

VOSH PROGRAM DIRECTIVE: 13-002A**ISSUED: 01 January 2018****Subject** **Areas of Direct Federal Enforcement by OSHA in Virginia****Purpose** This Directive specifies the areas of continued direct federal enforcement in the Commonwealth by federal OSHA under the State Plan agreement (the "Agreement") between Virginia and the U.S. Department of Labor.

This Program Directive is an internal guideline, not a statutory or regulatory rule, 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 Administrative Process Act; it does not have general application and is not being enforced as having the force of law.

Scope This Directive applies VOSH-wide.**Reference** 29 CFR 1952.375 (as amended)**Cancellation** Not Applicable**Effective Date** 01 January 2018**Expiration Date** Not Applicable**Action** Directors and Managers shall ensure that compliance officers are aware of the scope of direct federal OSHA enforcement in Virginia and that of the VOSH Program.

C. Ray Davenport
Commissioner

Attachment: 29 CFR 1952.375

Distribution: Commissioner of Labor and Industry Manager of Cooperative Programs
Assistant Commissioner VOSH Compliance & Cooperative Programs Staffs
VOSH Directors and Managers OSHA Region III & OSHA Norfolk Area Offices
VOSH Legal Support & OIS Staffs

I. Background and Summary

Under the OSHA State Plan Agreement with the Commonwealth, federal OSHA has relinquished direct enforcement authority for occupational safety and health to VOSH only in regard to those occupational safety and health areas specifically covered by the Virginia State Plan specified at 29 CFR 1952.375. This includes most private sector establishments and all public sector areas of agriculture, general industry and construction. VOSH jurisdiction would also extend to any public sector maritime industry if and when it may exist. -

II. Direct Federal OSHA Jurisdiction in Virginia.

Federal OSHA retains full authority for enforcement for all other situations not specifically delegated to the Commonwealth under 29 CFR 1952.375. Direct OSHA jurisdiction includes enforcement and administration of all statutory laws, rules and regulatory standards authorized under the federal Occupational Safety and Health Act, Public Law 91-596, for the protection of all employees in such places of employment in Virginia where federal OSHA has retained primary authority.

Federal enforcement also includes any other situation where VOSH does not have an enforceable statute, regulation, or order, or where VOSH does not have territorial jurisdiction over the employment or place of employment. As set out at 29 CFR 1952.375, OSHA retains full authority over places of employment in the Commonwealth which are not subject to State enforcement under the Plan for certain industries, circumstances, and situations including:

A. Places of Direct Federal or Federal Entity-Related Employment

Federal government employers, employees, and other related federal entities, e.g., the U.S. Postal Service (USPS) which includes USPS employees and contract employees as well as contractor-operated facilities, or portions thereof, specifically engaged in USPS mail operations.

B. U. S. Military Facilities

Employment at worksites located within federal military facilities is the responsibility of federal OSHA.

C. Other Federal Enclaves

There also exists within Virginia numerous federal enclaves or places of federal or joint federal/state activities where civil jurisdiction may or may not have been wholly or partially ceded by the Commonwealth to the federal government. This may result in "Exclusive", "Proprietary", "Partial", or "Concurrent" federal jurisdictional status vis-a-vis the State, or in some cases, a combination thereof. This status may impact the determination of jurisdiction between OSHA and VOSH.

In any such situation, the VOSH Division of Legal Support (DLS) should be contacted prior to any enforcement activity. DLS shall consult with the Office of the Attorney General

(OAG) and federal OSHA to determine the precise jurisdictional authority for a particular location or portion thereof.

D. Private Sector Maritime Industry

Federal OSHA retains its authority relative to safety and health in private sector maritime activities and will continue to enforce all provisions of the Act, rules or orders, and all federal standards, current or future, specifically directed to such maritime employment. This includes:

- 29 CFR Part 1910, general industry applicable to maritime in the private sector;
- 29 CFR Part 1915, shipyard employment in the private sector;
- 29 CFR Part 1917, marine terminals in the private sector;
- 29 CFR Part 1918, longshoring in the private sector;
- 29 CFR Part 1919, gear certification in the private sector; and,
- 29 CFR Part 1926, construction applicable to maritime in the private sector

E. Federal OSHA also retains direct jurisdiction for:

- Employment at the U.S. Department of Energy's Southeastern Power Administration Kerr-Philpott System (*Reference: 71 FR 36988, June 29, 2006*)
- Federal enclaves where civil jurisdiction has been ceded by Virginia to the federal government.

