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October 28, 2010

Marthe B. Kent  
Regional Administrator  
Occupational Safety and Health Administration  
JFK Federal Building, Room E340  
Boston, MA 02203

Dear Ms. Kent:

The State of Vermont would like to thank Region 1 OSHA staff for the comprehensive review of the Vermont Occupational Safety and Health program (VOSHA). The staff was professional and worked diligently to complete the audit. I would also like to express my thanks to Region 1 for agreeing to assist Vermont with the correction of the findings.

In the spring of 2009, Region 1 staff offered to conduct an audit of the Vermont State Plan program. VOSHA agreed to this audit so we could correct any weaknesses that were discovered. This audit was conducted on June 15, 2009 and was based on a random sample of FY 2008 closed cases. By the time we received the report, the Federal Fiscal year 2009 was complete and it was too late to impact the data in the 2009 case files. These 2009 case files were the ones selected for the E-FAME audit.

During FY 2010 VOSHA put into effect many of the recommendations from the June 2009 audit. As a result of the voluntary audit, VOSHA has worked diligently to correct the findings and is today well on the road to correcting the issues raised in this E-FAME report.

VOSHA appreciates the work of the Region 1 staff in both the voluntary and the E-FAME audits. We will work closely with the Region to correct any remaining issues.

VOSHA requests that in future audits/monitoring that OSHA develop a comprehensive approach that could be used by all regions. Additionally we request that there be sufficient time allowed for audit staff to give a comprehensive out briefing. This would include a discussion of the findings and the specific case files and violations so that the state can adequately prepare a response.

**Overview of Corrective Action Plan:**

- VOSHA conducts staff meetings once a month. Attendance is required for the 6 Safety CSHOs, the 4 Health CSHOs, 1 CAS and the two management staff. Topics are selected in advance and all staff are required to review the topic and come to the meeting prepared to discuss it.

The 4 specific FOM chapters that are mentioned in this report (Chapter 4 Violations; Chapter 5 Case file preparation; Chapter 6 Penalties and debt collection; and Chapter 11 Imminent Danger, Fatality, Catastrophe and Emergency Response) will be set as staff meeting topics beginning with the November staff meeting. Because Chapters 4, 5 and 6 address systemic issues, they will be the first ones scheduled. Chapter 11 will be the last topic reviewed with all CSHOs because Vermont has so few fatalities. In the interim, however, VOSHA management will review Chapter 11 with the 2 senior CSHOs.



The schedule for staff meeting topics will be as follows:

- o November: Chapter 4 Violations
  - o January: Chapter 6 Penalties and debt collection
  - o February: Chapter 5 Case file preparation
  - o March: Chapter 11 Imminent Danger, Fatality, Catastrophe and Emergency Response
- Chapter 7 Post citation procedures and abatement verification covers issues that are handled by the VOSHA Director or the Compliance Chief. They will review this chapter by the end of November.
  - VOSHA will bi-weekly run specific NCR and Micro to Host reports to determine the program's status in regards to the recommendations in this report.
  - By November 30, 2010 VOSHA will enroll all CSHO's in the OSHA 1310 course, enroll 1 CSHO in the OSHA 3300 PSM course and submit a request to the Regional Administrator to have the OSHA 2450 brought to Vermont.

**Areas of Success:**

While every program has room for improvement, I do feel it is important to point out the measures where VOSHA has met or exceeded the reference standard:

- o With regard to measure SAMM # 6, the percent of serious, willful, and/or repeat (S/W/R) violations verified, VOSHA has worked to improve the data entry for this measure. This measure has improved over the years, and this improvement continued from FY 2008 to FY 2009.
- o The percent of programmed inspections with S/W/R violations in Vermont is above the national data in both safety and health, as detailed in SAMM #8.
- o The percent of programmed safety inspections with S/W/R violations for FY 2009 is at 76.88, an increase over the state's percent of 60.95 in FY 2008; this exceeds the national data of 58.6 percent.
- o Vermont's S/W/R percentage for safety has remained consistently above the national average over the last six years.
- o The percent of programmed health inspections with S/W/R violations has been above the national average in four of the last five fiscal years. In 2008, the state recorded 55.56 percent of inspections with S/W/R violations. In 2009, this statistic improved to 57.14 percent, well above the national percentage of 51.2 percent. VOSHA's performance on this measure continues to reflect the state's successful targeting of its worst safety and health offenders and VOSHA's referral to Vermont's successful safety programs.
- o VOSHA reduced the Days Away Restricted or Transferred (DART) from the Strategic Plan baseline for 6 targeted industries. These include Construction, Transportation & Warehousing, Food Manufacturing, Plastics & Rubber Products Manufacturing, Nonmetallic Mineral Product Manufacturing and Wholesalers, Nondurable Goods.

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**Concern related to comparison of Vermont's penalties:**

It should be noted that based on the most recently available demographic data (2008) Vermont has a total of 23,337 private sector businesses. Of this total, 89.9% have 19 or fewer employees. The complete demographic breakdown is:

<u>Employees</u>	<u># of businesses</u>	<u>Percent</u>
1 - 19	20,967	89.9
20 - 49	1,634	7.0
50 - 99	433	1.9
100 - 249	226	1.0
250 +	77	0.2

As this chart shows, 99.8% of Vermont businesses are eligible for a Size reduction, and a disproportionate number are eligible for the maximum size reduction.

