

New York State Department of Labor

Public Employee Safety and Health

Field Operations Manual



PUBLIC EMPLOYEE SAFETY AND HEALTH

FIELD OPERATIONS MANUAL

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CHAPTER 1

GENERAL RESPONSIBILITIES AND ADMINISTRATIVE PROCEDURES

Director

- A. 1. General. The overall responsibility is to serve as the single point of contact at the Division of Safety and Health regarding all matters affecting the field or of interest to it. The Director has the twofold duty of:
 - A. 1. a. Ensuring that all policies, programs, procedures, priorities, and instructions issued by the agency are consistently implemented by the field organizations of the agency, and
 - A. 1. b. Representing the interests and concerns of the field offices at the State level.
- A. 2. Responsibilities. The Director, Division of Safety and Health, shall carry out the responsibilities of the Office under the direction of the Commissioner of Labor.
- A. 3. Specific. All written requests for interpretations and clarifications of PESH policy or procedures from the field offices shall be submitted to the Directorate of Compliance Programs through the Director; and the Director shall review and evaluate all new DOSH policies and procedures which affect the field for feasibility of field implementation. The Director shall perform the following specific support functions:
 - A. 3. a. Coordination of the field programs for the agency representing the field interests in the development of policy, programs, and procedures by the DOSH Director;
 - A. 3. b. The principal conduit of information from the DOSH Director and the executive staff of the DOSH Director's office to the Program Managers.
 - A. 3. c. Guidance to field organizations on technical issues interpreting program requirements and providing day-to-day supervision of the Program Managers; and
 - A. 3. d. Timely short-term analysis of field activity and operations, conducting audits of Program Manager's Offices and selected District Offices, and evaluating the effectiveness of field operations.

Program Manager.

- B. 1. General. It is the duty or mission of the Program Manager to manage, execute and evaluate all programs of the Public Employee Safety and Health Bureau (PESH).
- B. 2. Responsibilities. The responsibilities of the Program Manager, such as carrying out administrative, operational and program activities, are spelled out in the most current PESH

Instructions and Memorandums. These responsibilities may be delegated, as the Program Manager decides proper, to the Assistant Program Manager. Responsibilities for activities within the Program Manager's Office may be delegated to the Assistant Program Managers as appropriate.

District Supervisor (and Associate IH reviewing reports).

- C. 1. General. It is the duty or mission of the District Supervisor to accomplish PESH's programs within the designated geographical boundaries of the District Office. This includes administrative and technical support of the Compliance Safety and Health Officers (CSHOs) assigned to the District Office.
- C. 2. Responsibilities. The District Supervisor shall carry out these under the authority and guidance of the Program Manager and follow current PESH Instructions and Memorandums from both the DOSH Director's and Program Manager's Offices in performing administrative and operational duties. These duties may be sub-delegated, as appropriate, to safety and/or health supervisors. The Field Operations Manual (FOM) provides guidance for the conduct of most compliance operations activities. Interpretation and clarification as well as additional guidance shall be obtained from or through the Program Manager.
- C. 3. Specific. In fulfilling the responsibilities as outlined in the preceding paragraph, the District Supervisor has a wide range of more specific duties, including, but not limited to, the following:
 - C. 3. a. Ensure that inspections are scheduled within the framework of the Administrative plan, that inspection scheduling follows established agency procedures, and that scheduling practices are adequately documented; (See Chapter II for inspection priorities.)
 - C. 3. b. Review inspection reports from CSHOs and issue citations and proposed penalties, when appropriate; (See Chapters III, IV, V, and VI.)
 - C. 3. c. Modify citations, proposed penalties and abatement dates, when appropriate and when requested within the allowable time and in accordance with established procedures; (See Chapters III, IV, and V.)
 - C. 3. d. Ensure that prompt and appropriate action is taken with regard to the collection of assessed penalties and the transmission of monies collected to the Program Manager's Office.
 - C. 3. e. Determine the validity of complaints and referrals and take appropriate action; (See Chapter IX.)
 - C. 3. f. Initiate imminent danger and fatality/catastrophe investigations; (See Chapters VII and VIII.)
 - C. 3. g. Arrange, through the Program Manager, for the assistance of experts, as necessary, for inspections and investigations; (See Chapters III and VIII.)
 - C. 3. h. Coordinate special compliance problems (e.g., failures to abate, willful violations, refusals of entry, etc) with the Program Manager and the Department of Labor Counsel;

(See Chapters III and V.)

- C. 3. i. Hold informal conferences with employers and arrange for off-site consultation services, speeches, seminars, etc., in response to inquiries from employer or employee groups or members of the interested public; (See Chapter III.)
- C. 3. j. Provide abatement assistance to employers and arrange for off-site consultation services, speeches, seminars, etc., in response to inquiries from employer or employee groups or members of the interested public; (See Chapter III.)
- C. 3. k. Completion of OIS information by the inspector.
- C. 3. l. Ensure that an inspection case file is established and maintained for each inspection, containing all appropriate documents pertaining to the case, and including an activity diary comprising a chronological record of significant actions taken affecting the case; (See Chapter III, Appendix A.)
- C. 3. m. Coordinate with the Department of Labor Counsel on contested cases, including potential formal settlements; help arrange for the assistance of expert or other witnesses; personally testify, as appropriate, regarding the scheduling of inspections and the issuance of citations and proposed penalties; (See Chapters II, III, V and VI.)
- C. 3. n. Provide assistance to the District Section 27-a(10)(b) discrimination investigator as requested; (See Chapter X.)
- C. 3. o. Respond to requests for information pursuant to the Freedom of Information Law (FOIL) using current guidelines; and
- C. 3. p. Develop and implement a comprehensive safety and health program for District Office personnel, as appropriate, ensuring compliance with all applicable PESH standards and regulations.

Supervisor

- D. 1. General. The Field Supervisor has first level supervisory responsibility over CSHOs in the discharge of their duties. Program Managers may delegate authority to sign citations and to perform other duties normally assigned to the District Office Supervisors.
- D. 2. Responsibilities. The Supervisor exercises responsibility under the authority of the District Supervisor. The following are among the specific duties of the supervisor:
 - D. 2. a. Review the work products of CSHOs under supervision for technical adequacy in applying the policies and procedures in effect in the agency, accept, amend, or reject them as appropriate. (This review includes forwarding such products to a supervisor of the opposite discipline for review whenever items from that discipline are addressed.);
 - D. 2. b. Evaluate the performance of CSHOs under supervision;

- D. 2. c. Advise, counsel, and instruct CSHOs under supervision on PESH policies and procedures and on administrative matters;
- D. 2. d. Ensure that CSHOs have available all report forms and handouts in sufficient quantity for use in inspections; that necessary personal protective equipment is available for use and in serviceable condition; that test equipment required for inspections is properly calibrated and ready for use when needed; and that CSHOs are trained in the field use of such equipment;
- D. 2. e. Develop, schedule and/or execute training to upgrade the knowledge and skills of CSHO staff under supervision;
- D. 2. f. Evaluate incoming complaints and referrals, establish priorities among inspection categories, schedule programmed and unprogrammed inspections in accordance with the targeting procedures outlined in Chapter II, and ensure that adherence to targeting procedures is adequately documented;
- D. 2. g. Recommend and initiates work methods, organizational alignment, and the structure of work to achieve optimum utilization of available resources;
- D. 2. h. Participate in informal conferences, as appropriate, and generally offer advice and consultation to the District Supervisor on program and procedural issues; and
- D. 2. i. Provide abatement assistance to employers and arrange for off-site consultation services, speeches, seminars, etc., in response to inquiries from employer or employee groups or members of the interested public. (See Chapter III.)

Compliance Safety and Health Officer.

- E. 1. General. It is the mission of the Compliance Safety and Health Officer (CSHO) to represent PESH to the public and, in so doing, to carry out the policies and procedures of the bureau under the direction of the supervisor.
- E. 2. Responsibilities. The primary responsibility of the CSHO is to carry out the mission of the agency in accordance with established policies and procedures. The most effective means of achieving this goal is to build cooperative relationships in the interest of workplace safety and health. This is accomplished primarily through quality inspections reflecting the highest levels of professionalism.
- E. 2. a. Preparation. The most important time spent in a CSHO's professional activity is that devoted to preparing for an inspection. Once the establishment for inspection has been assigned, the CSHO shall review the types of conditions likely to be encountered, including the work processes, equipment and machinery involved, and the hazards likely to be associated with them. All available sources of information shall be used to bring about as complete a familiarity with the establishment as is practicable. The quality of the inspection will be judged by employer and employee alike based on the familiarity with the work done and the problems associated with it.
- E. 2. b. First Impression. CSHOs must be aware that a good first impression is of utmost

importance to the creation of an atmosphere of cooperation and is essential to the successful completion to the inspection. Such an impression can be created by careful planning. Dress shall be appropriate to the type of establishment to be inspected. Proper protective clothing and equipment shall be worn and company compartment rules scrupulously observed. CSHOs shall attempt to become aware of how the employer and the employee representatives feel about PESH's presence in the workplace and shall take care not to become a source of resentment. A precise and respectful professionalism shall characterize the CSHO's demeanor. The inspection shall be conducted as efficiently as possible, without undue delay and with sensitivity to the needs and concerns of those involved.

- E. 2. c. Concern for Safety and Health. During the walkaround the CSHO shall encourage dialogue and questions related to safety and health issues and shall offer suggestions and explanations as to how problems might be abated. The major goal of PESH's inspections is to foster a mutual interest on the part of labor and management in eliminating or reducing workplace hazards. This involves building cooperation on the foundation of existing good safety and health practices, which practices shall be commended and promoted whenever possible.
- E. 2. d. Balanced Approach. PESH policy is to remain neutral in dealing with management and labor. The CSHO is an agent of neither side but rather of PESH and is, therefore, charged with ensuring a safe and healthful workplace. Bias or even the appearance of partiality toward one side or the other will lessen PESH's ability to carry out this mandate.
- E. 2. e. Thoroughness. PESH will be judged at every step of the inspection by the actions of the CSHO. The closing conference shall be used as a means of reinforcing the agency's intent to be cooperative, helpful, and courteous in the conduct of its business. The CSHO shall explain the availability of other PESH programs in addition to enforcement, such as consultation, and training.
- E. 3. Subpoenas Served on CSHOs. If a CSHO is served with a subpoena, the District Supervisor shall be informed immediately and shall refer the matter to the Program Manager and the Department of Labor Counsel.
- E. 4. Testifying in Hearings. The CSHO is required to testify in hearings on PESH's behalf. The CSHO shall be mindful of this fact when recording observations during inspections. The case file shall reflect conditions observed in the workplace as accurately as possible. If the CSHO is called upon to testify, the case file will be invaluable as a means for recalling actual conditions.
- E. 5. Release of Inspection Information. The information obtained from inspections is confidential but is to be determined as disclosable or non-disclosable on the basis of criteria established in the Freedom of Information Law.
- E. 5. a. The CSHO shall not discuss information connected within any case except as indicated elsewhere in this FOM. Thus, for example, case file information may be discussed with employer or employee representatives in the closing conference, during informal conferences, and the like. (See, for example, Chapters III and V.)

NOTE: This subparagraph is intended to apply to discussions with persons outside of PESH. It is not intended to prohibit professional consultation with other bureau employees.

- E. 5. b. Any requests for such information shall be directed to the District Supervisor. If it is determined that a request for information is not a routine request but one covered by the FOIL, the request shall be immediately referred to the designated disclosure officer.
- E. 6. Disposition of Inspection Records. "Inspection records" are any records made by a CSHO that concern, relate to, or are a part of any inspection or that concern, relate to, or are part of the performance of any official duty. Such original material and all copies shall be included in the case file. These records are the property of the NYS Government and a part of the case file. Inspection records are not the property of the CSHO and under no circumstances are they to be retained or used for any private purpose. Copies of documents, notes or other recorded information not necessary or pertinent or not suitable for inclusion in the case file shall, with the concurrence and permission of the District Supervisor, be destroyed in accordance with an approved record disposition schedule.
- E. 7. Correspondence with the Public. CSHOs normally shall not correspond with the public except as directed by the District Supervisor. All formal correspondence shall be submitted to the District Supervisor for approval. This shall not be interpreted to mean that a CSHO cannot answer questions regarding PESH programs, including standards interpretations, if asked while on an inspection or over the telephone.

District Office as Full Service Resource Center.

- F. 1. Outreach Program Plan. The Program Manager shall ensure that each District Supervisor maintains an outreach program plan appropriate to local conditions.
- F. 1. a. Each District Supervisor shall identify the targets of the outreach program in accordance with the needs in the service area, and the resources available in the District Office. These targets are expected to vary with different areas.
- F. 1. b. Such outreach targets shall include industries or employers and their employees which are the subject of Special Emphasis Programs developed and approved in accordance with the FOM, Chapter II, F.2.b.(4).
- F. 2. Program Manager's Office Support Services. The Program Manager shall ensure that the District Supervisors receive the support necessary to maintain their programs.
- F. 2. a. Each District Supervisor shall draw up a list of CSHOs who possess, in the supervisor's opinion, some unique skill, specialized knowledge, or academic credentials not generally available among PESH compliance personnel.
- F. 2. a. (1) The District Office list shall be updated as needed.
- F. 2. b. When questions arise in a District Office which appear to require specialized assistance in order to resolve a particular safety or health concern, the Program Manager shall be

contacted and asked to recommend a CSHO from among those listed by the District Supervisors who may be able to offer assistance.

- F. 2. b. (1) The Program Manager shall ensure that a knowledgeable CSHO is recommended and shall make arrangements with the District Supervisor to whom the CSHO is assigned for his/her services to be made available to the requesting District Supervisor.
- F. 2. b. (2) The Program Manager shall develop guidelines governing the circumstances under which CSHO services shall be provided in response to requests for assistance.
- F. 2. c. The Program Manager's Office shall develop handout packages, consisting of printed and photocopied materials, which can be distributed to interested persons. Once the targeted audiences for these packages have been identified, they shall be tailored, as much as possible, to the interests or requirements of the audience.
- F. 2. d. Short courses addressing specific issues shall also be developed by the Program Manager's Office both for presentation by PESH District Office personnel and for loaning out to others for delivery. Such courses shall be planned so that they do not normally exceed 6 hours training time.
- F. 3. Training and Education Services. The District Office should serve as a center for the diffusion of safety and health information into the community.
- F. 3. a. Identification of Materials. An audit of all resource material presently in the District Office shall be made and updated annually.
 - F. 3. a. (1) A list of the training resources available in each District Office library; e.g., films, slides, film strips, video tapes, records, audio tapes and other training materials, shall be sent to the Program Manager.
 - F. 3. a. (2) Technical library materials shall also be identified.
 - F. 3. a. (3) The Program Manager shall be kept informed of any data bases to which District Offices may have access.
 - F. 3. a. (4) The Program Manager shall have lists of available materials published for distribution by CSHOs during closing conferences or whenever appropriate.
- F. 3. b. Lending Policies. It is PESH policy to make training and technical materials available to the public whenever they can be of assistance in safety and health matters.
 - F. 3. b. (1) Guidelines shall be developed in each Region governing the lending policies and procedures to be followed in the District Office.
 - F. 3. b. (2) Books and other library materials as well as video and audio materials shall not normally be available to the public for use outside the physical

location of the District Office. They may be loaned out, however, to other agencies, to PESH contractors, such as 21(d) consultation managers, or to appropriate public agencies such as vocational or other schools.

