

September 20, 2010

Michael G. Connors, Regional Administrator
U. S. Department of Labor
Occupational Safety and Health Administration
230 S. Dearborn St., Room 3244
Chicago, IL 60604

Dear Mr. Connors:

RE: Minnesota's Response to the FY 2009 Enhanced FAME Report

I have received the advance copy of the final Minnesota FY 2009 Enhanced FAME report, dated September 13, 2010, which includes detailed findings and recommendations for the MNOSHA Program as a result of the January 2010 audit. I am pleased to submit Minnesota's attached short response to that report.

I appreciated and welcomed the audit; it is an important and necessary tool to measure MNOSHA's performance. I was pleased to notice all the findings were related to paperwork and would not affect the safety and health of Minnesota workers. It is apparent our MNOSHA staff performs at a high level, which has resulted in safer workplaces in Minnesota.

As the report indicated, MNOSHA exceeds Federal OSHA in numerous areas. This is demonstrated from the Minnesota's fatality rate that has declined by 52% in calendar year 2008 from its prior five-year baseline average. Similarly, Minnesota's TRC and DART rates have decreased by 26% and 36% respectively during the past five years. These decreases are larger than the national rate of 23% TRC and 25% DART.

I appreciate the numerous positive comments contained within the report. The attached response reflects MNOSHA's response and status to each of federal OSHA's findings and recommendations; all of which have been resolved.

Sincerely,
/signed/

Steve Sviggurny
Commissioner

Att.
cc: Steven F. Witt, USDOL
Barbara Bryant, USDOL
M. Hysell, Area Director, USDOL
J. Krueger, Director, MNOSHA

**Minnesota OSHA's
Short Response
to
FFY 2009 Baseline Special Evaluation Report
(Enhanced Federal Annual Monitoring and Evaluation report – EFAME)**

Minnesota OSHA (MNOSHA) general remarks:

MNOSHA management and staff are proud of its program.

The MNOSHA program strives to conduct fair inspections, reach reasonable conclusions and prepare well-documented case files. The MNOSHA program is efficient in assigning cases, completing and reviewing cases and resolving disputed cases. MNOSHA responded to employee complaints in 3.2 days, far exceeding the agreed-upon goal of 9.0 days. When violations are found, MNOSHA completes its report and issues citations on average of three weeks sooner than federal OSHA, i.e., 23 days versus 44 days for safety inspections and 33 versus 57 days for health inspections. When employers appeal citations, MNOSHA resolves the cases an average of three months sooner than federal OSHA (139 days versus 246 days).

Throughout the program's 37-year history, MNOSHA has established an effective and cooperative relationship with its Area and Regional monitors. MNOSHA is proud of this relationship and continues to support a cooperative process, i.e., regular contact with the Area Director and quarterly monitoring meetings. The Area Director is on the agenda for all quarterly MNOSHA Advisory Council meetings. Additionally, MNOSHA was the lead agency during the I-35W bridge removal and federal OSHA cooperated fully with the program during that extensive project. MNOSHA program staff operates in a proactive, self-directed manner to fulfill program reporting obligations. As stated in this report on page 35, MNOSHA has responded timely to all federal program changes and has subsequently submitted to federal OSHA all changes or plan supplements, to the MNOSHA program for federal approval as set forth in 29 CFR 1953.6. This includes legislative changes, internal policy updates, standards adoption notices and manual changes. All MNOSHA policies, standards and manuals referenced in this report have been previously approved by federal OSHA.

MNOSHA has reviewed federal OSHA's recommendations and takes this opportunity to respond to the FAME Report. To assure the conclusions are accurate and fair, MNOSHA analyzed data and formulated responses to provide information that was absent from the report which supports and explains MNOSHA's position and application of MNOSHA policies and program elements. All recommendations have been resolved accordingly.

MNOSHA's short response to findings and recommendations
[Ref. FFY 2009 EFAME, D. findings and recommendations, pp. 7-8]

1. **Finding:** 18% of non-formal complaint responses [from employers] were classified as 'accurate' without sufficient information provided by the employer to show that abatement of the alleged hazard has occurred or that no hazard existed.

