

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
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Juliann Sum, Chief

July 30, 2015

David Shiraishi, Area Director
Occupational Safety and Health Administration
Oakland Area Office
1301 Clay Street, Suite 1080N
Oakland, CA 94612

RE: CASPA 2014-CA 55

Dear Mr. Shiraishi:

This letter responds to federal OSHA's findings and recommendations regarding a Complaint About State Program Administration (CASPA 2014-CA 55) filed by Public Employees for Environmental Responsibility (PEER) dated February 11, 2014. We received federal OSHA's findings and recommendations on June 30, 2015.

We are surprised that federal OSHA bases their findings regarding Cal/OSHA's "chronic deficiencies" almost entirely on outdated information from the federal fiscal year that ended in September 2013, reflecting conditions under previous Cal/OSHA leadership. In the intervening period, Cal/OSHA has made substantial improvements in staffing resources, training, procedures, and inspection outcomes. Federal OSHA's Region IX and Area Office staff have acknowledged these improvements during discussions regarding our annual grant applications and in ongoing communications with us generally. Yet federal OSHA leadership has chosen to disregard these major developments. They direct us to "move as quickly as possible to improve staffing levels," which we have already been doing for almost two years now.

In 2013, the Department of Industrial Relations (DIR) succeeded in lifting statutory spending limits for Cal/OSHA. In 2014, DIR and Cal/OSHA requested and obtained resources to fill 26 previously unfunded positions and fund an additional 15 positions in our Process Safety Management Unit. In 2015, DIR and Cal/OSHA were again successful in requesting additional positions for Cal/OSHA, including 36 positions in the Enforcement Branch, 6 positions in the Legal Unit, and one position in the Research and Standards Occupational Health Unit. The number of positions in the Enforcement Branch has increased by more than 15 percent.

In addition to the infusion of new resources, we have been working diligently to establish long-needed procedures, channels of communication, and basic infrastructure within Cal/OSHA. I am pleased to report that we are making progress at a rapid pace.

Comments on Federal OSHA's Findings

As discussed below, many of federal OSHA's findings are either inaccurate or based on overly narrow interpretations of data retrieved from federal OSHA's database system.

1. Inspections in high hazard industries. PEER alleged that Cal/OSHA conducted an inadequate number of inspections in dangerous workplaces. Federal OSHA concludes that because Cal/OSHA conducts a lower percentage of programmed inspections and higher percentages of complaint-based and accident-based inspections than federal OSHA, Cal/OSHA's ability to focus resources in dangerous workplaces is inhibited. They recommend that Cal/OSHA conduct fewer inspections of complaints and accident-related hospitalizations. They also conclude that Cal/OSHA's programmed inspections do not identify sufficient numbers of serious, willful, or repeat violations per inspection.

- a. Accident-based inspections identify greater numbers of serious, willful, and repeat violations.* During Cal/OSHA inspections of work-related accidents involving death or serious injury or illness requiring hospitalization, which constitute approximately 25 percent of our inspections, our compliance officers identify greater numbers of serious, willful, and repeat violations than during all other types of inspections, including programmed inspections. By their own recent actions, federal OSHA appears to recognize the importance of conducting on-site inspections of accidents involving serious injury or illness. In the period since January 1, 2015, the date that their new requirement for employers to report serious, work-related injuries and illnesses went into effect, federal OSHA increased their own on-site inspections of non-fatal accidents from zero percent to 40 percent (according to an article in the National Law Review, posted at <http://www.natlawreview.com/article/osha-s-response-to-compliance-new-reporting-rules-and-what-it-means-to-employers>).
- b. Not all complaints are investigated by on-site inspection.* Cal/OSHA does not respond to all complaints by on-site inspection. We do letter investigations of most non-formal complaints. We also do letter investigations of formal, non-serious complaints where the complainant agrees to a letter investigation instead of an on-site inspection.
- c. Other types of programmed inspections play a critical role in protecting workers and preventing disasters in California.* Beyond Cal/OSHA's programmed inspections in high hazard industries, California's Labor Enforcement Task Force targets non-compliant employers in the underground economy to protect vulnerable workers who are reluctant to file complaints with governmental enforcement agencies and whose employers are less likely to report serious injuries and illnesses to Cal/OSHA. In addition, Cal/OSHA's programmed inspections conducted in tunnels under construction and in oil refineries and other chemical plants that handle large quantities of toxic and flammable materials help to avert disasters in those industries. Federal OSHA lacks these kinds of programs.

