



COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

Courtney M. Malveaux
COMMISSIONER

POWERS-TAYLOR BUILDING
13 SOUTH THIRTEENTH STREET
RICHMOND, VA 23219
PHONE (804) 371-2327
FAX (804) 371-6524
TDD 711

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Mr. John M. Hermanson
Regional Administrator, Region III
U. S. Department of Labor – OSHA
The Curtis Center
170 South Independence Mall West
Suite 740
Philadelphia, PA 19106-3309

SUBJECT: FFY 2009 Baseline Special Evaluation Report (Enhanced Federal Annual Monitoring and Evaluation Report (EFAME))

Dear Mr. Hermanson:

Thank you for your letter of September 13th transmitting the above EFAME report for Virginia's review. Before providing some limited comments, let me thank you and your staff for the professional manner in which this special evaluation was conducted and for the continuing and longstanding excellent support and assistance the Virginia Occupational Safety and Health (VOSH) program has received from Region III.

As you know, your regional and area office staff have worked closely together with the VOSH program over the years to conduct extensive onsite office evaluations on a rotating basis of our four regional offices. We have always found those evaluations to be very timely and helpful in identifying areas where improvements were needed, and also found valuable your confirmation of local efforts that we took to enhance safety and health protection for Virginia's employees and employers.

The VOSH program prides itself on maintaining equally strong enforcement and cooperative program elements, and with your help the VOSH program has been able to achieve many great things that benefit Virginia's employees and employers:

- injury and illness rates that are consistently well below the national average in both private and public sector employment, including a 20% reduction in Virginia's total recordable injury and illness rate between FFY 2006 and 2009;

- a 48% reduction in fatal accidents investigated by VOSH since 2005 (2009: 33 fatalities; 2008: 39; 2007: 44; 2006: 55; 2005: 64);
- Virginia unique regulations in confined space hazards in the construction and telecommunications industries; overhead high voltage line safety; fall protection in steel erection; reverse signal operation in construction and general industry; and compliance with manufacturers instructions for vehicles, machinery, tools and equipment in general industry, construction, maritime and agriculture;
- a national top ten ranking in the rate of state occupational safety and health inspections per number of employers¹;
- 88% of all strategic goals, State Activity Mandated Measures (SAMM) and State Indicator Report (SIR) measures were met or partially met as noted in the EFAME;
- the highest overall on-time complaint response rate in the country;
- an exemplary one of a kind Apprenticeship Program for VOSH Compliance Safety and Health Officers (CSHO), Industrial Hygienists and Safety and Health Consultants;
- a thriving Virginia Voluntary Protection Program (VPP) which now has 43 members; and a Safety and Health Achievement and Recognition Program (SHARP) with 38 members; and
- an annual safety and health conference which is now entering its 16th successful year of outreach to employees, employers, unions, associations and government.

With regard to our initial comments below on the EFAME, we understand the difficulties that you and your staff encountered in undertaking this enhanced evaluation and realize that certain limitations and timelines were placed on your conduct of the evaluation that were not of your making. Please be assured that any procedural comments or recommendations detailed below are not directed at you or your staff.

As requested, the VOSH program will provide you with a formal response to Virginia's EFAME report with a corrective action plan within 30 days. In the interim, we provide the following recommendations and comments regarding the special evaluation process.

Recommendations on the Special Evaluation Process

1. In past evaluations, Region III staff has always provided the VOSH program with their notes and case file review forms at the close of the onsite visit so that VOSH staff could review the files and clear up any questions or confusion about findings with Region III staff, and be able to take the information to our field staff for direct action to immediately correct any deficiencies or offer praise for a job well done. At the close of the onsite visit for the enhanced evaluation we asked for the same courtesy and were refused. We were only able to obtain the actual documentation used to support the draft and final versions of the EFAME report after the draft had already been forwarded to the national office.

¹ "Death on the Job The Toll of Neglect", 19th edition, April 2010, AFL-CIO.

In addition, it has been normal practice in previous annual evaluations for your staff to conduct a closing conference at the end of the onsite evaluation so that the results of the case file reviews, areas of concern and positive findings could be reviewed with VOSH staff so that we could give prompt attention to the areas identified. No substantive closing conference was permitted at the end of the enhanced evaluation onsite visit.

As you will note from our initial comments on the EFAME below, it is unfortunate that past successful practices implemented by Region III, which were in the best spirit of government transparency, were not followed in this enhanced evaluation. As with any OSHA or VOSH inspection, errors of small or even large import can occur in a monitoring or audit situation because of the sheer volume of the undertaking and time constraints placed on the process from outside sources. Unfortunately, it appears that the final Virginia EFAME report contains some errors and misstatements that could have been avoided. It serves neither the VOSH program nor federal OSHA to have evaluation documents made available to the public that contain such errors.