MNOSHA requirement: ADM 3.16 Administrative Procedures for Handling Complaints and Information Requests section V.A. *'an adequate response to a non-formal complaint is one in which the employer provides sufficient information to show that abatement of the alleged hazard has occurred or the lack of any hazard'*.

Status: Contrary to MNOSHA requirements.

Recommendation: Ensure an adequate response to a non-formal complaint is received by MNOSHA in which the employer provides sufficient information to show abatement of the alleged hazard has occurred or the lack of any hazard.

MNOSHA Response: MNOSHA examined its documentation requirements. The employer's responses have been considered an abatement certification, i.e., a signed notice that corrective actions have been completed or the necessary investigation has occurred. In most cases, the alleged hazards are of a non-serious nature and further documentation is not sought. In other cases, a follow-up call is made with the employer and staff may have omitted to note this in the file. The complainant is advised that the employer's response to the alleged hazards must be posted in the workplace.

MNOSHA Action/Status:

MNOSHA reviewed ADM 3.16, Complaint Handling, and updated the directive to require abatement documentation on complaint items where potential high gravity serious hazards are alleged. The directive will be forwarded to federal OSHA in a plan supplement.

2. **Finding:** For fatality investigations, the form OSHA-170 (Accident Investigation Summary) was not filled out in adequate detail.

MNOSHA requirement: MOOSE Manual *'Investigation Description (Abstract). Provide a brief description of the event. The purpose of this summary is to provide readers (including those outside of MNOSHA) with a general idea of what happened.'*

OSHA requirement: Fatality/Catastrophe Investigation Procedures CPL 02-00-137 section V.A.1 *'states are required to complete the OSHA- 170 (see paragraph XVI.B) only for fatalities, this is OSHA's means for counting fatalities investigated'* And section XVI.B.2 *'The OSHA-170 narrative should not be a copy of the summary provided on the OSHA-36 pre-investigation form. The OSHA-170 narrative must comprehensively describe the characteristics of the worksite; the employer and its relationship with other employers, if relevant; the employee task/activity being performed; the related equipment used; and other pertinent information in enough detail to provide a third party reader of the narrative with a mental picture of the fatal incident and the factual circumstances surrounding the event.'*

Status: MNOSHA requirements are contrary to Federal OSHA requirements.

Recommendation: Ensure that the OSHA-170 narrative contains enough detail to provide a third party reader of the narrative with a mental picture of the fatal incident and the factual circumstances surrounding the event.

MNOSHA Response: Federal OSHA requires that the OSHA-170 be submitted and saved as final as soon as MNOSHA becomes aware of a workplace fatality and determines that it is within its jurisdiction, even if most of the data fields are left blank. Often, the information that the OSHI has gathered at this time is not complete. MNOSHA enters the fatal incident details in the inspection file. MNOSHA uses the OSHA-1AC, Narrative, particularly Section F, Summary of Complaint, Referral, Accident or Followup Findings to document the details of the fatal incident and the factual circumstances surrounding the event. MNOSHA's MOOSE system allows users to access the incident details by simply opening the file and reading the narrative. Entering identical data into the 170 is redundant. However, MNOSHA will revise its MOOSE Manual to specify that the OSHA-170 narrative be updated later in the investigation and that it contain enough detail to provide a third party reader of the narrative with a mental picture of the fatal incident and the factual circumstances surrounding the event.

MNOSHA Action/Status:

For every fatality case MNOSHA supervisors complete a Significant Activity Report prior to issuance of citations (or closing of the file if no citations are issued). This report includes a

description of the event and a summary of the investigation findings. In response to the audit findings, MNOSHA supervisors were instructed to update the OSHA-170 form when they prepare the Significant Activity Report.

3. **Finding:** Data initiative inspections were conducted without information contained in the file to explain the compliance officer's discussions on site as it pertained to the injury and illness information reviewed during inspections, including information showing the compliance officer's evaluation of the company's OSHA 300 logs.

