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RON CURRY
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Deputy Secretary

October 18, 2010

Mr. William A. Burke, Acting Regional Administrator
Occupational Safety and Health Administration
525 Griffin Street, Room 602
Dallas, TX 75202-5024

Dear Mr. Burke:

As requested in your letter of September 13, 2010, we hereby submit our formal response to the final report of the FY 2009 Federal Annual Monitoring and Evaluation (FAME) of the New Mexico Occupational Health and Safety Bureau. As you will see, most of the corrective actions to address the recommendations contained in the report have already been implemented. A few will take more time, but with the continued assistance of the Region VI staff, we are confident that the identified issues will be quickly resolved.

Please do not hesitate to contact us if you have any questions or comments regarding our corrective action plan.

Sincerely,
/Signed/

Ron Curry
Secretary

Enclosure: New Mexico's Response to OSHA's 2009 Federal Annual Monitoring and Evaluation (FAME) Report

Cc: Steven Witt, Director, Cooperative and State Programs
Barbara Bryant, Director, Office of State Programs

**NEW MEXICO'S RESPONSE TO OSHA'S
2009 FEDERAL ANNUAL MONITORING AND EVALUATION (FAME) REPORT
OCTOBER 18, 2010**

I. INTRODUCTION

The New Mexico Occupational Health and Safety Bureau (OHSB) appreciates the opportunity to respond to the federal OSHA evaluation of OHSB's program conducted in February 2010. The evaluation was conducted by a six-person team from the OSHA Region VI office in a cooperative and professional manner and involved all 27 OHSB staff members. While the team's evaluation revealed several areas where OHSB can improve its procedures and operations, it also highlighted a number of areas where our performance is excellent. The evaluation team provided pertinent information during and immediately following their review that enabled us to implement procedural improvements quickly.

II. OHSB RESPONSE TO FINDINGS AND RECOMMENDATIONS

Finding 1: Of the 11 OHSB staff members interviewed regarding complaints, 9 (82%) were aware of the 5 working day goal for responding to complaints by inspection.

Recommendation: New Mexico OHSB should ensure that all compliance staff members are aware of the NM FOM timeframe goals for responding to complaints.

Response: As discussed in the FAME Report, New Mexico receives and processes very few complaints each year. As a result, each complaint receives direct attention by compliance program management to ensure rapid assignment and investigation. The Compliance Program Manager or his designee assigns the investigation to a Compliance Officer (CO) and provides direct instructions on investigation requirements, including the timeframe for completion. New Mexico has historically exceeded established goals for responding to complaints as reflected in State Activity Mandated Measure 1 (SAMM 1). The FY2009 data show that the average number of days to initiate an inspection of a complaint was 3.6 days and that all complainants were notified on time.

The timeframes for investigating complaints has been contained in the written performance evaluation for each CO since 2005 and is reviewed with each CO at least twice each year.

Corrective Action: The OHSB Compliance Program Manager reviewed the 5-day goal with all compliance staff at the monthly compliance meeting which immediately followed the evaluation in February 2010. OHSB management will continue to review response goals during meetings, bureau training and individual performance reviews.

Status: Corrective action is complete.

Finding 2: None of the 12 fatality case files closed in FY 2009 included documentation regarding contact with victims' family members. Contact did take place in several cases, but was not documented.

Recommendation: New Mexico OHSB should ensure that family members are contacted early on and at appropriate times during fatality investigations, as provided in the New Mexico Field Operations Manual (NM FOM), and that these contacts are documented in the case files.

Response: New Mexico did not adopt the April 2005 federal OSHA directive CPL 02-00-137 that contains procedures for contacting family members. OHSB notified federal OSHA of our decision at that time and our response was accepted. Prior to the 2009 revision of the NM FOM (effective in November 2009), OHSB policies did not include the procedures followed by federal OSHA for contacting victims' family members. Prior to that, compliance staff contacted family members when it was determined that useful information might be obtained during an investigation.

Corrective Action: OHSB implemented a policy change which included letters and phone contact with victims' family members during all fatality investigations as part of the NM FOM revision in November 2009, after the period covered by this OSHA evaluation. The policy remains in effect. All documents received or created as part of a fatality investigation are included in case files.

Status: Corrective action is complete.

Finding 3: There were several issues regarding case file documentation in general that apply to all cases we reviewed, except the 12 fatality cases which were fully and accurately documented.

Recommendation: New Mexico OHSB should ensure that:

- 1) Each case file contains a diary sheet that documents all actions taken, when they were taken, and by whom.

Response: OHSB case files have historically included a tracking sheet containing dates for standard actions and a diary sheet documenting actions taken following citation issuance. However, the diary sheet was not normally used to document all actions taken, including those prior to issuance, while the case was still open.

