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October 26, 2010

Ms. Cindy A. Coe
Regional Administrator
Occupational Safety and Health Administration
61 Forsyth Street, SW, Room 6T50
Atlanta, Georgia 30303

Dear Ms. Coe:

Enclosed is Kentucky's response to the FY 2009 Enhanced Federal Annual Monitoring Report. Please contact me or Mr. Chuck Stribling, CSP, OSH Federal-State Coordinator, if you have any questions or need additional information.

Sincerely,

/Signed/

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Kentucky Labor Cabinet Occupational Safety and Health Program

RESPONSE

to

ENHANCED FEDERAL ANNUAL MONITORING REPORT

for

FEDERAL FISCAL YEAR 2009

I. POINTS REGARDING OSHA's ENHANCED FAME REPORT

A. General Reply

Kentucky understands the unique challenges OSHA's team faced during the Enhanced Federal Annual Monitoring Evaluation (FAME) process and is appreciative of the professionalism and courtesy demonstrated by Region 4 staff during the recent audit. Any comments or responses presented here are not specifically directed at the Regional Administrator or Region 4 staff.

Kentucky's Occupational Safety and Health (OSH) Program has long prided itself on its dedication to all employees' safety and health concerns, as well as their discrimination rights. The Kentucky OSH Program agrees with OSHA's approach to workplace safety and health and is eager to work with OSHA. In his September 28 press release that accompanied the release of the Enhanced FAME reports, Dr. Michaels stated, "Our goal is to identify problems in state-run programs before they result in serious injuries or fatalities." Dr. Michaels continues, "While we found many positives in the state programs, we also found deficiencies including concerns about identification of hazards, proper classification of violations, proposed penalty levels, and failure to follow up on violations to ensure that workplace safety and health problems are corrected." As OSHA states in the Enhanced FAME report, OSHA's twenty (20) recommendations were made "to enhance the performance of the State Program." Most of OSHA's recommendations are primarily administrative or procedural in nature and **none** of the recommendations affect the safety, health, or discrimination rights of Kentucky's employees. Kentucky is pleased, and not at all surprised, that OSHA did not find the type of serious deficiencies in Kentucky that were identified in Dr. Michaels' statement. OSHA's Enhanced FAME report clearly demonstrates the Kentucky OSH Program surpasses Dr. Michaels' goal.

In fact, Kentucky had procedures in place at the time of the Enhanced FAME audit for most of OSHA's recommendations. However, since the recommendations primarily address Kentucky's in-house administrative process, it appears OSHA believes that some of Kentucky's procedures are not as comprehensive or as streamlined as OSHA desires. While OSHA's recommendations are generally well-taken, again, it is important to note that **none** of the recommendations directly affect employee safety, health, discrimination protections, or employer compliance.

Several of OSHA's twenty (20) recommendations are related to Integrated Management Information System (IMIS) data or procedures. The Kentucky OSH Program is puzzled by this. The IMIS procedures utilized by Kentucky prior to, and during, OSHA's Enhanced FAME audit had been employed in Kentucky for several years. IMIS issues were not brought to the Kentucky OSH Program's attention by OSHA during state program audits prior to the Enhanced FAME audit.

Several of OSHA's recommendations in the Enhanced FAME report were communicated to Kentucky during the onsite audit closing conference. Kentucky implemented action addressing most of the recommendations after the closing conference and prior to the issuance of the Enhanced FAME report.

B. Performance Goal 3.1.1

Pages four (4), eight (8), and twelve (12) of the Enhanced FAME report indicate that Kentucky is “on target” to meet all performance goals except the goal to maintain a technology infrastructure that provides a reliable data repository to support the Kentucky OSH Program’s goals and strategies. The narrative on page twelve (12) of the report provides OSHA’s rationale for their assertion that Kentucky was “on target” to meet all performance goals except the goal to maintain a technology infrastructure that provides a reliable data repository to support the Kentucky OSH Program’s goals and strategies. OSHA states:

“Kentucky is not meeting this goal. The FY 2009 Annual performance Goal for 3.1.1 was to maintain 100 percent of all OSHA Integrated Management Information System (IMIS) equipment and software to ensure that all data on the information system is accurate, accessible, and current for both the Kentucky OSH Program and OSHA.”

OSHA continues:

“However, this evaluation found that data is not being entered and updated and in other cases it is not being updated in a timely manner.”