MNOSHA requirement: MNOSHA Field Compliance Manual chapter III section F.c.1. *'Copy the 300 Log summary totals for each of the preceding three calendar years. Discuss the company's lost workday injury rate (LWDIR) and significant injuries and illnesses with opening conference attendees to determine if there are specific work areas to be included in the inspection.'*

OSHA requirement: FIRM CPL 2.103 Chapter III Section B.1.a: *'The OSHA 1-A Form, or its equivalent, shall be used to record information relative to the following at a minimum' – 'Comment on S&H program to the extent necessary, based on CSO's professional judgment, including penalty reduction justifications for good faith.'*

Status: Contrary to MNOSHA and contrary to Federal OSHA requirements.

Recommendation: Ensure that compliance officer's discuss the company's LWDIR to determine if there are specific work areas to be included in the inspection and document the evaluation as it relates to the on-site activity.

MNOSHA Response: MNOSHA disagrees. Each year MNOSHA uses Data Initiative Safety Inspections as a priority. MNOSHA completes all of its safety data initiative inspections each year throughout the state in accordance with ADM 2.1, Scheduling, and the Field Compliance Manual (FCM).

The reference to the excerpt of the FCM quoted in this concern is incorrect. The language quoted is found in Chapter III, section F.3.c.(1). It should be noted that section F is titled "Opening Conference," 3. is titled, "Other Opening Conference Topics," and c. (1) is specific instructions for checking all records required by the Act. This excerpt of the Field Compliance Manual is not, in any way, limited to or related to the scheduling of data initiative inspections.

MNOSHA investigators undergo detailed training on the Field Compliance Manual and are accompanied on field inspections by senior level staff as well as their supervisor prior to being allowed to conduct independent inspections in the field. This extensive training and competency checks ensure that the investigator is following all aspects of the Field Compliance Manual.

Each investigator is trained to review the 300 log in all inspections where OSHA 300 log data is required to be reviewed and collected. As part of the review of the 300 log information, certain areas or activities of an establishment may warrant a more scrutinizing look by the investigator, and the investigators are trained to use the 300 logs as a tool in this manner.

Additionally, investigators are trained to discuss the data contained in the 300 log with the employer in order to obtain any additional information or insights the employer may have and to answer any of the employer's 300 log related questions. Similarly, investigators are trained to discuss the use of cameras and monitoring equipment, explain obligations of the General Duty Clause, inquire about the employer's familiarity with OSHA and many other topics during the opening conference. However, investigators are not required to document every topic of discussion that occurs, as this would be an impractical and over-burdensome requirement of professional field investigators.

MNOSHA Action/Status:

MNOSHA's current practices are not contrary to MNOSHA requirements. Investigators are trained to discuss data contained in the 300 log with employers in order to obtain any additional information or insights the employer may have and to answer any of the employer's 300 log related questions. MNOSHA will continue to follow its FCM and scheduling directive with regard to data initiative inspections.

4. **Finding:** Non-serious (other-than-serious) violations are classified as situations where an accident or exposure, resulting from a violation of a standard, would normally cause only minor injury or illness requiring one-time-only first aid treatment and subsequent observation. Recordable injury or illness is not a criterion in determining if a violation is classified as serious or not.

MNOSHA requirement: MNOSHA -Field Compliance Manual Chapter IV B.2. and Chapter IV B.1.c

OSHA requirement: FIRM CPL 2.103 Chapter III Section C.2.a. and Chapter III Section C.2.b.

Status: Contrary to Federal OSHA requirements

Recommendation: Ensure the determination for violation classification as "other-than-serious" are independent of OSHA recordability requirements.

MNOSHA Response: MNOSHA disagrees. Federal OSHA appears to base this recommendation on a sentence in MNOSHA's FCM that states a serious violation is one which "would cause a recordable injury or illness." Federal OSHA takes this sentence out of context. MNOSHA's determination of whether a violation is serious or non-serious does not rely solely on whether or not an injury is recordable. MNOSHA bases its determination on both the statutory definition and a section of the FCM that elaborates quite extensively on factors to consider whether a violation is serious. Minn. Stat. § 182.651, subd. 12, defines a serious violation as "*a violation of any standard, rule, or order other than a de minimis violation which is the proximate cause of the death of an employee. It also means a violation of any standard, rule, or order which creates 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 a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*" The federal OSHA recommendation to separate classification from recordability is therefore unnecessary.