2. **Follow-up inspections.** PEER alleged that Cal/OSHA failed to conduct follow-up inspections of companies with serious violations. Federal OSHA agrees with PEER, basing its conclusion on a scan report run in July 2014 in IMIS (OSHA's database system used for inspections opened prior to October 1, 2014) and on P&P C-15 of Cal/OSHA's Policy and Procedure Manual.
 - a. **Violations of citations under first-level appeal are not required to be abated.** The scan report that federal OSHA ran in July 2014 included over 2,000 inspections. Of these inspections, federal OSHA believes they identified 210 inspections involving serious citations for which abatement should have been obtained and entered into IMIS. However, employers are not required to abate violations during the period in which the citations are under first-level appeal with the Occupational Safety and Health Appeals Board. (This is similar to the federal system.) Of the 210 inspections identified by federal OSHA, 145 involved citations for serious violations that were under appeal. In addition, four of the 210 inspections did not have unabated serious violations.
 - b. **Abatement may not yet be entered in IMIS.** Of the remaining 61 inspections involving serious citations that were not under appeal, we contacted managers overseeing a sampling of those inspections and learned that either there had been an error or delay with an abatement action appearing in IMIS (including situations where federal OSHA's host computer in Washington, D.C. failed to receive data from the local computer in a Cal/OSHA district office) or the violations were still being abated. Cal/OSHA staff are permitted in some cases to extend an abatement period based on the amount of time the employer needs to accomplish abatement and the availability of interim safety and health measures. (OSHA has similar procedures.) We believe that our staff do obtain appropriate abatement in all cases where a serious violation was identified and cited in an inspection and not dismissed on appeal.
3. **Lapse times.** PEER alleged that Cal/OSHA failed to issue citations in a timely manner, leading to delays in abatement actions and prolonged employee exposure to hazards. Federal OSHA agrees with PEER, citing their own lapse times as a model for California.
 - a. **Many serious violations are abated during Cal/OSHA inspections.** Approximately 40 percent of serious violations are abated during an inspection, before Cal/OSHA formally issues citations. The effect of any delay in issuing citations is partially offset by employers abating violations during inspections.
 - b. **Many serious violations are appealed, which stays the requirement to abate.** Over 70 percent of serious violations are appealed (including both abated and unabated violations), which stays the requirement to abate until the administrative law judge issues a decision. Therefore, we cannot require abatement of a violation while the citation is under appeal.
 - c. **California statute allows six months for Cal/OSHA to issue citations.** California statute requires Cal/OSHA to issue citations before six months have elapsed since the occurrence

of the violation. (OSHA has the same time limit.) Cal/OSHA's average lapse times were well within the statutory limit.

4. **Response times.** PEER alleged that Cal/OSHA failed to respond to worker complaints of unsafe or unhealthy working conditions in a timely manner. Federal OSHA agrees with PEER, citing Cal/OSHA's average and longest times to respond.
 - a. **Cal/OSHA responded in a timely manner in the majority of cases.** Federal OSHA compares Cal/OSHA's average times to respond to all complaints against statutory mandates for Cal/OSHA to respond to formal serious complaints within three working days and to formal non-serious complaints within 14 calendar days. Although Cal/OSHA's average response times in federal fiscal year 2013 did not meet these mandates, the gap was small. In a majority of cases, Cal/OSHA did respond in a timely manner: 86.3 percent of responses to serious complaints and 70.0 percent of responses to non-serious complaints were initiated within the required period. Furthermore, Cal/OSHA's performance in this area improved significantly in federal fiscal year 2014, as discussed below.

