



CHERIE BERRY
COMMISSIONER OF LABOR

ALLEN MCNEELY
DEPUTY COMMISSIONER/DIRECTOR
OCCUPATIONAL SAFETY AND HEALTH DIVISION

August 14, 2012

Cindy Coe, Regional Administrator
United States Department of Labor
Occupational Safety and Health Administration
60 Forsyth Street, Southwest, Room 6T50
Atlanta, Georgia 30303

Re: North Carolina Response to FY 2011 Federal Annual Monitoring and Evaluation (FAME) Report

Dear Ms. Coe:

The North Carolina State Plan was granted final approval on December 10, 1996. Final approval determination is a public acknowledgement that a State Plan is "at least as effective" as the federal OSHA program. The Occupational Safety and Health Act stipulates that federal OSHA must make a continuing evaluation of the manner in which each State having an approved plan is carrying out the plan. However the current evaluation process does not seem to be designed to determine if the State is appropriately carrying out the already approved plan in an "at least as effective" manner. The current evaluation process seems to be an ongoing comparison with federal OSHA activity and the federal OSHA way of doing things rather than a determination of effectiveness. The concept of State Plans is based on an assumption that states should have a right to conduct activity consistent with their plan. However, the evaluation process seems to be an attempt to determine if each state plan is just like the federal OSHA program. Consequently, instead of supporting and advancing unique state plans that address the issues in each State, the evaluation process has turned into an annual attempt to make each state plan more like federal OSHA.

In the absence of specific guidance from federal OSHA as to what constitutes effectiveness, or a willingness by federal OSHA to even acknowledge program effectiveness in the audit report, the State Plan has used the guidance provided by Congress to determine effectiveness as described in the Government Performance and Results Act (GPRA). GPRA requires a strategic planning process that defines effectiveness in terms of achieving specific outcome goals. The State Plan is continuing to evolve and improve in an attempt to develop the best procedures and strategies to reach established outcome goals and achieve program results. The State's high activity level and the program's lowest ever injury and illness rate of 3.1 supports the State's assumption that we're continuing to move in the right direction. The State would prefer an evaluation protocol in which more emphasis is placed on working with the State day by day to resolve issues rather than a "got you" approach that addresses items once per year in a multi-purpose audit report.

The biggest disappointment in the audit report is that while it highlights a few areas of State activity, the report does not provide a complete picture of the overall effectiveness of the program. This approach is especially true in the Executive Summary section of the report. The State has also received no explanation as to why the audit instructions even go so far as to indicate that the audit report should not “render a judgment on the state plan’s effectiveness, overall or in any specific areas.”

In most cases, the areas that federal OSHA chose to highlight certainly reflect differences in the federal and state programs but have little to do with overall program effectiveness. The way federal OSHA presents information in their audit report tends to make the State lose confidence in this formal monitoring process. It is also disappointing that with the time spent on the audit process it does not result in a determination as to whether the State is “at least as effective” as federal OSHA. Thankfully, the tone and emphasis of the audit report does not reflect the positive day to day working relationship with federal OSHA personnel. At the field level, there continues to be a spirit of program improvement and achievement of outcome goals. The State will continue to work with federal OSHA to develop an audit tool that accurately reflects state activity and performance levels with a goal of continued program improvement.

As far as the specific recommendations in the report, many did not meet the criteria included in the audit instruction document. The audit instructions indicated that recommendations should be “outcome and results oriented rather than process-oriented”. A number of the recommendations address how the State Plan operates differently than federal OSHA when the differences do not negatively influence effectiveness.

The following information is provided in response to the specific recommendations included in the FY 2011 FAME.

Recommendation 11-01 (formerly 10-1, 09-01) – OSHNC should revise their records retention policy with respect to OSHNC inspection case file documentation to retain pertinent information.

Response - This recommendation is a carry-over from the FY 2009 E-FAME. As the State has indicated previously, we do not feel that this item relates to program effectiveness. Certain items are purged from case files as a cost saving measure to reduce the amount of document imaging that is required. Our most recent imaging bill was over \$115,000 and a two year total has been about \$220,000.