The ultimate purpose of any evaluation or audit should be to provide feedback to the party being monitored in a timely manner so that corrective action can be taken as quickly as possible. The combination of a closing conference and your staff's notes and case file review forms are the best and most detailed source of information that can be provided to a state plan to improve its program, but that information was not made available until many months after the onsite visit. We now find ourselves receiving a final evaluation report for FFY 2009 at the end of FFY 2010 with no significant opportunity to take corrective action that could have effected FFY 2010 operations. This is a situation that all parties would be wise to avoid in the future.

Recommendation: State plans should be provided with the opportunity of a closing conference at the end of the onsite visit to address substantive concerns, procedural oversights and recognize positive accomplishments; and should be immediately provided copies of the monitor's notes and case file review forms so that any negative trends can be analyzed and quickly addressed.

2. Many of the findings and recommendations in the EFAME report were based on case file reviews, but the findings do not quantify the extent of the problem identified, nor do they indicate if the findings were statewide or were limited to one or two regions. Instead the findings contain phrases like "did not always" or "were not always" or in some instances leave the reader with the impression that VOSH never completed a required procedure. As you know, an error that occurred in twenty percent of the 129 case files reviewed would be much more significant than one that occurred in 2% of case files reviewed.

Recommendation: If a finding in the annual evaluation report is based on documentation from case file reviews, the finding should quantify the extent of the problem identified (e.g., in 10 of the 50 (20%)

case files reviewed where procedures required that the employer's OSHA 300 log data be collected, a copy of the log was not contained in the case file. In addition, if the problem appeared to be limited to one or two regions, the finding should indicate that as well.

VOSH Initial Response to EFAME

The Virginia EFAME contains 17 findings and 18 recommendations. As noted above, the VOSH program will provide you a formal response within 30 days with a corrective action plan.

Although we have not had the opportunity to finish our formal response to the EFAME, we were able to conduct some initial analysis of the case file review forms which we eventually received well after the onsite visit. We have also reviewed the actual inspection files in developing our preliminary responses to the items below:

Recommendation 9: **OSHA 300-logs for three years must be obtained from the employer and reviewed by compliance officers, pursuant to VOSH's FOM, while on-site during inspection activity.**

VOSH Response: VOSH agrees that certain case files, primarily in one regional office, did not contain copies of the OSHA 300 logs as required by the VOSH FOM. In one region 22 case files were reviewed by OSHA staff, with 15 of the 22 case files (68%) identified as not containing OSHA 300 logs as required. VOSH has determined that 10 of the 15 case files (67%) were properly identified by OSHA as not having the required copy of the OSHA 300 log. **Please note that this regional trend could not have been identified and addressed directly at the source without a thorough review of federal OSHA case file review notes by VOSH staff.**

However, in 5 of the 15 case files (33%) identified by OSHA as not having the required copy of the OSHA 300 log, VOSH determined that the employers were not required by regulation to have an OSHA 300 log because of the number of employees in the company or because the employer had been in business for less than one year.

This issue did not appear to be a significant problem in any of the other regional offices. In fact, one other region noted that the only inspection case file identified as not having a copy of the OSHA 300 log did not have one because the employer had failed to fill one out and that a citation was issued to the employer.

Recommendation 15: **Copies of signed settlement agreements must be maintained in case files.**

VOSH Response: This recommendation and the finding that supported it were not found to be justified by a review of the actual case file documentation. Of the case files identified by OSHA as not having a copy of the signed settlement agreement when one was required, VOSH did not find a single example to support OSHA's finding. In the cases identified by OSHA, citations were issued and **not contested** by the employer, so no changes were made to the violations or penalties and no settlement agreement was required or entered into.

While we anticipate that further detailed analysis will confirm many of OSHA's monitoring findings, and perhaps refute others, we are also confident that those findings do not indicate any substantial shortcoming in the VOSH program. It is Virginia's firm belief, and statistical analysis proves, that the VOSH program is a fully effective state plan for occupational safety and health whose dedicated staff do a remarkable job, particularly in difficult budgetary times, of protecting Virginia's employees and employers from occupational hazards in a very effective and efficient manner.

Thank you again for this initial opportunity to provide our comments and recommendations in response to the enhanced evaluation process and Virginia's 2010 FFY EFAME report. We look forward to an ongoing cooperative and mutually supportive relationship with Region III. Please accept our sincere thanks for the valuable services you have provided to the Commonwealth of Virginia's employees and employers.

Sincerely,

/signed/

Courtney M. Malveaux
Commissioner

CMM/jww

Enclosures

cc: Assistant Commissioner Bill Burge, VOSH Directors