or lost. Proper tagging must be done; “chain of custody” procedures must be followed. This is especially important with certain physical evidence such as samples or damaged machine parts or safety equipment. (See Chapter 1 for Chain of Custody procedures.)

Employee complaints and signed statements are confidential and will be withheld from disclosure. Because of this, it is absolutely necessary that employee statements are limited to actual statements. If the employee has nothing relevant to the subject matter to add, then the information should be incorporated into the narrative but not set aside on a signed witness statement.

When gathering documents, they should be systematically tagged, recorded in the diary log, and filed appropriately. For evidence that cannot be stored within the case file, such as a broken part, it must be placed in a separate container that is correctly tagged and labeled. The case file should reference or describe this external evidence to ensure its relevance and context are preserved. Proper organization and documentation are crucial for maintaining the integrity of the investigation.

Prior to writing the narrative, the CSHO should review all the documents and evidence gathered to ensure that there are no “holes” or unanswered questions concerning the findings and conclusions of the investigation or any material aspect of it.

The written narrative report is then prepared to present a written summary of the case findings, conclusions, and recommendations. The narrative is the “word picture” of the inspector. As such, it must contain complete thoughts, complete names, and complete description of events.

When writing the report, the CSHO should assume that the reader knows absolutely nothing about the incident, the people involved, or the investigation. As mentioned above, but cannot be overemphasized, the summary report must answer the six basic questions: who, what, when, where, why, and how. Documentation must be contained in the file to support the answers to the basic questions.

AT A MINIMUM, CASE FILES WILL ANSWER THE QUESTIONS:					
Who?	What?	When?	Where?	Why	How?

- D. Content and Style of Narrative.** The written narrative report is not an essay. Only relevant, pertinent and essential information should be included in the narrative report.

The narrative will not duplicate the detailed information contained in witness statements or other auxiliary reports but will summarize the pertinent findings and conclusions drawn from these documents. The narrative will reference the attached documents, which will be tabbed. The reader will thus be able to refer easily to each attached document for more detailed information. The narrative will be:

FACTUAL - documented, true information; not opinion; and

ACCURATE - exact and correct; and

LOGICAL - sensible, chronological and in sequential order; and

CLEAR - easy to understand; no jargon or slang; and

CONCISE - as few words as possible; brief and to the point; and

COMPLETE - who, what, when, where, why and how addressed.

STRUCTURED PROPERLY - proper grammar, sentence structure, paragraphing and punctuation.

- E. Format.** To ensure that all narratives are written in a consistent, complete and accurate manner, the following format will be utilized by all staff. ALL narratives, both significant and non-significant will consist of two (2) sections: **PURPOSE** and **FINDINGS**.

1. **The PURPOSE section** will contain the following information:

- (a) A brief description of the worksite inspected (e.g., a multistory apartment building under construction).
- (b) A statement of why the inspection or investigation was initiated. Initiation may have resulted from a complaint, a referral, an accident, a Local Emphasis Program or a programmed inspection. If an accident occurred, this section should state the time and date of the accident and should include the name of the person who reported the accident, and the time the report was received. If a complaint or referral was involved, the Compliance Officer shall provide a short summary of the complaint and state the date the complaint was received.
- (c) For multi-employer worksite inspections, the narrative should list the general contractor and subcontractors, including the inspection number for each employer.

2. **The FINDINGS section** should contain all relevant facts and findings of the inspection/investigation and include the following information:
 - (a) This section of the narrative should identify the documented findings that support the Compliance Officer's recommendation to issue or not issue citations. This section will summarize the evidence that will be used by the Commissioner in issuing a final order and may later be used by the Commonwealth's Attorney in trial if the Commissioner's Order is contested.
 - (b) If the purpose of the inspection was to investigate a complaint or referral, the findings for each complaint/referral item are to be listed, and if a citation is to be issued, a reference to what is being cited
 - (c) If the purpose of the inspection was to investigate an accident, the findings should be divided into those related to the accident and those unrelated to the accident.
 - (d) Data should not be repeated; unnecessary adjectives should not be used. Never make assumptions. Opinions should be omitted. The facts should be stated simply and clearly. The facts should be arranged in a logical order, explaining the findings of the investigation from beginning to end.
 - (e) If citations are being recommended, the Compliance Officer should refer the reader to the VOSH 1Bs. If no citations are recommended, the Compliance Officer should note that at the end of the narrative.
3. **Sample Narrative.** Examples of proper VOSH Inspection/ Investigation Narratives for significant cases are in the Appendix A.

F. Order and Organization – Significant Cases. All significant cases will be filed in (4) four-part file folders with the exhibits in Section 2 tabbed using prepared legal file dividers.

1. The case file for significant cases will contain six (6) sections: Those sections will contain the following:

SECTION 1 - Case diary log; narrative; and citations

SECTION 2 - Exhibits (grouped and tabbed)

SECTION 3 - Post citation documents and correspondence

SECTION 4 - All legal/court documents

SECTION 5 - Freedom of Information documents

SECTION 6 - Other exhibits and documents

2. The following describes in detail the content and order of each section:

(1) **SECTION 1** of the file folder will contain in order:

- (a) Diary Log;
- (b) Narrative;
- (c) Justification for willful citation(s) (if applicable);
- (d) Citation(s) in draft form.

(2) **SECTION 2** of the file folder will contain the following documents, in order:

- (a) Case review sheet;
- (b) Routing sheet;
- (c) A list of exhibits (lists in order all documents in Section 2);
- (d) Behind the list of exhibits, also in Section 2 of the file, the exhibits will be grouped and filed in the following order. These groupings shall be tabbed. Individual documents will be numbered in the bottom right hand corner of the page and referenced by tab number in the case diary log, when used, and also by the narrative report. For example, interview statements would be numbered 1a, 1b, 1c, etc.

- 1 Interview Statements;
- 2 OIS Violation Worksheets with pictures;
- 3 Sketches, Diagrams, etc.;
- 4 Medical/Police reports;
- 5 VOSH Forms;
- 6 Pre-Citation Correspondence;
- 7 Inspection History;
- 8 Inspector notes

9 Photos/Videos/CDs/DVDs

- (3) **SECTION 3** of the file folder will contain all post-citation forms, documents, and correspondence associated with the citation and the penalty assessment. The most recent documents will be filed on top; all will be filed chronologically. All mailing certification cards will be filed with the appropriate letter.

The following documents shall be filed in SECTION 3:

- (a) Post-Citation Forms, etc.;
 - (b) Penalty Payment Report;
 - (c) Failure to Abate;
 - (d) Amended Citations;
 - (e) Settlement Agreement;
 - (f) Abatement Letters;
 - (g) Notification to Commonwealth's Atty. of Contest;
 - (h) Notice of Contest;
 - (I) Informal Conference Report;
 - (j) Informal Conference Notice.
- (4) **SECTION 4** of the file folder will contain all documents associated with civil or criminal court action. The most recent documents will be filed on top; all will be filed chronologically.

The following documents will be filed in SECTION 4 when applicable:

- (a) Summons
 - (b) Subpoena
 - (c) Final Order
 - (d) Other Contest Documents
- (5) **SECTION 5** of the file folder will contain all documents and correspondence related to Freedom of Information Requests.
- (6) **SECTION 6** of the file folder will contain documents, exhibits or other correspondence related to the case and not filed in other sections of the file folder the following documents will be filed in section 6, when applicable:

(a) Company Policies, Procedures, Equipment Manuals, Equipment Specifications, Contracts, etc.

(b) All other material (letters, etc.) related to the case and not filed in other sections'

G. **Order and Organization – Non-Significant Cases.** Non-significant cases will be filed in letter sized file folders and have 2 sections. Sections 1, 3 and 5 have been combined into 1 section that will be attached to the left side of the folder and will be labeled as "Section 1". Sections 2, 4 and 6 will be attached to the right side of the folder and will be labeled as "Section 2".

1. The case file for non-significant cases will contain two (2) sections. Those sections will contain the following:

SECTION 1 - Case file diary logs, all communication related activity after the citation, letters of contest, informal conference request/notes, informal settlement agreements, payment plan, documented communication, citation and green cards, safety narrative

SECTION 2 – Case file status and routing pt. 1 and 2, file review notes, exhibits (tabbed), interview statements, VOSH 1-Bs, sketches, diagrams, medical reports, police reports, VOSH forms, pre-citation, correspondence, inspection history, inspection notes, photos, video tape referee.

2. The following describes in detail the content and order of each section:

(1) SECTION 1 of the file folder will contain in order:

- (a) Case file diary logs;
- (b) all communication related activity after the citation;
- (c) letters of contest;
- (d) informal conference request/notes;
- (e) informal settlement agreements;
- (f) payment plan;
- (g) documented communication;
- (h) citation and green cards;
- (i) safety narrative

(2) **SECTION 2** of the file folder will contain the following documents, in order:

- (a) Case file status;
- (b) Routing sheet;
- (c) File Review notes;
- (d) Case File Checklist;
- (e) Supervisor Interview Statement (Yellow Paper)
- (f) Employee Interview Statement (Green Paper)
- (g) State Violation Worksheet (OIS-Generated)
- (h) Severity Rating Assessment
- (i) SER Citation Justification Summary
- (j) Violation Photo-sheet
- (k) Directive, Letter of Interpretation, memorandum of understanding, or referenced external documents (i.e., manual pages)
- (l) Behind the list of exhibits, also in Section 2 of the file, the exhibits will be grouped and filed in the following order. These groupings shall be tabbed. Individual documents will be numbered in the bottom righthand corner of the page and referenced by tab number in the case diary log, when used, and also by the narrative report. For example, interview statements would be numbered 1a, 1b, 1c, etc.
 - 1 Interview Statements;
 - 2 OIS Violation Worksheets with pictures;
 - 3 Sketches, Diagrams, etc.;
 - 4 Medical/Police reports;
 - 5 VOSH Forms;
 - 6 Pre-Citation Correspondence;
 - 7 Inspection History;
 - 8 Inspector notes

9 Photos/Videos/CDs/DVDs

Left side of folder- SECTION 1	Right side of folder- SECTION 2
Tabbed Exhibits (A-D) A. Case File Diary Log Pages 1 and 2 B. Post-Citation Activity/ Correspondence C. Copy of Issued Citations D. Safety Narrative	Routing Sheet Case File Organization File Review Notes New/Blue Checklist Tabbed Exhibits (A-K) A. Interview Statements B. Violation Worksheets C. Sketches and Diagrams D. Medical/Police Reports E. VOSH Forms F. Pre-Citation Correspondence G. Inspection History H. Inspection Notes I. Pictures/Video/CDs J. Equipment/Programs/300 K. Company Information

- H. Inspection Conducted But No Citations Issued.** For inspections that do not result in citations being issued, a lesser amount of documentation can be included in the case file. At a minimum, the case file shall include the Inspection Report, the Narrative, and a general statement that at the time of the inspection no conditions were observed in violation of any standard, and a complaint/referral response letter, if appropriate shall clearly address all of the complaint item(s).
- I. No Inspection.** For "No Inspections," the CSHO shall include in the case file an Inspection Report, which indicates the reason why no inspection was conducted. If there was a denial of entry, then the information necessary to obtain a warrant or an explanation of why a warrant is not being sought shall be included. The case file shall also include a complaint/referral response letter, if appropriate, that explains why an inspection was not conducted.
- J. Classified and Trade Secret Information.**
- Any classified or trade secret information and/or personal knowledge of such information by Agency personnel shall be handled in accordance with the regulations of §40.1-51.4:1 of the *Code of Virginia* which protects the confidentiality of trade secret information during the course of VOSH inspections. Trade secrets are matters that are not of public or general

knowledge. A trade secret, as referenced in § 1905 of Title 18 of the United States Code, includes information concerning or related to processes, operations, style of work, or apparatus, or related to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. The collection of such information and the number of agency personnel with access to it shall be limited to the minimum necessary for the conduct of investigative activities. CSHOs shall specifically identify any classified and trade secret information in the case file. Title 18 USC 1905, as referenced by [Section 15](#) of the *OSH Act*, specifies criminal penalties in the event of improper disclosure.

2. It is essential to the effective enforcement of the *OSH Act* that CSHOs and all VOSH personnel preserve the confidentiality of all information and investigations that could reveal a trade secret. When the employer identifies an operation or condition as a trade secret, it shall be treated as such (unless, after following proper procedures, including consulting with the HLS Division, the Agency determines that the matter is not a trade secret). Information obtained in such areas, including all negatives, photographs, video, and audio recordings and documentation forms shall be labeled:

"ADMINISTRATIVELY CONTROLLED INFORMATION" "RESTRICTED
TRADE INFORMATION"

3. If the employer objects to the taking of photographs and/or video recordings because trade secrets would or may be disclosed, CSHOs should advise employers of the protection against such disclosure afforded by §40.1-51.4:1 of the Code of Virginia and §250 of the VOSH Administrative Regulation Manual.

Appendix A

SAMPLE NARRATIVE - #1
VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY
SIGNIFICANT CASE INSPECTION NARRATIVE

CSHO I.D.: W 2381-032-89
INSPECTION #: 000000000
DATE CASE OPENED: 3/3/89

TYPE INSPECTION: Accident-Fatality

EMPLOYER: Virginia
Steel
Corporation
6623
Wexford
Lane
Richmond, Virginia 23225

BUSINESS TYPE: Steel Erection

INSPECTION SITE: 100 North Fourth Street
Richmond, Virginia 23241

I. BACKGROUND

- A. PURPOSE - This inspection was initiated as a result of a fatal accident which occurred at the inspection site listed above at 9 a.m. on March 3, 1989. The accident was reported to the Richmond Regional Office at 9:30 a.m. on March 3, 1989, by R. E. Lee, Site Superintendent for Virginia Steel Corporation.
- B. WORKSITE DESCRIPTION - Two multi-story office buildings are being constructed on the worksite by Imperial Builders Corporation. The two buildings are joined together by an atrium roof at the sixth floor level of buildings. (See photo #1 at Exhibit 2.)

Virginia Steel Corporation is the contractor erecting the steel beam structure of the building.

C. INSPECTION HISTORY - Virginia Steel Corporation has been inspected four (4) times in the past three (3) years. Eight (8) citations (6 - Serious, 2- Other) have been issued to the company. (See Inspection History at Exhibit 7a.)

D. CONDUCT OF THE INSPECTION

1.OPENING CONFERENCE - The opening conference was held at 1:30 p.m. on March 3, 1989, at the accident site. (See Exhibit 5b for details concerning the opening conference.)

2.WALKAROUND - The walkaround was conducted during the period of March 4-15, 1989. (See Exhibit 5b)

3.CLOSING CONFERENCE - The Closing Conference was held at 10 a.m. on June 2, 1989. (See Exhibit 5b)

II. FINDINGS OF FACT

A. This accident involved a fall from the atrium roof at the worksite. The atrium roof structure consisted of steel beams with open web steel joists spaced five (5) feet on center across the beams. The structure measures approximately forty-eight (48) feet between the two (2) buildings, eighty (80) feet long at its longest point and is approximately seventy (70) feet above a concrete floor. (See photos #4 through #8 at Exhibit 2.)

B. The joists had been spaced on the beams of the atrium roof structure but had not been completely welded and the bridging had not been installed. (See Employee Interview Statements at Exhibits 1a thru 1b.)

C. A bundle of decking had been stored on the joists of the atrium roof. (See photo #5 at Exhibit 2 and Mr. Grant's (victim's coworker) Interview Statement at Exhibit 1b.)

D. It is normal practice for employees of Virginia Steel Corporation to walk the beams to where the joists are and then sit down on the beam and wrap their safety lanyards around the beams. (See Employee Interview Statements at Exhibits 1d thru 1f.)

E. It is also normal practice for employees of Virginia Steel Corporation not to tie off before reaching the work area, no matter how high above the ground they are. (See Site Supervisor's Interview Statement at Exhibit 1g.)

- F. On the morning of March 3, 1989, Mr. Lee, site supervisor, instructed Mr. Grant and Mr. Jackson (victim) to continue welding the beams and joists on the atrium roof. (See Interview Statement at Exhibit 1g.) Mr. Grant went to fabricate some steel frames; he last saw Mr. Jackson walking on the second beam. Within minutes of Mr. Grant's leaving, Mr. Jackson fell to his death. (See Mr. Grant's Interview Statement at Exhibit 1f.)
- G. No one witnessed the accident. After the fall, Mr. Jackson's safety belt and lanyard were found hooked across his shoulder and waist. He was not tied off to the beam and the employer had not provided any other form of fall protection such as a safety net. (See Employee Interview Statements at Exhibits 1d through 1g.)

III. CONCLUSIONS/RECOMMENDATIONS

- A. That a Serious citation be issued for violation of Title §40.1-51.1(a), Code of Virginia in that open web steel joists did not have the bridging installed and were not permanently fastened prior to storing construction loads on the joists, thereby creating an unstable condition, thus exposing an employee on the joist to a 70-foot fall hazard. (See Findings II.B, C, and D above.)

Proposed Penalty - \$10,000.

- B. That a Serious citation be issued for violation of 1926.20(b)(1). No danger signs were posted indicating an immediate hazard. (See findings II.D and E above)

Proposed Penalty - \$3,000.

- C. That a Willful citation be issued for violation of 1926.750(b)(1)(ii). A safety net was not installed; the potential fall distance greatly exceeded 25 feet. (See Finding II.G above) (See Section 1 for Willful Justification.)

Proposed Penalty - \$90,000.

(SEE PENALTY CALCULATION WORKSHEETS - Section 1)

Appendix B

SAMPLE NARRATIVE - #2
VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY
SIGNIFICANT CASE INSPECTION NARRATIVE

CSHO I. D.: H0000-000-96
INSPECTION #: 105070555
DATE CASE OPENED: 10/5/89

TYPE INSPECTION: Accident/Fatality

EMPLOYER: Augusta Silo
Route 2, Box 104
Boxer, Virginia 20074

BUSINESS TYPE: Silo Construction and Repair

INSPECTION SITE: Waterside Plantation
Route 250 West (1/2 mile east of Zion Crossroads)
P.O. Box 463
Waterside, Virginia 22900

I. BACKGROUND

- A. PURPOSE - This inspection was initiated as a result of an accident which occurred at the inspection site listed above at 10:00 am on September 7, 1989. This accident resulted in the fatality of an employee, Mr. Joseph A. Smith on September 14, 1989.

The accident/fatality was reported to the Richmond VOSH Regional Office by Mr. J. M. Blackman, Loss Control Consultant for Consolidated Risk Management Service on October 4, 1989 at 10:15 am (20 days after the fatality).

- B. WORKSITE DESCRIPTION - The accident occurred in an Augusta Silo Feed Storage Structure, a silo measuring 80 feet in height and 25 feet in diameter. This structure was one of five (5) silos at the Waterside Plantation. (See Photo #1, Exhibit 2.)

C. INSPECTION HISTORY - None

D. CONDUCT OF THE INSPECTION

1. OPENING CONFERENCE - The opening conference was conducted with employer representatives on October 5, 1989 at the employer address above. (See Exhibit 5b for opening conference report/Inspection Worksheet)

2. WALKAROUND - The walkaround was conducted on October 6, 1989 at the worksite located on Waterside Plantation. Employer representatives and the farm foreman were present. (See Exhibit 5b for summary of walkaround/Inspection Summary)

Interviews were conducted with the victim's co-workers, employer representatives, farm representatives, and medical experts. (See 1a thru 1d and 4g)

3. CLOSING CONFERENCE - The closing conference was held on October 30, 1989. (See Exhibit 5b)

II. FINDINGS OF FACT

A. On September 7, 1989, the victim, along with Sam Clark, another serviceman were working to remove a forage unloader from an Augusta Silo Storage Structure at Waterside Plantation. This entailed entering a hatch in the silo measuring 32" x 20" tall. A tunnel approximately 36" in diameter was dug through the silage to allow the workers entry to work on the structure. (See photo's # 7 and 8, Exhibit 2 and employee statement at Exhibit 1a)

The work performed by Smith and Clark was continuing from the previous day. (Exhibit 1a)

B. Mr. Clark entered the structure first, at approximately 9 a.m., and removed two (2) sections of the unloader arm before exiting the silo at 9:20 a.m. The victim, Mr. Smith then entered the silo at approximately 9:30 a.m. to continue removing the remaining parts of the unloader. (See Employee Interview Statement at Exhibit 1a)

According to Mr. Clark, Smith was wearing a MSA Constant Flow Air Line Respirator. (See photo #6, Exhibit 2 for picture of the respirator worn; see Exhibit 4a for specifications of the respirator) Clark observed Smith through the tunnel as Smith connected a Lugall and began pulling on the unloader chain. His light also was reflecting on the silo walls. At first, work progressed normally, but after approximately 15 minutes, Clark could no longer detect movement on the part of Smith. (See Exhibit 1a)

- C. Clark attempted to contact the victim by rapping on the steel backbone of the unloader but got no response from Smith. He then informed Gordon Carr, the Site Supervisor, who had arrived at the worksite just after the victim entered the silo, that he could not contact Smith. (See Exhibit 1a)
- D. Mr. Clark and Mr. Carr removed loose feed material which had gathered at the entrance of the silo in the tunnel. The victim was seen by Clark and Carr slumped in the center of the structure; he was not moving. (See Exhibits 1a and 1b)

Mr. Carr attached a length of pipe to a centrifugal blower and blew fresh air into the structure. (See photo #2, Exhibit 2, for a picture of the apparatus used)

Mr. Clark tied a rope around his waist that was attached to the outside of the structure and entered the silo to retrieve Smith. Clark did not wear a respirator since there was none available; he took periodic breaths from the end of the pipe supplied by the blower. (See Exhibits 1a and 1b)

- E. Clark attached a second rope around Smith's legs and with the assistance of Mr. Carr, pulled Smith outside the structure. This occurred at approximately 10 a.m. (See Exhibits 1a and 1b)

Smith was wearing the respirator; it was observed to be functional by Mr. Carr. The hose did not appear to be obstructed or kinked. Smith's face and tongue were observed to be swollen; he was making a gurgling sound in his throat. (See Exhibit 1a)

- F. Mr. Carr removed the respirator from Smith, placed him on his stomach and pumped on his back until he regurgitated some green material and began breathing short breaths at approximately 10:03 a.m. (Exhibit 1a)
- G. The Orange County Rescue Squad arrived at 10:10 a.m. (The squad had been called during the rescue by a farm worker, John Snead.) Upon their

arrival, a helicopter was summoned and the victim was transported to the University of Virginia Medical Center. (See Exhibit 1c and 4a)

- H. Mr. Smith lapsed into a coma on September 8, 1989, and his condition continued to deteriorate. His family requested that support be terminated on September 14, 1989; he expired at 8:20 p.m. that evening. (See Hospital Discharge Summary - Exhibit 4b)
- I. Joseph Allan Smith was a 34 year old white male, with no known past medical problems. He was not known to have any drug or alcohol problem. He was 5'9" tall, and weighed 182 pounds. He wore a full beard. He had worked for Augusta Silo for three (3) months. (See Medical History - Exhibit 4c)
- J. The cause of death according to the autopsy report was hypoxic encephalopathy or a lack of oxygen to the brain resulting in multi-organ failure. The circumstances which lead to the occurrence of the hypoxic event remain undetermined. (See autopsy report - Exhibit 4c)
- K. According to a statement from Dr. Sheets, (Exhibit 4d) one of the pathologists who assisted in the autopsy:
 - 1.Heat stroke was not likely based on the victim's body temperature at admission and the fact that there was no mention of treatment for heat stroke by the emergency personnel. (The body temperature upon admission was 100.4.)
 - 2.A toxic exposure was not likely based on microscopic examination of the victim's lungs and other tissues which displayed no evidence of such an exposure.
 - 3.Hypoxia caused by a pre-existing medical condition was not consistent with the findings that the employee had no previous medical history which would suggest such a condition.
 - 4.Description of the victim during rescue suggests a respiratory asphyxia.
- L. The temperature on the day of the accident was reported to be 76 F. (Exhibit 8) The temperature inside the structure was not measured on the day of the accident, but was measured during the walkaround and was noted to be 101 F. The temperature outside that day was 71 F. (Exhibit 8) Humidity inside the structure was not measured, but would be expected to be near 100% according to the manufacturer. (See Section 6)

The employer is aware that a hot environment exists inside the structure and recommends that employees stay inside no longer than 10 to 15 minutes before taking a break. (See Augusta Silo Operators Manual - Section 6) Gatorade is always made available at the worksites for employees. (See site supervisor's statement - Exhibit 1b)

- M. The Augusta Silo structure is not intended for continuous employee occupancy; it is designed for the storage of livestock feed. Egress is limited to the small hatch in the side of the structure. It is designed to limit oxygen from the stored feed creating a hazardous atmosphere inside. (See manual - Section 6)

The employer did not require that the atmosphere inside the structure be tested prior to any employee entering. The employer had no equipment to test the atmosphere for percent oxygen, flammability, or any other toxic material. (See employer statement - Exhibit 1d)

The manufacturer indicates that a lack of oxygen and excessive carbon dioxide are the major atmospheric hazards inside a structure. The build-up of toxic gasses such as hydrogen sulfide from decomposing protein, oxides of nitrogen, or carbon monoxide are extremely rare because oxygen is limited inside the structure. (See Manual - Section 6)

The employer assumes an oxygen-deficient atmosphere and requires the use of a respirator of the type worn by the victim. (See statements of employer and coworker - Exhibits 1b and 1d)

- N. The employer did not have written standard operating procedures for respirator use. The respirator used by the victim was stored in the tool box on the back of a service truck with other tools and equipment. The face piece and corrugated breathing tube were partially covered with cattle feed. The quick disconnect valve on the flow control valve had been modified by making the attachment to the air hose permanent. The respirator and compressor used by the victim were tested again on the walkaround and appeared to function satisfactorily. (See Exhibit 1e)

Employees have not been medically screened prior to respirator use. Some training was conducted on February 20, 1989, prior to the victim's hiring. A copy of General Rules for wearing a respirator was given to the victim upon hiring. A signed receipt is filed in his personnel file. (See Section 6)

- O. Employees attending the victim while inside the structure were not trained in first aid, CPR, or rescue procedures. (Exhibit 1a)

- A respirator was not available for the attendant outside the entrance to the structure. (Exhibit 1a)
 - The victim was not wearing a retrieval device or retrieval line. (Exhibit 1a)
- P. The employer did not require the completion of an entry permit to be completed prior to any employee entering the structure. (See Employer and Employee Statements - Exhibits 1a, 1b, and 1d.)
- Q. The employer did not have a written hazard communication program. Material safety data sheets were posted on the bulletin board in the lunch room, but were not available for some hazardous chemicals. No labeling violations were documented. Training required by the hazard communication standard had not been conducted. (Exhibit 1a, b, and d)

III. CONCLUSIONS/RECOMMENDATIONS

- A. Issue a SERIOUS CITATION for violation of 1910.134(a)(2). No respiratory protection program in place. (Finding II.N.)

Proposed Penalty - \$5,400.

- B. Issue a SERIOUS CITATION for violation of 1910.146.3. Qualified person not present during confined space entry. (Finding II.O.)

Proposed Penalty - \$8,700.

- C. Issue a SERIOUS CITATION for violation of 1910.146.3. Atmospheric testing not performed prior to entry into a confined space. (Finding II.M.)

Proposed Penalty - \$8,700.

- D. Issue a SERIOUS CITATION for violation of 1910.146.5.C. Rescue team not available where confined space has hazardous atmosphere. (Finding II.A thru E)

Proposed Penalty - \$8,700.

- E. Issue a SERIOUS CITATION for violation of 1910.146.7.A.1 grouped with 1910.146.7.A.2.b. Employees not trained in confined space entry

procedures and attendant not trained in first aid and CPR. (Finding II.A thru E and O)

Proposed Penalty - \$8,700.

- F. Issue a SERIOUS CITATION for violation of 1910.146.9.A.1. Retrieval devices with retrieval lines not worn by entrants into a confined space which has a hazardous atmosphere. (Finding II.O.)

Proposed Penalty - \$8,700.

- G. Issue a SERIOUS CITATION for violation of 1910.146.9.B. Appropriate respiratory protection not available immediately outside the entrance to a confined space having a hazardous atmosphere. (Finding II.O.)

Proposed Penalty - \$8,700.

- H. Issue a SERIOUS CITATION for violation of 1926.59(e)(1). No written hazard communication program. (Finding II.Q.)

Proposed Penalty - \$5,400.

- I. Issue a SERIOUS CITATION for violation of 1926.59(h). Hazard communication training not provided. (Finding II.Q.)

Proposed Penalty - \$5,400.

- J. Issue an OTHER-THAN-SERIOUS (OTS) CITATION for violation of the A.R.M., Section 11.2.A. Report of fatality not made within 48 hours after the occurrence. (Finding I.A.)

Proposed Penalty - \$320.

- K. Issue an OTHER-THAN-SERIOUS (OTS) CITATION for violation of 1926.59(g)(1). Material safety data sheets not available. (Finding II.Q.)

No Penalty.

SEE Section 1 FOR PENALTY CALCULATION WORKSHEET)

Appendix C

SAMPLE NARRATIVE - #3 VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY NON-SIGNIFICANT CASE INSPECTION NARRATIVE

SAFETY NARRATIVE

Employer	Imperial Group Manufacturing, Inc.
Employer Site Address	5155 Cougar Center Drive Dublin, Virginia 24084
Employer Mail Address	5155 Cougar Center Drive Dublin, Virginia 24084
Inspection Number Optional Report Number CSHO ID DPOR License No. <i>(if applicable)</i>	1679742 046-23 Z0138 N/A

COVERAGE INFORMATION:

On May 18, 2023, at approximately 2:17 pm, the Southwest Regional VOSH Office received a complaint via the online reporting system (E-UPA: 25768) for a manufacturing facility located on Cougar Center Drive in Dublin, Virginia. The UPA for this complaint is 2031565. The complaint item was for an area of the facility known as the CAT Cell. This complaint inspection number is 1679096, and it was opened and closed by CSHO N1913 as an NCI. During the inspection process for this complaint, the OSHA 300 Logs were received from the company. There was an amputation listed on their log that VOSH was not aware of, and there were multiple injuries listed on the log that were not consistent with what was listed as happening. Also during the course of the inspection, it was learned through the interview process that the company had multiple, recent amputations that had not been reported to VOSH. CSHO N1913 was instructed to open an additional inspection with Imperial to address the injuries that were on the OSHA 300 Log. The CSHO interviewed multiple employees from the log, and based on this information, coupled with the observations made by the CSHO during the previous inspection, the CSHO was instructed by Headquarters and the Regional Safety Director to return to Imperial and open a comprehensive inspection.

CSHO N1913 departed the agency in September 2023, and the case was transferred to CSHO Z0138.

NATURE AND SCOPE:

Check Applicable Boxes and Explain Findings:

☒ Planned Inspection

NATURE AND SCOPE -- UNUSUAL CIRCUMSTANCES:

☒ None

Comments: N/A

OPENING CONFERENCE NOTES:

On May 31, 2023, CSHO N1913 arrived at the facility at approximately 10:45 am. A conference call was made between Imperial and the Southwest Regional Safety Director. The Director explained the reasoning behind expanding the inspection to a comprehensive inspection. The Corporate EHS Manager was confused, but Imperial was not reluctant to performing the inspection. The Corporate EHS Manager told the Regional Safety Director that she was working on lock out tag out procedures, and they would be using the Master Lock Software. An abbreviated opening was conducted based on 2 previous opening conferences happening within the last few weeks. Other than the abovementioned, there was nothing abnormal about the opening conference. The opening conference was conducted in one of the facility's conference rooms with the following people present:

- Jessica Hinkley, Human Resources Manager
- Shawna Aujla, Corporate EHS Manager (via telephone)
- Russell Bamberger, Southwest Regional Safety Director (via telephone, in the beginning)

The Corporate EHS Manager called into the opening conference because her office was located in Texas, and she was not on site.

The walkaround was conducted over the course of several days and covered the three buildings which are a part of this worksite.

FINDINGS:

This was a comprehensive inspection, so all buildings were inspected. In total the company had 3 different buildings to be inspected, and the walk-around portion of the inspection took multiple days.

Violations

CHAPTER- 8

Chapter 8: Violations

I. Basis of Violations

A. Standards and Regulations

- 1. Employer Responsibility for Compliance** Section 40.1-51.1 of the Code of Virginia that each employer has a responsibility to comply with occupational safety and health standards promulgated under Title 40.1, which includes standards incorporated by reference. For example, the American National Standard Institute (ANSI) standard A92.2–1969, “Vehicle Mounted Elevating and Rotating Work Platforms,” including appendix, is incorporated by reference as specified in §1910.67. Only the mandatory provisions, i.e., those containing the word “shall” or other mandatory language of standards incorporated by reference, are adopted as standards under Title 40.1 of the Code of Virginia.

The standards which are the basis of violations are subdivided as follows:

- a. Part 1910 Standards for General Industry
 - b. Part 1915 Shipyard Employment (Public Sector only)
 - c. Part 1917 Maritime Standards (Public Sector only)
 - d. Part 1918 Longshoring (Public Sector only)
 - e. Part 1926 Standards for Construction
 - f. Part 1928 Standards for Agriculture
- 2. Source and Naming Conventions.** The specific standards and regulations which serve as the basis of violations are found in 16VAC25 series regulations under the Virginia Administrative Code. The most specific provision of a standard shall be used for citing violations.

Standards are subdivided as per the following nomenclature:

a. Federal OSHA Identical Standards

Subdivision Naming Convention	Example

Part	1910
Section	1910.23 or 1910.0023
Paragraph	1910.23(c)
Sub-paragraph	1910.23(c)(1)
Sub-sub-paragraph	1910.23(c)(1)(I)

b. Virginia Unique Standards (not federal OSHA identical)

SubdivisionNaming Convention	Example
Title	16
Name (Virginia Administrative Code)	16VAC
Agency Code (Safety & Health Codes Board)	16VAC25
Chapter	16VAC25-60
Section	16VAC25-60-120
Paragraph	16VAC25-60-120.A.
Sub-paragraph	16VAC25-60-120.A.1.
Sub-sub-paragraph	16VAC25-60-120.A.1.a.

3. Definition and Application of Vertical and Horizontal Standards

- a. Vertical standards are standards that apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment, or installations.

- b. Horizontal standards are other (more general) standards applicable to multiple industries. See §1910.5(c).

4. **Application of Horizontal and Vertical Standards.** If a CSHO is uncertain whether to cite under a horizontal or a vertical standard when both may be applicable, the Regional Safety or Health Director shall be consulted. The following guidelines shall be considered:

a. **General Guidelines**

- (1) **Use Horizontal Standard If No Vertical Standard.** If the particular industry does not have a vertical standard that covers the hazard, then the CSHO shall use the applicable horizontal standard.

- (2) **Vertical Standard to Normally Take Precedence.** When a hazard in a particular industry is covered by both a vertical (e.g., Part 1915) and a horizontal (e.g., Part 1910) standard, the vertical standard shall normally take precedence. However, if the horizontal standard is more stringent, the region should consult with the VOSH Program Directors for clarification and citation assistance.

- (3) **Horizontal Has Greater Protection With No Conflict to**

Vertical. In situations covered by both a horizontal (general) and a vertical (specific) standard where the horizontal standard appears to offer greater protection, the horizontal (general) standard may be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical (specific) standard.

- (4) **Analysis of Intent.** To determine whether there is a conflict or inconsistency between the standards, an analysis of the intent of the two standards must be performed. For the horizontal standard to take precedence and apply, the analysis must show that the vertical standard does not address the precise hazard involved, even though it may address related or similar.

b. **Exemptions to General Guidelines**

- (1) **Agriculture Exception.** Only those parts of §1910 which are specifically referenced in §1928 (Safety Standards for Agriculture) apply to agriculture.
- (2) **Cite the Activity Not the Industry.** When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO shall focus attention on the particular activity an employer is engaged in rather than on the nature of the employer's general business.

EXAMPLE: A road construction contractor operates his own vehicle repair shop to keep his heavy equipment, such as dump trucks, backhoes, graders, etc., in operational order. Violations found while inspecting this shop would come under the general industry standards, as would any other vehicle repair facility; because that is the activity performed by the shop. The fact that the firm's business is actually construction does not matter.

- (3) **Only Certain 1910 Standards Apply to Construction.** Hazards found in construction work that are not covered by a specific Part 1926 standard shall not normally be cited under Part 1910 unless that standard has been identified as being applicable to construction. See Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, VOSH PD 12-151A (15 May 1997).

Note: If a question arises as to whether an activity is deemed construction for purposes of Title 40.1, contact the VOSH Director. (See also VOSH ARM 16VAC25-60130).

5. **Violation of Variances.** The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in Part IV of the VOSH Administrative Regulation Manual §§190-220. An employer will not be subject to citation if the observed condition is in compliance with either the granted variance or the controlling standard.

- a. **Not in Compliance With Variance.** In the event that the employer is not in compliance with the requirements of the variance, a violation of the controlling standard shall be cited

with a reference in the citation to the variance provision that has not been met.

- b. **Variance Application Filed.** If, during the course of a compliance inspection, the CSHO discovers that the employer has filed an application for variance regarding a condition which is determined to be an apparent violation of the standard, this fact shall be reported to the Regional Safety or Health Director who shall obtain information concerning the status of the variance request.
- c. **Variance Granted by Federal OSHA.** If a variance was granted to the employer by Federal OSHA, the Regional Safety or Health Director will consult with the appropriate VOSH Program Director and DHLS to determine if the variance has been honored by VOSH. If the variance has not been honored and the observed condition is not in compliance with the controlling standard, a violation will be issued.

6. **Interpretation of Standards.** Employers, employees, and their representatives may request standards interpretations from VOSH.

- a. All requests for interpretations of standards shall be referred to the appropriate Program Director depending upon the standard. Draft interpretations will be developed by the Program Director and circulated for concurrence to the other division directors, as appropriate.
- b. The Program Director shall email a copy of the interpretation to each Regional Safety or Health Director to be filed with the appropriate program directive or standard.

- B. Employee Exposure.** A hazardous condition that violates a VOSH standard or the general duty clause shall be cited only when employee exposure can be documented. No citation may be issued after the expiration of six (6) months following the occurrence of any alleged violation. In cases involving VOSH receipt of a complaint, referral or an incident report from the Workers' Compensation Commission (WCC), the six (6) months' time frame does not begin to run until VOSH receives the complaint/referral or WCC incident report.

Any alleged violation is deemed to have “occurred” on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected. If an employer fails to notify the commissioner of any work-related fatality, amputation, in-patient hospitalization, or loss of an eye within the required statutory time frame, the six (6) month time frame does not commence until the commissioner receives actual notice of the incident. See VOSH Administrative Regulation Manual 16VAC25-60-260. The VOSH Division of Hearing and Legal Services (DHLS) should be consulted in such cases.

1. **Determination of Employer/Employee Relationship.** Whether or not exposed persons are employees of a particular employer depends on several factors, the most important of which is who controls the manner in which employees perform their assigned work. The question of who pays these employees may not be the key factor. Determining the employer of exposed employees may be a complex issue, in which case the Regional Safety or Health Director shall seek the advice of the DHLS (DHLS). (See also Chapter 15, Legal Issues).
2. **Proximity to the Hazard.** The actual and/or potential proximity of the employees to a hazard shall be thoroughly documented (i.e., photos, measurements, employee interviews).
3. **Observed Exposure**
 - a. Employee exposure is established if the CSHO witnesses, observes, or monitors the proximity or access of an employee to the hazard or potentially hazardous condition.
 - b. The use of personal protective equipment may not, in itself, adequately prevent employee exposures to a hazardous condition. Such exposures may be cited where the applicable standard requires the additional use of engineering and/or administrative (including work practice) controls, or where the personal protective equipment used is inadequate.
4. **Unobserved Exposure.** Where employee exposure is not observed, witnessed, or monitored by CSHOs, employee exposure may be established through witness statements or other evidence that exposure to a hazardous condition has occurred or may continue to occur.

- a. Past Exposure.** In a fatality or other “accident/incident” investigation, prior employee exposure(s) may be established if the CSHO determines, through written statements or other evidence, that exposure(s) to a hazardous condition occurred at the time of the accident/incident. In addition, prior exposures may serve as the basis for a violation when:
- (1) The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur;
 - (2) It is reasonably predictable that employee exposure to a hazardous condition could recur when:
 - (a) The employee exposure has occurred in the previous six months;
 - (b) The hazardous condition is an integral part of an employer’s normal operations; and
 - (c) The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.
- b. Potential Exposure.** Potential exposure to a hazardous condition may be established if there is evidence that employees have access to the hazard, and may include one or more of the following:
- (1) When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements;
 - (2) When a hazard would pose a danger to employees simply by their presence in an area and it is reasonably predictable that they could come into that area during the course of the work, to rest or to eat, or to enter or exit from an assigned work area;

- (3) When a hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is reasonably predictable that an employee could again use the equipment or be exposed to the materials in the course of work; However, if the inspection reveals an adequately communicated and effectively enforced safety policy or program that would prevent or minimize employee exposure, including accidental exposure to the hazardous condition, it would not be reasonably predictable that employee exposure could occur. In such circumstances, no citation should be issued in relation to the condition.

c. Documenting Employee Exposure. CSHOs shall thoroughly document exposure, both observed and unobserved, for each potential violation. This includes:

- (1) Statements by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (other employees who have observed exposure to the hazardous condition), union representatives, engineering personnel, management, or members of the exposed employee's family;
- (2) Recorded statements or signed written statements;
- (3) Photographs, video, and/or measurements;
- (4) All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, OSHA-300/301, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies and records, company emails and correspondence, etc.) ; and
- (5) Diagrams and graphic representations.

C. Regulatory Requirements. Violations of the VOSH Administrative Regulation Manual (16VAC25-60) and Part 1904 shall be documented and cited when an employer does not comply with posting, recordkeeping, and reporting requirements of the regulations contained in these parts as provided

by agency policy. See also [VOSH PD 01-009A, Citation Policy for Paperwork and Written Program Violations](#), (or its successor).

NOTE: Part 1904 and §40.1-51.1.D of the Code of Virginia have new requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The new rule also updates the list of employers partially exempt from OSHA record-keeping requirements. (See 79 FR 56129, Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014.)

NOTE: If prior to the lapse of the 8-hour reporting period for fatal accidents, or the 24-hour reporting period for hospitalizations of one or more persons, an amputation or loss of an eye, VOSH becomes aware of an incident required to be reported under §1904.39 through means other than an employer report, there is no violation for failure to report.

- D. Hazard Communication.** Section 1910.1200 requires chemical manufacturers and importers to assess the hazards of chemicals they produce or import, and applies to these employers even though they may not have their own employees exposed. Violations of this standard by manufacturers or importers shall be documented and cited, irrespective of any employee exposure at the manufacturing or importing location. See [VOSH PD 02-060B \(or its successor\)](#), [Inspection Procedures for the Hazard Communication Standard](#), dated 15 September 1999.

E. Employer/Employee Responsibilities

1. **Employer Responsibilities.** Section 40.1-51.1A of the Code of Virginia states: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." This section also states that employers shall "comply with all applicable occupational safety and health rules and regulations promulgated under this title."
2. **Employee Responsibilities**
 - a. Section 40.1-51.2 of the Code of Virginia states: "It shall be the duty of each employee to comply with all occupational safety and health rules and regulations issued pursuant to this chapter and any orders issued thereunder which are applicable to his

own action and conduct.” The Title does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

- b. In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Regional Safety or Health Director who shall consult with the applicable VOSH Director
 - c. The CSHO is expected to obtain information to ascertain whether the employer is exercising appropriate oversight of the workplace to ensure compliance with the Title. Concerted refusals by employees to comply will not ordinarily bar the issuance of a citation where the employer has failed to exercise its authority to adequately supervise employees, including taking appropriate disciplinary action.
- 2. **Affirmative Defenses.** An affirmative defense is a claim which, if established by the employer, will excuse it from a violation which has otherwise been documented by the CSHO. Although affirmative defenses must be proved by the employer at the time of the hearing, CSHOs should preliminarily gather evidence that supports/rebutts an employer’s potential defenses. See Chapter 5, Inspection Procedures, and Chapter on Legal Issues, for additional information.
 - 3. **Multi-Employer Worksites.** On multi-employer worksites in all industry sectors, more than one employer may be cited for a hazardous condition that violates a VOSH standard. (For specific and detailed guidance, refer to the multi-employer citation issuance requirements detailed in Chapter on Inspection Procedures, and VOSH Administrative Regulation Manual, §260 subsections F and G.)

II. Types of Violations

- A. **Other-than-Serious Violations.** This type of violation, defined in regulation as “Other Violation” in §10 of the VOSH Administrative Regulation Manual, shall be cited in situations where the most serious injury or illness that would be likely to result from the hazardous condition cannot reasonably be expected

to cause death or serious physical harm to exposed employees but does have a direct or immediate relationship to their safety and health.

B. Serious Violations

1. **Statutory Provision.** Section 40.1-49.3., of the Code of Virginia, provides that “. . . a serious violation shall be deemed to exist in a workplace if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.”
2. **The Four Elements of Serious Violation.** The CSHO shall consider four elements to determine if a violation is serious. The four-step analysis below is necessary to make the determination that an apparent violation is properly classified as “serious”, that is, whether there is a substantial probability that death or serious physical harm could result from an accident or exposure relating to the violative condition.

If more than one type of accident or health hazard exposure exists which the standard is designed to prevent, the CSHO shall determine which type could reasonably be expected to result in the most severe injury or illness and shall base the classification of the violation on that determination.

- a. **Step 1 - Type of Accident or Exposure.** The CSHO shall consider the types of accident or health hazard exposure which the violated standard or the general duty provision is designed to prevent. The CSHO need not establish the exact way in which an accident, or health hazard exposure would occur. The exposure or potential exposure of an employee is sufficient to establish that an accident or health hazard exposure could occur. However, the CSHO shall note the facts which could affect the severity of the injury or illness resulting from the accident or health hazard exposure.

EXAMPLE: Employees are observed working at the un-guarded edge of an open-sided floor 30 feet above the ground in

apparent violation of §1926.501(b)(1). The regulation requires that the edge of the open sided floor be guarded by standard guardrail systems. The type of hazard the standard is designed to prevent is a fall from the edge of the floor to the ground below.

EXAMPLE: Employees are observed working in an area in which debris is located in apparent violation of §1915.91(b). The type of hazard the standard is designed to prevent here is employees tripping on debris.

EXAMPLE: An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to methylene chloride at 100 ppm in apparent violation of §1910.1052. This is 75 ppm above the PEL mandated by the standard.

- b. **Step 2 - Most Serious Injury or Illness.** The CSHO shall determine the most serious injury or illness which could reasonably be expected to result from the type of accident or health hazard exposure identified in Step 1. The CSHO shall not give consideration at this point to factors which relate to the probability that an injury or illness will occur.

EXAMPLE: If an employee falls from the edge of an open-sided floor 30 feet to the ground below, the employee could die, break bones, suffer a concussion, or experience other serious injuries that would substantially impair a body function.

EXAMPLE: If an employee trips on debris, the trip may cause abrasions or bruises, but it is only marginally predictable that the employee could suffer a substantial impairment of a bodily function. If, however, the area is littered with broken glass or other sharp objects, it is reasonably predictable that an employee who tripped on debris could suffer deep cuts which could require suturing. If the area contains possible impalement hazards, serious injury to internal organs or broken bones could result.

For conditions involving exposure to air contaminants or harmful physical agents, the CSHO shall consider the

concentration levels of the contaminant or physical agent in determining the types of illness which could reasonably result from the condition. The Chemical Information table found in Appendix A of the IH Technical Manual shall be used to determine toxicological properties of substances listed as well as a Health Code Number. A preliminary violation classification shall be assigned in accordance with the instructions given in sections on violations.

- In order to support a preliminary classification of serious, VOSH must establish a prima facie case that exposure at the sampled level would, if representative of conditions to which employees are normally exposed, lead to illness.
- The CSHO must make every reasonable attempt to show that the sampled exposure is in fact representative of employee exposure under normal working conditions.

The CSHO shall, therefore, identify and record all available evidence which indicates the frequency and duration of employee exposure. Such evidence would include:

- (1) The nature of the operation from which the exposure results;
- (2) Whether the exposure is regular and on-going or of limited frequency and duration;
- (3) How long employees have worked at the operation in the past;
- (4) Whether employees are performing functions which are expected to continue;
- (5) Whether work practices, engineering controls, production levels and other operating parameters are typical or normal operations;

Where such evidence is difficult to obtain or where it is inconclusive, the CSHO shall estimate the frequency and duration from the evidence available. If the evidence indicates that it is reasonable to predict that regular, ongoing exposure could occur, the CSHO shall presume such exposure in determining the types of illnesses which could result from the violating condition. EXAMPLE: If an employee is exposed regularly to methylene chloride at 100 ppm, it is reasonable to predict that cancer could result.

