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MEMORANDUM FOR: CAROLYN RAMONA HANTZ
Assistant Inspector General for Audit

FROM: *Jeannette J. Galanis for*
JEANNETTE J. GALANIS
Deputy Assistant Secretary for Policy
For Mine Safety and Health Administration

SUBJECT: Response to the Office of the Inspector General's (OIG) Draft
Audit Report, *MSHA Can Improve How Violations Are Issued,
Terminated, Modified, and Vacated*

The Mine Safety and Health Administration (MSHA) appreciates the opportunity to comment on the work the OIG performed in evaluating MSHA's citation and order writing process. MSHA understands the importance of the program and the necessity for operators to comply with health and safety standards to ensure the health and safety of miners.

Further, MSHA would like to thank OIG for incorporating MSHA's comments into the report, as to show a more balanced picture of circumstances surrounding their findings. However, MSHA does have concerns over the objectivity of information presented in the report and its timeliness. Generally Accepted Government Auditing Standards (GAGAS), as prescribed in Chapter 9 "Reporting Standards for Performance Audits" of the General Accountability Office's (GAO) 2018 revision to their *Government Auditing Standards* publication (Yellow Book), has guidance MSHA recommends OIG take into consideration. Specifically, paragraphs 9.17b-c (objectivity) and 9.17g (timeliness).

1. Objectivity

Paragraph 9.17b of the Yellow Book states:

Objective means that the presentation of the report is balanced in content and tone. A report's credibility is significantly enhanced when it presents evidence in an unbiased manner and in the proper context. This means presenting the audit results impartially and fairly. This balanced tone can be achieved when reports present sufficient, appropriate evidence to support conclusions while refraining from using adjectives or adverbs that characterize evidence in a way that implies criticism or unsupported conclusions.

Further, paragraph 9.17c of the Yellow Book states:

It also means the report states evidence and findings without omission of significant relevant information related to the audit objectives. Providing report users with an understanding means providing perspective on the extent and significance of reported findings, such as the frequency of occurrence relative to the number of cases or transactions tested and the relationship of the findings to the entity's operations.

Objectivity is a concern for MSHA within the following elements of the report: a) presentation of data and b) OIG's analysis of "overdue" terminations.

a. Presentation of data

Regarding data presentation, one need not look further than the "Briefly" section of the report. This section of the report receives the highest volume of readership because it provides the reader a concise overview of report themes. In the "Briefly" is a section titled, "Thousands of violations written by MSHA inspectors did not comply with the Mine Act and MSHA Handbook requirements." While this statement is true, it does not provide the proper context as to the significance of reported findings, nor the frequency of occurrence related to the number of transactions. Specifically, the thousands of violations cited by the OIG is actually about 7,000 out of 736,000 violations (less than one percent). Further, the estimated 7,000 exceptions were from a test population of about 45,000 violations, which were judgmentally selected, as opposed to criteria generally associated with audit findings. Since the sample size and selection were subjective, the reader of the report is not provided conclusions from representative or valid data.

MSHA has concerns over the presentation of data in other sections of the report. For example, figure 2 of the report shows minimum and maximum due dates for hazards including the mean (average). Because this data show a range, inclusive of outliers, without quantifying or placing context on the frequency of outliers, it gives the reader the impression that variances in due dates are a pervasive problem.

b. OIG's analysis of "overdue" terminations

The OIG's underlying methodology for analyzing "overdue" terminations needs further clarification because the report implies all unterminated citations are also unabated citations. This is not the case. The mine operator is responsible for correcting the hazard by the abatement due date, and the inspector is responsible for verifying that the hazard has been abated and terminated by the termination due date.

Additionally, with respect to termination and abatement due dates, the OIG mistakenly refers to extended due dates as “overdue” due dates, and wrongly concluded that “extended” due dates means that miners are exposed to hazards. Once a hazard has been identified, it is the operator’s responsibility to abate the hazard, and if this cannot be done immediately, the operator will danger off the hazardous areas or remove equipment from use, etc., to assure miners are not exposed to the hazard. For example, an area with an inadequate roof may take time to abate and need multiple extensions to terminate the citation depending on the conditions of the mine, materials needed, and the time it would take to get materials. Moreover, it may take additional time for MSHA inspectors to physically return to the mine and terminate the citation. In such a circumstance, the mine operator would danger off the area to assure miners are not exposed. The OIG’s conclusion that citations that have “overdue” (extended) due dates means the hazards have been unabated, thereby exposing miners to hazards longer than necessary, or putting the safety of miners in jeopardy is incorrect.

2. Timeliness

Paragraph 9.17b of the Yellow Book states:

To be of maximum use, providing relevant evidence in time to respond to officials of the audited entity, legislative officials, and other users’ legitimate needs is the auditors’ goal. Likewise, the evidence provided in the report is more helpful if it is current. Therefore, the timely issuance of the report is an important reporting goal for auditors.

OIG’s audit scope analyzed violations issued between January 1, 2013 and September 30, 2019. This is problematic. During the pendency of this audit, there were two Administrations, three by the time of the issuance of this report, and multiple changes implemented at the Department of Labor and MSHA that were not addressed by the report. Specifically, the implementation of DOL’s Shared Services initiative, the modernization of MSHA systems, and numerous updates to policies and procedures. The OIG did not adjust their scope to reflect the changes, nor did they significantly interact with MSHA subject matter experts post-2017 to understand the impacts of the changes taking place. As a result, the OIG missed a meaningful opportunity to provide recommendations tailored to MSHA’s current environment.

Nonetheless, MSHA acknowledges there are always opportunities for improvement and offers the following comments in response to the OIG recommendations.