Cal/OSHA's Ongoing Progress and Next Steps

In the two-year period since federal fiscal year (FFY) 2013, DIR and Cal/OSHA leadership have increased funding and positions for Cal/OSHA (as discussed above). These increased resources have begun to address many of the concerns expressed in PEER's complaint filed in early 2014. Additional steps and recommendations are discussed below.

1. Inspections in high hazard industries

- a. **Improvement in FFY 2014; additional positions in 2015.** Cal/OSHA conducted a greater number of high hazard targeted inspections in FFY 2014 than in FFY 2013: 301 inspections in FFY 2014 compared to 283 inspections in FFY 2013. (Note: The figure of 204 inspections in FFY 2013 stated in federal OSHA's findings is incorrect.) We were granted additional positions in 2015 for the express purpose of increasing our numbers of high hazard targeted inspections, inspections of worksites where Cal/OSHA issued permits to conduct high-risk construction operations, and other types of programmed inspections. We expect that after the additional staff are hired and trained, we will be conducting greater numbers of programmed inspections.
- b. **California requirements to investigate all formal complaints.** Federal OSHA suggests that we reduce our numbers of complaint-based inspections. However, we are required by California statute to investigate all formal complaints, both serious and non-serious, and we investigate these complaints by on-site inspection, except for non-serious complaints where the complainant has consented to letter investigation in lieu of on-site inspection. Some stakeholder groups feel strongly that we should continue to do on-site inspections of all formal complaints. To address federal OSHA's concern, we invite federal OSHA to

participate in a meeting, which we would organize, to discuss this issue with California stakeholders.

- c. California requirements to investigate work-related accidents.** State statute requires us to investigate work-related accidents that result in death or in serious injury or illness to an employee, which is defined as a work-related injury or illness that requires inpatient hospitalization for more than 24 hours for other than medical observation or in which the employee loses a member of the body or suffers serious permanent disfigurement. We are not proposing at this time to discontinue these inspections of work-related accidents.
- d. Programmed inspections other than high hazard targeted inspections.** State budget legislation and other statutes require us to conduct programmed inspections in the underground economy (Cal/OSHA's Labor Enforcement Task Force Unit), in tunnels under construction (Cal/OSHA's Mining and Tunneling Unit), and in oil refineries and other chemical plants that handle large quantities of toxic and flammable materials (Cal/OSHA's Process Safety Management Unit). The Labor Enforcement Task Force inspections and Process Safety Management inspections are entirely funded by California, not federal OSHA. Starting on October 1, 2015, the Mining and Tunneling inspections will also be entirely funded by California. We are not proposing at this time to discontinue these state-mandated programmed inspections.

2. Follow-up inspections

- a. Additional positions in 2015.** We believe that we are already obtaining evidence of abatement in all cases where a serious violation was identified and cited in an inspection and not dismissed on appeal. The additional positions we were granted in 2015 are intended to increase the numbers of follow-up inspections we will conduct even if the employer has submitted evidence of abatement. We expect that after the additional staff are hired and trained, we will be able to increase our inspections in this category.

3. Lapse times

- a. Improvement in first quarter of FFY 2015; additional positions in 2015.** Cal/OSHA's average lapse time for both safety and health inspections initiated in the first quarter of FFY 2015 was 68.00 days. This is shorter than the average lapse times of 70.42 days for safety inspections and 75.99 days for health inspections in FFY 2014, and 72.55 days for safety inspections and 75.96 days health inspections in FFY 2013. Going forward, the additional positions we were granted in 2015 are intended to further reduce our lapse times. We expect that after the additional staff are hired and trained, we will in fact be able to further reduce lapse times.
- b. Factors causing longer lapse times in California.** Historically, Cal/OSHA compliance officers have conducted significantly greater numbers of complaint-based and accident-based inspections than federal OSHA compliance officers. In addition, in FFY 2013 and FFY 2014, Cal/OSHA conducted higher percentages of health inspections than federal