Corrective Action: The need for better use of diary sheets was also detected during the State Internal Evaluation Program (SIEP) and a recommendation was made regarding diary sheets. OHSB has since developed a tracking sheet for use by compliance officers during and following inspections. COs have been instructed in the use of the diary sheet and inclusion in all case files was implemented as of August 2010.

Status: Corrective action is complete.

Recommendation: New Mexico OHSB should ensure that:

2) Written employee statements are included in all case files.

Response: All OHSB inspections include employee participation and discussion during the walk-around to ensure an understanding of processes and related hazards. Where potential violations are identified, comments made by employees and employer representatives are documented to support citations. Comments have typically been written within field notes and on field worksheets which are then used as supporting documents to citation items.

Separate, written interview statements are included in those non-fatality case files where the need for a written statement is deemed necessary to establish the existence of a violation. Written statements are taken in most, if not all, cases where potential willful violations are identified during the inspection. A written interview statement is not necessary to prove a violation where other sufficient evidence is obtained, which is often the case. The low rate of vacated and reclassified citations in New Mexico provides support for the legal sufficiency of violations cited by OHSB.

OHSB understands that information on potential violations that are not apparent during other inspection phases may be gained during an interview. For that reason, we will continue to exercise diligence in identifying the need for interview statements during inspections. However, we do not agree that separate written interview statements should be taken for every inspection and included in every case file. Such a practice would unnecessarily prolong some inspections, taking valuable time from conducting additional inspections and removing employees from hazards.

OHSB will not, at this time, institute a policy change to require written interview statements in every case file. The federal FOM Chapter 3, VII.I.5.b states "Interview statements of employees or other persons shall be obtained whenever CSHOs determine that such statements would be useful in documenting potential violations." The New Mexico FOM contains the same language providing the opportunity for Compliance Officers to determine the usefulness of such statements. We are unaware of any OSHA policy which requires written statements for every inspection. However, should compelling information become available to suggest that such practice is warranted, OHSB may consider instituting such a policy.

Corrective Action: No corrective action is required.

Status: Complete.

Recommendation: New Mexico OHSB should ensure that:

3) Employee exposure to hazards is documented.

Response: For case files involving citations, the documentation of exposure must be contained in the case file. This documentation should be noted on the worksheets used during inspections and a specific statement regarding employee exposure should be included in the case file.

Corrective Action: The need for more complete documentation of employee exposure was also noted during the execution of OHSB's 2010 State Internal Evaluation Program. The Compliance Program Manager responded to a similar recommendation from the SIEP by conducting training sessions that emphasized the requirement to fully document employee exposure and by ensuring that case file reviews include checking the adequacy of such documentation. This issue will be reviewed periodically during internal compliance officer training sessions and future SIEP reviews.

Status: On-going.

Recommendation: New Mexico OHSB should ensure that:

4) Employer knowledge is documented.

Response: For case files involving citations, the documentation of employer knowledge must be contained in the case file. This documentation should be noted on the worksheets used during inspections and a specific statement regarding employer knowledge should be included in the case file.

Corrective Action: During internal compliance officer training sessions, the Compliance Program Manager will continue to emphasize the need for proper documentation of employer knowledge. He will also ensure that case file reviews include checking the adequacy of such documentation.

Status: On-going.

Recommendation: New Mexico OHSB should ensure that:

5) The four elements for a general duty clause violation are documented on the OSHA-1B form: identify the hazard to which employees are exposed; state how the hazard is recognized (including industry recognition); state how the hazard would cause death or serious physical harm; identify the feasible abatement methods.

Response: OHSB case files that involve violations of the general duty clause do have documentation pertaining to the four elements of a general duty clause violation. However, not all citations issued for general duty clause violations contained an adequate description of the four elements.

Corrective Action: All Compliance Officers have been instructed to adequately address each of the four elements of general duty clause violations in the citations. Supervisors will continue to monitor each case where general duty violations are identified to ensure that all necessary evidence is obtained and documented in the alleged violation description.

Status: On-going.

Recommendation: New Mexico OHSB should ensure that:

6) OSHA-300 log data is documented and entered into the IMIS for all appropriate case files.

Response: OHSB agrees that the OSHA-300 log data was not properly documented and entered into the IMIS for all appropriate case files. This was also noted in our 2010 SIEP findings. We did, however, find that Compliance Officers reviewed injury and illness information during inspections and recommended recordkeeping citations where appropriate.

Compliance Officers would be more likely to perform this task if there was a recognizable benefit that justified the time and effort required.

Corrective Action: All Compliance Officers have been instructed to obtain, document, and enter OSHA-300 log data when it is required.

Status: Corrective action is complete.

Finding 4: Our case file reviews found that union contact information was not always documented. In one case, the OSHA-1 form was marked “non-union”, but the mobile site survey states that the company had union representation. We also found that documentation of union participation in the inspection and subsequent actions is not always included in the case file.