Recommendation 1: Provide training to inspectors and supervisors on complying with MSHA guidance for each violation type.

MSHA Response: MSHA agrees with the spirit of this recommendation, as demonstrated by the fact we provide 35 hours of citation and order writing training for entry level inspectors and a refresher citation and order writing review course for journeyman training. Additionally, the

Agency provides citation and order writing review training for field office supervisors. MSHA will review how it may use its current training courses, if necessary, to provide additional guidance to inspectors or supervisors.

Recommendation 2: Provide training on how to determine the subsequent inspection when multiple inspections overlap, enter violations into the system in same chronological order identified, be specific when writing the “Area or Equipment” entry, and when it is appropriate to list “No area affected” for an order.

MSHA Response: MSHA will address this recommendation, as necessary, in its existing journeyman and entry level inspector training programs.

Recommendation 3: Update system controls to improve compliance of MSHA violations with the Mine Act and MSHA guidance in the following instances:

- a. Verify only authorized violation types used
- b. Include all required phrases automatically in the “Condition or Practice” entry when the inspector selects 103(a) citations, 104(g)(1) orders, 104(e)(1)/104(e)(2) orders, or 107(a) orders.
- c. Ensure 104(d) orders and 104(g)(1) orders cite eligible CFR sections.
- d. Verify the correlations between the CFR or Mine Act sections of 104(b) orders and the original violation.
- e. Verify 104(d) violations and 104(e) violations reference the correct parent violation by including additional crucial attributes in the system controls, such as issue date, event number, and event start date.
- f. Verify orders have the “Area or Equipment” entry populated when initially issuing the violation.
- g. Apply system controls to modifications done directly in MCAS, such as modifications due to court decisions or settlements.
- h. Identify modifications needed to other violations when vacating or modifying a violation.
- i. Verify the reasonableness of the due dates and provide warnings to inspectors when due dates appear excessively long.
- j. Provide a warning message to inspectors when trying to issue a safeguard at a mine that would lead to multiple safeguards citing the same regulation issued for a single mine.

MSHA Response: MSHA will review the recommended modifications and impacts to data reporting to determine what, if any, systems controls are necessary. However, MSHA cannot agree to the recommendation as written because it contains incorrect references to certain regulatory requirements (e.g, recommendation 3e. - 104(e) addresses issuance of a notice and is not a violation).

Recommendation 4: Update the Citation and Order Writing Handbook to clarify situations when multiple safeguards can be issued for a single mine and to correct any examples that do not comply with the instructions listed in the Handbook.

MSHA Response: MSHA agrees with the spirit of the recommendation but does not intend to update the text of the Citation and Order Writing handbook. MSHA has already addressed this issue to ensure compliance with the Mine Act, and the Agency has instructed inspectors to issue safeguards under the specific criteria in the standard. We will review whether additional examples need to be included in the handbook.

Recommendation 5: Improve the violations termination process by decreasing the percentage of future untimely terminations, improving the use of 104(b) orders, and not allowing due dates to be extended unless for the specific, justified reasons listed on the violation form.

MSHA Response: MSHA disagrees with the OIG's use of "abate" and "terminate" as synonyms in this report and disagrees with the OIG's conclusions, which lead to this recommendation. MSHA will assure the topic of citation/order termination is covered in journeyman and entry level inspector training.

Recommendation 6: Provide training on how to write specific supporting reasons on the violation forms or other documentation (e.g., vacate memos) when extending, modifying, or vacating violations.

MSHA Response: MSHA will assure this recommendation is addressed in existing journeyman training and entry level inspector training.

Recommendation 7: Develop a metric to measure performance and an internal control to verify timely uploading of violations from the inspector's laptop/tablet into MCAS.

MSHA Response: MSHA believes the spirit of this recommendations is already addressed. MSHA's Inspector Application System (IAS) has a built-in control mechanism to determine when violations transmitted for upload have not occurred and will automatically resend on the next upload action. Additionally, the inspectors and MCAS maintain transaction logs that show the status of individual uploads and can be used to address this recommendation. MSHA will use this information along with measuring the average time to upload violations to ensure the Agency is trending in the right direction. MSHA will continue review Agency data to determine if there are outliers and address appropriately, as necessary.

Recommendation 8: Complete periodic reviews to determine whether MSHA personnel are meeting the timely upload and recording of violations in MCAS, terminating violations by the due date, and effectively using 104(b) orders.

MSHA Response: MSHA agrees with the spirit of this recommendation. Since Recommendation 7 captures the substance of this Recommendation, please see response to Recommendation 7.

Recommendation 9: Simplify the design of the supervisory checklists by revising compound questions into simple questions answerable by a single response (yes, no, or not applicable) and

provide refresher training on the quantity completion requirements, how to properly complete and review the checklist, and the importance of providing feedback using the checklist.

MSHA Response: The Mine Safety and Health Enforcement Supervisors Handbook was updated in December 2020. The updates to the handbook also included revisions to the checklists that addressed the OIG's concerns. This recommendation should be closed. See attached.

Recommendation 10: Work with the Solicitor's Office and the Federal Mine Safety and Health Review Commission to implement a process to ensure violations listed in settlement agreements or court decisions still comply with the Mine Act and Mathies test.

MSHA Response: MSHA agrees with the importance of this recommendation and ensuring violations listed in settlement agreements comply with the Mine Act, and Commission decisions accurately reflect the outcome of the contest proceeding. Further discussions, however, will be needed to determine what, if any, changes are necessary to address this recommendation.

We appreciate the opportunity to comment on the report. If you have any questions or need further information, please contact Reza Noorani, Office of Program Policy Evaluation (OPPE) Chief at noorani.reza@dol.gov