MNOSHA Action/Status:

MNOSHA's determination of whether a violation is serious or non-serious does not rely solely on whether or not an injury is recordable. MNOSHA bases its determination on both the statutory definition and a section of the FCM that elaborates quite extensively on factors to consider whether a violation is serious. MNOSHA will continue to follow its FCM.

5. **Finding:** In 41% of the cases reviewed, penalty reduction recommendations for good faith credit were applied at levels higher than warranted.

MNOSHA requirement: MNOSHA Field Compliance Manual Chapter VI Section 4.a.

Status: Contrary to MNOSHA requirements.

Recommendation: Ensure good faith credit is applied and documented appropriately in the case files.

MNOSHA Response: MNOSHA refutes federal OSHA's assertion that good faith credits were incorrectly applied in 15 of 37 inspection files. Chapter VI, Section B. 4.a.1 and 2 rely on the investigator's discretion to determine the difference between incidental deficiencies (30% credit), and more than incidental deficiencies (20% credit), of an employer's safety and health program. Investigator discretion is further relied upon to determine if an employer's safety and health program, either formal or informal, is not clearly implemented or effective or is a canned type program (10%). Zero percent credit is given where a willful citation is issued or the employer has no safety or health program.

MNOSHA contends that in 10 of the 15 cases identified by federal OSHA, the investigator did document satisfactorily their justification of the good faith credits applied. However, MNOSHA does recognize that documentation was not satisfactory in 14% of the cases reviewed.

MNOSHA Action/Status:

MNOSHA developed refresher training for all field staff on determining and documenting good faith credits. Refresher training was completed in September 2010 staff meetings.

6. **Finding:** Of the 57 cases reviewed, abatement documentation for corrective action following inspections was not requested by MNOSHA in any circumstance.

MNOSHA requirement: ADM 3.4B Review of Progress Reports (Abatement Verification) section B.2.d. *'Unless, specified in the citation, it is not generally a requirement for employers to submit these documents.'* And section A.8. *'Those violations which are not observed by the OSHI as abated shall be marked "Abatement Documentation Required" on the MNOSHD 1-B following the guidelines in the Case File Prep Manual.'*

OSHA requirement: CPL 02-00-114 Abatement Verification Regulation, 29 CFR 1903.19 – Enforcement Policies and Procedures section VII E *'...all willful and repeat citations require abatement documentation, such as written, videographic, or photographic evidence of abatement...the employer must provide abatement documentation for any serious violation for which the Agency indicates on the citation that such abatement documentation is required. OSHA policy is that all high gravity serious citations will require abatement documentation. Where, in the opinion of the Area Director, abatement documentation is not required for a high gravity serious violation, the reasoning will be noted in the case file.'*

Status: Contrary to MNOSHA requirements and contrary to Federal OSHA requirements.

Recommendation: Ensure violations have been corrected by obtaining proof of the corrective action to ensure employee protections are in place following inspections.

MNOSHA Response: MNOSHA did not adopt, and is not required to follow, 1903.19, but rather follows its own Abatement Verification rule, Minn. Rules 5210.0532, which was adopted March 30, 1998. The rule requires documentation (e.g., physical proof) when the citation indicates it is necessary. MNOSHA inspectors are instructed to discuss abatement methods with employers during all closing conferences. The discussion includes feasibility, timeframe for completion, as well as the need to submit progress reports. The citation contains language describing the need for progress reports and the citation package which the employer receives includes a Mandatory Progress Report form and copies are also available on the MNOSHA web site

MNOSHA has obtained abatement certification from employers, yet lacked documentation sought by federal OSHA. Certification includes a signed notice from the employer that corrective actions have been completed and the information in the progress report is accurate. Additionally, the threat of additional penalties is described in Minn. Stat. §182.667 for making false statements in any certification or document filed with the agency.

In practice, this is not entirely inconsistent with federal OSHA, which does not require documentation on all items, just certain violations, such as willful, repeat and designated serious items.