- F. 3. b. (3) Some control method, such as a checkouts system with return due date, shall be instituted so that the whereabouts of the loaned materials can be tracked.

NOTE: Printed material meant for distribution to the public, such as copies of laws, regulations, and informational brochures, pamphlets, and booklets shall be provided in accordance with the FOM, Chapter III, D.3.e.

- F. 3. c. Informational Services. PESH desires to keep employers and employees accurately informed of current developments within the agency. Several programs for informing the public are being tested in the field and additional services will be added as soon as they can be developed.

- F. 3. c. (1) District Supervisors shall include in their outreach program plan a procedure for informing the safety and health community in their jurisdictions of PESH developments, such as:

- F. 3. c. (1) (a) New or revised standards;

- F. 3. c. (1) (b) Other standards activity, as appropriate, including the status of proposed standards, comment periods, or public hearings;

- F. 3. c. (1) (c) Developments in the area of voluntary compliance;

- F. 3. c. (1) (d) Courses offered at the OSHA Training Institute;

- F. 3. c. (1) (e) Accident information fact sheets, when appropriate; etc.

- F. 3. c. (2) Onsite consultation services available through 21(d) contractors or 18(b) State programs shall be given wide publicity.

- F. 4. Referral Services. The District Office shall make every effort to be cognizant of the safety and health resources available within its jurisdiction. The District Supervisor and staff shall be prepared to make appropriate referrals when the occasion arises.

- F. 4. a. Examples of such resources are:

- F. 4. a. (1) Local professional safety and health organizations, either private or public;

- F. 4. a. (2) 21(d) or State program onsite consultation projects;

- F. 4. a. (3) Other PESH services; e.g., investigation of Sec 27-a(10)(b) discrimination complaints;

- F. 4. a. (4) Other related Government agencies; e.g., NIOSH, Wage and Hour, FGIS, EPA; and

- F. 4. a. (5) NIOSH-approved laboratory analysis services.
- F. 4. b. The specific offerings of each of the resources identified shall be determined so that proper use may be made of them.
- F. 4. c. Lists of these resources with names of contact persons, addresses and telephone numbers shall be developed and kept on file. They shall be updated at least once a year.
- F. 4. d. Caution shall be exercised in making referrals to particular consultants or other private safety and health services or equipment distributors. PESH does not wish to promote or to give the appearance of promoting specific enterprises. There are organizations to which interested parties can be referred for lists of such businesses.
- F. 4. e. In District Offices, referral services would, of course, include referral to available State program services, such as enforcement and other compliance services, and training and education.
- F. 5. Other Services.
- F. 5. a. Voluntary Compliance Programs. PESH offers a large variety of voluntary compliance programs which employers shall be encouraged to investigate and in which to participate, when appropriate.
- F. 5. a. (1) Labor/Management Programs. The District Supervisor and staff shall also be familiar with programs being conducted. While potential participants in such programs may be limited, appropriate employers shall be encouraged and assisted to develop a program for consideration.
- F. 5. b. Abatement Assistance. It is PESH policy to offer assistance in every feasible manner toward the removal of safety or health hazards from the workplace. Such assistance shall be offered to any interested party as deemed appropriate and feasible by the District Supervisor in consultation with the Program Manager. Abatement assistance may be offered in connection with an enforcement inspection or independently of such an inspection.
- F. 5. b. (1) When connected with citations issued as a result of an inspection, abatement assistance shall be governed by the guidelines in the FOM, Chapter III, F.
- F. 5. b. (2) When no inspection is involved, PESH shall offer any appropriate off-site assistance in removing hazards from the workplace.
- F. 5. b. (2) (a) Employers and employee representatives shall be encouraged to seek such assistance whenever it could be helpful.
- F. 5. b. (2) (b) The offering of such assistance shall be a part of the outreach program plan developed by each District Supervisor. The means of making known PESH's policy of offering hazard removal assistance shall be determined as a part of that program plan.

- F. 5. b. (3) Onsite consultation services shall be made available to agencies which request such assistance.
- F. 5. c. Other Technical Services. It is PESH policy to offer technical assistance whenever appropriate.
- F. 5. c. (1) Such services shall be available to employers covered by the PESH Act.
- F. 5. c. (2) The District Office may loan out selected technical equipment on a limited basis to other agencies, and PESH contractors, such as 21(d) consultation managers, provided that the borrowers are trained in the use of the equipment, for the purpose of conducting initial monitoring to identify potential health hazards, emergency monitoring, single case monitoring when processes have been changed, or for other legitimate purposes. Loans of equipment for routine monitoring are not feasible.
- F. 5. c. (3) Guidelines shall be developed in each Region governing the lending policies and procedures to be followed in the District Office. Such policies and procedures shall include the following guidelines:

- F. 5. c. (3) (a) Some control method, such as a checkouts system with return due date, shall be instituted so that the whereabouts of the loaned equipment can be tracked.
- F. 5. c. (3) (b) The equipment to be loaned shall be thoroughly checked out and its condition noted. The lender shall sign an agreement to repair any damage resulting to the equipment while it is in his/her custody.
- F. 5. c. (3) (c) Equipment shall not be loaned out when that equipment is necessary for the District Office to carry out its compliance mission.
- F. 6. Public Information Policy. The District Supervisor may publicize the services offered by way of local news releases or public service announcements as appropriate in local circumstances. Such publicity efforts shall be part of a public information section within the outreach program plan.
- F. 6. a. All news and public service announcements shall be approved by the Program Manager prior to release.
- F. 6. b. Professional staff are encouraged to become members of professional safety and health organizations and/or to attend the meetings of such organizations regularly. Such meetings can be a vehicle for informing the public of PESH's balanced program mix.
- F. 6. c. The District Supervisor shall extend the bureau's cooperation toward all local cooperative safety and health efforts in the community. This cooperation shall be expressed in whatever way seems most appropriate.

G. (reserved)

CHAPTER II

COMPLIANCE PROGRAMMING

Program Planning.

- A. 1. Purpose. Compliance Programming provides general guidelines to the Program Manager and District Supervisor in planning compliance operations and related activities and instructions for their implementation.
- A. 2. Primary Consideration. The primary consideration in conducting compliance operations is the attainment of maximum effective inspection coverage. To achieve this goal, the guidelines in this chapter shall be used for scheduling inspections.
- A. 3. Home-Based Worksites.
- A. 3. a. PESH will not perform any inspections of employees' home offices. A home office is defined as office work activities in a home-based setting/worksites (e.g., filing, keyboarding, computer research, reading, writing) and may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet).
- A. 3. b. PESH will only conduct inspections of other home based worksites, such as home manufacturing operations, when it receives a complaint or referral alleging that a violation of a safety or health standard exists that threatens physical harm, that an imminent danger is present, or that there was a work-related fatality.

Inspection/Investigation Types.

- B. 1. Unprogrammed. Inspections scheduled in response to alleged hazardous working conditions that have been identified at a specific worksite are unprogrammed. This type of inspection responds to imminent dangers, fatalities/catastrophes, complaints, and referrals. It also includes follow-up and monitoring inspections scheduled by the District Office.

NOTE: This category includes all employers directly affected by the subject of the unprogrammed activity.

- B. 2. Unprogrammed Related. Inspections of employers at multi-employer worksites whose operations are not directly affected by the subject of the conditions identified in the complaint, accident, or referral are unprogrammed related. An example would be a trenching inspection conducted at the unprogrammed worksite, where the trenching hazard was not identified in the complaint, accident report, or referral.
- B. 3. Programmed. Inspections of worksites which have been scheduled based upon objective or neutral selection criteria are programmed. The worksites are selected according to scheduling plans for safety and for health or special emphasis programs.

- B. 4. Programmed Related. Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment such as a low hazard employer at a worksite where programmed inspections are being conducted for all high hazard employers. All high hazard employers at the worksite shall normally be included in the programmed inspections. (See Chapter II Appendix)

Inspection Scope.

Inspections, either programmed or unprogrammed, may fall into one of two categories depending on the scope of the inspection:

- C. 1. Comprehensive. A substantially complete inspection of the potentially high hazard areas of the establishment. An inspection may be deemed comprehensive even though, as a result of the exercise of professional judgment, not all potentially hazardous conditions, operations and practices within those areas are inspected.
- C. 2. Partial. An inspection whose focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment.
- C. 2. a. A partial inspection, whether programmed or unprogrammed, may include, in addition to its principal focus, a review of injury and illness records, an assessment of the employer's hazard communication and lockout/tagout programs, an evaluation of the employer's safety and health management program, and a brief walkaround to survey, as deemed appropriate, those area, conditions, operations, and practices that, based on the exercise of discretion and professional judgment, are believed to have the greatest hazard potential, but see Chapter III, D.1.d.(5)(b) regarding inspection warrants.
- C. 2. b. The information gathered during this review and walkaround shall be used to confirm or revise the determination made in accordance with the FOM, Chapter III, D.7.c., as to whether the inspection scope should be expanded.

Inspection Selection Criteria

- D. 1. General Requirements. PESH's priority system for conducting inspections is designed to distribute available PESH resources as effectively as possible to ensure that maximum feasible protection is provided to the working men and women of this state.
- D. 1. a. Scheduling. The District Supervisor shall ensure that inspections are scheduled within the framework of the priorities outlined in this chapter, that they are consistent with the objectives of the Bureau, and that appropriate documentation of scheduling practices is maintained.
- D. 1. b. Effect of Contest. If an employer scheduled for inspection, either programmed or unprogrammed, has appealed a citation and penalty received because of a previous inspection and the case is still pending before the Industrial Board of Appeals, the following guidelines apply as per Section 66.9 of 12 NYCRR:

- D. 1. b. (1) If the employer has petitioned the Board and been granted a stay of enforcement regarding the citation appealed, all proceedings against the employer with regard to this citation and penalty shall be stayed. No programmed or unprogrammed inspections relative to this citation can be conducted until a decision is rendered by the Board.
- D. 1. b. (2) The granting of the stay does not affect inspections, programmed or unprogrammed, in other parts of the workplace, covered by other PESH regulations.
- D. 1. b. (3) If the employer has not petitioned the Board for a stay of enforcement, then all programmed or unprogrammed activity may proceed as usual.
- D. 1. b. (4) If the violation(s) is under appeal and no stay of enforcement has been granted, then all applicable penalties will continue to accrue.
- D. 2. Employer Contacts. Contacts for information initiated by employers or their representatives shall not trigger an inspection, nor shall such employer inquiries protect them against regular inspections conducted pursuant to guidelines established by the bureau. Further, if an employer or his representative indicates that an imminent danger exists or that a fatality or catastrophe has occurred, the District Supervisor shall act in accordance with established inspection priority procedures.

Inspection Priorities.

- E. 1. Administrative Plan. Below is a copy to the New York State Department of Labor Administrative Plan for Public Employee Safety and Health Program Inspections pursuant to Labor Law Section 27-a, Subdivision 5c.

Administrative Plan:

All PESH inspections conducted within each of the nine geographically defined districts of the Public Employee Safety and Health Bureau will be assigned according to the schedule of priorities listed below in descending order of priority.

1. Imminent danger.
2. Fatalities/Catastrophe investigations.
3. Complaint investigations (including Discrimination Complaints).
4. Timely follow-up visits to employers with outstanding serious violations.
5. Inspections of construction sites at which public employees are engaged in construction and related activities.
6. Programmed inspections. Programmed inspections will be undertaken within each of the Bureau's nine district offices by assigning each inspector to a specific geographic area, usually defined by county boundaries. Upon assignment of a specific county the inspector will complete inspections of all places of public employment in such locality

before being assigned to conduct inspections in another specific geographic locality. At the discretion of the Director of Safety and Health, inspections of facilities and occupations which statistics and past experience indicate have a low hazard potential may be deferred in favor of assignment to higher hazard worksites in other areas. Generally, no more than one programmed inspection of a worksite per year shall occur. If the Director finds that statistics indicate a high probability that a particular safety and health hazard exists within a standard industrial classification or at an individual facility, inspection of such worksites shall be given priority and may occur more frequently than once a year.

(a) Policy. Programmed inspections are scheduled in accord with the State Administrative Plan.

(b) Description.

1 Safety Inspections. Safety and Health Inspectors are assigned to specific counties or portions of counties. An inspector will not inspect all public employee worksites within one county before proceeding to the next, but rather will visit an equal mixing of locations by selecting limited areas to inspect within all the assigned counties. Programmed safety inspections will not be conducted in establishments not on the safety high hazard list (Chapter III Appendix, Paragraph H) [A96-3] When visiting a small geographical area such as a village, town or state facility, the public employee worksites therein will be inspected according to the following priority:

Worksites whose Standard Industrial Classification/North American Industrial Classification System (SIC/NAICS) Code appears on the PESH list of "high incidence rate of injuries and illnesses" SIC codes.

Worksites whose SIC/NAICS code does not appear on the PESH list when authorized by the Program Manager's Office.

2 Health Inspections. [A96-3] Programmed health inspections will continue to be selected and scheduled from the health high hazard list distributed from the Program Manager's office. However, Industrial Hygienists will now be assigned a specific territory which they will move through in a systematic manner to insure that all worksites with SIC/NAICS Codes on the health high hazard list are inspected. A listing by SIC/NAICS code of health high hazard workplaces is periodically issued from the Program Manager's office.

NOTE: Each PESH district office will maintain a list, arranged by county, of facilities with the designated SIC/NAICS codes. No industrial hygienist will give special emphasis to any one particular type of workplace.

- (c) Where no establishment list is provided by the Program Manager's Office, the District Supervisor shall compile a complete list of active establishments (work sites) considering all establishments (work sites) within the coverage of the office and using the best available information (commerce directories, commercial telephone listings, local permits, local knowledge, etc.). From this list work sites for inspection will be selected randomly.

E. 2. Order of Priority. Unless otherwise noted in particular cases, priority of accomplishment and assignment of manpower resources for inspection categories shall be as follows:

<u>Priority</u>	<u>Category</u>
First	Imminent Danger
Second	Fatality/Catastrophe Investigations
Third	Investigation of Complaints/Discriminations/Referrals
Fourth	Follow-ups
Fifth	Programmed Inspections

E. 3. Efficient Use of Resources. Unprogrammed inspections normally shall be scheduled and conducted prior to programmed inspections. For efficient use of resources, or when bureau objectives so dictate, programmed inspections may occasionally receive a higher priority than unprogrammed inspections. For example, a programmed inspection may be conducted during the response period for a formal non-serious complaint.

Inspection Scheduling.

F. 1. Unprogrammed Inspections. Those inspections conducted in response to specific evidence of hazardous conditions at a worksite are considered unprogrammed inspections.