EXAMPLE: If an employee is exposed regularly to acetic acid at 20 ppm, it is reasonable that the resulting illnesses would be irritation to eyes, nose and throat, or occupational asthma with chronic rhinitis and sinusitis.

- (c) **Step 3 - Death or Serious Physical Harm.** The CSHO shall determine whether the results of the injury or illness identified in Step 2 could include death or serious physical harm.
- (1) Serious physical harm is defined as impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional.
- (2) Serious physical harm can also be an illness that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body.
- (a) Injuries that constitute serious physical harm include, but are not limited to:
- Amputation (loss of all or part of an appendage);
 - Concussion;

- Crushing (internal, even if skin surface is intact);
- Fractures (simple or compound);
- Burns or scalds, including electric & chemical burns;
- Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing;
- Sprains and strains (usually involving hospitalization or multiple days away from work); and
- Musculoskeletal disorders.

(b) Illnesses that constitute serious physical harm include, but are not limited, to:

- Cancer;
- Respiratory illness (silicosis, asbestosis, byssinosis, etc.);
- Hearing impairment;
- Central nervous system impairment;
- Visual impairment; and
- Poisoning.

EXAMPLE: If an employee falls 15 feet to the ground, suffers broken bones or a concussion, and experiences substantial impairment of a part of the body requiring treatment by a medical doctor, the injury would constitute serious physical harm.

EXAMPLE: If an employee trips on debris and because of the presence of sharp debris or equipment suffers a deep cut to the hand requiring suturing, the use of the hand could be substantially reduced. This injury would be classified as serious.

EXAMPLE: An employee develops chronic beryllium disease after long-term exposure to beryllium at a concentration in air of 0.004 mg/m³, and his or her breathing capacity is significantly reduced. This illness would constitute serious physical harm.

NOTE: The key determination is the likelihood that death or serious harm will result IF an accident or exposure occurs. The likelihood of an accident occurring is addressed in penalty assessments and not by the classification.

- (d) **Step 4 - Employer Knowledge.** The CSHO shall determine whether the employer knew, or with the exercise of reasonable diligence, could have known, of the presence of the hazardous condition.
- (1) The knowledge requirement is met if it is determined that the employer actually knew of the hazardous condition which constituted the apparent violation. In this regard, a supervisor represents the employer and a supervisor's knowledge of the hazardous condition amounts to employer knowledge. Examples include situations where the employer or his representative saw the condition, an employee or employee representative reported it to the employer, or an employee was previously injured by the condition and the employer knew about the injury.
- (2) In cases where the employer may contend that a supervisor's own conduct constitutes an isolated event of employee misconduct, the CSHO shall attempt to determine the extent to which a supervisor was trained and supervised so as to prevent such conduct, and how the employer enforces the rule.
- (3) If, after reasonable attempts to do so, it cannot be determined that the employer has actual knowledge of the hazardous condition, the knowledge requirement is met if the CSHO is satisfied that the employer could have known through the exercise of reasonable diligence.

Examples of such evidence include:

- The violation/hazard was in plain view and obvious.

- The duration of the hazard was not brief.
- The employer failed to regularly inspect the workplace for readily identifiable hazards
- The employer failed to train and supervise employees regarding the particular hazard.

3. Other Issues When Classifying a Violation as Serious

Additional considerations for when to cite a violation as serious include:

- All General Duty Clause violations shall be classified as serious violations.
- Probability is not to be considered in determining whether a violation is serious, i.e., that death or serious physical harm could result from an accident or illness will occur.
- The violation classification need not be completed for each instance; only once for each full item, or, if items are grouped, once for the group.
- If the full item consists of multiple instances or grouped items, the classification shall be based on the most serious item.

C. General Duty Requirements. Section 40.1-51.1.A, Code of Virginia, requires that: “It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are likely to cause death or serious physical harm to his employees...” This shall only be used when there is no specific standard which is applicable to the recognized hazard.

1. Evaluation of Potential General Duty (§40.1-51.1.A.) Situations
Legal precedent has established that the following elements are necessary to prove a violation of the general duty clause:
 - a. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
 - b. The hazard was recognized;

- c. The hazard was causing or was likely to cause death or serious physical harm; and
 - d. There was a feasible and useful method to correct the hazard.
- 2. **Discussion of General Duty Elements (§40.1-51.1.A.).** The above four elements of a general duty standard violation are discussed in greater detail as follows:
 - a. **A Hazard to Which Employees Were Exposed.** A general duty citation must involve both a serious hazard and exposure of employees.
 - (1) **Hazard.** A hazard is a danger which threatens physical harm to employees.
 - (a) **Not the Lack of a Particular Abatement Method.** In the past, some general duty (§40.1-51.1.A.) citations have incorrectly alleged that the violation is the failure to implement certain precautions, corrective measures or other abatement steps rather than the failure to prevent or remove the particular hazard. It must be emphasized that general duty violations do not mandate a particular abatement measure but only require an employer to render the work place free of certain hazards by any feasible and effective means which the employer wishes to utilize. In situations where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the CSHO shall consult with the Regional Safety or Health Director for assistance in articulating the hazard properly.

Where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the Regional Safety or Health Director shall consult with the Program Director for assistance in describing the hazard properly.

EXAMPLE. Employees that are doing sanding operations may be exposed to the hazard of fire caused by sparking in the presence of magnesium dust.

One of the abatement methods may be engineering controls, such as adequate ventilation. The “hazard” is the exposure to the potential of a fire; it is not the lack of adequate ventilation.

EXAMPLE. A danger of explosion due to the presence of certain gases could be abated by the use of non-sparking tools. The hazard is the explosion danger due to the presence of the gases; it is not the lack of non-sparking tools.

EXAMPLE. In a hazardous situation involving high pressure gas where the employer does not have adequate work rules addressing the hazard, has not trained his employees properly, has not installed the proper high pressure equipment, or has improperly installed the equipment that is in place, there are three abatement measures which the employer failed to take; there is only one hazard (for example, exposure to the hazard of explosion due to the presence of high pressure gas) and hence, only one general duty clause citation. Where necessary, the Program Director shall consult with the DHLS Director.

- (b) The Hazard Is Not a Particular Accident.** The occurrence of an accident does not necessarily mean that the employer has violated the general duty clause although the accident may be evidence of a hazard. In some cases, a general duty violation may be unrelated to the accident. Although the accident facts may be relevant and shall be gathered, the citation shall only address the hazard in the workplace. The facts of the

accident shall be included only if they are relevant to the hazard cited.

EXAMPLE. A fire occurred in a workplace where flammable materials were present. No one was injured by the fire but an employee, disregarding the clear instructions of his supervisor to use an available exit, jumped out of a window and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard causing or likely to cause death or serious physical harm, but the action of the employee may be an instance of unpreventable employee misconduct. The citation shall address the underlying workplace fire hazard. Only include the accident/incident involving the employee if it is relevant to the hazard cited.

(c) The Hazard Must Be Reasonably Foreseeable.

The hazard for which a citation is issued must be reasonably foreseeable.

- (1) All the factors which could cause a hazard need not be present in the same place at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.

EXAMPLE: If a danger of explosion due to the presence of certain gases exists in one area of a plant, but non-sparking tools are used in that area so that there is no ignition source, no §40.1-51.1.A. violation would exist. If sparking tools are used in other areas of the plant and the employer has not taken sufficient safety precautions to preclude their use in the area in which non-sparking tools should be used, then a foreseeable hazard may exist.

- (2) It is necessary to establish the reasonable foreseeability of the general workplace hazard, rather than the particular hazard which led to the accident.

EXAMPLE: A titanium dust fire may have spread from one room to another only because an open can of gasoline was in the second room. An employee who usually worked in both rooms was burned in the second room from the gasoline. The presence of gasoline in the second room may be a rare occurrence. It is not necessary to prove that a fire in both rooms was reasonably foreseeable. It is necessary only to prove that the fire hazard, in this case, due to the presence of titanium dust, was reasonably foreseeable.

- (d) **The Hazard Must Affect the Cited Employer's Employees.** The employees exposed to the hazard for which a general duty violation is cited (§40.1-51.1.A. hazard) must be the employees of the cited employer.

- (1) An employer, under the General Duty Clause, is only cited for hazard exposure of his own employees. Therefore, an employer who may have created and/or controlled the hazard shall not be cited for a violation of §40.1-51.1(2), unless its own employees are exposed to the hazard.
- (2) In complex situations such as multi-employer worksites where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the Regional Safety or Health

Director shall consult with the DHLS to determine the sufficiency of the evidence regarding the employment relationship.

- (3) Whether exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays these employees may not be the determining factor. The fact that an employer denies that exposed employees are his employees does not necessarily decide the legal issue involved.

- (e) **The Hazard Must Be Recognized.** Recognition of a hazard can be established on the basis of industry recognition, employer recognition, or “common-sense” recognition. The use of commonsense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by satisfactory evidence and adequate documentation in the file as follows:

- (1) **Industry Recognition.** A hazard is recognized if the employer’s industry recognizes it. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a general duty standard violation. Although evidence of recognition by the employer’s specific branch within an industry is preferred, evidence that the employer’s industry recognizes the hazard may be sufficient. The CSHO shall consult with the Regional Safety or Health Director on this issue. Industry recognition of a particular hazard can be established in several ways:

- (a) Statements by industry safety or health experts which are relevant to the hazard.
- (b) Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry.
- (c) Manufacturer's warnings on equipment which are relevant to the hazard.
- (d) Statistical or empirical studies conducted by the employer's industry which demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees should also be considered if the employer or the industry has been made aware of them.
- (e) Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity.
- (f) State and local laws or regulations which apply in the jurisdiction in which the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended.

Regulations of Federal agencies other than OSHA or of State atomic energy agencies generally

shall not be used. They raise substantial difficulties under Section 4(b)(1) of the OSH Act, which provides that VOSH is preempted when such an agency has statutory authority to deal with the working condition in question.

In cases where state and local government agencies have codes or regulations covering hazards not addressed by VOSH standards, the DHLS shall determine whether the hazard is to be cited under a §40.1-51.1.A general duty violation or referred to the appropriate local agency for enforcement.

EXAMPLE: A safety hazard on a personnel elevator in a factory may be documented during an inspection. It is determined that the hazard is not clearly covered under §40.1-51.1.A., but there is a local code which addresses this hazard and a local agency actively enforces the code. The situation shall normally be referred to the local enforcement agency in lieu of citing §40.1-51.1.A.

- (g) Standards issued by the American National Standards Institute (ANSI), the National Fire Protection Agency (NFPA), and other private standard-setting organizations, if the relevant industry participated on the committee drafting the standards. Otherwise, such private standards

shall normally be used only as corroborating evidence of recognition. Preambles to these standards which discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. It must be emphasized, however, that these private standards cannot be enforced like VOSH standards. They are simply evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.

- (h) NIOSH criteria documents; the publications of EPA, the National Cancer Institute, and other agencies; OSHA hazard alerts; the IHFOM; and articles in medical or scientific journals by persons other than those in the industry, if used only to supplement other evidence which more clearly establishes recognition. Such publications can be relied upon only if it is established that they have been widely distributed in general, or in the relevant industry.

- (2) **Employer Recognition.** A recognized hazard can be established by evidence of actual employer knowledge. Evidence of such recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the VOSH inspection, or instances where employees have clearly called the hazard to the employer's attention.

- (a) Company memoranda, safety rules, operating manuals or operating procedures and collective bargaining agreements may reveal the employer's awareness of the hazard. In addition, accident, injury and illness reports prepared for VOSH or OSHA, Worker's Compensation, or other purposes, Industrial Insurance, or other purposes, may show this knowledge.
- (b) Employee complaints or grievances to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.
- (c) Employer awareness may be demonstrated by prior VOSH, federal OSHA, or other State Plan inspection history which involved the same hazard.
- (d) The employer's own corrective action may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford any significant protection to the employees.

(3) **Common-Sense Recognition.** If industry or employer recognition of the hazard cannot be established in accordance with (1) and (2), recognition can still be established if it is concluded that any reasonable person would have recognized the hazard. This theory of

recognition shall be used only in flagrant cases.

EXAMPLE: In a general industry situation, a court has held that any reasonable person would recognize that it is hazardous to dump bricks from an unenclosed chute into an alleyway between buildings which is 26 feet below and in which unwarned employees work. (In construction, the general duty violation could not be cited in this situation because §1926.252 or §1926.852 applies.)

- (f) **The Hazard Was Causing or Was Likely to Cause Death or Serious Physical Harm.** This element of a general duty standard violation is identical to the elements of a serious violation. Serious physical harm is defined in this chapter. This element of a general duty standard violation (§40.1-51.1.A. hazard) can be established by showing that:

- (1) An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or
- (2) If an accident occurred, the likely result would be death or serious physical harm.

EXAMPLE. An employee is standing at the edge of an unguarded piece of equipment 25 feet above ground. Under these circumstances, if the falling incident occurs, death or serious physical harm (i.e., broken bones), is likely.

- (3) In a health context, establishing serious physical harm at the cited levels may be particularly difficult if the illness will

require the passage of a substantial period of time to occur. Expert testimony is crucial to establish that serious physical harm will occur for such illnesses. It will generally be easier to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. To establish that the hazard causes or is likely to cause death or serious physical harm when such illness or death will occur only after the passage of a substantial period of time, the following must be shown:

- (a) Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels reasonably could occur;
- (b) Illness reasonably could result from such regular and continuing employee exposure; and
- (c) If illness does occur, its likely result is death or serious physical harm.

(g) The Hazard Can Be Corrected by a Feasible and Useful Method.

- (1) To establish a general duty violation the Department must identify a method which is feasible, available and likely to correct the hazard. The information shall indicate that the recognized hazard, rather than a particular accident, is preventable.
- (2) If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a duty general citation may be issued.

A citation shall not be issued merely because the Department knows of an abatement method different from that of the employer, if the Department's method would not reduce the hazard significantly more than the employer's method. It must also be noted that in some cases only a series of abatement methods will alleviate a hazard. In such a case all the abatement methods shall be mentioned.

- (3) Feasible and useful abatement methods can be established by reference to:
- (a) The employer's own abatement method which existed prior to the inspection but was not implemented;
 - (b) The implementation of feasible abatement measures by the employer after the accident or inspection;
 - (c) The implementation of abatement measures by other companies;
 - (d) The recommendations by the manufacturer of the hazardous equipment involved in the case; and
 - (e) Suggested abatement methods contained in trade journals, private standards and individual employer standards. Private standards shall not be relied on in a general duty citation as mandating specific abatement methods.

EXAMPLE: If an ANSI standard deals with the hazard of exposure to hydrogen sulfide gas and refers

to various abatement methods, such as the prevention of the buildup of materials which create the gas and the provision of ventilation, the ANSI standard may be used as evidence of the existence of feasible abatement measures.

The citation for the example given shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a feasible and useful abatement method existed; e.g., preventing the buildup of gas by providing an adequate ventilation system. It would not be correct to issue a citation alleging that the employer failed to prevent the buildup of materials which could create the gas and failed to provide a ventilation system as both of these are abatement methods, not hazards.

- (f) Evidence provided by expert witnesses which demonstrates the feasibility of the abatement methods. Although it is not necessary to establish that the industry recognizes a particular abatement method, such evidence shall be used if available.

3. Limitations On Use of a General Duty Clause. The General Duty Clause may be applied in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard.

All General Duty Clause violations shall be cited as serious.

The General Duty Clause may be applicable to some types of employment which are inherently dangerous (fire brigades, emergency rescue operations, etc.). Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards which are likely to cause death or serious physical harm. These steps include anticipating hazards which may be encountered, providing appropriate protective equipment, and providing training, instruction, and necessary equipment. An employer who has not taken appropriate steps on any of these or similar items and has allowed the hazard to continue to exist may be cited under the general duty clause (if not covered under a standard).

- a. **General Duty Clause, §40.1-51.1.A., Shall Not Be Used When an Alternate Standard Applies.** Legal precedent establishes that general duty violations may not be used if a VOSH standard applies to the hazardous working condition.

EXAMPLE. A hazard covered only partially by a standard would be construction employees exposed to a collapse hazard because of a failure to properly install reinforcing steel. Construction standards contain requirements for reinforcing steel in wall, piers, columns, and similar vertical structures, but do not contain requirements for steel placement in horizontal planes, e.g., a concrete floor. A failure to properly install reinforcing steel in a floor in accordance with industry standards and/or structural drawings could be cited under the general duty clause.

EXAMPLE. General Duty shall not be cited for electrical hazards as §1910.303(b) and §1926.403(b) require that electrical equipment is to be kept free from recognized hazards that are likely to cause death or serious physical harm to employees.

- (1) **Review of Existing Standards.** Prior to issuing a general duty citation, VOSH standards must be reviewed carefully to determine whether an existing VOSH standard applies to the hazard. If a standard applies, the standard shall be cited rather than general duty. Prior to

the issuance of a general duty standard citation, a notation shall be made in the file to indicate that the standards were reviewed and no other standard applies.

- (2) **Consultation.** If there is a question as to whether another standard applies, the CSHO shall consult with the Regional Safety or Health Director.
- (3) **When to Cite General Duty, in the Alternative.** General Duty may be cited in the alternative when a standard is also cited to cover a situation where there is doubt as to whether the standard applies to the hazard. Before citing in the alternative, the Regional Safety or Health Director shall consult with the appropriate Program Director and the DHLS.
 - (a) If, in a subsequent informal conference or notice of contest proceeding, an employer questions whether the specific standard, cited in the alternative, applies to the situation, the Regional Safety or Health Director. The Director shall refer the matter to the DHLS and the Assistant Attorney General for appropriate legal advice.
 - (b) When the employer raises the issue of the preemption of the general duty clause by the cited standard in a subsequent informal conference or notice of contest proceeding, the Regional Safety or Health Director shall follow the same procedure as above.
- b. **Grouping.** General Duty standard violations shall not generally be grouped together, but may be grouped with a related violation of a specific standard.
- c. **Strictness of Standard.** General Duty §40.1-51.1.A. of the Code of Virginia shall not normally be used to impose a stricter requirement than that required by the other standard.

EXAMPLE. If the standard provides for a permissible exposure limit (PEL) of 5 ppm, even if data establishes that a 3 ppm level is a recognized hazard, a General Duty violation shall not be cited to require that the 3 ppm level be achieved unless the limits are based on different health effects. If the standard has only a time-weighted average permissible exposure level and the hazard involves exposure above a recognized ceiling level, the CSHO shall consult with the Regional Safety or Health Director, who shall discuss any proposed citation with the applicable Safety or Health, Program Director and the DHLS.

Note: An exception to this rule may apply if it can be documented that “an employer knows a particular safety or health standard is inadequate to protect his workers against the specific hazard it is intended to address.” *International Union, U.A.W. v. General Dynamics Land Systems Div.*, 815 F.2d 1570 (D.C. Cir. 1987). Such cases shall be subject to pre-citation review.

- d. **Abatement Methods.** General Duty violations shall normally not be used to require an abatement method not set forth in a specific standard. If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, general duty, or §40.1-51.1.A. of the Code of Virginia shall not be cited to require medical surveillance.
- e. **“Should” Standards.** General Duty violations §40.1-51.1.A. of the Code of Virginia shall not be used to enforce “should” standards. If a reference standard or its predecessor, such as an ANSI standard, uses the word “should,” neither the standard nor safe place shall ordinarily be cited with respect to the hazard addressed by the “should” portion of the standard.
- f. **Hazards Exempted by a Standard.** Section 40.1-51.1.A. shall not normally be used to cover categories of hazards exempted by a standard. If, however, the exemption is in place because the drafters of the standard (or source document) declined to deal with the exempt category for reasons other than the lack of a hazard, a General Duty standard may be cited if all the necessary elements for such a citation are present.

- g. Citing a General Standard, or alternative standard.** There are a number of general standards which shall be considered for citation rather than the General Duty clause, or §40.1-51.1.A., in certain situations which initially may not appear to be governed by a standard.
- (1) If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard shall be cited. In general industry, §1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE. In construction, §1926.28(a) may be applicable.
 - (2) For a health hazard, the particular toxic substance standards, such as asbestos and coke oven emission, shall be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in §1910.1000 may apply in general industry and §1926.55 may apply in construction.
 - (3) Another standard which may possibly be cited is §1910.134(a) which deals with the hazards of breathing harmful air contaminants not covered under §1910.1000 or another specific standard.
 - (4) In addition, §1910.141(g)(2) may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and §1910.132(a) may be cited when toxic materials are absorbed through the skin.
 - (5) The foregoing standards as well as others which may be applicable shall be considered carefully before issuing a general §40.1-51.1.A. citation for a health hazard.

- h. Pre-Citation Review.** The Regional Safety or Health Director shall ensure that all proposed §40.1-51.1.A. citations undergo pre-citation review as follows:

 - (1) The Regional Safety or Health Director shall review the case file prior to the issuance of all §40.1-51.1.A. citations to ensure that all elements required in this chapter are included and that the case file is complete. The Regional Safety or Health Director shall also review the file and forward it to the Program Director for a decision on whether to issue the citation. The DHLS will review the case to ensure that it is legally supportable.
 - (2) If a standard does not apply and all criteria for issuing a §40.151.1.A. citation are not met but the Regional Safety or Health Director determines that the hazard justifies some type of notification, a letter describing the hazard and suggesting corrective action shall be sent to the employer and the employee representative.
- i. Classification of General Duty, Violations.** Only those hazards alleging serious violations may be cited under a general duty standard. This includes willful and/or repeated violations which would otherwise qualify as serious violations, except for their willful or repeated nature.
- j. Justification of General Duty Citations.** To ensure that all citations of a general duty standard are fully justified, the evidence necessary to establish each element of a general duty violation shall be documented in the file. This includes all photographs, videotapes, sampling data, witness statements and other documentary and physical evidence necessary to establish the violation. Additional documentation includes why it was common knowledge, why it was detectable, why it was recognized practice and supporting statements or reference materials.

 - (1) If copies of documents relied on to establish the various general duty elements cannot be obtained before issuing

the citation, these documents shall be accurately quoted and identified in the file so they can be obtained later, if necessary.

- (2) If experts are needed to establish any elements of the violation, the experts shall be consulted before the citation is issued and their opinions noted in the file. The file shall also contain their addresses and telephone numbers.
- (3) The file shall contain a statement that a search has been made of the standards and that no standard applies to the cited condition.
- (4) Reporting General Duty Violations Not Covered by a Standard. The Regional Safety or Health Director shall evaluate all alleged general duty clause violations to determine whether they should be referred to the Virginia Safety and Health Codes Board or federal OSHA for the development of new or revised standards. Those violations considered candidates for development or revision of a standard shall be forwarded through the Program Director to the Commissioner.

D. Willful Violations. The CSHO should look carefully at all violations for elements of willfulness. The following definitions and procedures apply whenever the CSHO suspects that a willful violation may exist:

1. Intentional Violation or Plain Indifference

A willful violation exists under the Labor Laws of Virginia where the evidence shows either an intentional violation of the Labor Laws of Virginia or plain indifference to its requirements.

- a. Intentional and Knowing.** The employer committed an intentional and knowing violation if at least one of the following occurs:

(1)	An employer representative was aware of the requirements of the Labor Laws of Virginia, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements, and did not abate the hazard.

OR

(2)	An employer representative was not aware of the requirements of the Labor Laws of Virginia or standards, but was aware of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement, and did not abate the hazard.

NOTE: Good faith efforts made by the employer to minimize or abate a hazard may sometimes preclude the issuance of a willful violation, although a serious, repeat or other-than-serious violation may still issue. In such cases, CSHOs should consult with the Regional Safety or Health Director and the DHLS.

OR

(3)	A willful citation may be issued where an employer knows the specific steps that must be taken to address a hazard, but substitutes its own judgment for the requirements of the standard. EXAMPLE: Repeated issuance of citations that address the same or similar conditions.

- b. Plain Indifference.** The employer committed a violation with plain indifference to the law where at least one of the following occurs:

(1)	Management officials were aware of a VOSH requirement applicable to the company's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

OR

- (2) Company officials were aware of a continuing compliance problem but made little or no effort to avoid violations.
EXAMPLE. The employer is aware of the existence of unguarded power presses that have caused near misses, lacerations and/or amputations in the past and does nothing to abate the hazard.

OR

- (3) An employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives.

OR

- (4) In particularly flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if he or she had possessed it.
EXAMPLE. An employer sends employees into a deep unprotected excavation containing a hazardous atmosphere without ever inspecting for potential hazards.

2. **Evil or Malicious Intent Is Not Necessary.** It is not necessary that the violation be committed with a malicious purpose or an evil intent to be deemed “willful.” It is sufficient that the violation was deliberate, voluntary or intentional as

distinguished from inadvertent, accidental or ordinarily negligent.

3. **Evidence Indicating Willfulness.** The CSHO shall carefully develop and record in the file during the inspection, all evidence available that indicates employer awareness of and the disregard for statutory obligations or of the hazardous conditions. Willfulness could exist if an employer is advised by employees or employee representatives of an alleged hazardous condition and the employer makes no reasonable effort to verify and correct the condition. Additional factors which can influence a decision as to whether violations are willful include:
- a. The nature of the employer's business and the knowledge regarding safety and health matters which could reasonably be expected in the industry.
 - b. The precautions taken by the employer to limit the hazardous conditions.
 - c. The employer's awareness of the Labor Laws of Virginia and of the responsibility to provide safe and healthful working conditions.
 - d. Whether similar violations and/or hazardous conditions have been brought to the attention of the employer.
 - e. Whether the nature and extent of the violations disclose a purposeful disregard of the employer's responsibility under the Act. It is important to distinguish between the type of "knowledge" required to prove a serious violation, and the "knowledge" required for a willful violation.

For a serious violation, it is only necessary to prove that the employer knew or reasonably should have known of the hazard and employee exposure to the hazard. For example, in a typical trenching case, this would merely involve knowledge by the employer that they were engaged in the type of work which would require a certain type of trench to be dug, and knowledge that

employees would at some point have to enter that trench.

On the other hand, the “knowledge” factor to prove a willful violation requires proof that the employer knew or reasonably should have known that violations of the rules would be taking place or acted in reckless disregard to whether violations of the rules would be taking place. Using the above example of a trenching case, this would involve not only knowledge that a trench was being dug, and that employees would be entering the trench, but also knowledge that there was either inadequate shoring or lack of a trench box, etc. as required by the standard.

4. **Willful-serious Violations.** Willful violations involving a substantial probability of death or serious bodily injury (i.e., but for the “willful” nature of the violation, it would have been classified as “serious”) may not be combined or grouped. Grouping of several “willful” other-than-serious violations is permitted where it would result in a single “willful” violation (and single penalty) that created a substantial probability of death or serious physical harm.

- E. **Criminal/Willful Violations.** Section 40.1-49.4.K, Code of Virginia, provides that, “Any employer who willfully violates any safety or health provisions of this title or standard, rules or regulations adopted pursuant thereto, and that violation causes death to any employee, shall, upon conviction, be punished by a fine of not more than \$70,000 or by imprisonment for not more than six months, or by both such fine and imprisonment. If the conviction is for a violation committed after a first conviction or such person, punishment shall be a fine of not more than \$140,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.”

1. **Evaluation of All Willful, Potentially Criminal Cases**

The Regional Safety or Health Director shall carefully evaluate all willful cases involving worker deaths to determine whether they may involve criminal violations. Because the nature of the evidence available is of paramount importance in an investigation of this type, there shall be early and close liaison between the CSHO, the Regional Safety or Health Director, the applicable Program Director and the

DHLS in developing any finding which might involve a Criminal/Willful violation.

2. Establishment of Criminal/Willful

The following criteria shall be considered in investigating possible criminal/willful violations:

- a. **Required Elements.** To establish a criminal/willful violation, the CSHO must prove all three elements:

(1) The employer violated a VOSH standard and/or §40.1-51.1.A. of the Code of Virginia;

AND

(2) The violation was willful in nature;

AND

(3) The violation of the standard caused the death of an employee. In order to prove that the violation of the standard caused the death of an employee, there must be evidence in the file which clearly demonstrates that the violation of the standard was the cause of or a contributing factor to an employee's death.

3. **Investigation of Criminal Willful Situations.** The difficulty of prosecuting a criminal willful violation, because of the higher burden of proof, requires special investigative techniques. To identify the persons involved who may be subject to prosecution, the CSHO shall determine who had control over the worksite and over the employees.

- a. Questions which should be asked to determine who had control over the worksite include:
- (1) Who had power to stop work on the site or in a particular area of the site?
 - (2) Who had power to correct safety violations?
 - (3) Who had the power to sign company checks to purchase goods, services or equipment to be used on the site?

- (4) Who could direct the work of subcontractors?
- (5) Who was responsible for assuring safe work practices by subcontractors?
- (6) Did any of the persons involved hold corporate level positions?

b. Questions which should be asked in order to determine who had control over the employees on the site include:

- (1) Who had power to hire workers for the worksite?
- (2) Who had power to fire workers on the worksite?
- (3) Who could change terms of employment for workers (i.e., move them to different jobs, increase or decrease their pay, promote or demote the workers, etc.)?
- (4) Who had power to direct work on the site?
- (5) Who had power to approve time sheets approve pay and sign the workers' checks?
- (6) Who was responsible for assuring safe work practices on the site for company employees?
- (7) Who had the authority to discipline employees for safety or other work rule violations?

3. **Evaluation.** The Regional Safety or Health Director, in coordination with the applicable Program Director, the DHLS and the Assistant Attorney General shall carefully evaluate all cases involving workers' deaths to determine whether they involve a criminal violation of §40.1-49.4.K, Code of Virginia.

Note: For all fatalities, the possibility of a manslaughter prosecution exists. See definitions and procedures involved in manslaughter investigations.

4. **Regional Safety or Health Director Responsibilities**

In regard to the necessity of issuance of "Miranda" warnings to an employer when a Criminal/Willful investigation is in progress, the situation would have to be one where the person being interviewed understands or perceives that they have been placed either in custody or in a custodial situation by police. Only the police have the authority to "Mirandize" criminal suspects or individuals in custody.

For the purposes of the CSHO conducting an investigation, the question of whether or not Miranda warnings have been issued to an individual would depend on whether an actual law enforcement officer was present during the CSHO's interview. In such circumstances, the Regional Safety or Health Director shall seek the advice of the DHLS on this question who shall consult with the Assistant Attorney General.

- a. When a jobsite fatality occurs, the CSHO and Regional Safety or Health Director shall follow the procedures for fatalities and significant case review.
- b. The Regional Safety or Health Director shall immediately telephone local law enforcement officials and the applicable Program Director to inform them of the fatality and VOSH's ongoing investigation. The DHLS will contact the Commonwealth's Attorney.
- c. If the Regional Safety or Health Director determines that expert assistance is needed to provide the causal connection between an apparent violation of the standard and the death of an employee, such assistance shall be obtained in accordance with instructions.

5. Procedures

- a. If the CSHO determines that a willful violation of VOSH law and regulations has resulted in a fatality, he shall immediately notify the Regional Safety or Health Director who shall notify the applicable Program Director, the DHLS and the Commissioner.
- b. If the evidence supports a criminal violation of VOSH laws and regulations under the definitions set out, the Program Director shall consult with the DHLS, the Assistant Attorney General and the Commissioner to determine whether a criminal investigation is appropriate. At the direction of the Commissioner, the Regional Safety or Health Director or the Legal Support staff shall immediately consult with the Commonwealth's Attorney.
- c. After this determination is made, all further investigation shall be coordinated with local law enforcement officials. The Commonwealth's Attorney may determine the type and scope of investigatory procedures. Once the Commonwealth's Attorney is involved in the investigation, the CSHO shall not conduct any further questioning of the principals without prior consultation with the Commonwealth's Attorney and the Legal Support staff.
- d. When the investigation is completed, the DHLS and the applicable Safety or Health Program Director shall review the case and suggest an appropriate course of action to the Commissioner. The Commissioner, on review of the case file, shall recommend a course of action to the Commonwealth's Attorney.

- e. If the Commonwealth's Attorney determines that prosecution is warranted, the CSHO and the DHLS staff, at the direction of the Attorney General's Office and the Commissioner, shall provide the Commonwealth's Attorney with all requested support.
- f. When a willful violation is related to a fatality, the Safety or Health Director shall ensure that the case file contains documentation regarding the decision NOT to make a criminal referral. The documentation should indicate which elements of a criminal violation make the case unsuitable for criminal referral.
For example, the case file documentation could state that, "the evidence gathered for a specific criminal/willful element did not meet the greater burden of proof for criminal prosecution."

F. Repeated Violations. An employer may be cited for a repeated violation if that employer has been cited previously for a substantially similar condition and the citation has become a final order. All repeated violations must be cited based on the nature of the hazardous condition, not just the code being cited. Repeated violations shall be cited regardless of the previous modification of an earlier violation.

1. Identical Standard

Generally, similar conditions can be demonstrated by showing that in both situations the identical standard was violated.

EXAMPLE. Previously a citation was issued for a violation of §1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of §1910.132(a) for not requiring the use of head protection, i.e., hard hats. Although the same standard was involved, the hazardous conditions found were not substantially similar, therefore a repeated violation would not be appropriate.

2. Different Standards

In some circumstances, similar conditions can be demonstrated when different standards are violated. Although there may be different standards involved, the hazardous conditions found could be substantially similar and therefore a repeated violation would be appropriate.

EXAMPLE. A citation was previously issued for a violation of §1910.28(d)(7) for not installing standard guardrails on a tubular welded frame scaffold platform. A recent inspection of the same establishment reveals a violation of §1910.28(c)(14) for not installing guardrails on a tube and coupler scaffold platform. Although there are different standards involved, the hazardous conditions found were substantially similar, and therefore citing a repeated violation would be appropriate.

3. When to Issue a Repeated Violation

a. **Time Limitations.** A citation will be issued as a repeated violation if the following apply:

- (1) The citation is issued within three (3) years of the final order of the previous citation, or,
- (2) The citation is issued within three (3) years of the final abatement date of that previous citation, whichever is later.

EXAMPLE. A programmed inspection is conducted on 16 December 2012. A serious hazard is found and cited. Although the employer corrects the hazard at the time of inspection, and the CSHO witnesses the correction, the employer appeals the citation. An unprogrammed inspection is conducted on 17 January 2013.

The CSHO finds a violation involving the same hazard which the employer had previously corrected.

Because the original violation is still under appeal, a repeated violation will not be issued. If the employer had not appealed the original violation, it would be a final order and a repeated violation would be issued.

b. **Second Instance Repeated.** When a violation is found during an inspection, and a repeated citation has been issued for a substantially similar condition which meets the above time limitations, the violation may be classified as a second instance repeated violation.

EXAMPLE: An inspection is conducted 17 February 2011, and a violation of a particular standard is found. On 09 October 2009, a repeated violation of the same standard was cited. The violation found on 17 February 2011 may be cited as a second repeated violation.

- c. **Multiple Repeated.** If an employer is cited three (3) times for a violation within three (3) years of the date of issuance of a Citation and Notice of Penalty, the violation will be treated as a significant case. The case shall be prepared and reviewed as such. It may also be cited as willful, if appropriate, and after review by the Division of the Legal Support.

4. Employers with Multiple Establishments or Operations

- a. **No Instance of Statewide Repeated Violations.** Employers with multiple establishments or operations, statewide or across VOSH regional boundaries, or without a fixed site of business, may not be cited for statewide repeated violations where the violations occur in different VOSH Regional Office jurisdictions.
- b. **Multi-Facility Employer Within a VOSH Region.** A multi-facility employer shall be cited for a repeated violation if the violation occurred at any worksite within the same VOSH Regional Office jurisdiction.

EXAMPLE: Where the construction site extends over a large area and/or the scope of the job is unclear (such as road building), that portion of the workplace specified in the employer's contract which falls within the Region Office jurisdiction is the establishment. If an employer has several worksites within the same Region Office jurisdiction, a citation of a violation at Worksite "A" in the region will serve as the basis for a repeated citation at Worksite "B" in the same region.

- 4. **Joint Ventures.** When several parent companies go together in a "joint venture" to contract or complete a project, the joint venture becomes a separate entity, different from each of the parent companies. Violations cited against the joint venture will be considered only against previous citations issued against the joint venture to be considered a repeat. Parent companies involved in joint ventures are not subject to violations of the joint venture.
- 5. **Repeated vs. Willful.** Repeated violations differ from willful violations in that they may result from an inadvertent, accidental or ordinarily negligent act. A willful violation need not be one for which the employer has been previously cited. Where a

repeated violation also meets the criteria for willful, the violation shall be cited as willful.

6. **Repeated vs. Failure to Abate.** Repeated violations are also to be distinguished from a failure to abate. If during a later inspection a violation of a previously cited standard is found, but such violation does not involve the same piece of equipment or the same location within an establishment or worksite, the violation may be a repeated one. If during a later inspection a violation of a previously cited standard is found on the same piece of equipment or in the same location and the evidence indicates that the violation has continued uncorrected since the original inspection, there has been a failure to abate. If, however, the violation was not continuous; i.e., if it had been corrected and reoccurred, the subsequent reoccurrence is a repeated violation. Where there is no evidence or documentation available to determine whether the violation has continued uncorrected, or whether it has been corrected and subsequently reoccurred, it shall be cited as a repeated violation. (For more information refer to Chapter 3, Program Planning, regarding follow-up and monitoring inspections, and Chapter 13, Abatement Verification)

8. **Alleged Violation Description (AVD).** If a repeated citation is issued, the CSHO must ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation. The AVD should reference the date of issuance of the previously cited standard as well as the final order date for that violation.

For example, following the AVD state appropriate language such as:

[Employer Name or Establishment Name] was previously cited for a substantially similar violation of this Virginia Occupational Safety and Health (VOSH) regulation [insert previously cited regulation], which was contained in VOSH inspection number _____, citation number _____, item number _____ and was affirmed as a final order of the Commissioner on [insert the date], with respect to a workplace located at _____.

- G. **De Minimis Violations.** De minimis violations are violations of standards which have no direct or immediate relationship to safety or health. CSHOs identifying de minimis violations of a VOSH standard shall not issue a citation for that violation, but should verbally notify the employer and make a note of the situation in the inspection case file. The criteria for classifying a violation as de minimis are as follows:

1. **Employer Complies with Clear Intent of Standard**

An employer complies with the clear intent of the standard but deviates from its particular requirements in a manner that has no direct or immediate relationship to employee safety or health. These deviations may involve distance specifications, construction material requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations, or the like.

EXAMPLE: Section 1910.27(1)(ii) allows 12 inches (30 centimeters) as the maximum distance between ladder rungs. Where the rungs are 13 inches (33 centimeters) apart, the condition is de minimis.

EXAMPLE: Section 1910.28(a)(3) requires guarding on all open sides of scaffolds. Where employees are tied off with safety belts in lieu of guarding, often the intent of the standard will be met, and the absence of guarding may be de minimis.

EXAMPLE: Section 1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

3. **Employer Complies with Proposed Standard.** An employer complies with a proposed standard or amendment or a consensus standard rather than with the standard in effect at the time of the inspection and the employer's action clearly provides equal or greater employee protection or the employer complies with a written interpretation issued by OSHA or VOSH.
4. **Employer Technically Exceeds Standard.** An employer's workplace is at the "state of the art" which is technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

Note: Maximum professional discretion must be exercised in determining the point at which noncompliance with a standard constitutes a de minimis violation.

III. Violations of Standards Requiring Special Documentation

A. Violations of the Abatement Verification Standard

Under the provisions of §307 in the VOSH Administrative Regulation Manual, employers are required to certify in writing when and how all cited violations have been abated.

The standard also includes requirements for employee notification, and for tagging moveable equipment that is related to a violation. (See also Chapter 13, Abatement Verification.)

1. Employer Requirements to Tag Moveable Equipment

Only equipment, whether hand-held or not, which is moved within the worksite or between worksites is required to be tagged. The tag is intended to provide an interim form of protection to employees through notification for those who may not have knowledge of the citation or the inherent hazardous condition. CSHOs should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to enforcement of the tagging requirement of §307 of the VOSH Administrative Regulation Manual because the tagging provision is triggered upon movement of the equipment.

The employer, and not the CSHO, shall apply the tags to any equipment. This is an employer's responsibility.

- 2. Evidence of Tagging Violations.** Tag-related citations must be observed by a CSHO before a citation is issued for failure to initially tag cited moveable equipment. VOSH must be able to prove the employer's initial failure to act (tag the moveable equipment upon receipt of the citation). Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited moveable equipment, a citation may be issued for failure to maintain the tag.

- 3. Employee Notification Violations.** Like tag-related citations, evidence of an employer's failure to notify employees of abatement activity by posting must be obtained at the worksite.

Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees the employer may post the abatement activity document(s) or a summary of the document(s) in a location where it will be readily observable by affected employees and their representatives or may otherwise communicate fully with affected employees and their representatives about abatement activities.

The CSHO must determine not only whether the document(s) or summaries were appropriately posted, but also whether as an alternative, other communication methods such as meetings or employee publications were used.

- B. Citation of Ventilation Standards.** In cases where a ventilation standard citation may be appropriate, consideration shall be given to standards intended to control exposure to recognized hazardous levels of air contaminants, to prevent fire or explosions, or to regulate operations which may involve confined space or specific hazardous conditions.

In applying these standards, the following guidelines shall be observed:

1. Health-Related Ventilation Standards

An employer is considered in compliance with a health-related airflow ventilation standard when the employee exposure does not exceed appropriate airborne contaminant standards; e.g., the PELs prescribed in §1910.1000.

- a. Where an overexposure to an airborne contaminant is detected, the appropriate feasible administrative or engineering control shall be required; e.g., §1910.1000(e). In no case shall citations of this standard be issued for the purpose of requiring specific volumes of air to ventilate such exposures.
- b. Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. Where a specific standard has been violated and an actual or potential hazard has been documented, a citation shall be issued.

- 2. Fire-and Explosion-Related Ventilation Standards.** Although they are not technically health violations, the following guidelines shall be observed when citing fire- and explosion-related ventilation standards:

- a. **Adequate Ventilation.** In the application of fire-and explosion-related ventilation standards, VOSH considers that an operation has adequate ventilation when both of the following criteria are met:
 - (1) The requirement of the specific standard has been met.
 - (2) The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

EXCEPTION: Certain standards specify violations when 10 percent of the LEL is exceeded. These standards are found in maritime and construction exposures.

- a. **Citation Policy.** If 25 percent (10 percent when specified for maritime or construction operations) of the LEL has been exceeded and:

- (1) The standard requirements have not been met, the standard violation normally shall be cited as serious.
- (2) There is no applicable specific ventilation standard; §40.151.A., of the Code of Virginia shall be cited in accordance with the guidelines given.

3. **Special Conditions Ventilation Standards.** The primary hazards in this category are those resulting from confined space operations and welding. (See Program Directives on Confined Space, 02-065C and 02-062A, or their successors.)

- C. **Violations of the Noise Standard.** Current enforcement policy regarding §1910.95(b)(1) may allow employers to rely on personal protective equipment and a hearing conservation program rather than engineering and/or administrative controls when employee exposure to noise is no higher than 95 dBa, or a dose of 200%. Professional judgment is necessary to supplement the general guidelines provided here. In cases where deviations from these guidelines seem to be warranted, the Regional Safety or Health Director will consult with the Health Program Director.

1. **Citing the Standard.** Citations for violation of §1910.95(b)(1) shall be issued when: exposure levels exceed 95 dBa for an eight hour time weighted average (TWA); engineering controls or administrative controls are feasible, both technically and economically; and these controls will achieve at least a 3 dBa reduction.

Note: See guidelines on technical and economic feasibility. The Health Program Director can provide additional information on engineering control costs and technological feasibility when requested by the Regional Safety or Health Director.

2. **Ongoing Testing Program.** For levels from 90 dBa up to and including 95 dBa, a control is not reasonably necessary when an employer has an ongoing hearing conservation program and had the results of audiometric testing indicate that existing controls and hearing

protectors are adequately protecting employees. In making this decision, such factors as exposure levels, the number of employees tested, and the duration of the testing program shall be taken into consideration.

3. **No Ongoing Testing Program.** When employee noise exposures are less than 95 dBa, but the employer does not have an ongoing hearing conservation program, or the results of audiometric testing indicate that the employer's existing program is not working, citations §1910.95(c)-(n) are appropriate. The CSHO shall consider whether:
- a. Reliance on an effective hearing conservation program would be less costly than engineering or administrative controls.
 - b. An effective hearing conservation program can be established, or improvements can be made, in an existing hearing conservation program which could bring the employer into compliance with Tables G-16 or G-16a.
 - c. Engineering or administrative controls are both technically and economically feasible.

4. **Comparing Attenuation.** When comparing the degree of attenuation of personal protectors and engineering or administrative controls, all of the following factors in addition to the guidelines in the VOSH Industrial Hygiene Technical Manual must be considered and documented in the case file:

- a. **Hearing Protection.** Personal hearing protection must attenuate the occupational noise received by the employee's ears to within the levels specified in §1910.95(c)(1). Hearing protectors shall be evaluated for the purpose of analyzing the benefits of administrative or engineering controls in accordance with Appendix B of §1910.95.
- b. **Employee Noise Reduction by Controls.** Feasible engineering or administrative controls may only be required if a significant noise reduction can be achieved. An anticipated reduction in employee noise exposure is significant if at least a 3 dBa decrease is achieved by one or a combination of the following:
 - (1) Source controls;
 - (2) Control of industrial environment, e.g., barriers, enclosure, etc.
 - (3) Administrative controls.
- c. **Control Options.** When evaluating control options for the purpose of this instruction, consider all types of abatement possibilities such as the following:
 - (1) **Partial Use of Controls.** It may be beneficial to implement some of the controls while forgoing more costly ones.

- (2) **Substitution.** Abatement plans may include replacing process equipment with quieter equipment that will significantly reduce exposure levels and make interim engineering controls for existing machinery impractical.
5. **Classification as Serious.** When hearing protection is required but not used and employee exposure exceeds the limits of Table G-16, §1910.95(i)(2)(i) shall be cited and classified as serious whether or not the employer has instituted a hearing conservation program. Section 1910.95(a) shall no longer be cited, except in the case of the oil and gas drilling industry.
Note: Citations of §1910.95(i)(2)(ii)(b) shall also be classified as serious.
6. **Hearing Program Violation.** If an employer has instituted a hearing conservation program and a violation of the hearing conservation amendment is found (other than §1910.95(i)(2)(i) or (i)(2)(ii)(b)), a citation shall be issued if employee noise exposure equals or exceeds an 8-hour time-weighted average of 85 dBa.
6. **8-Hour TWA & Lack of Program.** If the employer has not instituted a hearing conservation program and employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dBa, a citation only for §1910.95(c) shall be issued.
7. **Grouping & Classification.** Violations of §1910.95(i)(2)(i) from the hearing conservation amendment may be grouped with violations of §1910.95(b)(1) and classified as serious when an employee is exposed to noise levels above the limits of Table G-16 and:
- a. Hearing protection is not used or is not adequate to prevent overexposure to an employee; or
 - b. There is evidence of hearing loss which could reasonably be considered to:
 - (1) Be work-related, and
 - (2) Have been preventable, at least to some degree, if the employer had been in compliance with the cited provisions.

8. **Citing for Overexposure.** When an employee is overexposed, citations shall not be issued in cases where no engineering or administrative controls are possible, but effective hearing protection is being provided and used. (Refer to C.1. in this Chapter.)

- D. **Violations of the Respirator Standard.** When considering a citation for respirator violations, the following guidelines shall be observed (see PDs 02-411 and 02-435, or their successors).

i. **When Overexposure Does Not Occur**

Where an overexposure has not been established:

- a. But an improper type of respirator is being used (e.g., a dust respirator being used to reduce exposure to organic vapors), a citation under §1910.134(b)(2) shall be issued, provided the CSHO documents that an overexposure is possible.
- b. And one or more of the other requirements of §1910.134 is not being met, e.g., an unapproved respirator is being used to reduce exposure to toxic dusts, generally a de minimis violation shall be recorded in accordance with VOSH procedures. (Note that this policy does not include emergency use respirators.) The CSHO shall advise the employer of the elements of a good respirator program as required under §1910.134.
- c. In exceptional circumstances a citation may be warranted if an adverse health condition due to the respirator itself could be supported and documented. Examples may include a dirty respirator that is causing dermatitis, a worker's health being jeopardized by wearing a respirator due to an inadequately evaluated medical condition or a significant ingestion hazard created by an improperly cleaned respirator.

ii. **When Overexposure Does Occur.** In cases where an overexposure to an air contaminant has been established,

the following principles apply to citations of §1910.134.