Kentucky respectfully disagrees and firmly believes that a technology infrastructure is maintained that provides a reliable data repository. Kentucky believes OSHA’s conclusion is completely incorrect. Kentucky’s technology infrastructure has been in place for decades and the IMIS practices/procedures utilized by Kentucky prior to, and during, OSHA’s Enhanced FAME audit had been employed in Kentucky for nearly as long. Kentucky’s goal to maintain a technology infrastructure that provides a reliable data repository to support the Kentucky OSH Program’s goals and strategies is a goal that has appeared in performance plans submitted to OSHA since 2004. Nothing has changed. Any problem(s) with Kentucky’s technology infrastructure or failure to meet the goal has never been an issue raised by OSHA prior to the Enhanced FAME report. Furthermore, IMIS issues have not been brought to the Kentucky OSH Program’s attention by OSHA during state program audits prior to the Enhanced FAME audit.

OSHA apparently fails to consider Kentucky’s 2009 Performance Plan indicator for measuring successful achievement of Performance Goal 3.1.1. It states:

“Percent of equipment and software changes completed, as outlined by OMDS.”

Kentucky has always maintained 100% of all IMIS equipment and software at a considerable cost. Kentucky’s success achieving the indicator is demonstrated in Kentucky’s financial records and evident in the everyday exchange of IMIS data between Kentucky and OSHA. Kentucky submits that if a technology infrastructure was not 100 percent maintained by Kentucky, then the transfer of data in IMIS between OSHA and Kentucky would be a significant issue. However, that is not the case. The exchange of IMIS data between Kentucky and OSHA was not a problem of any sort during the period OSHA reviewed for the Enhanced FAME audit, or at any other time for that matter. OSHA’s assertion that a technology infrastructure was not 100 percent maintained by Kentucky is unfounded, incorrect, and absurd.

Kentucky acknowledges there may be instances where IMIS data was unintentionally entered inaccurately or not current. However, prior to and during the preparation of this response to OSHA, Kentucky discovered that many of the IMIS data issues pointed out in OSHA's report appear to be nonexistent. That is, many of the IMIS issues simply did not exist when Kentucky attempted to abate the issues OSHA identified. Kentucky believes the IMIS issues OSHA discovered during the Enhanced FAME audit were primarily limited to a very small portion of the small sample of case files OSHA reviewed. Kentucky believes the IMIS related issues OSHA identified in the Enhanced FAME report are not systemic and representative of "the big picture."

C. Correction

On page eleven (11) in the "Goal 2.1.3" section of the Enhanced FAME report, OSHA makes the following statement:

"The Kentucky OSH Program no longer prints the Federal or State regulation books."

That is incorrect. The Kentucky OSH Program prints state specific OSH requirements that go above and beyond OSHA's requirements in a document entitled *Kentucky Occupational Safety and Health Standards for Construction and General Industry*. The document is provided free of charge to employers on a compact disk along with the federal regulations and a hard copy of the document is provided to employers upon request.

D. Enhanced FAME Report Omission

There are several areas where employee protections in the Commonwealth of Kentucky are far greater than federal jurisdictions. With regard to OSH regulations, Kentucky has several state specific regulations that provide greater employee protection such as logout/tagout, first aid, employee hospitalization reporting, emergency eyewash and showers, amputation reporting, fall protection in steel erection and residential construction, bloodborne pathogens in construction, and confined space in construction. These are a few examples of Kentucky state specific OSH requirements that exceed OSHA's requirements, and there are several more.

Kentucky refrains from explaining the aforementioned regulations and every other such state specific regulation in this reply. However, with the exception of a couple of sentences in the Enhanced FAME report, Kentucky is very disappointed that OSHA's report completely failed to identify areas where Kentucky's OSH regulations, policies, and discrimination provisions exceed OSHA's minimum requirements. Kentucky believes OSHA should have recognized, at a minimum, the Labor Cabinet's Division of OSH Compliance and the Cabinet's Division of OSH Education and Training for their *considerable* enforcement and outreach efforts concerning Kentucky's state specific regulations that provided greater protection to employees than OSHA's minimum requirements.

II. SPECIFIC RECOMMENDATIONS and REPLIES

Recommendation 1: Management should evaluate all complaints including formal complaints to determine when an investigation, rather than an inspection, would be more appropriate to allow a more effective use of their resources.