F. 1. a. Priorities. Unprogrammed inspections (excluding follow-ups and monitoring) shall normally be scheduled with the following priorities:

F. 1. a. (1) Reports of alleged imminent danger situations from any source, including referrals and complaints regardless of formality (Chapter VII);

F. 1. a. (2) Fatalities/catastrophes (Chapter VIII);

F. 1. a. (3) Formal complaints, CSHO referrals, re-inspection referrals, and referrals from other agencies, classified as serious (Chapter IX);

F. 1. a. (4) Media and employer reports of accident involving serious injuries or hazards of a serious nature (Chapter IX, B.2.b(6) and (7));

F. 1. a. (5) Formal non-serious complaints (Chapter IX);

F. 1. b. Scope. Unprogrammed inspections of an establishment are normally partial inspections limited to the specific working conditions or practices forming the basis for the unprogrammed inspection. Depending upon available resources, the scope may be expanded under any of the following circumstances which shall be documented in the

case file:

- F. 1. b. (1) The establishment is listed on the current District Office safety or health inspection register.
- F. 1. b. (2) A substantially complete inspection of a construction or maritime establishment has not been conducted within the preceding 3 months.
- F. 1. b. (3) PESH inspection records for the establishment or for the employer in the case of a mobile worksite, indicate a history of significant violations.
- F. 1. b. (4) The allegations providing the basis for the unprogrammed inspection indicate the existence of potential hazards which can be identified by expanding the inspection.
- F. 1. b. (5) Any other legitimate reason as determined by the District Supervisor.
- F. 1. c. Follow-up Inspections. In cases where a follow-up inspection is necessary, it shall be conducted as promptly as resources permit.
- F. 1. c. (1) Follow-up Inspection Priority. Except in unusual circumstances, follow-up inspections shall be conducted no later than 30 working days after the latest violation abatement date and shall take priority over all programmed inspections and any unprogrammed inspection with hazards evaluated as non-serious. The seriousness of the hazards requiring abatement shall determine the priority among follow-up inspections.

NOTE: If unusual circumstances require modification of inspection priorities, the case file shall be documented regarding the unusual circumstances.

- F. 1. c. (2) Required Follow-up Inspections. PESH currently conducts follow-ups on all citations issued. Follow-ups can be conducted along with programmed inspections in the assigned geographical territory, thereby resulting in a savings in time and travel.
- F. 1. c. (3) Exceptions to Required Follow-up Inspections. It will not be necessary to conduct a follow-up inspection if any of the following applies:
- F. 1. c. (3) (a) Unquestionable Proof of Abatement. A follow-up inspection will not be necessary where unquestionable proof of abatement has been presented such as when the CSHO observed and documented the correction of the cited condition during the inspection.
- F. 1. c. (3) (b) District Supervisor Determination. The District Supervisor may determine that a follow-up inspection is not required. Justification for not conducting follow-up inspections may include statements by the employee or employer representative or other knowledgeable professionals attesting to the correction of the violation.

NOTE: Written signed statements are preferred; however, verbal communications are acceptable if summarized by PESH personnel in a written memorandum for the case file.

- F. 1. c. (4) Multiple Abatement Dates. If a follow-up inspection is to be conducted where an employer has been cited for a number of violations with varying abatement dates, the follow-up inspection normally shall not be scheduled until after most, if not all, of the abatement dates set forth for the more serious violations in the citation(s) have passed. If satisfactory corrective action has been taken by the employer, additional follow-up activity normally shall not be scheduled unless the District Supervisor believes that complex engineering controls or other special factors involved in the case warrant such activity.
- F. 1. c. (5) Notice of Contest. When a citation is currently under appeal, a follow-up inspection will be scheduled as usual, unless the Industrial Board of Appeals has granted a stay of enforcement.
- F. 1. c. (6) Final Order. If the Board renders a decision affirming the alleged violations, the abatement date may be determined by the Board and a follow-up inspection scheduled at the appropriate time if a follow-up had not as yet been conducted. (Ref: Labor Law, Article 3, Section 101.3)
- F. 1. d. Monitoring Inspections. Monitoring inspections are conducted to ensure that hazards are being corrected and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance. Such inspections may be scheduled, among other reasons, as a result of a petition for modification of abatement date (PMA) (Chapter III, E.9); a corporate-wide settlement agreement (CSA) (OSHA Instruction CPL 2.90); or to ensure that terms of a permanent variance or Alternative Compliance Agreement are being carried out.
 - F. 1. d. (1) Monitoring visits shall be conducted for each (PMA) date on serious, willful and repeated violations which extends the final abatement date by more than one year from the citation issuance date.
 - F. 1. d. (1) (a) These inspections shall be conducted as soon as possible after first contact with the employer but no later than 15 working days following the receipt of certification of posting unless an extension is requested and granted by the Industrial Board of Appeals. (See Chapter III, E.9.f. and g.)
 - F. 1. d. (1) (b) Such inspections shall have priority equal to that of serious formal complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.
 - F. 1. d. (2) Monitoring visits in response to PMAs for non-serious violations of for serious, willful, or repeated violations which would result in a final abatement date of one year or less from the citation issuance date shall be scheduled at the discretion of the District Supervisor, based on the gravity of the violation and on resource availability.
 - F. 1. d. (2) (a) These inspections shall be conducted as soon as possible after first contact with the employer but not later than 15 working days following the receipt of certification of posting unless and extension is requested and granted by the Industrial Board of Appeals. (See Chapter III, E.9.f. and g.)

- F. 1. d. (2) (b) Such inspections shall have priority equal to that of serious formal complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.
- F. 1. d. (3) Monitoring visits shall be scheduled to check on progress made on long-term or multi step abatement plans whenever abatement dates extend beyond one year from the issuance date of the citation.
- F. 1. d. (3) (a) These inspections shall be conducted every 6 months, counted from the citation date until final abatement has been achieved for all cited violations. If the case has been contested, the final order date shall be used as a starting point, instead of the citation date. A settlement agreement may specify an alternative monitoring schedule.
- F. 1. d. (3) (b) If the employer is submitting satisfactory quarterly progress reports and the District Supervisor agrees, after careful review, that these reports reflect adequate progress on implementation of control measures and adequate interim protection for employees, a monitoring inspection may be conducted every 12 months.
- F. 1. d. (3) (c) Such inspections shall have priority equal to that of serious formal complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.
- F. 1. d. (4) Monitoring visits shall be scheduled to verify compliance with the terms of granted variances/alternative compliance agreement.
- F. 1. d. (4) (a) The Program Manager's Office shall provide to each affected District Office an updated list of granted variances at the beginning of each fiscal year.
- F. 1. d. (4) (b) The District Supervisor shall review each variance annually to determine if an inspection is warranted based on:
- F. 1. d. (4) (b) 1 Significant differences from standards;
- F. 1. d. (4) (b) 2 No monitoring for current and previous two fiscal years; or
- F. 1. d. (4) (b) 3 Employer not in compliance with terms on previous inspections.
- F. 1. d. (4) (c) Such inspections shall have priority equal to that of a serious formal complaint.
- F. 1. d. (4) (d) A report on the results of these monitoring visits shall be forwarded to the Program Manager's Office.
- F. 1. d. (5) Monitoring visits may also be made for other reasons, as outlined in Chapter III, I.1.

- F. 1. e. Reinspection Referrals. Once a determination is made that a reinspection referral is required, based on the definition in Chapter IX, B.2.b.(2), the inspection shall be conducted in accordance with the priorities given at F.1.a.(3).
- F. 2. Programmed Inspections. A programmed inspection generally is a comprehensive inspection of the work site but may be limited as necessary in view of resource availability and other enforcement priorities. (Low hazard areas, such as office space, may be excluded from inspection without affecting the comprehensiveness of the inspection.)
- F. 2. a. General. Certain considerations are fundamental to the implementation of PESH's targeting system.
- F. 2. a. (1) Policy. It is PESH policy that inspections conducted as programmed inspections be primarily in the "high hazard" sectors of employment. Programmed safety inspections will not be conducted in establishments not on the safety high hazard list (Chapter II Appendix) [A96-3]
- F. 2. a. (1) (a) SIC/NAICS codes which encompass hazardous public employee worksites are based on data compiled by the Department's Research and Statistics Division in the publication, "Occupational Injuries and Illnesses Survey. - State and Local Government - New York State (year)." In the area of safety, PESH considers a "high rate" workplace to be one in which the incidence rate for that SIC/NAICS code is equal to or greater than the rate obtained by the following formula: [A96-3]
- F. 2. a. (1) (a) 1 Take the lowest average incidence rate of the last five years for the total public sector as reported by Research and Statistics for the past five years.
- F. 2. a. (1) (a) 2 Set the "high hazard" rate at 75% of the number found in number 1 above.
- F. 2. a. (1) (b) In the area of health, the bureau considers a "high hazard" industry to be one with a previous history of serious PESH health citations.
- F. 2. a. (1) (c) For the purpose of scheduling programmed inspections, construction and maritime are considered to be categories of high hazard employment.
- F. 2. b. Guidelines and Procedures. Programmed inspections may be conducted jointly by both safety and health personnel whenever resources are available and it is likely, based on experience in inspecting similar workplaces, that both safety hazards and health hazards exist to a significant degree. If an inspection is begun as safety only or as health only but the CSHO determines during the course of the inspection that it should be expanded, the CSHO shall contact the District Supervisor. A decision will then be made on the basis of the information available whether the inspection should be expanded and, if so, to what extent. A decision may also be made, based on resource availability, to handle the information as a CSHO referral for inspection at a later time.

COMPLIANCE PROGRAMMING CHAPTER II APPENDIX

- A. Programmed Inspections. [A96-3, A94-4, IH94-1]
- A. 1. Safety Inspections. Programmed safety inspections will be conducted in establishments with high hazard ratings as listed in this appendix. Programmed safety inspections will not be conducted in establishments not on the safety high hazard list, except at the direction of the Program Manager's Office.
- A. 1. a. SIC/NAICS codes which encompass hazardous public employee work sites are based on data compiled by the Department of Labor's Research and Statistics Division in the publication, "Occupational Injuries and Illnesses Survey, - State and Local Government - New York State (year)."
- A. 1. b. In the area of safety, PESH considers a "high rate" workplace to be one in which the incidence rate for that SIC/NAICS code is equal to or greater than the rate obtained by the following formula.
- A. 1. b. (1) Take the lowest average incidence rate of the last five years for the total public sector as reported by Research and Statistics for the past five years.
- A. 1. b. (2) Set the "high hazard" rate at 75% of the number found in number (1) above.

Safety High Hazards

SIC	NAICS	Description	Examples
0279	112990	Animal Specialties	Laboratory Animal Farms
0752	115210	Animal Specialty Service	
0851	115310	Forestry Services	
0921	112511	Fish Hatcheries and Preserves	
1542	236220	Non Residential Construction	
1611	237310	Highway and Street Construction	DOT & Public Works Departments
4111	485111	Mixed Mode Transit System	
4111	485112	Commuter Rail System	
4111	485113	Bus and other Motor Vehicle Transit System	
4111	485119	Other Urban Transit Systems	
4119	485999	All other Transit and Ground Passenger Transportation	EMS/EMT
4173	488490	Other Support activities for Road Transportation	
4212	484110	General Freight Trucking Local	
4449	483211	Water Transportation of Freight	Canal Barge Operations
4499	532411	Water Transportation Service	Canal Operations & Maintenance
4522	481211	Nonscheduled Chartered Passenger Air Transportation	
4522	481212	Nonscheduled Chartered Freight Air Transportation	
4581	488111	Air Traffic Control	
4581	488119	Other airport operations	
4581	488190	Other support activities for air transportation	
	488490	Other support activities for road transportation	

4785			
4911	221111	Hydroelectric Power generation	
4911	221112	Fossil Fuel Power generation	
4911	221113	Nuclear electric Power generation	
4911	221114	Other Power generation	Solar
4911	221115	Other Power generation	Wind
4911	221116	Other Power generation	Geothermal
4911	221117	Other Power generation	Biomass
4911	221118	Other Power generation	Other
4925	221210	Production and/or Distribution	
4953	562111	Solid waste collection	
4953	562112	Hazardous waste collection	
4953	562119	Other waste collection	
4953	562211	Hazardous water treatment & disposal	
4953	562212	Solid waste landfill	
4953	562213	Solid waste combustor & incinerators	
4953	562219	Other non-hazardous waste treatment	
4959	561710	Exterminating & Pest Control Services	
4959	561720	Janitorial Services	
4961	221330	Steam and air conditioning supply	
5093	423930	Scrap and waste materials	
6512	531120	Lessons of residential building	
6531	531110	Lessons of residential building and dwellings	
7334	323114	Photocopy/Reproduction Areas	
7349	561720	Janitorial Services	
7389	561439	Other building service centers, including copy shop	
7922	711410	Theatrical Producers and Misc. Theatrical Services	
7992	713910	Public Golf Courses	
7999	532292	Recreational costs rental	Bicycles, canoes
7999	487990	Scenic and sightseeing transportation other	
7999	487110	Scenic and sightseeing transportation other	land
7999	487120	Scenic and sightseeing transportation other	water
7999	711310	Promotion of performing arts, ports	
8011	621111	Office of physicians (except mental health)	
8011	621112	Office of physicians (mental health)	
8051	623110	Skilled nursing care facilities	Infirmaries, Nursing homes, etc Developmental Centers, Nursing homes
8059	623210	Nursing & Personal care facilities, nec	
8062	622110	General Medical & Surgical Hospitals	
8063	622210	Psychiatric Hospitals	Adult and children's psych center
8069	622310	Specialty Hospital (except Psychiatric)	
8071	621511	Medical laboratories	
8082	621610	Home Health care services	
8211	611110	Elementary & Secondary schools	

8221	611310	Colleges and universities
8222	611210	Junior Colleges
8249	611513	Apprenticeship training
8249	611519	Other technical and trade schools
8322	624210	Community food services
8322	624110	Child and youth services
8322	624120	Service for the elderly & disabled
8322	624190	Other individual and family services
8322	624210	Community food services
8322	922150	Parole and Probation officers
8322	624230	Emergency and other relief services
8331	624310	Vocational Rehabilitation services
		Residential intellectual and developmental disability
8361	623210	facilities
8361	623220	Residential mental health and substance abuse facilities
8361	623312	Assist living facilities for the elderly
8361	623990	Other residential care facilities
8412	712110	Museums
8412	712120	Historical sites
8733	541711	Research and development in biotechnology
		Research and development in physical, engineering,
8733	541712	and life science (except biotechnology)
		Research and development in social science and
8733	541720	humanities
8734	541380	Testing Laboratories
9111	921110	Executives Offices
9199	921190	Other general government support
9221	922120	Police protection
9223	922140	Correctional Institutions
9224	922160	Fire protection
9229	922190	Other justice, public order and safety activities
9431	923120	Administration of Public Health Programs
9511	924110	Air and water resources and solid waste management
9512	924120	Administration of conservation programs
9621	926120	Regulation, administration of transportation programs
9641	926140	Regulation, Agricultural Markets and commodities

- A. 2. Industrial Hygiene Inspections. Programmed health inspections will be selected and scheduled from the health high hazard list. Industrial Hygienists will be assigned a specific territory which they will move through in a systemic manner to insure that all work sites with SIC/NAICS codes on the health high hazard list are inspected.