However, as we have said previously; we would continue to work with federal OSHA to address competing needs. With this promise to work with federal OSHA in mind, we have decided to change our retention policy to extend the amount of time we will maintain a closed case file before certain items are purged. Closed case files will be retained without any items removed for a period of one calendar year following the end of the fiscal year. This additional 15 months should ensure that case files are available for review by federal OSHA for evaluation purposes or in the event of an investigation of a Complaint About State Program Administration (CASPA). We would anticipate that this response should satisfy federal OSHA concerns and preclude this recommendation from appearing in subsequent evaluations.

Recommendation 11-02 – OSHNC should implement additional training to ensure that health files appropriately address potential exposures through full-shift monitoring.

Response - The State reviewed the health files that were the basis for this recommendation and does not agree with the assessment that our inspections did not address potential exposures through full-shift monitoring. Specific guidance for conducting industrial hygiene inspections is included in Chapter XV of the Field Operations Manual. These industrial hygiene compliance procedures include sampling protocol and are more detailed than information included in the federal OSHA Operations Manual.

For the case file review process to have benefit to the State in improving program performance, the results of the case file review should be discussed with the State. Unfortunately the State did not get the opportunity to discuss this issue with federal OSHA. The monitoring instructions recommend that discussion take place as soon as possible. This approach might resolve any disagreement about state activity. It is the State's expectation that this discussion should take place at least before any federal assumptions become a basis for a recommendation in the audit report. In the case of health case file review, the discussion would probably have taken a limited amount of time since a total of only 20 health case files were reviewed from a sample size of nearly 1,500 health inspections.

Recommendation 11-03 – OSHNC should implement procedures to ensure case files include documentation as to why non-formal complaints are upgraded when the OSHA-7 indicates that an inspection will not be conducted. None of the complaint files reviewed included signed OSHA-7 forms.

Response - North Carolina's complaint procedures allow a district supervisor to conduct an inspection of a nonformal complaint, if the complaint alleges serious hazards that could cause death or serious physical harm. Complaints that are designated as either serious health or serious safety on the OSHA 7 are candidates for inspection whether a signed OSHA 7 is secured or not. The State attempts to secure a signed OSHA 7 for all complaints in which the complainant indicates a willingness to sign the complaint form. However, a signed OSHA 7 is not required for a district supervisor to assign a complaint for inspection that includes an allegation of a serious safety or health item. The State will continue to investigate complaints according to established procedures. Since the state approach is "at least as effective" as federal OSHA, it is not apparent why this recommendation relating to procedural issues is included in the audit report. The State will continue to work with federal OSHA on ways to improve the complaint intake process.

Recommendation 11-04 – OSHNC should implement measures to ensure that initial and final NOK letters are signed by supervisors and sent at the beginning and end of fatality investigations and that signed copies are maintained in the case file.

Response - North Carolina's procedures require that contact is made with the next of kin (NOK) by compliance staff. The next of kin ombudsman is also always available to communicate with the NOK. During FY 2012, the State conducted an internal audit of the fatality inspection process specially relating to contact with the NOK. The audit determined that in almost every case the CSHO had made contact with the NOK or included an explanation as to why the NOK could not be contacted. State procedures require that an initial letter and an inspection results letter are sent to the NOK. The initial letter is signed by the CSHO. This seems appropriate since the CSHO is working directly with the case and will potentially have the most contact with the NOK. The initial letter also provides information to the NOK about contacting the next of kin ombudsman. The State will not be satisfied until each contact is made with the NOK that is required by established policies and procedures.

Results of the state's internal audit were shared with all compliance staff including those specific instances in which NOK contact was not made as required. Corrective action requests were also completed to determine what additional action should be taken to ensure that all required contact is made with the NOK. One approach has been the development of a checklist that documents all required activity relating to a fatality investigation. This checklist will be implemented and employees will be trained in its use. State procedure already requires that the CSHO meets at least weekly with the supervisor to track the status of a fatality investigation. The procedure will be revised to indicate that fatality discussions between the CSHO and the supervisor will also include the status of contact with the NOK.

Recommendation 11-05 – OSHNC should implement procedures to ensure that coding is uniform and appropriate. Employees should be provided with additional training on how codes should be applied.