- a. **Employer to Provide Respirators.** Section 1910.134(a)(2) is the general section requiring employers to provide respirators "...when such equipment is necessary to protect the health of the employee" and also requiring the establishment and maintenance of a respiratory protection program which meets the requirements outlined in §1910.134(b). If no respiratory program at all has been established, §1910.134(a)(2) alone shall be cited. When a program has been established and some, but not all, of the requirements under

§1910.134(b) are being met, the specific standards under §1920.134(b) that are applicable shall be cited.

- b. **Respiratory Program Requirements.** An acceptable respiratory program includes all of the elements of §1910.134. However, the standard is structured such that essentially the same requirement is often specified in more than one section. In these cases, the section which most adequately describes the violation shall be cited.

E. Additive and Synergistic Effects

1. **Evaluation.** Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination shall be evaluated using the formula found in §1910.1000(d)(2). The use of this formula requires that the exposures have an additive effect on the same body organ or system. Caution must be used in applying the additive formula, and prior consultation with the Program Director is required.
2. **Notification.** If the CSHO suspects that synergistic effects are possible, it shall be brought to the attention of the Regional Safety or Health Director, who shall refer the question to the Program Director and the DHLS Director. If it is decided that there is a synergistic effect of the substances found together, the violations shall be grouped, when appropriate, for purposes of increasing the violation classification severity and/or the penalty.

F. Absorption and Ingestion Hazards. The following guidelines apply when citing absorption and ingestion violations. Such citations do not depend on measurements of airborne concentrations, but shall normally be supported by wipe sampling. Citations under §40.1-51.1.A., Code of Virginia, may be issued when there is reasonable probability that employees will be exposed to these hazards.

1. **Absorption Hazards.** A citation for exposure to materials which can be absorbed through the skin or which can cause a skin effect (i.e., dermatitis) shall be issued where appropriate personal protective equipment (clothing) is necessary, but not worn. (See §1910.1000, Table Z-1, substances marked “skin”). The citation shall be issued under §1910.132(a) as either a serious or other-than-serious citation, according to the hazard.

If a serious skin absorption or dermatitis hazard exists which cannot be eliminated with protective clothing, a §40.1-51.1.A., General Duty Clause, citation may be considered. Engineering or administrative (including work practice controls shall be required in these cases to prevent the hazard).

2. **Ingestion Hazards.** A citation under §1910.141(g)(2) and (4) shall be issued when there are employees consuming food or beverages (including drinking fountains), a significant quantity of a toxic material may be ingested and subsequently absorbed.
Where, for any substance, a serious hazard is determined to exist due to the potential of ingestion or absorption of the substance for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under §40.1-51.1A., or General Duty Clause.
3. **Guidelines for Improper Personal Hygiene Citations**
 - a. **Issuing a Citation.** There are three (3) primary considerations when issuing a citation of an ingestion or absorption:
 - (1) A health risk exists as demonstrated by one of the following:
 - (a) A potential for an illness, such as dermatitis, or
 - (b) The presence of a toxic material that can be ingested or absorbed through the skin or in some other manner. (See the Chemical Information Table.)
 - (2) The potential that the toxic material can be ingested or absorbed, e.g., that it can be present on the skin of the employee, can be established by evaluating the conditions of use and determining the possibility that a health hazard exists.
 - (3) The conditions of use can be documented by taking both qualitative and quantitative results of wipe sampling into consideration when evaluating the hazard.
 - b. **Supporting a Citation.** There are four (4) primary considerations which must be met to support a citation:

- (1) The potential for ingestion or absorption of the toxic material must represent a health hazard.
- (2) The ingestion or absorption of the hazardous material must represent a health hazard.
- (3) The toxic substance must be of such a nature and exist in such quantities as to pose a serious hazard. The substance must be present on surfaces which have hard contact (such as lunch tables, cigarettes, etc.), or on other surfaces potential for ingestion or absorption of the toxic material (e.g., a water fountain.)
- (4) The protective clothing or other abatement means would be effective in eliminating or significantly reducing exposure.

- G. Classification of Violations for the New Health Standards.** In general, classification decisions regarding violations of the exposure limits of the new health standards shall be governed by the Chemical Information Manual.
- H. Wipe Sampling.** In general, wipe sampling, not air sampling, will be necessary to establish the presence of a toxic material posing a potential absorption or ingestion hazard. (Refer to IH Technical Manual for sampling procedure).
- I. Determination of Source.** Prior to the issuance of a citation, the CSHO shall carefully investigate the source or cause of the observed hazards to determine if some type of engineering, administrative or work practice control, or combination thereof, may be applied which would reduce employee exposure.
- J. Biological Monitoring.** If the employer has been conducting biological monitoring, the CSHO shall evaluate the results of such testing. The results may assist in determining whether a significant quantity of the toxic material is being ingested or absorbed through the skin.
- K. Violations of Air Contaminant Standards (§1910.1000 Series).** When it has been established that an employee is exposed to a toxic substance in excess of the PEL established by VOSH standards (without regard to the use of respirator protection), a citation for exceeding the air contaminant standard shall be issued. The following guidelines shall be used when a citation of the air contaminant standards may be appropriate.

1. Requirements of the Standard

- a. Section 1910.1000(a) through (d) provides ceiling values and 8-hour time-weighted averages (threshold limit values) applicable to employee exposure to air contaminants.
- b. Section 1910.1000(e) provides that to achieve compliance with those exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When such controls do not achieve full compliance, protective equipment shall be used. Whenever respirators are used, their use shall comply with §1910.134.
- c. Section 1910.134(a) provides that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used. Their use shall comply with requirements contained in §1910.134 which provide for the type of respirator and their proper maintenance.
- d. The situation may exist where an employer must provide all three: feasible engineering controls, feasible administrative controls (including work practice controls), and personal protective equipment. Section 1910.1000(e) has been interpreted to allow employers to implement feasible engineering controls to administrative and work practice controls in any combination the employer chooses, provided this abatement means eliminates the overexposure.
- e. Where engineering or administrative controls are feasible, the employer must institute them to mitigate contamination despite the fact that the controls would not reduce the air contaminant levels below the applicable ceiling value or threshold limit value. In addition, personal protective equipment will constitute satisfactory abatement only when implementing all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels.

2. **Classification of Violations of Air Contaminant Standards.** The violation shall be classified as serious or other-than-serious on the basis of the requirements in the Chemical Information Manual and on the basis of the use of respiratory protection at the time of the violation. Classification of violations depends upon whether the illness is serious or other-than-serious, whether the illness is reasonably predictable at

the exposure level, and whether the employer knew or could have known through reasonable diligence that a hazardous condition existed.

a. Principles of Classification. Exposure to a substance shall be considered serious if the exposure could cause impairment to the body as described in guidelines.

- (1) In general, substances having a single health code of 13 or less shall be considered to be serious at any level above the Permissible Exposure Limit (PEL). Substances in categories 6, 8 and 12, however, are not considered to be serious at levels in which only mild, temporary effects would be expected to occur.
- (2) Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which “moderate” irritation could be expected.
- (3) For a substance, e.g., cyclohexanol, having multiple health codes covering both serious and other-than-serious effects, a classification of other-than-serious shall be applied up to a level at which a serious effect(s) could be expected.
- (4) For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH recommended value, but no VOSH PEL, a citation for exposure in excess of the recommended value shall be considered under §40.1-51.1, Code of Virginia, in accordance with the guidelines.
- (5) If an employee is exposed to concentrations of a substance below the PEL, but in excess of recommended value (e.g., ACGIH TLV or NIOSH recommended value), a citation for inhalation cannot normally be issued. The CSHO shall advise the employer that a reduction of the PEL has been recommended.
- (6) For a substance having an 8-hour PEL with no ceiling PEL but for which a ceiling ACGIH or NOISH ceiling value has been recommended, the case shall be referred to the Program Director in accordance with guidelines. If no citation is to be issued, the CSHO shall nevertheless advise the employer that a ceiling value has been recommended.

b. Effect of Respirator Protection Factors. The CSHO shall consider protection for the type of respirator in use and the

possibility of overexposure if the respirator fails. If protection factors are exceeded and if the potential for overexposure exists, a citation for failure to control excessive exposure shall be issued.

3. Limitations on Issuing Citations of Air Contaminant Violations.

No violation of the §1910.1000 series would exist and no citation would be issued in the following circumstances:

- a. Where identified employee exposure level is not above that specified in the standard, regardless of whether engineering controls, administrative controls or personal protective equipment are utilized.
- b. Where the exposure level of an identified employee is above that specified in the standard, but all feasible engineering and administrative controls are utilized and personal protective equipment is provided, worn and maintained in accordance with the provisions of § 1910.134.

L. Violations of the Hazard Communication Standard. Violations of the hazard communication standard shall be classified as serious whenever such violations cause or contribute to a potential exposure capable of producing serious physical harm or death. Refer to PD 02-060A, or its successor.

1. Combination or Grouping. Such violations shall be combined or grouped in accordance with guidelines. Because of the difficulty of using the penalty calculation factors for shipped containers (as opposed to in-plant hazards), the following special penalty guidelines for shipped containers shall apply:

- a. If no hazard determination has been conducted, a high severity assessment and a lesser probability assessment shall be applied to produce a GBP of \$2,500.
- b. If there is no material safety data sheet (MSDS) available, or no label for a hazardous chemical (classified as serious), a high severity assessment and a greater probability assessment shall be applied to produce a GBP of \$5,000.
- c. If the label has an inadequate hazard warning, or none at all, a GBP of \$2,500 or \$5,000 with appropriate severity and probability assessments shall be applied, depending upon significance of the missing elements.
- d. If the MSDS does not contain sufficient hazard information, a GBP of \$2,500 or \$5,000, with appropriate severity and probability assessments, shall be applied, depending on the significance of the missing elements.

2. **Chemical Identity Violations.** Violations of §1910.1200(i)(2) (when the employer refuses to provide specific chemical identity information in a medical emergency) shall be classified as willful with a probability/severity factor of 5 to 10, depending on the circumstances involved in the particular case.

Penalties

CHAPTER- 9

Chapter 9: PENALTIES

I. Penalties

A. General Policy

The penalty structure provided under §40.1-49.4, of the *Code of Virginia*, is intended primarily to provide an incentive toward correcting violations voluntarily, not only to the offending employer, but also to other employers who may be in violation of the same infractions of the standards or regulations. Administratively, **VOSH will not issue a penalty of less than \$100.**

1. Deterrent to Violations

Proposed penalties are not designed as punishment for violations or as a source of income for the Department; however, the penalty amounts should be sufficient to serve as an effective deterrent to violations.

2. Other-Than-Serious Violations

In accordance with §40.1-49.4.G., *Code of Virginia*, other-than-serious or regulatory violations may be cited without a penalty. There is no statutory requirement that a penalty must be assessed when the violation is not serious; but a penalty must be assessed when the violation is serious.

B. Civil Penalties

The following factors are used to calculate a proposed penalty.

1. Type of Violation as a Factor

In assessing civil penalties for violations, a distinction is made between serious and other-than-serious violations.

- a. Serious. The maximum penalty that may be assessed for a serious violation is **\$16,287** at issuance.
- b. Other-Than-Serious. The maximum penalty that may be assessed for an other-than-serious violation is **\$16,287.**
- c. Willful or Repeated. Willful or repeated violations may be based

on hazards classified as either serious or other-than-serious. In the case of willful or repeated violations, a civil penalty of up to \$162,849 may be assessed, but the penalty may not be less than \$10,000 for a willful violation.

- d. Regulatory Violations. The maximum penalty that may be assessed for an other-than-serious regulatory violation is \$16,287.
- e. Failure to Abate. Penalties for failure to abate a violation may be up to \$16,287 for each calendar day that the violation continues beyond the final abatement date.

2. Statutory Authority

Section 40.1-49.4.A.4.(a) provides the Commissioner with the statutory authority to assess civil penalties for violations of §40.1-49.4.

- a. Section 40.1-49.4.H., *Code of Virginia*, provides that any employer who has received a citation for an alleged violation of a serious nature shall be assessed a civil penalty of up to \$16,287 for each violation.
- b. Section 40.1-49.4.G., *Code of Virginia*, provides that, when the violation is specifically determined to be other-than-serious, a civil penalty of up to \$16,287 may be assessed for each violation.
- c. Section 40.1-49.4. G., *Code of Virginia*, provides that, when violations of certain posting requirements (refer to Section I.B.14) are cited, a civil penalty of up to \$16,287 shall be assessed.

3. Minimum Penalties

The following guidelines apply:

- a. Serious. **The minimum penalty amount for serious violations shall be \$600 at issuance.**
- b. Willful. **The assessed penalty for any willful violation shall not be less than \$10,000.** This is an OSH Act statutory minimum and not subject to administrative discretion.

4. **Penalty Factors**

Section 40.1-49.4.A.4(a), *Code of Virginia*, provides that, in assessing penalties, due consideration shall be given to the following factors:

- a. The **gravity** of the violation,
- b. The **size** of the business (i.e., number of employees),
- c. The **good faith** of the employer, and
- d. The employer's **history** of previous violations.

Neither a penalty calculation factor, e.g., probability assessment factors, nor penalty adjustment factor, e.g., the gravity of the violation, size of the business, good faith of the employer, or the employer's history of previous violations, shall materially affect the final penalty calculation if it would tend to dilute the penalty excessively.

EXAMPLE: In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight that might be otherwise given to the number of employees exposed.

5. **Gravity of Violation**

The gravity of the violation primarily determines penalty amounts. It shall be the basis for calculating the basic penalty for both serious and other-than-serious violations.

- a. Gravity Factors. To determine the gravity of a violation, the following two assessments shall be made:
 - (1) The **severity** of the injury or illness which could result from the alleged violation.
 - (2) The **probability** that an injury or illness could occur as a result of the alleged violation.
- b. Other Penalty Factors. The size of the business, the good faith of the employer, and the history of previous violations shall be taken into account in deciding whether and to what extent the gravity-based penalty (GBP) may be reduced or increased.
- c. Severity Assessment. The classification of the alleged violation(s) as serious or other-than-serious is based on the severity of the injury or illness which could *reasonably* be expected to result from the employee's exposure to the hazard. This classification constitutes the first step in determining the gravity of the violation. The most serious injury or illness which is reasonably predictable as a result of an employee's exposure to the safety or health hazard cited shall be assigned a severity assessment in accordance with the following factors:
 - (1) High Severity. This would include death from injury or illness, injuries involving permanent disability, or chronic, irreversible illnesses.
 - (2) Medium Severity. This would include injuries or temporary, reversible illnesses resulting in hospitalization, substantial outpatient care of a variable but limited period of disability.

- (3) Low Severity. This would include injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment, i.e., limited out-patient care.
 - (4) Minimal Severity. This would include other-than-serious violations. Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the injury or illness most likely to result would probably not cause death or serious physical harm.
- d. Probability Assessment. The probability (likelihood or chance) that an injury or illness would result from a hazard affects the amount of the penalty to be assessed. However, **probability has no role in determining the classification of the violation.**

To determine penalty, the Compliance Officer, using professional judgment, shall identify and evaluate all of the factors influencing the probability of the occurrence of an injury or illness and shall assign them a weight in accordance with the relative contribution of each.

Probability shall be categorized as either greater or lesser probability:

- (1) Greater probability. This applies when a death or an injury or illness has actually occurred or the likelihood that an injury or illness will occur is relatively high, for example, when near miss has actually occurred. The violation shall be assessed as “greater probability.”
- (2) Lesser probability. This applies when the likelihood that an injury or illness will occur is judged to be relatively low.

- (3) Violations. When violations likely to result in injury and/or illness are involved, the following circumstances shall be considered (and documented in the case file).
- (a) Probability for Imminent Danger. The Compliance Officer shall assign a greater probability value for hazards that are determined to be imminent danger. *See Chapter 7, Fatality and Imminent Danger, for definition and procedures for imminent danger.*
- (b) Probability Rating Chart. The Compliance Officer shall use the Probability Rating Chart for assessing probability in alleged hazards for situations other than where a death, injury, illness or imminent danger situation has actually occurred:

New Probability Rating Chart								
Rating:	1	2	3	4	5	6	7	8
# of Employees	1	2	3	4	5	6	7	8 or more
Frequency	<1 wk	1/wk	2-6/wk	<2h/day	2-3h/day	4-5h/day	6-7h/day	8+h/day
Proximity	Marginal			In Danger Zone				Point of danger
Other factors	1	"Other factors" must be justified on 1B						8

1. Add the rating for each factor used = sum
 2. Divide the sum by the total number of factors used, and
 3. Round the result to the nearest tenth.

1.0 – 4.5 = Lesser Probability
 4.6 – 8.0 = Greater Probability

(Example: # of Employees 5 + Frequency 4 + Proximity 5 = 14
 Sum of 14/3 factors = 4.67
 Rounded to 4.7 total = Greater Probability)

See below for further guidance on the elements of actual or potential exposure, other considerations in determining probability and other factors affecting probability.

(c) Safety Violations. Among the factors to be considered are:

- 1 Number of employees exposed.
- 2 Frequency of exposure or the duration of employee overexposure to contaminants.
- 3 Employee proximity to hazardous condition (“marginal”, “in danger zone” “point of danger”).

Other factors.

- 4 Weather/working conditions.
- 5 Employee skill level.
- 6 Employee awareness of hazard.
- 7 Pace/speed/nature of task/work.
- 8 Use of appropriate PPE.
- 9 Medical surveillance program.

- 10 Youth and inexperience of employees, especially those under 18 years old.
- 11 Other pertinent working conditions or mitigating circumstances.

EXAMPLE:

Greater Probability: Five employees exposed 4-5 hours per day, installing roofing materials on a 10/12 pitch roof, gusty wind and showers. Two of the employees have less than two weeks experience, no fall protection equipment on site, no documented safety training or orientation.

Probability Rating Chart Application:

Factor	Rating
Number of employees: 5	
Frequency:	6
Proximity:	8
Other:	8
Total:	27

Sum of 27 (rating) / 4 (factors with score) = 6.75

Probability

Rounded to: 6.7 - Greater

Versus:

Lesser Probability: Two employees exposed 4 hours per week, installing roofing materials on a 4/12 pitch roof, sunny and fair weather, both workers having over three (3) years' experience.

Probability Rating Chart Application:

Factor	Rating
Number of employees:	2
Frequency:	3
Proximity:	6
Other:	0
Total:	11

Sum of 11 (rating) / 3 (factors with score) = 3.67

Rounded to: 3.7 - Lesser Probability

(d) Health Violations. Program violations are **not** included in probability assessment, but are considered separately in Section I.B.6. Health violations typically involve exposure to chemicals, noise, infectious agents, heat stress, or non-ionizing radiation.

- 1 Number of workers exposed to the hazardous conditions, both at the same time and sequentially.
- 2 Duration of employee overexposure to hazardous levels of contaminants or other illness-producing conditions.
- 3 Use of appropriate personal protective equipment; whether, for example, such equipment is utilized by all exposed employees and the employer has an effective PPE program in effect should be mentioned, or whether it is not utilized by any of the exposed employees and the employer has no program.
- 4 Medical surveillance program is in place as appropriate and effectively protects the employees, and a defective program which only partially and inadequately protects them, or no medical surveillance program is in effect.

EXAMPLE:

Lesser Probability: One employee exposed to chemicals 4 hours per day with no GHS update training provided, but the employee is aware of

specific chemical hazards and appropriate PPE is provided and used.

Probability Rating Chart Application:

Factor	Rating
Number of employees:	1
Frequency:	6
Proximity:	1
Other:	0
Total:	8

Sum of 8 (rating) / 3 (factors with score) = 2.67

Rounded to: 2.7 - Lesser Probability

Versus:

Greater Probability: Same facts as above (One employee exposed to chemicals 4 hours per day with no GHS update training provided, but aware of specific chemical hazards), except PPE is not provided to the employee.

Probability Rating Chart Application:

Factor	Rating
Number of employees:	1
Frequency:	6
Proximity:	7
Other:	0
Total:	14

Sum of 11 (rating) / 3 (factors with score) = 4.67

Rounded to: 4.7 - Greater

Probability

- (e) Elements of Actual or Potential Exposure. The following three items shall normally be considered for actual or potential exposure in relation to the hazard and standard violated, and weighted accordingly (as documented in the case file). Violations with actual overexposure will usually receive a higher probability factor than comparable violations with potential overexposure. All violations shall be considered for conditions, circumstances, and/or practices at the worksite which would affect the likelihood of harmful contact, ingestion, inhalation, or other harmful exposure cited.

- 1 Level of Exposure. Generally, the greater the level of exposure, the greater the probability of harm. Inhalation exposure shall be considered in relation to the level above the PEL, STEL, ceiling, IDLH, or proximity to the lethal level. Ingestion or contact exposure shall take into account area and amount of contaminant in solid or liquid form, and relation to the likelihood of harmful exposure. Noise shall be considered for the level above the PEL. Other agents shall be considered in relation to the level above established limits or for the intensity of exposure where there is a dose/effect relationship.
 - 2 Frequency/Duration of Employee Over-exposure. Generally, the greater the frequency or length of exposure, the greater the probability is for harm. Frequency of exposure (how often) may be more significant for acutely acting agents, whereas duration (how long) may be more significant for chronically acting agents.
 - 3 Number of Employees Exposed. The probability of harm is usually dependent upon the number of employees exposed. An exception would be when the exposure situation reaches an upper level in which all would be affected if the event or exposure occurred.
- (f) Other Considerations in Determining Probability. The following two items may also be considered

in determining probability. These considerations will be used less often, but the Compliance Officer shall weigh them into the probability assessment as applicable (and document in the case file.)

- 1 Personal Protective Equipment. When the use of appropriate PPE is a factor, the Compliance Officer shall consider whether such equipment *is* utilized by all exposed employees and the extent to which such equipment is *effectively* utilized, if at all.

- 2 Medical Surveillance. Where medical surveillance is a factor, the Compliance Officer shall consider if it effectively protects the employees or if it is a defective program which only partly and inadequately protects them, or no medical surveillance at all is in effect.

(g) Other Factors Affecting Probability. There are other factors which may significantly affect the probability that the hazard will produce an injury or illness. They shall also be considered and documented:

- 1 Mitigating Circumstances. Situations or conditions that may lower the probability, such as specific safety or health instructions, effective training programs, evidence of correction underway, warning signs and labels or special procedures, or mandatory administrative controls providing some, though not complete protection, may be used to lower the

probability.

- 2 Contributing Circumstances. On the other hand, contributing circumstances may be used to raise probability. This would include inappropriate or inadequate safety or health instructions, inadequate or no training, or widespread hazardous conditions or faulty equipment, with little or no attempt to control them, may be used to raise the probability.

6. Final Probability Assessment

All of the factors outlined above shall be considered together in arriving at a final probability assessment.

- a. A factor shall not materially affect the final probability assessment if, based on the professional judgment of the Compliance Officer as documented in the case file, it:
 - (1) Does not significantly influence the probability of an injury or illness causing condition, or
 - (2) Would tend to dilute the penalty excessively.

EXAMPLE: In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight given to the number of employees exposed.

This can be achieved by either properly classifying the hazard as an imminent danger situation which would automatically result in a greater probability assessment,

or by eliminating the use of the “number of employees exposed” factor on the Probability Rating Chart, and only using the “frequency”, “proximity” and “other” factors in assessing probability.

- b. When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the Compliance Officer shall use professional judgment to adjust the probability appropriately. Such decisions shall be adequately documented in the case file.

7. Program Violations

Certain program and certification requirements have specific performance criteria within the body of their codes and can be readily processed through the gravity based penalty (GBP) structure. These include, but are not limited to: hazard communication program, respirator protection program, confined space entry program, bloodborne pathogen program, and the hearing conservation program. *(Refer to the applicable program directive for further guidance).*

Other program and certification requirements are not as readily processed through the GBP structure. These include, but are not limited to: accident prevention program, first aid certification, fall protection work plan, lockout/tagout program, logging plan, effective supervision, etc.

- a. Classification. The following procedures shall generally be followed in determining the severity of the program violation *(See VOSH PD 01-009A, October 15, 2007, or successor for further guidance)*:
 - (1) Other-than-serious. Program violations are classified as other-than-serious when it is documented that the employer does not have a written program or the program is missing one (1) or more element(s) *and no related serious hazards exist.*

- (2) Serious. Program violations are classified as serious when it is documented that the employer does not have the required written program or certification *and it can be documented that a related serious hazard is associated with a program deficiency.*

8. Gravity-Based Penalty (GBP)

The GBP is an unadjusted penalty and is calculated in accordance with the following procedures:

a. Severity and Probability

The GBP for each violation shall be determined based on an appropriate and balanced professional judgment, combining the severity assessment and the final probability assessment.

- b. **For Serious Violations**, the GBP shall be assigned on the basis of the following scale:

<u>Severity</u>	<u>Probability</u>	<u>GBP</u>
High	Greater	\$16,287

<u>Severity</u>	<u>Probability</u>	<u>GBP</u>
High	Lesser	\$13,765
Medium	Lesser	\$10,405

NOTE: *The gravity of violation is defined by the GBP which is a function of the severity and the probability.*

A high gravity violation is one with GBP of \$16,287 or greater.

A medium gravity violation is one with a GBP between \$8,955 and \$13,765.

A low gravity violation is one with GBP of \$7,210.

c. **Regulatory Violations**

Penalties to be assessed for regulatory violations are discussed in I.B.14. of this chapter.

d. **Penalty Adjustment**

OIS shall be used for determining appropriate adjusted penalties for violations, which consider the employer's good faith, size of business, and history.

- No adjustment of penalty amounts for good faith is made in cases for high gravity serious violations.
- The Regional Safety or Health Director has the option to determine that no adjustment for an other-than-serious violation may, on occasion, be appropriate and a high

unadjusted penalty amount is warranted.

e. **Other-Than-Serious (O-T-S) Severity Assessment**

For other-than-serious safety and health violations, there is only minimal severity:

- (1) Other-than-serious safety and health violations judged to be of greater probability shall be assigned a GBP of \$1,300 to which appropriate adjustment factors shall be applied.
- (2) Other-than-serious safety and health violations judged to be of lesser probability shall be cited with no penalty.
- (3) Penalties to
be proposed for other-than-serious regulatory violations are discussed in the section covering regulatory violations.

9. **Gravity Calculations for Combined or Grouped Violations**

Combined or grouped violations are normally considered as one violation and shall be assessed one GBP. *(For guidance on when to combine or group violations see Chapter 10, Violations)* The following procedures apply to the calculation of penalties for combined and grouped violations:

a. **Combined Violations**

Severity and probability assessments for combined violations shall be based on the instance with the highest gravity.

It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation if it is clear which instance *or* sub item will have the highest gravity.

b. **Grouped Violations**

For grouped violations, the following special guidelines shall be adhered to:

(1) **Severity Assessment.** There are two considerations to be kept in mind in calculating the severity of grouped violations:

(a) The severity assigned to the grouped violation shall be no less than the severity of the most serious injury or illness that could reasonably be expected to result from the employee's exposure to the hazard on any single item.

(b) If a more serious injury or illness is reasonably predictable from the grouped items than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor of the grouped violation.

(2) **Probability Assessment.** There are two considerations to be kept in mind in calculating the probability of grouped violations:

(a) The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness.

(b) If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment of the

grouped violation.

In addition, it should be kept in mind that some individual probability factors may be increased by grouping, and others may not. The increased values shall be used in the probability calculation if, in the professional judgment of the Compliance Officer, a more appropriate assessment will result. For example, the number of employees exposed may be increased, while the proximity factor may not.

- (3) Gravity-Based Penalty. A single severity assessment and a single probability assessment for the combined or grouped violation will result from the foregoing considerations. That result shall be the basis for determining an appropriate GBP for the violation item according to the guidelines.

10. Penalty Adjustment Factors

Since these adjustment factors are based on the general character of a business and its safety and health performance, the factors shall generally be calculated only once for each employer. After the classification and probability ratings have been determined for each violation, the adjustment factors shall be applied subject to the limitations indicated in the following paragraphs.

- a. Penalties assessed for violations that are classified as high severity and greater probability shall be adjusted only for size and history.
- b. Penalties assessed for violations that are classified as repeated shall be adjusted only for size.
- c. Penalties assessed for regulatory violations which are classified as willful shall be adjusted only for size. Penalties assessed for violations classified as willful shall be adjusted only for size and

history.

NOTE: If one violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation and at the same time acting in good faith.

d. The rate of penalty reduction for size of business, employer's good faith and employer's history of previous violations shall be calculated on the basis of the criteria described in the following paragraphs:

(1) Size. A maximum penalty reduction of 70 percent is permitted for small businesses. "Size of business" shall be measured on the basis of the maximum number of employees of an employer at all workplaces nationwide, including federal OSHA and State Plan States at any one time during the previous 12 months. Information on the total number of an employer's employees can generally be obtained at the inspected worksite. However, on occasion, it may be necessary to obtain or confirm the information from the employer's headquarters.

(a) The rates of reduction are as follows:

<u>Number of Employees</u>	<u>Percent Reduction</u>
1-25	70%
26-100	40%

- (b) When a small business has one or more serious violation(s) of high gravity or a number of serious violations of moderate gravity indicating a lack of concern for employee safety and health, the Regional Safety or Health Director may determine that only a partial reduction in penalty shall be permitted for size of business.
 - (c) An employer's ability to pay a penalty shall not normally be investigated or considered in determining the penalty reduction for size of business.
 - (d) However, if an employer presents convincing evidence at an informal conference of inability to pay a penalty because of financial difficulties, the Regional Safety or Health Director may determine that a penalty reduction or a penalty installment payment plan is appropriate. Such a determination shall be documented in the case file.
 - (e) Where VOSH has reasonable cause to believe that employee misclassification has occurred, penalty reductions for *size and good faith* will NOT be afforded to the employer. (*Refer to Chapter 15, I.B.3.d.*)
- (2) Good Faith. A penalty reduction of up to 25 percent is permitted in recognition of an employer's "good faith" in increments of 0%, 5%, 10%, 15%, 20% and 25%.

The maximum allowable good faith reduction for "primary considerations" (*see below*) is 15%.

The maximum allowable good faith reduction for written programs is 10%.

The total adjustment for good faith will be the sum of the percentage scores arrived at by the CSHO on primary considerations and written programs.

EXCEPTION: If one willful violation is found, no good faith reduction can be applied to any of the violations found during the same inspection. As stated above, an employer cannot be willfully in violation of the Act and at the same time be acting in “good faith.”

No *single* factor shall be used to determine good faith. Primary considerations include:

- (a) The employer’s cooperation/attitude during the inspection.
- (b) Whether any efforts were made to comply with safety standards before the inspection.
- (c) Whether the employer promptly abates violations during the inspection.
- (d) The employer’s participation in professional organizations.
- (e) Did the employer conduct worksite inspections either internally or through outside consultants, insurance companies, etc.

- (f) Employee comments during interviews on the safety and health protections provided by the employer, both positive and negative will be considered.
- (g) **No reduction (0%)** shall be given for an **assessment of “not good”**.
 - A **reduction of 5%** shall normally be given when the CSHO’s assessment of the primary considerations indicates the employer’s approach to safety and health at the site was **“acceptable”**.
 - A **reduction of 10%** shall normally be given for a **“good” assessment**.
 - A **reduction of 15%** shall normally be given for a **“very good” assessment**.
- (h) A **10% reduction for written programs** shall normally be given if the employer has a written safety and health program, documented during the inspection, that has been effectively implemented, and also:
 - 1 Provides for appropriate management commitment and employee involvement; worksite analysis for the purpose of hazard identification; hazard prevention and control measures, and safety and health training.
 - 2 Has deficiencies that are only incidental.
 - 3 Includes all programs required under VOSH standards applicable to the

workplace, e.g., hazard communication, lockout-tagout, hazardous materials and emergency response, safety and health programs for construction (§1926.20), and trenching and excavation).

- 4 Where young persons, i.e., less than 18 years old, are employed, the Compliance Officer's evaluation shall consider whether the employers program appropriately addresses the particular regulatory requirements for the employment of such minors, relative to the types of work they perform and the potential hazards to which they might be exposed.
- 5 Where persons who speak limited or no English are employed, the Compliance Officer's evaluation shall consider whether the employer's program appropriately addresses the particular needs of such employees, relative to the types of work they perform, and the potential hazards to which they might be exposed.
- 6 One example of the contents and framework of an effective safety and health management program is OSHA's Voluntary Safety and Health Program Management Guidelines; Issuance of Voluntary Guidelines (*See Federal Register, Vol. 54, No. 16, 26 January 1989, pp. 3904-3916, or later revisions as published*).

- (i) A **5% reduction for written programs** shall normally be given if the employer has a documentable and effective safety and health program, but with no more than only incidental deficiencies. For example, an acceptable program will be documentable by such means as the minutes of employee safety and health meetings, employee training sessions, or other evidence of implemented programs applicable to the workplace.
- (j) Only increments of 5% may be used to reduce penalties due to the employer's good faith from 0% up to 25%; no intermediate percentages shall be used.
- (k) No reduction shall be given to an employer for any violation in the inspection where a willful, repeated, high gravity serious violation is found or a failure to abate penalty is assessed.
- (l) No adjustment for good faith is made in the case of a violation that has directly contributed to the cause of a fatal accident, or a violation that has directly contributed to the cause of a non-fatal injury or illness resulting in serious physical harm to an employee.
- (m) No reduction shall be given to an employer who has no safety and health program or if there are major deficiencies in the program.
- (n) An employer whose inspection history includes fatality-related violations or has a willful or a significant number of serious violations within the previous three years may not receive a reduction

for good faith.

- (o) No reduction shall be given to an employer being cited for abatement verification violations.
 - (p.) Where VOSH has reasonable cause to believe that employee misclassification has occurred, penalty reductions for *size and good faith* will NOT be afforded to the employer. (*Refer to Chapter 15, I.B.3.d.*)
- (3) History. A reduction of 10% shall be given to employers who have not been cited by VOSH for any serious, willful or repeated violations in the past three years.
- (4) Total Adjustment. The total adjustment will normally be the sum of all the adjustment factors.
- a. No penalty reduction factors may be applied to any violation which has directly contributed to a fatality. Such a violation shall be penalized at \$16,287 for each serious and \$162,849 for each willful or repeat.
 - b. No adjustment of penalty amount may, on occasion, be appropriate for other-than-serious violations where the Regional Safety or Health Director has determined that a high unadjusted penalty amount is warranted.
 - c. No penalty reduction factors may be applied to any violation which has directly contributed to a non-fatal injury or illness resulting in serious physical harm to an employee (Reference Chapter 10.II.B.2.c on criteria for determining “serious physical harm”). Such a violation shall be penalized at \$16,287 for each serious and \$162,849 for each willful or repeat.

11. Effect on Penalties If Employer Immediately Corrects or Initiates Corrective Action

Appropriate penalties will be assessed with respect to an alleged violation after being informed of such alleged violation by the Compliance Officer, even though the employer immediately corrects or initiates steps to correct the hazard. Such correction may be considered in calculating good faith.

12. Ability to Pay

An employer's ability to pay a penalty shall not normally be investigated or considered in determining any penalty reduction. However, if an employer presents convincing evidence of inability to pay a penalty because of financial difficulties at an informal conference, the Regional Safety or Health Director may determine that a penalty reduction is appropriate. Such a determination shall be documented in the case file.

Table 11-1

PENALTY TABLE

Penalty Reduction in Dollars	Gravity Assessments						
	OTS	Low/Lesser	Low/Greater	Med/Lesser	Med/Greater	High/Lesser	High/Greater
GBP	\$1,300	\$7,210	\$8,955	\$10,485	\$12,715	\$13,765	\$16,287
10%	\$1,170	\$6,490	\$8,060	\$9,435	\$11,445	\$12,390	\$14,660
15%	\$1,105	\$6,130	\$7,610	\$8,910	\$10,810	\$11,700	NA
20%	\$1,040	\$5,770	\$7,165	\$8,390	\$10,170	\$11,010	\$13,030
25%	\$975	\$5,410	\$6,715	\$7,865	\$9,535	\$10,325	NA
30%	\$910	\$5,045	\$6,270	\$7,340	\$8,900	\$9,635	\$11,400
35%	\$845	\$4,685	\$5,820	\$6,815	\$8,265	\$8,945	NA
40%	\$780	\$4,325	\$5,375	\$6,290	\$7,630	\$8,260	\$9,770
45%	\$715	\$3,965	\$4,925	\$5,765	\$6,995	\$7,570	NA
50%	\$650	\$3,605	\$4,480	\$5,245	\$6,360	\$6,885	\$8,145
55%	\$585	\$3,245	\$4,030	\$4,720	\$5,720	\$6,195	NA
60%	\$520	\$2,885	\$3,580	\$4,195	\$5,085	\$5,505	\$6,515
65%	\$455	\$2,525	\$3,135	\$3,670	\$4,450	\$4,820	NA
70%	\$390	\$2,165	\$2,685	\$3,145	\$3,815	\$4,130	\$4,885
75%	\$325	\$1,805	\$2,240	\$2,620	\$3,180	\$3,440	NA
80%	\$260	\$1,440	\$1,790	\$2,095	\$2,545	\$2,755	\$3,255
85%	\$195	\$1,080	\$1,345	\$1,575	\$1,905	\$2,065	NA
90%	\$130	\$720	\$895	\$1,050	\$1,270	\$1,375	NA
95%	\$65	\$600*	\$600*	\$600*	\$635	\$690	NA

Note 1: Minimum Serious penalty is \$600.00

Note 2: No reduction for good faith (25%) is permitted for High Gravity Serious (High/Greater)

Severity	Probability	GBP
High	Greater	\$16,287

Severity	Probability	GBP
High	Lesser	\$13,765

13. Repeat Violations

Section 40.1-49.4.J., *Code of Virginia*, provides that an employer who repeatedly violates VOSH requirements may be assessed a civil penalty of not more than \$162,849 for each violation.

The VOSH *Administrative Regulation Manual* defines a repeated violation as:

“... a violation deemed to exist in a place of employment that is substantially similar to a previous violation of a law, standard or regulation that was the subject of a prior final order against the same employer. A repeated violation results from an inadvertent or accidental act, since a violation otherwise repeated would be willful.”

Repeat violations may be cited for a period of three years following issuance of a final order which cites any violation of standard, regulation, or statute.

No penalty reduction factors may be applied to any violation which directly contributed to a fatality. Such a repeat violation shall be penalized at \$162,849.

No penalty reduction factors may be applied to any repeat violation which directly contributed to a non-fatal injury or illness resulting in serious physical harm to an employee (Reference Chapter 10.II.B.2.c on criteria for determining “serious physical harm”). Such a repeat violation shall be penalized at \$162,849.

- a. Gravity-Based Penalty Factors. Each violation shall be classified as serious or other-than-serious. A GBP shall then be calculated for repeated violations based on facts noted during the current inspection. Only the adjustment factors for size appropriate to the facts at the time of the inspection shall be applied.
- b. Penalty Increase Factors. The amount of the increased penalty to be assessed for a repeated violation shall be determined by the size of the employer.

- (1) Smaller Employers. For employers with 250 or fewer

employees, the GBP shall be doubled for the first repeated violation and quintupled if the violations have been cited twice before. If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, the GBP may be multiplied by 10. The reasons for imposing a higher multiplier factor shall be explained in the file.

- (2) Larger Employers. For employers with more than 250 employees, the GBP shall be multiplied by 5 for the first repeated violation and multiplied by 10 for the second repeated violation.
- c. Other-than-Serious Violations with No Initial Penalty. For a repeated other-than-serious violation that had no initial penalty, if a decision is made to penalize, a GBP of \$200 shall be assessed for the first repeated violation, \$500 if the violation has been cited twice before, and \$1,000 for a third repetition.
- d. Regulatory Violations. For repeated regulatory violations, the initial penalty shall be doubled for the first repeated violation and quintupled if the violation has been cited twice before. If the Program Director determines that it is appropriate to apply a deterrent effect, the initial penalty may be multiplied by 10.

14. Willful Violations

Section 40.1-49.4.J., *Code of Virginia*, provides that an employer who willfully violates VOSH requirements may be assessed a civil penalty of not more than \$162,849 but not less than \$10,000 for each violation.

- Willful violations shall be classified as serious or other-than-serious.
- There shall be no reduction for good faith.
- If a willful violation directly contributes to a fatality, a penalty of \$162,849 shall be assessed.

- A \$162,849 penalty may also be assessed in cases where there is no fatality.
- a. Gravity-Based Penalty Factors Each violation shall be classified as serious or other-than-serious. After determining the gravity of the violation for both severity and probability, a GBP shall be determined based on the facts noted during the inspection.
- b. Determination of the Gravity of the Violation

➤ **Severity** of the injury/illness:

High: Death from injury/illness; injuries involving permanent disability; or chronic, irreversible illnesses;

Medium: Injuries or temporary reversible illnesses resulting in hospitalization, substantial outpatient care of a variable but limited period of disability;

Low: Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment, i.e., limited outpatient care.

➤ **Probability** that an injury/illness could occur:

Greater: A death or an injury or illness has actually occurred or the likelihood that an injury or illness will occur is judged to be relatively high;

Lesser: Likelihood that an injury or illness will

occur is judged to be relatively low.

- (1) The Compliance Officer will determine the gravity of the violation based upon: 1) the severity of the injury or illness which could result from the alleged violation, and 2), the probability that an injury or illness could occur as a result of the alleged violation using the Probability Rating Chart.
- (2) For willful violations, a severity of high, medium or low shall be assigned and a probability of greater or lesser is also assigned. The greater probability factor shall be used if an employee(s) suffers an injury or illness as a result of a violation.
- (3) Once the gravity of the violation is determined, the penalty will be adjusted for size and history

NOTE: *For a willful violation, no penalty reduction will be permitted on the basis of good faith, and no penalty reduction will be permitted where there has been a fatality.*

No penalty reduction factors may be applied to any willful violation which directly contributed to a non-fatal injury or illness resulting in serious physical harm to an employee (Reference Chapter 10.II.B.2.c on criteria for determining “serious physical harm”). Such a willful violation shall be penalized at \$162,849.

EXAMPLE: A Compliance Officer inspects the trenching site of Employer X. Employer X has 15 employees. A review of the employer’s history shows that the employer has been cited for serious violations within the past three years. The Compliance Officer categorizes

the trenching violation as medium severity and greater probability. The Compliance Officer then determines that Employer X is entitled to a 70% reduction for size (fewer than 25 employees) and no reduction for history: therefore, the total penalty reduction is 70%.

Go to the following table. Look for the severity and probability factors which you have assigned to the violation. A willful violation categorized as medium severity/greater probability with a penalty reduction of 70% results in a proposed penalty of \$34,500.

c. Reduction Factor for Size – Serious Willful

The reduction factors for size for serious willful violations shall be applied as shown in the following chart. This chart helps minimize the impact of large penalties for small employers with 250 fewer employees.

However, in no case shall the proposed penalty be less than the minimum, i.e., \$10,000, for these employers. The rates of reduction are as follows:

<u>Number of Employees</u>	<u>Percent Reduction</u>
1-25	70% reduction
26-100	40% reduction

d. Reduction Factor for History– Serious Willful

A ten percent (10%) reduction for history shall be given to

employers who have not been cited by VOSH for any serious, willful, or repeat violations in the last 3 years. The percentage reduction factor for history shall be added to the percentage reduction for size and the combined percentage reduction factor shall be applied at the same time. The proposed penalty shall then be determined from the table below. **In no case shall a proposed penalty for a willful violation be less than \$10,000.**

Table 11-2

PENALTY REDUCTIONS FOR WILLFUL VIOLATION(S)

Penalty Reduction in Dollars	Willful Gravity Assessment					
	Low/Lesser	Low/Greater	Med/Lesser	Med/Greater	High/Lesser	High/Greater
GBP	\$110,000	\$115,000	\$120,000	\$125,000	\$130,000	\$162,849
10%	\$99,000	\$103,500	\$108,000	\$112,500	\$117,000	\$146,565
20%	\$88,000	\$92,000	\$96,000	\$100,000	\$104,000	\$130,280
30%	\$77,000	\$80,500	\$84,000	\$87,500	\$91,000	\$113,995
40%	\$66,000	\$69,000	\$72,000	\$75,000	\$78,000	\$97,710
50%	\$55,000	\$57,500	\$60,000	\$62,500	\$65,000	\$81,425
60%	\$44,000	\$46,000	\$48,000	\$50,000	\$52,000	\$65,140
70%	\$33,000	\$34,500	\$36,000	\$37,500	\$39,000	\$48,855
80%	\$22,000	\$23,000	\$24,000	\$25,000	\$26,000	\$32,570
Note 1: No reduction for good faith is permitted for Willful violations						
Note 2: Minimum penalty for Willful violation is \$10,000						



The proposed penalty for any willful violation shall not be less than \$10,000.



No penalty reduction factors may be applied to any violation which directly contributed to a fatality. Such a willful violation shall be penalized at \$162,849.



No penalty reduction factors may be applied to any willful violation which directly contributed to a non-fatal injury or illness resulting in serious physical harm to an employee (*reference chapter 10.ii.b.2.c on criteria for determining "serious physical harm"*). Such a willful violation shall be

penalized at \$162,849.

- e. Other-than-Serious Violations. Sections 40 through 60 of the VOSH *Administrative Regulation Manual* provide that an employer who violates any of the posting or recordkeeping requirements may be assessed a civil penalty of up to \$16,287 for each violation. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after reduction for size and history, be less than \$10,000.
- f. Egregious Violations. For flagrant cases involving willful violations, an egregious, i.e., violation-by-violation, penalty procedure may be considered. Under this procedure, standard penalty calculations described in section C. are applied, but instead of grouping or combining violations for penalty purposes, *each* instance of noncompliance is considered to be a separate violation and a separate penalty is applied. Compliance Officers who identify a case which could have egregious violations shall notify the Regional Safety or Health Director as soon as possible. Only the Commissioner may authorize the use of this policy and approve the assessment of egregious penalties.

15. General Application

The procedures that follow shall be used in determining proposed penalties for violations of VOSH regulatory requirements contained in the VOSH *Administrative Regulation Manual*, only when the employer has received a copy of the OSHA 300 Form through the Recordkeeping Requirements booklet or from any other source, or had knowledge of the requirements.

- a. If the employer has not received the booklet or the OSHA 300 Form, and did not have knowledge, citations without proposed penalties will be issued.
- b. Except as otherwise noted, penalties for regulatory violations

shall have adjustment factors for size and history applied in determining the proposed penalty.

16. Posting Requirements

Penalties for violation of posting requirements shall be proposed as follows:

- a. VOSH Notice. If the employer has not displayed (posted) the notice furnished by the Virginia Occupational Safety and Health Program (or OSHA) as prescribed in §40 of the VOSH *Administrative Regulation Manual*, an other-than-serious citation shall normally be issued. The unadjusted penalty for this alleged violation shall be \$1,000.
- b. Annual Summary. If an employer fails to post the summary portion of the OSHA-300 Form or an equivalent form as required by 16VAC25-85-1904.29 during the most recent period 01 February to 30 April, as required by 16VAC25-85-1904.32, even if there have been no injuries, an other-than-serious citation shall be issued with an unadjusted penalty of \$1,000.
- c. Citation. If an employer received a citation which has not been posted as prescribed in §40 of the VOSH *Administrative Regulation Manual*, an other-than-serious citation shall be issued. The unadjusted penalty shall be \$3,000.

17. Reporting and Recordkeeping Requirements

Section 40.1-49.4.G., *Code of Virginia*, provides that violations of the recordkeeping and reporting requirements may be assessed civil penalties of up to \$16,287 for each violation.

- a. OSHA-300 Form or Equivalent Form. If the employer does not maintain the Log and Summary of Occupational Injuries and Illnesses, the OSHA-300 Form or equivalent form as prescribed in 16VAC25-85-1904 recordkeeping requirements for recordable

injuries and illnesses have occurred during the calendar year, an other-than-serious citation shall be issued. There shall be an unadjusted penalty of \$1,000 for each year the form was not maintained.

- (1) No Recordable Injuries or Illnesses. When no recordable injuries or illnesses have occurred at a workplace during the current calendar year, the OSHA-300 Form or equivalent form need not be completed until the end of the calendar year for certification of the summary.
 - (2) Significant Recordkeeping Deficiencies. An OSHA-300 with significant deficiencies shall be considered as “not maintained”.
- b. OSHA-301 FORM. If the employer does not maintain the Supplementary Record, OSHA-301 Form or equivalent form, as prescribed in 16VAC25-85-1904 recordkeeping requirements, an other-than-serious citation shall be issued.

There shall be an adjusted penalty of \$1,000 for each OSHA-301 form not maintained.