REPLY: Kentucky takes issue with this recommendation. This recommendation has no basis, is misleading, and implies that Kentucky does not evaluate all complaints. However, nothing could be further from the truth. OSHA's narrative on page fourteen (14) of the Enhanced FAME report contradicts this recommendation and clearly indicates the Kentucky Division of OSH Compliance does indeed evaluate all complaints. OSHA states, "**All** valid, formal complaints are scheduled for workplace inspections. **Complaints are evaluated** by the Compliance Program managers, prioritized, and inspected or investigated based upon classification and gravity of the alleged hazard." [**Emphasis added.**]

The Division of OSH Compliance Program Managers have always evaluated **every** complaint, formal (written and signed) or non-formal, and categorized them according to severity.

Kentucky law requires complaints be written and signed by an employee or representative of the employee(s). Therefore, Kentucky does not inspect electronic complaints unless they allege imminent dangers, fatalities, catastrophes, hospitalizations, amputations, or the complainant submits a signed complaint. The Division of OSH Compliance attempts to contact the complainant when an electronic complaint is received and asks the individual to submit a written signed complaint pursuant to Kentucky law. Anonymous electronic complaints, or electronic complaints received by an individual who is not an employee or representative of the employee(s), are processed as a non-formal complaint and a letter is sent to the employer.

On page fifteen (15) of the Enhanced FAME report, OSHA states:

"It was determined that the state was conducting inspections of signed formal complaints where it was questionable of a serious hazard existed....."

Kentucky law establishes that inspections will be conducted upon receipt of notification and when reasonable grounds exist for such violation or danger. Kentucky believes an employee, or representative of employees, who takes the time to memorialize a workplace concern(s) in the form of a written and signed complaint has a concern that warrants an onsite evaluation by the Division of OSH Compliance. Kentucky believes onsite observation is the surest method to determine if a "questionable" serious hazard exists. Kentucky believes employees are better protected and served when alleged hazard determination is made through direct onsite observation rather than attempting a determination via indirect observation methods. Additionally, experience establishes that other serious hazards not alleged in a complaint may be discovered during inspection of the complaint items.

OSHA states on page fourteen (14), "The state places emphasis on customer service and assuring that each complaint is given attention consistent with the complaint directive and the severity of the alleged hazards." The Division of OSH Compliance is proud of its attention to customer

service. As OSHA states on page fourteen (14), complaint investigations were initiated within an average of 2.65 days from the time of receipt and complaint inspections were initiated within an average of 6.63 days from the time of receipt. OSHA states that only a “few complaints were responded to late because of a lack of available resources.” To be more precise, as OSHA states on page fourteen (14), of the 522 complaints Kentucky handled and 245 complaint inspections Kentucky conducted, “Three (3) serious complaints inspections were opened later than 30 days after assignment in FY 2009.” OSHA does not indicate if the three (3) “serious complaint inspections” that were opened later than thirty (30) days resulted in citations issued; and if so, OSHA does not indicate if the citations were related to the alleged compliant hazards or other hazards observed during the inspection.

As noted above, Kentucky clearly evaluates all complaints and assigns investigations or inspections based upon classification and gravity of alleged hazards and believes this is a very responsible, sound practice. The Division of OSH Compliance will continue its present method. The Division of OSH Compliance believes this is a very appropriate, very efficient, and very effective use of resources.

Corrective Action Plan: None. The Division of OSH Compliance believes its practice is a very appropriate, very efficient, and very effective use of resources and will continue as is.

Recommendation 2: The state should accurately enter and update all complaints and complaint related actions in the IMIS in accordance with the IMIS manual. IMIS reports should be used on a weekly basis to track the status and complaint due dates.

REPLY: Complaints are indeed entered into the IMIS. Supervisors in the Division of OSH Compliance enter formal complaints into the IMIS and assign them to compliance officers. Other Division of OSH Compliance staff enter non-formal complaints into the IMIS and send letters.

The Division of OSH Compliance has utilized the IMIS “CASES WITH CITATIONS PENDING” report for several years and was unaware that other IMIS reports were available. Utilization of other IMIS reports was never brought to the Kentucky OSH Program’s attention by OSHA during state program audits prior to the Enhanced FAME audit. In addition, training regarding other IMIS applicable reports was not offered to Kentucky OSH Program staff within the last decade, or perhaps even longer.

OSHA’s Region 4 office provided IMIS training in April 2010 to the Kentucky OSH Program after OSHA’s Enhanced FAME audit. As a result of the training, the Division of OSH Compliance now produces weekly IMIS reports which are provided to the division Director and both division Program Managers. The Program Managers disseminate the information to staff.