While these numbers are not unique to Vermont, comparing VOSHA's penalty statistics to Federal OSHA in aggregate guarantees that the OSHA penalties will be higher than Vermont's. To my knowledge no direct comparison has been made with Federal OSHA states with similar demographics and I therefore remain concerned about what appears to be an unbalanced comparison.

In closing, please find enclosed a more detailed response to the audit findings and our Corrective Action Plan. Should you have any questions or concerns, please don't hesitate to contact myself or Robert McLeod.

Sincerely,  
/signed/

Valerie Rickert  
Acting Commissioner

VR:lc

Enclosure

cc: Robert McLeod  
Stephen Monahan

## **Corrective Action Plan Narrative**

Nine out of **19 State Activity Mandated Measures (SAMM)** standards were not met – % of complaints/referrals responded to within 1 day (imminent danger); % of S/W/R violations verified (private and public); average no. of calendar days from opening conference to citation issuance; average violations per inspections with violations (S/W/R and other-than-serious); average initial penalty per serious violation-private sector only; % of total inspections in the public sector; and % of 11(c) investigations completed within 90 days.

We strongly recommend that VOSHA improve its performance with respect to the nine standards of the SAMM report that have not been met.

### STATE RESPONSE:

There are 4 SAMM measures (SAMM 3, 4, 6 and 13) where the reference data is 100%. For the balance of the measures, the states are measured against federal data. While I believe that 100% is the appropriate goal for these measures and that Vermont should strive to achieve that goal, would it not be appropriate to also provide state data from Federal OSHA states as a comparison.

To specifically answer each of the 9 SAMM measures that were not met, I enclose the following:

### **SAMM 4. Percent of complaints and referrals responded to in 1 day – Imminent Danger.**

The complaints in this measurement were incorrectly classified as Imminent Danger. None of the complaints VOSHA received in FY2009 were Imminent Danger. That said, VOSHA will closely monitor all complaint/referral classifications and respond in an appropriate and timely manner.

### **SAMM 6. Percent of S/W/R violations verified.**

VOSHA will continue to use the NCR and Micro to Host reports to monitor abatement activity. Cases will not be closed until hazard abatement has been provided by the employer. If necessary, monitoring or follow up inspections will be scheduled.

### **SAMM 7. Average number of calendar days from opening conference to citation issuance - health.**

Vermont improved from FY 08 to FY09 resulting in the state being only 2.7 days longer than Federal OSHA. For the period ending 9/30/10, SAMM 7 shows that VOSHA Safety is 15 days and VOSHA Health is 12 days below the Reference/standard.

### **SAMM 9. Average violations per inspection with violations S/W/R and OTS.**

VOSHA will continue to work to bring the average number of violations closer to the reference standard. Based on other recommendations in this report, VOSHA will conduct training at its monthly staff meeting on the FOM section dealing with violation grouping. All CSHOs are required to review their photos to find any additional hazards. The VOSHA Compliance Chief and VOSHA Director also review the photos.

(Oct. 28, 2010 attachment to Response)

While this measure is below Federal OSHA, VOSHA's performance on SMM 8 Percent of programmed inspections with S/W/R violations is 18% higher for safety and 3% for health.

**SMM 10. Average initial penalty per serious violation – private sector.**

Since the voluntary audit conducted by Region 1 staff in June 2009, VOSHA has mandated that violation criteria be properly evaluated and assessed to address OSHA's concerns. The average penalty is now \$1,065. VOSHA will review of the appropriate FOM chapters with staff and continue to have supervisory review of penalty assessment to ensure compliance.

**SMM 11. Percent of total inspections in the Public Sector.**

This measure fluctuates from year to year and is based on a running three year average. The SMM for FY 2010 shows Vermont's percentage of Public Sector inspections is 9.32% with a reference/standard of 9.3%.

**SMM 13. Percent of 11 (c) investigations completed in 90 days.**

Beginning in September 2009 is the first time that VOSHA has had two Discrimination Investigators. During FY 2009, one of the Discrimination investigators was in training. Our investigators are safety CSHO's that also have inspection duties. We do not have the benefit of dedicated staff to conduct these investigations.

A review of the discrimination IMIS report shows that VOSHA conducted 5 discrimination investigations in FY 2009 and that all were closed in less than 90 days. During this period of time VOSHA was incorrectly using enforcement forms to open discrimination investigations. We believe this may have caused duplications that were not closed causing what appeared to be untimely closure.

**State Indicator Report (SIR) standards were not met – private sector serious safety/health violations; private sector average penalty for other-than-serious safety/health violations; private sector safety inspections/100 hrs.; private sector penalty retention; % of violations reclassified; and % of penalty retention.**

We strongly recommend that VOSHA improve its performance with respect to the eight standards of the SIR report that have not been met.

STATE RESPONSE:

**C.3.A. Private Sector Serious Safety Violations**

**C.3.B. Private Sector Serious Health Violations**

VOSHA will continue to work to bring the average number of violations closer to the reference standard. Based on other recommendations in this report, VOSHA will conduct training at its monthly staff meeting on the FOM section dealing with violation grouping. All CSHO's are required to review their photos to find any additional hazards. The VOSHA Compliance Chief and VOSHA Director also review the photos.

It Should be noted that on this report VOSHA's percent of programmed inspections with violations is 21% higher than the reference standard for Safety and 27% for Health.

(Oct. 28, 2010 attachment to Response)

**C.5.A. Private Sector Average Penalty for Other-than-Serious Safety Violations**

**C.5.B. Private Sector Average Penalty for Other-than-Serious Health Violations**

VOSHA will review the appropriate section of the FOM on penalty assessment for both Serious and OTS violations

**C.6.A. Private Sector Safety Inspections Per 100 Hours**

VOSHA will be evaluating this finding to determine the cause. Once the cause has been determined, VOSHA will take appropriate steps.