Response - North Carolina has procedures in place to provide guidance in coding inspection case files. The importance of properly coding case files has been continuously shared with compliance personnel. The State was not provided with specific case files review notes so it is not apparent what the specific coding issue might have been in all of the ten case files listed as examples of coding issues. Nevertheless, the State will work with Federal OSHA to eliminate specific coding errors.

One issue that was brought to the attention of the State was the classification of inspections as safety or health. There is currently no federal OSHA definition pertaining to what constitutes a health or safety inspection. This issue has previously been discussed with federal OSHA including personnel in the Office of State Programs. The subject of health inspections and hazards also becomes an issue when considering appropriation rider exemptions. The definition of health hazard has also not been established which is necessary to implement stipulations included in the appropriation rider.

In North Carolina, any inspection conducted by health compliance officer is classified as a health inspection and those inspections conducted by a safety compliance officer are coded as safety. This is the case whether safety or health violations are cited by the compliance officer. The State will maintain this policy until we have determined that there is a better approach. This is another example of federal OSHA preferring that the State conduct business the federal way when the issue has no impact on program effectiveness.

Recommendation 11-06 – OSHNC should assign Health CSHOs with respiratory protection. Procedures should be developed and implemented for CSHOs to indicate what type of PPE, to include respiratory protection was used during the inspection.

Response - The State appreciates federal OSHA's concerns about our compliance personnel but the findings relating to Recommendation Number Six continue to be misleading even after the State previously brought this issue to the attention of federal OSHA. The FAME report does not include documentation of even one specific case in which CSHOs have not worn adequate personal protective equipment while conducting an inspection. North Carolina's Respiratory Protection Program stipulates that respirators will be made available to CSHOs when required, provides for respirator training requirements, and fit testing. CSHOs also receive annual physicals to determine, if they are physically able to wear a respirator. The state's respirator policy was made available to federal OSHA, and a member of the safety and health committee spoke with the auditor about our respirator policy. The State believes that our respirator program provides appropriate safe guards to protect CSHOs.

In 2009, 82 additional half-mask respirators of various sizes and appropriate filtering cartridges were ordered, received and distributed to field offices. The Compliance Bureau assigned respirators to Winston-Salem and Asheville based CSHOs. The Charlotte, Raleigh, and Wilmington offices all have appropriate quantities of respirators available at their offices. If it is determined that a respirator is needed for a compliance activity they are available for use, per policy. All CSHOs/supervisors have had annual physicals and are cleared for respirator usage. OSHNC has fit testing equipment in each office and has the ability to fit test on-demand, as needed

Nevertheless, in response to the federal OSHA recommendation, respirators will be assigned to each health compliance officer to be used within the guidelines established in the Respiratory Protection Program. This would include the assurance that the CSHO would confer with their supervisor to confirm respiratory protection requirements.

Even though adoption was not required, the State initially adopted the federal OSHA Respiratory Protection Program Guidelines (CPL 2-2.54). Within the framework of the state's safety and health program procedures, the State eventually adopted its own respirator policy. Both the state and federal policies require that as conditions dictate that state CSHOs should be provided with a respirator. We believe that even a casual review will confirm that the state's respirator policy is more protective than the federal policy since the CSHO must communicate directly with a supervisor before a respirator is assigned. This process insures that the appropriate respirator is provided with the right cartridge or canister. It also allows for conversation about the inspection process to confirm that the CSHO at no time put them self in a situation in which they would be overexposed to chemicals.

The written federal policy does not clarify when a respirator will be assigned but leaves the responsibility of having the appropriate respirator with the CSHO. Having a specific respirator permanently assigned to the CSHO also raises issues relating to storage and care. The trunk of a car subjects the respirator to possible damage as a result of extreme temperatures, dust, and sunlight. Even though the state's respirator policy that provided for issuance of respirators as needed has been effective in providing protection for employees as confirmed by review by division industrial hygienist, as stated previously, in consideration of the federal OSHA recommendation, the policy will be changed and each health compliance officer will be assigned a respirator.