Health High Hazards List

SIC	NAICS	Description	Examples
0279	112990	Animal Specialties	Laboratory Animal Farms
0851	115310	Forestry Services	
0921	112511	Fish Hatcheries and Preserves	
1542	236220	Non-Residential Construction	
1611	237310	Highway and Street Construction	DOT & Public Works Departments
20-39		Manufacturing	
4111	485111	Mixed Mode Transit System	
4111	485112	Commuter Rail System	
4111	485113	Bus and other Motor Vehicle Transit System	
4111	485119	Other Urban Transit Systems	
4119	485999	All other Transit and Ground Passenger Transportation	EMS/EMT Canal Barge Operations
4449	483211	Water Transportation of Freight	Canal Operations & Maintenance
4499	532411	Water Transportation Service	
4522	481211	Nonscheduled Chartered Passenger Air Transportation	
4522	481212	Nonscheduled Chartered Freight Air Transportation	
4581	488111	Air Traffic Control	
4581	488119	Other airport operations	
4581	488190	Other support activities for air transportation	
4785	488490	Other support activities for road transportation	
4911	221111	Hydroelectric Power generation	
4911	221112	Fossil Fuel Power generation	
4911	221113	Nuclear electric Power generation	
4911	221114	Other Power generation	Solar, wind
SIC	NAICS	Description	Examples
4911	221117	Other Power generation	Biomass
4911	221118	Other Power generation	Other
4925	221210	Production and/or Distribution	
4931	221111	Hydroelectric Power generation	
4931	221112	Fossil Fuel Power generation	
4931	221113	Nuclear electric Power generation	
4931	221114	Other Power generation	
4931	221115	Other Power generation	
4931	221116	Other Power generation	
4931	221117	Other Power generation	
4931	221118	Other Power generation	
4941	221310	Water supply	

4952	221320	Sewage Systems	
4953	562111	Solid waste collection	
4953	562112	Hazardous waste collection	
4953	562119	Other waste collection	
4953	562211	Hazardous water treatment & disposal	
4953	562212	Solid waste landfill	
4953	562213	Solid waste combustor & incinerators	
4953	562219	Other non-hazardous waste treatment	
4959	561710	Exterminating & Pest Control Services	
4959	561720	Janitorial Services	
4961	221330	Steam and air conditioning supply	
5093	423930	Scrap and waste materials	
6512	531120	Lessons of residential building	
6531	531110	Lessons of residential building and dwellings	
7334	323114	Photocopy/Reproduction Areas	
7349	561720	Janitorial Services	
7389	561439	Other building service centers, including copy shop	
7538		General Automotive Repair shops	
7922	711410	Theatrical Producers and Misc. Theatrical Services	
7992	713910	Public Golf Courses	
7999	532292	Recreational costs rental	Bicycles, canoes
7999	487990	Scenic and sightseeing transportation other	
7999	487110	Scenic and sightseeing transportation other	land
7999	487120	Scenic and sightseeing transportation other	water
7999	711310	Promotion of performing arts, ports	
8011	621111	Office of physicians (except mental health)	
8011	621112	Office of physicians (mental health)	
8051	623110	Skilled nursing care facilities	Infirmaries, Nursing homes, etc
8059	623210	Nursing & Personal care facilities, nec	Developmental Centers, Nursing homes
8062	622110	General Medical & Surgical Hospitals	
8063	622210	Psychiatric Hospitals	Adult and children's psychiatric center
8069	622310	Specialty Hospital (except Psychiatric)	
8071	621511	Medical laboratories	
8082	621610	Home Health care services	
8211	611110	Elementary & Secondary schools	
8221	611310	Colleges and universities	
8222	611210	Junior Colleges	
8249	611513	Apprenticeship training	
8249	611519	Other technical and trade schools	
8361	623210	Residential intellectual and developmental disability facilities	

8361	623220	Residential mental health and substance abuse facilities
8361	623312	Assist living facilities for the elderly
8361	623990	Other residential care facilities
8412	712110	Museums
8412	712120	Historical sites
8733	541711	Research and development in biotechnology
8733	541712	Research and development in physical, engineering, and life science (except biotechnology)
8733	541720	Research and development in social science and humanities
8734	541380	Testing Laboratories
9221	922120	Police protection
9223	922140	Correctional Institutions
9224	922160	Fire protection
9229	922190	Other justice, public order and safety activities
9431	923120	Administration of Public Health Programs
9512	924120	Administration of conservation programs

CHAPTER III

GENERAL INSPECTION PROCEDURES

CSHO Responsibilities.

- A. 1. The primary responsibility of the Compliance Safety and Health Officer (CSHO) is to carry out the mandate given to the Commissioner of Labor, namely, "to assure so far as possible every working man and woman safe and healthful working conditions..." To accomplish this mandate the Public Employee Safety and Health Bureau employs a wide variety of programs and initiatives, one of which is enforcement of standards through the conduct of effective inspections to determine whether employers are:
 - A. 1. a. Furnishing places of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees, and
 - A. 1. b. Complying with safety and health standards and regulations promulgated under the Act.
- A. 2. The conduct of effective inspections requires identification, professional evaluation and accurate reporting of safety and health conditions and practices. Inspections may vary considerably in scope and detail, depending upon the circumstances in each case.

Preparation.

- B. 1. General Planning. It is most important that the CSHO spend an adequate amount of time preparing for an inspection.
 - B. 1. a. CSHOs shall plan individual work schedules in advance in coordination with their supervisor reflecting the priorities in Chapter II.
 - B. 1. b. Supervisors shall ensure that CSHOs carefully review data available at the District Office for information relevant to the establishments scheduled for inspection. These may include inspection files, other establishment files and reference materials. When CSHOs need additional information concerning the type of industry to be inspected, the supervisor shall be consulted.
 - B. 1. c. During review of previous inspection case files, CSHOs shall note those citations that were issued and their abatement status as documented in the case file, especially those high gravity serious and willful
- B. 2. Pre-inspection Planning. Due to the wide variety of industries and associated hazards likely to be encountered, pre-inspection preparation is often helpful to the conduct of a quality inspection. The CSHO together with the supervisor, if appropriate, shall carefully review:

- B. 2. a. All pertinent information contained in the establishment file and appropriate reference sources to become knowledgeable in the potential hazards and industrial processes that may be encountered and shall identify the personal protective equipment necessary for protection against these anticipated hazards.
- B. 2. b. Appropriate standards and sampling methods and, based on experience and information on file concerning the establishment, shall select the instruments and equipment that will be needed for the inspection and prepare them according to the standard methods of sampling and calibration.
- B. 3. Preinspection Compulsory Process. NYCRR Part 802.3 authorizes the agency to seek a warrant in advance of an attempted inspection if circumstances are such that "pre-inspection process (is) desirable or necessary." The Act authorizes the bureau to issue administrative subpoenas to obtain necessary evidence with no time restrictions.
- B. 3. a. Although bureau policy is generally not to seek warrants without evidence that the employer is likely to refuse entry, the Program Manager may, on a case-by-case basis, authorize the District Supervisor to seek compulsory process in advance of an attempt to inspect or investigate whenever circumstances indicate the desirability of such warrants.

NOTE: Examples of such circumstances would be evidence of being denied entry in previous inspections, or awareness that a job will only last a short time or that job processes will be changing rapidly.
- B. 3. b. Administrative subpoenas may also be issued prior to any attempt to contact the employer or other person for evidence related to a PESH inspection or investigation. (See OSHA Instruction ADM 4.4.)
- B. 4. Inspection Materials and Equipment. The CSHO shall have all report forms in sufficient quantity to conduct the inspection, all assigned personal protective equipment available for use and in serviceable condition, and appropriate handouts, if available.
- B. 4. a. If based on the pre-inspection review or upon facts discovered at the worksite, a need for unassigned personal protective equipment is identified, the supervisor shall ensure that any required equipment is provided. Prior to the inspection, the supervisor shall ensure that the CSHO has been trained in the uses and limitations of such equipment.
- B. 4. b. Unless an exception is authorized by the supervisor because of the nature of the worksite (e.g., a worksite where no overhead hazards, eye hazards, and/or foot hazards are likely to be present), approved hard hats, approved safety glasses with permanently or rigidly attached side shields, and approved safety shoes shall be worn by CSHOs on the walkaround phase of all inspections. This will set an example for industry and provide minimum acceptable protection for the CSHO.
- B. 4. c. Inspections involving the use of negative pressure respirators shall not be assigned without the CSHO's having had an adequate quantitative fit test within the last year. Since respirators with tight-fitting face pieces require the skin to be clean shaven at the points where sealing occurs, CSHOs assigned to conduct inspections which involve the use of such respirators shall not have interfering facial hair.

- B. 4. d. If there is a need for special or additional inspection equipment, the supervisor shall be consulted to ensure that training in the use and limitation of such equipment has been accomplished prior to the inspection. The supervisor shall ensure that a review or recheck in the use of all equipment is given to the CSHO at least once a year.
- B. 5. Expert Assistance. The District Supervisor shall arrange through the Program Manager for a specialist from within PESH to assist in an inspection of investigation when the need for such expertise is identified. If PESH specialists are not available, or when otherwise desirable, the Program Manager shall arrange for the procurement of the services of qualified consultants. For further details on the selection of experts, see Chapter VIII, D.2.
- B. 5. a. Expert assistance may be necessary during inspection for the implementation of engineering or administrative controls involving, but not limited to, noise, air contaminants, complicated machine guarding and construction.
- B. 5. b. PESH specialists may accompany the CSHO or perform their tasks separately. A CSHO must accompany outside consultants. PESH specialists and outside consultants shall be briefed on the purpose of the inspection and personal protective equipment to be utilized.
- B. 5. c. All data, conclusions and recommendations from the assigned specialists shall be made part of the inspection report, including information on any resultant actions.
- B. 6. Safety and Health Rules of the Employer. The CSHO shall comply with all safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by OSHA standards or by the employer for the protection of employees.
- B. 7. Immunization and Other Special Entrance Requirements. Many pharmaceutical firms, medical research laboratories and hospitals have areas which have special entrance requirements. These requirements may include proof of up-to-date immunization and the use of respirators, special clothing or other protective devices or equipment.
- B. 7. a. The CSHO will not enter any area where special entrance restrictions apply until the required precautions have been taken. It shall be ascertained prior to inspection, if possible, if an establishment has areas with immunization or other special entrance requirement. If the supervisor and CSHO cannot make a determination through consultation, the District Supervisor or supervisor may telephone the establishment using the following procedures. Such communication will NOT be considered advance notice. (See Part 802.4 and C of this chapter if advance notice is to be given.)
 - B. 7. a. (1) Telephone as far in advance of the proposed inspection date as possible so the employer cannot determine a time relationship between the communication and a possible future inspection.
 - B. 7. a. (2) State the purpose of the inquiry and that an inspection may be scheduled in the future. DO NOT GIVE A SPECIFIC DATE.
 - B. 7. a. (3) Determine the type of immunizations(s) and/or special precautions required and the building or area which has restricted access.
- B. 7. b. If immunization is required, the supervisor shall ensure that the inspecting CSHO has the proper immunization and that any required incubation or waiting period is met prior to

the inspection. Those immunizations necessary to complete inspections will be provided by the Bureau. (See D.8.e.(2) for procedures to follow if immunization areas are initially identified during walkaround.)

Advanced Notice of Inspections.

- C. 1. Policy. Part 802.4 contains a general prohibition against the giving of advance notice of inspections, except as authorized by the Commissioner or the Commissioner's designee.
- C. 1. a. The PESH Act regulates many conditions which are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, the Act, prohibits unauthorized advance notice and authorizes PESH to enter worksites "without delay" in order to preserve the element of surprise.
- C. 1. b. There may be occasions when advance notice is necessary to conduct an effective investigation. These occasions are narrow exceptions to the statutory prohibition against advance notice.
- C. 1. c. Advance notice of inspections may be given only in the following situations:
 - C. 1. c. (1) In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible;
 - C. 1. c. (2) When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary;
 - C. 1. c. (3) To ensure the presence of employer and employee representatives or other appropriate personnel who, as determined by the District Supervisor, are needed to aid in the inspection; and
 - C. 1. c. (4) When the District Supervisor determines that giving advance notice would enhance the probability of an effective and thorough inspection; e.g., in complex fatality investigations, or in conducting universal inspections. (See pg IV-41)
- C. 1. d. Advance notice exists whenever the District Supervisor sets up a specific date or time with the employer for the CSHO to begin an inspection, or to continue an inspection that was interrupted or delayed more than 5 working days as described in C.1.d.(3). It generally does not include nonspecific indications of potential future inspections.
 - C. 1. d. (1) Although advance notice normally does not exist after the CSHO has arrived at the worksite, presented credentials and announced the inspection, many causes can serve to delay or interrupt the continued conduct of the inspection. For example, the employer representative on site may request a delay of entry pending the return of the president or some other higher ranking official, or sampling may have to be delayed for some reason for completion of the initial walkaround.
 - C. 1. d. (1) (a) Such delays shall be short as possible. If an employer's (or an employee representative's) request for delay appears reasonable, the CSHO may delay or interrupt the inspection for up to an hour. The supervisor shall be

contacted if the delay lasts or is anticipated to last longer than one hour.

- C. 1. d. (1) (b) The supervisor shall decide whether the circumstances justify a delay of more than one hour and, if so, for how long. If the delay appears reasonable, the inspection may be delayed or interrupted for the time judged necessary, but in no case for longer than 5 working days except as indicated in C.1.d.(3).
- C. 1. d. (1) (c) In cases where screening sampling is performed and laboratory analysis of the samples is required, there shall be no more than 5 working days between receipt of screening results and the onset of full-shift sampling.
- C. 1. d. (1) (d) The inspection shall be resumed as soon as reasonably possible. Delays or interruptions of less than 5 working days shall not require implementation of advance notice procedures.
- C. 1. d. (2) If the employer or the employee representative requests a delay which the supervisor believes is unreasonable or without sufficient justification (e.g., too long, not in good faith) or if the delay requested is for more than 5 working days except as indicated in C.1.d.(3), the CSHO shall inform the requester that agency policy does not allow for such a delay. If the employer representative continues to insist on the delay, the situation shall be treated as a refusal of entry and shall be handled in accordance with the procedures in D.1.d.(10).
- C. 1. d. (3) In unusual circumstances, the District Supervisor may decide that a delay of more than 5 working days is necessary; e.g., the process to be sampled may not be activated within that time or compliance personnel may not be available in the District Office because of higher priority demands. Any situation involving a delay of more than 5 working days, whatever the justification, shall be handled as advance notice and must be approved by the District Supervisor. In such cases the procedures in C.2. shall be observed in addition to the following:
 - C. 1. d. (3) (a) The CSHO shall determine whether employees at the worksite are represented by a labor organization or a safety committee and, if so, who the authorized representative of employees is.
 - C. 1. d. (3) (b) The CSHO shall notify the employee representative of the delay as promptly as possible and shall keep the representative informed of future appointments or other arrangements for resuming the inspection.
 - C. 1. d. (3) (c) If more than one employer is at the worksite, authorized employee representatives of all such employers shall be notified of the delay as promptly as possible and kept informed of arrangements for resuming the inspection.
 - C. 1. d. (3) (d) The CSHO may request the employer(s) to inform the employee representatives of the delay and to notify them promptly when arrangements have been made to resume the inspection.
 - C. 1. d. (3) (e) If there is no authorized representative of employee, the procedures in

C.2.h. shall be followed.