**C.9. Private Sector Penalty Retention Standard is not met.**

VOSHA strives to retain at least 60% of its assessed penalties at informal conferences, but in some cases reduces penalties to avoid the cost of litigation. Some penalty reductions recognize the financial investment an employer has made to correct the violations and assure that they do not reoccur. In some instances this reflects training contracted to private sources.

**E.2. Percent of Violations Reclassified (Review Procedures)**

**E.3. Percent of Penalty Retention (Review Procedures)**

These two measures were the result of one case that had to be dismissed due to a procedural error. This error was fixed by a statutory change in June 2009 that allowed service of citations by certified mail.

VOSHA believes that we could more effectively monitor these measures if the SIR was provided to the state more often or was made a Micro to Host report that could be run as needed.

*Based on statistical comparison of enforcement performance with other State Plans and Federal OSHA, VT's **average violations per initial inspection** and **average current penalty per serious violation** marked below the data for all State Plans and Federal OSHA.*

We recommend that VOSHA improve its performance with respect to the highlighted [enforcement performance] areas to come more into line with the Federal system.

STATE RESPONSE:

**Average Violations Per Initial Inspection**

VOSHA will continue to work to bring the average number of violations closer to the reference standard. Based on other recommendations in this report, VOSHA will conduct training at its monthly staff meeting on the FOM section dealing with violation grouping. All CSHO's are required to review their photos to find any additional hazards. The VOSHA Compliance Chief and VOSHA Director also review the photos.

While this measure is below Federal OSHA, VOSHA's performance on SAMM 8 Percent of programmed inspections with SW/R violations is 18% higher for safety and 3% for health.

(Oct. 28, 2010 attachment to Response)

### **Average Current Penalty Per Serious Violation**

Since the voluntary audit conducted by Region 1 staff in June 2009, VOSHA has mandated that violation criteria be properly evaluated and assessed to address OSHA's concerns. The average initial penalty is now \$1,065. VOSHA will review of the appropriate FOM chapters with staff and continue to have supervisory review of penalty assessment to ensure compliance.

**Case file deficiencies** included absence of CSHO's field notes; inadequate documentation of abatement verification; and failure to document labor organization notification of the informal conference. The CSHOs were not meeting the FOM diary sheet requirements. Documents were not in the order established by Appendix C of ADM 03-01-005.

We recommend that all VOSHA staff members review and follow Appendix C of ADM 03-01-005, which provides detailed information regarding "Inspection Case File Organization." This directive provides detailed instructions about which materials should appear on the left of the case file and which materials should appear on the right side of the file, and the specific order in which these documents should be placed.

#### STATE RESPONSE:

Based on a voluntary audit conducted by Region 1 personnel in June 2009 and based on reviews of FY 2008 closed cases, VOSHA management took appropriate steps to provide additional information in the case file diary. An electronic diary has been developed so CSHO's can record all contacts with the employer, employees or their representatives. These diaries will be placed in the case files when they are compiled.

VOSHA will develop case file checklists for both programmed and unprogrammed safety and health inspections.

VOSHA will review ADM 03-01-003 and Appendix C, but respectfully submits that we will continue to organize case files as best meets VOSHA's needs.

In regard to CSHO field notes, the Regional staff was advised in 2009 that Vermont cannot protect these records under the Vermont Public Records Act. I have been informed that Federal CSHO field notes are protected from disclosure for FOIA requests. Vermont CSHO's transfer the information from their field notes to the case files. Our notes are not part of the file because of the Vermont Public Records Act.

VOSHA is reviewing with Department Counsel to determine whether CSHO field notes should be included in the case file.

**Case file** review found that in several instances the OSHA-7 Complaint Form was not contained in the case files. A few files did not contain copies of the letter sent to the complainant advising of the outcome of the inspection.

VOSHA must send all response letters to complainants advising them of the results of the inspections or investigations resulting from their complaints. In accordance with the FOM, the letters must include an appropriate response detailing the outcome of the inspection or investigation for each alleged complaint item.

(Oct. 28, 2010 attachment to Response)

STATE RESPONSE:

VOSHA will place a copy of the VOSHA-7 complaint form that is given to the employer in the case file. Although VOSHA sends letters to all complainants advising them of the results of their complaint, some case files lacked a copy of the letter. VOSHA will ensure that all response letters are placed in the case files.

VOSHA will develop a check list for safety and health programmed and unprogrammed inspections.

**Fatality investigation case files 1:**

*(A) Discussions between CSHOs and supervisors regarding investigations were not well documented.*

VOSHA must ensure that important discussions between CSHOs and supervisors regarding fatality investigations are documented in the case file diary sheet.

*(B) The CSHO did not reconstruct the scene of the accident.*

In addition to discussions between CSHOs and their supervisors, all information relevant to the fatality investigation must be documented in the case file diary sheet in accordance with the Field Operations Manual (FOM) (Chapter 5, Section X), which states that: "All case files shall contain an activity diary sheet, which is designed to provide a ready record and summary of all actions relating to a case. It will be used to document important events or actions related to the case, especially those not noted elsewhere in the case file ...."

*(C) There was no evidence that an initial letter and a copy of the citations had been sent to the victim's family.*

VOSHA must adhere to the FOM, Chapter 11, Section II.G. that discusses the requirements to follow with regard to contact with families of victims during an inspection.