Recommendation: OHSB should ensure that union representation is identified in the case file and documented on the OSHA-1 form, and that union representatives are appropriately involved during inspections and any subsequent review actions.

Response: OHSB strives to obtain and record accurate information in all case files regarding union participation at work sites inspected by OHSB and acknowledges that union representation was incorrectly documented in at least one case. When OHSB determines that employees at a job site do have union representation, the representatives are afforded an opportunity to participate in the inspection. OHSB always requires employers to post notices for all review actions, thus providing a notification to employees and employee representatives and affording them an opportunity to participate.

Corrective Action: OHSB will continue to stress to Compliance Officers the requirement to identify and document union representation and to appropriately involve union participation during inspections. We will continue to follow established policies for the posting of notices of meetings, and will continue to assure that the employer attests to posting of notices.

Status: Corrective action is complete.

Finding 5: Citation lapse time has been a focus of State efforts for several years. The safety lapse time has been successfully reduced, but health remains an issue.

Recommendation: OHSB should continue efforts to further reduce health citation lapse times.

Response: The details provided in the FAME report contain an accurate description of the actions taken to address this issue. This issue was identified by the Region VI State Plans Program Manager several years ago and has been discussed in every quarterly review since that time. Corrective action was initiated when the issue was first identified and has been on-going since that time.

In our 2010 SIEP we identified a response time issue with the Salt Lake Technical Center (SLTC) that contributed to extended lapse times in FY2010. The average turn-around time for obtaining diagnostic results from the SLTC is 27 days. One of the reasons SLTC gave for the longer than usual response times was that in order to handle “a large influx of samples from the Gulf Oil Spill” SLTC “had to divert 4 of ... 8 organic analysts to this project, causing delays in processing our normal sample load.”

Corrective Action: OHSB will continue to utilize IMIS reports to identify open cases with prolonged lapse times in order to minimize delays in citation issuance.

We will continue to perform a monthly analysis of lapse times for individual Compliance Officers and will continue to use lapse times as a major factor during employee performance evaluations. We have instituted progressive administrative discipline for Compliance Officers whose performance in this area is substandard.

In addition, we are investigating alternative sources for performing analyses of samples obtained during health inspections in an attempt to find a provider with quicker response times than the SLTC.

Status: On-going.

Finding 6: Our case file reviews of 57 closed cases with identified violations found that 98.3% (221/225) of the violations were properly classified. Violations that were not properly classified include injuries/illnesses of asphyxia, systemic poisoning, and electrical shock noted as minimal severity.

Recommendation: OHSB should ensure that Compliance Officers appropriately assess the severity of all injuries and illnesses identified as violations.

Response: In our closing conference with the audit team, we were provided with the specific cases where improper classification was detected. We subsequently reviewed these case files and conducted specific training for Compliance Officers in response to this review. We do take a minor exception to the wording of the finding. Specifically, we believe the errors were in the descriptions of the potential injuries and illnesses that could have resulted from exposure to the cited hazards, not improper classification of the violations themselves.

We also believe that the accuracy of our violation classification process is validated by the data in the Interim State Indicator Report (SIR), Item C.8 titled "Violations Reclassified %." When OHSB performance is compared to federal performance in this area, New Mexico consistently achieves lower rates for violations reclassified. For example, according to the SIR report contained in Appendix E of the FAME report, the percentage of violations that were reclassified by federal OSHA in FY 2009 was 4.8% versus the New Mexico rate of 1.1%.

Corrective Action: OHSB has conducted training for Compliance Officers to ensure that potential injuries and illnesses associated with identified hazards are appropriately described.

Status: Corrective action is complete.

Finding 7: In 6 of the 84 case files (7%), we identified hazards that were not addressed.

Recommendation: OHSB should ensure that potential hazards are assessed through appropriate sampling, and that all hazards are addressed through either a citation or, if no standard exists and the elements of a general duty violation are not present, a hazard alert or general duty clause letter sent to the employer.

Response: This finding did not establish the presence of violations that were not cited, only that there may have been hazards present that were not addressed.

We agree that the ability to properly identify hazards varies among Compliance Officers, who have different levels of training and experience. We are confident that overall, our Compliance Officers are competent in identifying hazards. Inspections are assigned to Compliance Officers based upon their experience and ability to recognize hazards in a specific industry.

Corrective Action: We will continue to evaluate Compliance Officers' competency in hazard identification through individual case review and monthly analysis of citation rates. We will continue to evaluate the experience level and training histories of our Compliance Officers and attempt to enroll them in appropriate training courses to improve their ability to properly recognize and cite hazards.

Status: On-going.

Finding 8: Our review of penalty calculations found that in 50 of 54 cases (93%) with penalties, the penalties were properly calculated. However, Compliance Officers did not uniformly complete the violation calculation worksheet for assessing penalties.