- C. 2. Procedures. In the situations described in C.1.c. and d.(3), advance notice may be given by the CSHO only after authorization by the District Supervisor. In cases of apparent imminent danger, however, advance notice may be given by the CSHO without such authorization if the District Supervisor is not immediately available. The District Supervisor shall be notified as soon possible and kept apprized of all details.
- C. 2. a. If it is decided to provide advance notice, the CSHO shall do so by telephone or other appropriate contact. This contact normally shall be made not more than 24 hours prior to the inspection. Documentation of the conditions requiring advance notice and the procedures followed shall be included in the case file.
- C. 2. b. If advance notice is to be given at a construction or other multiple employer site, the CSHO shall contact the general contractor. If there are two or more general contractors, all shall be contacted. The general contractor shall be informed of the responsibility of advising all subcontractors on the site of the inspection.
- C. 2. c. During the telephone contact with the employer, the CSHO shall identify himself/herself, explain the purpose of the inspection, state when the inspection is expected to be conducted, ascertain the employer's normal business hours and whether special protective equipment or precautions are required. If immunizations are necessary, the supervisor shall be notified. (See B.7. for immunization requirements.)
- C. 2. d. An important purpose of advance notice is to make arrangements for the presence of employer and employee representatives to aid in the conduct of an effective and thorough inspection. A responsible management official shall be requested to assist in the inspection. The CSHO shall advise the employer that Section 27(5)(b) and Part 802.4 require that an employee representative be given an opportunity to participate in the inspection.
- C. 2. e. The CSHO shall determine if employees at the establishment are represented by a labor organization(s) and if there is a safety committee with employee representatives. The CSHO shall advise the employer that, when advance notice is given, it is the employer's responsibility to notify the authorized employee representative(s) promptly of the inspection
- C. 2. f. If a general contractor is contacted, it shall be pointed out that it is that contractor's responsibility to instruct each subcontractor of the obligation to notify employee representatives promptly of the inspection.
- C. 2. g. If the employer requests and furnishes the identity of the representative, the CSHO shall promptly inform the employee representative of the inspection and shall provide any other information necessary in accordance with Part 802.4.
- C. 2. h. The advance notice requirement with respect to employees applies only if there is a known representative authorized by employees, such as a labor organization or a safety committee with employee representatives. If there is no authorized employee representative or if it cannot be determined with reasonable certainty who the representative is, the CSHO shall consult with a reasonable number of employees during the inspection to determine the impact or possible adverse effects of the advance notice.

Conduct of the Inspection.

- D. 1. Entry of the Workplace. The CSHO shall enter the establishment to be inspected with an attitude reflecting a professional, balanced, and thorough concern for safety and health.
- D. 1. a. Time of Inspection. Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise. The supervisor shall be contacted before entry during other than normal working hours.
- D. 1. b. Severe Weather Conditions. If severe weather conditions encountered during an inspection cause workplace activities to shut down, the inspection shall be continued at a later time as soon as weather permits.
 - D. 1. b. (1) If work continues during adverse weather conditions but the CSHO decides that the weather interferes with the effectiveness of the inspection, it shall be terminated and continued when conditions improve.
 - D. 1. b. (2) If work continues and the CSHO decides to continue the inspection in spite of bad weather, hazardous conditions created by the weather shall be noted since they may be the subject of later citation.
- D. 1. c. Presenting Credentials. At the beginning of the inspection the CSHO shall attempt to locate the owner, operator or agent in charge at the workplace and present credentials. On construction sites this will most often be the representative of the general contractor. In the following circumstances, the CSHO shall:
 - D. 1. c. (1) Identify the top management official at the beginning of the inspection when the person in charge is not present. This person may be the foreman, leadman, gang boss or senior member of the crew.
 - D. 1. c. (2) When neither the person in charge nor a management official is present, contact the employer by telephone and request the presence of the owner, operator or management official. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. This delay shall not normally exceed one hour.
 - D. 1. c. (3) If the person in charge at the workplace cannot be determined according to the circumstances in (1) and (2) above, record the extent of the inquiry in the case file and proceed with the physical inspection after contacting the supervisor. If the person in charge arrives during the inspection, an abbreviated opening conference shall be held, and the person shall be informed of the status of the inspection and included in the continued walkaround.
 - D. 1. c. (4) On multi-employer sites ask the superintendent, project manager or other representative of the general or prime contractor to identify the subcontractors or other contractors on the site together with the names of the individuals in charge of their operations.

- D. 1. c. (4) (a) The CSHO shall then request that these individuals be contacted and asked to assemble in the general contractor's office or other suitable location, together with their employee representatives, if any.
- D. 1. c. (4) (b) The inspection shall not be postponed or unreasonably delayed because of the unavailability of one or more representatives.
- D. 1. d. Refusal to Permit Inspection. Part 802.2 provides that CSHOs may enter without delay and at reasonable times any establishment covered under the Act for the purpose of conducting an inspection. An employer has a right to require that the CSHO seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.
- D. 1. d. (1) Refusal of Entry or Inspection. The CSHO shall not engage in argument concerning refusal. When the employer refuses to permit entry upon being presented proper credentials or allows entry but then refuses to permit or hinders the inspection in some way, a tactful attempt shall be made to obtain as much information as possible about the establishment. (See D.1.d.(5)(c)7 for the information the CSHO shall attempt to obtain.)
- D. 1. d. (1) (a) If the employer refuses to allow an inspection of the establishment to proceed, the CSHO shall leave the premises and immediately report the refusal to the supervisor. The District Supervisor shall notify the Program Manager.
- D. 1. d. (1) (b) If the employer raises no objection to inspection of certain portions of the workplace but objects to inspection of other portions, the CSHO shall inform the supervisor of the partial refusal. Normally, the CSHO shall continue the inspection, confining it only to those certain portions to which the employer has raised no objections.
- D. 1. d. (1) (c) In either case the CSHO shall advise the employer that the refusal will be reported to the supervisor and that the bureau may take further action, which may include obtaining legal process.
- D. 1. d. (2) Questionable Refusal. When permission to enter or inspect is not clearly given, the CSHO shall make an effort to clarify the employer's intent.
- D. 1. d. (2) (a) If there is doubt as to whether the employer intends to permit an inspection, the CSHO shall not proceed but shall contact the supervisor immediately. When the employer's intent is clarified, the CSHO shall either conduct the inspection or proceed as outlined in D.1.d.(1).
- D. 1. d. (2) (b) When the employer hesitates or leaves for a period of time so that permission is not clearly given within one hour of initial entry, the CSHO shall contact the supervisor, who shall decide whether or not permission is being refused.
- D. 1. d. (2) (b) 1 The CSHO may answer reasonable questions presented by the employer; e.g., the scope of the inspection, purpose, anticipated

length.

- D. 1. d. (2) (b) 2 The CSHO shall avoid giving any impression of unyielding insistence or intimidation concerning the right to inspect.
- D. 1. d. (2) (c) If it becomes clear that the employer is refusing permission to enter, the CSHO shall leave the establishment and contact the supervisor.
- D. 1. d. (3) Employer Interference. Where entry has been allowed but the employer interferes with or limits any important aspect to the inspection, the CSHO shall immediately contact the supervisor for instructions on whether or not to consider this action as a refusal. Examples of interference are refusals to permit the walkaround, the examination of records essential to the inspection, the taking of essential photographs and/or videotapes, the inspection of a particular part of the premises, indispensable employee interviews, or the refusal to allow attachment of sampling devices.
- D. 1. d. (4) Administrative Subpoena. Whenever there is a reasonable need for records, documents, testimony and/or other supporting evidence necessary for completing an inspection scheduled in accordance with any current and approved inspection scheduling system or an investigation of any matter properly falling within the statutory authority of the bureau, the Program Manager or District Supervisor if authorized by explicit delegation to do so, may issue an administrative subpoena.
- D. 1. d. (4) (a) If PESH is not permitted access to necessary documents, records, testimony, etc., during an inspection, or if entry to a workplace is refused, appropriate legal action will be taken.

Section 31 of the Labor Law imposes a duty upon individuals from whom information is requested to furnish such information to the Commissioner or his designee. Section 39 of the Labor Law allows the Commissioner to designate officers of the Department as having the power to issue subpoenas. When records, documents, testimony or other evidence requested by the CSHO or the Supervisor is not provided by the employer upon request, the Supervisor will contact the Program Manager's office. Refer to Chapter I. G. for procedures relating to issuance of an administrative subpoena.

If it is determined that the employer is refusing entry in whole or in part, the CSHO will contact his Supervisor. The Supervisor will contact the employer in an effort to resolve the matter. If the employer continues to refuse entry, the Supervisor will contact the Program Manager's office for further action. The Program Manager will, after approval of the Director, contact the Attorney General who has been given the authority under Executive Law Article 5, Section 63 to "prosecute and defend all actions and proceedings in which ... any office thereof [the State] which requires the services of attorney or counsel ...".

- D. 1. d. (5) Obtaining Compulsory Process. If it is determined, upon refusal of entry or refusal to produce required evidence, that a warrant will be sought, the District Supervisor shall proceed according to guidelines and procedures established in the

State for warrant applications.

- D. 1. d. (5) (a) With the approval of the Program Manager and the Department of Labor Counsel, the District Supervisor may initiate the compulsory process.
- D. 1. d. (5) (b) In some parts of the state, warrants to conduct unprogrammed inspections are limited in scope. For the sake of uniformity, the warrant sought when employer consent has been withheld shall normally be limited to the specific working conditions or practices forming the basis of the unprogrammed inspection. A broad scope warrant, however, may be sought when the information giving rise to the unprogrammed inspection indicates conditions which are pervasive in nature. A broad scope warrant also may be sought when the establishment is listed on the current safety inspection register or the current health inspection register.
- D. 1. d. (5) (c) If the warrant is to be obtained by the Department of Labor Counsel, the District Supervisor shall transmit in writing to the Department of Labor Counsel, within 48 hours after the determination is made that compulsory process (warrant) is necessary, the following information:
- D. 1. d. (5) (c) 1 District Office, telephone number, and name of supervisor involved.
- D. 1. d. (5) (c) 2 Name of CSHO attempting inspection and inspection number, if assigned. Identify whether inspection to be conducted included safety item, health items or both.
- D. 1. d. (5) (c) 3 Legal name of establishment and address including City, State and County. Include site location if different from mailing address.
- D. 1. d. (5) (c) 4 Estimated number of employees at inspection site.
- D. 1. d. (5) (c) 5 SIC/NAICS Code and high hazard ranking for that specific industry within the State.
- D. 1. d. (5) (c) 6 Summary of all facts leading to the refusal of entry or limitation of inspection, including the following:
- D. 1. d. (5) (c) 6 a Date and time of entry.
- D. 1. d. (5) (c) 6 b Date and time of denial.
- D. 1. d. (5) (c) 6 c Stage of denial (entry, opening conference, walkaround, etc.)
- D. 1. d. (5) (c) 7 Narrative of all actions taken by the CSHO leading up to during and after refusal including, as a minimum, the following information.
- D. 1. d. (5) (c) 7 a Full name and title of the person to whom CSHO presented

credentials.

- D. 1. d. (5) (c) 7 b Full name and title of person(s) who refused entry.
- D. 1. d. (5) (c) 7 c Reasons stated for the denial by person(s) refusing entry.
- D. 1. d. (5) (c) 7 d Response, if any, by CSHO to c above.
- D. 1. d. (5) (c) 7 e Name and address of witnesses to denial of entry.
- D. 1. d. (5) (c) 8 All previous inspection information, including copies of the previous citations.
- D. 1. d. (5) (c) 9 Previous requests for warrant. Attach details, if applicable.
- D. 1. d. (5) (c) 10 As much of the current inspection report as has been completed.
- D. 1. d. (5) (c) 11 Other pertinent information such as description of the workplace; the work process; machinery, tools and material used; known hazards and injuries associated with the specific manufacturing process or industry.
- D. 1. d. (5) (c) 12 Investigative techniques which will be required during the proposed inspection; e.g., personal sampling, photographs, videotapes, examination of records, access to medical records, etc.
- D. 1. d. (5) (c) 13 The specific reasons for the selection of this establishment for the inspection including proposed scope of the inspection and rationale:
- D. 1. d. (5) (c) 13 a Imminent Danger.
- X Description of alleged imminent danger situation.
 - X Date received and source of information.
 - X Original allegation and copy of typed report, including basis for reasonable expectation of death or serious physical harm and immediacy of danger.
 - X Whether all current imminent danger processing procedures have been strictly followed.
- D. 1. d. (5) (c) 13 b Fatality/Catastrophe.
- X Type of accident-fatality, catastrophe.
 - X Method of accident notification (telephone, news media (attach copy of report), employee

representative, other.

X Number of employee involved fatalities, injuries, number hospitalized.

D. 1. d. (5) (c) 13 c
Sanitized complaint

Complaint.

Sanitized complaint UPA (Unprogrammed Activity)

X Reasonable grounds for believing that a violation that threatens physical harm or imminent danger exists, including standards that could be violated if the complaint is true and accurate.

X Whether all current complaint processing procedures have been strictly followed.

X Additional information gathered pertaining to complaint evaluation.

D. 1. d. (5) (c) 13 d

Referral.

X Original referral and copy of completed Referral UPA.

X Specific description of the hazards observed and the potential injury or illness that may result from the specific hazard.

X Specific standards that may be violated.

X Number of employees affected by the specific hazard.

X Corroborative information or other supporting material to demonstrate potential existence of a hazard and employee exposure, if known.

X Whether all current referral processing procedures have been strictly followed.

X Additional information gathered pertaining to referral evaluation.

D. 1. d. (5) (c) 13 e

Programmed.

X Safety - general industry, maritime, construction.

X Targeted health.

X Special emphasis program - Special Programs, Local Emphasis Program.

D. 1. d. (5) (c) 13 f Follow up.

X Date of initial inspection.

X Details and reasons follow up was to be conducted.

X Copies of previous citations on the basis of which the follow up was initiated.

X Copies of settlement stipulations and final orders, if appropriate.

X Previous history of failure to correct, if any.

D. 1. d. (5) (c) 13 g Monitoring.

X Date of original inspection.

X Details and reasons monitoring inspection was to be conducted.

X Copies of previous citations on the basis of which the monitoring inspection was initiated.

X PMA request, if applicable.

D. 1. d. (6) Compulsory Process. When a court order or warrant is obtained requiring an employer to allow an inspection, the CSHO is authorized to conduct the inspection in accordance with the provisions of the court order or warrant. All questions from the employer concerning reasonableness of any aspect of an inspection conducted pursuant to compulsory process shall be referred to the District Supervisor.

D. 1. d. (7) Action to be Taken Upon Receipt of Compulsory Process. The inspection will normally begin within 24 hours of receipt of compulsory process or of the date authorized by compulsory process for the initiation of the inspection.