*(Other finding: the CSHO assessed the probability "lesser" when it should have been rated "greater")*

**Fatality investigation case files 2:**

*VOSHA cited the incorrect standard (cited 1910.26(c) (2) (iv) but should have cited 1910.26(c) (3) (i)), and the case file did not contain notes reconstructing the scene of the accident.*

We recommend VOSHA review and follow the FOM, Chapter 11, Section II.E.2., which discusses potential items to be documented in the case file, such as how and why the incident occurred; the physical layout of the worksite; sketches/drawings; measurements; video/audio/photos to identify sources; and whether the accident was work-related.

STATE RESPONSE:

VOSHA will conduct training on FOM Chapter 11 at a future staff meeting. CSHOs will be required to review the chapter and be prepared to discuss. A check list will be developed and CSHOs will be required to review Chapter 11 when they do a fatality investigation. This review will be necessary due to the low number of fatal accidents that occur in Vermont each year.

In regards to the finding that VOSHA cited the incorrect standard, this accident occurred between 9:00 PM and 7:00 AM the following morning. No one witnessed the accident. VOSHA cited the violations we knew we could prove.

(Oct. 28, 2010 attachment to Response)

VOSHA's **average of 2.4 violations cited** per initial inspection is below the Federal OSHA average of 3.1 violations.

VOSHA's average violations cited per inspection should increase to align with Federal OSHA's average of 3.1 per initial inspection.

STATE RESPONSE:

VOSHA will continue to work to bring the average number of violations closer to the reference standard. Based on other recommendations in this report, VOSHA will conduct training at its monthly staff meeting on the FOM section dealing with violation grouping. All CSHOs are required to review their photos to find any additional hazards. The VOSHA Compliance Chief and VOSHA Director also review the photos.

While this measure is below Federal OSHA, VOSHA's performance on SAMM 8 Percent of programmed inspections with S/W/R violations is 18% higher for safety and 3% for health.

Case file review revealed several **hazard identification issues**: all apparent violations were not cited or some **[standards]** were misclassified in the citations sent to the employer (p.28).

VOSHA should review the pictures taken by CSHOs more closely and do more research and also should train and network with appropriate staff throughout region to improve hazard recognition and referencing of the correct standards when hazards are identified.

STATE RESPONSE:

The issue of reviewing case file photographs was raised in the Region 1 Voluntary audit of FY 2008 case files. Beginning in FY 2010 photographs are closely reviewed for additional hazards by the CSHO and by the VOSHA Compliance Chief and the VOSHA Director.

We found that CSHOs **grouped serious violations** that should not have been grouped, which also reduces penalties. Nine out of 137 (6.5%) serious violations were grouped as serious. Of these nine grouped citations, we found that four were grouped incorrectly.

To group serious violations appropriately, VOSHA CSHOs must adhere to the guidelines established in the FOM for grouping. Chapter 4, Section X of the FOM lists the situations that normally call for grouping violations.

STATE RESPONSE:

VOSHA will, as part of its ongoing training, have CSHOs and managers review the appropriate sections of the FOM regarding violation grouping. It should be noted that although 6.5% of the violations reviewed were grouped, only 4 (3.5%) were incorrectly grouped. VOSHA believes that this finding is subjective. The cited section of the FOM states:

**B. Grouping.**

(Oct. 28, 2010 attachment to Response)

When a source of a hazard is identified which involves interrelated violations of different standards, the violations may be grouped into a single violation. The following situations normally call for grouping violations:

**1. Grouping Related Violations.**

If violations classified either as serious or other than serious are so closely related they may constitute as a single hazardous condition, such violations shall be grouped and the overall classification shall normally be based on the most serious item.

All four of the violations were on bench grinders. The CSHO grouped the work rest and tongue guard on each bench grinder.

*The [case file] review revealed that, in a number of cases, the CSHOs did not correctly assess **the gravity of the violation**, and erred on the side of assessing lower probability and severity than warranted, thus reducing the overall penalties.*

VOSHA must ensure that CSHOs use penalty calculations that conform to the FOM. The minimum and maximum penalties are discussed in Chapter 6.II.C. and D, respectively. Section III discusses the four factors to take into consideration: 1) The gravity of the violation; 2) Size of the employer's business; 3) The good faith of the employer; and 4) The employer's history of previous violations. VOSHA staff should also review the Gravity-Based Penalty (GBP) section in the FOM, which is discussed in Chapter 6.III, sections 3, 4 and 5.

STATE RESPONSE:

The issue of improper penalty calculation was raised in the Region 1 voluntary audit of 2008 case files in June 2009. By the time VOSHA received the audit report it was FY 2010. Effective with cases opened after October 1, 2009 VOSHA implemented the suggestions provided by the Region resulting in an average serious penalty to \$1065. VOSHA will as part of its ongoing training have CSHO's and managers review the appropriate sections of the FOM regarding penalty calculations and specifically the gravity of violations.

*[Case file reviews found that] a few **violations were incorrectly classified** as "other" rather than "serious."*

We recommend that VOSHA staff review Chapter 4, Section II of the FOM, which discusses the factors that determine whether a violation is to be classified as serious, and also Chapter 4, Section IV of the FOM, which discusses the factors that determine whether violations should be classified as other-than-serious.

STATE RESPONSE:

VOSHA has instructed CSHO's about the appropriate classification of violations. Any violation that would normally be classified as serious will require a complete explanation if it is being cited as OTS.

VOSHA will as part of its ongoing training have CSHO's and managers review the appropriate sections of the FOM regarding violation classification.