Corrective Action Plan: The pertinent portion of this recommendation was implemented after IMIS training was provided by Region 4 and prior to the issuance of the Enhanced FAME report.

Recommendation 3: All electronic complaints (e-complaints) and complaints handled by phone, fax, and letter should be coded with the applicable national, local, and strategic codes.

REPLY: This recommendation puzzles the Kentucky OSH Program. Kentucky's complaint coding practices utilized prior to, and during, OSHA's Enhanced FAME audit had been in place for several years and the issue was never brought to the attention of the Division of OSH Compliance by OSHA during state program audits prior to the Enhanced FAME audit. As stated in the reply to Recommendation 1, Kentucky does not inspect non-formal complaints unless they allege imminent dangers, fatalities, catastrophes, hospitalizations, amputations, or the complainant submits a signed complaint. Kentucky was unaware electronic complaints and complaints handled by telephone, fax, and letter, since they are non-formal complaints, were to be coded.

In response to this recommendation, OSH-1 forms are now completed with every electronic complaint whether or not an inspection is conducted, and it is coded. The Kentucky OSH Program will use other IMIS codes for telephone, facsimile, and letter complaints.

Corrective Action Plan: This recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 4: All complainants should be timely notified and provided a copy of the employer's response following a complaint investigation. The notification should provide the complainant with the opportunity to dispute the employer's response. In addition, employer responses that are disputed should be considered, appropriately responded to, and documented in the file.

REPLY: Kentucky believes this recommendation is misleading since in fact Kentucky does notify the complainant. As OSHA states on page fifteen (15) of the Enhanced FAME report, the Division of OSH Compliance provides the complainant with a letter notifying the individual of the inspection results.

Kentucky has not traditionally notified the complainant of the employer's response. In response to this recommendation, the Division of OSH Compliance now provides complainants with a letter advising that the employer's response has been received and is available upon request. Complaint investigations are not closed out without a program manager's review and agreement the case is ripe for closure. A complainant's disputed response of an employer's reply is evaluated on a case-by-case basis.

Corrective Action Plan: The pertinent portion of this recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 5: All complainants should be timely notified of the inspection results addressing the state's findings of each complaint item. The notification should provide the complainant with the opportunity to appeal the inspection results.

REPLY: Kentucky believes OSHA's use of the term "timely" is grossly incorrect, misleading, and has no basis. Following a complaint inspection, the Division of OSH Compliance has **always** provided the complainant with a letter notifying the individual of the inspection results.

The letter, provided when citations are issued, advised the complainant of the findings and provided the complainant with a copy of the citations. If citations are not issued, the complainant is advised of the inspection findings. Furthermore, OSHA acknowledges on page fifteen (15) of the Enhanced FAME report that Kentucky notifies the complainant and provides inspection results.

Kentucky has not traditionally provided notification to complaints that specifically addressed the findings of each complaint item. In response to this recommendation, the Division of OSH Compliance has augmented its procedure by addressing each complaint item individually in the letter to complainants. The letter also describes the complainant's appeal rights pursuant to Kentucky law. Complaint inspections are not closed out without a program manager's review and agreement the case is ripe for closure.

Corrective Action Plan: The pertinent portion of this recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 6: KY OSH should send written correspondence to the next of kin providing them with information regarding the investigation. This letter should be signed by the Director of OSH Compliance or the Commissioner.

REPLY: Kentucky believes this is another recommendation that is misleading. As OSHA states on page sixteen (16):

“Following an inquiry by the Regional Administrator in Region IV in mid-fiscal year 2009 regarding KY OSH's fatality correspondence, KY OSH revised its process to include a follow-up letter after the CSHO makes contact via phone. However, at the time of this review this process had not been fully implemented by the Kentucky.”

Kentucky clearly sends written correspondence to the next of kin with information regarding the investigation. The follow-up letter to the next of kin, signed by the compliance officer, explains the inspection process and provides the officer's contact information.

Kentucky communicated to Region IV its new next of kin letter process in 2009 prior to the Enhanced FAME audit and no concerns or objections were communicated to Kentucky. In fact, Region IV was appreciative of Kentucky's accommodation and modification. The Division of OSH Compliance believes that it is more appropriate for the next of kin letter to be signed by the compliance officer considering the compliance officer made first contact with, and is in communication with, the next of kin.

