

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210



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MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: LOREN SWEATT *Loren Sweatt*
Acting Assistant Secretary

SUBJECT: Response to OIG's Draft Report No. 02-19-001-10-105, "OSHA Procedures for Issuing Guidance Were Not Adequate and Mostly Not Followed"

Thank you for the opportunity to provide comment on the draft of the Office of Inspector General (OIG) Audit Report No. 02-19-001-10-105, "OSHA Procedures for Issuing Guidance Were Not Adequate and Mostly Not Followed." OSHA appreciates the efforts OIG undertook to develop this report.

OSHA agrees significant lapses occurred between 2013-2016 in the monitoring process and records management procedures to ensure timely and appropriate issuance of guidance documents. The OIG's finding that OSHA did not follow procedures or could not document it followed procedures for 80 percent of sampled guidance is troubling. OSHA is working aggressively to rectify this through a review of existing procedures, improved accountability, and documentation.

As OSHA advised the OIG during the audit process, OSHA has existing protocols to review documents before the issuance of guidance. For example, when preparing to issue guidance, draft guidance is to be reviewed and approved at multiple levels within the agency and Department (including the Office of the Solicitor). The review and approval process includes, among other things, an examination of the draft document for consistency with OSHA policy and for compliance with Administrative Procedure Act (APA) and Occupational Safety and Health Act (OSH Act) requirements, as well as a consideration of any risks involved in the agency action. While a formal decision tree is not included in the protocol, the process itself, including the issuance of a final guidance document with Assistant Secretary approval, requires guidance to be issued in compliance with applicable law after careful review.

Based on the OIG's audit as well as in response to successful legal challenges to OSHA's guidance documents discussed in the OIG's report, OSHA has taken and is taking additional

steps to ensure guidance follows proper procedures in the future. A review and revision of the Directives on Directives, which covers both policy and non-policy guidance clearance processes (including both ADM 03-00-002 (policy) and ADM 03-00-004 (non-policy)), is ongoing and the changes will be provided in the agency's corrective action plan. In the meantime, each of the Directorates responsible for issuing guidance is ensuring their staff is following required record maintenance policies and reminding staff of correct processes for issuing guidance documents. OSHA is also considering a more formal internal system through the directive control process to ensure guidance follows required protocols through the review, clearance, and final approval processes.

OSHA has a few clarifying comments regarding the draft report:

- OIG's audit report suggests that *all* of OSHA's documents must go through the same type or level of review. OSHA notes that a different level of review and analysis is appropriate for different types of documents. An examination of the letter of interpretation process has led to the Assistant Secretary of Policy's office now reviewing OSHA's Letters of Interpretation (LOI) to ensure these letters do not create new or additional requirements.
- OSHA agrees the agency must not "unintentionally create arbitrary and expensive employer compliance burdens" when deciding whether it is appropriate to issue policy guidance versus rulemaking as noted in the Executive Summary. The agency would note the unprecedented legal challenges of all four instances cited in Exhibit 2 of the report regarding the issuance of policy guidance or interpretation of rules demonstrates the need to reevaluate the existing clearance procedures and ensure those procedures are being followed and documented appropriately. Failure to follow existing protocols and consider costs to the regulated community, as well as, legal risk may have led to the issuance of these documents that were ultimately withdrawn or amended to address stakeholder concerns related to compliance burdens.
- OSHA agrees appropriate documentation of compliance with APA and OSH Act requirements was not present in the record examined by OIG. OSHA protocols do require OSHA and the Solicitors' Office to carefully evaluate these factors. In each of the four lawsuits referenced in OIG's audit report, the agency understands OIG may not have been able to substantiate these steps due to gaps in the records management procedures.
- Based on the successful challenges to OSHA's guidance documents, OSHA leadership and staff, as well as the Solicitors' Office, are acutely aware of the potential legal risks of issuing policy guidance documents. Going forward, the agency will carefully weigh and deliberate the pros and cons of issuing guidance and ensure appropriate documentation of those decisions.
- Some of the documents referenced in the report are not guidance documents and potentially outside the scope of OIG's concerns. For example, two of the documents, the Guidelines for Products Developed by OSHA's Alliance Program Participants and the National Construction Safety and Health Achievement Recognition Program (SHARP) National Construction Pilot Program Guidelines, are related to the management of the respective programs and thus do not appear to meet the OIG's definition of guidance.

See audit report p. 3 (“OSHA guidance documents are the tools and materials available to OSHA staff and stakeholders to help employers and workers comply with OSH Act standards, maintain safe working conditions, and protect worker rights.”). These documents relate to program management rather than compliance with OSHA standards.

Thank you again for the opportunity to provide comments. The agency looks forward to receiving the final report and the opportunity to describe the corrective action plan.