(Oct. 28, 2010 attachment to Response)

*Six of the case files involving **unions** did not contain any **documentation** to indicate that the union had been sent a copy of the citations. In addition, **field notes**, which likely contained the information obtained from the employees during interviews, were not kept in the files.*

VOSHA should adhere to the FOM, Chapter 5, Section XI.B.2 by sending a notification to the unions of the citations sent to the employer and retaining a copy of such in the case file. In addition, VOSHA should review the FOM, Chapter 5, Section XII.A.2 regarding maintaining field notes in the official case files.

STATE RESPONSE:

VOSHA did in fact send a copy of the citations to the union, but failed to place the documentation in the case file.

VOSHA will develop a case file checklist for both programmed and unprogrammed safety and health inspections. All checklists will include union related items.

In regard to CSHO field notes, the Regional staff was advised in 2009 that Vermont cannot protect these records under the Vermont Public Records Act. VOSHA has been informed that Federal CSHO field notes are protected from disclosure for FOIA requests. Vermont CSHO's transfer the information from their field notes to the case files. Our notes are not part of the file.

VOSHA is working with Department counsel to determine whether field notes should be part of the case file despite the Vermont Public Records Act.

*We found some cases which lacked **sufficient evidence** to legally support the **standards** cited or the actions taken by VOSHA to delete citations. In other cases, the CSHO cited the incorrect standard or assessed the penalties incorrectly*

VOSHA must review and follow the FOM, Chapter 4 which discusses the evidence necessary to support violations.

STATE RESPONSE:

VOSHA will schedule training on FOM Chapter 4 at a monthly staff meeting. CSHO's will be required to review the chapter and be prepared to discuss it.

Case file diaries now reflect the reasoning for any changes to the cited standards at the informal conference.

*The data in SAMM #6 shows that VOSHA fell short of the goal of 100 percent for **verifying S/W/R violations abated** in a timely manner, with a year-end percentage of 93.81 in the private sector and 93.55 percent in the public sector.*

We strongly recommend that VOSHA work harder to ensure timely abatement of serious, willful or repeat violations which helps ensure that workers are protected from injuries and illnesses.

STATE RESPONSE:

(Oct. 28, 2010 attachment to Response)

VOSHA will continue to use the NCR and Micro to Host reports to monitor abatement activity. Cases will not be closed until hazard abatement has been provided by the employer. If necessary, monitoring or follow up inspections will be scheduled.

*Some of the case files we reviewed lacked **proper evidence of abatement**. (A)-(B) We found that 13 out of the 76 cases (17%) we reviewed did not contain adequate documentation of abatement. Some of these case files had been closed without any documentation of adequate proof of abatement.*

(C) In addition to providing written verification of hazard abatement, employers must also provide relevant documents, plans and progress reports.” In some cases, we noted that the file did not contain such documents, such as written hazard communication programs, evidence of training, and emergency action plans, that were required to be provided by the employer.

(A) VOSHA must adhere to the directives in Chapter 7 of the FOM, Section IV (b), which also states the “case file remains open throughout the inspection process and is not closed until the Agency is satisfied that abatement has occurred. If abatement was not completed, annotate the circumstances or reasons in the case file and enter the proper code in the IMIS.”

(B) VOSHA should also ensure that Chapter 7 of the FOM, Section XV is adhered to. This section states: “The closing of a case file without abatement certification(s) must be justified through a statement in the case file by the Area Director or his/her designee, addressing the reason for accepting each uncertified violation as an abated citation.”

(C) We recommend that VOSHA thoroughly review and adhere to Chapter 7 of OSHA’s FOM on Abatement Documentation, particularly Section B, which relates to Adequacy of Abatement Documentation. As stated in that section, examples of documents that demonstrate that abatement is complete include “(a) copy of program documents if the citation was related to a missing or inadequate program, such as a deficiency in the employer’s respirator or hazard communication program.”

STATE RESPONSE:

VOSHA management will review Chapter 7 of the FOM to assure that violations have been properly and adequately abated. VOSHA explains to all employers that they are to provide proof of abatement and the steps they are taking to assure that the violations do not reoccur.

VOSHA sends abatement instructions to employers with their citations, but will also include the abatement template that OSHA sends to employers.

*Some of the case files we reviewed lacked **proper evidence of abatement**. Case files related with **Petitions for Modification of Abatement (PMA)** were missing the abatement completion date or interim protections to be followed during the PMA.*

VOSHA must also ensure that all documentation related to Petitions for Modification of Abatement (PMA) are contained in the relevant case files, such as copies of the petition itself, as well as VOSHA’s approval (or denial) of the PMA, and any written objections by employees to the PMA. See Chapter 7 of the FOM, Section III for more information on PMA,s.

STATE RESPONSE:

(Oct. 28, 2010 attachment to Response)

VOSHA has received two documents from Region1. These documents, the PMA tracking sheet and the PMA letter to employers will be put into use with applicable Vermont specific modifications.

*There were a few cases in which the proper **[informal conference] procedures** were not followed (e.g., missing original citation following violation reclassification; inadequate documentation on the reason for citation deletion, on the informal settlement agreement or abatement; or held after the 20-day period).*

(A) VOSHA should review and follow the FOM, Chapter 7, which discusses the procedures to follow for informal conferences and informal settlement agreements. It states that the informal conference will be conducted within the 20 calendar day contest period. In addition, this section discusses the requirement that an affected employee or his representative shall be given the opportunity to participate, and VOSHA must be sure to follow this direction.