- (1) A penalty of \$1,000 shall be assessed for each OSHA-301 form or equivalent form not maintained up to a maximum of \$16,287.
- (2) A penalty of \$1,000 shall be assessed for each OSHA-301 Form or equivalent form inaccurately maintained, up to a maximum of \$16,287.
- (3) Minor inaccuracies shall be cited, but with no penalties.
- (4) If a large number of violations or other circumstances indicate that the violations are willful, then other

penalties, including violation-by-violation may be applied.

- c. Reporting Fatalities. Employers are required to report, either orally or in writing, to the Department within eight (8) hours of any occurrence of an employment accident which is classified as a fatality. (*See VOSH Administrative Regulation Manual §50 and §40.1-51.1.D. Code of Virginia.*) A penalty of \$5,000 shall be assessed. No adjustments shall be applied.
 - (1) An other-than-serious citation shall be issued for failure to report such an occurrence. The unadjusted penalty shall be \$5,000.
 - (2) If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of \$16,287 may be assessed.
 - (3) If the Regional Safety or Health Director becomes aware of an incident required to be reported through some means other than an employer report prior to the elapse of the 8-hour reporting period and an inspection of the incident is made, a citable violation for failure to report does not exist.
- d. Reporting hospitalizations, amputations and loss of an eye. Employers are required to report, either orally or in writing, to the Department within twenty-four (24) hours the hospitalization of one or more persons, an amputation or loss of an eye.
 - (1) An other-than-serious citation shall be issued for failure to report such an occurrence. The unadjusted penalty shall be \$5,000.

- (2) If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of \$16,287 may be assessed.
- (3) If the Regional Safety or Health Director becomes aware of an incident required to be reported through some means other than an employer report prior to the elapse of the 24-hour reporting period and an inspection of the incident is made, a citable violation for failure to report does not exist.

NOTE: Part 1904 and §40.1-51.1.D of the *Code of Virginia* have new requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The new rule also updates the list of employers partially exempt from OSHA record-keeping requirements. (See 79 FR 56129, *Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions*, September 18, 2014.)

18. Failure to Abate

Section 40.1-49.4.I., *Code of Virginia*, provides criteria for assessing civil penalties for failure to abate a violation. A penalty of not more than \$16,287 may be assessed for each day the violation continues past the final abatement date.

- a. Application. An appropriate citation shall be issued in cases where violations have not been corrected as required.

Failure to abate penalties shall be applied when an employer has not corrected a violation which was cited previously when the previous citation has become a final order. A good faith but unsuccessful effort to abate the violation shall be taken into consideration when determining the appropriate penalty amount as indicated in later sections.

- (1) No Employer Contest. If a timely notice of contest has not been filed, the citation and proposed penalties shall be deemed to be a final order of the Commissioner upon the expiration of the contest period and not subject to review by any court or agency. Penalties for failure to abate shall be applied where abatement has not been accomplished.
- (2) Employer Contests Alleged Violation(s). If an employer contests one or more of the alleged violations, the period for abatement does not begin to run, for the contested items, until the day following the entry of the final order affirming the citation by the Circuit Court or by the Supreme Court in the case of an appeal.
 - (a) If the employer contests only the amount of the proposed penalty, the employer must correct the alleged violation within the prescribed abatement period.
 - (b) If an employer contests an abatement date in good faith, a Failure to Abate notice shall not be issued for the item contested until a final order affirming a date is entered, the new abatement period, if any, has been completed, and the employer has still failed to abate.

EXCEPTION: When a high gravity serious hazard is cited with an abatement date of less than 15 working days, a follow-up inspection may be scheduled after expiration of the abatement period, but still within the 15-day notice of contest period, provided that the employer has not actually filed such a notice.

- b. Employer Contest. If an employer contests one or more of the alleged violations, the period for abatement does not begin to run (as to those items contested) until the final order has been issued, and the contest rights have lapsed or been exhausted.

If an employer has been granted an extension of abatement, a Failure to Abate Notice shall not be issued for that violation until the new abatement period has lapsed, and the employer has still failed to abate the violation.

- c. **Calculation of Additional Penalties.** A GBP for unabated violations shall be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection. This recalculated GBP, however, shall not be less than that assessed for the item when originally cited, except as provided in I.B.16.e., *Good Faith Effort to Abate*, below.

- (1) **Method of Calculation.** In those instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Regional Safety or Health Director. In no case shall the penalty be less than \$1,000 per day. Adjustment factors shall then be applied to arrive at the daily proposed penalty.
- (2) Only the adjustment factor for size, based upon the circumstances noted during the re-inspection, shall then be applied to arrive at the daily proposed penalty.
- (3) The daily proposed penalty shall be multiplied by the number of calendar days that the unabated violation has continued, except as provided below.
 - (a) The number of days unabated shall be counted from the day following the abatement date specified in the citation as the final order. It will include all calendar days between that date and the date of re-inspection, excluding the date of re-inspection.
 - (b) Normally, the maximum total proposed penalty for failure to abate a particular violation shall not exceed thirty (30) times the amount of the daily proposed penalty.
 - (c) At the discretion of the Program Director, a lesser penalty may be proposed with the reasons for doing so, e.g., achievement of an appropriate deterrent effect, documented in the case file.
 - (d) If a penalty in excess of the normal maximum of

thirty (30) times the amount of the daily proposed penalty is deemed appropriate by the Program Director, the case shall be treated under the violation-by-violation penalty procedures established.

- (4) In unusual circumstances such as where the gravity of the violation is at the highest level (high severity and greater probability), or when the employer has willfully failed to abate the violation or has failed to abate a second time, higher penalties shall be proposed. In such situations, the proposed penalty and factors involved shall be developed in consultation with the appropriate VOSH Programs Director and the Division of Hearing and Legal Services and approved by the Commissioner.

d. **Partial Abatement**

- (1) **Partial Reduction.** When the violation has been partially abated, the Regional Safety or Health Director may authorize the Compliance Officer to factor in a reduction of 25% to 75% to the amount of the assessed penalty calculated as outlined in part (2), above. The reasons for this action shall be documented in the case file.
- (2) **Only Some Instances Corrected.** When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional assessed penalty shall take into consideration the extent to which the violation has been abated.

EXAMPLE: Where three out of five instances have been corrected, the assessed penalty (calculated as outlined in part (2) above, without regard to any partial abatement) may be reduced by 60%.

- (3) **Substantive Requirements.** In multi-step correction items, only the failure to comply with substantive (rather than procedural) requirements shall generally incur a failure to abate penalty.
- (4) **Procedural Requirements.** On rare occasions, when the Department decides to issue a Failure to Abate Notice for

failure to comply with procedural requirements, the calculation of the assessed penalty shall consider the extent to which a violation has been substantially abated, with the daily assessed penalty (calculated as outlined in above, without regard to any partial abatement) reduced accordingly.

- a. **Good Faith Effort to Abate.** When the Compliance Officer believes, and so documents in the case file, that the employer has made a good faith effort to correct the violation and the employer had good reason to believe that it was fully abated, the Compliance Officer may reduce or eliminate the assessed penalty that would otherwise be justified.
19. **Grouping.** Violations of the posting and recordkeeping requirements which involve the same document (e.g., summary portion of the OSHA-300 Form was neither posted nor maintained) shall be grouped as an other-than-serious violation for penalty purposes. The unadjusted penalty for the group violations would then take on the highest dollar value of the individual items, which would normally be \$1,000.
 20. **Access to Records.** The VOSH *Administrative Regulation Manual* requires an employer to maintain forms and records and provide them for inspection and copying by an authorized representative of the Commissioner or by an employee, former employee or authorized representative of employees. (See *VOSH Administrative Regulation Manual*, §§60 and 80).
 21. **Notification Requirements.** An employer who has received advance notice of an inspection, as required by §40 of the *Administration Regulations Manual*, must notify the authorized employee representative.

When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by §230 of the *VOSH Administrative Regulation Manual*, an other-than-serious citation shall be issued with an unadjusted penalty for \$2,000.

C. Criminal Penalties

1. **Code of Virginia Provisions.** The *Code of Virginia* provides criminal penalties in the following cases:
 - a. Willful violations of a VOSH standard, rule of order causing death of an employee. (§40.1-49.4.K.);
 - b. Giving unauthorized advance notice. (§40.1-51.3:1);

- c. Giving false information. (§40.1-51.4:2);
 - d. Refusal to answer questions; obstruction of inspection. (§40.1-10).
2. **Imposed by Courts.** Criminal penalties are imposed by the courts after trials and not by VOSH.

D. Egregious Penalties

1. **Purpose.** Large proposed penalties, e.g., where penalties are proposed on a violation-by-violation basis, and criteria guiding approval of such penalties by the Commissioner, are based on meeting the public purpose.
2. **Guidance**
- a. **Early Identification of Cases.** It is important that the Regional Safety or Health Director identify, as early as possible, cases which may be appropriate for violation-by-violation treatment.
 - (1) Careful documentation of evidence for each violation and appropriate involvement of technical specialists required for litigation is essential to the successful pursuit of potential egregious cases.
 - (2) Coordination with Headquarters must be scheduled in time for comprehensive review before the expiration of the statutory 6-month citation period.
 - (3) Early involvement of the Division of Hearing and Legal Services will ensure adequate legal, evidentiary, and resource coordination.
 - b. **Criteria.** Those conditions which constitute a flagrant violation of the law or of VOSH standards/regulations are appropriate for violation-by-violation handling. The following criteria shall be used by the Regional Safety or Health Director to determine whether to recommend the use of violation-by-violation citations and penalties:
 - (1) Cases must be classified as willful.
 - (a) The employer is found in violation of a VOSH requirement:
 - 1 Of which he has actual knowledge at the time of the violation. Such knowledge may be demonstrated through previous

citation history, accident experience, widely publicized agency compliance, direct evidence of specific recognized jobsite hazards or other appropriate factors; and

- 2 Intentionally, through conscious, voluntary action or inaction, having made no reasonable effort to eliminate the known violation.

- (2) Cases must fall in at least one of the categories given in the following list, (a) through (f).

- (a) The violations resulted in worker fatalities or a large number of injuries or illnesses.
- (b) The violations resulted in persistently high rates of worker injuries or illnesses.
- (c) The employer has an extensive history of prior violations of VOSH law.
- (d) The employer has intentionally disregarded safety and health responsibilities.
- (e) The employer's conduct taken as a whole amounts to clear bad faith in the performance of his duties under the law.
- (f) The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.

- (3) Cases which satisfy only one of the two main criteria, above, are not suitable for violation-by-violation penalties. For example, an employer who has an extensive history for the case in question may not be subject to egregious penalties.

- c. **Case Support Requirements.** Because these cases involve administrative and legal issues critical to effective compliance with the law, it is essential to ensure that the highest professional standards are met in the conduct of inspections, the issuance of citations and the litigation of these cases.

- (1) **Documentation.** Whenever a case is proposed for violation-by-violation treatment, fully detailed written responses to the questions in the appendix must be developed. Supporting documentation shall be provided and cross-referenced whenever possible. Mandatory use of these questions is intended to provide a consistent format to aid in review of these cases, as well as to ensure as much as possible uniformity of case development across the state.
- (2) **Evidence.** Documentary support shall ordinarily be planned for and obtained early in the investigation.
 - (a) The evidence necessary to support citations being considered for violation-by-violation penalty sanctions shall be included in the case file. Such evidence must be present for each separate violation.
 - 1 Photographs, videotapes, audiotapes, sampling data, and witness statements shall be used whenever possible to provide supporting evidence of violative conditions.
 - 2 Company documents supporting knowledge of that standard and the violative conditions as well as willfulness of the violation shall be diligently sought and obtained by interrogatories as appropriate.
 - 3 Examples of such documents are internal audit reports, consultant or insurance company reports, trade association articles, minutes from safety meetings, complaints from employees, memoranda and other correspondence from safety personnel, especially from plant (or site) safety to plant (or site) management.

Also included might be recognition by corporate safety personnel of violations and bringing these violations to the

attention of higher management, notes relating to VOSH activities, and industry practice in other companies or industries.

- (b) Employers must be asked explicitly:
 - 1 If and when they recognized the hazardous nature of each of the violations;
 - 2 If they knew what VOSH's standards require and, if so, what steps the company had taken to abate the violations and why the apparent violations had not been corrected;
 - 3 Whether they knew of the documents identified under subparagraph (a), above, and what those documents contained.
- (c) Their response shall be carefully documented in writing (verbatim, if possible). An attempt shall be made to have a second person present as a witness, particularly when dealing with potentially compromising matters.
- (d) Signed employee statements shall be obtained routinely to support each of these violations in as much detail as possible.
- (e) Employee exposure and the nature and extent of injuries or illnesses related to the violations shall be carefully and adequately described.
- (f) The need for interrogatories and medical access orders shall be decided and documents obtained as soon as possible.
- (g) The need for experts shall also be decided and necessary arrangements made as soon as possible. It is anticipated that experts will be needed for cases involving complex violations, such as ergonomics or abatement methods.
- (h) Particular attention shall be paid to anticipating and preparing for possible employer defenses in accordance with the guidelines in this FOM.

- (3) **The Division of Hearing and Legal Services Involvement.** Early involvement of the Division of Hearing and Legal Services is essential to examine and evaluate the documentation and other evidence supporting the violations and to determine whether expert witnesses or depositions will be necessary, as well as to provide sufficient time for the Division of Hearing and Legal Services to write an opinion on the merits of the case.
- d. **Citations.** The law authorizes penalties to be proposed for each violation but limits the maximum penalty that can be proposed. In accordance with the guidelines, the following procedures shall be adhered to in issuing citations with violation-by-violation penalties.
 - (1) Each separate violation must have its own Alleged Violation Description which will describe the particular conditions associated with that violation instance.
 - (2) Each separate violation must have its own penalty calculated in accordance with the procedures given in this Chapter.
- e. **Case Review.** The procedures and timetables for significant case review will be followed in all cases involving violation-by-violation citations.
 - (1) The Regional Safety or Health Director shall notify the Program Director of a potential egregious case. The Program Director shall, in turn, notify the Commissioner of the following:
 - (a) Establishment name;
 - (b) Regional Office of jurisdiction;
 - (c) Six-month date;
 - (d) Opening conference date;
 - (e) General type of apparent violations, e.g., safety, health, recordkeeping.
 - (2) Regional Safety or Health Director(s) shall take care not

to expand the inspection beyond what they can reasonably expect to accomplish within these time frames.

- (3) The Program Director shall coordinate the provision of needed technical support and expert witnesses and may request assistance from federal OSHA, if necessary.
 - (4) The Regional Safety or Health Director shall complete his part of the significant case review as soon as possible, but not later than forty-five (45) days prior to the six (6)-month date and forward the case file to the Program Director for review.
- f. **Recordkeeping Violations.** If the case involves recordkeeping violations which are being considered for additional penalties, further steps are necessary.
- (1) Copies of evidence supporting each recordkeeping violation proposed as egregious, as developed from the company's occupational injury and illness logs and supplementary records, worker's compensation records, medical records, first aid logs and other sources shall be included in the package.
 - (2) This evidence must support the existence of a violation for both non-recorded and mis-recorded cases. It must include the particular recordability criteria involved: whether the case involved days away from work or days of restricted work activity beyond the day of injury or onset of illness as well as evidence that the case was work-related.

NOTE: Medical records contained in the case file shall be handled in accordance with the guidelines.

Citations

CHAPTER- 10

Chapter 10: Citations

I. Pre-citation Consultation

- A. General.** In order to ensure uniformity, consistency and the legal adequacy of a limited category of citation items, there shall be appropriate discussions between Regional Safety and Health Directors (Regional Directors), Program Director(s), and the Division of Hearing and Legal Services (DHLS) Director.

***NOTE:** This consultation is different from significant case review in as much as it occurs while the investigation is still under way or while draft citations are being prepared.*

- 1. Procedures for Significant Cases.** Discussions in accordance with program procedures shall occur when the citation items could involve important, novel or complex litigation in which the Regional Director would expect the investment of major litigation resources.
 - a. Categories of cases where discussions shall occur are as follows:
 - (1) All willful and general duty clause violations;
 - (2) Complex preemption questions involving other enforcement agencies;
 - (3) Cases arising under newly promulgated safety and health standards;
 - (4) Cases of significant public concern such as fatalities and catastrophic events;
 - (5) Cases which are likely to become major litigation vehicles in the development of VOSH law;
 - (6) Cases in which the employer is public sector and the region is proposing high severity/greater probability citation(s);
 - (7) Categories of cases designated by the Office of the Attorney General and the Commissioner of Labor and Industry as being appropriate for pre-citation consultation for reasons of litigation strategy or the elimination of unnecessary duplication of effort;

- (8) Categories of cases that have been identified by Federal OSHA as being of significant concern on the national level;
 - (9) In addition, the Program Director may request appropriate discussions with the Regional Director or the DHLS Director in other cases not listed in the above categories.
- b. Pre-citation discussion(s) between the regional offices and the Program Director(s) shall be conducted at the earliest possible stage of a VOSH investigation in order to assist in developing an investigation strategy, particularly in cases involving fatalities catastrophic events and cases of significant public concern.
 - c. Where required as a result of pre-citation discussion, the Regional Director(s) will undertake additional investigation which may involve obtaining expert assistance.
 - d. Nothing in the above procedures shall affect VOSH's responsibility and final authority to issue citations.

B. Citation Considerations

- 1. **General.** §40.1-49.4.A.1. of the *Code of Virginia* controls the writing of citations.
 - a. **Section 40.1-49.4.A.1.** "...the commissioner...shall with reasonable promptness issue a citation to the employer." The time which has elapsed from the completion of the inspection or investigation until the issuance of citation(s) shall be as brief as possible and closely monitored by the Regional Safety or Health Director.
 - (1) The Regional Director(s) shall issue citations as soon as possible after an inspection for safety require laboratory analysis of samples.
 - (2) When potential health violations require the receipt of laboratory results before they can be cited, a citation shall be issued as soon as possible after the results are received in the Regional Office.
 - b. **Section 40.1-49.4.A.3.** "No citation may be issued...after the expiration of six (6) months following the occurrence of any

alleged violation.” Accordingly, no citation shall be issued where the date on which it is actually assigned and dated is six (6) months past when the alleged violation last occurred.

Where the actions or omissions of the employer concealed the existence of the violation, the time limitation is suspended until such time as VOSH learns or could have learned of the violation. The Director of the DHLS shall be consulted prior to any such issuance.

Examples of continuing violations are failure to report fatal accidents, and failure to maintain certain records. VOSH must not have been the cause of the delay in discovering the violation.

2. Specific Instructions. The proper writing of a citation is an essential part of the enforcement process.

- a. **Standards and Regulations.** After identifying a hazardous condition, the CSHO shall review existing standards and regulations to ensure that the hazardous condition noted is covered within the scope and application of the standard. Citations shall not be issued unless the citation is based on mandatory language in VOSH standards and, when applicable, in referenced standards.
- b. **Citing in the Alternative.** A situation can also exist where more than one standard may apply to a single violation, depending on legal interpretations.
 - (1) The potentially applicable standards may be cited using the words, “**IN THE ALTERNATIVE**” in between the Alleged Violation Descriptions for each cited standard. Where a violation is alleged “in the alternative”, only one penalty, not one penalty for each standard cited, shall be proposed for the violative condition. A reference in the citation to each of the standards involved shall be accompanied by a separate Alleged Violation Description (AVD) which clearly alleges all of the necessary elements of a violation of that standard.

Example: Serious Citation 1, Item 1,
Serious Citation 1, Item 2
\$10,080 1910.212(a)(1)

[Alleged violation description][Alleged violation description]

IN THE ALTERNATIVE:

Serious Citation 1, Item 1,

Va. Code §40.1-51.1(a) [Alleged violation description][Alleged violation description]

- (a) Section 40.1-51.1.A. of the *Code of Virginia*, may be cited (a General Duty violation) in the alternative when a specific standard is cited to cover situations in which the cited standard may not apply.
 - (b) Before using alternative citing, the Director of the DHLS shall be consulted.
- c. **Citing Multiple Standards.** In rare cases, the same factual situation or hazardous condition may present possible multiple violations and involve more than one standard. For example, the facts which support a violation of §1910.28(a)(1) may also support a violation of §1910.132(a) if no scaffolding is provided when it should be and the use of body belts or lanyards is not required by the employer. In such a situation, a penalty for each standard shall be proposed.
- d. **Ordering of Violations on the Citation.** Violations shall be written in the numerical order in which they appear in the standards. Grouped violations shall also be written in the same order. If penalties are to be proposed for a grouped violation, the penalty shall be written across from the first violation item appearing on the VOSH-2.
- e. **Ensuring Consistency of Citations with Safety and Health Evaluation.** Before issuing any citation, the CSHO and the Regional Director will review the IW-1/ EMPLOYER INTERVIEW SHEET to ensure that the evaluations made at that time are consistent with the citations to be issued. The Regional Director shall note this review on the case file review notes.

- (1) Should any difference exist between the original evaluation and the citation, either the evaluation should be changed or the citation should not be issued.
- (2) An example of inconsistency between a citation and the prior safety and health evaluation are where an evaluation graded the employer at an Average (2) or Above Average (3) for most of the items in the IW-1/ EMPLOYER INTERVIEW SHEET and a training violation was cited.
- (3) In the above example, if the initial evaluation is considered correct, the citation should not be issued, and if the facts of the case show that the earlier evaluation was incorrect, the IW-1/ EMPLOYER INTERVIEW SHEET should be changed.
- (4) Where employee misconduct is a potential defense, it is also important to check this section as an adequate training program since an adequate training program is a vital part of the employer's defense.

3. **Issuing No Citation.** When an inspection, either partial or comprehensive, results in a finding of no violations, a letter will be sent to the employer to inform them of the findings. (*Refer to the applicable letter in Appendix "A".*)

C. Writing Citations

1. **Timeline for Writing Citations.** Section 40.1-49.4. A. of the Code of Virginia controls the writing of citations. "...the Commissioner...shall with reasonable promptness issue a citation to the employer. No citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation."
 - a. The Regional Safety or Health Director shall issue citations as soon as possible after an inspection for safety violations and for health violations which do not require laboratory analysis of samples.
 - b. When potential health violations require the receipt of laboratory results before they can be cited, a citation shall be issued as soon as possible after the results are received by the regional office.

- (1) If the results of an inspection yields citation items which do not require extensive investigation, as well as others which do, those citation items which do not require extensive investigation shall be issued promptly. In such cases, the employer shall be informed of the potential for additional citations, and of anticipated time frames.
- (2) After the completion of any extensive investigation required for such additional hazard(s) as discussed in item c. above, a new citation should be issued with a new citation number, but with the same inspection number. However, any citations must still be issued within six months following the occurrence of the alleged violation.
- (3) If questions arise concerning the six-month statute of limitations for citation issuance, the Director of the DHLS shall be consulted.

2. **Delayed Notification of Alleged Violation.** No inspection shall be initiated where an alleged violation last occurred six (6) months or more prior to the date on which the Department was notified of the condition. Where the actions or omissions of the employer concealed the existence of the violation, the time limitation is suspended until such time that VOSH learns or could have learned of the violation. A citation shall not be issued where any alleged violation last occurred six (6) months or more prior to the date on which the opening conference occurred.

1. **Alternative Standards**

Refer to sections I.B.2.b and I.B.2.c. of this chapter.

D. **Combining and Grouping of Violations.** Except for standards which deal with many unrelated hazards, the same standard may not be cited more than once on a single citation. However, the same standard may be cited on different citations on the same inspection.

1. **Combining.** Violations of a **single standard** having the same classification that are found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Normally, different facets of the same standard shall also be combined. Each instance of the violation shall be separately set out within that item of the citation. General violations of a standard may be combined with serious violations of the same standard when appropriate.

2. **Grouping.** When the source of *one* hazard is identified and involves interrelated violations of different standards, these may be grouped into a single violation. Within the grouping, the most serious violation(s) should be listed first. The following situations normally call for grouping violations:
 - a. **Grouping Related Violations.** When the CSHO believes that violations classified as serious are so closely related as to constitute a single hazardous condition, the violations should be grouped.
 - b. **Grouping Other than Serious Violations Where Grouping Results in a Serious Violation.** Two or more individual violations which, if considered individually represent other than serious violations may be grouped and alleged as a single serious violation if together they create a substantial probability of death or serious physical harm.
 - c. **Where Grouping Results in Higher Gravity Other-than-Serious Violation.** If a number of other-than-serious violations exist in the same piece of equipment, and when viewed together, these violations affect the overall gravity of possible injury resulting from an accident involving the combined violations, then the violations may be grouped, although the resulting citation will be an other-than-serious violation.
 - d. **Violations of Posting and Recordkeeping Requirements.** Violations of the posting and recordkeeping requirements which involve the same document, e.g., OSHA-300 Form was not posted or maintained, shall normally be grouped for penalty purposes.
3. **When Not to Group.** Instances when grouping is normally inappropriate:
 - a. **Single Inspection.** Only violations discovered in a single inspection of a single establishment or worksite may be grouped. An inspection in the same establishment or at the same worksite shall be considered to be a single inspection even if it continues for a period of more than one day or is

discontinued with the intention of resuming it after a short period of time.

- b. Multiple Inspections. Violations discovered in multiple inspections of a single establishment or worksite may not be grouped. An inspection in the same establishment or at the same worksite shall be considered a single inspection even if it continues for a period of more than one day or is discontinued with the intention of resuming it after a short period of time.
- c. Separate Establishments of the Same Employer. Where inspections are conducted, either at the same time or different times, at two establishments of the same employer and instances of the same violation are discovered during each inspection, the employer shall be issued separate citations for each establishment. The violations shall not be grouped.
- d. General Duty Clause Violations. Because §40.1-51.1.A. is cited so as to cover all aspects of a serious hazard for which no standard exists, **no grouping of separate General Duty Clause or standard violations is permitted.** This provision, however, does not prohibit grouping a §40.1-51.1.A. violation with a related violation of a specific standard.
- e. Egregious Penalty Cases. Violations suitable for egregious penalties (i.e., proposed as violation-by-violation citations) shall not be combined or grouped. Other violations in an egregious penalty case which are not suitable for egregious penalties may be grouped or combined. (See information on egregious penalties.)
- f. Violations Related to a Fatality. Violations which are directly related to a fatality may not be combined or grouped. Other violations in a fatality case which are not directly related to the fatality may be grouped or combined.
- g. Willful-serious Violations. Willful violations involving a substantial probability of death or serious bodily injury (i.e., but for the “willful” nature of the violation, it would have been classified as “serious”) may not be combined or grouped. Grouping of several “willful” other-than-serious violations is permitted where it would result in a single “willful” violation (and single penalty) that created a substantial probability of death or serious physical harm.

II. Citation Review

A. Regional Director's Authority and Responsibility to Review Citations

1. **Elements of Review.** The Regional Director shall be responsible for ensuring, with regard to all citations, that:
 - ✓ The documentation of the violation is sufficient to support the citation;
 - ✓ The language of the citation is clear and adequately communicates to the employer a clear description of the hazard (including its location) and employee exposure;
 - ✓ The proper codes were cited; and,
 - ✓ The penalty was calculated correctly.
2. **Substantial Deficiency Found.** If the Regional Director finds a substantial deficiency in the citation or the documentation, e.g., inappropriate gravity or the documentation does not support the citation, the report with an explanation shall be returned to the CSHO for modification.
3. **Errors Regional Directors May Correct.** The Regional Director may personally correct errors in the following: the Code cited, calculation of penalty assessed, and minor inaccuracies in the citation narrative (AVD/variable information) as follows:
 - a. **Justification in File and Communication to CSHO.** The Regional Director shall include justifications in the case file for each change and shall communicate the changes to the CSHO.
 - b. **Method Used to Make Changes.** Changes shall be made by drawing a single line through the incorrect information, then writing in the correct information. The original recommendations from the CSHO must remain legible, and the Regional Director must initial each change and document them. (*See VOSH-FRN form in Appendix "B"*).
 - c. **Difference of Opinion Between CSHO and Regional Director.** If the Regional Director and the CSHO disagree about changes, such differences shall be resolved through discussion by the Regional Director with the applicable VOSH Program Director.

B. Case File Review Procedures

1. General

All case files will be reviewed and approved by the Regional Director to ensure that the files are organized in accordance with procedures, and that they are well documented, and that they are clearly presented with appropriate findings and conclusions. Significant case files shall be reviewed and approved as described in this chapter.

2. Significant Case Review

- a. Definition of Significant Case. Any occupational safety or health compliance case which involves one of the following conditions shall be considered a VOSH “significant case”:
 - (1) Willful/criminal willful violation;
 - (2) Willful violations case suitable for egregious penalty treatment;
 - (3) Fatalities and catastrophic events;
 - (4) Interest at national level identified by OSHA;
 - (5) Interest by media, public officials, or other interest groups;
 - (6) Identified as significant by the Commissioner;
 - (7) Repeat violation (third instance or higher);
 - (8) Ergonomics violations.
- b. Review Procedures for Significant Cases. All significant cases shall be reviewed by the Regional Director, Program Director and the DHLS.
- c. Time Frame for Issuance of Citations for Significant Cases. All citations will be issued by the Regional Director following the case review process. Citations will be issued no later than six (6) months following the occurrence of the alleged violations (see §16VAC25-60-260.A.1 of the VOSH *Administrative Regulation Manual*, and Chapter 15, Legal Issues).
- d. Tracking Significant Cases. Significant cases will be tracked by DHLS.

3. **Review of Contested Cases.** All contested cases not settled during an informal conference will be reviewed by the Regional Director and Program Director. The Program Director may refer the contested case to the DHLS for advice on drafting a settlement agreement, for preparation of a final order, or for filing a bill of complaint.
4. **Regional Director's Review.** Regional Directors will review cases for compliance with all requirements of the FOM and other agency policy and procedures.

At a minimum, the Regional Director will review each of the following case file elements:

- a. Case file organization is consistent with requirements;
- b. Case narrative is complete, clear, and prepared in accordance with procedures;
- c. Findings and conclusions are well documented;
- d. Appropriate documentation is contained in the file;
- e. All exhibits are properly numbered and tabbed;
- f. All required VOSH forms are completed correctly;
- g. Appropriate testing/sampling was done;
- h. Sufficient photos and witness statements of employees, accident witnesses and supervisory personnel are included;
- i. Violations are properly cited and are described sufficiently;
- j. Citations are written in accordance with the FOM;
- k. Justification is included in the file for all willful and criminal willful cases;
- l. Penalties were accurately calculated;
- m. Inspection was conducted and the file prepared in a timely manner;
- n. Citations are consistent with safety and health evaluation on VOSH-IW1.

The Regional Director will always prepare written case file notes. (*See VOSH-FRN form in Appendix "B"*). These notes will be attached to the file.

For all significant or contested cases, the Regional Director will also complete a case review process form (See Appendix B). When this form is used, the review notes should be attached to it. The forms then will be included in Section 2 of the case file and forwarded to the Program Director for review.

For cases where it may be appropriate to use the egregious penalty procedures, the Regional Director will apply the required criteria. If the case meets the criteria, the Regional Director will notify the Program Director who shall then notify the Commissioner or his designee. The documentation and evidence required for violation-by-violation penalties shall be added to the case file, if these are not already included.

The Regional Director will ensure that all deficiencies are corrected by the CSHO before forwarding the case file to the Program Director for review.

The case file will be forwarded to Headquarters as soon as possible, but no later than ninety (90) days after the opening conference.

5. **Program Director's Review.** The Program Director or their designee will review all significant cases and all cases which have proposed egregious penalties. The Program Director or their designee will also review all contested cases which are sent to Headquarters. The Program Director or their designee will document any comments from such reviews to the case file.

At a minimum, the Program Director or their designee will review the file to determine the following:

- ✓ The Regional Director properly reviewed and made any necessary changes or corrections to the file before forwarding it for a significant case review;
- ✓ The case file is organized in accordance with the procedures of this FOM;
- ✓ Case narrative is clear and is written in accordance with procedures;
- ✓ All findings and conclusions are clear, concise, proper, and well documented;
- ✓ Violations are properly cited and the citations are written correctly;
- ✓ Investigation and case file preparation was completed in a timely fashion to allow for Headquarter staff review;
- ✓ Closing Conference was held unless the Regional Director was directed otherwise and all necessary VOSH forms have been accurately completed;
- ✓ Penalty was calculated properly.

If the Program Director or their designee determines that additional investigation or documentation is needed to substantiate the case findings or conclusions, the file will be returned to the Regional Director for action.

6. **The Division of Hearing and Legal Services (DHLS) Review.** DHLS is responsible for conducting a pre-citation issuance review of all VOSH significant cases to ensure that all of the elements of a *prima facie* case are sufficiently documented for each fatality/accident related willful, and third repeat violations; and to ensure that the Department's course of action in the case is legally supported by the documentation in the case file and that the evidence is sufficient to withstand a contest from the employer, or, in the case where no citation is issued, that the evidence supports the decision, and that proper investigative procedures were utilized by the inspector. The results of the review conducted by DHLS shall be summarized in writing. The following areas will be reviewed by the DHLS:
- a. *Prima Facie* Case. The DHLS shall review each violation to ensure that the following elements of the *prima facie* case are sufficiently documented for each violation cited:
 - (1) Existence of a safety or health hazard;
 - (2) Content and applicability of VOSH regulation or statute and employer violation of the regulation, statute or general duty clause;
 - (3) Employee exposure; and
 - (4) Employer knowledge;
 - b. Citation Language. Each violation on the citation shall be reviewed to ensure that the language is used accurately and reflects the meaning and intent of the regulation or statute cited.
 - c. General Duty Violations. This will be reviewed to ensure compliance with the requirements in the FOM.
 - d. Classification of Violations. These shall be reviewed to ensure accuracy, i.e., Serious vs. Other-than-Serious; or Repeat vs. Willful.
 - e. Citation for Multi-Employer Worksites. These are reviewed to ensure that the right employer was cited. Unusual issues include employee vs. independent contractor relationship and

general contractor/subcontractor vs. owner/independent contractor.

- f. Violation-by-Violation Penalties. These shall be reviewed to evaluate the documentation and other evidence and to provide an opinion on the merits of the case.
 - g. Affirmative Defenses. These must be evidenced in the documentation contained in the case file.
 - h. Training Violations. These will be reviewed for appropriateness.
 - i. Case File Documentation. This must be sufficient to support all findings and conclusions.
7. **CSHO Notification.** The Regional Director shall inform the CSHO of the results of the significant case review and provide him with a copy of the completed case review process form for that file. (*See VOSH-FRN form in Appendix "B"*).

III. Citation Issuance

A. Issuing Citations

- 1. **Sending Citations to the Employer.** Citations shall be issued in accordance with the requirements of §260 of the *VOSH Administrative Regulation Manual*. Citations shall be sent by certified mail or professional courier/parcel delivery service. Hand delivery of citations to the employer or an appropriate agent of the employer may be substituted for certified mailing if it is believed that this method would be more effective. Professional messenger service is acceptable. A signed receipt shall be obtained whenever possible; otherwise, the circumstances of delivery shall be documented in the file.
- 2. **Sending Citations to Employees or Employee Representative.** The Regional Office shall mail copies of citations to qualified employee representatives. Citations shall also be mailed to any employee upon request.

B. Amending or Administratively Vacating Citation & Notification of Penalty

- 1. **Citation Amendment or Administrative Vacating Justified.** A citation shall be replaced by an amended citation, or administratively vacated when information is presented to the Regional Director which indicates a need for such amendment or vacation under certain conditions which may include:

- a. Administrative or technical error:
 - (1) Citing of an incorrect standard.
 - (2) Incorrect or incomplete description of the alleged violation.
 - (3) A serious violation which should originally have been classified as other-than-serious.
 - b. The Regional Director shall review the following circumstances before amending or withdrawing a citation:
 - (1) Additional facts and documentation establish a valid affirmative defense.
 - (2) Additional facts and documentation establish that there was no employee exposure to the hazard.
 - (3) Additional facts and documentation establish a need to modify abatement date, penalty, or to reclassify citation items.
 - (4) Citations issued to the wrong employer.
- 2. Citation Amendment or Administrative Vacating Not Justified.** A citation shall *not* be amended or administratively vacated under certain conditions which include:
- a. The fifteen (15) working days for filing a notice of contest has expired and the citation has become a final order.
 - b. Employee representatives have not been given the opportunity to present their views unless the amendment/vacation involves only an administrative or technical error.
 - c. Editorial and/or stylistic modifications.
- 3. Procedures for Amending or Administratively Vacating Citations.** The following procedures are to be followed in amending or administratively vacating citations:
- a. Regional Director. The Regional Director or his designee shall issue an amended citation when becoming aware of any of the conditions in section I.B.1. This will replace a previous citation

in its entirety, or if the entire citation and notice is to be withdrawn, will administratively vacate the citation and notice.

A copy of the original citation shall be attached to the amended Citation and Notification of Penalty Form when the amended form is sent to the employer. In the latter case, the Regional Safety or Health Director shall follow the procedures below to notify the employer and employee representative, where applicable, of the amended or vacated citation.

- b. When Amendments Change Classification of Citation Items. Changes initiated by the Regional Director without an informal conference are the exception. In such cases, if proposed amendments to citation items change the classification of the items; e.g., serious to other-than-serious, the original citation items shall be replaced with new, appropriate citation items on the amended citation.
- c. Elements of Amended Citation and Notice. The amended Citation shall clearly indicate that:
 - (1) The employer is obligated to post the amended citation until the amended violation has been corrected or for three working days, whichever is longer;
 - (2) The period of contest of the amended will begin from the day following the date of receipt of the amended Citation and Notification of Penalty Form; and
 - (3) The contest period does not apply to the unchanged portions of the citation.
- d. Citation Vacated in Entirety. When circumstances warrant, a citation may be administratively vacated in its entirety by the Regional Director, Program Directors, or the Commissioner. The Regional Director must place justifying documentation in the case file. If a citation is to be withdrawn, the following procedures apply:
 - (1) Letter to Employer. A letter withdrawing the Citation and Notification of Penalty should be sent to the employer, by the Regional Director. The letter should refer to the original citation and penalty, state that they are vacated, and direct that the letter be posted by the employer for three working days in those locations

where the original citation was posted. The letter should direct the employer to discard the original citation.

- (2) Copy to Employee or Employee Representative. When applicable to the specific situation (e.g., an employee representative participated in the walkaround inspection, the inspection was in response to a complaint signed by an employee or an employee representative, or the withdrawal resulted from an informal conference or settlement agreement in which an employee representative exercised the right to participate), a copy of the letter shall also be sent to the employee or the employee representative as appropriate. A copy of the withdrawal letter shall also be sent to any employee representative who has received a copy of the Citation and Notice, according to section III.A., above.
- (3) The instructions contained in this section, with appropriate modification, are also applicable to the amendment of the notification of Failure to Abate Alleged Violation.
- (4) The assistance of the applicable Program Director shall be sought when amendments cause complicated drafting problems.

4. Procedure to Follow for Citations That are Sent to Employers and Not Received.

- a. After thirteen (13) days of mailing the citation, the CSHO will contact the employer to verify their mailing address.
- b. The CSHO will send a second notification through certified mailing.
- c. If the second notification is returned as undeliverable, the CSHO will hand deliver the citation.
- d. If CSHO is still unable to deliver the citation after hand delivery, the citation becomes a Final Order, by law, and the CSHO will send it to accounting.

Abatement

CHAPTER- 11

Chapter 11: Abatement

I. Abatement

The VOSH Abatement Verification regulation, §307 through §320 of the *VOSH Administrative Regulation Manual*, includes requirements that employers must follow, if they are cited for a VOSH violation, to ensure that they have abated the cited hazard(s).

The Regional Safety or Health Director is responsible for determining if abatement has been accomplished. Abatement of all violations must be verified through Compliance Officer observation, or through employer provided abatement certification, and additional abatement documentation when required by the citation.

II. Important Terms and Concepts

- A. **Abatement verification** consists of abatement certification and abatement documentation, e.g., abatement photographs, abatement plans, and progress reports, etc.
- B. **Abatement certification** is a brief, signed statement from the employer attesting to when and how abatement was achieved for the violations cited.
- C. **Abatement documentation** is additional material submitted along with the abatement certification to show that abatement is complete and can include, but is not limited to, photos or videos, and receipts for materials and/or labor (*see below*).

Abatement documentation must be accurate and describe or portray the abated condition adequately. It may be submitted in electronic form, if approved by the Regional Safety or Health Director. The abatement regulation does not mandate a particular type of documentary evidence for any specific cited condition. The adequacy of the abatement documentation submitted by the employer will be assessed by VOSH using the information available in the citation and the Department's knowledge of the employer's workplace and history.

- D. **Petition for Modification of Abatement** ("PMA") is the process that allows an employer to file a petition when they have made a good faith effort to comply with abatement requirements but have not completed the abatement due to factors beyond their control.

III. Abatement Certification

Abatement certification is **the minimum level of abatement verification** and is required for all violations once they become final orders.

An exception exists where the CSHO observed abatement during the on-site portion of the inspection and the violation is listed on the citation as **“Corrected During Inspection (CDI)”** See Section II.D of this chapter, CSHO Observed Abatement.

A. Abatement Certification Requirements. The employer’s written certification that abatement is complete must include the following information for each cited violation:

1. The date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement;
2. The employer’s name and address;
3. The inspection number to which the submission relates;
4. The citation and item numbers to which the submission relates;
5. A statement that the information submitted is accurate; and
6. The signature of the employer or the employer’s authorized representative.

A non-mandatory example of an abatement certification letter is available at the end of this section on Abatement Verification (16VAC25-60-307).

B. Abatement Certification Timeframe.

1. All Serious citation items which have become final orders require written abatement certification within ten (10) calendar days of the abatement date.
2. A **Petition for Modification of Abatement** Date (“PMA”) received and processed in accordance with the guidance of the FOM will suspend the ten (10) day time period for receipt of the abatement certification for the item for which the PMA is requested.

Thus, no citation will be issued for failure to submit the certification within ten (10) days of the abatement date.

3. If the PMA is denied, the ten (10) day time period for submission to VOSH begins on the day the employer receives notice of the denial.

IV. Abatement Documentation.

More extensive documentation of abatement is required for the most serious violations. When a violation requires abatement documentation, in addition to

certifying abatement, the employer must submit documents demonstrating that abatement is complete.

A. Required Abatement Documentation. Pursuant to , documentation of abatement is required for the following:

1. Willful violations;
2. Repeat violations; and
3. Serious violations where VOSH determines that such documentation is necessary as indicated on the citation. For further information, see Section VI.C. of this chapter, Abatement Documentation for Serious Violations.

B. Adequacy of Abatement Documentation.

1. Abatement documentation must be accurate and describe or portray the abated condition adequately. It can be submitted in electronic form, if approved by the Regional Director.
2. The abatement regulation does not mandate a particular type of documentary evidence for any specific cited conditions.
3. The adequacy of the abatement documentation submitted by the employer will be assessed by VOSH using the information available in the citation and the Agency's knowledge of the employer's workplace and history.
4. Examples of documents that demonstrate that abatement is complete include, but are not limited to:
 - a. Photographic or video evidence of abatement;
 - b. Evidence of the purchase or repair of equipment;
 - c. Evidence of actions taken to abate;
 - d. Bills from repair services;
 - e. Reports or evaluations by safety and health professionals describing the abatement of the hazard or a report of analytical testing;
 - f. Documentation from the manufacturer that the article that was repaired is within the manufacturer's specifications;

- g. Records of training completed by employees, if the citation is related to inadequate employee training; and
 - h. A copy of program documents, if the citation was related to a missing or inadequate program, such as a deficiency in the employer's respirator or hazard communication program.
- 5. Abatement documentation (photos, employer programs, etc.) shall be retained in accordance with Program Directive 02-006B Abatement Verification Regulation §307 of the VOSH Administrative Regulations Manual (ARM)- Enforcement Policies and Procedures.

C. Abatement Documentation for Serious Violations.

1. High Gravity Serious Violations.

- a. VOSH policy generally specifies that all high gravity serious violations will require abatement documentation.
- b. Where, in the opinion of the Regional Director, abatement documentation is not required for a high-gravity serious violation, the reasons for this must be set forth in the case file.

2. Moderate or Low Gravity Serious Violations. Moderate or low gravity serious violations should not normally require abatement documentation, except when the Regional Director will require evidence of abatement for moderate- and low-gravity serious violations under the following circumstances:

- a. If the establishment has been issued a citation for a willful violation or a failure-to-abate notice for any standard which has become final order in the previous three (3) years; or
- b. If the employer has any history of a violation that resulted in a fatality, or an OSHA-300 Log entry indicating serious physical harm to an employee in the past three (3) years. The standard being cited must be similar to the standard cited in connection with the fatality or serious injury or illness.

D. CSHO Observed Abatement.

- 1. Employers are not required to certify abatement for violations which they promptly abate during the onsite portion of the inspection, and which is observed by the CSHO.
 - a. Regional Directors can use their discretion in extending the "24 hour" time limit to document abated conditions during the inspection.

- b. Observed abatement will be documented on the Abatement section of the Violation Worksheet for each violation and must include the date and method of abatement.
2. If the observed abatement is for a violation that would normally require abatement documentation by the employer, then the documentation in the case file must also indicate that abatement is complete. Where suitable, the CSHO can use photographs or video evidence. For further information about adequacy of abatement documentation, see Section VI.B, of this chapter, Adequacy of Abatement Documentation.
3. When the abatement has been witnessed and documented by the CSHO, a notation reading “Corrected During Inspection” shall be made on the citation.
4. Notations stating “Corrected during inspection” or “Employer has abated all hazards” shall not be made on the citation in cases where there is evidence of a continuing violative practice by an employer who can be subject to a summary enforcement order under Section 11(b) of the Act (i.e., failure to provide fall protection is a recurring condition based on citation history or other indications that suggest widespread violations of the same or similar standards at other establishments or construction worksites).

V. Monitoring Information for Abatement Periods Greater than ninety (90) Days.

A. Abatement Periods Greater than ninety (90) Days. For abatement periods greater than ninety (90) calendar days, the regulation allows the Regional Director flexibility in either requiring or not requiring monitoring information.

1. The requirement for abatement plans and progress reports must be specifically associated with the citation item to which they relate.
2. Progress reports cannot be required unless abatement plans are specifically required.
3. Note that Paragraphs (e) and (f) of §307 Virginia Administrative Code have limits: the Regional Director is not allowed to require an abatement plan for abatement periods less than ninety-one (91) days or for citations classified as other-than-serious.
4. The regulation places an obligation on employers, where necessary, to identify how employees are to be protected from exposure to the violative condition during the abatement period. One way of ensuring

that interim protection is included in the abatement plan is to note this requirement on the citation. See §307 of the Virginia Administrative Code, Abatement Plans and Progress Reports.

B. Abatement Plans.

1. The Regional Director can require an employer to submit an abatement plan for each qualifying cited violation.
 - a. The requirement for an abatement plan must be indicated in the citation.
 - b. The citation can also call for the abatement plan to include interim measures.
2. Within twenty-five (25) calendar days from the final order date, the employer must submit an abatement plan for each violation that identifies the violation and the steps to be taken to achieve abatement. The abatement plan must include a schedule for completing the abatement and, where necessary, the methods for protecting employees from exposure to the hazardous conditions in the interim until the abatement is complete (§1903.19(e)(2)).
3. In cases where the employer cannot prepare an abatement plan within the allotted time, a PMA must be submitted by the employer to amend the abatement date.

C. Progress Reports.

1. An employer that is required to submit an abatement plan can also be required to submit periodic progress reports for each cited violation. In such cases, the citation must indicate:
 - a. That periodic progress reports are required and the citation items for which they are required;
 - b. The date on which an initial progress report must be submitted, which can be no sooner than thirty (30) calendar days after the due date of an abatement plan;
 - c. Whether additional progress reports are required; and
 - d. The date(s) on which additional progress reports must be submitted.
2. For each violation the progress report must identify, in a single sentence, if possible, the action taken to achieve abatement and the date

that the action was taken. There is nothing in this policy or the regulation prohibiting progress reports as a result of settlement agreements.

D. Special Requirements for Long-Term Abatement.

1. Long-term abatement is abatement that will be completed more than one (1) year from the citation issuance date.
2. The Regional Director must require the employer to submit an abatement plan for every violation with an abatement date in excess of one (1) year.
3. Progress reports are mandatory and must be filed, at a minimum, every six (6) months. More frequent reporting can be required at the discretion of the regional director.

E. Employer Failure to Submit Required Abatement Certification.

Actions Preceding Citation for Failure to Certify Abatement.