D. 1. d. (7) (a) The CSHO shall serve a copy of the compulsory process on the employer and make a separate notation as to the time, place, name and job title of the individual served.

D. 1. d. (7) (b) The compulsory process may have a space for a return of service entry by the CSHO in which the exact dates of the inspection made pursuant to the compulsory process are to be entered. Upon completion of the inspection, the CSHO will complete the return of service on the original compulsory process, sign and forward it to the supervisor for appropriate action.

- D. 1. d. (7) (c) If physical resistance or interference by the employer is anticipated, the District Supervisor shall notify the Program Manager; appropriate action shall be determined.
- D. 1. d. (7) (d) Even where the walkaround is limited by a warrant or an employer's consent to specific conditions or practices, a subpoena for records shall be served, if necessary. The records specified in the subpoena shall include (as appropriate) injury and illness records, exposure records, the written hazards communication program, the written lockout-tagout program, and records relevant to the employer's safety and health management program, such as safety and health manuals or minutes from safety meetings.
- D. 1. d. (7) (e) The Program Manager or District Supervisor if authorized by explicit delegation to do so, may issue, for each inspection, an administrative subpoena which seeks production of the above specified categories of documents. The subpoena may call for immediate production of the records with the exception of the documents relevant to the safety and health management program, for which a period of 5 working days normally shall be allowed.
- D. 1. d. (7) (f) In exceptional cases, a second warrant may be sought based on the review of records or on "plain view" observations of other potential violations during a limited scope walkaround.
- D. 1. d. (8) Refused Entry or Interference with a Compulsory Process. When a apparent refusal to permit entry or inspection is encountered upon presenting the compulsory process, the CSHO shall specifically inquire whether the employer is refusing to comply with the compulsory process.
- D. 1. d. (8) (a) If the employer refused to comply or if consent is not clearly given (for example, the employer expresses an objection to the inspection), the CSHO shall not attempt to conduct the inspection but shall leave the premises and contact the supervisor concerning further action. The CSHO shall make notations (including all possible witnesses to the refusal or interference) and fully report all relevant facts.
- D. 1. d. (8) (b) The District Supervisor shall contact both the Program Manager and the Department of Labor Counsel, either orally or in writing, as appropriate, concerning the refusal to comply or the interference.
- D. 1. d. (8) (c) The Program Manager, jointly with the Department of Labor Counsel, shall decide what further action shall be taken.
- D. 1. d. (9) Law Enforcement Assistance. A Law Enforcement Official may accompany a CSHO when the compulsory process is required.
- D. 1. e. Forcible Interference with Conduct of Inspection or Other Official Duties. It is a criminal offense to kill "any officer or employee ... of the Department of Labor assigned to perform investigative, inspection or law enforcement functions, while engaged in the

performance of his official duties."

- D. 1. e. (1) Agency Response. Whenever a PESH official or employee encounters forcible resistance, opposition, interference, etc., or is assaulted or threatened with assault while engaged in the performance of official duties, all investigative activity shall cease.
- D. 1. e. (1) (a) The supervisor shall be advised by the most expeditious means.
- D. 1. e. (1) (b) Upon receiving a report of such forcible interference, the District Supervisor or designee shall immediately notify the Program Manager.
- D. 1. e. (2) Types of Interference. Although the employer is legally entitled to refuse permission to conduct an inspection without a warrant, the Act does not permit forcible conduct against the CSHO. The following illustrates the type of forcible conduct which shall be immediately reported to the supervisor:
 - D. 1. e. (2) (a) Anyone physically holding, grabbing, pushing, shoving, or in any way limiting the official's or employee's freedom of action or choice of action. The threat of any action which limits freedom of action or choice of action is included.
 - D. 1. e. (2) (b) Anyone striking, kicking, or in any way inflicting or attempting to inflict injury, pain or shock on the official or employee. The threat of such actions is included as is oral abuse which menaces or causes concern for the official's or employee's safety.
 - D. 1. e. (2) (c) Anyone assaulting or threatening the official or employee with a weapon of any kind. The handling or display of weapons in a menacing manner is included.
- D. 1. f. Release for Entry. The CSHO shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information.
- D. 1. f. (1) If the employer requires that a release be signed before entering the establishment, the CSHO shall inform the employer of the Commissioner's authority under Part 802.2. If the employer still insists on the signing of a release, the CSHO shall suspend the inspection and report the matter promptly to the supervisor who shall decide if the situation is to be treated as a refusal of entry.
- D. 1. f. (2) The CSHO may sign a visitor's register, plant pass, or any other book or form used by the establishment to control the entry and movement of persons upon its premises. Such signature shall not constitute any form of a release or waiver of prosecution of liability under the Act.
- D. 1. f. (3) In case of any doubt, the CSHO shall consult with the supervisor before signing any document.
- D. 1. g. Strike or Labor Dispute. Plants or establishments may be inspected regardless of the existence of labor disputes involving work stoppages, strikes or picketing. If the CSHO

identifies an unanticipated labor dispute at a proposed inspection site, the supervisor shall be consulted before any contact is made.

- D. 1. g. (1) Programmed Inspections. Programmed inspections may be deferred during a strike or labor dispute, either between a recognized union and the employer or between two unions competing for bargaining rights in the establishment.
- D. 1. g. (2) Unprogrammed Inspections. Unprogrammed inspections (complaints, fatalities, etc.) Will be performed during strikes or labor disputes. However, the seriousness and reliability of any complaint shall be thoroughly investigated by the supervisor prior to scheduling an inspection to ensure as far as possible that the complaint reflects a good faith belief that a true hazard exists and is not merely an attempt to harass the employer or to gain a bargaining advantage for labor. If there is a picket line at the establishment, the CSHO shall inform the appropriate union official of the reason for the inspection prior to initiating the inspection.
- D. 1. h. No Inspection. If a scheduled inspection cannot be conducted, the CSHO shall document the reasons for not conducting the inspection, and shall include the names of persons contacted on the NYPESH-1A form to be included in the case file.
- D. 1. i. Voluntary Rescue Operations. [A95-2] PESH has no authority to direct rescue operations. This is the responsibility of the employer and/or local emergency agencies. PESH does have jurisdiction over emergency responders who respond with the local emergency agency. PESH will not inspect the conduct of rescue operations until they are complete. Public agencies providing rescue services will be expected to follow all standards which are applicable to them and the operations they are conducting. With the exception of the Permit Required Confined Space Standard, the employers of employees whose job duties do not include providing assistance or rescue to trapped or injured workers will not be cited for violations of standards because of the "Good Samaritan" activities of such employees.
- D. 2. Employee Participation. CSHOs shall determine as soon as possible after arrival whether the employees at the worksite to be inspected are represented and, if so, shall ensure that employee representatives are afforded the opportunity to participate in all phases of the workplace inspection. If an employer resists or interferes with participation by employee representatives in an inspection and this cannot be resolved by the CSHO, the employer shall be informed of the right of the employee representative to participate. Continued resistance shall be construed as a refusal to permit the inspection and the supervisor shall be contacted in accordance with D.1.d.(1).

NOTE: For the purpose of this chapter, the term "employee representative" refers to (1) a representative of the certified or recognized bargaining agent, or, if none, (2) an employee member of a safety and health committee who has been chosen by the employees (employee committee members or employees at large) as their PESH representative, or (3) an individual employee who has been selected as the walkaround representative by the employees of the establishment.

- D. 2. a. Procedures for Union Representation During PESH Inspections. These procedures will apply on all types of inspections that PESH conducts.

- D. 2. a. (1) The PESH inspector shall determine as soon as possible after arrival whether the employees at the worksite to be inspected are represented. If so, an authorized employee representative shall be requested and afforded an opportunity to participate in all phases of the inspection.
- D. 2. a. (2) To assure proper representation, the PESH inspector should request management to contact the highest elected union official located at that worksite.
- D. 2. a. (3) The PESH inspector must speak directly to the union representative, whether it is in person or by phone. Make sure that you have the correct union title for this individual. If the employee representative declines to participate, he must tell this directly to the PESH inspector. The union official must be informed that he has the right to designate another union member to be his representative during the inspection. If no one is designated and the offer to participate is declined, our responsibility under the law is met.
- D. 2. a. (4) The authorized employee representative will generally be someone located at that worksite. The law does not give us the authority to permit a union representative to travel from one site to another at the expense of the employer to be the authorized employee representative.
- D. 2. a. (5) If there is no elected union official at a particular worksite, ask management to contact the local President by phone. The PESH inspector should then speak to the President and ask if he wishes to designate a workplace representative for the inspection.
- D. 2. a. (6) Shop Steward declination: When the local President declines to participate, the union has given up its right for representation. If a lower level officer or shop steward declines to accompany the inspector, it must be ascertained that he is the highest ranking officer at the facility and has the authority to make the decision.
- D. 2. a. (7) CSEA complaints: The CSEA complaint form lists three "authorized employee representatives". CSEA's intent is to have the complainant list three union officials or members designated by the local president to be representatives. Their names need not be held confidential; therefore, at the opening conference ask management to contact either the CSEA Local President or one of the three people listed on the complaint. A declination from one of these union officials (without them designating another representative) is sufficient to meet our obligation under the law.
- D. 2. a. (8) The inspection narrative must contain the information on who was asked to accompany you, what his/her title is, and if they declined, a statement so indicating.
- D. 3. Opening Conference. The CSHO shall inform the employer of the purpose of the inspection and shall obtain the employer's consent to include participation of an employee representative, as defined in D.2., when appropriate. The opening conference shall be kept as brief as possible, normally not to exceed one hour. Conditions of the worksite shall be noted upon arrival as well as any changes which may occur during the opening conference. Pursuant to Part 802.5(c), the employer and the employee representatives shall be informed of the opportunity to participate in

the physical inspection of the workplace.

NOTE: An abbreviated opening conference shall be conducted whenever the CSHO believes that the circumstances at the worksite dictate that the walk around begin as promptly as possible. In such cases the opening conference shall be limited to the bare essentials; namely, identification, purpose of the visit, and a request for employer and employee representatives. The other elements shall be fully addressed in the closing conference.

- D. 3. a. Purpose of the Inspection. The employer shall be informed as to the reason for the inspection as follows:
- D. 3. a. (1) Imminent Danger Situations. When responding to an alleged imminent danger situation, the CSHO is required to get to the location of the alleged hazard(s) as quickly as possible. Under these circumstances, an expedited opening conference shall be conducted by limiting activities to presenting credentials and explaining the nature, scope, and purpose of the inspection.
 - D. 3. a. (1) (a) Potential safety and health hazards that may be encountered during the inspection shall be identified and appropriate steps taken to provide for personal protection.
 - D. 3. a. (1) (b) The presence of employer and employee representatives shall be requested; however, the inspection shall not be unreasonably delayed to await their arrival.
 - D. 3. a. (1) (c) The employer shall be advised that, because of the abbreviated nature of the opening conference, there will be a more extensive discussion at the closing conference.
 - D. 3. a. (1) (d) Unreasonable delays shall be reported immediately to the supervisor.
- D. 3. a. (2) Fatality/Catastrophe Investigations. The employer shall be informed that an investigation will be conducted and extensive interviews with witnesses will be necessary. The purpose of an accident investigation shall be explained; namely, to determine:
 - D. 3. a. (2) (a) The cause to the accident.
 - D. 3. a. (2) (b) Whether a violation of PESH safety and health standards related to the accident occurred.
 - D. 3. a. (2) (c) What effect the standard violation had on the occurrence of the accident.
 - D. 3. a. (2) (d) If PESH standards should be revised to correct the hazardous working condition that led to the accident.
- D. 3. a. (3) Complaint Investigations. For a complaint investigation, the CSHO shall provide a copy of the complaint(s) to the employer and the employee representatives at the beginning of the opening conference.

- D. 3. a. (4) Referral Investigations. During the opening conference of a referral investigation, the CSHO shall inform the employer that the investigation is a result of a referral (e.g., from another agency, or a previous PESH inspection or in response to specific evidence of probable violations at a worksite).
- D. 3. a. (5) Follow-up Inspections. The CSHO shall explain that any item that had been previously cited will be evaluated for complete abatement of the hazard.
- D. 3. a. (6) Monitoring Inspections. The CSHO shall review the cited items with the employer to determine the progress of abatement and explain to the employer the reason for the monitoring visit; e.g., PMA, CSA, variance, alternative compliance agreement and multi-step abatement.
- D. 3. a. (7) Programmed Inspections. The CSHO shall explain to the employer that programmed inspections are conducted in accordance with the NYS DOL Administrative Plan. A copy of the Plan may be provided to the employer upon request. (See F.2.a.(2) of FOM)
- D. 3. b. Health Inspections. During a health inspection or, as appropriate, during a safety inspection when evaluating potential health hazard, include in the opening conference the following additional procedures:
 - D. 3. b. (1) Request process flow charts and plant layouts relevant to the inspection. If the plant layout and process flow charts are not available, sketch a plant layout as necessary during the course of the initial walkaround, identifying the operations and the relative dimensions of the work area. Distribution of major process equipment, including engineering controls in use, shall also be included on the sketch.
 - D. 3. b. (2) Make a brief examination of all workplace records pertinent to the inspection.
 - D. 3. b. (2) (a) If detailed review is necessary, the CSHO may wish to proceed with the initial walkaround and return later to examine the records more thoroughly.
 - D. 3. b. (2) (b) Many valuable insights can be obtained from an examination of required and other records (e.g., symptomatology which may relate to workplace exposure, frequency of injuries or illnesses, dermatitis, personal protective equipment usage, monitoring data, audiometric test results, ventilation tests, process flow charts and a list of hazardous raw, intermediate, and final product materials) to ensure a more effective inspection and such an examination shall not be omitted if it can be done.
 - D. 3. b. (2) (c) In some plants, sampling for obvious health hazards can be initiated soon after the opening conference. Details of the walkaround can be accomplished while collecting the samples.

Attendance At Opening Conference.