MNOSHA Action/Status:

MNOSHA has its own abatement verification rule, Minn. Rules 5210.0532, and corresponding abatement verification directive, ADM 3.4. The directive was reviewed and updated and will be forwarded to federal OSHA in a plan supplement. Updates include the addition of definitions for Certification of Abatement and Documentation of Abatement and when each is required. Documentation of Abatement is required for all citations with a combined severity and probability rating of E5 or greater for all inspections with an opening conference date of August 20, 2010, or later.

7. **Finding:** In 31% of the 13 fatality inspection files and in 21% of the 25 files reviewed where serious hazards [violations] were identified and abatement was classified as Corrected During Inspection (CDI), "No Abatement Documentation Required" the specific information outlining the corrective action observed by the compliance officer was not documented appropriately in the case file.

MNOSHA requirement: ADM 3.4B Review of Progress Reports (Abatement Verification) section B.2.d. *'Equipment related and all program-related (e.g., crane inspections, training, competent person, etc.) violations will always require employer certification of abatement.'*

OSHA requirement: CPL 02-00-114 Abatement Verification Regulation, 29 CFR 1903.19 – Enforcement Policies and Procedures Section VII E

Status: Contrary to MNOSHA requirements and contrary to Federal OSHA requirements.

Recommendation: Ensure Corrected During Inspection (CDI), "No Abatement Documentation Required" is being applied appropriately and the specific information outlining the corrective action observed by the compliance officer is documented in the case file.

MNOSHA Response: MNOSHA did not adopt and is not required to follow, 1903.19, but rather follows its own Abatement Verification rule, Minn. Rules 5210.0532, which was adopted March 30, 1998. MNOSHA understands the importance of hazard abatement and its concurrent documentation needs. MNOSHA has obtained abatement certification from employers, yet lacked documentation sought by federal OSHA. MNOSHA has begun the development of new abatement documentation guidelines for its staff. The guidelines will outline what documents an employer must provide to show abatement as well as the case file documentation desired. MNOSHA will also address the case file documentation needed when hazards are abated while inspectors are on site.

MNOSHA Action/Status:

MNOSHA has its own abatement verification rule, Minn. Rules 5210.0532, and corresponding abatement verification directive, ADM 3.4. The directive was reviewed and updated and will be forwarded to federal OSHA in a plan supplement. Each supervisor covered this directive in their September 2010 staff meetings. All lead staff has been instructed when reviewing case files to ensure that Corrected During Inspection is adequately documented.

8. **Finding:** Petition for Modification of Abatement (PMA) requests are granted without employer's providing all the required information in the requests.

MNOSHA requirement: MN Regulation 5210.0542 Subpart 6 and ADM 3.5 Extension of Abatement Dates – PMA Processing

OSHA Requirement: 29 CFR 1903.14a and CPL 2.103 Chapter IV Section D.2.

Status: Contrary to MNOSHA requirements and contrary to Federal OSHA requirements.

Recommendation: Ensure PMA requests contain all the required information before accepting the requests.

MNOSHA Response: MNOSHA did not adopt and is not required to follow, 1903.19, but rather follows its own Abatement Verification rule, Minn. Rules 5210.0532, which was adopted March 30, 1998. MNOSHA accepts the finding that some PMAs were granted based on incomplete information, most often via the Mandatory Progress Report. However, in many cases the employer included information similar to what would be contained in a PMA request. MNOSHA notes that the Mandatory Progress Report form must be posted in the workplace for employees to see and a copy must be given to all affected employee representatives. In addition, Minn. Rules 5210.0542 requires MNOSHA to wait 10 days before responding in order to give employees the time to notify MNOSHA of any concerns.

MNOSHA Action/Status:

MNOSHA has its own abatement verification rule, Minn. Rules 5210.0532, and corresponding extension of abatement dates – PMA processing directive, ADM 3.5. The directive was reviewed, updated and issued on Aug. 20, 2010, and will be forwarded to federal OSHA in a plan supplement. As part of this directive, a PMA form was developed and is included in the citation package mailed to an employer. PMA requests will no longer be accepted on progress reports.