Unfortunately, OSHA does not quantify the extent of the “had not been fully implemented” issue. OSHA provides no information stating whether or not the issue was limited to a small sample of reviewed case files or if the issue was representative of a majority of reviewed case files. Considering that Kentucky's process of sending written correspondence was initiated in mid-fiscal year of the period covered by the Enhanced FAME audit, Kentucky believes it is an isolated issue.

Corrective Action Plan: Kentucky implemented a process in mid-fiscal year 2009 that provides written correspondence to next of kin and will continue to do so.

Recommendation 7: At the conclusion of the fatality investigation the state should send the next of kin a letter signed by the Director of OSH Compliance or Commissioner and explain the state's findings or the results of the investigation with a copy of the citations if any are issued. The next of kin should be informed of informal conferences, as well as any changes in the citations as a result of a settlement.

REPLY: Again, Kentucky believes this is another recommendation that is misleading. Kentucky does not understand OSHA's basis for the first sentence of the recommendation and takes issue with it. At the conclusion of a fatality investigation, Kentucky's practice for over twenty-three (23) years has been for the Director of Compliance to send the next of kin a letter with a copy of the citations if citations were issued; or, a letter advising no violations were found if citations were not issued. Furthermore, OSHA contradicts the first sentence of this recommendation on page seventeen (17) of the Enhanced FAME report. OSHA states:

“At the conclusion of the investigation, the final letter sent to family members was a generic letter indication that citations were or were not being issued with a copy of the citations attached.”

The misleading first sentence of this recommendation clearly has no basis.

With regard to the second sentence of this recommendation, Kentucky interprets the term “...result of a settlement” to mean the result of changes agreed to in an informal conference. The Division of OSH Compliance has traditionally not informed the next of kin regarding informal conferences or any changes in citations as a result of an informal conference unless the next of kin so requests. Kentucky notes that changes in fatality related citations as a result of an informal conference are very uncommon. Also, experience establishes that compliance officers often find that some next of kin understandably do not want the Division of OSH Compliance's continued presence in their lives for personal reasons. In those cases, the Division of OSH Compliance respects the wishes of the next of kin and does not intrude.

In response to this recommendation, the Division of OSH Compliance now sends a letter to the next of kin who desire to be informed advising them of informal conferences and any changes in the citations as a result of an informal conference settlement.

Corrective Action Plan: Action completed.

Recommendation 8: Settlement agreements need to include employer commitments and justification for penalty reductions and/or modifications documented in the case file.

REPLY: Kentucky does not understand if OSHA's use of the term “settlement agreements” in this recommendation refers to changes as a result of an informal conference or refers to formal settlement agreements.

If this recommendation is referring to changes as a result of informal conference, Kentucky takes issue with OSHA's "justification for penalty reductions and/or modifications documented in the case file" statement. Kentucky does not understand OSHA's basis for the statement and believes it is a gross error. Division of OSH Compliance supervisors **have always** been required to justify **any and all** penalty reductions, citation dismissals, or citation reclassifications in their informal conference recommendations. **The information is documented in the case file.**

In response to this recommendation, the Division of OSH Compliance will include "employer commitments" in informal conference documentation.

Although this recommendation does not expressly reference fatality case files, Kentucky believes that omission was an oversight on OSHA's part and is indeed specifically related to fatality case files. Kentucky believes that is the case since this recommendation is grouped with recommendations six (6) and seven (7), all of which are presented after the "Fatalities" narrative of the report. The remainder of this reply is founded on that basis.

When a fatality case is contested, it is sent to the Labor Cabinet's Office of General Counsel and assigned to an attorney. The attorney sends an introductory letter to the next of kin, provides contact information, and explains the contest process. Kentucky notes that some next of kin file for party status while others do not file but wish to be kept updated.

The Division of OSH Compliance neither drafts nor administers formal settlement agreements. Supreme Court of Kentucky rules may interpret this as an unauthorized practice of law. Nevertheless, the Division of OSH Compliance is working with the Cabinet's Office of General Counsel to develop a procedure that will address this recommendation.

Corrective Action Plan: The Division of OSH Compliance will include "employer commitments" in informal conference documentation. The Division of OSH Compliance is working with the Cabinet's Office of General Counsel to develop a procedure that will address this recommendation for formal settlement agreements.