F. Where enforcement jurisdiction is shared between federal OSHA and VOSH for a particular project or facility, in the interest of administrative practicability, federal jurisdiction may be assumed over the entire project or facility. In such cases, federal enforcement authority may be exercised after consultation with VOSH.

III. VOSH Referrals of Complaints and Accidents Outside of Its Jurisdiction

A. VOSH shall refer the following to Federal OSHA:

1. Employee(s) of the United States Government;
2. Employers working at a worksite clearly controlled by an agency or department of the United States government, e.g., military installations, national parks and federal buildings, where the federal entity:
 - a. claims exclusive federal jurisdiction over the area in which a contractor's employees are working; or
 - b. refuses entry to VOSH enforcement personnel.

NOTE: *Until any possible jurisdictional issues are resolved between a federal agency or department and federal OSHA, VOSH compliance personnel shall not attempt to conduct an inspection or investigation.*

3. Workplace discrimination or retaliation under Section 11(c) of the Federal Occupational Safety and Health Act by employees under the jurisdiction of federal OSHA;

NOTE: *Under VOSH's jurisdiction, any complaint of employee discrimination or retaliation, related to VOSH Program activities, shall be referred to VOSH Discrimination Investigation (See VOSH Program Directive 04-001E or its successor).*

4. Transporting hazardous substances under regulations implementing Section 405 of the Surface Transportation Act, Section 7 of the International Safe Container Act and Section 211 of the Asbestos Hazard Emergency Response Act (AHERA);

5. Employers who manufacture explosives under contract to the United States Department of Defense (DOD) and who are under contract with federal government agencies which require compliance with:

- (1) DOD Contractor's Safety Manual(s);
- (2) Explosive Safety Requirements and Surveillance; and,
- (3) where the Department of the Army or DOD conducts site inspections to ensure compliance.

6. Maritime activities on "navigable waters", i.e., waters deep and wide enough to afford ship passage to the Atlantic Ocean (*also see VOSH PD 02-101 and CPL 02-01-020 for the OSHA/Coast Guard definition of "navigable waters"*), including but not limited to:

- a. Longshoring operations on all vessels from the shore side of the means of access to the said ships;
- b. Marine vessel construction operations from the means of access on the shore;
- c. All afloat marine shipbuilding and repair from the foot of the gangway;
- d. All shipbuilding and repair in graving docks or dry docks;
- e. All ship repairing done on marine railways or similar conveyances used to haul vessels out of the water;
- f. All floating fuel operations;
- g. All diving from vessels afloat on the navigable waters;

- h. All afloat dredging, pile driving and similar operations outside the three (3) mile continental limit; or
- i. All offshore drilling, drilling rigs operating outside the three (3) mile continental limit.

J. Preemption by Other Agencies

A. VOSH compliance personnel and management shall review all complaints and accidents involving the following situations to determine VOSH jurisdiction or the need for referral to the appropriate listed agency:

- 1. U.S. or Virginia Army National Guard; or U.S. or Virginia Air National Guard;

NOTE: Complaints and accidents at state-owned Virginia Army National Guard and Virginia Air National Guard facilities may fall under VOSH's jurisdiction providing the unit has not been federalized or does not require federal recognition. Compliance staff and/or the Compliance Manager shall contact the Division of Legal Support (DLS) prior to initiating or referring the complaint/accident.

- 2. Railroad operations to the federal Railroad Administration; notwithstanding the below-mentioned exclusions (*see 43 FR 10583*):

EXCLUSIONS: VOSH has jurisdiction over the safety and health of railroad employees in offices and shops devoted to the construction, maintenance or repair of rolling stock and other railroad equipment. VOSH also has occupational health jurisdiction over all other railroad employees and has safety jurisdiction over all other railroad employees, as long as no other federal or state agency is actively exercising safety jurisdiction. Compliance personnel shall contact DLS before asserting jurisdiction over railroad employees who do not work in offices or repair or maintenance shops.

- 3. In-flight airline operations to the Federal Aviation Administration, U.S. Department of Transportation; and

- 4. Any U.S. National Parks and U.S. National Monuments within the Commonwealth of Virginia to the U.S. Department of the Interior.