(B) The VOSHA supervisor who conducts the informal conference must be sure to document reasons for granting penalty reductions (and extended abatement dates) on the case file diary sheet.

#### STATE RESPONSE

VOSHA will review FOM chapter 7 concerning informal conferences and informal settlement agreements. Based on the Region 1 voluntary audit, the case diary sheet reflects the discussions during the informal conference and any reasoning for changes to violation classification and penalty reductions. Case file diaries now reflect the reasoning for any changes to the cited standards at the informal conference

Requests for PMA's are documented in the diary sheet.

VOSHA sends employers a copy of the notice to affected employees as part of the citation package. There are instructions for employers regarding the rights of affected employees and/or their representative.

VOSHA CSHO's will be instructed to notify employers of these rights at the closing conference. Any request for an informal conference must contain a statement from the employer that the employee notice has been posted.

*When we conducted the on-site review, VOSHA was in the process of having legal counsel establish a formal policy on **debt collection procedures**, and provided us with the draft "VOSHA Penalty Collection Protocol," currently being formalized.*

We advise VOSHA to follow through in establishing formal debt collection procedures based on those set forth in Chapter 6 of the FOM. State Plan programs must have "an effective debt collection mechanism in place" in accordance with the State Plan grant requirements established in OSHA Directive 09-02 (CSP-02). This debt collection mechanism must also be documented in the State Plan. VOSHA procedures, once finalized, should be sent to the regional office for approval and then will become part of VOSHA's State Plan.

#### STATE RESPONSE:

(Oct. 28, 2010 attachment to Response)

VOSHA has had a debt collection procedure in place since January 2009. The final procedure is as follows:

### **VOSHA PENALTY COLLECTION PROCEDURE**

- I. SEND CITATION & PENALTY (C&P) BY CERTIFIED MAIL
  - A. Tickle for follow-up in 30 days from the date of mailing.
    1. If green card has not been returned, check status on [www.usps.com](http://www.usps.com)
      - a. if/when website site shows delivery, print out the record for the file.
    2. If C&P refused, returned as unclaimed, or “delivered” back to us, prepare and mail service packet for the sheriff.
      - a. tickle for follow-up in 10-15 days
  - B. Make sure the file contains documentation of the date and the means by which the C&P was served on the Respondent;
    1. the signed green card, or
    2. the sheriff’s return of service, or
    3. the printout from the USPS website
  - C. Tickle for follow-up 25-30 days after C&P served on Respondent
    1. If C&P paid, process the check
    2. If C&P contested, file moves into “in contest” mode and is forwarded to the prosecuting attorney
    3. If C&P not paid and not contested, then place into collection mode
      - a. send “now deemed final order of the board” letter (see attached)
      - b. tickle for follow-up in 20 days.
  - D. ASAP after day 20, turn the file over to the Staff Attorney for collection.
    1. photocopy extra set for attorney: (in the alternative, copy entire file)
      - a. the C&P
      - b. the VOSHA 51
      - c. any record of service attempts and the final proof of service
      - d. the “now deemed final order of the board” letter
- II. WHEN THE VRB ISSUES A BOARD ORDER—AFTER HEARING OR PURSUANT TO SETTLEMENT
  - A. Tickle for follow-up 40-45 days after Order mailed by VRB.
    1. If Order paid, process the check
    2. If Order appealed, file stays with the prosecuting attorney
    3. If Order not paid and not appealed, go into collection mode
      - a. send collection letter
      - b. tickle for follow-up in 20 days.
  - B. ASAP after day 20, turn the file over to the Staff Attorney for collection.
    1. photocopy extra set for attorney: (in the alternative, copy entire file)
      - a. the C&P
      - b. the VOSHA 51
      - c. any record of service attempts and the final proof of service
      - d. the VRB Order
      - e. the collection letter
      - f. the settlement agreement where one exists

(Oct. 28, 2010 attachment to Response)

Date

Individual, Title  
Company  
Address  
Town, State, Zip

**Re: COLLECTION NOTICE: Penalty Due \$\_\_\_\_\_**  
**VOSHA Inspection #\_\_\_\_\_**  
**Response due by\_\_\_\_\_**

Dear \_\_\_\_\_:

Following a VOSHA inspection conducted on \_\_\_\_\_(date)\_\_\_\_\_, a Citation and Notice of Penalty in the amount of \$\_\_\_\_\_ was served on \_\_\_\_\_(company)\_\_\_\_\_ by certified mailing on \_\_\_(date)\_\_\_\_\_.

Title 21 Section 226 of the Vermont Statutes provides that if a proposed penalty is not contested in writing to VOSHA within twenty (20) days, the citation and penalty proposed shall be deemed a Final Order of the VOSHA Review Board and not subject to review by any court or agency. The twenty-day period has expired, and VOSHA has not received a written notice of contest from \_\_\_\_\_(company)\_\_\_\_\_. **Accordingly, the proposed penalty of \$\_\_\_\_\_ is now final and immediately due to VOSHA.**

Please make a check or money order **payable to VOSHA** and mail it to the VOSHA office at the above address, using the self-addressed envelope enclosed for your convenience. **The VOSHA Inspection # indicated above must be noted on the payment so that it may be properly credited.** If payment in full is not received, or if satisfactory payment arrangements have not been made, within fifteen days of the date of this letter, the file will be turned over to legal counsel for collection.

Your cooperation in this matter will be appreciated. If you have any questions or need additional information, please contact me.