The CSHO shall conduct a joint opening conference or separate conferences as follows:

- D. 3. c (1) Joint Conference. Whenever practicable, a joint opening conference shall be held with the employer and the employee representatives (if there is an employee representative as defined in D.2. of this chapter).
- D. 3. c (2) Separate Conferences. Where either party chooses not to have a joint conference, separate conferences shall be held for the employer and the employee representatives. A written summary of each conference shall be made and attached to the case file. A copy of the written summaries will be available from the District Supervisor upon request by the employer or the employee representative. Where it is determined that separate conferences will unacceptably delay observation or evaluation of the workplace safety or health hazard, each conference shall be brief, and if appropriate, reconvened after the inspection of the alleged hazards.
- D. 3. d. Scope. The CSHO shall outline in general terms the scope of the inspection, including private employee interviews, physical inspection of the workplace and records, possible referrals, discrimination complaints, and the closing conference(s).
- D. 3. d. (1) Explain that previously issued citations, if any, will also be included as part of this inspection as a follow-up or to monitor abatement progress, if they have become a final order of the Industrial Board of Appeals.
- D. 3. e. Reference Items. During the opening conference of every inspection, the CSHO shall explain:
 - D. 3. e. (1) The PESH poster and SH 900 Forms, as well as other applicable laws and regulations. The CSHO shall also inform the employer representatives of procedures for obtaining additional copies of any materials.
 - D. 3. e. (2) The CSHO will review and explain the following reference materials by the end of the closing conference:
 - SH 909 – PESH Act
 - 12 NYCRR – Parts 801, 802, 803, 804, 805, and 820
 - SH 907 – Employer’s Rights and Responsibilities pamphlet
 - P 906 – Employee’s Rights and Responsibilities pamphlet
 - Log and Summary of Injuries and Illnesses/recordkeeping information and forms (SH900, SH 900.1, and SH 900.2)
 - P 206 – Consultation Assistance pamphlet
 - SH 908 – PESH poster
 - SH 918 – Penalty Information for Public Employers
 - NYS Right to Know / Hazard Communication Information
 - 12 NYCRR Part 800.6 – Workplace Violence Prevention Program Rule
 - SH 904 - Closing Conference Pamphlet

These materials may be accessed at:

<http://www.labor.ny.gov/workerprotection/safetyhealth/inspector%20reference%20material.shtm>

- D. 3. f. Program Mix. The CSHO shall briefly indicate the PESH shares the employer’s goal of

reducing workplace injuries and illnesses, that the bureau is developing a variety of different cooperative approaches which are designed to assist the employer in achieving this goal, and that a more detailed discussion will take place during the closing conference.

- D. 3. g. Data entry. The CSHO shall obtain available information for the OIS Inspection data entry during the opening conference.
- D. 3. h. Employees of Other Employers. During the opening conference, the CSHO shall determine whether the employees of any other employers are working at the establishment.
 - (1) If there are such employees and any questions arise as to whether their employers should be included in the inspection, the CSHO shall contact the supervisor to ascertain whether additional inspections shall be conducted and what limitations there may be to such inspection activity.
- D. 3. h. (1) (a) All employers potentially present at any scheduled worksite normally shall be included within the scope of the inspection, except as indicated in (b) and (c) below. Thus, for example, all construction contractors working at a manufacturing establishment scheduled for inspection are to be included in the inspection assignment.
- D. 3. h. (1) (b) When, however, the criteria given in Chapter IX, B.2.b.(1)(c), are met, a CSHO referral may be made and an inspection conducted under the guidelines outlined in Chapter IX.
- D. 3. h. (1) (c) When a construction operation is too large to be efficiently handled during the inspection of the programmed manufacturing establishment, the operation shall be treated as a referral, for inspection at a later time, in accordance with Chapter IX, B.
- D. 3. h. (2) If additional inspections are authorized, both employer and employee representatives of the other employers shall be invited to the opening conference. The inspection shall not be delayed to wait for these employer or employee representatives longer than would be reasonably necessary for either to arrive.
- D. 3. h. (3) If the site is a multi-employer site, such as, but not limited to construction, the CSHO shall determine during the opening conference who is responsible for providing common services available to all employees on site; e.g., sanitation, first aid, handrails, etc.
 - (3) (a) It shall be pointed out to all contractors that, apart from any arrangements that may have been made, each employer remains responsible for his or her own employees.
 - (3) (b) If it cannot be established which contractor is responsible for common services, the CSHO will determine which employer is the exposing, creating, or enforcing employer, whenever violations are noted.

- D. 3. i. Consultation Programs.
- D. 3. i. (1) PESH Consultations. In accordance with 29 CFR 1908.7 and Chapter IX of the Consultation Policies and Procedures Manual (CPPM), the CSHO shall ascertain at the opening conference whether a PESH funded consultation is in progress.
- D. 3. i. (1) (a) Except as indicated in 29 CFR 1908.7(b)(2)(iv), an onsite consultation visit in progress has priority over programmed inspections.
- D. 3. i. (1) (a) 1 For conditions covered by the employer's request for consultation, an on-site visit shall be considered in progress from the beginning of the opening conference through the end of the closing conference.
- D. 3. i. (1) (a) 2 For conditions not covered by the employer's request, the on-site visit shall be considered in progress only while the consultant is at the place of employment.
- D. 3. i. (1) (b) If a consultation visit is in progress, the following procedures shall be observed:
- D. 3. i. (1) (b) 1 If the consultant is actually in the facility, the inspection shall be deferred until after the consultant's closing conference.
- D. 3. i. (1) (b) 2 If the consultant has left the site but has not yet held a closing conference with the employer, the inspection shall be deferred until after the closing conference and may be carried over to the next cycle.
- D. 3. i. (1) (b) 3 Where the period between the consultation opening conference and the closing conference exceeds 30 days, the Program Manager may decide that the inspection shall proceed in the interest of timely assurance of worker protection. If, after conferring with the Consultation Project Manager, the Program Manager determines that the consultation is being conducted properly and at a reasonable pace, the inspection normally shall be deferred until after the consultant's closing conference.
- D. 3. i. (1) (c) If the programmed inspection is scheduled for a multi-employer worksite, such as a construction site, the following guidelines apply:
- D. 3. i. (1) (c) 1 If the general contractor has invited the consultant on site, the consultant shall be considered on site with respect to the entire worksite.
- D. 3. i. (1) (c) 2 If the consultant has been invited by one of the subcontractors and the scope of the consultant's visit is limited to the operations of that one subcontractor, the inspection of the entire worksite shall not be deferred; the subcontractor who has invited the consultant to visit, however, shall be excluded from the scope of the inspection.

- D. 3. i. (1) (d) If a follow-up inspection (including monitoring) or an imminent danger, fatality/catastrophe, complaint or referral investigation is to be conducted, the inspection shall not be deferred, but its scope shall be limited to those areas required to complete the purpose of the investigation. The CSHO shall also comply with the provisions of Chapter II, C.2.a., for a partial inspection, except to the extent that those items are being addressed by the consultant. For example, if the consultant is working with the employer's hazard communication program, that program need not be reviewed by the CSHO.
- D. 3. i. (1) (d) 1 For imminent danger, fatality/catastrophe or formal complaint investigations the employer shall be advised that the consultant must terminate the on-site until the compliance inspection shall have been completed.
- D. 3. i. (1) (d) 2 For CSHO referral or follow-up (including monitoring) inspections the employer shall be advised that the consultant may either continue the on-site visit in areas of the facility not covered by the investigation or terminate the consultation visit until the compliance inspection shall have been completed.
- D. 3. i. (1) (e) If an employer refused entry at the time of a compliance inspection, the District Supervisor shall notify the Program Manager of the refusal and request that no response to a consultation request that might be received from that employer be given until PESH decides whether to seek a warrant. The District Supervisor shall inform the project manager as soon as possible after the resolution of the warrant issue so that a consultation visit may be conducted if the employer should request one. The Program Manager may decide to allow a consultation visit to proceed in the interim if that is judged to be in the best interest of employee safety and health.
- D. 3. i. (1) (f) The employer has no obligation to inform the CSHO of a prior consultative visit. If, however, a copy of the consultant's report is provided and the CSHO finds serious hazards during the walkaround inspection that were previously identified by the consultant, a citation shall be issued for such violations.
- D. 3. j. Other Opening Conference Topics. The CSHO shall determine at the beginning of the opening conference:
- D. 3. j. (1) Employer Name. What the correct legal name of the employer is, what type of legal entity is it, and whether it is a subsidiary of any other entity.
- D. 3. j. (2) Coverage. What facts show that the employer is covered under the Act.
- D. 3. j. (3) Photographs and Videotapes. Whether the employer has any objection to taking photographs and/or videotapes as permitted by 29 CFR 1903.7(b). If the employer does object, the CSHO shall immediately notify the supervisor in accordance with D.1.d.(3).

- D. 3. j. (4) Hazard Assessment. If the employer has a written certification that a hazard assessment has been performed pursuant to 29 CFR1910.132(d)(2), the CSHO shall request a copy. If the hazard assessment itself is not in writing, the CSHO shall ask the person who performed the hazard assessment to describe all potential workplace hazards and then select appropriate personal protective equipment. If there is no hazard assessment, the CSHO will determine potential hazards from sources such as the Log of Injuries and Illnesses and shall select personal protective equipment accordingly.
- D. 3. j. (5) Potential Hazards to Walkaround Participants. The CSHO shall ensure that all members of the inspection party are advised as to appropriate personal protective equipment that is required based on the CSHO's hazard assessment.
- D. 4. Records Review. If the employer is maintaining records of occupational injuries and illnesses on a form that is equivalent to the SH 900 form, no violations of 12 NYCRR 801.29 shall be issued. An equivalent form may include a computer printout, utilizing code numbers instead of descriptive narrative in some of the columns (for example, location or departments may be assigned number codes or injuries/illnesses may have assigned codes). If codes are used, the CSHO must have access to the meaning of the codes so that a proper review of the record may be conducted. Employers are increasingly using computer programs and centralizing their records. This is also acceptable as long as the following conditions are met:
- * employees know how to request and receive a copy of the record for their location;
 - * the centralized record is sorted by location;
 - * employees may receive the information within the work shift, or by the end of the next business day;
 - * the record is current to within six days;
 - * the annual summary will be posted in each location from the 1st of February to the 30th of April;
 - * the format is similar {equivalent} to the SH 900; and
 - * only recordable injuries are in the record or are readily broken out of the program for purposes of completing the annual summary and the SH 900's.
- D. 4. a. Injury and Illness Records Review. Review the SH 900 logs and record in the narrative section of the case file the DART rate that occurred in each of the reference years. The DART rate includes cases involving days away from work, restricted work activity, and transfers to another job. It is calculated based on $(N/EH) \times (200,000)$ where N is the number of cases involving days away and/or restricted work activity and/or job transfers; EH is the total number of hours worked by all workers during the calendar year; and 200,000 is the base number of hours worked for 100 full time equivalent workers. NOTE: Volunteer organizations (FDs, ambulances, etc.) should assume a 40hr work week per employee.
- D. 4. a. (1) Illnesses. The CSHO conducting a safety inspection shall make note of any

significant recorded illnesses and submit a health referral if appropriate. The employer and the employee representatives shall be advised of the possibility of a referral health inspection.

- D. 4. a. (2) Verification of Records. The CSHO shall verify the accuracy of the SH 900 logs by carefully checking them against workers' compensation first reports of injury or C-2 and first aid records, when such first aid records are no more detailed than the type of information contained in the C-2. It may also be appropriate to check SH 900 logs against more detailed first aid and medical records located at the establishment or at other locations.

NOTE: Access to the more detailed first aid and/or medical records may require a written medical access order or the express consent of each employee with a medical record. (See OSHA Instruction CPL 2-2.33.) Such records may be sought in cases where there is evidence of widespread record keeping violations.

- D. 4. a. (2) (a) These documents must be examined carefully to ensure that all work-related injuries and illnesses are being properly recorded on the SH 900.
- D. 4. a. (2) (a) 1 If time allows, all workers' compensation first reports of injury or the C-2 and first aid records shall be reviewed to determine if:
 - D. 4. a. (2) (a) 1 a Treatment was given that could qualify as medical treatment;
 - D. 4. a. (2) (a) 1 b There were any lost time injuries or injuries that resulted in restricted work activities or transfer to another job;
 - D. 4. a. (2) (a) 1 c Any injuries resulted in loss of consciousness;
 - D. 4. a. (2) (a) 1 d Any illnesses were diagnosed; or
 - D. 4. a. (2) (a) 1 e Anything else that would indicate that a recordable injury or illness occurred.
- D. 4. a. (2) (a) 2 If all reports cannot be examined, a representative sample shall be extracted for closer review as indicated in the preceding subsection.
- D. 4. a. (2) (a) 2 a If any cases noted under 1 are found, the SH 900 shall be checked to ensure that they have been properly recorded.
- D. 4. a. (2) (a) 3 The company representative responsible for maintaining injury and illness records shall be interviewed to determine what the company's recording policy is. This individual shall be identified in the case file.
- D. 4. a. (2) (a) 4 Injury and illness records shall be reviewed and verified with employee representatives or other informed employees.

- D. 4. a. (2) (a) 5 If the verification process indicates that the SH 900 does not accurately reflect the lost workday injury experience at the establishment or that the employer is not properly recording injuries or illnesses, this shall be documented in the case file. Data from the log shall not be used for calculating of the DART rate. The CSHO shall advise the employer of the problem and proceed with the inspection.
- D. 4. a. (2) (a) 6 If the credibility of the records has been verified, the CSHO shall proceed with the calculation of the DART rate.
- D. 5. Walkaround Representatives. Those representatives designated to accompany the CSHO during the walkaround are considered walkaround representatives.
- D. 5. a. Employer Representatives. Anyone designated by the employer as a representative is acceptable. In cases of isolated or remote locations, the senior supervisor, foreman, gang boss or head technician on site at the time of inspection is the employer representative. Subject to the guidelines given in D.6.e., every reasonable effort shall be made to afford general walkaround rights to every employer representative on a multi-employer worksite.
- D. 5. b. Employee Representatives. Subject to the guidelines in D.6.e., one or more employee representatives shall be given an opportunity to accompany the CSHO during the walkaround phase of the inspection, to provide appropriate involvement of employees in the physical inspection of their own places of employment, and to give them an opportunity to point out hazardous conditions. Part 802.5(d) gives the CSHO authority to resolve disputes as to who represents the employees for walkaround purposes. The following guidelines shall be utilized for determining employee representatives.
 - D. 5. b. (1) Employees Represented by a Certified or Recognized Bargaining Agent. During the opening conference, the highest ranking union official or union employee representative shall designate who will participate in the walkaround. (See D.2.)
 - D. 5. b. (2) Safety Committee. The employee members of an established plant safety committee or the employees at large may have designated an employee representative or PESH inspection purposes or agreed to accept as their representative the employee designated by the committee to accompany the CSHO during a PESH inspection.
 - D. 5. b. (3) No Certified or Recognized Bargaining Agent. Where employees are not represented by an authorized representative, where there is no established safety committee, or where employees have not chosen or agreed to an employee representative for PESH inspection purposes whether or not there is a safety committee, the CSHO shall determine if any other employees would suitably represent the interests of employees on the walkaround.
 - D. 5. b. (3) (a) If selection of such employee representatives is impractical, the inspection shall be conducted without an accompanying employee representative; and the CSHO shall consult with a reasonable number of employees during the walkaround in accordance with the provisions of Part 802.5 and Section

27-a(5)(b) of the Act.