9. **Finding:** Minnesota On-Site Consultation conducts consultation visits and VPP evaluation visits concurrently with MNSTAR [VPP] staff funded with the 23(g) grant.

OSHA Requirement: CSP 08-02 FY 2009 Instructions for (1) Integrated 23(g) State Plan grants and 21(d) On-Site Consultation Cooperative Agreements; (2) 23(g) Public Employee Only State Plan Grants; and (3) 23(g) State Plan Grants without 21(d) Funding – Appendix A – Exhibit I – Cooperative Agreement only allows 21(d) Consultants to conduct consultation visits.

Status: Contrary to 21(d) Cooperative Agreement

Recommendation: Ensure Consultation's functions are conducted by 21(d) funded employees. Ensure 23(g) cooperative activities are conducted by 23(g) grant personnel.

MNOSHA Response: WSC will revise its current practice.

MNOSHA Action/Status:

The Minnesota Department of Labor and Industry (DLI) is making changes to its MNSTAR and MNSHARP programs, which will increase program oversight and accountability. MNOSHA will implement direct time charging on time sheets for tracking 23g SHARP and 21d Consultation activity.

10. **Finding:** For corporate VPP applications, one application is being submitted and for both the corporate and other locations.

MNOSHA requirement: MNOSHA's ADM 3.28 MNSTAR Voluntary Protection Program Section 1: All written applications for consideration as a MNSTAR participant must meet the criteria in Federal OSHA Instruction CSP 03-01-003 Voluntary Protection Program (VPP) Policy and Procedures Manual.

OSHA Requirement: Federal OSHA Instruction CSP 03-01-003 Voluntary Protection Program (VPP) Policy and Procedures Manual, Chapter V (I) applications must be submitted for each worksite.

Status: Contrary to MNSTAR and Federal OSHA requirements.

Recommendation: Ensure each worksite applying for MNSTAR participation submits an application applicable to each worksite.

MNOSHA Response: WSC will require corporate applications to VPP to include individual site applications, for each site within the corporation that wishes to apply for VPP.

MNOSHA Action/Status:

The Minnesota Department of Labor and Industry will implement some organizational changes that will increase VPP program accountability and oversight. MNOSHA will ensure that worksites applying for MNSTAR participation submit an application for each site.

11. **Finding:** An employer working as a contractor at a worksite covered by the Process Safety Management standard did not submit an application with the appropriate VPP Process Safety Management (PSM) Application Supplement. The MNSTAR evaluation team did not have a PSM level-one auditor participate in the on-site review.

MNOSHA requirement: MNOSHA's ADM 3.28 MNSTAR Voluntary Protection Program Section 1: All written applications for consideration as a MNSTAR participant must meet the criteria in Federal OSHA Instruction CSP 03-01-003 Voluntary Protection Program (VPP) Policy and Procedures Manual and provide all information required in the VPP application/information kit.

OSHA Requirement: 29 CFR 1910.119 Process Safety Management of Highly Hazardous Chemicals applies to contractors performing turnaround on process equipment. Federal OSHA Instruction CSP 03-01-003 Voluntary Protection Program (VPP) Policy and Procedures Manual requires these employers to submit the PSM Application Supplement with the application and also requires a PSM level one auditor to participate in the on-site review.

Status: Contrary to MNSTAR and Federal OSHA requirements.

Recommendation: Ensure all applications of contractors working at worksites covered by 29 CFR 1910.119 contain the PSM Application Supplement. Ensure the MNSTAR evaluation team consists of at least one PSM level one auditor.

MNOSHA Response: Subsequent MNSTAR evaluations of contractors at PSM sites will include a level one auditor for PSM.

VPP contractors at PSM covered sites have submitted the "Supplement B" as part of their annual self evaluation.

MNOSHA Action/Status:

The Minnesota Department of Labor and Industry will implement some organizational changes that will increase VPP program accountability and oversight; this issue will be addressed accordingly. All initial evaluations and recertification evaluations of contractors will include a PSM level one auditor to assess the PSM program. MNOSHA currently has three staff that meet the PSM level-one auditor status and they will be used in future evaluations.