Recommendation 9: It is recommended that the state evaluate and determine the cause of the high in-compliance rate for programmed inspections.

REPLY: Kentucky believes the term "in-compliance," though useful as a classification tool, is rather ambiguous when used as a simple reporting mechanism instead of viewing an inspection as a process which has fully assessed the conditions found in a Kentucky workplace. Kentucky views "in-compliance" inspections as those where "no hazards were observed at the time of the inspection and no citations were recommended." This is a subtle difference, but it does exist. OSHA makes a statement on page eighteen (18) of the Enhanced FAME report that supports Kentucky's point of view. OSHA states:

"The case file reviews did not reveal any instances of photos that showed hazards, a failure to sample where exposure might be expected or any other hazards or program deficiencies that were not addressed."

In other words, the “in-compliance” reports obviously reflected that at the time of the inspections, no hazards were observed.

OSHA’s perception of “high in-compliance rate for programmed inspections” may lie in the type of industries selected through Kentucky’s Targeting Outreach Program (TOP), a process in which the Division of OSH Compliance has no input. The Division of OSH Education and Training’s Statistical Services Branch collects data through the OSHA Data Initiative. After analysis of the most current calendar year, the top ten (10) high hazard industries in Kentucky are identified using four (4) digit North American Industry Classification System codes. Following that identification, the Division of OSH Education and Training sends a TOP letter to each employer in each industry offering free consultation services in an effort to reduce employee injuries and illnesses. Each employer is asked to respond to the offer by completing and returning an enclosed form by a pre-determined date. Employers who fail to respond are compiled into a list and turned over to the Division of OSH Compliance. The Division of OSH Compliance schedules either a complete safety or a health inspection from the aforementioned list.

Employers who do not request Division of OSH Education and Training assistance in response to a TOP letter may have strong OSH programs and do not need Division of OSH Education and Training’s assistance. However, those employers are still turned over to the Division of OSH Compliance since they failed to respond to the Division of OSH Education and Training. Subsequent Division of OSH Compliance inspection(s) may verify the strength of the employer’s OSH program thus resulting in no citations being recommended. This may be one (1) of the main reasons for the high “in-compliance” rate for programmed inspections.

Another probable reason for Kentucky’s rate of programmed inspections that resulted in no citations being recommended is the frequency of programmed inspections that many of Kentucky’s employers receive from the Division of OSH Compliance. Unlike OSHA, Kentucky’s Division of OSH Compliance often inspects many of the same employers for programmed inspections. It is very logical that such employers would be “in-compliance.” For instance, a compliance officer who inspects an employer who has experienced three (3) programmed inspections in the past six (6) or seven (7) years would be more likely to find an absence of hazards and thus no citations would be recommended or issued.

Closely related to this is the fact that the Division of OSH Compliance often conducts programmed inspections at workplaces that have taken advantage of Kentucky’s strong consultation program. Although employers who experienced a comprehensive audit by Kentucky’s Division of OSH Education and Training are still subject to subsequent programmed inspections, experience shows that those employers have worked diligently to create a workplace that is free from safety and health hazards. It is not uncommon that a compliance officer who inspects those worksites is likely to find an absence of hazards and thus no citations would be recommended or issued.

Regardless of the reason(s), OSHA clearly makes the most important point on page eighteen (18) of the Enhanced FAME report. To reiterate, OSHA states:

“During the review of the 50 programmed inspection case files in general industry (private sector), 48% were in-compliance overall, 56.3% of the programmed construction inspections files reviewed and 44.1% of the programmed general industry (46.7%-safety and 42.1%-health) files reviewed were in-compliance. The case file reviews **did not** reveal any instances of photos that showed hazards, a failure to sample where exposure might be expected or any other hazards or program deficiencies that were not addressed.”
[Emphasis added.]

Kentucky would be very concerned if OSHA found instances of photos that showed hazards; or if OSHA found that Kentucky failed to sample where exposure might be expected; or if OSHA found the presence of other hazards or program deficiencies that Kentucky failed to recognize and cite. However, that is clearly not the case as demonstrated in the aforementioned quote. OSHA validates that Kentucky’s “in-compliance” programmed inspection results are accurate.

Kentucky believes “the high in-compliance rate” is more relative to its programmed inspection targeting. Kentucky is working on developing an additional method to identify workplaces that warrant Division of OSH Compliance programmed inspections.

Corrective Action Plan: Kentucky has evaluated and determined the cause of the high “in-compliance” rate for programmed inspections and provided the information in the reply above.