Recommendation: OHSB should ensure that Compliance Officers complete the “Violation Calculation” guide on the back of the OHSB Field Worksheet, to ensure uniformity in assessing severity and probability for penalty calculations.

Response: We acknowledge that some variance exists among Compliance Officers in the interpretation of severity and probability for penalty calculations, but it is important to note that we have occasionally encountered unintended consequences when relying strictly upon the “Violation Calculation” guide. As a result, we consciously decided not to implement a strict policy of utilizing the guide for penalty calculations in every case. We will, however, continue to utilize the guide as just that – a guide – and will encourage its use as a training tool. We will continue to follow the NM FOM in determining penalties. We believe it provides guidance for considering the factors used to calculate penalties that is at least as effective as the “Violation Calculation” guide.

Corrective Action: No corrective action is required.

Status: Complete.

Finding 9: We did find 9 of 57 (15%) case files with at least one violation with a longer than necessary assigned abatement date.

Recommendation: OHSB should ensure that, in accordance with NM FOM Chapter 5, Section II.C.2.k, “The abatement period shall be the shortest interval within which the employer can reasonably be expected to correct the violation.”

Response: We acknowledge that some Compliance Officers have developed patterns or habits for determining abatement periods which may not always take into account the shortest reasonable intervals. We also acknowledge that quick abatement of hazards is paramount to achieving our goal of providing a safe and healthful workplace for all employees in New Mexico.

Although the SIR data for “Abatement Periods for Violations” (Appendix E, Item C.4) may not be a direct correlation to the finding above, we believe the comparison of New Mexico data with federal data validates our practices related to abatement dates. When compared to federal numbers, we consistently achieve substantially lower results for abatement periods “greater than 30 days for safety violations” and

“greater than 60 days for health violations.” For example, the percent of safety violations with an abatement period longer than 30 days for FY 2009 shows the federal rate was 17.6% and the New Mexico rate was only 3.3%. The percent of health violations with an abatement period longer than 60 days shows the federal rate was 10.0% while New Mexico OHSB’s rate was 1.0%.

Corrective Action: The Compliance Program Manager has emphasized to Compliance Officers the need to consider abatement periods for violations based on the circumstances in each individual case in order to achieve optimum results in abatement time intervals.

Status: Corrective action is complete.

Finding 10: Our case file reviews found that the reasons why a violation was changed as the result of an informal administrative review were not always documented in the case files.

Recommendation: OHSB should ensure that the reasons why violations and/or penalties are changed at the Informal Administrative Review are documented in the case file.

Response: OHSB questions the advisability of always documenting the reasons for changing violations and/or penalties. The settlement process often involves compromises that are reached after consideration of a variety of factors, including a desire to ensure that workplace hazards are abated in a timely manner, acknowledgement of the fact that the existence of a particular violation is not always “cut and dried”, and an obligation to ensure that limited resources are utilized wisely. Requiring documentation of the specific factors considered as part of the settlement process will increase the likelihood that parties not directly involved will misunderstand how the process worked and will take elements of an agreement out of context, which could result in unintended consequences.

Corrective Action: On a case-by-case basis, OHSB managers will utilize their best judgment in deciding when to document the reasons for the decisions made during informal administrative reviews.

Status: Corrective action is complete.

Finding 11: All case files followed the provisions of the VPP Manual. We found, however, that the annual reports were missing in most of the files.

Recommendation: OHSB should ensure that the Voluntary Protection Program (VPP) case files are complete, including annual reports wherever they are maintained. One suggestion could be to create an electronic file that would be accessible to appropriate staff at any location at any time.

Response: The Compliance Assistance Specialists responsible for the administration of the VPP program have offices in our Albuquerque office and maintain the VPP files there. When annual reports are completed, they are delivered to our Santa Fe office for review and approval by the Bureau Chief and then they are returned to the appropriate Compliance Assistance Specialist in Albuquerque.

Corrective Action: Any missing annual reports will be obtained and filed. We will institute a practice of creating and posting electronic copies of the annual reports.

Status: On-going.

Finding 12: There are apparent inconsistencies in language and interpretation within the State's private interviewing regulations themselves. (Affecting 18(e) determination)

Recommendation: OHSB should continue efforts to clarify the apparent inconsistencies within the private interviewing regulations (11.5.1.21.E NMAC).

Response: OHSB acknowledges the inconsistency in language and interpretation of the private interviewing regulations that were created by the Environmental Improvement Board. As noted in the evaluation report, OHSB attempted to resolve the issue in 2009 by proposing statutory changes, but was unsuccessful.

Corrective Action: OHSB has requested legal assistance in drafting and presenting appropriate corrections of the regulations to the Environmental Improvement Board. The proposed regulatory changes will be presented to the Environmental Improvement Board for consideration in FY2011.

Status: On-going.