1. If abatement certification, or any required documentation, is not received within thirteen (13) calendar days after the abatement date [the regulation requires filing within ten (10) calendar days after the abatement date; and another three (3) calendar days is added for mailing], then the following procedures should be followed:
 - a. Remind the employer by telephone of the requirement to submit the material and tell the employer that a citation will be issued if the required documents are not received within seven (7) calendar days after the telephone call.
 - b. During the conversation with the employer, determine why the employer has not complied and document all communication efforts in the case file. Discuss VOSH's PMA policy and explain that a late petition to modify the abatement date can be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.
 - c. Issue a follow-up letter to the employer the same day as the telephone call.
 - d. The employer can be allowed to respond by fax or email where appropriate.
2. If the certification and/or documentation are not received within the next seven (7) calendar days, then a single other-than-serious citation combining all the individual instances where the employer has not submitted abatement verification (certification and documentation) with a penalty of not less than \$1,000 will be issued.

3. Normally citations for failure to submit abatement certification for violations of §307 D shall not be issued until the above procedures have been followed and the employer has been provided additional opportunity to comply. These pre-citation procedures also apply when abatement plans, or progress reports are not received within thirteen (13) days of the due date.

F. Citation for Failure to Verify.

1. Citations for failure to submit abatement verification (certification, documentation, abatement plans or progress reports) requires formal follow-up activities such as reaching out to the employer by phone or email before issuing citations.

NOTE: Each violation of §307 of the Administrative Regulation Manual (c), (d), (e), or (f) with respect to each original citation item is a separate item.

3. For those situations where the abatement date falls within the fifteen (15) day informal conference time period, and when an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation's classification or abatement period is to be modified.
4. For those rare instances where the reminder letter is returned to the Regional Office by the Post Office as undeliverable and telephone contact efforts fail, the Regional Director has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certification.
5. *For those instances where the abatement certifications for other-than-serious citations are not obtained after following the procedures in (the above part), a citation may be marked as completed based upon the Regional Director's discretion. The Regional Director shall consult with the Program Director prior to updating abatement status in OIS.*

G. Certification Omissions.

1. An initial minor or non-substantive omission in an abatement certification (e.g., lack of a definitive statement that the information being submitted is accurate) should be considered a de minimis condition of the regulation.
2. If there are minor deficiencies, such as omitting the inspection number, signature or date, the employer should be contacted by telephone to

verify that the documents received were the ones that they intended to submit. If so, then the date stamp of the Regional Office can serve as the date on the document.

3. A certification with an omitted signature should be returned to the employer to be signed.

H. Penalty Assessment for Failure to Submit Abatement Certification and/or Documentation.

The penalty provisions for failing to submit abatement certification and/or abatement documentation will be \$,1000. No adjustments for size, history, or good faith will be given. VOSH ARM, §307 D and E.

The penalty for not notifying employees and tagging will follow the same penalty structure which is currently being §40.1-51.2(b) of the Code of Virginia applied for failure to post citations. VOSH ARM, §307 H.1, H.2, H.3, J.1, J.2, J.3, J.5, and J.6.

VI. Tagging for Movable Equipment.

A. Tag-Related Citations.

Tag-related citations must be observed by CSHOs prior to the issuance of a citation for failure to initially tag the cited movable equipment.

1. See §1903.19, Non-mandatory Appendix C, for a sample warning tag. VOSH must be able to prove the employer's initial failure to act (tag the movable equipment upon receipt of the citation).
2. Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation can be issued for failure to maintain the tag or copy of the citation using §1903.19(i)(6).

B. Equipment Which is Moved.

Tags are intended to provide an interim form of protection to employees through notification for those who may not be aware of the citation or the hazardous condition.

1. For non-hand-held equipment, CSHOs should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement (§1903.19(i)) because the tagging provision is triggered upon movement of the equipment.

2. For hand-held equipment, employers must attach a warning tag or copy of the citation immediately after the employer's receipt of the citation. The attachment of the tag is not dependent on any subsequent movement of the equipment.

VII. Failure to Notify Employees by Posting.

A. Evidence.

Like tag-related citations, CSHOs shall investigate an employer's failure to notify employees by posting.

B. Location of Posting.

Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees (§1903.19(g)(2)) the employer can post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives. Employers may also communicate by other means with affected employees and their representatives regarding abatement activities.

C. Other Communication.

The CSHO must determine not only whether the documents or summaries were appropriately posted, but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used as an alternative.

VIII. Abatement Verification for Special Enforcement Situations.

A. Construction Activity Considerations.

1. Construction activities pose situations requiring special consideration.
 - a. In cases of citations issued to construction employers, abatement verification can be achieved if the inspected project site is complete and the cited employer is no longer working on site.
 - b. If a CSHO does not receive abatement information and returns to the site and the project is complete, often times the contractor will not be on site. Abatement documentation (photos) would show the cited hazards (s) as abated if the project is complete. This will prevent CSHOs from tracking down contractors for abatement certification and save man hours.

2. Equipment-related and all program-related (e.g., crane inspection, hazard communication, respirator, training, competent person, qualified persons) violations will always require employer certification of abatement regardless of construction site closure.
3. Where the violation specified in a citation is the employer's general practice of failing to comply with a requirement (e.g., the employer routinely fails to provide fall protection at its worksites), closure/completion of the individual worksite will not be accepted as abatement.
4. For situations where the main office of the employer being cited is physically located in another Regional jurisdiction, the Regional Director who has jurisdiction over the worksite will proceed as if the employer's main office were in the Regional Director's jurisdiction, and notify the affected Regional Office of the communication with the employer.
5. Where a follow-up inspection to verify abatement is deemed necessary, the affected Regional Offices will determine the most efficient and mutually beneficial approach to conducting the inspection.

B. Field Sanitation and Temporary Labor Camps.

1. **Agriculture.** A farming operation with ten (10) or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve (12) months is not exempt from VOSH inspection. The inspection may include all working conditions covered by VOSH standards, including Field Sanitation, §1928.110, and Temporary Labor Camps.

C. Follow-Up Policy for Employer Failure to Verify Abatement under §1903.19.

Follow-up or monitoring inspections would not normally be conducted when evidence of abatement is provided by the employer or employee representatives. For further information on exceptions for Severe Violator Enforcement Program (SVEP) cases, see CPL 02-00-169, Severe Violator Enforcement Program (SVEP), September 15, 2022.

NOTE: For further information on extended abatement periods, see Section V, Monitoring Information for Abatement Periods Greater than ninety (90) Days, and Section X.D., Monitoring Inspections, both of this chapter.

1. Where the employer has not submitted the required abatement certification or documentation within the time permitted by the

regulation, the Regional Director has discretion to conduct a follow-up inspection.

2. Submission of inadequate documents can also be the basis for a follow-up inspection.
3. This inspection should not generally occur before the end of the original fifteen (15) day contest period, except in unusual circumstances.

IX. On-Site Visits: Procedures for Abatement Verification and Monitoring.

A. Follow-Up Inspections.

The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected or to verify the accuracy of information provided during a phone/email/fax investigation or Rapid Response Investigation

B. Severe Injury Reporting Monitoring.

VOSH may conduct monitoring inspections of closed Rapid Response Investigations (RRIs) based on a randomized selection of closed investigations. The monitoring inspection is to ensure accuracy in the reporting and will be limited to an inspection of the previously reported condition. See Memorandum on Revised Interim Procedures for Reporting Requirements under 29 CFR 1904.39, March 4, 2016.

C. Initial Follow-Up.

1. The initial follow-up is the first follow-up inspection after issuance of the citation.
2. If a violation is found not to have been abated, then the CSHO shall inform the employer that the employer is subject to a Notification of Failure to Abate Alleged Violation and proposed additional daily penalties while such failure or violation continues.
3. Failure to comply with enforceable interim abatement dates involving multi-step abatement shall be subject to a Notification of Failure to Abate Alleged Violation.
4. Where the employer has implemented some controls, but the control measures were inadequate during follow-up monitoring, and when other technology was available that would have brought the process into compliance, a Notification of Failure to Abate Alleged Violation

normally shall be issued. If the employer has exhibited good faith, a late PMA for extenuating circumstances can be considered.

5. Where an apparent failure to abate by means of engineering controls is found to be due to technical infeasibility, no failure to abate notice shall be issued; however, if proper administrative controls, work practices or personal protective equipment are not utilized, a Notification of Failure to Abate Alleged Violation shall be issued.

D. Second Follow-Up.

1. Any subsequent follow-up after the initial follow-up inspection dealing with the same violations is considered a second follow-up.
 - a. After the Notification of Failure to Abate Alleged Violation has been issued, the Area Director shall allow a reasonable time for abatement of the violation before conducting a second follow-up. The employer must ensure that employees are adequately protected by other means until the violations are corrected.
 - b. If the employer contests the proposed additional daily penalties, then a follow-up inspection shall still be scheduled to ensure correction of the original violation.
2. If a second follow-up inspection reveals that the employer still has not corrected the original violations, a second Notification of Failure to Abate Alleged Violation with additional daily penalties shall be issued if the Regional Director, after consultation with the Program Director, concludes that this action is appropriate.
3. If a Notification of Failure to Abate Alleged Violation and additional daily penalties are not to be proposed because of an employer's flagrant disregard of a citation or an item on a citation, then the Regional Director shall immediately contact the Program Director. This communication, in writing, should detail the circumstances so that the matter can be referred to the Deputy Commissioner for Regulatory Programs for appropriate action, in accordance with Section 11(b) of the Act.

E. OSH Act Section 11(b).

There may be times during the initial follow-up when, because of an employer's flagrant disregard of a citation or other factors, it will be apparent that traditional enforcement actions would be inappropriate or ineffective. In such cases, a summary enforcement action shall be initiated under Section 11(b) of the Act in the U.S. Court of Appeals. The Regional Director shall notify the Regional Administrator, in writing, of all the particular circumstances of the case for referral to the RSOL.

F. Follow-Up Inspections.

1. Follow-up inspections shall be coded as such in OIS and associated with the inspection case file from which the citations being evaluated were issued. The applicable identification and description sections of the Violation Worksheet, citation, or file narrative shall be used for documenting correction of violations and failure to abate items during follow-up inspections. Failure to Abate violations are issued in the original inspection. Repeat violations are issued in the follow-up inspection.
2. If Serious, Willful, or Repeat violation items were appropriately grouped in the Violation Worksheets in the original case file, they can be grouped on the follow-up Violation Worksheet; otherwise, individual Violation Worksheets shall be used for each item. The correction of other-than serious violations can be documented in the narrative portion of the case file.
3. **Documentation of Hazard Abatement by Employer.**
 - a. The hazard abatement observed by the CSHO shall be specifically described in the Violation Worksheet, including any applicable dimensions, materials, specifications, personal protective equipment, engineering controls, measurements or readings, or other conditions.
 - b. Brief terms such as “corrected” or “in compliance” will not be accepted as proper documentation for violations having been corrected.
 - c. When appropriate, this written description shall be supplemented by a photograph and/or a video recording to illustrate correction circumstances.
 - d. Only the item description and identification blocks need to be completed on the follow-up Violation Worksheet with an occasional inclusion of an applicable employer statement concerning correction under the employer knowledge section, if appropriate.
4. **Sampling.**
 - a. CSHOs conducting a follow-up inspection to determine abatement of violations of air contaminant or noise standards, shall decide whether sampling is necessary and if so, what kind (i.e., spot sampling, short term sampling, or full-shift sampling).

- b. If there is reasonable probability that a Notification of Failure to Abate Alleged Violation will be issued, then full-shift sampling is required to verify exposure limits based on an (eight) 8-hour time-weighted average.

5. Narrative.

The CSHO must include in the narrative the findings of the inspection, along with recommendations for action. In order to make a valid recommendation, it is important to have all pertinent factors available in an organized manner.

6. Failure to Abate.

In the event that any item has not been abated, complete documentation shall be included on an Violation Worksheet.

X. Monitoring Inspections.

A. General.

Monitoring inspections are conducted to ensure that hazards are being corrected, and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance. Such inspections can be scheduled for the following reasons, among others:

1. Abatement dates in excess of one year.
2. A **Petition for Modification of Abatement** date (PMA).
3. A Corporate-Wide Settlement Agreement. See CPL 02-00-152, Guidelines for Administration of Corporate-Wide Settlement Agreements, June 22, 2011.
4. To ensure that terms of a permanent variance are being carried out.
5. At the request of an employer requesting technical assistance granted by the Regional director.

B. Conduct of Monitoring Inspection (PMAs and Long-Term Abatement).

Monitoring inspections shall be conducted in the same manner as follow-up inspections. An inspection shall be classified as a monitoring inspection when a safety/health inspection is conducted for one or more of the following purposes:

1. Determine the progress that an employer is making toward final correction.
2. Ensure that the target dates of a multi-step abatement plan are being met.
3. Ensure that an employer's petition for the modification of abatement dates is made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible.
4. Ensure that the employees are being properly protected until final controls are implemented.
5. Ensure that the terms of a permanent variance are being implemented.
6. Provide abatement assistance for items under citation.

C. Abatement Dates in Excess of One Year.

1. Monitoring visits shall be scheduled to check on progress made whenever abatement dates extend beyond one year from the issuance date of the citation.
2. These inspections shall be conducted approximately every six months, counted from the citation date, until final abatement has been achieved for all cited violations.
 - a. If the case has been contested, then the final order date (instead of the citation date) shall be used as a starting point.
 - b. A settlement agreement can specify an alternative monitoring schedule.
3. If the employer is submitting satisfactory quarterly progress reports and the Regional Director agrees after careful review that these reports reflect adequate progress on implementation of control measures and that they provide adequate interim protection for employees, then a monitoring inspection can be conducted every twelve months.
4. Such inspections shall have priority equal to that of serious formal complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.

D. Monitoring Abatement Efforts.

1. The Regional Director shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.
2. Where engineering controls have been cited or required for abatement, a monitoring inspection shall be scheduled to evaluate the employer's abatement efforts. Failure to conduct a monitoring inspection shall be fully explained in the case file.
3. Where no engineering controls have been cited but more time is needed for other reasons that do not require assistance from VOSH (such as delays in receiving equipment), a monitoring visit need not normally be scheduled.
4. Monitoring inspections shall be scheduled as soon as possible after the initial contact with the employer and shall not be delayed until actual receipt of the PMA.
5. CSHOs shall decide during the monitoring inspection whether sampling is necessary and, if so, to what extent (i.e., spot sampling, short-term sampling, or full-shift sampling).
6. CSHOs shall include pertinent findings in the narrative along with recommendations for action. To reach a valid conclusion when recommending action, it is important to have all relevant factors available in an organized manner. The factors to be considered can include, but are not limited to, the following:
 - a. Progress reports or other indications of the employer's good faith efforts, demonstrating effective use of technical expertise and/or management skills, accuracy of information reported by the employer, and timeliness of progress reports.
 - b. The employer's assessment of the hazards by means of surveys performed by in-house personnel, consultants, and/or the employer's insurance agency.
 - c. Other documentation collected by Regional Office personnel, including verification of progress reports, success and/or failure of abatement efforts, and assessment of current exposure levels of employees.
 - d. Employer and employee interviews.
 - e. Specific reasons for requesting additional time, including specific plans for controlling exposures and specific calendar dates.
 - f. Personal protective equipment.

- g. Medical programs.
- h. Emergency action plans.

E. Monitoring Corporate-Wide Settlement Agreements.

Corporate-wide Settlement Agreements (CSA) extend abatement requirements to all covered locations of the company. These agreements can require baseline, periodic, and follow-up monitoring. More information about abatement related to CSA is in CPL 02-00-152, Guidelines for Adminstrating of Corporate-Wide Settlement Agreements, dated June 22, 2011.

X. Notification of Failure to Abate.

A. Violation.

A Notification of Failure to Abate Alleged Violation (VOSH-2B) shall be issued in cases where violations have not been corrected as required, as verified by an onsite inspection or follow-up inspection.

B. Penalties.

Failure to abate penalties shall be applied when an employer has not corrected a previously cited violation that is a final order of the Commissioner.

C. Calculation of Additional Penalties.

1. A Gravity Based Penalty (GBP) for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection.
2. Detailed information on calculating failure to abate (FTA) penalties is included in Chapter on Penalties and Debt Collection.

XI. Case File Management.

A. Closing of Case File Without Abatement Certification.

The closing of a case file without abatement certification(s) must be justified through a statement in the case file by the Regional Director or his designee, addressing the reason for accepting each uncertified violation as an abated citation.

B. Review of Employer-Submitted Abatement.

Regional Offices are encouraged to review employer-submitted abatement verification materials as soon as possible but no later than thirty (30) days after

receipt. If the review will be delayed, notify the employer that the material will be reviewed by a certain date, and that the case will be closed if appropriate, after that time.

C. **Whether to Keep Abatement Documentation.**

Abatement documentation (photos, employer programs) shall be retained in accordance with OSHA Instruction ADM 03-01-005, OSHA Compliance Records, dated August 3, 1998.

XII. Abatement Services Available to Employers.

Employers requesting abatement assistance shall be informed that VOSH is willing to work with them even after citations have been issued, and that VOSH can provide incentives for immediate onsite abatement of certain types of violations. For further information see Chapter on Penalties, Section on Effect on Penalties if Employer Immediately Corrects.

XIII. Abatement Coding in OIS

A. Entering abatement status in OIS is critical to ensure that corrective actions for violations are corrected within the specified time. OIS has five (5) abatement status selections to choose from, which are:

1. Abatement Complete.

Selected after a review of employer provided documentation demonstrate corrective actions taken to abate cited violations.

2. Not Completed – Employer Out of Business.

Selected after the employer provides documentation that the cited business is closed or no longer in operation.

3. Not Completed – Worksite Changed.

When the employer has completed a project on the site they were inspected on and is no longer on site.

4. Not Completed – Solicitor Advised.

Selected when a contested case goes through litigation and is dismissed or when directed by the Department of Legal Services

5. Not Completed – AD Discretion.

Selected for other than serious violations were the Regional director has made reasonable efforts to contact the employer but have been unsuccessful.

- B. All abatement status updates will have a brief completed abatement description to capture the abatement actions.

C. Contested cases.

When a case is contested, the period for abatement does not begin to run for the contested items until the day following the entry of the final order affirming the citation. If the employer provides abatement information for a contested citation, the abatement status will be updated in OIS as “Abatement Completed” once the abatement information is verified for the cited violations.

Post Citation Procedures

CHAPTER- 12

Chapter 11: Post Citation Procedures

I. POST-CITATION PROCESSES

A. Informal Conferences

1. **General.** Pursuant to §330 of the *VOSH Administrative Regulation Manual*, the employer, any affected employee or employee representative may request an informal conference.
2. **Procedures.** Whenever an informal conference is requested by the employer, an affected employee or the employee representative, both parties shall be afforded the opportunity to participate fully. If the requesting party objects to the attendance of the other party, separate informal conferences may be held. During the conduct of a joint informal conference, separate or private discussions may be permitted if either party so requests.
 - a. Notification of Participants - Employer Requested Informal Conference. After an informal conference requested by an employer has been scheduled, it is the duty of the employer to notify the employees of the issues involved, and the date, time and place of the informal conference in accordance with §330 E. of the *VOSH Administrative Regulation Manual*.
 - b. Notification of Participants - Employee Requested Informal Conference. After an informal conference requested by an employee has been scheduled, the Regional Director shall notify the affected parties of the date, time and place by telephonic or electronic means, and, if considered useful, in writing in accordance with §330 E. of the *VOSH Administrative Regulation Manual*.
 - (1) The employer shall be requested to complete and post the form provided in the citation package.
 - (2) Documentation of the Regional Director's actions notifying the parties of the informal conference shall be placed in the case file.
3. **Participation by VOSH Officials.** The inspecting CSHO(s) shall be notified of an upcoming informal conference and, if feasible, shall be given the opportunity to participate in the informal conference unless the Regional Director anticipates that only a penalty adjustment will result. They shall be advised of any changes made by the Regional Director in the event they were unable to participate.
 - a. In complex cases, in order to ensure that discussions of, and

possible settlement or modifications to, the citation(s) or penalty may be completely and accurately recalled, at least, one other VOSH employee in addition to the Regional Director may be present at the informal conference. This employee may be the CSHO, a clerical staff member, or other assigned person.

- b. A second VOSH staff member such as the CSHO or other assigned person should attend all informal conferences in the following situations:
 - 1. Cases which involve total proposed penalties of \$100,000 or more;
 - 2. Cases which are so lengthy or complex that an additional individual is needed to provide assistance to the principal VOSH representative.
 - c. The Regional Director shall ensure that notes are made indicating the basis for any decisions made at, or as a result of, the informal conference. It is appropriate to record the informal conference and to use the recording in lieu of written notes, but the recording should not be used as a substitute for the second VOSH conference participant cited in the above paragraph.
4. **Conduct of the Informal Conference.** The Regional Director shall normally conduct the informal conference. The following guidelines shall be used.
- a. Opening Remarks. The opening remarks shall include discussions of the following:
 - (1) Purpose of the informal conference.
 - (2) Rights of participants.
 - (3) Contest rights and time restraints.
 - (4) Limitations, if any.
 - (5) Settlement of cases.
 - (6) Other relevant information. For example, if no employee or employee representative has responded, whether the employer has posted the notification form regarding the informal conference, etc.
 - b. Conference. The conference shall include discussion of any relevant matters including citations, safety and health programs, conduct of the inspection, means of correction and penalties in accordance with the following:

- (1) All parties shall be encouraged to participate fully so their views can be properly considered.
 - (2) Positions on all issues discussed shall be fully considered before making a determination regarding possible settlement of the case in accordance with current VOSH procedures.
 - (3) VOSH representatives shall make every effort to assist both the employer and the affected employees and their representatives to improve safety and health in the workplace.
 - (4) No opinions regarding the legal merits of an employer's case shall be expressed during the informal conference.
 - (5) There should be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the Commonwealth's Attorney for criminal prosecution.
- c. Closing. At the conclusion of the discussion, the main issues and potential courses of action shall be summarized. A written summary of the informal conference shall be compiled. This summary, together with any other relevant notes or recordings of the discussions that are made by the Regional Director, shall be placed in the case file.
5. **Decisions.** At the end of the informal conference, unless it involves a significant case, the Regional Director shall make a decision as to what action is appropriate in light of facts brought up during the conference.
- a. When preparing to make a decision to settle a case, the Regional Director shall make a reasonable effort to obtain the views of the employee representative, if there is one, and if he did not attend the conference. There is no need to contact the employee representative if only a penalty adjustment is involved.
 - b. Changes to citations, penalties, or abatement dates normally shall be made by a means of an informal settlement agreement in accordance with current VOSH procedures. The reasons for such changes shall be documented in the case file.
 - c. Employers shall be informed that they are required by §330 F. of the *VOSH Administrative Regulation Manual* to post copies of all amendments to the citation resulting from informal

conferences.

- d. Affected parties shall be notified of the results and decisions of the informal conference in accordance with current VOSH procedures. They shall be informed of VOSH policy granting them the right to appeal, informally, to the applicable Program Director, any decision with which they disagree.
 - e. The CSHOs who conducted the inspection, and the Regional Directors shall be informed of the results and decisions of informal settlement agreements and amended citations.
 - f. For more detail on settlement agreements, refer to I.D.
6. **Failure to Abate.** If the informal conference involves an alleged failure to abate, the Regional Safety and/or Health Director may set a new abatement date in the informal settlement agreement, documenting for the case file the time that has passed since the original citation, the steps that the employer has taken to inform the exposed employees of the risk and to protect them from the hazard, and the measures that will have to be taken to correct the condition.
- a. Once a new abatement date has been set, a modification of abatement date shall be entered into the OIS system following current procedures.
 - b. A letter shall be sent to the employer reminding him in the strongest possible terms that abatement is legally required if no written notice of contest is submitted within the contest period for the Notification of Failure to Abate Alleged Violations.
 - c. The employer shall also be reminded that if there is any problem in meeting the new abatement date after it becomes a final order, a written request for extension of abatement date must be filed with the Regional Director in accordance with guidelines.

B. Petitions for Modification of Abatement (PMA) Date – Extension of Abatement Time. Section 320 of the VOSH *Administrative Regulation Manual* governs the disposition of petitions for extensions of abatement time. If the employer requests additional time after the fifteen (15) working-day contest period has passed, the following procedures are to be observed:

- 1. **Filing Date.** A written petition for extension of abatement time must be mailed to, or received by, the Regional Director who issued the citation no later than the close of business on the date which abatement was originally required.

- a. If a request is submitted orally, the employer shall be informed that VOSH cannot accept an oral request and that a written petition must be mailed by the end of the next working day after the abatement date. If there is not sufficient time to file a written petition, the employer shall be informed of the requirements as listed in §320 of the *VOSH Administrative Regulation Manual*.
 - b. A late petition may be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.
2. **Failure to Meet All Requirements.** If the employer's letter does not meet all the requirements, a letter spelling out these requirements and identifying the missing elements shall be sent to the employer within ten (10) working days, specifying a reasonable amount of time for the employer to return the completed petition.
 - a. If no response is received or if the information returned is still insufficient, a second attempt (by telephone or in writing) shall be made. The employer shall be informed of the consequences of a failure to respond adequately; namely that the petition will not be granted and that the employer may consequently be found in failure to abate upon a follow-up inspection.
 - b. If the employer responds satisfactorily by telephone and if the Regional Director determines that the requirements for the petition have been met, appropriate documentation shall be placed in the case file.
3. **Delayed Decisions.** Although VOSH policy is to handle petitions for extension of abatement as quickly as possible, there are some cases where the Regional Director's decision on the petition is delayed because of inadequacies in the petition itself, a decision to conduct a monitoring inspection or the need for the Deputy Commissioner for Regulatory Program's involvement. A letter conveying the need for further time shall be sent to the employer and the employee representatives.
4. **Position on Petition for Modification of Abatement (PMA)**
 - a. When a Petition is Anticipated. Whenever a citation for engineering controls or other violation which the Regional Director believes can be reasonably expected to give rise to a future petition for extension of abatement time, the following procedures shall apply:
 - (1) A follow-up date forty-five (45) days prior to the final abatement date shall be entered into the information retrieval system used by the Regional Office. When that

follow-up date arrives, the file shall be pulled and reviewed by the Regional Director and the CSHO involved.

- (2) After review, the Regional Director shall contact the employer to determine abatement progress. Information on the status of abatement shall be obtained and documented in the case file. The potential need for additional time shall be discussed with the employer. If the employer indicates that more time will be necessary to complete correction of the citations, this need shall be documented and the procedures for seeking an extension shall be explained.
- b. Requirements for a Petition. If a letter is received from an employer requesting a modification of an abatement date, the Regional Director shall ensure that the following five (5) requirements (refer to §320.C. of the *VOSH Administrative Regulation Manual*) are set forth in sufficient detail in the employer's petition:
- (1) All steps taken by the employer and the dates of such action in an effort to achieve compliance during the prescribed abatement period.
 - (2) The specific additional abatement time necessary to achieve compliance.
 - (3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.
 - (4) Interim steps being taken to safeguard the employees against the cited hazard during the abatement period.
 - (5) A certification that a copy of the petition has been posted in a conspicuous place near the location where the violation occurred or where all affected employees will have notice thereof. The petition shall remain posted for ten (10) working days and shall be served on the authorized representative of affected employees, if there is one. Such certification shall include the date on which posting and service was made.
- c. Processing the Petition for Extension. After fifteen (15) working

days following certification of the petition posting, the Regional Director shall determine VOSH's position, agreeing with, or objecting to, the petition. This shall be done within ten (10) working days following the fifteen (15) days (if additional time has not been requested from the Deputy Commissioner for Regulatory Programs). The following action shall be taken:

- (1) If the request is six (6) months or less from the issuance date of the citation, the Regional Director has the authority to approve or object to the petition.
- (2) Any petition requesting an abatement date which is more than six (6) months and up to and including one (1) year from the issuance date of the citation requires the approval of the applicable Program Director.
- (3) Any petition requesting an abatement date which is more than one (1) year from the issuance date of the citation requires the approval of the Commissioner.
- (4) If the petition is approved, the Regional Director shall notify the employer and the employee representatives by letter.
- (5) If, after a second contact with the employer, the information required continues to be substantially insufficient, the Regional Director shall contact the Program Director who, after consultation with the Deputy Commissioner for Regulatory Programs, shall object to the petition.
- (6) If supporting evidence justifies it, e.g., employer has taken no meaningful abatement action at all or has otherwise exhibited bad faith, the Regional Director, the Program Director or the Deputy Commissioner for Regulatory Programs, as appropriate, shall object to the petition.
 - (a) Both the employer and the employee representatives shall be notified on the date the decision is made by letter with return receipt requested.
 - (b) When appropriate, a failure to abate notification may be issued in conjunction with the objection to the extension request.

5. **Employee Objections.** Affected employees or their representatives may file an objection in writing to an employer's petition with the Regional Director within ten (10) working days of the date of posting of the petition by the employer or its service upon an authorized employee representative.
 - a. Failure to file such a written objection within the ten (10) working-day period constitutes a waiver of any further right to object to the petition.
 - b. If an employee or an employee representative objects to the extension of the abatement date, the appropriate VOSH official, as set out in the guidelines, shall hold an informal conference to try to resolve the issue (see this chapter for procedures to be followed). If settlement is not made through the informal conference or does not appear probable, the matter will be set for a hearing by the Commissioner under §§2.2-4019-2.2-4021, *Code of Virginia*. (See §320 of the *VOSH Administrative Regulation Manual*).
6. **Appeals of Adverse Decisions.** The employer or an affected employee or employee representative may seek review of an adverse decision regarding the petition for extension of abatement by mailing a written request to the Commissioner within five (5) working days of receipt of the decision. The Commissioner will hear the appeal using the procedures of §§2.2-4019-2.2-4021, *Code of Virginia*. (See §320 of the *VOSH Administrative Regulation Manual*).
7. **Abatement Efforts.** The Regional Director shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.
 - a. Where engineering controls have been cited or required for abatement, a monitoring inspection shall normally be scheduled to evaluate the employer's abatement efforts. Failure to conduct a monitoring inspection shall be fully explained in the case file.
 - b. Where no engineering controls have been cited but more time is needed for other reasons not requiring assistance from VOSH such as delays in receiving equipment, a monitoring visit need not normally be scheduled.
 - c. Monitoring inspections shall be scheduled as soon as possible after the initial contact with the employer rather than be delayed until actual receipt of the extension petition.
 - d. The CSHO shall decide during the monitoring inspection

whether sampling is necessary and, if so, to what extent; i.e., spot sampling, short-term sampling, or full-shift sampling.

- e. The CSHO shall include pertinent findings in the narrative along with recommendations for action. To reach a valid conclusion when recommending action, it is important to have all the relevant factors available in an organized manner. The following factors shall be considered:
 - (1) Progress reports or other indications of the employer's good faith, demonstrating effective use of technical expertise and management skills, accuracy of information reported by the employer and timeliness of progress reports.
 - (2) The employer's assessment of the hazards by means of surveys performed by in-house personnel, consultants or the employer's insurance company.
 - (3) Other documentation collected, including verification of progress reports, success or failure of abatement efforts, and assessment of current exposure levels to employees.
 - (4) Employer and employee interviews.
 - (5) Specific reasons for requesting additional time including specific plans for controlling exposure, and specific calendar dates.
 - (6) Personal protective equipment.
 - (7) Medical programs.
 - (8) Emergency action plans.

NOTE: Not all these factors will be pertinent in every extension review. Neither are all the factors listed which must be considered in every case.

- C. **Services Available to Employers.** Employers requesting abatement assistance shall be informed that VOSH is willing to work with them even after citations have been issued. In addition, the employer shall be made aware of the availability of VOSH onsite consultation services for which they may qualify. Such services are provided at no charge to the employer. (*See related guidelines*).

- D. **Settlement of Cases**

1. General

Regional Directors are granted settlement authority to make the informal conference a more significant and uniformly used element of the compliance process; to avoid delays in correction of hazards which could result from litigation, and to give VOSH and affected employers and employees a way to resolve conflicts without prolonged litigation.

- a. Regional Directors should send a letter to employers with each set of citations issued. The letter shall notify employers of the opportunity to discuss amendments to citations and proposed penalties during an informal conference and of the Regional Director's authority to make certain appropriate amendments. (Refer to section I.A.2. of this Chapter for additional notification requirements).
- b. Regional Directors are authorized to enter into Informal Settlement Agreements with an employer before the employer files a written notice of contest.
- c. For routine cases, the Regional Directors are authorized, as outlined in this chapter, to change abatement dates, to reclassify violations (e.g., serious to other-than-serious), and to modify or withdraw a penalty, a citation or a citation item. The employer must present evidence during the informal conference which convinces the Regional Director that the changes are justified.
 - (1) Decisions shall be made in accordance with the guidelines given in this chapter.
 - (2) Reduction in penalties or negotiation of a penalty installment payment plan must be based on evidence of financial hardship presented by the employer. Such evidence could consist of federal/state tax returns, copies of financial statements or other appropriate documents depicting the financial condition of the employer.
 - (3) Adequate documentation of settlement negotiations and the justification for any changes made shall be placed in the case file.
- d. For significant cases and those cases where the Program Director has settlement authority, the Regional Director shall conduct the informal conference to determine what proposed settlement is offered by the employer.

The Regional Director shall submit this information to the Program Director, who shall make a decision, if the change falls within his settlement authority, or review the proposed settlement

and submit it to the Commissioner for final action.

- e. The Regional Director shall negotiate the amount of penalty reduction or a penalty installment payment plan, depending on the circumstances of the case, the financial condition of the employer and what improvements in employee safety and health can be obtained in return.
 - (1) Improvements in employee safety and health that can be added to settlement agreements include:
 - (a) Written safety procedures addressing the particular hazard;
 - (b) Written training requirements specifying initial training, weekly/monthly safety meetings and annual retraining;
 - (c) Written training records documenting those employees having received training in addition to the subject of the training and date of training;
 - (d) Written disciplinary procedures specifying measures to be taken against employees who violate safety and health procedures;
 - (e) Written disciplinary records documenting discipline taken against employees for violation of safety and health procedures.

NOTE: *Regional Director(s) may contact the DHLS to request assistance in drafting settlement agreements containing any of the above safety and health improvements.*

- f. Employers shall be informed that they are required by §§40 and 330 of the VOSH *Administrative Regulation Manual* to post copies of all amendments or changes resulting from informal conferences. Employee representatives must also be provided with copies of such documents by the employer when the informal conference was at the request of the employer. This regulation covers amended citations, citation withdrawals and settlement agreements. (Refer to Section I.A.2. of this Chapter for complete notification requirements).

2. Pre-Contest Settlement (Informal Settlement Agreement or ISA)
Pre-contest settlements generally occur during the informal conference.

- a. If a settlement is reached during the informal conference, an Informal Settlement Agreement shall be prepared, and the employer representative shall be invited to sign it. The Informal Settlement Agreement shall be effective upon signature by the Regional Director and the employer representative. Both shall date the document as of the day of actual signature.
 - (1) If the employer representative requests more time to consider the agreement and if there is sufficient time remaining of the fifteen (15) working day period, the Regional Director shall provide the original for the employer to study while considering whether to sign it.
 - (2) If the agreement is not prepared during the informal conference, the Regional Director shall provide the original to the employer by certified mail, return receipt requested or in person or by email, if circumstances warrant such action (e.g., an agreement has been reached over the phone, but there is not sufficient mailing time for the employer to sign the agreement and return it to the Regional office before the end of the contest period).
 - (a) If the agreement is provided to the employer, a copy shall be kept in the case file. The employer shall be informed in writing that no changes are to be made to the original by the employer without explicit prior authorization for such changes from the Regional Director.
 - (b) The Regional Director shall also make it very clear that it is the employer's responsibility to sign the agreement prior to the expiration of the contest period.
 - (c) In every case, the Regional Director shall inform the employer during the informal conference that the citation will become final and unreviewable at the end of the contest period unless the employer either signs the agreement or files a written notice of contest.
 - (d) If the employer representative wishes to make any changes to the text of the agreement, the Regional Director must agree to and authorize the proposed changes prior to the expiration of the contest period.

- 1 If the changes proposed by the employer are acceptable to VOSH, the Regional Director shall authorize the change and work out the exact language to be written into the agreement. The employer shall be instructed to incorporate the agreed-upon language into the agreement, sign it and return it to the Regional Office as soon as possible.
 - 2 Annotations, including the exact language of any changes authorized by the Regional Director, shall be made to the file copy of the agreement, and a dated record of the authorization shall be signed by the Regional Director and placed in the case file.
- (f) Upon receipt of the Informal Settlement Agreement signed by the employer, the Regional Director shall ensure that any modified text of the agreement is in accordance with the notations made in the case file. The Regional Director shall initial and date the changes.
- 1 If so, the citation record shall be updated in accordance with current procedures.
 - 2 If not, and if the variations substantially change the terms of the agreement, the agreement signed by the employer shall be considered as a notice of intent to contest and shall be handled accordingly. If there is any question as to whether any variation is substantive, the Regional Director shall contact the applicable Program Director for guidance.
- (g) If the employer cannot be reached, a reasonable time shall be allowed the receipt of the agreement from the employer.
- 1 After that time, if the agreement has still not been received, the Regional Director shall presume that the employer is not going to sign the agreement and treat the

citation as a final order until such time as the agreement is received.

- 2 The employer shall be required to certify that the Informal Settlement Agreement was signed prior to the expiration of the contest period.

- (3) In any case where the Regional Director provides an employer with a proposed agreement, the Informal Settlement Agreement is effective the moment the employer representative signs it as long as the contest period has not expired.

- (a) If the citation is amended as a result of the informal conference, the amended citation shall include the following or similar language:

“This citation has been amended by agreement between the Commissioner and the Employer named above. As part of the written agreement, the employer has waived his right to file a Notice of Contest to this order. This agreement shall not be construed as an admission by the Employer of civil liability for any violation alleged by the Commissioner. This agreement may be used for future enforcement purposes pursuant to Title 40.1 of the Code of Virginia.” (See Appendix “B” VOSH-ISA, Informal Settlement Agreement Form.)

- (b) If the Regional Director’s settlement efforts are unsuccessful and the employer contests the citation, the Regional Director shall state the terms of the final settlement offer in a memorandum to the Program Director.

3. **Procedures for Preparing the Informal Settlement Agreement.** VOSH will prepare and process informal settlement agreements in accordance with the provisions of §340 of the VOSH *Administrative Regulation Manual*.

4. **Contest of Citations, Notifications of Penalty or Abatement Dates.** The employer must notify the Regional Office in writing of its intent to contest. Such notification must be postmarked no later than the 15th working day after receipt of the citation and notification of penalty (working days are Monday through Friday, excluding holidays),

otherwise the citation becomes final order of the Commissioner. The Department has no authority to modify the contest period. Employers may also send their notice of contest electronically via email or fax. Oral notices of contest do not satisfy the requirement to give written notification.

An employer's notice of contest must clearly state what is specifically being contested. It must identify which item(s) of the citation, penalty, the abatement date, or any combination of these is being objected to. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the fifteen (15) working day period in which the employer must contest, §270.A of the *VOSH Administrative Regulation Manual*.

VOSH will normally cease all investigatory activities once an employer has filed a notice of contest. Any action relating to a contested case must first have the concurrence of the DHLS.

- a. **Computation of Time.** The employer must file a notice of contest within fifteen (15) working days from receipt of the citation(s). See §40.1-49.4.B, *Code of Virginia*. The computation of time for the purpose of filing a notice of contest begins the day *after* the employer receives the citation (see green card to determine date of receipt). Therefore, the date of receipt is not included when calculating the fifteen (15) working day period. (*See §1-13.3, Code of Virginia.*) Any questions concerning this issue should be directed to the DHLS for guidance.
- b. **Employer Contest.** This written notification, called a Notice of Intent to Contest, must clearly state what is being contested--which item of the citation, the penalty, the correction date, or any combination. The CSHO shall ask the employer to read the pamphlet accompanying the citation for additional details.
 - (1) If the employer wishes a later abatement date only and there is a valid reason, the Regional Director should be contacted. The Regional Director may issue an amended citation changing an abatement date prior to the expiration of the fifteen (15) working day period without the employer's filing a contest.
 - (2) If the employer contests just the penalty or only some of the citation items, all uncontested items must still be abated by the dates indicated on the citation and the corresponding penalties paid within fifteen (15) days of notification.
- c. **Employee Contest.** The CSHO shall indicate that the law

provides that employees or their authorized representative(s) have the right to contest in writing any or all of the abatement dates set for a violation if they believe the date(s) to be unreasonable.

- d. **Contest Process.** If settlement is not reached, VOSH will forward the contested case to the Commonwealth's Attorney for the jurisdiction where the violation occurred, and after a complaint has been filed, the Circuit Court shall promptly set the matter for a hearing.
 1. Upon receipt of the Notice of Intent to Contest, the Regional Director shall notify the Commonwealth's Attorney, and DHLS, immediately.
 2. An employer or employee or employee representative with party status, pursuant to §40.1-49.4.E., *Code of Virginia*, may be represented by a person who is not an attorney.
 3. The Circuit Court shall hear the case and issue a written order affirming, modifying, or vacating the Commissioner's citation or proposed penalty, or directing other appropriate relief.
 - b. **Penalties.** Penalties must be paid within fifteen (15) working days after the citation and penalty become a final order of the Commissioner. If, however, the employer contests the citation or the penalty in good faith, the penalties need not be paid for those items contested until a final decision is made.
 - f. **Abatement Action.** For violations that the employer does not contest, the employer is expected to notify the Regional Director promptly by letter that the cited conditions have been corrected by the abatement date set in the citation.
 - g. **Public Sector Contest Procedures.** Contest procedures applicable to the State agencies are contained in §280 and §300 of the VOSH *Administrative Regulation Manual*. Contest procedures applicable to the political subdivisions are contained in §280 and §290 of the VOSH *Administrative Regulation Manual*.
5. **Post-Contest Settlement (Informal Settlement Agreement).** Post-contest settlements will generally occur before the bill of complaint is filed with the court. The time limits are goals for internal use only. If time limits need to be extended, approval for an extension shall be obtained from the next person in the supervisory chain (e.g., the Regional

Director would contact the Program Director for an extension). The reasons for the extension shall be documented in the case file. The following procedures are guides to be used except in extraordinary cases:

- a. Following the filing of a Notice of Contest, the Regional Director shall notify the employer that settlement negotiations will only be available at the Regional Office for a brief period following the end of the fifteen (15) working day contest period.
- b. If the employer expresses no interest in trying to reach a settlement agreement, the Regional Director shall attempt to find out why and forward that information, along with the case file, to Headquarters for review.
- c. If negotiations are attempted but no settlement agreement is reached within three (3) weeks of the close of the contest period the Regional Director will send the case file to Headquarters.
- d. When the Regional Director submits the case file to the Headquarters, recommendations concerning settlement possibilities shall be included and all settlement proposals made to the employer shall be documented. A detailed explanation of the employer's reasons for contest shall be provided if known. (Information contained in an informal conference report or employer's contest letter may be referenced to satisfy this requirement).

6. **Corporate-Wide Settlement Agreements.** In certain egregious violation situations, or at an employer's request, VOSH may negotiate and enter into Corporate-Wide Settlement Agreements (CSAs) to obtain formal recognition by the employer of cited hazards and formal acceptance of the obligation to seek out and abate those hazards throughout all workplaces under its control.
7. **Court's Post-Contest Settlement (Agreed Order).** Settlement negotiations for agreed orders will be through the Commonwealth's Attorney and the DHLS after the bill of complaint has been filed with the court. Section 340 of the *VOSH Administrative Regulation Manual* requires any formal settlement agreement to be embodied in an agreed order and presented to the court for approval.
8. **Penalty Installment Payment Agreement**
Penalty Installment Payment Plans negotiated by the Regional Director will become part of the Informal Settlement Agreement. (*See Appendix "A"*).

Legal Considerations

CHAPTER- 13

Chapter 12: LEGAL CONSIDERATIONS

I. Legal Considerations

A. General. During the course of a Compliance Officer's work, numerous questions can arise which require legal advice. This section will not substitute for contact with the Division of Hearing and Legal Services (DHLS) or the Assistant Attorney General but may serve to answer some initial questions. The legal authority for the VOSH program, subpoenas of VOSH personnel, definitions of employees and contest procedures are among the topics covered in this section. The DHLS should be contacted if any questions arise about the legal considerations addressed under this chapter.

B. VOSH Program Authority

- 1. General.** Authority for VOSH to conduct inspections is derived from the State Constitution. While the federal program relies on the commerce clause of the U.S. Constitution for authority to inspect, the VOSH program relies on the state police power found in the Virginia Constitution. During an inspection, federal OSHA must ensure that an employer is engaged in interstate commerce, a step VOSH does not have to do. All employers are subject to the police power of the state and therefore are subject to VOSH inspection, except those industry sectors in which federal OSHA has retained direct enforcement authority or for which 4(b)(1) of the OSH Act provides federal preemption.
- 2. Employer Rights.** While employers are subject to inspection by VOSH, the Fourth Amendment of the U.S. Constitution and the Virginia Constitution guarantees them the right to be free from unreasonable searches and seizures. So, they may insist on a warrant before VOSH inspects them. The warrant shall be issued by a court based on a finding of probable cause to search. Two court cases have made clear the requirements of probable cause for VOSH:
 - a. *Marshall v. Barlows.*** Probable cause to issue a warrant may be based on:
 - (1) specific evidence of an existing violation (e.g., employee complaint), or
 - (2) showing of reasonable legislative or administrative standards for conducting an inspection (e.g., general schedule or special emphasis programs).

- b. ***Amato v. Mosher Steel.*** This case has further defined reasonable legislative or administrative standards by requiring that the inspection program be based on reasonable standards that are applied to a particular workplace in a neutral and fair manner. (See §40.1-49.9, *Code of Virginia*.)

NOTE: Under no circumstances is an employer to be treated any differently because he has exercised his constitutional right to require a warrant.

- c. **Jurisdictional Limitations.** VOSH does not have authority to inspect working conditions of:

- (1) Employees not covered by the federal OSH Act, including but not limited to:
- (a) Mines and quarries.
 - (b) Railroads.
 - (c) Nuclear facilities.

NOTE: VOSH has “Memorandums of Understanding” with certain federal safety agencies which further define the scope of VOSH’s inspection authority in the above industries. Contact the DHLS when jurisdiction questions arise.

- (2) Employees of the United States.
- (3) Employees who, although employed by private employers, are working within enclaves of the federal government where the United States federal government exercises exclusive jurisdiction.
- (4) Private sector maritime employees.

NOTE: VOSH does have maritime standards for public sector employees, but does not cover private sector maritime employees.

3. **Employees for Compliance Purposes – Definition.** VOSH is often confronted with situations in which the definition of employee is important. There are cases in which issuing a citation depends on whether the individual exposed to the hazard is an employee for purposes of the law. Employers are only subject to §40.1-49.4, *Code of Virginia*, if they are engaged in business and have one or more employees.

- a. Examples of “Employees”. In the following situations, an individual would be considered an employee for purposes of the law:
- (1) A management representative such as a company president, vice-president or plant manager is an employee for purposes of the law when he is performing work on the site for the employer and is exposed to the hazard cited.

EXAMPLES: The president of a company is working near a hazard after all other employees have left the premises. He is entitled to the protections of occupational safety and health laws as much as any other worker. A company vice-president who spends 40 hours per week working with a shovel in an excavation is an employee.

- (2) A partner in a partnership is an employee for the purposes of the law when he is performing work on the site for the partnership and is exposed to the cited hazard.

EXAMPLE: A “silent partner” has invested in a business and received half of the profits worked in the store six or seven hours per week when the other partner was absent. This silent partner considered his role to be just looking after the investment, but was held by a court to be an employee because he was actually performing duties done by employees.

- (3) Stockholders in a corporation are considered employees for the purpose of the law when they are performing work on the site for the employer/corporation and are exposed to a cited hazard.

EXAMPLE: Three stockholders of a company were forced to work as production workers for a weekly salary for the company after it had lost money for two consecutive years. They were exposed to a hazard and were considered employees because they were doing production work for the company.

- (4) An employer’s family members are employees for the purposes of the law when they are performing work on the site for the employer and are exposed to a cited hazard.

EXAMPLE: An employer who has three members of his family as his only workers is subject to the law because his family members are doing work for the company and are as entitled to the protection of VOSH as any other worker.

NOTE: Immediate family members of a farm employer are granted a specific exemption from OSHA or VOSH regulations under the Federal Appropriations Act. (See VOSH PD 02-003Q or successor).

- b. **Examples of “Not an Employee.”** In the following situations, the individuals exposed to the hazard would not be considered employees:
- (1) A self-employed person or a sole owner of a business who is the only one exposed to the hazard cited. (*Refer to discussion on “Employees vs. Independent Contractors”*).
 - (2) Any person exposed to the hazard cited who is not doing any work for the employer, e.g., bystander, or stockholder or partner not doing any work for the company.
- c. **Volunteers.** Members of volunteer rescue squads and volunteer fire departments and other volunteers serving the state pursuant to the Virginia State Government Volunteers Act are not public employees and are, therefore, not covered by VOSH.