Recommendation 10: It is recommended that all inspections be coded with the applicable national, local, and strategic codes.

REPLY: OSHA’s recommendation is based upon their review of a very small sample of case files. Kentucky notes that OSHA did not conclude that the inspection coding completed by the Division of OSH Compliance was incorrect. Kentucky also notes that OSHA does not identify how many of the small sample of case files reviewed needed additional coding and if so, what additional codes were necessary.

Nevertheless, in response to the Enhanced FAME audit closing conference, the Division of OSH Compliance re-emphasized coding with staff.

Corrective Action Plan: This recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 11: Evaluate and determine the cause of the high citation lapse time for safety and health.

REPLY: The Division of OSH Compliance experienced massive staff turnover in the last five (5) years. Approximately twenty-one (21) of the thirty-eight (38) current compliance officers have less than five (5) years experience.

While all Division of OSH Compliance staff are outstanding, hardworking, and extremely dedicated individuals, they are relatively young and still learning how to keep up with the ever-increasing workload. Some compliance officers may carry fifteen (15) or more open inspections

including general schedules, complaints, referrals, imminent dangers, amputations, accidents, and fatalities. Ideally, in such instances, staff would be provided ample office time to compile their reports which would reduce lapse time. However, that is not the case. Even though some compliance officers carry multiple open inspections and need office time to compile her or his report, she or he may be dispatched to an inspection when need arises.

The Labor Cabinet would like to be in a position to hire additional compliance staff which could eventually help with the high caseload. Unfortunately, that is not a possibility in the current economic climate.

Corrective Action Plan: Kentucky has evaluated and determined the cause of the high citation lapse time for safety and health and provided the information in the reply above.

Recommendation 12: A tracking system for abatements should be implemented to ensure abatements are tracked and followed up on in a timely manner.

REPLY: Program Managers in the Division of OSH Compliance review their respective abatements monthly or bi-weekly depending on the program. In response to this recommendation, Division of OSH Compliance Program Managers now review their respective abatements weekly to determine which case files can be closed and which need contact.

As previously stated, OSHA's Region 4 office provided IMIS training to the Kentucky OSH Program after OSHA's Enhanced FAME audit. The training has resulted in Division of OSH Compliance staff utilizing the IMIS system to assist in abatement tracking.

Corrective Action Plan: This recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 13: Ensure data is entered and updated in the IMIS and timely corrections are made from opening to closing of inspection files. Utilize IMIS reports weekly to track and manage enforcement activity.

REPLY: Management staff in the Division of OSH Compliance have utilized the "CASES WITH CITATIONS PENDING" report for several years to monitor the length of time an inspection with citations is open. The IMIS training provided by Region 4 to the Kentucky OSH Program was extremely helpful for the Division of OSH Compliance. As a result of this training, the Division of OSH Compliance is now able to utilize additional IMIS resources to ensure accurate data entry, as well as updating, tracking, and managing enforcement activity.

Corrective Action Plan: This recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 14: Develop and implement a debt collection procedure to ensure debts are collected. In addition, IMIS generated reports should be utilized to track cases with penalties due.

REPLY: As a result of Region 4 IMIS training provided to the Kentucky OSH Program, the Division of OSH Compliance is now able to utilize additional IMIS resources to track cases with penalties due.

Corrective Action Plan: This recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 15: Whistleblower investigators should document all contacts related to the investigation in a telephone log.

REPLY: Kentucky's whistleblower investigator(s) has always had a telephone log to document contacts. Its use has been re-emphasized in response to this recommendation.

Corrective Action Plan: This recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 16: Conduct personal interviews (as much as possible) with Whistleblower complainants, witnesses and management and memorialize all interviews in signed statements. If signed statements are not possible, at a minimum make a memo to the file regarding the interview.

REPLY: In response to this recommendation, the investigator is conducting interviews and including written and signed statements in case files as much as possible.

Corrective Action Plan: This recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 17: Clearly record Whistleblower investigation findings in the final investigative report to include at a minimum: tell the story about what happened that led to the adverse action, to include protected activity; include complainant's allegations, respondent's assertions and what was found to be factual; analyze the timing of the adverse action to the protected activity; analyze whether respondent was angry at complainant for participating in protected activity; and analyze whether complainant was treated different than other employees similarly situated.

REPLY: Whistleblower investigations now include documentation in the final investigative report that addresses this recommendation.