Sincerely,

Robert McLeod  
VOSHA Manager

RM/dm

(Oct. 28, 2010 attachment to Response)

Date

Individual, Title  
Company  
Address  
Town, State, Zip

**Re: COLLECTION NOTICE: Penalty Due \$\_\_\_\_\_**  
**PROGRESS REPORT DUE**  
**VOSHA Inspection #\_\_\_\_\_**  
**Response due \_\_\_\_\_**

Dear \_\_\_\_\_

Following a VOSHA inspection conducted on \_\_\_\_ (date) \_\_\_\_, a Citation and Notice of Penalty in the amount of \$ \_\_\_\_\_ was served on \_\_\_\_ (company) \_\_\_\_\_ by certified mailing on \_\_\_\_ (date) \_\_\_\_.

Title 21 Section 226 of the Vermont Statutes provides that if a proposed penalty is not contested in writing to VOSHA within twenty (20) days, the citation and penalty proposed shall be deemed a Final Order of the VOSHA Review Board and not subject to review by any court or agency. The twenty-day period has expired, and VOSHA has not received a written notice of contest from \_\_\_\_ (company) \_\_\_\_. **Accordingly, the proposed penalty of \$ \_\_\_\_\_ is now final and immediately due to VOSHA.**

Please make a check or money order **payable to VOSHA** and mail it to the VOSHA office at the above address, using the self-addressed envelope enclosed for your convenience. **The VOSHA Inspection # indicated above must be noted on the payment so that it may be properly credited.** If payment in full is not received, or if satisfactory payment arrangements have not been made, within fifteen days of the date of this letter, the file will be turned over to legal counsel for collection.

A written report explaining your progress in correcting the violations is now overdue. Failure to report corrective action may result in a follow-up inspection to verify that you have posted the citation(s) and corrected the violation(s) as required. Uncorrected violations will be subject to mandatory additional penalties. Please notify VOSHA immediately of the status of corrective actions.

Your cooperation in this matter will be appreciated. If you have any questions or need additional information, please contact me.

Sincerely,

Robert McLeod  
VOSHA Manager

RM/dm

(Oct. 28, 2010 attachment to Response)

VOSHA has fallen behind in **promulgation and adoption** of **new and revised Federal OSHA standards**, due to the State's time-consuming rulemaking procedures. One of the effects of severe budgetary constraints has been to hold off on advertising some **federal program changes** (\$2,500/ad), which is a factor for the delay in some FPCs.

We urge VOSHA to respond in a timely manner to FPCs and Federal Standard Actions.

#### STATE RESPONSE

VOSHA agrees with this finding and recognizes the importance of adopting federal standards in a timely manner. Recent amendments to the Vermont Administrative Procedures rules will reduce some of the advertising costs associated with rulemaking, but do not change the time frames set for rulemaking.

The VOSHA Director will begin the rulemaking process upon notification that a final rule has been promulgated by OSHA. This has to recognize that the first committee to review the rule meets only once a month.

**VPP** - Two SGE's participated on the IBM onsite on April 2-10, 2008 without having received approval from the SGE Coordinator.

VOSHA must request prior approval from the SGE Coordinator at the National Office to use SGE's on *Green Mountain (GM)* VPP onsite reviews.

#### STATE RESPONSE

VOSHA agrees with this recommendation and will request prior approval from the SGE Coordinator at the National Office to use SGE's on GMVPP onsite reviews. The GMVPP manager has already requested and received approval to utilize an SGE on an upcoming recertification.

The **VPP** onsite evaluation that involved the PSM standard was conducted on September 17-20, 2007, although none of the seven team members had received PSM Level 1 auditor training.

VOSHA must have at least one CSHO trained in PSM to ensure compliance with the PSM Standard.

#### STATE RESPONSE:

VOSHA agrees with this finding and will schedule a Safety or Health CSHO for the PSM course series beginning in FY2011. By November 30, 2010 VOSHA will have a CSHO enrolled in the OSHA 3400 PSM course

Our review found that the PSM questionnaire was not sent to the VOSHA **VPP** site covered under the PSM standard.

VOSHA must send the PSM questionnaires for completion by the VPP site covered under PSM for completion and must be included in the site's 2009 annual self-evaluation.

(Oct. 28, 2010 attachment to Response)

STATE RESPONSE:

The PSM questionnaire will be forwarded to the site with a request that they complete the questionnaire as part of their 2009 annual self-evaluation. This company is scheduled for a recertification audit this Fall and Region 1 has agreed to provide a PSM qualified person to assist in the evaluation.

*Effective April 18, 2008, CSP 03-01-003 modifies procedures for VPP onsite evaluations. Review of the GMVPP files we found discrepancies related to Medical Access Orders (MAOs), final reports containing 90-day items, abatement verification or documentation.*

VOSHA should use the revised report format for initial and recertification VPP onsite evaluations.

STATE RESPONSE:

VOSHA will use CSP 03-01-003 when performing all activities associated with GMVPP. Each file will have a copy of the MAO and the State will require that all 90 day items are corrected before approval is granted

*VOSHA staff are required to enter an OSHA 55 intervention form for each VPP onsite evaluation that is conducted. Staff must also enter the OSHA form 31 timesheet into IMIS. We found that the team leader has entered a 55 intervention for each of the sites evaluated.*

VOSHA must ensure that staff enter their weekly activity on the OSHA form 31 timesheets. The OSHA 55 intervention form should be incorporated into the OSHA form 31 when appropriate.