Volunteers serve without pay or benefits, except those benefits listed in §2.1-558, of the *Code of Virginia*. Where benefits go beyond, or are different from, those listed in §2.1-558, of the *Code of Virginia*, the Compliance Officer shall consult with the Regional Safety or Health Director who may contact the Division of Legal Support, if necessary.

NOTE: Consult with the DHLS in all cases when questions arise about who is an employee.

- d. **Misclassification.** Employee misclassification occurs when an employer has improperly classified a worker who is actually an employee as an independent contractor. As part of the normal inspection process, all construction contractors shall be asked for their Department of Professional Occupational Regulation (DPOR) license number in order to help determine whether misclassification is occurring at the worksite. (*Refer VOSH Program Directive 02-026.*) Generally, in such cases, one of the following three situations will be evident:
- (1) Misclassification is occurring and there is an unlicensed construction contractor onsite;

- (2) Misclassification is occurring and there are no DPOR licensing issues;

For situations 1. and 2. above, if VOSH citations and penalties are proposed for the employer, penalty reductions for size and good faith will NOT be afforded to the employer.

Also note a third situation which is related:

- (3) There is no misclassification issue but there is an unlicensed construction contractor onsite.

In situation 3., where citations are issued to an unlicensed contractor that is not engaging in misclassification, a “good faith” penalty reduction may be available to that contractor provided they meet the “good faith” requirements in the FOM.

4. Employer/Employee Responsibilities

- a. **Section 40.1-51.2(a), *Code of Virginia* states that:** “It shall be the duty of each employee to comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this chapter which are applicable to his own actions and conduct.”

- (1) The law does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
- (2) Although the employer is not the absolute guarantor or insurer of all employee actions, reasonable steps must be taken by the employer to protect employees from hazards that may result from failure to comply with the standards; e.g., informing employees of hazards and how to protect themselves, enforcing safety and health rules, and the like.

- b. **Employee Refusal to Comply.** In cases where the Compliance Officer determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Regional Safety or Health Director, who shall consult with the

Program Director, for discussion and advice in regard as to how to proceed.

Under no circumstances shall a Compliance Officer become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. The Compliance Officer, in the performance of their duties, is expected to obtain enough information to determine whether the employer is using all appropriate authority to ensure employee compliance with VOSH laws, standards, and regulations.

However, concerted refusals by employees to comply with VOSH laws, standards, and regulations will not prohibit the issuance of an appropriate citation to the employer where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge, to ensure compliance with VOSH laws, standards, and regulations.

- c. **Employer Exercise of Authority.** Under no circumstances shall a Compliance Officer become involved in an *on-site* dispute involving labor/management issues or interpretation of collective-bargaining agreements. The Compliance Officer is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with VOSH laws, standards and regulations. Concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge.

- 5. **Six (6) Month Statute of Limitations to Issue Citations.** The Compliance Officer shall act in accordance with §16VAC25-60-260.A.1 of the VOSH *Administrative Regulation Manual* and §40.1-49.4.A.3, of the *Code of Virginia* which require that:

No citation may be issued after the expiration of six (6) months following the occurrence of any alleged violation. The six (6) month time frame is deemed to be tolled on the date the citation is issued by the commissioner, without regard for when the citation is received by the employer. For purposes of calculating the six (6) month time frame for citation issuance, the following requirements shall apply:

- a. The six (6) month time frame begins to run on the day after the incident or event occurred or notice was received by the

commissioner (as specified below), in accordance with §1-210.A. of the Code of Virginia. The term “month” shall be construed to mean one (1) calendar month in accordance with §1-223 of the Code of Virginia.

- b. An alleged violation is deemed to have “occurred” on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected.
- c. As required by §40.1-51.1.D, of the *Code of Virginia*, and notwithstanding subsection b. above, or the VOSH *Administrative Regulation Manual*, if an employer fails to notify the commissioner of any work-related incident(s):
 - (1) within eight (8) hours of the occurrence of a fatality, or
 - (2) within twenty-four (24) hours of any work-related incident resulting in:
 - (i) inpatient hospitalization of one (1) or more persons,
 - (ii) an amputation, or
 - (iii) the loss of an eye, as prescribed in the rules and regulations of the Safety and Health Codes Board.

Then the six (6) month time frame shall not be deemed to commence until the commissioner receives actual notice of the incident.
- d. Notwithstanding subsection B5b. of this chapter, if the commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of accident report filing information forwarded from the Virginia Workers’ Compensation Commission as provided in §65.2-900 of the *Code of Virginia*, the six (6) month time frame shall not be deemed to commence until the commissioner actually receives such information from the Virginia Workers’ Compensation Commission.
- e. Notwithstanding subsection B5b. of this chapter, if the Commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee(s), through receipt of a complaint in accordance with §100 of these regulations, or referral, the six (6) month time frame shall not be

deemed to commence until the commissioner actually receives the complaint or referral.

C. Affirmative Defenses

1. **Definition.** An affirmative defense is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proven by VOSH.
2. **Burden of Proof.** Although affirmative defenses must be proven by the employer at the time of the hearing, VOSH must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. The Compliance Officer shall keep in mind the potential affirmative defenses that the employer may make, and during the inspection shall attempt to gather contrary evidence.
3. **Common Affirmative Defenses.** The following are explanations of the more common affirmative defenses with which the Compliance Officer shall become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.
 - a. **Unpreventable Employee Misconduct or “Isolated Event.”**
Section 260.B. of the VOSH *Administrative Regulation Manual* codifies the “employee misconduct defense:”

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

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

- b. **Application to Management.** Section 260.C. of the VOSH *Administrative Regulation Manual* provides that the employee misconduct defense does not apply to “any officer, management official or supervisor having direction, management control or custody of any place of employment which was the subject of the violative condition cited.”
- c. **Investigation of Employee Misconduct.** The following example illustrates the questions to be asked about employee misconduct situations. An unguarded table saw is observed. The saw, however, has a guard which is reattached while the Compliance Officer watches. Facts which the Compliance Officer shall document may include:
- (1) Who removed the guard and why?
 - (2) Did the employer know that the guard had been removed?
 - (3) How long or how often had the saw been used without guards?
 - (4) Did the employer have a work rule that the saw guards not be removed?
 - (5) How was the work rule communicated?
 - (6) Was the work rule enforced?
 - (7) Were there written training procedures?
 - (8) Were there training records?
 - (9) Were there disciplinary policies?
 - (10) Was the disciplinary policy enforced?
- d. **Impossibility.** In some instances, compliance is impossible. In this case, compliance with the requirements of a standard would:
- (1) Be functionally impossible or would prevent performances of required work; and
 - (2) Necessitate that there are no alternative means of employee protection.

EXAMPLE: During the course of the inspection an unguarded table saw is observed. The employer states that the nature of its work makes a guard unworkable. Facts which the Compliance Officer shall document may include: Would a guard make performance of the work impossible or merely more difficult? Could a guard be used part of the time? Has the employer attempted to use guards? Has the employer considered alternative means or methods of avoiding or reducing the hazard?

- e. **Greater Hazard.** Compliance with a standard would result in greater hazards to employees than non-compliance and:
 - (1) There are no alternative means of employee protection; and
 - (2) An application of a variance would be inappropriate.

EXAMPLE: The employer indicates that a saw guard had been removed because it caused particles to be thrown into the operator's face. Facts which the Compliance Officer shall consider may include: Was the guard used properly? Would a different type of guard eliminate the problem? How often was the operator struck by particles and what kind of injuries resulted? Would safety glasses, a face mask, or a transparent shelf attached to the saw prevent injury? Was operator technique at fault and did the employer attempt to correct it? Was a variance sought?

NOTE: *The DHLS is responsible for processing all variance requests.*

- (3) **Documentation Requirements.** When it is reasonable to assume an affirmative defense may be an issue, the Compliance Officer shall make efforts to gather and record facts relevant to the defense. Closing conferences are often a good opportunity to examine employee misconduct questions. The Compliance Officer shall bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the Regional Safety or Health Director. Where it appears that every element of an affirmative defense is present, the Regional Safety or Health Director may decide, after consultation with the Program Manager and the DHLS Director, that a citation shall not be issued.

II. Powers and Duties of the Commissioner

A. Interrogatories

1. In accordance with §40.1-6(4) of the *Code of Virginia*, the Commissioner has the authority to:

“...file a written or printed list of relevant interrogatories and require full and complete answers to the same to be returned under oath within thirty days of the receipt of such list of questions.”
2. The appropriate Program Director shall consult with the DHLS about pursuing possible interrogatories in accordance with §40.1-6(4) of the *Code of Virginia*. The DHLS shall notify the Office of the Attorney General in cases where the Commissioner has determined that the issuance of interrogatories is necessary to the furtherance of the inspection/investigation. Such interrogatories may be issued to employers, employer representatives, employees and employee representatives, and others as determined by the Commissioner.

B. Injunctive Relief

1. In accordance with §40.1-49.4.F.1 of the *Code of Virginia* in regard to an imminent danger situation which states:

“...the Commissioner may file a civil action with the clerk of the circuit court having equity jurisdiction over the employer or the place of employment involved asking the court to temporarily or permanently enjoin any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this title.

Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

No order issued without prior notice to the employer shall be effective for more than five working days. Whenever and as soon as the

Commissioner concludes that conditions or practices described in this subsection exist in any place of employment and that judicial relief shall be sought, he shall immediately inform the affected employer and employees of such proposed course of action.”

The appropriate Program Director shall consult with the DHLS about pursuing possible injunctive relief in imminent danger situations when the employer has indicated its unwillingness to immediately remove employees from exposure to the imminent danger hazard or condition. The DHLS shall notify the Office of the Attorney General and the appropriate Commonwealth’s Attorney in cases where the commissioner has determined that injunctive relief is necessary to provide protection to employees from such imminent danger hazards or conditions.

2. In accordance with §40.1-49.4.F.2 of the *Code of Virginia* in regard to injunctive relief generally, e.g., final order situations where an employer fails to provide abatement information:

“Any court described in this section shall also have jurisdiction, upon petition of the Commissioner or his authorized representative, to enjoin any violations of this title or the standards, rules or regulations promulgated thereunder.”

- a. Injunctive relief may be appropriate in a number of situations involving an employer’s failure to comply with VOSH laws, standards and regulations. The appropriate Program Director shall consult with the DHLS about pursuing possible injunctive relief in situations including but not limited to:
 - (1) any case in which a final order was obtained by the Commissioner and the employer has failed to provide the required abatement verification information or has provided incomplete abatement verification information;
 - (2) any case in which a final order was obtained by the Commissioner and the employer has failed to comply with one or more terms of the settlement agreement or agreed order.
- b. The DHLS shall notify the Office of the Attorney General and the appropriate Commonwealth’s Attorney in cases where injunctive relief is being sought in accordance with §40.1-49.4.F.2. of the *Code of Virginia*.

III. Judicial Review of VOSH Contested Cases. Section 40.1-49.4, *et seq.*, *Code of Virginia*, requires the Commissioner, upon receipt of a notice of contest of a citation, proposed penalty or order of abatement, to begin proceedings to have a contested case heard in the Circuit Court for the jurisdiction where the violation occurred. The Commonwealth's Attorney for that jurisdiction represents the Department before the Circuit Court in any criminal or civil matter involving the compliance of Virginia's Occupational Safety and Health laws, pursuant to §40.1-49.6, of the *Code of Virginia*. Assistance from the Office of the Attorney General is also available.

A. Transmittal of Notice of Contest

1. General

- a. Once a letter of contest regarding a VOSH citation is received, it is reviewed by the appropriate Regional Safety or Health Director to determine which parts of the citation are contested. The DHLS shall be consulted in questionable cases.
- b. The envelope that contained the Notice of Contest shall be retained in the case file with the postmark intact.
- c. Where the Regional Safety or Health Director is certain that the Notice of Contest was not received, e.g., postmarked, within the 15-working day period allowed for contest, the employer should be advised of the statutory time limitation. The employer or employee shall be informed that the court has no jurisdiction to hear the case when the Notice of Contest was not filed within the 15-working days allowed and, therefore, that the citation, abatement order and proposed penalty are final orders.
- d. If the Notice of Contest is submitted to the Regional Safety or Health Director after the 15-working day period but the Notice contests only the reasonableness of the abatement period, it shall be treated as a Petition for Extension of Abatement Time and handled in accordance with the relevant instructions.
- e. If written communication is received from an employer containing objection, criticism, or other adverse comment about a citation or proposed penalty which does not clearly appear to be a Notice of Contest, the Regional Safety or Health Director should contact the employer as soon as possible to clarify the intent of the communication. Such clarification must be obtained prior to the end of the 15-working day contest period. The Regional Safety or Health Director shall not attempt to talk

the employer out of the contest, but shall seek only to clarify whether the employer intends the document to be a Notice of Contest. The Regional Safety or Health Director shall write a memorandum for the case file regarding the substance of this conversation. If the employer did not intend the document to be a Notice of Contest, it shall be retained in the case file with the memorandum of the contact with the employer.

- f. If the Regional Safety or Health Director's contact with the employer reveals a desire for an informal conference, the employer shall be informed that an informal conference does not stay the running of the 15-working day period for contest.

B. Post-Filing VOSH Activities. After the VOSH complaint has been filed with the Circuit Court, there shall be no investigations of, or conferences with, the employer without clearance from the DHLS and the Office of the Commonwealth's Attorney.

C. Elements of Proof in a VOSH Case. To establish the existence of a VOSH violation, a Compliance Officer must document four elements during an investigation. These elements are:

1. A standard, regulation, or a statute applies to the hazard in question.

- a. Construction standards apply only to employers with employees engaged in construction work. Construction work includes any work consisting of construction, alteration or repair, including painting or decoration of any structure. Work performed in one of the traditional construction trades, e.g., plumbing, carpentry, masonry, roofing, etc., whether performed on a construction site or in a manufacturing plant, will normally fall under the definition of construction work. Alteration or repair performed on a structure, as opposed to a piece of machinery or equipment, will normally be considered construction work. Workers engaged in operations which are an integral part of, or involved with, the performance of construction work are protected by the construction standards. See §130.1 of the VOSH *Administrative Regulation Manual*. For example, an employer who is dismantling cranes used on a construction site is performing work that is integral to the construction industry, and is therefore subject to construction standards.

- b. Agricultural standards apply exclusively to employers with employees engaged in agricultural operations.
- c. Private sector maritime employers are covered by federal OSHA. Maritime standards apply only to public sector employers with employees engaged in maritime activities.
- d. General Industry standards apply to all covered employees unless the general industry standard is limited to a certain type of business or the construction, maritime or agricultural standards apply. Certain general industry standards have been included by reference in the construction, maritime or agricultural standards.

The Compliance Officer should check the particular standard for the industry being inspected in order to determine which general industry standards apply.

2. The Employer has Violated the Standard, Regulation or Statute in Question. See Violations.

The testimony of the Compliance Officer is crucial to prove this element. The Compliance Officer will tell the court what hazard he or she saw. Photographs of the hazard, if the Compliance Officer authenticates them, can also be used to prove this element.

(“Authenticates” means the Compliance Officer testifies that the picture accurately represents what he or she saw at the time the photo was taken.) This is all that is necessary if the Compliance Officer witnessed or photographed the violative condition.

If the violation occurred before the Compliance Officer arrived at the site, documentation of the item and proof in court must come from a different source. If an employee or a person not employed by the employer tells the Compliance Officer about the hazardous condition that employee or non-employee must testify about it in court because of the hearsay rule. This legal rule provides that a person can only testify about what they know and not what someone else knows. Something a person tells you about a violation is something they know and cannot be testified to by you. There is an exception to this rule which helps the Compliance Officer when they are testifying. You are allowed to say what a supervisory representative of the company tells you during the investigation. When a foreman or other company superintendent tells you that he saw a hazard or that they had been working in a trench without shoring for a week, that is proof of the hazard.

Your case file should accurately document what an employee or another witness told you about a condition even though you cannot testify about it. This documentation can still serve as proof for issuing a citation and matters of settlement even though we may not be able to use it in court.

Since the Compliance Office can testify to the statements of foremen and other supervisory personnel in court, it is especially important to document what they tell you somewhere in the file. If at all possible, a statement should be taken from supervisors and foremen addressing each violation.

If a statement cannot be taken, the Compliance Officer should put in quotes any statements made by supervisory personnel which could help to prove any of the four elements of the violation.

3. The Employer has Actual Knowledge or Should have Known of the Violative Condition. See Chapter on Violations, for more information on this subject.

- a. Proof of a supervisor's knowledge can be imputed to the employer.
- b. Proof of the employer's knowledge of the physical condition or hazard constituting the violation is enough for this element. It is not necessary to show knowledge of the law or standard to prove a violation, but it will be necessary for proof of a willful violation.

At trial, the Compliance Officer will testify about employer knowledge. The scope of the testimony will depend upon the type of employer knowledge VOSH wants to prove (actual knowledge or constructive knowledge - i.e., the employer should have known).

There are several ways to show actual knowledge of the hazardous condition. A statement to the Compliance Officer during the investigation by a representative of the employer about their knowledge of the hazard is easiest and should be documented in an interview statement, or if that is not possible, by the Compliance Officer noting in quotes any statement by the representative that would provide proof of actual knowledge.

A photograph of the violation with a company representative in the picture or actually exposed to the hazard is excellent documentation of actual knowledge. A statement by employee(s) that a supervisor had been present previously when the hazard existed and no order to correct the hazard was issued, or the supervisor ordered the employees to disregard the hazard, would provide proof of actual knowledge sufficient to issue a citation.

Another method of proving employer knowledge is to show that the employer should have known of the hazard. The first step in demonstrating this is a photograph or the Compliance Officer's testimony that the violation was in plain view.

VOSH also needs to show that the employer representative had the opportunity to discover the hazard. The employer may have a practice of supervisory personnel walking through the work site or the industry of the employer has a practice of examining their worksites. The hazard must have existed long enough for the employer to have been able to discover it, which will have to be determined through employee/supervisory statements.

Photos of machinery showing a significant accumulation of dust with the guard removed is one method of showing duration. An employer's statement that they normally do walk around the site or actively supervise the site should be documented. The frequency with which they do so should be noted. The supervisor's statement should be discussed with employees to verify that the supervisor actually performed the inspections as frequently as they said they did.

If the hazard is not in plain view, then the Compliance Officer needs better documentation to show that an employer representative visited the area where the hazard was and did it frequently enough that they should have discovered the violation.

4. An Employee of the Cited Employer is Exposed to the Violative Condition. See, Violations, for more information on this subject.

Demonstrating employee exposure in court will most often be done by the testimony of the Compliance Officer. Among the methods of

documenting the employee exposure are oral and written statements by employer representatives; oral and written statements by employees; photographs or videotapes and possibly other documents. The Compliance Officer can tell the court about employee exposure if the employer representative admitted exposure to them in either an oral or a written statement. If the proof is a statement by an employee, either oral or written, the Compliance Officer will not be able to use that in court. The employee would have to testify directly.

A photograph of the hazard with an employee exposed takes us 90% of the way toward proving this element. VOSH must still show that the picture is of an employee of the cited employer. Unless it is obvious on the face of the photo VOSH will need to rely on the statements of supervisory personnel to demonstrate this element. It is likely in manufacturing situations that exposure can be demonstrated solely by a photograph, while in multi-employer worksites in construction, the Compliance Officer needs to get verification of employment from supervisory personnel.

In any case where VOSH is using past exposure of employees to the hazard the Compliance Officer will need documentation of the exposure. Evidence of an injury or the statement of an employer representative should be enough.

D. Outline of Legal Process

1. General

- a. After a Notice of Contest is received and all reasonable attempts at settlement have failed, the Program Director may authorize a request to file a complaint in Circuit Court. The DHLS will draft the request for issuance. The DHLS will also arrange contact with the Commonwealth's Attorney in the jurisdiction where the violation occurred. A copy of the case file will be sent to the Commonwealth's Attorney.
- b. The Staff Attorneys assigned to the case will contact the Commonwealth's Attorney to arrange a date to file the complaint. The Commonwealth's Attorney may decide to request leave of court to have the DHLS Attorney appointed as a Special Assistant Commonwealth's Attorney pursuant to §19.2-155 of the Code of Virginia.

- c. Attempts may be made to settle the case by the DHLS and the Program Manager even after the filing of the suit. If a settlement cannot be reached, the case will proceed to trial.
- d. Prior to trial, both parties may engage in discovery as authorized by §40.1-49.4.L.2., *Code of Virginia*. Discovery may include the release of the Compliance Officer's notes, findings and narrative.
 - (1) Discovery Methods. Once a legal proceeding has been initiated, each party has the opportunity to "discover" evidence in the possession of an opposing party. Traditionally, discovery methods include:
 - (a) Request for Admissions,
 - (b) Interrogatories,
 - (c) Requests for Production of Documents, and
 - (d) Depositions.

An attorney from the DHLS or the Commonwealth's Attorney will represent the agency in responding to discovery requests. It is essential that all VOSH personnel coordinate and cooperate with the assigned attorney to ensure that such responses are accurate, complete, and filed in a timely manner.
 - (2) Interrogatories. Compliance Officers shall draft and sign answers to interrogatories, with DHLS assistance. It is the responsibility of the Compliance Officer to answer each interrogatory separately and fully. The DHLS attorney or the Commonwealth's Attorney will sign any objections to the interrogatories. Compliance Officers should be aware that they may be deposed and/or examined at hearing on the interrogatory answers provided.
 - (3) Production of Documents
 - (a) If a request for production of documents is served on the Department the Regional Office will immediately make all documents relevant to

that discovery demand available to the DHLS attorney.

- (b) While portions of those materials may be later withheld based on governmental privileges or doctrine (e.g., statements that would reveal the identity of an informer), Compliance Officers must not withhold any information from the DHLS attorney.
- (c) It is the responsibility of the DHLS to review all material and to assert any applicable privileges that may justify withholding documents/materials that would otherwise be discoverable.
- (4) Depositions. Depositions permit an opposing party to take a potential witness' pre-hearing statement under oath in order to better understand the witness's potential testimony if the matter later proceeds to a hearing. Compliance Officers or other VOSH personnel may be required to offer testimony during a deposition. In such cases, a DHLS attorney or the Commonwealth's Attorney will be present with the witness.
- (5) Testifying in Hearings. While instructions provided by DHLS attorneys and Commonwealth's Attorney take precedence, particularly during trial preparation, the following considerations will generally enhance the hearing testimony of Compliance Officers:
 - (a) Review Documents and Evidence. In consultation with the Division of Legal Support, Compliance Officers should review documents and evidence relevant to the inspection or investigation before the proceeding so that when testifying, they are very familiar with the evidence and need not regularly refer to the file or other documents.
 - (b) Attire. Wear appropriate clothing that reflects the Department's respect for the court or other tribunal before which you are testifying. This also applies when appearing before a

magistrate to seek an administrative search warrant.

(c) Responses to Questions. Answer all questions directly and honestly. If you do not understand a question, indicate that and ask that the question be repeated or clarified.

(d) Judge's Instruction(s). Listen carefully to any instruction provided by the judge and, unless instructed to the contrary by DHLS counsel or the Commonwealth's Attorney, follow the judge's instruction(s).

- e. Trial preparation will include at least one pretrial meeting between the Department (the Staff Attorney, Compliance Officer and/or Regional Safety or Health Director) and the Commonwealth's Attorney.
- f. The Commonwealth's Attorney or the DHLS attorney, if appointed as a Special Assistant Commonwealth's Attorney, will present the case on behalf of VOSH. After opening statements by both attorneys, the Compliance Officer will normally be called as the first witness to explain the events leading up to the citation.
- g. At the end of the Commonwealth's evidence, the defense attorney may file a motion to strike the evidence as a way of having the case dismissed. The judge will only grant such a motion if VOSH is unable to prove all the prima facie elements for the violations cited. If the motion to strike is not granted, the defense attorney will present the employer's testimony and evidence.
- h. After all testimony is heard at the trial, and each side has made their closing arguments, the judge will issue an order affirming, modifying or vacating the citation or proposed penalty.

IV. Appeals

- A. **General.** Appeals from Circuit Court may be heard by the Virginia Court of Appeals. Should the Circuit Court judge not decide any or all issues in a case for VOSH, the Department has thirty (30) days to file an appeal with the

Virginia Court of Appeals. Because of this time limitation, the following procedures must be done in a timely manner.

B. The Division of Hearing and Legal Services Memorandum. After each trial, the staff attorney in consultation with other VOSH personnel in attendance will prepare a memorandum outlining the results of the trial. The memorandum will discuss the strengths and weaknesses of the case and its result and include a recommendation regarding any appeal of an adverse decision.

1. The above-mentioned memorandum will be given to the DHLS as soon as possible after the entry of the Final Order. A copy of this memorandum will be sent to the Assistant Attorney General.
2. The Director of the DHLS will review the memorandum and make a recommendation whether or not to go forward with any appeal immediately thereafter. This recommendation will be forwarded to the Program Director and the Commissioner for review.
3. The Commissioner will make a final determination on the appeal within three working days upon its receipt by his office.

C. Commissioner's Decision. The final decision on appealing the judge's decision will be made by the Commissioner after consultation with the Attorney General's Office and/or the Commonwealth's Attorney.

IV. Virginia Freedom of Information Act (FOIA) Issues

A. General Policy for Releasing Information. In general, records from files that are part of an active Department inspection or investigation will not be released until the inspection or investigation is resolved.

However, as required by "Virginia Freedom of Information Act," Virginia Code §2.2-3700, et seq., any public records in our possession at the time of the request may be subject to being inspected by or disclosed to members of the public. In such circumstances, all identifiable exempted/privileged information will be removed in accordance with applicable laws and regulations prior to releasing the information (*see Va. Freedom of Information Act; Government Data Collection and Dissemination Practices Act; Virginia Code §40.1-11; and 16 VAC 25-60-90 of the VOSH Administrative Regulation Manual*).

Requests for public records or questions regarding obtaining records from the Department of Labor and Industry should be sent to:

Virginia Department of Labor and Industry
Office of Policy and Planning
Attn: FOIA Request
6606 West Broad Street, Suite
Richmond, VA 23230

Telephone: 804.786.9933

Fax: 804.786.8418

Email: FOIACoordinator@doli.virginia.gov

In addition, the Freedom of Information Advisory Council is available to answer questions about FOIA. The Council may be contacted by email at foiacouncil@leg.state.va.us, or by phone at 804.225.3056 or toll free at 1.866.448.4100.

B. Procedures Regarding FOIA Requests

1. FOIA requests need not be in writing, and do not have to mention the FOI Act to qualify as an FOIA request.
2. A “Public Record” is defined as:

“all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, Photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.”
3. Within five working days of receiving a request, VOSH must provide the requested records to the requester or make one of the following responses in writing:
 - a. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with this chapter. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

-
- b. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.
 - c. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.
 - d. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.
 - 4. VOSH may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, VOSH will make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.
- C. Reasonable Charges.** VOSH is allowed under the FOIA law to make reasonable charges up to, but not to exceed, its actual costs incurred in searching, accessing, duplicating, supplying and/or otherwise providing the requested records or information.
- D. Other Legal Authority**
- 1. **Code of Virginia - Title 40.1.** In regard to using or revealing information gathered, Section 40.1-11 of the *Code of Virginia* states that: “Neither the Commissioner nor any employee of the Department shall make

use of or reveal any information or statistics gathered from any person,
company or corporation for any purposes other than those of this title.”

2. VOSH Administrative Regulation Manual. Under Section 90 of the VOSH ARM, (*16VAC25-60-90*), Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas:

- a. Pursuant to the Virginia Freedom of Information Act (FOIA) and with the exceptions stated in subsections B through H of this section, employers, employees and their representatives shall have access to information gathered in the course of an inspection.
- b. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to §40.1-49.8 of the *Code of Virginia* shall not be disclosed for any purpose, except to the individual giving the statement.
- c. All file documents contained in case files which are under investigation, and where a citation has not been issued, are not disclosable until such time as:
 1. The decision has been made not to issue citations; or,
 2. Six (6) months has lapsed following the occurrence of an alleged violation.
- d. Issued citations, orders of abatement and proposed penalties are public documents and are releasable upon a written request. All other file documents in cases where a citation has been issued are not disclosable until the case is a final order of the commissioner or the court; except that once a copy of file documents in a contested case has been provided to legal counsel for the employer in response to a request for discovery, or to a third party in response to a subpoena duces tecum, such documents shall be releasable upon a written request, subject to the exclusions in this regulation and the Virginia Freedom of Information Act.

Information required to be kept confidential by law shall not be disclosed by the commissioner or by any employee of the Department. In particular, the following specific information is deemed to be non-disclosable:

1. The identity of and statements of an employee or employee representative who has complained of hazardous conditions to the commissioner;
 2. The identities of employers, owners, operators, agents or employees interviewed during inspections and their interview statements;
 3. Employee medical and personnel records obtained during VOSH inspections. Such records may be released to the employee or his duly authorized representative upon a written, and endorsed request; and,
 4. Employer trade secrets, commercial, and financial data.
- h. The commissioner may decline to disclose a document that is excluded from the disclosure requirements of the Virginia FOIA, particularly documents and evidence related to criminal investigations, writings protected by the attorney-client privilege, documents compiled for use in litigation, and personnel records.
- i. An effective program of investigation and conciliation of complaints of discrimination requires confidentiality. Accordingly, disclosure of records of such complaints, investigations, and conciliations will be presumed to not serve the purposes of Title 40.1 of the *Code of Virginia*, except for statistical and other general information that does not reveal the identities of particular employers or employees.
- j. All information gathered through participation in Consultation Services or Training Programs of the Department shall be withheld from disclosure except for statistical data which does not identify individual employers.
- j. The commissioner, in response to a subpoena, order, or other demand of a court or other authority in connection with a proceeding to which the Department is not a party, shall not disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the approval of the Commissioner of Labor and Industry.
- k. The commissioner shall disclose information and statistics gathered pursuant to the enforcement of Virginia's occupational safety and health laws, standards, and regulations where it has been determined that such a disclosure will serve to promote the safety, health, and welfare of employees. Any person requesting disclosure

of such information and statistics should include in his written request any information that will aid the commissioner in this determination.”

LETTERS

Appendix A

- I. **Sample Letters**
- II. **Checklists**
- III. **Sample Case Narratives**

The following items are sample letters for VOSH use and other supplemental materials for the Program referred to in Chapters 1 through 15. The general reference sections listed above is noted in order to guide the reader as to the location of the topic.

Appendix: A

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SAMPLE LETTER
Complaint Notification to Employer – Type 1

Date _____

Company _____

Attn: _____

Street _____

City, State Zip _____

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear :

On _____, the Virginia Occupational Safety and Health (VOSH) Program received notice of safety and health hazards at your above worksite. We notified you by telephone of these alleged hazards on _____. The specific nature of the alleged hazards is as follows:

[Insert list of complaint items]

We have not determined whether the alleged hazards exist at your workplace, and we do not intend to conduct an inspection at this time. However, since allegations of workplace hazards have been made, we request that you immediately investigate the alleged conditions and make any necessary corrections or modifications.

Please advise me in writing no later than _____, of the results of your investigation. Please also provide supporting documentation of your findings, including any applicable measurements or monitoring results, and photographs which would demonstrate elimination of the hazard, as well as a description of any corrective action you have taken or are in the process of taking.

If you believe a complaint item is not valid then please state why. To facilitate providing our department with a timely response you may, if desired, fax your response to us at [Fax number].

This letter is not a citation or a notification of proposed penalty which, according to VOSH laws and regulations may be issued only after an inspection of the workplace. It is our goal to assure that hazards are promptly identified and eliminated. Please take immediate corrective action where needed. We encourage employee participation in investigating and responding to any alleged hazard.

If we do not receive a response from you by _____, indicating that appropriate action has been taken or that no hazard exists and why, a VOSH inspection will likely be conducted. An inspection may include a review of the following: injury and illness records, hazard communication, personal protective equipment, emergency action or response, bloodborne pathogens, confined space entry, lockout/tagout and related safety and health issues.

Please note, however, that VOSH selects for inspection some cases where we have received letters in which employers have indicated satisfactory corrective action. This is to ensure that employers have actually taken

the action stated in their letters.

The State of Virginia offers VOSH Consultation services without charge, to assist in resolving all occupational safety and health issues. However, the variety of services available or the scheduling of those services may be limited by the VOSH Consultation project's requirement to give priority to small businesses in high hazard industries and by its backlog. To discuss or request the services call or write _____, Manager, Consultation Services, Virginia Department of Labor and Industry, Main Street Centre, 600 E. Main St., Richmond 23219-2430, *(Insert phone number)*.

You are required by VOSH laws and regulations to post a copy of this letter where it will be readily accessible for review by all of your employees and return a copy of the signed Certificate of Posting (Attachment A) to this office. In addition, you are required to provide a copy of this letter and your response to a representative of any recognized union or safety committee if these are at your facility. Failure to do so may result in an onsite inspection.

The complainant has been furnished a copy of this letter and will be provided a copy of your response. Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

If you have any questions concerning this matter, please contact _____ at the address in the letterhead. Your personal support and interest in the safety and health of your employees is appreciated.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosure: Attachment A

CERTIFICATE OF POSTING
VOSH NOTIFICATION OF ALLEGED HAZARD(S)

Complaint Number _____

Date of Posting: _____

Date Copy Given to an
Employee Representative: _____

On behalf of the employer, I certify that a copy of the complaint letter received from the Virginia Occupational Safety and Health (VOSH) Program has been posted in a conspicuous place, where all affected employees will have notice, or near such location where the alleged hazardous condition(s) occurred, and such notice has been given to each authorized representative of affected employees, if any. This notice was or will be posted for a minimum of ten (10) working days or until any hazardous conditions found are corrected.

Signature

Title

Employer/Establishment Name

SAMPLE LETTER**Complaint Notification to Employer – Type 2**

Date _____

Company _____

Attn: _____

Street _____

City, State Zip _____

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear :

On _____, the Virginia Occupational Safety and Health (VOSH) Program received a notice of alleged unsafe conditions at your above worksite. We notified you by telephone of these alleged hazards on _____. The specific nature of the alleged hazards is as follows:

[Insert list of complaint items]

We have not determined whether the hazards, as alleged, exist at your workplace; and we are not conducting an inspection at this time. However, since allegations of workplace hazards have been made, we request that you immediately investigate the alleged conditions and make any necessary corrections or modifications within (5) five working days from receipt of this notification by telephone.

Please provide the date when the corrective action was actually COMPLETED and give a brief statement explaining what corrective actions were made.

NOTE: When responding, if your corrective actions for any given complaint item cannot be completed until a future date - due to ordering parts, repair contracts, etc. - then we will need a follow-up letter from you confirming completion of abatement on the affected item(s).

Please also provide supporting documentation of your findings, including any applicable measurements or monitoring results, and photographs which would demonstrate elimination of the hazard, as well as a description of any corrective action you have taken or are in the process of taking. If you believe a complaint item is not valid then please state why. To facilitate providing our department with a timely response you may, if desired, fax your response to us at [Fax number].

This letter is not a citation or a notification of proposed penalties. Our goal is to ensure that hazards are promptly identified and eliminated. We also encourage employee participation in investigating and responding to any alleged hazard. **However, if we do not receive a written response from you by (date-five working days after the date of this letter) indicating that appropriate action has been taken or that no hazard exists and**

why, a VOSH inspection may be conducted.

An inspection may include a review of the following: injury and illness records and any required programs such as hazard communication, personal protective equipment, emergency action or response, bloodborne pathogens, confined space entry, lockout/tagout, and other related safety and health issues.

The State of Virginia offers VOSH Consultation services, without charge, to assist in resolving all occupational safety and health issues. The variety of services available or the scheduling of those services may be limited by the consultation project's requirement to give priority to small businesses in high hazard industries and by its case backlog. You may also be able to obtain similar services from your insurance carrier or private consultant. To discuss or request the services call or write _____, Manager, Consultation Services, Virginia Department of Labor and Industry, Main Street Centre, 600 E. Main St., Richmond 23219-2430, (*Insert phone number*).

You are required by VOSH laws and regulations to post a copy of this letter and your response to it where it will be readily accessible for review by all of your employees and to return a copy of the signed Certificate of Posting (Attachment A enclosed) to this office. In addition, you are required to provide a copy of this letter and your response to it to a representative of any recognized employee union or safety committee if these are at your facility. Failure to do this may result in an on-site inspection. A copy of this letter and your response may also be furnished to the complainant.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

If you have any questions concerning this matter, please contact this office. Your personal support and interest in the safety and health of your employees is appreciated.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosure: Attachment A

Attachment A

CERTIFICATE OF POSTING VOSH NOTIFICATION OF ALLEGED HAZARD(S)

VOSH Complaint Number: _____

Date of Posting by Employer: _____

Date Copy Given to an
Employee Representative: _____

On behalf of the employer, I certify that a copy of the complaint letter received from the Virginia Occupational Safety and Health (VOSH) Program has been posted in a conspicuous place, where all affected employees will have notice, or near such location where the alleged hazardous condition(s) occurred, and such notice has been given to each authorized representative of affected employees, if any. This notice was or will be posted for a minimum of ten (10) working days or until any hazardous conditions found are corrected.

Signature

Title

Employer/Establishment Name

SAMPLE LETTER**Initial Response to Complainant – Type 1**

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear :

The purpose of this letter is to acknowledge receipt of your complaint and to inform you that an inspection of the above worksite will be scheduled as soon as possible, in accordance with the priorities established by the Virginia Occupational Safety and Health (VOSH) Program. You will be informed of the results of our inspection when they are available.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Insert Name, Address, Email Address and Telephone Number of Discrimination Investigator]

Thank you for your interest in workplace safety and health.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

SAMPLE LETTER

Initial Complaint Response – Type 2

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear :

In response to your complaint concerning safety/health hazards at the above worksite, the Virginia Occupational Safety and Health (VOSH) Program conducted an inspection at the location detailed in the complaint. The inspection was finalized on *(enter date complaint is closed, citations were issued, or no citations issued)* and the results of our investigation of your complaint are as follows:

Examples - of different scenarios:

Item 1. Employees performing welding operations are exposed to *(provide description of hazard/work operation)*.

Findings: This complaint item was confirmed. The employees performing the welding were *(provide description of hazard facts)*. This item was cited as detailed in the attached copy of the citation.

Item 2: Employees performing *[provide description of hazard/work operation]*.

Findings: This complaint item was partially confirmed but was determined not to be a violation of the VOSH standards. The employees performing*[provide description of facts uncovered which support finding that complaint was partially confirmed but that no violation exists]*.

Item 3: Employees performing *[provide description of hazard/work operation]*.

Findings: This complaint item was not confirmed. The employees performing*[provide description of facts uncovered which support finding that complaint was not confirmed and that no violation exists]*.

Item 4: Employees performing *[provide description of hazard/work operation]*.

Findings: This complaint item could not be *confirmed or documented* at the time of the inspection. The employees performing *[provide description of facts uncovered which support finding that complaint could not confirmed or documented (e.g., process no longer being used)]*.

[NOTE: If the initial complaint had both safety and health items and these were divided between two separate inspections - one addressing the safety items and one addressing health items - address the items you inspected as detailed above and then use the following paragraphs to address the items on the companion inspection depending on the circumstances. Don't bother writing out each complete item beside each item number in this situation. The complainant will get a listing of these items with the other case's findings anyway.]

[Examples for Referencing the Findings on Companion Cases:]

Item 2: *or if several items are involved use this next example:*

Item 2 through Item 5, Item 7, and Items 10 and 11:

[If the companion case is still being completed use the following:]

The results of the investigation of the [safety/health] complaint item(s) are still being reviewed. Once completed, a separate letter will be sent to you relating the findings from [safety/health] inspection number _____, which has been conducted in conjunction with this [safety/health] inspection to address the [safety/health] item(s) detailed in your complaint.

[If the companion case is already completed use the following:]

Findings: For these findings, please refer to the separate letter that was sent to you which relates the results from [safety/health] inspection number _____ that was conducted in conjunction with this [safety/health] inspection to address the [safety/health] items detailed in your complaint.

[If the companion case hasn't been completed yet, use:]

Findings: The results of the investigation of these [safety/health] complaint items are still being reviewed. Once completed, a separate letter will be sent to you relating the findings from [safety/health] inspection number _____ which was conducted in conjunction with this [safety/health] inspection to address the [safety/health] items detailed in your complaint.

Following the formats above for addressing the findings, describe what you found or didn't find and then whether it was cited. When the condition was determined not to be a violation of the standard briefly detail why this was the case. Keep your responses streamlined and stick to the complaint items. Don't discuss things like "based on interviews, employer statements, etc., it appeared that ...etc., etc."

Don't explain that you are citing an item as serious or other than serious, etc. or get into a discussion of what

the gravity factors are and why. All this is superfluous, as we will give them a copy of the citation anyway, if one is being issued. Conclude your response with one of the following catch all phrases depending on the outcome:

Option 1: The confirmed complaint items discussed above that were determined to be in violation of the VOSH standards have been cited.

Option 2: In addition to confirmed complaint items that were determined to be in violation of the VOSH standards, the inspection also identified other conditions that were VOSH violations.

Option 3: Although the complaint items discussed above were not determined to be in violation of the VOSH standards, the inspection did identify other conditions that were VOSH violations.

Option 4: Complaint items or other conditions identified during the course of this inspection that were determined to be in violation of the VOSH standards have been cited.

[Then add the following phrase to one of the above sentences if citations were issued:]

A copy of the VOSH Citation and Notification of Penalty, which was issued to the employer is enclosed for your review, and should have been posted by the employer at the workplace for at least three (3) working days after receipt.

[Use this ending if no citations are issued:]

Based on our findings as detailed above, we have closed the complaint's investigation file as of the date of this letter, on the grounds that the alleged complaint item(s) [have been or are now] being properly addressed. However, if you have additional knowledge regarding the results of this complaint inspection which you believe would dispute our findings, then please send us written notification detailing the basis for your concerns as soon as possible following the receipt of this letter.

If you do not agree with our inspection results, you may contact me for a clarification of the matter. You also have the right to an informal review by VOSH. This review may be obtained by submitting a written statement of your position to the Regional Safety or Health Director. The Regional Safety or Health Director will provide the employer with a copy of such statement by certified mail. Your identity will be withheld unless you explicitly request that it be revealed.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Name, Address and Telephone Number of Discrimination Investigator]

Thank you for your interest in assuring a safe and healthful workplace.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Attachment A *[if citations were issued, attach copy]*

SAMPLE LETTER

Complaint Correction In Progress – Letter Response To Employer

Date _____

Company _____

Attn: _____

Street _____

City, State Zip _____

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*

Complaint Number _____

Dear _____:

Thank you for your recent response to our complaint letter. Your letter states that you are making progress toward correcting the conditions. Please send us confirmation, in writing by _____, when your corrective action has been completed.

Please contact us immediately, if you should encounter any difficulties which you believe might result in a delay in completing your corrective actions by this date.

A copy of your response and this letter is also being provided to the concerned person(s) who had initially reported the hazardous conditions.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

Your interest in the safety and health of your employees is appreciated.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

SAMPLE LETTER**Interim Response to Complainant – Type 1**

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*

Complaint Number _____

Dear :

In response to your complaint of alleged health and safety hazards at the above worksite, the Virginia Occupational Safety and Health (VOSH) Program has notified the employer requesting that appropriate action be taken to correct the described conditions. Enclosed is a copy of that letter for your information.

As the letter indicates, the employer has been given five working days to respond to these conditions. Please notify me if you have information that corrections and/or modifications have not been made within five (5) working days from receipt of this letter.

Unless requested otherwise, we have not revealed your identity to the employer. Upon receipt of any additional information from the employer, a copy of the response will be forwarded to you.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Name, Address and Telephone Number of Discrimination Investigator]

Your continued interest in workplace safety and health is appreciated.

Sincerely,

Regional Safety or Health Director

Virginia Occupational Safety and Health

Enclosure

SAMPLE LETTER

Interim Response to Complainant – Type 2

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Complaint Number _____

Dear :

We have been advised by the above employer that the hazards about which you complained are presently being investigated. Enclosed is a copy of a letter from the employer.

VOSH has requested that the employer submit written notification to us when all corrective action has been completed.

A copy of the employer's response will be forwarded to you for your information as soon as we receive it.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Name, Address and Telephone Number of Discrimination Investigator]

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosure

SAMPLE LETTER**Violation Correction in Progress – Letter Response To Complainant**

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*

Complaint Number _____

Dear :

We have been advised by the above employer that the hazards which you had asked VOSH to investigate are presently being corrected. The results of the employer's response are enclosed for your information.

The Virginia Occupational Safety and Health Compliance (VOSH) has sent a letter to the employer requesting that they provide the agency with written notification once all of the corrective actions have been completed. A copy of this letter to the employer has been enclosed for your records. The results from the employer's final response will also be forwarded to you as soon as possible upon receipt.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Name, Address and Telephone Number of Discrimination Investigator]

Thank you for your concern for a safe and healthful workplace.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

SAMPLE LETTER**Complaint Notification to Employer
Citing Employer's Failure to Respond to Initial Complaint Notification**

Date _____

Company _____

Attn: _____

Street _____

City, State Zip _____

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*

Complaint Number _____

Dear :

A letter of complaint alleging unsafe working conditions at your work location was sent to you on _____. In the letter you were asked to respond to the alleged unsafe conditions by _____. We are not in receipt of your response at this time. If we do not receive a letter of response from you within 10 working days, an unannounced inspection may be scheduled to determine if these conditions do in fact exist and if so what measures your company has taken to abate them. Violations found during the inspection that pertain to the complaint items, as well as any other violations found during the inspection, would be cited.

We would appreciate your cooperation in this matter in order that our file on this complaint may be closed. Please also note that VOSH selects for inspection a random sample of cases in which employers have indicated satisfactory corrective action. This policy has been established to ensure that employers have actually taken the action asserted in their letters.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

If you have any questions concerning this matter, please contact _____ at the above number. Your cooperation in this matter is appreciated.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

SAMPLE LETTER**Results of Inspection to Complainant**

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear :

In response to your complaint concerning safety and health hazards at the above worksite, the Virginia Occupational Safety and Health (VOSH) Program conducted an inspection. That inspection was completed on _____. The results of our inspection of your complaint items are as follows:

[List complaint item, result of inspection (e.g., complaint item confirmed or not confirmed), and violation item cited in response, as applicable]

Attached for your information is a copy of the VOSH Citation and Notification of Penalty, which was sent to the employer on _____, and should have been posted at the workplace for at least three working days after receipt.

If you do not agree with our inspection results, you may contact me for a clarification of the matter. You also have the right to an informal review by VOSH. This review may be obtained by submitting a written statement of your position to the Regional Safety or Health Director. The Regional Safety or Health Director will provide the employer with a copy of such statement by certified mail. Your identity will be withheld unless you explicitly request that it be revealed. Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

Thank you for your concern for a safe and healthy workplace.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

SAMPLE LETTER**Informal Conference – Response Needed From Employer**

Date _____

Company _____

Attn: _____

Street _____

City, State Zip _____

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear :

Option 1: Since receiving your letter of contest for the above referenced Virginia Occupational Safety and Health (VOSH) inspection on _____, we have attempted unsuccessfully to contact you by telephone on numerous occasions to schedule the informal conference that you requested in your letter. If we have not heard from you in three weeks, we will proceed with the handling of your contest. However, you need to be aware that without an Explanatory Letter of Contest detailing the reasons for your contest and which provides additional information you wish us to consider regarding our inspection results, that it is unlikely that a contest review will change the initial findings.

Option 2: Pursuant to the Informal Conference which we held with you on the above referenced Virginia Occupational Safety and Health (VOSH) inspection on _____, you requested time to think over our proposed settlement offer to reduce the penalties from \$_____ to \$_____ and agreed to contact us regarding your decision within the next couple of weeks. Since then we have attempted unsuccessfully to contact you on numerous occasions to learn what you have decided regarding our proposal. Please contact us and advise if you wish to accept our offer or wish to continue your contest. If you do decide to continue your contest, we request you provide us with an Explanatory Letter of Contest along with any supporting documentation you wish us to consider on your behalf.

If we have not heard from you by *[2 week date]*, we will proceed with the handling of your contest. However, you need to be aware that consideration of your contest by our Central Office in Richmond will be based upon the initial penalties as issued and that any proposed settlement offer tendered by the Central Office may not reflect any previous offers made. You should also be aware that if you do not provide any additional information you wish us to consider regarding our inspection results, that it is unlikely that a contest review will substantially change the initial findings.

Please contact us in writing by the above date and advise us of the action you wish take regarding this inspection. If we have not heard from you by this date, we will forward your case file to our Central Office in Richmond for review.