In regards to the second part of your recommendation, the state does not see any need and/or benefit in requiring our staff to document the types of PPE worn at each individual worksite where they are performing compliance activity. OSHNC FOM Chapter III Section B.5 provides inspection preparation procedures to be followed by all CSHOs. These procedures specifically indicate that for all inspections the CSHO is to conduct a hazard assessment and ensure all necessary PPE is utilized. In addition, OSHNC procedures require hard hats, safety glasses and safety shoes be worn at all times during construction inspections, due to the ever changing nature of construction sites. These procedure also indicate that inspections involving the use of respirators will not be assigned to a CSHO that has not had an adequate fit test within the last year and appropriate respirator training. In addition the procedures indicate that if there is a need for special or additional inspection equipment, the district supervisor will be consulted to ensure that training in the use and limitation of such equipment has been completed prior to its use. Finally our procedures indicate that the district supervisors will ensure that a review or recheck in the use of all equipment is given to the CSHOs periodically.

Recommendation 11-07 (formerly 10-02, 09-06) – OSHNC should provide additional training to CSHOs to ensure each violation is classified accurately for penalty assessment, severity and probability. Guidelines for rating the severity of the injury or illness being prevented should be reviewed and revised as needed to assure that they are consistent with the definitions of high, medium, and low severity in OSHNC's procedures. Supervisors should ensure that case files are reviewed more carefully to ensure this is being done.

Response - The State appreciates the value of case file review in determining if there are any deviations from established policies and procedures. It is not apparent however what prompted the case file review to include penalty calculation when the state's average penalty was comparable to federal OSHA in FY 2011. Nevertheless, for the case file review process to work, the State must receive specific instances of nonconformity from case files that have been reviewed. Even after repeated requests, the State did not receive specific case file findings or worksheets for the case files reviewed. The State only received a list of case files in which "problems" were identified. Specific case file information was not even provided for the examples of misclassified violations included in the audit report. For senior management personnel who reviewed each case file provided on a list from federal OSHA, it was not often apparent where the alleged problem areas existed.

This audit approach is not consistent with the audit instructions prepared by federal OSHA or good audit practice. The instructions indicated that when information from case file review is used to support findings in a report, the report should include the number and percentage of case files in which the issue was identified. This information was also not shared with the State or included in the audit report. This is a problem that was initially indentified by the State in the FY 2009 E-FAME. When audit reports are released with such fanfare and subjects the State to significant public scrutiny, the starting point for federal OSHA in producing an accurate audit report would seem to be assurances that audit instructions are followed explicitly and information is correct. This can be assured by sharing case file information directly with the State. This is especially true in the case file review portion of this audit in which such a small number of case files were reviewed. A total of only 135 case files were reviewed from the 4,276 inspections conducted by the State.

The State utilizes its own internal audit system to determine if violations are classified correctly and that penalties are calculated according to established procedures. It is the goal of the State to calculate penalties according to established procedures that are similar to federal OSHA. One of the ways that the State confirms that policies and procedures are followed is by conducting internal audits of program operations. In FY 2011, an audit was conducted of specific compliance districts. The audit included case file review and attention to penalty calculation and violation classification. Problem areas in individual case files were not only documented in the audit report, but on an action request form used by the State to document nonconformities.

The action requests are reviewed by senior management and appropriate action is taken. This can include policy revision when necessary and in response to our internal audit a specific training course was prepared for CSHOs. The training content included penalty calculation and violation classification. The classification of electrical violations was also noted in the FAME. A statistical analysis conducted by OSHNC confirmed that the state's percent serious for electrical violations was less than the overall federal OHSA rate. However, the statistics reviewed also indicated that there was also significant deviation for federal OSHA from region to region. The State has secured the services of an external electrical expert to help confirm that electrical violations are being classified appropriately.

As well as developing training to address nonconformities, the importance of field level case file review was also discussed with supervisory personnel. Even though the audit did not uncover significant deviation from established policies and procedures, the State expects continued improvement in the area of penalty calculation and violation classification.

Recommendation 11-08 – OSHNC should eliminate the Cooperation penalty reduction policy.