STATE RESPONSE:

VOSHA staff have been notified that they are required to complete their OSHA 31 form on a biweekly basis. This is one of their required duties that will be reviewed at the time of their annual evaluation. At monthly staff meetings, the issue of timely and accurate completion of OSHA 31's is discussed.

*The GMVPP manager verbally accepts the application and schedules the onsite within two months at the convenience of the applicant. Files were lacking in that they did not contain the dates the applications were received and accepted.*

VOSHA should ensure that GMVPP files contain the date the application was received and the date the application was accepted. In addition, VOSHA should send a letter to the applicant acknowledging receipt of the VPP application.

STATE RESPONSE:

VOSHA will ensure that GMVPP applications are stamped with the date they were received and that a letter to the applicant acknowledging receipt is sent within 15 days.

*The VPP records are located on the VPP program manager's personal drive.*

(Oct. 28, 2010 attachment to Response)

All of the GMVPP electronic documents must be placed on the "S" (public) drive to allow access to management in the Montpelier office in the event of a public request.

STATE RESPONSE:

VOSHA agrees with this feels that this is a good idea. A folder has been established on the "S" drive and all electronic files have been copied to the folder.

*Some **[discrimination] files** had detailed phone logs, and others did not contain any phone log. The OSHA Form 87 (or the IMIS Case Activity Worksheet) was not found in some of the files. In addition, copies of notification letters and closing letters to the complainant and respondent were not included in some of the case files.*

VOSHA must assemble discrimination case files in an orderly fashion and in accordance with OSHA's Discrimination Manual, Chapter 5.III.B.1, which includes a Case Activity Worksheet, or OSHA 87 and notification and closing letters to the parties. In addition, an activity/telephone log must be accurately documented with telephone calls and significant events that occur with respect to the case.

STATE RESPONSE:

VOSHA management will review Chapter 5.III.B.1 of the Discrimination Manual with the discrimination investigators and will follow the requirements in the section. Discrimination case files will be organized per the instructions in the Discrimination manual and will include a case file activity/telephone log to track all case file activity.

*Some CSHO's have **exceeded** the **time frame** of three years from date of hire to complete all courses required under TED 01-00-018.,*

Since some of the program's CSHOs have not met this timeframe, the VOSHA director should ensure that all staff complete their remaining courses as soon as possible.

STATE RESPONSE:

VOSHA staff are scheduled to attend the #1310 Investigative Interviewing Techniques or #2450 Evaluation of Safety and Health Management Systems in FY2011.

In the Spring of 2010 VOSHA requested through the Regional Administrator that course #2450 Evaluation of Safety and Health Management Systems be brought to Vermont. VOSHA agreed to pay the travel and per diem expenses for the instructor. The course would have been available to any CSHO in the region that needed the course.

We were informed by OTI that it was not possible to provide the course because of the large number of newly hired CSHO's. At an OSHSPA meeting Hank Payne advised that Vermont should request the course again in the Spring of 2011. If OTI is able to bring this course to Vermont, those CSHO's scheduled to take it in Chicago will be transferred to the #1310 course.

By November 30, 2010 VOSHA will have all CSHO's enrolled in the OSHA 1310 course. Additionally, by that date VOSHA will have a request submitted to the Regional Administrator to have the OSHA 2450 course delivered in Vermont.

(Oct. 28, 2010 attachment to Response)

*VOSHA did not adopt the longshoring and marine terminal standard because there is no maritime industry in the state. However, according to the IMIS and as a result of further research on **Maritime** enforcement, we found that Vermont may in fact have sites subject to Section 29 CFR 1915 and 1917 (p. 48).*

VOSHA must reevaluate the need to adopt the longshoring and marine terminal standard and advise the region of its findings.

#### STATE RESPONSE

VOSHA has reviewed this recommendation and has agreed to adopt 29 CFR PART 1915 - Occupational Safety and Health Standards for Shipyard Employment per the following e-mail sent to the Regional Office on August 24, 2010:

**From:** McLeod, Robert

**To:** Grouke, Joan - OSHA

**Cc:** Hooper, Robert - OSHA; Kent, Marthe - OSHA; Conway, Edward - OSHA; Monahan, Steve - OSHA State (SP-VT)

**Sent:** Tue Aug 24 16:00:27 2010

**Subject:** RE: Adoption of Maritime standards

Vermont will begin adoption of 29 CFR PART 1915 - Occupational Safety and Health Standards for Shipyard Employment. Vermont does have 2 marinas that provide maintenance and repair services as well as storage. Additionally, Lake Champlain Transportation does maintenance and repairs dockside and does have one dry dock for major repairs and inspections.

In regard to PART 1917 - Marine Terminals and PART 1918 - Safety and Health Regulations for Longshoring, Vermont does not have any of these facilities or operations. Lake Champlain Transportation does have paved parking areas for the controlled loading and unloading of vehicles, motorcycles, bicycles and foot passengers.

I estimate that the adoption of this standard can be accomplished by May 1, 2011

*VOSHA was using OSHA-1 inspection numbers to assign a case number to **11(c) cases** and also was filing the 11(c) complaint on an OSHA-7 complaint form (p. 61).*

VOSHA management and investigators were informed *that safety and health inspection forms have a separate purpose from 11(c) forms*, and were instructed not to use the OSHA-1 and the OSHA-7 forms for 11(c) complaints. Following this practice will avoid duplication of files. In addition, in writing up the final analysis in a case, listing the elements separately will help ensure that all required elements are covered

#### STATE RESPONSE

VOSHA has ceased using safety and health inspection forms for Discrimination cases and will follow the directions in the Discrimination Manual.