OSHA. From observing the performance of different units and offices in Cal/OSHA Enforcement, we know that when compliance officers conduct greater numbers of complaint-based and accident-based inspections, or conduct health inspections instead of safety inspections, their lapse times increase. In addition, when we intend to issue serious citations, we are required by statute to give employers 15 days to submit evidence rebutting our presumption that there was a serious violation. We must then spend additional time considering evidence submitted by the employer and possibly revising the citations. This increases the length of time to issue serious citations and also increases the length of time to issue general citations where the compliance officer originally believed the citation was serious. Federal OSHA does not have such a requirement. We believe these factors explain why our lapse times have been longer than federal OSHA's.

c. California requirements to investigate all formal complaints submitted by phone, fax, email, mail, or in person and all work-related accidents resulting in an employee's death or serious injury or illness. State statute requires us to investigate to all formal complaints, which in California can be filed by phone, fax, email, mail, or in person. By contrast, federal OSHA accepts formal complaints only if submitted in writing and signed by the complainant. This requirement inhibits many workers from filing formal complaints with federal OSHA. In addition, as discussed earlier in this letter, state statute requires us to investigate work-related accidents that result in death or in serious injury or illness to an employee, which is defined as a work-related injury or illness that requires inpatient hospitalization for more than 24 hours for other than medical observation or in which the employee loses a member of the body or suffers serious permanent disfigurement. By contrast, federal OSHA has historically investigated only the work-related accidents that cause death to an employee or hospitalization of three or more employees, which is a much higher threshold than Cal/OSHA's.

d. Appropriate lapse times for California. Because Cal/OSHA compliance officers conduct many more complaint-based and accident-based inspections and proportionately more health inspections than federal OSHA compliance officers, and must allow time for employers to rebut possible serious citations, we do not believe it is fair or realistic to expect us to achieve the same lapse times as federal OSHA. We request that federal OSHA engage in discussions with us to identify appropriate, expected lapse times for Cal/OSHA.

4. Response times

a. Improvement in FFY 2014. Cal/OSHA response times in FFY 2014 were significantly shorter than in FFY 2013:

- We responded to 90.3 percent of serious complaints in FFY 2014 within three working days (average response time of 3.77 working days), compared to 86.3 percent in FFY 2013.
- We responded to 92.8 percent of non-serious complaints in FFY 2014 within 14 calendar days (average response time of 12.6 calendar days, which meets federal OSHA's mandate), compared to 70.0 percent in FFY 2013.

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- b. Additional positions in 2015.** The additional positions we were granted in 2015 are intended to further reduce our response times. We expect that after the additional staff are hired and trained, we will be able to accomplish this further reduction. We will also investigate the outliers involving unusually long response times mentioned in federal OSHA's findings, and will establish appropriate methods to address the particular causes of those delays.

Conclusion

This letter describes how Cal/OSHA's performance has improved since federal fiscal year 2013. With the additional positions granted this year, we expect to see continued improvement.

To explore how we should further focus our resources in high hazard industries, we invite federal OSHA to participate in a meeting with California stakeholders, which we would organize, to discuss how we should handle formal complaints.

To establish appropriate lapse times, we request that federal OSHA engage in discussions with us to consider factors in California that lengthen lapse time. In addition, we note that OIS (OSHA's new database system that we must use to process our inspections) was not designed to accommodate features of the California state plan, and ongoing problems with OIS contribute to delays in preparing inspection reports.

We also request that federal OSHA work with us to better understand the broad range of programs unique to California that protect workers beyond the traditional models federal OSHA uses to evaluate state plan performance. Finally, we request that federal OSHA leadership base its official recommendations and policy solutions for Cal/OSHA on information that is complete, accurate, and current.

Sincerely,

A handwritten signature in black ink, appearing to read "Juliann Sum". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Juliann Sum, Chief

cc: Christine Baker, Director
Department of Industrial Relations