Response – For federal OSHA to suggest that the State eliminate a program because it is different from a federal program is to miss the entire rationale for state programs. Having a state program allows the State to establish unique programs in their state that are designed to help in achieving established outcome goals. North Carolina's cooperation credit is intended to provide an incentive for the employer to immediately abate a hazard and assist the CSHO during the inspection process. This is similar to federal OSHA's quick fix penalty reduction program which provides a penalty reduction greater than the state reduction of 10%. The OSHA Act does not stipulate that a state with final approval must have identical procedures, policies, and directives to be "at least as effective" as federal OSHA. Even with the cooperation penalty credit, the state's penalty amounts were comparable to federal OSHA during this audit period. The State routinely reviews all policies to determine if they continue to promote the intended results. The cooperation policy will also be routinely reviewed. At this time however, the State does not have plans to eliminate the cooperation penalty reduction policy.

The State's cooperation policy requires that the CSHO document their reasoning for giving cooperation credit and specific examples of cooperation are included in the Compliance Operations Manual. One reason for giving cooperation credit is when a violation is abated at the time of the inspection. This is similar to federal OSHA's quick-fix reduction. State personnel reviewed most of the case files identified by federal OSHA as having issues with the justification of the cooperation reduction. The review confirmed that CSHOs did not always indicate in the case file why cooperation credit was being given. To address this issue, all compliance personnel from supervisor to CSHO have been given specific written instructions on the implementation of the cooperation penalty credit. It is also included in new training material. Justification for giving the cooperation credit will continue to be an area of emphasis as supervisors review case files and internal audits are conducted.

Recommendation 11-09 – OSHNC should ensure that informal conference notes documenting changes made to the citations and/or penalties are legible, organized, and include the justification in the case file.

Response -The State's review of case files included in the audit confirmed that informal conference notes were not always included in appropriate case files. Action requests were prepared to initiate a revision to the Compliance Operations Manual to make it clear that informal conference notes should be prepared to document actions taken during an informal conference, and the notes should be placed in the case file.

Recommendation 11-10 (formerly 10-3, 0909 A-D) – The State should continue their work toward the necessary modification to the EDB's program to ensure procedures are at least as effective as Federal procedures. The State should develop and implement a tracking system with a final due date to ensure timely completion.

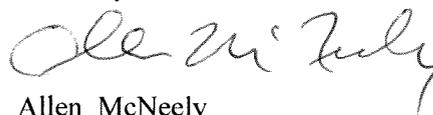
Response - A revised OSH Discrimination Manual dated May 11, 2012 was submitted to federal OSHA as a plan change on May 25, 2012. The revised manual addresses recommendations included in the 2009

E-FAME. These include a provision for receiving oral complaints, conducting interviews in person, documenting the closing conference activity, and case disposition. The Employment Discrimination Bureau will continue to work with federal OSHA to develop and implement policies and procedures that are "at least as effective" as federal OSHA. This must be accomplished within the guidelines developed by the North Carolina General Assembly in the Retaliatory Employment Discrimination Act.

Closing - The State appreciates the opportunity to respond to the specific recommendations included in the FY 2011 FAME Report. However, as stated previously, we are once again disappointed that with all of the time and effort put into this audit process that a determination could not be made as to the overall effectiveness of the State Program. This seems like an obvious primary goal of the process. The state's activity level, including the number of compliance inspections, and performance outcome certainly compares favorable to federal OSHA and is obviously "at least as effective", if not more effective. However, federal OSHA's reluctance to share federal data and define "at least as effective" makes statistical program comparisons difficult. State performance includes injury and illness rates that have declined steadily during the program's history and reached its lowest level in FY 2010 of 3.1. It should also be noted that the State did not have a single complaint about state program administration (CASPA) filed in FY 2011. Positive state performance data should be prominently placed in the audit report and in the executive summary of the report in order to give a total picture of the North Carolina State Program.

Finally, the diverse audience for the report should not prevent the audit process from serving as a mechanism to help to improve state programs. As usual, the State is willing to continue to work with federal OSHA to address all valid concerns included in this report. We are also committed to working with federal OSHA to assure that all audit reports accurately reflect state activity and documents the effectiveness level of the North Carolina State Program. As stated in the FAME guidance document, the audit should "identify areas of concern and areas of excellence." Please consider this letter to be the State's official response to the FY 2011 FAME to be posted along with the FAME on your public web site.

Sincerely,



Allen McNeely

cc: Kim Morton
Doug Kalinowski
Eric Lahaie