Please call me at _____, Ext. ____ if you have any questions.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

SAMPLE LETTER

Commonwealth Attorney – Notice of Employer Contest Letter

Date

COMMONWEALTH ATTORNEY

Address

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]
Inspection Number _____

Dear :

Pursuant to 40.1-49.4E of the *Code of Virginia*, "the Commissioner [of Labor and Industry] shall immediately notify the Commonwealth's Attorney for the jurisdiction wherein the violation(s) is alleged to have occurred...."

The purpose of this letter is to notify you that the above-reference employer has issued a notice of its intention to contest the Virginia Occupational Safety and Health (VOSH) citation(s) issued by the Virginia Department of Labor and Industry, in accordance with §40.1-49.4.A.4(b) of the *Code of Virginia*.

Please see the attached notice of contest received from the company. Further information will be sent to you if the contest is not withdrawn or settled.

We appreciate your assistance with our VOSH contested case.

Please call me at _____, Ext. ____ if you have any questions.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

SAMPLE LETTER**Response to Employer After Last Day to Contest Has Passed**

Date

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*

Inspection Number _____

Dear :

This letter is in reference to your phone message of _____, at _____ [a.m./p.m.] to arrange an informal conference for the above inspection and is to confirm the content of our subsequent conversation on _____, at _____ [a.m./p.m.] regarding your request.

I fully appreciate the difficulties that small companies may encounter when dealing with governmental agencies such as ours and understand that some of the requirements may be initially confusing. In fact, this is the reason our agency's inspectors give a detailed explanation of the employer's rights and responsibilities to the employer at the conclusion of each inspection, as well as a copy of the Closing Conference Guide. It is also the reason that citations are sent by certified mail and include additional instructions to the employer which again explain the employer's rights.

Regrettably, _____, was your company's last day to request an informal conference to discuss and/or to contest the citations and penalties that were issued. This date is the fifteenth working day following your company's receipt of the citations on _____. By delaying after _____, to contact us, the citations and penalties have become a Final Order of the Commissioner and are enforceable as an order of the Circuit Court.

As regards the \$_____ penalty owed by your company, VOSH is aware of the hardship a significant penalty might create for a small business and is always receptive to any company's efforts to meet their obligations. To this end, a penalty payment plan is available, upon request, which would help to mitigate the financial impact. Please advise me by _____, if you wish to arrange to a payment plan.

Also, for your future reference, I would like to suggest that you take time to read through the Closing Conference Guide our inspector provided to your company at the completion of the inspection and, where applicable, the cover letter which was enclosed with the citations you received on _____. These items explain your rights as the employer in the inspection and citation process and include a discussion of when and how to request an informal conference and/or to contest a citation. Many companies find it helpful to take advantage of these options and your company may also wish to do this in any future inspections (whether conducted by State or federal Agencies) that involve your operations.

Please contact me if you should have any questions or if I can be of any assistance. Thank you for your cooperation in our mutual efforts to improve workplace safety.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

SAMPLE LETTER**Petition for Modification of Abatement Request Received – Response to Employer**

Date:

Company

Attn:

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear _____:

As we discussed on _____, I am writing to you regarding your petition dated _____, in which you are requesting that the abatement due date for Citation 1, Item 1a be extended from _____ to _____. Your documentation of your need for the extension as detailed in your letter dated _____, is justifiable. However, before we can actually grant approval for the extension of the abatement period to the new date that your company is requesting, VOSH must wait for a period of fifteen (15) working days following _____, which is the date that you posted a copy of your petition letter and the Certificate Of Abatement Extension Request which I had faxed to you.

As we discussed, the Virginia Occupational Safety and Health (VOSH) standards require that these items be posted in a prominent place at or near the location of the violations for your affected employees to review for ten (10) working days to permit them the time to file a written objection to their employer's petition for the extension of abatement within that ten (10) working day period. If no employee objection has been filed by the time this period has expired and received within the fifteen (15) working days from the date that you posted your Petition and your Certificate, then I will send you written notification that your petition to modify the abatement due date has been approved.

During this extended abatement period your company must take the additional precautions outlined in your request and any others that are necessary to safeguard the safety and health of your employees.

Thank you for your continuing efforts to achieve a satisfactory abatement of this item and for your cooperation in our mutual efforts to improve workplace safety. Please contact me at _____, if you have any further questions regarding your petition or if I can be of further assistance.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: Employer Representative

SAMPLE LETTER**Petition for Modification of Abatement Request Granted – Response to Employer**

Date:

Company

Attn:

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear :

I am writing to you in follow-up to your written petition concerning the above inspection dated _____, in which you requested that VOSH grant an extension of your abatement due date for Citation 1, Item 1a from _____, to _____. Based upon the documentation you provided regarding your need for the extension and upon the fact that no written petition objecting to the abatement extension has been filed with VOSH by any of your employees during the fifteen working day period since you posted your petition, I am writing you to confirm that your petition to extend the abatement due date for this item until _____, has been granted. Please post a copy of this letter granting the abatement extension next to the original citation in a prominent place at or near the location of the violation for your affected employee's information.

As we discussed previously, your company must continue to take the additional precautions outlined in your request and any others that are necessary to safeguard the safety and health of your employees during this extended abatement period. In addition, once you have completed your remaining abatement actions for this item, you will need to send me your completed Abatement Verification Form and your completed List of Corrective Actions Taken, along with your supporting documentation by _____, so that I can close the abatement actions for this item in your inspection file.

Thank you again for your continuing efforts to achieve a satisfactory abatement of this item and for your cooperation in our mutual efforts to improve workplace safety. Please contact me at _____, if you have any further questions regarding your abatement measures or if I can be of further assistance.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: Employer Representative

SAMPLE LETTER**Dunning Abatement Verification Request to Employer**

Date:

Company

Attn:

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear :

The Virginia Occupational Safety and Health (VOSH) Program conducted the above inspection of your facility on _____. As a result of this inspection, your company was issued a Notice of Citation and Penalty dated _____, which was received by your company on _____. Your company's last date to contest the violations was on _____ (fifteen (15) working days from the date of receipt), and your company was required to provide the List of Corrective Actions Taken/Abatement Verification Form that was included with the Citation Package by _____. To date we have not received any response from your company regarding its corrective actions.

It is possible that we have not received your abatement package as yet, if you mailed this information to our offices in the past few days or if you forwarded your abatement package with your penalty payment to our Central Office in Richmond. Should this be the case, please call me promptly and advise me when you sent the package to us. Alternatively, if you have chanced to overlook sending your abatement package to us, then please submit your completed List of Corrective Actions by mail or fax (_____) as soon as possible so that it will reach our office by _____ [*two (2) calendar weeks*].

Our current records also indicate that your penalty payment has not been recorded as of the date of this letter. Please make out your payment of \$_____ to the "Treasure of Virginia" and mail it to the Virginia Department of Labor and Industry, Attn: Accounting Office, Main Street Centre, 600 E. Main Street, Richmond 23219-2430. To ensure proper payment credit, please write the inspection number _____ on the payment check.

An addressed envelope for your payment was provided for your convenience in the original citation package. If you submitted your payment recently, it is possible that it may not have posted yet. Please advise me should this be the case.

If you have not sent your payment because your company is experiencing serious financial difficulties, then please contact me to advise me of your circumstances, as it is generally possible to make arrangements to establish a Penalty Payment Installment Plan in such situations.

Please contact me in writing on or before _____, and advise me of the Corrective Actions you have taken to abate the items cited. Our agency is required to issue additional citations for

violations of the abatement verification requirements (as detailed in the VOSH Administrative Regulation Manual in parts §§16VAC25-60-307.D and -307.E) and to conduct a follow-up inspection to determine if the abatement is in fact completed, in any circumstance where an employer continues to fail to provide abatement documentation after written contact.

If we do not receive your abatement documentation by this time, VOSH will be required to issue a separate citation with a penalty of \$_____ to your company for failing to provide the required abatement verification.

Also, if a follow-up inspection becomes necessary because an employer fails to provide abatement, and it is consequently discovered that the cited items have remained uncorrected, then the employer may be subject to additional penalties for failing to abate the violation items. (Please be aware that the penalties for Failure-To-Abate violations are severe and start at a minimum of a \$_____ per violation for each calendar day past the abatement due dates - up to a total of 30 days per violation).

Please contact me at *(telephone number)* , if you have additional questions regarding this inspection.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: Employer Representative

SAMPLE LETTER**Final Response to Complainant/Case Closed
Citing Employer's Affirmation of Corrective Action – Type 1**

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear _____:

[Employer name] has advised me that the hazards you complained about have been investigated. A copy of the employer's letter is enclosed.

With this information, VOSH feels the case can be closed on the grounds that the hazardous conditions have been corrected (or no longer exist). If you do not agree that the hazards you complained about have been satisfactorily abated, please contact us by _____. If we do not hear from you within that time, we will assume that the hazard has been corrected or eliminated and will take no further action with respect to this case.

Please note that Va. Code §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Insert Name, Address, Email Address, and Telephone Number of Discrimination Investigator]

Thank you for your interest in workplace safety and health.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

SAMPLE LETTER

Letter Response To Complainant / Complaint Closed Satisfactory – Type 2

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear :

In response to your recent investigation request regarding alleged safety/health hazards at the above worksite, VOSH has received written confirmation from the employer regarding the completion of the corrective actions that the employer has taken relating to the conditions described in your complaint.

The employer's corrective actions appear adequate, however, if you have additional knowledge regarding the results of this complaint investigation which you believe would dispute the employer's response, then please send us written notification detailing the basis for your concerns as soon as possible upon receipt of this letter.

Please note that §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others.

If you believe that you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with VOSH. You should file this complaint as soon as possible, since VOSH normally can accept only those complaints filed within 60 days of the alleged discriminatory action.

[Insert Name, Address, Email Address and Telephone Number of Discrimination Investigator]

Your interest in the enhancement of safety in the workplace is appreciated. We did not reveal your identity to the employer.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

Enclosures

SAMPLE LETTER

Final Response Letter to Employer Closing File/No Further Action on Complaint – Type 3

Date:

Company

Attn:

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear _____:

On _____, the Virginia Occupational Safety and Health (VOSH) Program notified you of alleged safety and/or health hazards at your worksite.

Your response to these allegations was received in the Regional Office on _____.

Based on our review of the information you provided in your response to these alleged hazards, we have determined that our file on this matter can be closed and no further action on this complaint is anticipated at this time.

Please note, however, that the complainant will also be given the opportunity to review the information provided in your response. If the complainant disputes the accuracy of the response, it may be necessary for VOSH to contact you for additional information or documentation of corrective action in order to resolve these issues. In some situations, it may be necessary to conduct an inspection of your workplace.

Please note that §40.1-51.2:1 of the Labor Laws of Virginia states that no persons shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or has otherwise acted to exercise his/her rights under the safety and health provisions under this Title for themselves or others. Adverse action taken against an employee who has filed a complaint or has engaged in an occupational safety and health activity protected by the Labor Laws of Virginia can result in a VOSH onsite inspection.

We appreciate your prompt response to these allegations, and your interest in the safety and health of your employees. Please feel free to contact this office if we can be of additional assistance to you.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

SAMPLE LETTER

No Citations Issued Letter to Employer – Type 4

Date:

Company

Attn:

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear _____:

An inspection of your workplace was conducted under the Virginia Occupational Safety and Health Law on ____*date*____. The inspection did not reveal any conditions which we consider to be violations of the standards.

Option A: This was a partial inspection which means the focus of the inspection was limited to certain potentially hazardous areas, operations, conditions or practices. It is possible, therefore, that inspections of your workplace in the future could result in conditions being found that we do consider to be violations of the VOSH standards.

OR

Option B: Even though this was a comprehensive inspection, it is possible that not all potentially hazardous conditions, operations or practices were observed. Therefore, future inspections of your workplace could result in conditions being found that we do consider to be violations of the VOSH standards.

We appreciate your interest in protecting the safety and health of Virginia's workers and wish to thank you for your cooperation during the conduct of this inspection.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

SAMPLE LETTER**Final Response to Complainant – Employer Out Of Business**

Date:

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
Complaint Number _____

Dear _____:

In response to your initial complaint on _____, concerning safety/health hazards at the above worksite, the Virginia Occupational Safety and Health (VOSH) Program attempted to contact the company owner, *[Owner's Name]*, by phone on _____, and also sent [him/her] a certified letter requesting a response to the complaint allegations. *[Owner's Name]* did not respond to the initial written request and to subsequent phone contacts, nor has our agency been able to locate *[Owner's Name]* since these contacts.

In accordance with agency policy, when an employer fails to respond to reasonable attempts to resolve a complaint investigation, we conduct an inspection at the site. This inspection, however, was unable to be completed. The first time the inspection was attempted, during weekly working hours, the establishment was not open. Attempts to confirm this over the phone *[Insert time frame and time of day]* were unsuccessful. The inspector then went by the establishment on *[Insert day, date, and time of day]*, but the business was not in operation.

Based on our current findings, the employer has completely ceased work operations, thereby effectively eliminating any further existing employee exposure to the alleged hazards. Therefore, we are closing this investigation request as we are unable to further investigate for existing complaint items in circumstances where the business is no longer in operation. However, if you have reason to believe that employees are still being exposed to these hazards, then please contact us in writing as soon as possible.

Thank you for your concern for a safe and healthful workplace.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

SAMPLE LETTER**Next of Kin Initial Information Letter**

Date

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear _____:

On behalf of the Virginia Department of Labor and Industry's Occupational Safety and Health (VOSH) Program, please accept my sincere sympathy on the death of your *(insert relationship - e.g., husband, wife, son, daughter, uncle, cousin, etc., then insert the victim's name)*.

We are now in the process of investigating the circumstances surrounding your *[relative]*'s accident to determine its cause. The purpose of the VOSH investigation is to determine whether safety and health violations were involved in the accident. Citations may be issued to the employer as a result of this investigation. We intend to do everything possible with the information gathered to ensure that workplace accidents like this do not recur and that Virginia's workers have the safest working conditions possible.

If you have information that might assist us in our efforts, or if you have questions or concerns about VOSH's policies and procedures, please feel free to contact me at *[Phone number]*.

You are also welcome to request copies of the case file, and any penalties or citations issued as a result of our investigation.

Please address all such requests in writing to:

[Name of DLS contact person]
Legal Assistant
Commonwealth of Virginia
Department of Labor and Industry
Main Street Centre
600 East Main Street
Richmond, Virginia 23219-2430
804.786.9933

Again, I extend my sympathy.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

SAMPLE LETTER

Next of Kin Information Letter – Citations Issued

Date

Name

Address

City, State Zip

SUBJECT: [Insert Employer Name, Site Address, City, State, Zip]

Inspection Number _____

Dear _____:

On behalf of the Virginia Department of Labor and Industry's Occupational Safety and Health (VOSH) Program, please accept my sincere sympathy on the death of *(insert relationship to victim - e.g., husband, wife, son, daughter, uncle, cousin, etc., then insert the victim's name)*.

We have completed our investigation into the circumstances surrounding your *[name of relative]* accident. The purpose of the VOSH investigation was to determine whether safety and health violations were involved in the accident. Citations have been issued to the employer as a result of this investigation. [If a violation directly related to the cause of the accident was cited, that fact should be mentioned. If violations were cited, but none were directly related to the accident, that fact should be mentioned.]

If you are interested in receiving a copy of the citations issued, you can do so by calling or writing:

[Name of DLS contact person]
Legal Assistant
Commonwealth of Virginia
Department of Labor and Industry
Main Street Centre
600 East Main Street
Richmond, Virginia 23219-2430
804.786.9933

Please note that once citations are issued, the employer has fifteen (15) working days from receipt of the citations to settle the case or file a written notice of contest with the Department. Once a case is contested, if further settlement attempts are not successful, the Commissioner of Labor and Industry will refer the case to the Commonwealth's Attorney for the jurisdiction where the accident occurred, for the filing of a complaint in the local Circuit Court.

Again, I extend my sympathy.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

SAMPLE LETTER

Next of Kin Information Letter – No Citations Issued

Date

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear _____:

On behalf of the Virginia Department of Labor and Industry's Occupational Safety and Health (VOSH) Program, please accept my sincere sympathy on the death of *(insert relationship - e.g., husband, wife, son, daughter, uncle, cousin, etc., then insert the victim's name)*.

We have completed our investigation into the circumstances surrounding your [relative]'s accident. The purpose of the VOSH investigation was to determine whether safety and health violations were involved in the accident. The VOSH investigation has been closed without finding any violations related to the cause of the accident.

If you are interested in receiving a copy of the closed inspection file, you can do so by calling or writing:

[Name of DLS contact person]
Legal Assistant
Commonwealth of Virginia
Department of Labor and Industry
Main Street Centre
600 East Main Street
Richmond, Virginia 23219-2430
804.786.9933

Again, I extend my sympathy.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

SAMPLE LETTER

Next of Kin Information Letter – Citations Issued, Case Contested and Final Order Entered

Date

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear _____:

On behalf of the Virginia Department of Labor and Industry's Occupational Safety and Health (VOSH) Program, please accept my sincere sympathy on the death of your *(insert relationship- e.g., husband, wife, son, daughter, uncle, cousin, etc., then insert the victim's name)*.

We have completed our investigation into the circumstances surrounding your [relative]'s accident. The purpose of the VOSH investigation was to determine whether safety and health violations were involved in the accident. Citations were issued to the employer as a result of this investigation, and then contested by the employer. The contested case and litigation process has resulted in a final order being entered for the case, and the case is now closed.

If you are interested in receiving a copy of the closed inspection file, you can do so by calling or writing:

[Name of DLS contact person]
Legal Assistant
Commonwealth of Virginia
Department of Labor and Industry
Main Street Centre
600 East Main Street
Richmond, Virginia 23219-2430
804.786.9933

Again, I extend my sympathy.

Sincerely,

Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

SAMPLE LETTER
Medical Examiner Letter Form

Date

Office of the Chief Medical Examiner

Name

Address

City, State Zip

SUBJECT: *[Insert Employer Name, Site Address, City, State, Zip]*
 Inspection Number _____

Dear _____:

Pursuant to the provisions of Labor Laws of Virginia, Title 40.1, a Virginia Occupational Safety and Health investigation is being conducted involving an industrial accident that occurred on _____, in _____.

In accordance with Va. Code §40.1-8, and to assist in our investigation, we request you provide to our agency copies of all reports including any toxicology reports on ____ *victim's name* ____, age ____, a former employee of the above employer.

We request the report(s) be sent to _____. We appreciate your assistance in this matter.

Sincerely,

VOSH Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

SAMPLE LETTER**Response to Inmate or Prisoner Complaint**

Date

Name

Address

City, State Zip

Dear _____ :

This letter is being written in response to a complaint recently received from you regarding a hazardous condition in your area at the _____ Correctional Center. Your letter was sent to _____ in our _____ office, and he in turn forwarded them to this office which is the jurisdictional area for the _____ Correctional Center.

I wish to assure you that the Commissioner takes great interest in all complaints which allege unsafe working conditions. Indeed, complaint-initiated inspections are considered a high priority by the Department of Labor and Industry's Virginia Occupational Safety and Health (VOSH) Program. However, in accordance with the Code of Virginia (see paragraph below), VOSH is limited as to the actions it can take in circumstances such as yours.

Section 40.1-2.1 of the Code of Virginia specifically provides:

The provisions of this title and any rules and regulations promulgated pursuant thereto shall not apply to the State or any of its agencies, institutions, or political subdivisions, or any public body, unless, and to the extent that, coverage is extended by specific regulation of the Commissioner or the Safety and Health Codes Board.

While the Safety and Health Codes Board ("the Board") extended VOSH's enforcement authority over "public employees", VOSH regulations are not applicable to prisoners confined in jails and correctional institutions. Section 10 of the VOSH Administrative Regulation Manual defines a "**public employee**" as: "**any employee of a public employer....Prisoners confined in jails controlled by any political subdivision of the Commonwealth and prisoners in institutions controlled by the Department of Corrections are not public employees unless employed by a public employer in a work-release program, pursuant to §53.1-60 or §53.1-131 of the Code of Virginia.**"

As a program of the Department of Labor and Industry, VOSH is generally limited to initiating an on-site complaint inspection in response to a formally written complaint from a current employee or from the immediate family of a current employee. Since the circumstances you describe are not related to working conditions as a result of being employed by a public employer in one of the above work release programs, VOSH will not be conducting an inspection in response to your letter.

Please note also that VOSH, as a program of a state agency, is not authorized to represent private individuals in personal claims. VOSH is responsible for conducting safety and health inspections and accident investigations to determine if covered employees are exposed to unsafe or unhealthy working conditions, as defined by Title 40.1 of the Code of Virginia and the Virginia Occupational Safety and Health Standards. In the course of these inspections, if it is determined that an employer has violated the VOSH standards, we would issue citations to the employer which, depending upon the classification of the violations, may result in monetary fines.

Please contact me if you have any further questions concerning this matter.

Sincerely,

VOSH Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

SAMPLE LETTER**Complaint Notification to Correction Personnel following Inmate Complaint**

(Discretionary use - to be sent only when situation warrants)

DATE

ADDRESS

Dear *(Correction Official)*:

On *(date)*, this Department received a complaint concerning alleged unsafe conditions at *(name of prison or institution)*. The specific nature of the complaint involves:

1. *(describe alleged hazard(s) and location(s))*
2. *(describe alleged hazard(s) and location(s))*
3. *(describe alleged hazard(s) and location(s))*

The complaint was originally filed by a prisoner, and our jurisdiction over prisoners only extends to those who are "...employed by a public employer in a work release program pursuant to §53.1-60 or §53.1-131 of the *Code of Virginia*" (see reference at 16VAC25-60-10). Our regulations also apply to workplace hazards alleged in the complaint that result in exposure of your guards or other employees to possible injury or illness.

We have not determined whether the hazard, as alleged, exists at your workplace; and we are not conducting an inspection at this time. However, we recommend you investigate the alleged condition(s) to assure that your employees are not exposed to the alleged hazards and make any necessary corrections or modifications within **five (5)** working days from receipt of this letter.

Please advise me in writing of your findings and of any action(s) you have taken. Your response should be detailed, stating specifically what action(s) you have taken to abate described conditions. This letter is not a citation. However, if we do not receive a response from you within **five (5)** working days that appropriate action has been taken, an inspection may be conducted. Action taken by you in this matter will not remove your workplace from the possibility of an unannounced inspection by duly authorized representatives of the Virginia Department of Labor and Industry.

You are requested to post a copy of this letter and your response to it where it will be readily accessible for review by all of your employees, for three (3) working days. A copy of your response may be forwarded to the complainant. If you have any questions concerning this matter, please contact this office. Your personal support and interest in the safety and health of your employees is appreciated.

Sincerely,

VOSH Regional Safety or Health Director
Virginia Occupational Safety and Health

c: case file

Standardized Information and Optional Recordkeeping Case Outline

Case files for recordkeeping citations to be considered for violation-by-violation penalty procedures shall be set up to group violations, using a numerical code as shown below, followed by the case number of the violation as may be recorded in the optional recordkeeping case outline.

A. Case types are as follows:

INJURY:

- 01--Laceration
- 02--Puncture wound
- 03--Fracture
- 04--Eye injury
- 05--Burn
- 06--Contusion
- 07--Strain/sprain
- 08--Hernia
- 09--Other (major category)
- 10--All other injuries (non-specific)

ILLNESS:

- 11--Dermatitis
- 12--Cumulative trauma disorder
- 13--Hearing loss
- 14--Poisoning
- 15--Respiratory disorder
- 16--Cancer
- 17--Other (major category)
- 18--All other illnesses (non-specific)

B. For burns, there shall be some estimate of the size of the burn. This can be given in the "Detailed Description of Event" column on the suggested recordkeeping case outline.

C. Using the suggested recordkeeping case outline or some other appropriate format, include the following types of information for each violation under "Detailed Description of Event":

1. Work relationship.

EXAMPLE: "While working as a welder...."

2. Injury.

EXAMPLE: Employee sprained his left wrist. Employee fractured her right index finger.

3. Basis of recordability: injury or illness.

EXAMPLE: Employee was to take prescription medicine (Naprosyn) for 5 days and received heat therapy on three subsequent visits.

D. Each violation must have:

1. A unique case file number;
2. A way to be identified, either by name or employee clock number;
3. The reason the instance is a violation of the BLS guidelines; and
4. A detailed description of the event (injury or illness).

E. Five guides are used in determining recordability:

1. Recordability of Cases Under the Occupational Safety and Health Act
(NOTE: See VOSH Program Directive 09-104A (15 April 2014))
2. Guidelines for establishing Work Relationship.
(NOTE: See VOSH Program Directive 09-104A (15 April 2014))
3. Medical Treatment vs. First Aid Guidelines,
4. A partial list of prescription and nonprescription drugs based on previous recordkeeping investigation history.
5. Physician's Abbreviations Guide.

(Agency Letterhead)

MEMORANDUM

TO: Commonwealth's Attorney/Attorney General's Office

FROM: Commissioner, Department of Labor and Industry

DATE: ____/____/____

SUBJECT: Contested Case Review; Company Name: _____
Inspection #: _____

NOTE: This review is conducted solely for the benefit of the Commonwealth's Attorney and/or the Office of the Attorney General, and is protected from disclosure under the Freedom of Information Act by the attorney-client privilege.

Employer's Position: (Summarize the employer's position on the items contested. Attach Informal Conference Notes or Employer letter as appropriate. Continue on separate sheet of paper if more space is needed.)

Regional Safety or Health Director's Recommendations: *(Continue on Separate Sheet if more space is needed.)*

Director's Recommendations:

____/____/____
Date Received

Deputy Commissioner's Decision/Recommendation:

____/____/____
Date Received

Legal Support Recommendations:

____/____/____
Date Received

Commissioner's Decision: *(When required)*

____/____/____
Date Received

Commonwealth's Attorney/Attorney General's

____/____/____
Date Received

CONSTRUCTION SAFETY AND HEALTH CHECKLIST

The following checklist is a brief overview of common hazards found on a construction site. It is not comprehensive and should be used to supplement necessary hazard recognition by the safety designee which is site specific.

A. General

Are employees exposed to any unsafe conditions during their travel to and from their work stations and at their work stations?

- ✓ housekeeping (tripping) hazards;
- ✓ overhead hazards;
- ✓ improper storage of materials or flammable substance;
- ✓ electrical hazards;
- ✓ open sided floors;
- ✓ floor openings and holes;
- ✓ unsafe or improperly installed stairs;
- ✓ inadequate illumination.

B. Personal Protective Equipment

Are employees wearing required personal protective equipment?

- ✓ hard hat;
- ✓ safety glasses;
- ✓ safety shoes;
- ✓ hearing protectors.

C. Electrical

Are employees protected from electrical hazards?

- ✓ exposed live electrical parts;
- ✓ GFCI provided or alternatively an assured equipment grounding program implemented;
- ✓ ungrounded electrical equipment;
- ✓ unprotected electrical cords.

D. Fire Protection

Are fire extinguisher(s) provided as appropriate?

E. Flammable and Combustible Liquids

Are flammable and combustible liquids handled and stored properly?

- ✓ safety cans used;
- ✓ flammable and combustible liquids not stored near exits or work areas.

F. Compressed Gases

Are compressed gases stored and properly handled?

- ✓ oxygen stored at least 20 feet from fuel gases;
- ✓ cylinders equipped with caps;
- ✓ fuel gases not stored inside a building;
- ✓ compressed cylinders secured and protected from damage.

G. Tools

Are tools used properly and maintained in a safe condition?

- ✓ hand tools in safe condition;
- ✓ electrical power tools equipped and used with guards;
- ✓ pneumatic tools and compressors equipped with proper safety devices.

H. Ladders

Are ladders properly used and maintained?

- ✓ no broken rungs or missing steps;
- ✓ properly secured and erected;
- ✓ metal ladders not used for electrical work;
- ✓ job-made ladders properly constructed.

I. Scaffolds

Are scaffolds properly erected and guarded?

- ✓ fully planked;
- ✓ equipped with guardrails;
- ✓ set on sound rigid footing.

J. Material Storage

Are materials properly handled and stored?

- ✓ stored in tiers and secured;
- ✓ not stored in aisle ways.

K. Material Hoists and Personnel Hoists

Are hoists properly erected, enclosed and used?

L. Motor Vehicles and Mechanized Equipment

1. Are vehicles with obstructed view(s) equipped with a back-up alarm or is an observer used to guide them?
2. Is mechanized equipment kept at least ten feet from overhead power lines?

EMPLOYER'S SAFETY AND HEALTH PROGRAM

- A. Management Commitment and Leadership
 - 1. There is a policy statement that has goals established, issued, and communicated to employees.
 - 2. Program revised annually.
 - 3. Participation in safety meetings, inspections: agenda item in meetings.
 - 4. Commitment of resources is adequate.
 - 5. Safety rules and procedures incorporated into site operations.
 - 6. Management observes safety rules.
- B. Assignment of Responsibility
 - 1. Safety designee on site, knowledgeable, and accountable.
 - 2. Supervisors (including foremen) safety and health responsibilities understood.
 - 3. Employees adhere to safety rules.
- C. Identification and Control of Hazards
 - 1. Periodic site safety inspection program involves supervisors.
 - 2. Preventative controls in place (PPE, maintenance, engineering controls).
 - 3. Action taken to address hazards.
 - 4. Safety Committee, where appropriate.
 - 5. Technical references available.
 - 6. Enforcement procedures by management.

D. Training and Education

1. Supervisors receive basic training.
2. Specialized training taken when needed.
3. Employee training program exists, is ongoing, and is effective.

E. Recordkeeping and Hazard Analysis

1. Records maintained of employee illnesses/injuries, and posted.
2. Supervisors perform accident investigations, determine causes and propose corrective action.
3. Injuries, near misses, and illnesses are evaluated for trends, similar causes; corrective action initiated.

F. First Aid and Medical Assistance

1. First aid supplies and medical service available.
2. Employees informed of medical results.
3. Emergency procedures and training, where necessary.

SAFETY AND HEALTH PROGRAM EVALUATION

- ✓ During all construction inspections the answers to the following questions, at a minimum, shall be obtained and specifically documented in the case file.
- ✓ Does the employer claim to have a safety and health program?
- ✓ Who is designated to deal with safety and health matters at this worksite?
- ✓ How often does this person conduct inspections of the worksite?
- ✓ When was the last inspection conducted?
- ✓ What hazards were observed during the last inspection?
- ✓ What actions were taken to eliminate the observed hazards?
- ✓ What hazards (*Indicate how many*) were noted during the VOSH inspection that a competent person as defined in 1926.32(f) should have recognized?
 - If a violation of 1926.20(b)(2) is contested a listing of each individual violation and the approximate date it was created shall be included in the case file.
- ✓ How many of these hazards were in existence at the time of the last inspection?
 - If a violation of 1926.20(b)(2) is contested a listing of each individual violation and the approximate date it was created shall be included in the case file.
- ✓ What explanation was given for the continued existence of these hazards? (Be specific and indicate who provided the explanation)
- ✓ If hazards were created after the last inspection how often should inspections be performed? (Explain the response in detail)

SAMPLE NARRATIVE - #1**VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY****SIGNIFICANT CASE INSPECTION NARRATIVE**

CSHO I.D.: W 2381-032-89

INSPECTION #: 000000000

DATE CASE OPENED: 3/3/89

TYPE INSPECTION: Accident-Fatality

EMPLOYER: Virginia Steel Corporation
6623 Wexford Lane
Richmond, Virginia 23225

BUSINESS TYPE: Steel Erection

INSPECTION SITE: 100 North Fourth Street
Richmond, Virginia 23241

I. BACKGROUND

A. PURPOSE - This inspection was initiated as a result of a fatal accident which occurred at the inspection site listed above at 9 a.m. on March 3, 1989. The accident was reported to the Richmond Regional Office at 9:30 a.m. on March 3, 1989, by R. E. Lee, Site Superintendent for Virginia Steel Corporation.

B. WORKSITE DESCRIPTION - Two multi-story office buildings are being constructed on the worksite by Imperial Builders Corporation. The two buildings are joined together by an atrium roof at the sixth floor level of buildings. (See photo #1 at Exhibit 2.)

Virginia Steel Corporation is the contractor erecting the steel beam structure of the building.

C. INSPECTION HISTORY - Virginia Steel Corporation has been inspected four (4) times in the past three (3) years. Eight (8) citations (6 - Serious, 2- Other) have been issued to the company. (See Inspection History at Exhibit 7a.)

D. CONDUCT OF THE INSPECTION

1. OPENING CONFERENCE - The opening conference was held at 1:30 p.m. on March 3, 1989, at the accident site. (See Exhibit 5b for details concerning the opening conference.)

2. WALKAROUND - The walkaround was conducted during the period of March 4-15, 1989. (See Exhibit 5b)

3. CLOSING CONFERENCE - The Closing Conference was held at 10 a.m. on June 2, 1989. (See Exhibit 5b)

II. FINDINGS OF FACT

- A. This accident involved a fall from the atrium roof at the worksite. The atrium roof structure consisted of steel beams with open web steel joists spaced five (5) feet on center across the beams. The structure measures approximately forty-eight (48) feet between the two (2) buildings, eighty (80) feet long at its longest point and is approximately seventy (70) feet above a concrete floor. (See photos #4 through #8 at Exhibit 2.)
- B. The joists had been spaced on the beams of the atrium roof structure but had not been completely welded and the bridging had not been installed. (See Employee Interview Statements at Exhibits 1a thru 1b.)
- C. A bundle of decking had been stored on the joists of the atrium roof. (See photo #5 at Exhibit 2 and Mr. Grant's (victim's coworker) Interview Statement at Exhibit 1b.)
- D. It is normal practice for employees of Virginia Steel Corporation to walk the beams to where the joists are and then sit down on the beam and wrap their safety lanyards around the beams. (See Employee Interview Statements at Exhibits 1d thru 1f.)
- E. It is also normal practice for employees of Virginia Steel Corporation not to tie off before reaching the work area, no matter how high above the ground they are. (See Site Supervisor's Interview Statement at Exhibit 1g.)
- F. On the morning of March 3, 1989, Mr. Lee, site supervisor, instructed Mr. Grant and Mr. Jackson (victim) to continue welding the beams and joists on the atrium roof. (See Interview Statement at Exhibit 1g.) Mr. Grant went to fabricate some steel frames; he last saw Mr. Jackson walking on the second beam. Within minutes of Mr. Grant's leaving, Mr. Jackson fell to his death. (See Mr. Grant's Interview Statement at Exhibit 1f.)
- G. No one witnessed the accident. After the fall, Mr. Jackson's safety belt and lanyard were found hooked across his shoulder and waist. He was not tied off to the beam and the employer had not provided any other form of fall protection such as a safety net. (See Employee Interview Statements at Exhibits 1d through 1g.)

III. CONCLUSIONS/RECOMMENDATIONS

- A. That a Serious citation be issued for violation of Title §40.1-51.1(a), Code of Virginia in that open web steel joists did not have the bridging installed and were not permanently fastened prior to storing construction loads on the joists, thereby creating an unstable condition, thus exposing an employee on the joist to a 70-foot fall hazard. (See Findings II.B, C, and D above.)

Proposed Penalty - \$10,000.

- B. That a Serious citation be issued for violation of 1926.20(b)(1). No danger signs were posted indicating an immediate hazard. (See findings II.D and E above)

Proposed Penalty - \$3,000.

- C. That a Willful citation be issued for violation of 1926.750(b)(1)(ii). A safety net was not installed; the potential fall distance greatly exceeded 25 feet. (See Finding II.G above) (See Section 1 for Willful Justification.)

Proposed Penalty - \$90,000.

(SEE PENALTY CALCULATION WORKSHEETS - Section 1)

SAMPLE NARRATIVE - #2**VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY****SIGNIFICANT CASE INSPECTION NARRATIVE**

CSHO I. D.: H0000-000-96

INSPECTION #: 105070555

DATE CASE OPENED: 10/5/89

TYPE INSPECTION: Accident/Fatality

EMPLOYER: Augusta Silo
Route 2, Box 104
Boxer, Virginia 20074

BUSINESS TYPE: Silo Construction and Repair

INSPECTION SITE: Waterside Plantation
Route 250 West (1/2 mile east of Zion Crossroads)
P.O. Box 463
Waterside, Virginia 22900

I. BACKGROUND

- A. PURPOSE - This inspection was initiated as a result of an accident which occurred at the inspection site listed above at 10:00 am on September 7, 1989. This accident resulted in the fatality of an employee, Mr. Joseph A. Smith on September 14, 1989.

The accident/fatality was reported to the Richmond VOSH Regional Office by Mr. J. M. Blackman, Loss Control Consultant for Consolidated Risk Management Service on October 4, 1989 at 10:15 am (20 days after the fatality).

- B. WORKSITE DESCRIPTION - The accident occurred in an Augusta Silo Feed Storage Structure, a silo measuring 80 feet in height and 25 feet in diameter. This structure was one of five (5) silos at the Waterside Plantation. (See Photo #1, Exhibit 2.)

- C. INSPECTION HISTORY - None

- D. CONDUCT OF THE INSPECTION

1. OPENING CONFERENCE - The opening conference was conducted with employer representatives on October 5, 1989 at the employer address above. (See Exhibit 5b for opening conference report/Inspection Worksheet)
2. WALKAROUND - The walkaround was conducted on October 6, 1989 at the worksite located on Waterside Plantation. Employer representatives and the farm foreman were present. (See Exhibit 5b for summary of walkaround/Inspection Summary)

Interviews were conducted with the victim's co-workers, employer representatives, farm representatives, and medical experts. *(See 1a thru 1d and 4g)*

3. CLOSING CONFERENCE - The closing conference was held on October 30, 1989. *(See Exhibit 5b)*

II. FINDINGS OF FACT

- A. On September 7, 1989, the victim, along with Sam Clark, another serviceman were working to remove a forage unloader from an Augusta Silo Storage Structure at Waterside Plantation. This entailed entering a hatch in the silo measuring 32" x 20" tall. A tunnel approximately 36" in diameter was dug through the silage to allow the workers entry to work on the structure. *(See photo's # 7 and 8, Exhibit 2 and employee statement at Exhibit 1a)*

The work performed by Smith and Clark was continuing from the previous day. (Exhibit 1a)

- B. Mr. Clark entered the structure first, at approximately 9 a.m., and removed two (2) sections of the unloader arm before exiting the silo at 9:20 a.m. The victim, Mr. Smith then entered the silo at approximately 9:30 a.m. to continue removing the remaining parts of the unloader. (See Employee Interview Statement at Exhibit 1a)

According to Mr. Clark, Smith was wearing a MSA Constant Flow Air Line Respirator. (See photo #6, Exhibit 2 for picture of the respirator worn; see Exhibit 4a for specifications of the respirator) Clark observed Smith through the tunnel as Smith connected a Lugall and began pulling on the unloader chain. His light also was reflecting on the silo walls. At first, work progressed normally, but after approximately 15 minutes, Clark could no longer detect movement on the part of Smith. (See Exhibit 1a)

- C. Clark attempted to contact the victim by rapping on the steel backbone of the unloader but got no response from Smith. He then informed Gordon Carr, the Site Supervisor, who had arrived at the worksite just after the victim entered the silo, that he could not contact Smith. (See Exhibit 1a)
- D. Mr. Clark and Mr. Carr removed loose feed material which had gathered at the entrance of the silo in the tunnel. The victim was seen by Clark and Carr slumped in the center of the structure; he was not moving. (See Exhibits 1a and 1b)

Mr. Carr attached a length of pipe to a centrifugal blower and blew fresh air into the structure. (See photo #2, Exhibit 2, for a picture of the apparatus used)

Mr. Clark tied a rope around his waist that was attached to the outside of the structure and entered the silo to retrieve Smith. Clark did not wear a respirator since there was none available; he took periodic breaths from the end of the pipe supplied by the blower. (See Exhibits 1a and 1b)

- E. Clark attached a second rope around Smith's legs and with the assistance of Mr. Carr, pulled Smith outside the structure. This occurred at approximately 10 a.m. (See Exhibits 1a and 1b)

Smith was wearing the respirator; it was observed to be functional by Mr. Carr. The hose did not appear to be obstructed or kinked. Smith's face and tongue were observed to be swollen; he was making a gurgling sound in his throat. (See Exhibit 1a)

- F. Mr. Carr removed the respirator from Smith, placed him on his stomach and pumped on his back until he regurgitated some green material and began breathing short breaths at approximately 10:03 a.m. (Exhibit 1a)
- G. The Orange County Rescue Squad arrived at 10:10 a.m. (The squad had been called during the rescue by a farm worker, John Snead.) Upon their arrival, a helicopter was summoned and the victim was transported to the University of Virginia Medical Center. (See Exhibit 1c and 4a)
- H. Mr. Smith lapsed into a coma on September 8, 1989, and his condition continued to deteriorate. His family requested that support be terminated on September 14, 1989; he expired at 8:20 p.m. that evening. (See Hospital Discharge Summary - Exhibit 4b)
- I. Joseph Allan Smith was a 34 year old white male, with no known past medical problems. He was not known to have any drug or alcohol problem. He was 5'9" tall, and weighed 182 pounds. He wore a full beard. He had worked for Augusta Silo for three (3) months. (See Medical History - Exhibit 4c)
- J. The cause of death according to the autopsy report was hypoxic encephalopathy or a lack of oxygen to the brain resulting in multi-organ failure. The circumstances which lead to the occurrence of the hypoxic event remain undetermined. (See autopsy report - Exhibit 4c)
- K. According to a statement from Dr. Sheets, (Exhibit 4d) one of the pathologists who assisted in the autopsy:
 - (1) Heat stroke was not likely based on the victim's body temperature at admission and the fact that there was no mention of treatment for heat stroke by the emergency personnel. (The body temperature upon admission was 100.4.)
 - (2) A toxic exposure was not likely based on microscopic examination of the victim's lungs and other tissues which displayed no evidence of such an exposure.
 - (3) Hypoxia caused by a pre-existing medical condition was not consistent with the findings that the employee had no previous medical history which would suggest such a condition.
 - (4) Description of the victim during rescue suggests a respiratory asphyxia.
- L. The temperature on the day of the accident was reported to be 76 F. (Exhibit 8) The temperature inside the structure was not measured on the day of the accident, but was measured during the walkaround and was noted to be 101 F. The temperature outside that day was 71 F. (Exhibit 8) Humidity inside the structure was not measured, but would be expected to be near 100% according to the manufacturer. (See Section 6)

The employer is aware that a hot environment exists inside the structure and recommends that employees stay inside no longer than 10 to 15 minutes before taking a break. (See Augusta Silo

Operators Manual - Section 6) Gatorade is always made available at the worksites for employees. (See site supervisor's statement - Exhibit 1b)

- M. The Augusta Silo structure is not intended for continuous employee occupancy; it is designed for the storage of livestock feed. Egress is limited to the small hatch in the side of the structure. It is designed to limit oxygen from the stored feed creating a hazardous atmosphere inside. (See manual - Section 6)

The employer did not require that the atmosphere inside the structure be tested prior to any employee entering. The employer had no equipment to test the atmosphere for percent oxygen, flammability, or any other toxic material. (See employer statement - Exhibit 1d)

The manufacturer indicates that a lack of oxygen and excessive carbon dioxide are the major atmospheric hazards inside a structure. The build-up of toxic gasses such as hydrogen sulfide from decomposing protein, oxides of nitrogen, or carbon monoxide are extremely rare because oxygen is limited inside the structure. (See Manual - Section 6)

The employer assumes an oxygen-deficient atmosphere and requires the use of a respirator of the type worn by the victim. (See statements of employer and coworker - Exhibits 1b and 1d)

- N. The employer did not have written standard operating procedures for respirator use. The respirator used by the victim was stored in the tool box on the back of a service truck with other tools and equipment. The face piece and corrugated breathing tube were partially covered with cattle feed. The quick disconnect valve on the flow control valve had been modified by making the attachment to the air hose permanent. The respirator and compressor used by the victim were tested again on the walkaround and appeared to function satisfactorily. (See Exhibit 1e)

Employees have not been medically screened prior to respirator use. Some training was conducted on February 20, 1989, prior to the victim's hiring. A copy of General Rules for wearing a respirator was given to the victim upon hiring. A signed receipt is filed in his personnel file. (See Section 6)

- O. Employees attending the victim while inside the structure were not trained in first aid, CPR, or rescue procedures. (Exhibit 1a)
- A respirator was not available for the attendant outside the entrance to the structure. (Exhibit 1a)
 - The victim was not wearing a retrieval device or retrieval line. (Exhibit 1a)
- P. The employer did not require the completion of an entry permit to be completed prior to any employee entering the structure. (See Employer and Employee Statements - Exhibits 1a, 1b, and 1d.)
- Q. The employer did not have a written hazard communication program. Material safety data sheets were posted on the bulletin board in the lunch room, but were not available for some hazardous chemicals. No labeling violations were documented. Training required by the hazard communication standard had not been conducted. (Exhibit 1a, b, and d)

III. CONCLUSIONS/RECOMMENDATIONS

- A. Issue a SERIOUS CITATION for violation of 1910.134(a)(2). No respiratory protection program in place. (Finding II.N.)
- Proposed Penalty - \$5,400.
- B. Issue a SERIOUS CITATION for violation of 1910.146.3. Qualified person not present during confined space entry. (Finding II.O.)
- Proposed Penalty - \$8,700.
- C. Issue a SERIOUS CITATION for violation of 1910.146.3. Atmospheric testing not performed prior to entry into a confined space. (Finding II.M.)
- Proposed Penalty - \$8,700.
- D. Issue a SERIOUS CITATION for violation of 1910.146.5.C. Rescue team not available where confined space has hazardous atmosphere. (Finding II.A thru E)
- Proposed Penalty - \$8,700.
- E. Issue a SERIOUS CITATION for violation of 1910.146.7.A.1 grouped with 1910.146.7.A.2.b. Employees not trained in confined space entry procedures and attendant not trained in first aid and CPR. (Finding II.A thru E and O)
- Proposed Penalty - \$8,700.
- F. Issue a SERIOUS CITATION for violation of 1910.146.9.A.1. Retrieval devices with retrieval lines not worn by entrants into a confined space which has a hazardous atmosphere. (Finding II.O.)
- Proposed Penalty - \$8,700.
- G. Issue a SERIOUS CITATION for violation of 1910.146.9.B. Appropriate respiratory protection not available immediately outside the entrance to a confined space having a hazardous atmosphere. (Finding II.O.)
- Proposed Penalty - \$8,700.
- H. Issue a SERIOUS CITATION for violation of 1926.59(e)(1). No written hazard communication program. (Finding II.Q.)
- Proposed Penalty - \$5,400.
- I. Issue a SERIOUS CITATION for violation of 1926.59(h). Hazard communication training not provided. (Finding II.Q.)
- Proposed Penalty - \$5,400.

- J. Issue an OTHER-THAN-SERIOUS (OTS) CITATION for violation of the A.R.M., Section 11.2.A. Report of fatality not made within 48 hours after the occurrence. (Finding I.A.)

Proposed Penalty - \$320.

- K. Issue an OTHER-THAN-SERIOUS (OTS) CITATION for violation of 1926.59(g)(1). Material safety data sheets not available. (Finding II.Q.)

No Penalty.

SEE Section 1 FOR PENALTY CALCULATION WORKSHEET)

FORMS

Appendix B

To insure uniform casework and presentation by all Regional Offices, the following revised VOSH forms have been **standardized** and are to be used **exclusively as displayed below or as revised in OIS**.

Hard copies are provided in this Appendix and e-copies will be available on the LAN.

-  These forms are **NOT** to be modified.
-  No other forms are to be created or used in case files **without prior approval from Headquarters**.

Appendix: B

Any suggested changes to existing forms or suggestions for additional forms should be forwarded to the Office of Policy and Planning.

TABLE OF CONTENTS

Appendix B

I. VOSH Forms

VOSH-CCR/SCR	Contested Case Review and Significant Case Review
VOSH-CDL	Case File Diary Log
VOSH-CDR	Citation Delivery Receipt
VOSH-CoC	Chain of Custody
VOSH-CPS	Casefile Photo Sheet
VOSH-CSR	Casefile Status and Routing
VOSH-EIS	Employee Interview Statement
VOSH-FRN	File Review Notes
VOSH-ICN	Informal Conference Notes
VOSH-ISA	Informal Settlement Agreement
VOSH-IW1	Inspection Worksheet / Employer Interview Form
VOSH-IW1C	Inspection Worksheet Construction – <i>(Reserved, in development)</i>
VOSH-NID	Notice of Alleged Imminent Danger
VOSH-PIPA	Penalty Installment Payment Agreement
VOSH-ROE	Refusal of Entry
VOSH-SIS	Supervisor Interview Statement
VOSH-TEW	Trenching and Excavation Worksheet
VOSH-WWD	Willful Worksheet Documentation

Agency Letterhead

MEMORANDUM

TO: Commonwealth's Attorney/Attorney General's Office

FROM: Commissioner, Department of Labor and Industry

DATE:

SUBJECT: ☐ Contested Case Review Company Name:
☐ Significant Case Review Inspection Number:

NOTE: This review is conducted solely for the benefit of the Commonwealth's Attorney and/or the Office of the Attorney General, and is protected from disclosure under the Freedom of Information Act by the Attorney General-client Privilege.