- 5. Complaints or accidents in underground mines or on surface mines or related areas, within the area designated by the issued permit, shall be referred to the federal Mine Safety and Health Administration (MSHA) of the U.S. Department of Labor, or the Virginia Department of Mines, Minerals, and Energy (DMME).

ATTACHMENT

29 C.F.R. § 1952.375 Level of Federal Enforcement.

Title 29 - Labor

Subpart EE—Virginia § 1952.375 Level of Federal Enforcement.

- (a) As a result of the Assistant Secretary's determination granting final approval to the Virginia plan under section 18(e) of the Act, effective November 30, 1988, occupational safety and health standards which have been promulgated under section 6 of the Act do not apply with respect to issues covered under the Virginia plan. This determination also relinquishes concurrent Federal OSHA authority to issue citations for violations of such standards under section 5(a)(2) and 9 of the Act; to conduct inspections and investigations under section 8 (except those necessary to conduct evaluation of the plan under section 18(f) and other inspections, investigations, or proceedings necessary to carry out Federal responsibilities not specifically preempted by section 18(e)); to conduct enforcement proceedings in contested cases under section 10; to institute proceedings to correct imminent dangers under section 13; and to propose civil penalties or initiate criminal proceedings for violations of the Federal Act under section 17. The Assistant Secretary retains jurisdiction under the above provisions in any proceeding commenced under section 9 or 10 before the effective date of the 18(e) determination.
- (b)(1) In accordance with section 18(e), final approval relinquishes Federal OSHA authority only with regard to occupational safety and health issues covered by the Virginia plan. OSHA retains full authority over issues which are not subject to State enforcement under the plan. Thus, Federal OSHA retains its authority relative to safety and health in private sector maritime activities and will continue to enforce all provisions of the Act, rules or orders, and all Federal standards, current or future, specifically directed to maritime employment (29 CFR Part 1915, shipyard employment; Part 1917, marine terminals; Part 1918, longshoring; Part 1919, gear certification) as well as provisions of general industry and construction standards (29 CFR Parts 1910 and 1926) appropriate to hazards found in these employments, and employment at worksites located within Federal military facilities as well as on other Federal enclaves where civil jurisdiction has been ceded by the State to the Federal government. Federal jurisdiction is also retained with respect to employment at the U.S. Department of Energy's Southeastern Power Administration Kerr-Philpott System; Federal government employers and employees; and the U.S. Postal Service (USPS), including USPS employees, and contract employees and contractor-operated facilities engaged in USPS mail operations.
- (2) In addition, any hazard, industry, geographical area, operation or facility over which the State is unable to effectively exercise jurisdiction for reasons which OSHA determines are not related to the required performance or structure of the plan shall be deemed to be an issue not covered by plan which has received final approval, and shall be subject to Federal enforcement. Where enforcement jurisdiction is shared between Federal and State authorities for a particular area, project, or facility, in the interest of administrative practicability Federal jurisdiction may be assumed over the entire project or facility. In any of the aforementioned circumstances, Federal enforcement authority may be exercised after consultation with the State designated agency.
- (c) Federal authority under provisions of the Act not listed in section 18(e) is unaffected by final approval of the plan. Thus, for example, the Assistant Secretary retains his authority under section 11(c) of the Act with regard to complaints alleging discrimination against employees because of the exercise of any right afforded to the employee by the Act, although such complaints may be referred to the State for

investigation. The Assistant Secretary also retains his authority under section 6 of the Act to promulgate, modify or revoke occupational safety and health standards which address the working conditions of all employees, including those in States which have received an affirmative 18(e) determination, although such standards may not be Federally applied. In the event that the State's 18(e) status is subsequently withdrawn and Federal authority reinstated, all Federal standards, including any standards promulgated or modified during the 18(e) period, would be Federally enforceable in that State.

- (d) As required by section 18(f) of the Act, OSHA will continue to monitor the operations of the Virginia State program to assure that the provisions of the State plan are substantially complied with and that the program remains at least as effective as the Federal program. Failure by the State to comply with its obligations may result in the revocation of Federal enforcement, and/or proceedings for withdrawal of plan approval.

[53 FR 48258, Nov. 30, 1988, as amended at 65 FR 36630, June 9, 2000; 71 FR 36991, June 29, 2006]