Corrective Action Plan: This recommendation was implemented prior to the issuance of the Enhanced FAME report.

Recommendation 18: When a Whistleblower case is settled between the parties and a Kentucky OSHA settlement agreement is not used, the investigator should obtain a copy of the agreement for the file. In addition, the state should develop guidelines to review and approve all settlement agreements to ensure that the complainant's rights are protected.

REPLY: In response to this recommendation, when a Kentucky settlement agreement is not used, the whistleblower investigator(s) will request settlement documents and include them in the case file. The Division of OSH Compliance is working with the Cabinet's Office of General Counsel to develop guidelines to review all settlement agreements. All settlement agreements between the parties will be reviewed by the Office of General Counsel to ensure the overall purpose of the anti-retaliation provision is served and any chilling effect of the alleged retaliation is addressed.

Corrective Action Plan: The first portion of the recommendation was implemented prior to the issuance of the Enhanced Fame report. The Division of OSH Compliance is working with the Cabinet's Office of General Counsel to develop guidelines to review all settlement agreements.

Recommendation 19: The Consultation Program should identify the factors affecting the issuance of the reports in order to reduce the time from the closing conference to the date the employer receives the report.

REPLY: The Division of OSH Education and Training experienced great turmoil during the previous administration. The division experienced a complete change of management personnel and responsibilities, which brought the report review and issuance process to a virtual standstill. That created a backlog of reports which remained until the division's management structure was fully re-staffed and operational. The Enhanced FAME audit occurred as the last of the backlogged reports were issued and entered into the NCR system. The problem had been identified, addressed, and essentially resolved prior to the Enhanced FAME audit.

Corrective Action Plan: The factors affecting the issuance of consultation reports in order to reduce the time between the closing conference and the date the employer receives the report are identified in the reply to this recommendation.

Recommendation 20: Kentucky should develop and implement a formal program for conducting periodic internal evaluations. The procedure should assure that internal evaluations possess integrity and independence. Reports resulting from internal evaluations will be made available to federal OSHA.

REPLY: This is another recommendation that puzzles Kentucky. OSHA's "State Plan Policies and Procedures Manual," CSP 01-00-002, Chapter 7, F. The State Internal Evaluation Program states in its entirety:

"A State's program for comprehensive evaluation of its internal operations is a critical component of the monitoring system. Providing that mandates are met, States have the flexibility to design and implement programs that will fit each individual State's needs and personnel resources.

1. Each State must periodically conduct reviews of its activities under the plan, focusing on key issues and areas of concern to the State.
2. The program must provide for integrity and independence in conducting evaluations.

3. States must maintain documentation of their internal evaluations and make it available for review by Federal monitors. Requests for materials that are not in Federal OSHA files will be referred to the individual State for a decision on releasability based on the State's own laws.”

Kentucky believes it had internal evaluation procedures in place at the time of the Enhanced FAME audit. It appears that OSHA believes Kentucky’s procedures need to be written into a single document. Kentucky notes that a written, single document internal evaluation program is not required by the CPL. In fact, a written internal evaluation program is not even required by the CPL. The CPL requires documentation of internal evaluations and that is very different from a written program. During the Enhanced FAME audit, OSHA’s audit team interviewed Kentucky staff about Kentucky’s internal evaluation process. The audit team was advised of Kentucky’s internal evaluation policies and procedures. Although Kentucky **maintains** documentation associated with internal evaluations, OSHA’s audit team did not request any documentation associated with the evaluations. *The audit team could have been provided with documentation if it had been requested.*

The Division of OSH Compliance and the Division of OSH Education and Training have always approached and conducted internal evaluations on several fronts, such as internal fiscal checks and balances, employee on the job evaluations, and review of employee work product, to complement a host of other internal policies and procedures. Kentucky’s internal evaluation process had been in place for decades prior to, and during, OSHA’s Enhanced FAME audit. Kentucky’s internal evaluation process was never brought to Kentucky’s attention during any state program audit prior to the Enhanced FAME audit.

Kentucky believes the aforementioned Chapter 7 information does not offer any meaningful substance regarding the specific content of an internal evaluation program.

Corrective Action Plan: In response to the Enhanced FAME audit closing conference, the Division of OSH Education and Training developed a written “Internal Quality Assurance Program” which was submitted to Region 4 in April 2010. The Division of OSH Compliance is developing a written program.