Please Review this case as it contains the following issue(s):

☐ Fatality or Catastrophic Event	☐ Third Repeat Violation
☐ Willful Case	☐ Ergonomics Case
☐ Potential Criminal Case	
☐ Willful Case Suitable for Egregious Penalties	
☐ Other case identified by the Commissioner as significant	
☐ Case Identified by VOSH Director/Division of Legal Support as significant	

Date Citation must be issued by: (6 months MM/DD/YYYY) _____/_____/_____

Employer's Position: *(Summarize the employer's position on the items contested. Attach Informal Conference Notes or Employer Letter as appropriate. Continue on separate paper if more space is needed.)*

Comments: _____ Date Received: _____

Regional Safety or Health Director: _____/_____/_____

VOSH Regional (Safety/ Health) Director: _____/_____/_____

Program Director: _____/_____/_____

Division of Legal Support: _____/_____/_____

Commissioner: _____/_____/_____

Commonwealth Attorney/Attorney General Office: _____/_____/_____

CASE FILE DIARY LOG



File Name:		Inspection Number:
CSHO Name:		Final Order Date:
Opening Conference Date:	<u>Complaints</u> Date Received: _____/_____/_____ Date of Response: _____/_____/_____ Status Change Date: _____/_____/_____ Reason for Change or Re-classification: _____ _____ _____	
Walkthrough Date:		
_____/_____/_____		
Closing Conference Date:		
_____/_____/_____		
Citation(s) Issuance Date:		
_____/_____/_____		
Informal Conference Date:		
_____/_____/_____		
Other Conferences <i>(List Conference Type and Date):</i>		

Case Closed Date: _____/_____/_____		
Comments:		
See page 2 (over) for log of contacts		

[illegible]

CITATION DELIVERY RECEIPT



Employer Name: _____

Inspection Number: _____

I, _____, an employee of the Virginia Department of Labor & Industry, have delivered the attached VOSH citation packet to: _____ on this date _____.

Signature of person receiving:

Date: _____

NOTES: _____

EVIDENCE COLLECTION CHAIN OF CUSTODY FORM



Inspection #:	Inspection Date:	CSHO ID #:

Employer Name:	Employer Address:

EVIDENCE COLLECTION			
Description of Property (Provide Serial #, Make, Model, Color, etc.):		Item #: ____ of ____ Use a separate form for each item.	
Evidence Removed From (Location):			
Evidence Removed From (Person/Employee):		Job Title:	
Receipt given to Employee for Evidence: ☐ YES ☐ NO		If NO, explain why:	
Item Collected By (CSHO Printed Name):		Item Collection Date:	Item Collection Time: ☐ AM ☐ PM
CSHO Signature:			

CHAIN OF CUSTODY			
How Was Item Secured (Description of container and sealing process):			
Storage Location:	Storage Date:	Storage Time: ☐ AM ☐ PM	
Custodian (Person and job title if other than self):			

Released By:	Released To:	Reason:
_____	_____	_____
Printed Name	Printed Name	_____
_____	_____	_____
Signature	Signature	Date: _____

Released By:	Released To:	Reason:
_____	_____	_____
Printed Name	Printed Name	_____
_____	_____	_____
Signature	Signature	Date: _____

Released By:	Released To:	Reason:
_____	_____	_____
Printed Name	Printed Name	_____
_____	_____	_____
Signature	Signature	Date: _____

Released By:	Released To:	Reason:
_____	_____	_____
Printed Name	Printed Name	_____
_____	_____	_____
Signature	Signature	Date: _____

Released By:	Released To:	Reason:
_____	_____	_____
Printed Name	Printed Name	_____
_____	_____	_____
Signature	Signature	Date: _____

Released By:	Released To:	Reason:
_____	_____	_____
Printed Name	Printed Name	_____
_____	_____	_____
Signature	Signature	Date: _____

CASEFILE PHOTO SHEET



Inspection No.	Report Number	Calendar Year	Area ID	Inspector ID

Employer/Contractor: _____

Worksite Address/Location: _____

Type of Inspection: _____

Photo Number:

Citation Ref. No.

Item No.

Compass Direction:

[] N [] S [] E [] W _____ Other []

Date of Photo:

Time:

Description of Photo/Hazard/Alleged Violation:

CASEFILE STATUS & ROUTING SHEET



Employer: _____ Site Address: _____ _____ ZIP: _____ Site Telephone: () _____ Mailing Address: _____ _____ ZIP: _____	Insp. No.: _____ Opt. Rpt. No.: _____ CSHO Name: _____ Office: _____ Region: _____ Supervisor: _____

Employee's Rep: _____ Job Title : _____ Union Position : _____ Home Address : _____ (If applicable) _____	Union Name: <i>(No abbreviation)</i> _____ _____ Local Number: _____ Address of Local: _____ _____

CASE FILE ROUTING & PROCESSING				
<i>(List dates, names and actions taken by all individuals involved with the Case File.)</i>				
Date Initiated	Name	Action Taken	Date Completed	Initials
_____	_____	_____	_____	_____

CASEFILE FOLDER ORGANIZATION OF NON-SIGNIFICANT CASES

(Refer to Chapter 9 for casefile organization of Significant Cases)

Contents (Left-hand side of folder)

Section I

Case Diary Log
Citations
Narrative
Post Citation Correspondence (in reverse chronological order (i.e., most recent correspondence on top))

EXAMPLES OF CORRESPONDENCE

"Last Day to Contest" Letter to Employer
Commonwealth Attorney Contest Notice
Failure to Abate Citations
Notice of Contest
Corrective Actions/Abatement Verification
Inspection Record Update (OSHA Form 167- I)
Informal Conference Worksheet
Informal Settlement Agreement
Expedited Informal Settlement Agreement

Contents (Right-hand side of folder)

Section II

Routing Sheet
File Review Notes
Exhibits - Tabbed:
Interview Statements
VOSH 1-B s
Sketches, Diagrams, Etc.
Medical/Police reports
VOSH Forms
Pre-Citation Correspondence
Inspection History
Inspection Notes
Photos/Video Tape Reference

RESULTS OF CASE REVIEW:

Reviewer's Initials/Date:

Offered Expedited Informal Settlement:

1. _____ No Changes Necessary

_____/____

_____ Yes _____ No _____ N/A

2. _____ Minimal Changes

_____/____

Penalty: Initial: \$ _____

3. _____ Revised, See Notes in Sect.II*

_____/____

EISA Offer: \$ _____

INFORMAL CONFERENCE RESULTS: ISA Accepted: _____ Yes _____ No _____ Undecided Revised Penalty Due: \$ _____

CONTEST DATA: Last Day to Contest: _____ LDC Reminder: **Ck box (✓)** for Faxed(), Mailed(), Emailed() on: _____

Additional Notes:

EMPLOYEE INTERVIEW STATEMENT



Date: ____/____/____ Time: ____ a.m./p.m. ____/____/____

CSHO ID # ____ Year ____ Inspection No. ____

Employee Name: _____ Phone: (____) - _____

Address: _____

Occupation: _____ (Male____) (Female____)

HAZARD COMMUNICATION CHECKLIST

☐ Access to Written Program ☐ Access to MSDS Sheets ☐ Labeling System Explained

☐ Training on Requirements of Standard ☐ Hazards of Chemicals/Precautions for Handling Explained

CONFINED SPACE CHECKLIST

☐ Qualified Person ☐ Preparation/Ventilation ☐ Atmospheric Testing

☐ Permit System ☐ Entry Procedures, Attendant/Non-Attendant

☐ Training Program ☐ Rescue Teams, Special Equipment and Tools, Rescue Devices

LOCKOUT/TAGOUT CHECKLIST

☐ Written Energy Control Procedures ☐ Proper Use of Tags or Locks

☐ Training ☐ Effectiveness of Energy Control Procedures

Employee Statement:

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Print Name

Employee Signature

Print Name

CSHO Signature

FILE REVIEW NOTES



Insp. No.: _____ CSHO ID. : _____

Inspection Date: ____ / ____ / ____

Case Name (Employer/Contractor): _____

Reviewed By: _____ Date of Review: ____ / ____ / ____

I. General Case Construction: Check box [✓] if OK, or circle box (i) if correction needed & comment below.

[] Appropriate sections utilized

[] Forms forwarded in timely fashion

[] Exhibits labeled correctly (if applicable)

[] Employees

Reviewer's Comments: _____

II. Citation Issues: Check box [✓] if OK, or circle box (i) if correction needed & comment below.

[] Appropriate standard is identified and cited correctly.

[] Same standard number is shown in AVD and at top of 1B.

[] AVD identifies location, process, equipment, hazard materials/chemicals, (as applicable) in a clear, concise manner. No superfluous information is included.

[] Grammar, spelling, punctuation, and sentence structure is adequate and understandable.

[] Citation issues match findings and references made in narrative, notes, photos, video, etc.

[] All photos/videos reviewed to determine if all shown violations were addressed. [] Employer knowledge is adequately identified and documented. (...exercise of reasonable diligence alone is not sufficient)

Reviewer's Comments: _____

III. Programmatic Issues: Check box [✓] if OK, or circle box (i) if correction needed & comment below.

IV. General Comments by Reviewer: _____

This form and other delineated elements (i.e., Violation Worksheet, narrative pages, etc.) showing corrections to be made will be filed in Section. II, Exhibit. 8 - Notes. This form is for internal use only and is not discoverable through FOIA requests.

INFORMAL CONFERENCE NOTES



Employer:		Inspection #:	Optional Report #:
Date:	Employer Representatives / Titles:		VOSH Representative(s):
Check boxes [✓] as applicable. Notes: ☐ Objective of Informal ☐ First Informal? ☐ Shows commitment. ☐ Clarify Final Order. ☐ Right to contest. Must post. ☐ Citation posted? ☐ Post Notice of Informal? ☐ Abatement complete? ☐ ARM §307? ☐ Yellow form complete? ☐ Questions? ☐ Discussion of issues?			
Items Reclassified:	Items Vacated:	Penalty Relief Offered:	Length of Informal:

Penalty Relief Justification

VOSH-ICN/2011

Good Faith in Abatement

Relief	✓	Justification
20%		All items abated during inspection OR well in advance of abatement date designated by CSHO. Clear, concise abatement letter with all supporting documentation is provided.
15%		All items abated by abatement date designated by CSHO. Clear, concise abatement letter with all supporting documentation provided.
10%		Timely abatement complete on all items except those that have time remaining (Informal Conference held before last date of abatement). Abatement will be complete by CSHO's designated abatement date for all items. Supporting documentation provided for all abated items. Additional information and supporting documentation to be provided by date due.
5% - 7% (At discretion of the Region Director or their agent.)		Timely abatement complete on all items where abatement dates have passed. Extension (PMA) requested for item(s) where abatement dates are not past due . Supporting documentation provided for all abated items. Additional information and supporting documentation to be provided by date due. OR Employer has made an attempt to abate violative conditions and has produced abatement documentation to the best of his/her ability. One or more exception in abatement letter or documentation exists.

ABATEMENT COSTS

Relief	✓	Justification
10%		Extensive abatement costs for one or more items or extensive plant-wide abatement costs. Abatement cost is equal to or exceeds 50% of the issued penalty (not EISA penalty). Example: penalty of \$4000 with abatement costs of \$2000 would qualify for a 10% penalty reduction under " Penalty Reduction Summary ".
5%		Moderate abatement costs or decision to use better abatement methods that result in higher abatement costs than are absolutely necessary. Abatement costs fall between 25% and 49% of the issued penalty. Example: Penalty of \$4000 with abatement costs of \$1000-\$1999 would qualify for a 5% penalty reduction under " Penalty Reduction Summary ".
3%		Low cost options taken. Abatement costs are not excessively high. Abatement cost is less than 25% of the issued penalty. Example: penalty of \$4000 with some abatement costs up to \$999 would qualify for a 3% penalty reduction under " Penalty Reduction Summary ".

Penalty Reduction Summary

Good Faith	%
Abatement Costs	%
TOTAL	%

INFORMAL SETTLEMENT AGREEMENT



Employer: _____ Inspection No.: _____

Address: _____ Issuance Date: _____

I. Pursuant to an informal conference between duly authorized representatives of the Virginia Occupational Safety and Health Program, Department of Labor and Industry, and the employer named above, the Department has issued an Amended Citation modifying the original citation referenced above. As consideration for the modification of the terms of the original Citation(s), the Employer hereby:

- (1) Waives its right to contest any terms of the Citation as amended.
- (2) Withdraws its Notice of Contest filed in this matter and waives its right to contest the Citation as amended.

I. The Employer agrees to pay the remaining penalty as per the amendment to the citation.

II. The Employer agrees to correct the violations as cited in the attached amendment to the citation.

III. The Employer agrees to immediately post a copy of this Informal Settlement Agreement and to immediately post a copy of the Citation(s) as amended alongside the original Citation(s) in a prominent place at or near the location of the violation(s) and to keep these items posted until each violation item of the amended Citation(s) has been completely corrected, or for three (3) working days (excluding weekends and State Holidays), whichever is longer.

IV. If not already provided, the Employer agrees to provide to the Department within _____ days of the effective date of this agreement documentation verifying abatement of each violation affirmed in this agreement. The documentation shall comply with §307.E.2. of the Virginia Occupational Safety and Health (VOSH) *Administrative Regulation Manual* which states that "Documents demonstrating that abatement is complete may include, but are not limited to, evidence of purchase or repair of equipment, photographic or video evidence of abatement or other written records."

VI. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the Commissioner. Under Va. Code §40.1-51.3:2., the fact of the issuance of a citation under Chapter 3 of Title 40.1 of the *Code of Virginia* will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the *Code of Virginia*.

VII. Unless otherwise provided in this agreement or in a separate penalty installment payment agreement, penalties assessed under this agreement are due and payable within 30 calendar days of the effective date of this agreement. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date, constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.

Employer Representative

____/____/____
Date

For VOSH Compliance

____/____/____
Date

Note: Employees should refer to the bottom of the VOSH Citation for an explanation of employee rights.

IW1 - INSPECTION WORKSHEET & EMPLOYER INTERVIEW SHEET



CSHO ID. /_ / Year / Inspection Number

ENTRANCE & OPENING

1. Date / / Time am/pm.
2. Type of Legal Entity: (☐ Corp.) (☐ Partnership) (☐ Sole Owner) (☐ Other:)
3. Ownership: (☐ Private Sector) (☐ Local Gov't) (☐ State Gov't)
4. Employer Name:
5. Site Address: Phone: -
6. Mailing Address: Phone: -
- Employer Rep. Email, Address : Name
of Partner/Owner (where applicable): DUNS No. (If available)
Federal Employer Identification No. (FEIN) DPOR License No. (If applicable)
NAICS Code:
7. Type of Business or Plant:
8. (☐) Provide business card, Credentials Presented:
Recipient: - Title:
9. (☐) Explain purpose of visit, employee participation, trade secrets, Title 40.1, & possibility of citation & penalties.
10. (☐) Provide copy of complaint, if complaint inspection.

PERSONS

11. Present at Opening (Name/Title): Conference: (☐ Separate) (☐ Joint) Present on
Walkaround: (☐ yes) (☐ no)
(☐ yes) (☐ no)
(☐ yes) (☐ no)
(☐ yes) (☐ no)
12. Employee Rep: (☐ yes) (☐ no) If yes, Name/Title: (☐ yes) (☐ no)

Address

Phone:

BACKGROUND

- 13 No. of Employees: In Establishment Covered by Insp. Controlled by Employer Number of Shifts
14. Fire extinguishers: (☐) Access/Egress: (☐)
15. Hazard Communication: (☐ Written Program) (☐ MSDS Sheets) (☐ Labeling) (☐ Training)
16. Confined Space: (☐ Permit System) (☐ Preparation) (☐ Training) (☐ Air Monitoring) (☐ Rescue Team/Materials)
17. Lockout/Tagout: (☐ Written Program) (☐ Periodic Inspections) (☐ Training)
18. Bloodborne Pathogens: (☐ PPE) (☐ Exposure Control Plan) (☐ Information and Training)
(☐ Hepatitis B Vaccination & Post Exposure Evaluation & Follow-up)
19. Inspection: (☐ yes) (☐ no) Scope: (☐ Partial) (☐ Comprehensive)
20. Type: (☐ Accident) (☐ Complaint) (☐ Referral) (☐ Monitoring) (☐ Variance) (☐ Follow-up)
(☐ Unprogrammed Related) (☐ Planned) (☐ Programmed Related)
- Comments

IW1-INSPECTION WORKSHEET & EMPLOYER INTERVIEW SHEET

(Page 2 - copy upside down)

OPENING CONFERENCE CHECKLIST

21. () Explain that Inspection Consists of Opening/Walkaround/Closing Video/Photos Permitted? () yes () no
Familiar with S/H Laws Regs? () yes () no () Explained _____
Familiar with Recordkeeping Regs? () yes () no () Explained _____
Trade Secrets/Restricted Areas? () yes () no () Explained _____
() Right to Talk to Employees in Private 840 1-10 8(21) () Discrimination Prohibited 840 1-51 2(1) () Posting Regs

SAFETY AND HEALTH PROGRAM EVALUATION

22. Written program? () yes () no Copy Evaluated? () yes () no First Aid / Kit / Diagrams

Employer DUNS plus 4 _____ Employer CAGE code _____

Is Employer currently a federal contractor NO _____ YES _____

Imminent Danger notice included case NO _____ YES _____

Date imminent danger notice was issued ____/____/____

Parent Company DUNS _____ Parent Company DUNS plus 4 _____

Parent Company CAGE code _____ Parent Company TIN/EIN _____

Parent Company legal name _____

Parent Company trade name / doing business as _____

g. Health Monitoring: (Chemicals? Effectiveness?) _____ () yes () no

h. Health Recordkeeping: (Types? Employee Access?) _____ () yes () no

i. Medical Programs: (Frequency? Content? Effectiveness?) _____ () yes () no

FAIR PAY AND SAFE WORKPLACES

IW1-INSPECTION WORKSHEET & EMPLOYER INTERVIEW SHEET

(page 3)

WALKAROUND AND INSPECTION CHECKLIST:[illegible]

27. Begin: Date: ____/____/____ Time: ____am./pm. Departure: Date: ____/____/____ Time: ____am./pm.

28. Personnel at Closing Not Already Listed (Name/Title/Address)

Phone:

Phone:

Phone:

Phone:

29. Review: *(Items 1-18 of Closing Conference Guide and FAT/CAT notification requirements)*

Comments:

30. Violations abated in CSHO’s presence and method of abatement:

31. Employer Representative Signature: _____ Date: ____/____/____

32. CSHO Signature: _____ Date: ____/____/____

This page reserved for:

IW1-C

INSPECTION WORKSHEET FOR CONSTRUCTION

(when issued)

This second page reserved for:
IW1-C
INSPECTION WORKSHEET FOR CONSTRUCTION
(when issued)

VOSH-NID/2017

VOSH-IW1-C

NOTICE OF ALLEGED IMMINENT DANGER

TO: EMPLOYER(S) AND EMPLOYEES AT THIS WORKSITE



From: COMMISSIONER of the VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY
Virginia Occupational Safety and Health Program (VOSH)

An inspection has been conducted by the Virginia Occupational Safety and Health Program of *[name and address of employer]*, Inspection Number *[number]*. On the basis of this inspection, it is alleged that an imminent danger(s) exists at this work site, which could reasonably be expected to cause death or serious physical harm to employees immediately, or before the imminence of such danger can be eliminated through the normal enforcement procedures otherwise provided by the occupational safety and health provisions of the Labor Laws of Virginia (§40.1, et seq. of the *Code of Virginia*).

By posting this NOTICE OF ALLEGED IMMINENT DANGER, the employer(s) and employees affected by the conditions described in this NOTICE are being informed of the possible dangers which could reasonably be expected to result in death or serious physical harm.

THE EMPLOYER(S) AND ALL EFFECTED EMPLOYEES ARE LIKEWISE BEING INFORMED THAT AN INJUNCTION TO ENJOIN ANY IMMINENT DANGEROUS CONDITION(S) MAY BE SOUGHT FROM THE APPROPRIATE CIRCUIT COURT IN ACCORDANCE WITH §40.1-49.4.F.1. of the *Code of Virginia*.

Section 40.1-49.4.F.1. of the *Code of Virginia* provides that the Commissioner of Labor and Industry may ask the circuit court having jurisdiction over the employer(s) or place of employment to temporarily or permanently enjoin the imminently dangerous activity and require the employer(s) to take such action as is necessary to avoid, correct, or remove the alleged imminent danger, including, where necessary, the removal of employees from the dangerous condition.

NOTE: *This notice does not constitute a Citation or alleged violation or a Notification of Proposed Penalty. Appropriate Citations and/or Proposed Penalties may be issued at a later date. The maximum penalty for willful and repeated violations is \$124,709 per violation, and for serious and other-than-serious violations is \$ 12,471 per violation.*

DESCRIPTION OF ALLEGED IMMINENT DANGER(S):

- 1.
- 2.
- 3.
- 4.

ISSUED BY: _____
Authorized Representative for the
Commissioner of the Department of Labor and Industry

DATE: ____/____/____

**This NOTICE OF ALLEGED IMMINENT DANGER must remain posted
until removed by a representative of the Commissioner
of the Virginia Department of Labor and Industry.**

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PENALTY INSTALLMENT PAYMENT AGREEMENT



Employer: _____

Address: _____

Inspection Number: _____ Issuance Date: _____

THIS AGREEMENT is entered into by the Commonwealth of Virginia, Commissioner of Labor and Industry (Commonwealth) and (_____).
Employer

1. The Employer shall pay a penalty of \$ _____ in lieu of the penalties originally proposed in the citation(s) *. The Employer shall pay an initial sum of \$ _____ no later than 15 days after the Employer receives a fully executed copy of this Agreement. The remaining amount of \$ _____ shall be paid in (____) installment payments of \$ _____ each. Each of the (____) installment payments is/are due on the fifteenth (15th) day of each month beginning _____ and ending _____.

Each check or money order, payable to the "*Treasurer of Virginia*" with the VOSH inspection number noted on it, shall be mailed to:

Accounting Division
Virginia Department of Labor and Industry
Main Street Centre
600 East Main Street, STE 207
Richmond, Virginia 23219-2430

2. The Employer has the option to pay the total penalty due under this Agreement in one lump sum payment of \$ _____, to be remitted to the address listed in Paragraph 1 above no later than fifteen days after the Employer receives a fully executed copy of this Agreement.
3. It is expressly understood that any modifications to penalty level or citation classification, or any vacating of a citation or penalty in this Agreement or a separate Settlement Agreement between the Commonwealth and the Employer are contingent upon the Employer's full payment of all penalties due under this Agreement. Failure by the Employer to substantially comply with the terms of this Agreement or to make a penalty payment by the due date, constitutes a breach of this Agreement and any separate Settlement Agreement between the parties. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.
4. The Employer certifies that the violations alleged in the above citation(s) have been abated.
5. As consideration for the modification of the terms of the original citation(s), the Employer agrees to withdraw its original notice of contest filed with respect to the above citation(s) and waives its rights to contest the remaining

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terms contained in this Agreement.

POSTING

6. The Employer shall post a copy of this Agreement for a period of thirty (30) days at each worksite in Virginia in a conspicuous location where notices to its employees are generally posted.

SETTLEMENT OF CLAIMS

7. **THIS AGREEMENT** is meant to compromise and settle the contested claims that arose out of the above referenced inspection. Pursuant to §40.1-51.3:2 of the *Code of Virginia*, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of civil penalty under Chapter 3 of Title 40.1 of the *Code of Virginia* shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the *Code of Virginia*.
8. All citations and penalties, as modified above, including all new obligations contained in this Agreement, are a final order of the Commissioner of Labor and Industry.

By: _____
Employer Representative Date

By: _____
VOSH Regional (Safety/ Health) Director Date

** Included only if penalty being reduced.*

REFUSAL OF ENTRY

After promptly contacting the Regional Safety or Health Director (*as applicable*) or Program Director and notifying them of the denial, the CSHO shall transmit in writing the following information to the applicable Regional Director:



1. Regional/Field Office involved: _____ Phone: (____) _____
2. CSHO full name: _____ CSHO ID#: _____
Insp. # (*if assigned*): _____ Insp. Type: Safety ____ Health ____ Both ____
3. Legal name of Establishment: _____
Site Address: _____

Zip _____
Mailing Address (*if different*): _____

Zip _____
4. Estimated number of Employees at the Establishment: _____
5. Date and Time of Entry: _____ Date and Time of Denial: _____
Inspection stage at denial (*entry, opening conference, walkaround*): _____
6. Full name and title of person to whom CSHO presented credentials: _____

Full name and title of person who refused entry: _____

Reason(s) stated for denial: _____

Response of CSHO to reason(s): _____
Name and address of witnesses to denial of entry: _____

7. VOSH inspection history? (____yes) (____no) (*attach additional sheet if "yes"*)
8. Previous requests for warrants? (____yes) (____no) (*attach additional sheet if "yes"*)
9. Any of current insp. report completed? (____yes) (____no) (*attach additional sheet if "yes"*)
10. Potential violations in plain view while on site (____yes) (____no) (*attach additional sheet if "yes"*)
11. Other relevant information such as a description of the workplace; work processes, chemicals, machinery, tools and materials used; known hazards associated with the industry and the types of injuries or illnesses that could result:

12. Investigative techniques which will be required during the proposed inspection:

Personal Sampling, Video, Photographs, Examination of records,
Private interviews, Access to medical records, Bulk samples
Other techniques: (*specify*) _____

13. NAICS code: _____ High hazard ranking: _____

14. Inspection type: Imminent danger Fatality/Catastrophe Complaint/Referral
 ___ Accident/ 1st Report Follow-up/Monitoring ___ Programmed

Specify reasons for the selection of the establishment for inspection, including scope of the inspection and rationale. (See FOM for list of required information.)

/ / _

[illegible]

1. In your company , to whom do you report directly to? _____
name & title
2. Has your supervisor or the person you report to visited the project? yes() no() If yes, when and how frequently? _____
3. Do you have authority to hire and fire workers on this job? yes() no() _____
4. Do you have authority to discipline workers for violations of safety/health rules on this job? yes () no ()
If yes, please explain: _____
5. Do you have the authority to stop from working the employees you supervise if they are violating a company safety/health rule or state regulation? yes() no() _____
6. *(For construction inspections)* Do you have authority to request the general contractor or another subcontractor to correct a safety/health hazard? yes() no() If yes, please explain: _____

7. Did you know that the _____ hazard was a violation of the _____ standard? yes() no()
8. Have you been trained on the requirements of the *(specific industry)* Safety or Health Stds? yes() no()
(Provide training background) _____

9. Did you know your employees were exposed to the _____ hazard? If so, did you remove your employees from exposure to the hazard until it could be corrected? yes() no() If not, why not? _____

10. Did you work around the _____ hazard today or at any other day or time since you have been onsite? yes() no() If yes, please explain. _____

11. What specific company safety or health procedures are in effect on this project, worksite, or location? _____

13. Have you been employed at this project, worksite, or location? If so, for how long have you worked there? _____

14. Does your employer conduct safety and/or health training for employees? yes() no() If so, what and how often? _____

Other comments or concerns: _____

Employee Signature

CSHO Signature

*EXAMPLES OF ADDITIONAL QUESTIONS FROM AN INSPECTION WHERE TEMPORARY SHORING COLLAPSED
DURING THE CONSTRUCTION OF A MULTI-STORY BUILDING*

15. Did you supervise the installation of the shoring system on the 4th floor of the project? If not, who was the supervisor of that work?
16. Have you supervised the installation of shoring in other areas of this or any other project?
17. What training have you received regarding the proper installation of shoring?
18. Have you seen an installation guide or written instructions for installing shoring?
Is the installation guide available to you? If so, where is it kept?
19. When was the shoring installed on the 4th floor of the project?
20. How do you determine the number and placement of the shoring when it is installed?
21. How is the temporary shoring held in position once they are set in place?
22. Is the temporary shoring inspected by anyone to ensure that they are installed correctly? By whom? How often?
23. Was the temporary shoring on the 4th floor inspected after they were installed? By whom? When?
24. Is it a common occurrence for the temporary shoring to come loose after they have been installed?
25. Is there a procedure to ensure that the temporary shoring stay in place after installation?
26. Are you aware of any instances of the temporary shoring becoming so loose that they fall out of place? If so, when and where?
27. How many employees do you supervise?
28. Are they trained to install shoring systems, in particular the _____ system? If so, please describe the type of training received?
29. Were you at the project site on the day of the fatality incident? If so, did you observe anything related to the incident?

TRENCHING AND EXCAVATION WORKSHEET



Date: _____

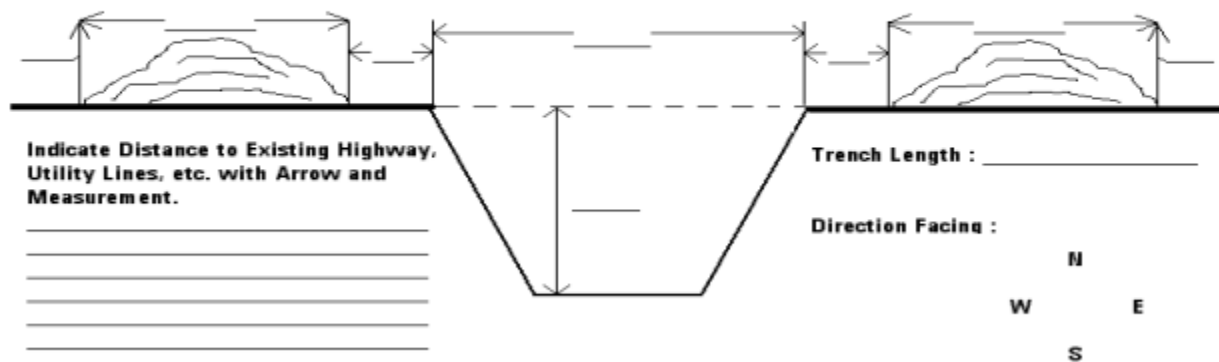
Time: _____
 _____/_____/_____

- CSHO ID Opt. Rpt. No. Yr. Inspection No.
1. Employer: _____
 2. Site Address: _____
 3. Witness/Exposed Employee(s): _____

Number Exposed: _____

4. Photos Taken? Yes No *If No, Why Not?* _____
5. Water in Trench Excavation? Yes No *If Yes, Circle Source* Running Rainwater Underground Other
6. Type of Material: Unstable / soft Hard/compact Other
7. Superimposed Load or Equipment Adjacent Yes No Type: _____
8. Previously Excavated/ Subject to Vibrations Yes No Detail: _____
9. Ladder Yes No Tied? Above Landing?
 PPE Yes No (Hard Hat)
10. Confined Space? Yes No If yes, Reason: _____

Indicate Dimensions



Additional Comments on Reverse

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COMPETENT PERSON INTERVIEW STATEMENT

Date: _____ Time: _____ CSHO Id.: _____
Insp. No. _____

Employee Name: _____ Phone (____) _____

Address: _____

Occupation: _____

Job Title: _____

Employer Name: _____ Employed from: _____ To: _____

Credentials presented

Discrimination explained

Union: Yes *If yes, Bargaining Unit Name:* _____
 No Address & Phone: _____

HAZCOM

Yes	No	Access to written program?
Yes	No	Access to MSDS?
Yes	No	Hazards of chemicals & precautions explained?
Yes	No	Labeling system explained?
Yes	No	Training?

RAMPS

Yes	No	Is Employer using a structural ramp? <i>(If no, skip to Confined Space)</i>
Yes	No	Is ramp used solely for employee access? If yes, was it designed by a competent person for safe access & egress? Yes No
Yes	No	Is ramp used for access and egress of equipment?
Yes	No	Is the competent person who designed the ramp qualified in structural design? List qualifications: _____
Yes	No	Does ramp meet design specifications?

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CONFINED SPACE

Yes	No	Does the trench or excavation meet definition of Confined Space in Part 1926.1202? <i>[If no, skip to Water Conditions.]</i>
Yes	No	Is the “competent person”, i.e., “qualified person”, trained to recognize and evaluate confined space hazards? Detail: _____
Yes	No	Is the competent person capable of specifying necessary control measures to assure worker safety? Detail: _____

WATER CONDITIONS

Yes	No	Is dewatering equipment being used on the site? If yes, <table border="0"><tr><td>Yes</td><td>No</td><td>Is the competent person monitoring the equipment and its proper operation?</td></tr></table>	Yes	No	Is the competent person monitoring the equipment and its proper operation?
Yes	No	Is the competent person monitoring the equipment and its proper operation?			
Yes	No	Has the excavation been subjected to heavy rainfall? If yes, <table border="0"><tr><td>Yes</td><td>No</td><td>Has the competent person inspected the excavation and complied with precautions of (h) (1) and (h) (2)?</td></tr></table>	Yes	No	Has the competent person inspected the excavation and complied with precautions of (h) (1) and (h) (2)?
Yes	No	Has the competent person inspected the excavation and complied with precautions of (h) (1) and (h) (2)?			

INSPECTIONS

Yes	No	Has the competent person conducted daily inspections of the excavation?
Yes	No	Has the competent person conducted daily inspections of the adjacent areas?
Yes	No	Has the competent person conducted daily inspections of protective systems?
Yes	No	Were these inspections conducted prior to the start of work?
Yes	No	Were these inspections conducted as needed throughout the work shift?
Yes	No	Were these inspections conducted after rainstorm or hazard-increasing occurrence?

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Yes	No	Based on CSHO's observation, has the competent person failed to recognize situations that could result in cave-ins? If yes, detail: _____ _____ _____

Yes	No	Does the competent person have the authority to remove employees from a hazardous area until proper precautions are taken?

PROTECTIVE SYSTEMS – *general questions:*

Yes	No	Is the excavation less than five (5) feet deep? If yes, has the competent person examined the ground for indication of potential cave-in?
		Yes No

Yes	No	Has the competent person inspected any damaged material or equipment used for protective systems and evaluated its suitability for continued use?

USE OF APPENDICES:

Yes	No	Is the employer relying upon either Appendices: "A" & "B" to design a sloping and shoring system (Option 2) OR "A" & "D" to select and construct a protective system (Option 1)

If yes for either option:

Yes	No	Has competent person properly classified the soil using Appendix "A"?

What type of soil does the competent person say is in the excavation? _____

What visual test(s) did the competent person perform? _____

What manual test(s) did the competent person perform? _____

Yes	No	Did the competent person choose the proper sloping or benching configuration from Appendix "B" (or the proper shoring from Appendix "D")? If no, detail: _____

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Signature of Competent Person

6

CONCLUSION

Yes No Has the Competent Person performed all tasks required by the standard?

Yes No Is the Competent Person “capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous or dangerous to employees”?

If not, list deficiencies: _____

Yes No Is the Competent Person “authorized to take prompt corrective measures to eliminate such hazards or conditions?”

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SOIL ANALYSIS CHECKLIST "A"

The following checklist can be used in the field to determine the soil type(s) present in an excavation. A separate analysis should be done on each layer of soil in the excavation wall.

DATE: _____

CSHO ID NO.: _____

EMPLOYER: _____

SITE LOCATION: _____

WHERE SAMPLE WAS TAKEN FROM: _____

APPROXIMATE DEPTH SAMPLE TAKEN: _____

VISUAL TESTS

1. **PARTICLE SIZE:**
 - Fine-grained? (Cohesive)
 - Coarse-grained, e.g., sand or gravel? (Granular)
2. **EXCAVATED SOIL:**
 - Remains in clumps (Cohesive)
 - Breaks up easily and does not stay in clumps? (Granular)
3. **SIDES OF EXCAVATION AND ADJACENT SURFACE AREA:**
 - Crack-like openings? (Indicates fissured material)
 - Chunks of soil spalling from sides? (Moving ground; fissured material)
4. **PREVIOUSLY DISTURBED SOIL:**
 - Evidence of existing utility or other underground structures?
 - Other evidence that soil previously disturbed?
5. **LAYERED SYSTEM:**

If opened side of excavation shows layered system, examine to determine if layers slope toward excavation. Estimate degree of slope of layers:
6. **WATER CONDITIONS:**
 - Evidence of surface water?
 - Water seeping from sides of excavation?
 - Location of level of water table?
7. **VIBRATION:**
 - Sources of vibration in excavation or in area adjacent to excavation?
 - Identify: _____

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MANUAL TESTS

1. PLASTICITY

Mold moist or wet sample of soil into a ball and roll into 1/8 inch threads. If material can be rolled into threads at least 2 inches long without crumbling or tearing, soil is cohesive.

RESULT: _____

2. DRY STRENGTH

Yes No Does dry soil crumble on its own, or with moderate pressure, into individual grains or fine powder? If yes, soil is granular.

Yes No Does dry soil fall into clumps which break up into smaller clumps and are the smaller clumps only broken up with difficulty? If yes, soil may be clay in any combination with gravel, sand or silt.

The soil may be considered unfissured only if all of the the following three (3) conditions exist:

- ✓ the dry soil breaks into clumps which do not break up into smaller clumps; and
- ✓ these clumps only be broken with difficulty; and
- ✓ there is no visual indication that the soil is fissured.

3. THUMB PENETRATION

Conduct this test on undisturbed clump of soil that has not had opportunity to dry.

Yes No Can the soil be readily indented with the thumb, but be penetrated only with great effort?

- If yes, the soil is Type "A" - Unconfined compressive strength of 1.5 tons per square foot (tsf).

Yes No Can soil be easily penetrated several inches by thumb and molded by light finger pressure?

- If yes, the soil is Type "C" - Unconfined compressive strength of 0.5 tons per square foot (tsf).

4. OTHER TESTS

Other manual tests, including pocket penetrometer, hand-operated shearvane, or drying test, need not be conducted by the CSHO. If the employer has used these tests to determine soil type, verify by use of the above manual tests. Use this section to record (✓) the employer's results:

ANALYSIS

Stable rock

Type "A"

Type "B"

Type "C"

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SOIL ANALYSIS CHECKLIST "B"

The following checklist can be used in the field to determine the soil type(s) present in an excavation. A separate analysis should be done on each layer of soil in the excavation wall.

DATE: _____ CSHO ID NO.: _____

EMPLOYER: _____

SITE LOCATION: _____

WHERE SAMPLE WAS TAKEN FROM: _____

APPROXIMATE DEPTH SAMPLE TAKEN: _____

VISUAL TESTS

This analysis should be used to determine qualitative information regarding the excavation site in general, the soil adjacent to the excavation, the soil forming the sides of the open excavation, and the soil taken as samples from excavated material.

- (1) Observe samples of soil that are excavated and soil in the sides of the excavation. Estimate the range of particle sizes and the relative amounts of the particle sizes. Soil that is primarily composed of fine-grained material is cohesive material. Soil composed primarily of coarse-grained sand or gravel is granular material.

RESULTS: _____

- (2) Observe soil as it is excavated. Soil that remains in clumps when excavated is cohesive. Soil that breaks up easily and does not stay in clumps is granular.

RESULTS: _____

- (3) Observe the sides of the opened excavation and the surface area adjacent to the excavation. Crack-like openings such as tension cracks could indicate fissured material. If chunks of soil spall off a vertical side, the soil could be fissured. Small spalls are evidence of moving ground and are indications of potentially hazardous situations.

RESULTS: _____

- (4) Observe the area adjacent to the excavation and the excavation itself for evidence of existing utility and other underground structures and identify previously disturbed soil.

RESULTS: _____

- (5) Observe the opened side of the excavation to identify layered systems. Examine layered systems to identify whether the layers slope toward the excavation. Estimate the degree of slope of the layers.

RESULTS: _____

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- (6) Observe the area adjacent to the excavation and the sides of the opened excavation for the evidence of surface water, water seeping from the sides of the excavation, or the location of the level of the water table.

RESULTS: _____

- (7) Observe the area adjacent to the excavation and the area within the excavation for sources of vibration that may affect the stability of the excavation face.

RESULTS: _____

MANUAL TESTS

These tests are conducted to determine quantitative as well as qualitative properties of soil and to provide more information in order to classify soil properly.

- 1.1. **PLASTICITY.** Mold a moist or wet sample of soil into a ball and attempt to roll it into threads as thin as 1/8-inch in diameter. Cohesive material can successfully be rolled into threads without crumbling. For example, if at least a two inch (50 mm) length of 1/8-inch thread can be held on one end without tearing, then the soil is cohesive.

RESULTS: _____

2. **DRY STRENGTH.** If the soil is dry and crumbles on its own or with moderate pressure into individual grains or fine powder, it is granular, i.e., any combination of gravel, sand or silt. If the soil is dry and falls into clumps which break up into smaller clumps but the smaller clumps can only be broken up with difficulty, it may be clay in combination with gravel, sand or silt. If the dry soil breaks into clumps which do not break up into smaller clumps and which can only be broken with difficulty, and there is no visual indication the soil is fissured, the soil may be considered unfissured.

RESULTS: _____

3. **THUMB PENETRATION.** The thumb penetration test can be used to estimate the unconfined compressive strength of cohesive soils.

- Type "A" soils with an unconfined compressive strength of 1.5 tons per square foot (tsf) can be readily indented by the thumb; however, they can be penetrated by the thumb only with very great effort.
- Type "C" soils with an unconfined compressive strength of 0.5 tsf can be easily penetrated several inches by the thumb, and can be molded by light finger pressure. This test should be conducted on an undisturbed soil sample, such as a large clump of soil as soon as practicable after excavation to keep to a minimum the effects of exposure to drying influences.
- If the excavation is later exposed to wetting influences, e.g., rain, flooding, etc., the classification of the soil must be changed accordingly.

RESULTS: _____

The following manual tests need not be conducted by the CSHO. If the employer has used these tests to determine soil type, verify by use of the above manual tests. Use this section to record the employer's results.

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4. Other strength tests. Estimates of unconfined compressive strength of soils can also be obtained by use of a pocket penetrometer or by using a hand-operated sheervane.
RESULTS: _____
5. Drying test. The basic purpose of the drying test is to differentiate between cohesive material with fissures, cohesive material without fissures, and granular material. The procedure for the drying test involves drying a sample of soil that is approximately one inch thick (2.45 cm) and six inches (15.24 cm) in diameter until it is thoroughly dry.
- A. If the sample develops cracks as it dries, significant fissures are indicated.
 - B. Samples that dry without cracking are to be broken by hand. If considerable force is necessary to break a sample, the soil has significant cohesive material content. The soil can be classified as an unfissured cohesive material and the unconfined compressive strength should be determined.
 - C. If a sample breaks easily by hand, it is either a fissured cohesive material or a granular material. To distinguish between the two, pulverize the dried clumps of the sample by hand or by stepping on them. If the clumps do not pulverize easily, the material is cohesive with fissures. If they pulverize easily into very small fragments, the material is granular.
6. If the employer has used these tests to determine soil type, verify by use of the above manual tests. Record (✓) the employer's results: Stable rock Type "A" Type "B" Type "C"

ANALYSIS

This section reviews the four classifications of soil listed in Soil Analysis Checklist "A". Record (✓) in the left margin the classification of this sample:

Stable rock means natural solid mineral matter that can be excavated with vertical sides and remain intact while exposed.

Type "A" means cohesive soils with an unconfined compressive strength of 1.5 tons per square foot (tsf) (144kPa) or greater. Examples of cohesive soils are: clay, silty clay, sandy clay, clay loam and, in some cases, silty clay loam and sandy clay loam. Cemented soils, such as caliche and hardpan, are also considered Type "A".

However, soil is NOT Type "A" if:

- i. The soil is fissured, or
- ii. The soil is subject to vibration from heavy traffic, pile driving or similar effects, or
- iii. The soil has been previously disturbed, or
- iv. The soil is part of a sloped, layered system where the layers dip into the excavation on a slope of four horizontal to one vertical (4H: 1V) or greater, or
- v. The material is subject to other factors that would require it to be classified as a less stable material.

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Type “B” soil means:

- i. Cohesive soil with an unconfined compressive strength greater than 0.5 tons per square foot (tsf) or (144 kPa) but less than 1.5 tsf (144 kPa); or
- ii. Granular cohesionless soils, including: angular gravel (similar to crushed rock), silt, silt loam, sandy loam, and, in some cases, silty clay loam and sandy clay loam.
- iii. Previously disturbed soils except those which would otherwise be classed as Type “C” soil.
- iv. Soil that meets the unconfined compressive strength or cementation requirements for Type A but is fissured or subject to vibration, or
- v. Material that is part of a sloped, layered system where the layers dip into the excavation on a slope less steep than four horizontal to one vertical (4H: 1V), but only if the material would otherwise be classified as Type B.

Type “C” soil means:

- i. Cohesive soil with an unconfined compressive strength of 0.5 tons per square foot (tsf) or (48 kPa) or less, or
- ii. Granular soils including gravel, sand and loamy sand, or
- iii. Submerged soil or soil from which water is freely seeping, or
- iv. Submerged rock that is not stable, or
- v. Material in a sloped, layered system where the layers dip into the excavation or a slope of four horizontal to one vertical (4H: 1V) or steeper.

WILLFUL WORKSHEET DOCUMENTATION



1. Hazard/violation:

2. Details of Exposure/Violation:

a. Employee(s): _____

b. Task or Tasks Being Performed: _____

c. Type of Employee Exposure: _____

d. VOSH Requirement: *(specific standard or general duty at §40.1-51.1.A. of the Code of Va.)*

a. Action Taken/Failure to Act: _____

3. Name(s) & Title(s) of Management Official(s): _____

4. Employer/Management Knowledge of 2.a. through 2.f. above: _____

5. Beyond Reasonable Doubt? Explain: _____

6. Beyond Reasonable Doubt of VOSH Standard, But Not Requirements of §40.1-51.1.A. Explain:

7. Condition/Violation caused death of employee(s)?
(Required for considering criminal charges)

Yes

No

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ELEMENTS OF A WILLFUL VIOLATION – A Guide for the CSHO

1. What is the evidence that the employer or employer representative knew that the condition was hazardous (*knowledge*)? _____

2. What is the evidence that the employer or employer representative knew that the condition violated a standard or other obligation under VOSH? _____

3. What is the evidence that the employer or employer representative knew VOSH requirements or other obligations involved? _____
4. What knowledge regarding safety and health matters for the violation or obligation under VOSH would be reasonably expected in this or for this industry? _____

5. What precautions were taken by the employer to limit the hazardous condition? _____

6. Were any similar violations or hazardous conditions brought to the employer's attention in the past?
_____ Yes _____ No

If so, what were the conditions, when did they occur, and who brought to the employer's attention in the past? _____

Were there any previous VOSH citations, letters or notifications (*if yes, when?*) _____

Were there any previous injuries, illnesses or accidents related to the violation or condition? (*If yes, when?*) _____
7. Was the violation or hazardous condition a generally recurring problem in this facility or other facilities under the employer's control? _____ Yes _____ No.
8. Did the nature and extent of the violation constitute plain indifference to safety and health? (*if yes, how?*) _____
9. Did the nature and extent of the violations constitute a purposeful or intentional disregard of the employer's responsibility under VOSH requirements? (*if, so, how?*) _____

10. What, if anything, was the company able to gain by not complying with the standards or the employer's obligation under VOSH? (*Was there a motive?*) _____

VOSH-WWD/2017

WILLFUL VIOLATION – Supervisor’s Review Worksheet

- A. Were management officials who ordered/allowed the hazardous exposure interviewed about their actions? Yes No Case File Location: _____
- B. Were exposed employees interviewed about how they came to be exposed to the hazard? __Yes __No
Case File Location: _____
- C. Was the employee representative, if any, interviewed about the hazardous exposure? ____Yes ____No
Case File Location: _____
- D. Does the evidence show that:
- (1) The employer committed an *intentional* and *knowing* violation of VOSH standards? __Yes __No
Case File Location: _____
- (2) The employer was aware that hazardous conditions existed and didn’t make a reasonable effort to eliminate the condition? Yes No
Case File Location: _____
- (3) The employer aware the condition violated a standard/other requirement of VOSH, and aware of the standard/other requirement was violated?
Yes No Case File Location: _____
- E. Does the evidence also show that:
- (1) The violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent?
Yes No Case File Location: _____
- (2) The nature and extent of the violation disclose a purposeful disregard of the employer’s responsibility for VOSH requirements?
Yes No Case File Location: _____

NOTE: In order for a proposed Willful violation to clear safety and health review, the following affirmative responses to the above items must be present:

- Items A, B, and C: if applicable
- Item D: at least one affirmative
- Item E: at least one affirmative

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