- D. 5. b. (3) (b) Employees selected for interviewing shall include individuals judged knowledgeable about the area or process being inspected.
- D. 6. Special Situations.
- D. 6. a. Preemption by Another Agency.
- D. 6. a. (1) The supervisor shall be alerted to potential conflicts with other enforcement agencies. If a question arises, upon receipt of a complaint, referral or inquiry, the supervisor shall contact the Program Manager's office for guidance. If an inspection has already begun, the inspector shall interrupt the inspection and contact the supervisor for guidance.
- D. 6. a. (2) The Program Manager's office shall consult the OSHA Directives System for Memorandums of Understanding that may be applicable. Counsel's office and the Director shall also be consulted.
- D. 6. a. (3) If it is determined that PESH does not have jurisdiction, the case shall be referred to the appropriate agency if there is reason to believe that violations may exist.
- D. 6. b. Labor Relations Disputes. The CSHO shall not become involved in labor relations disputes either between a recognized union and the employer or between two or more unions competing for bargaining rights. However, if there is a recognized union, the highest ranking official available will designate the authorized walkaround representative even though another union may be seeking recognition.
- D. 6. c. Expired Collective Bargaining Agreement. When a union contract has expired, the CSHO shall assume that the incumbent union remains as the bargaining agent unless that union is decertified, officially replaced, or has abandoned bargaining agent status.
- D. 6. d. Employee Representatives Not Employees of the Employer. Walkaround representatives authorized by employees will usually be employees of the employer. If, however, a non-employee (union official, industrial hygienist, safety engineer, or other experienced safety or health person) is designated by the employees as their representative to accompany the CSHO during the inspection, such a person normally shall be accorded walkaround rights consistent with Part 802.5. When the employees designate a non-employee as their walkaround representative then the CSHO must interview a reasonable number of employees during inspection. Questionable circumstances, including delays of more than one hour, shall be referred to the supervisor.
- D. 6. e. More Than One Representative. At establishments where more than one employer is present or in situations where groups of employees have different representatives, it is acceptable to have a different employer/employee representative for different phases of the inspection. More than one employer and/or employee representative may accompany the CSHO throughout or during any phase of an inspection if the CSHO determines that such additional representatives will aid and not interfere with the inspection (Part 802.5(c)).

- D. 6. e. (1) Whenever appropriate to avoid a large group, the CSHO shall encourage multiple employers to agree upon and choose a limited number of representatives for walkaround accompaniment purposes. If necessary, during the inspection, employer representatives not on the walkaround shall be contacted to participate in particular phases of the inspection.
- D. 6. e. (2) As an alternative, the CSHO shall divide a multi-employer inspection into separate phases; e.g., excavation, steel erection, mechanical, electrical, etc., and encourage different employer representatives to participate in different phases, as appropriate.
- D. 6. e. (3) The same principles shall govern the selection of employee representatives when several are involved.
- D. 6. f. Disruptive Conduct. The CSHO may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection (Part 802.5(d)). If disruption or interference occurs, the CSHO shall use professional judgment as to whether to suspend the walkaround or take other action. The supervisor shall be consulted if the walkaround is suspended. The employee representative shall be advised that during the inspection matters unrelated to the inspection shall not be discussed with employees.
- D. 6. g. Apparent Violations Observed Prior to the Walkaround. When an apparent violation is observed by the CSHO prior to the walkaround, it shall be noted. All such apparent violations shall be rechecked during the walkaround and cited if appropriate. When possible, serious violations shall be rechecked and documented immediately at the commencement of the walkaround.
- D. 6. h. Use of Tape Recorders. The use of tape recorders during the required conferences may inhibit the free exchange of information, and care shall be exercised in their use. Tape recorders may be used by the CSHO only after authorization by the supervisor.
 - D. 6. h. (1) The use of tape recorders may be authorized whenever circumstances justify it, such as where there is conflicting evidence indicating that the preservation of statements is advisable or where securing signed statements from affected employees will delay the expeditious completion of the investigation.
 - D. 6. h. (2) The tape recorder shall not be used in locations where it may be hazardous.
 - D. 6. h. (3) If the employer, employer representative, affected employees, or any other witnesses object to recording their statements during any part of the investigation, the inspection shall be continued without the tape recorder.
- D. 6. i. (1) Section 27-a of the Act states "Every employee shall comply with the safety and health standards and all rules, regulations and orders issued pursuant to this section which are applicable to his own actions and conduct." The Act does not provide for issuance of citations against employees. Employers are responsible for employee compliance with the standards.
- D. 6. i. (2) In cases where CSHOs determine that employees are systematically

refusing to comply with a standard applicable to their own action and conduct, the matter shall be referred to the District Supervisor who shall consult with the PESH Program Manager.

- D. 6. i. (3) Under no circumstances are CSHOs to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. CSHOs are expected to obtain sufficient information to assess whether the employer is using its authority to ensure employee compliance with the Act. Concerted refusals to comply by employees will not bar the issuance of a citation if the employer has failed to exercise its control to the maximum extent reasonable, including discipline and discharge.

D. 7. Examination of Record Programs and Posting Requirements.

- D. 7. a. Records. As appropriate, the CSHO shall comply with the records review procedures that follow, and document the findings in the case file.

NOTE: Exception B For partial inspections, whether programmed or unprogrammed, the CSHO may, but is not required to, include a review of the injury and illness records and an assessment of some or all of the employer's programs. See Chapter II, C. 2. a.

- D. 7. a. (1) Injury and Illness Records. At the time of the inspection, all injury and illness records required by Part 801.3 shall be examined. If the records have been examined during the current calendar year by a CSHO of the same discipline, the CSHO need only review the injury and illness records since the last inspection. The SH 900 data need not be entered on the NYPESH-1, unless:

- D. 7. a. (1) (a) The SH 900 data was not available at the time of the last inspection, but has now become available; or

- D. 7. a. (1) (b) The calendar year has changed since the last inspection and new SH 900 data is available.

NOTE: The CSHO shall not request access to the Bureau of Labor Statistics survey questionnaire (OSHA-200S) or even ask if the employer has participated in the survey program.

- D. 7. a. (2) Access to Employee Exposure and Medical Records. During all health inspections and safety inspections when designated by the supervisor, whatever the LWDI rate, the CSHO shall determine if applicable exposure and medical records are being maintained in accordance with the medical surveillance record keeping requirements of applicable standards or of 29 CFR 1910.1020. CSHO access to the employee medical records is authorized under Other Regulations and Procedures, Part 801.8(a), for the limited purpose of verifying the existence of required records. Review of the content of such medical records may require a written access order or express employee consent. (See OSHA Instructions CPL 2-2.32, CPL 2-2.33, and CPL 2-2.46.)

- D. 7. a. (3) Hazard Communication. The CSHO shall determine if the employer is covered

by the hazard communication standard. If so, the CSHO shall ensure that the applicable requirements have been met and the program is effective. (See OSHA Instruction CPL 2-2.38D.)[A93-8] Citations for violations of the standard shall be issued in accordance with the provisions of Chapter IV, C. and Chapter V, C. To ensure that the employer has an effective hazard communication program, the following shall be performed:

- D. 7. a. (3) (a) The CSHO shall confirm his/her analysis regarding record keeping and training by conducting employee interviews and documenting their responses in the case file
- D. 7. a. (3) (b) The CSHO shall conduct a brief tour of the facility to confirm compliance with the following elements of the hazard communication standard:
 - D. 7. a. (3) (b) 1 The existence of a written hazard communication program.
 - D. 7. a. (3) (b) 2 The required list of hazardous chemicals.
 - D. 7. a. (3) (b) 3 The existence of and reliance upon hazard determination procedures.
 - D. 7. a. (3) (b) 4 The existence and availability of material safety data sheets in the work area.
 - D. 7. a. (3) (b) 5 In-plant and shipped container labeling programs.
 - D. 7. a. (3) (b) 6 The effectiveness of required training.
- D. 7. a. (4) Lockout/Tagout. Evaluations of compliance with lockout/tagout standards shall be conducted during all general industry inspections within the scope of the standard. The review of records shall include special attention to injuries related to maintenance and servicing operations. (See OSHA Instruction STD 1-7.3.)
- D. 7. a. (5) Occupational Exposure to Rabies. Inspections for occupational exposure to rabies shall be conducted in response to employee complaints and as part of all comprehensive inspections conducted in workplaces where there is a substantial risk of exposure to rabies. All field staff will distribute the "Rabies Exposure Control Guide" developed by PESH, as well as any other appropriate literature, to employers with affected employees, as appropriate, including DPW and law enforcement agencies.
 - D. 7. a. (5) (a) Careful examination of the facility's Rabies Control Program (RCP) is the core element of these inspections. Occupational injury and illness records shall be carefully reviewed, and employees selected from all appropriate areas of the facility shall be interviewed to verify both the accuracy of the SH 900 records and the effectiveness of the RCP. Inspection of appropriate areas of the facility shall be conducted to determine the effectiveness of the facility's efforts to protect employees. CSHOs shall use appropriate caution when entering areas where employees are handling live or dead animals or specimens that may be potentially

infected.

- D. 7. a. (6) Other Records. Any other records which fall within the scope of the inspection and which are related directly to the purpose of the inspection (Part 802.2(c)) shall be examined. These may include, but are not limited to:
 - D. 7. a. (6) (a) Required certification records properly completed and any available equipment inspection and maintenance records;
 - D. 7. a. (6) (b) Medical surveillance or monitoring records, employee exposure records and other medical records not covered under the hazard communication standard. (See D.7.a.(3).)

NOTE: Whenever circumstances indicate or whenever assigned by their supervisors, adequately cross-trained CSHOs conducting a safety inspection shall also conduct a survey of records required by various health standard to be maintained by the employer. These required records may be evaluated by the CSHO at the site or may be copied for examination by the health staff.

- D. 7. a. (6) (c) Safety committee minutes; checklists; records of inspections conducted by plant safety and health committees, insurance companies, or consultant.
- D. 7. a. (6) (d) Variance
- D. 7. b. Posting. The CSHO shall determine if posting requirements are met in accordance with Section 27-a 6.b., Part 801 and Part 804. These include, but are not limited to:
 - D. 7. b. (1) PESH poster informing employees of their rights and obligations under the Act.
 - D. 7. b. (2) Annual Summary of Occupational Injuries and Illnesses during the period from February 1st to April 30th.
 - D. 7. b. (3) Current citations, if any.
 - D. 7. b. (4) Petitions for Modification of Abatement Date (PMAs).
- D. 7. c. Additional Information. It is PESH policy that all safety and health inspections include an entry into and survey of the workplace. Physical inspection of the workplace offers the opportunity not only to identify hazards, but also to verify the effectiveness of safety and health programs.
 - D. 7. c. (1) Accordingly, for all safety and health inspections, the CSHO shall review the employer's overall safety and health management program and specific programs such as those related to personal protective equipment and respiratory protection to evaluate their effectiveness and identify deficiencies.
 - D. 7. c. (2) This review shall include a brief survey of the workplace, focusing on any high hazard areas.

- D. 7. c. (3) A partial inspection may be expanded, in consultation with the District Supervisor, based on the following factors:
 - D. 7. c. (3) (a) Lack of comprehensive safety and health management program. (See D.8.a.(2) and Chapter III Appendix, "Narrative," B.18.)
 - D. 7. c. (3) (b) Significant deficiencies in critical programs such as respiratory protection programs, hazard communication, lockout/tagout, wire rope inspection for cranes, or fire protection programs.
 - D. 7. c. (3) (c) Moderate to high gravity serious violations of safety and health standards uncovered during the plant tour.
 - D. 7. c. (3) (d) Concentrations of injuries or illnesses in specific areas of the plant.
 - D. 7. c. (3) (e) Has a high injury and illness rate relative to their industry (SIC/NAICS).
- D. 7. c. (4) If it is determined to expand the inspection, the employer shall be immediately so notified.
- D. 7. c. (5) Observed violations shall be documented and cited appropriately.
- D. 8. Walkaround Inspection. The main purpose of the walkaround is to identify potential safety and/or health hazards in the workplace. The CSHO shall conduct the inspection in such a manner as to eliminate unnecessary personal exposure to hazards and to minimize unavoidable personal exposure to the extent possible.
- D. 8. a. General Procedures. It is essential during the walkaround portion of every inspection for the CSHO to:
 - D. 8. a. (1) Become familiar with plant processes, collect information on hazards, observe employees' activities and interview them as appropriate.
 - D. 8. a. (1) (a) For health inspections, a preliminary tour of the establishment normally shall be accomplished before any decision to conduct an in-depth industrial hygiene investigation.
 - D. 8. a. (1) (b) Such a preliminary walkaround shall survey existing engineering controls and collect screening samples, when appropriate, to determine the need for full-scale sampling.
 - D. 8. a. (1) (b) 1 If screening reveals potentially high exposure levels, a comprehensive health inspection shall be conducted.
 - D. 8. a. (1) (b) 2 If screening samples must be sent to the laboratory for analysis, the employer shall be so informed.
 - D. 8. a. (1) (b) 2 a If the laboratory results show that potentially high employee exposure levels exist, full-scale sampling of the potentially hazardous areas will be conducted.

- D. 8. a. (1) (b) 2 b If the results are negative, the file will be closed.
- D. 8. a. (2) Evaluate the employer's safety and health program (whether written or not) as follows:
- D. 8. a. (2) (a) By ascertaining the degree to which the employer is aware of potential hazards present in the workplace and the methods in use to control them:
- D. 8. a. (2) (a) 1 What plans and schedules does the employer have to institute, upgrade and maintain engineering and administrative controls?
- D. 8. a. (2) (a) 2 What is the employer's work practices program?
- D. 8. a. (2) (b) By determining employee knowledge of any hazards which exist in the establishment; the extent to which the employer's program covers the precautions to be taken by employees actually or potentially exposed to plant hazards; emergency procedures and inspection schedules for emergency personal protective equipment; the program for the selection, use and maintenance of routine personal protective equipment; and overall quality and extent of the educational and training program and the degree of employee participation in it.
- D. 8. a. (2) (b) 1 Compliance with the training requirements of any applicable safety and/or health standard shall be determined.
- D. 8. a. (2) (b) 2 The following specific elements of the establishment safety and health program shall be evaluated in the detail appropriate to the circumstances of the inspection:
- D. 8. a. (2) (b) 2 a Comprehensiveness. Evaluate the degree to which the employer's safety and health program addresses the full range of hazards normally encountered in the employers operations. This is an overall evaluation and shall take into account the evaluations of the remaining categories. Indicate whether the program is written.
- D. 8. a. (2) (b) 2 b Communication. Evaluate the employees' awareness of the access to the safety and health program, taking into account the principal means by which the program is communicated to them (e.g., oral instructions, booklets, memorandums, posters, etc.). Consider whether safety meetings are held by the employer, their frequency and the persons conducting them (e.g., crew foremen, intermediate level supervisors, safety director, etc.). The effectiveness of these means shall be considered in the evaluation.
- D. 8. a. (2) (b) 2 c Enforcement. Evaluate the degree to which safety and health rules are actually enforced, taking into account the principal methods used (e.g., warnings, written reprimands,

disciplinary action, discharge, etc.) And the effectiveness of these methods. Determine whether there is a staff (or one specific person) with assigned safety or health responsibilities and consider the effectiveness of the staff's performance.

- D. 8. a. (2) (b) 2 d Safety/Health Training Program. Evaluate separately any safety and health training programs the employer has. Factors to be considered include the need for special training in view of the hazards likely to be encountered or of specific requirements for such training and the need for ongoing or periodic training or retraining of employees.
- D. 8. a. (2) (b) 2 e Investigations. Evaluate the employer's efforts to make accident/injury/illness investigations and indicate whether adequate corrective and preventive actions are taken as a result.
- D. 8. a. (3) Determine compliance with specific performance standards that require emphasis such as hazard communication and lockout/tagout.
- D. 8. a. (4) Identify locations and conditions that received citations during a previous inspection and include follow-up or monitoring activities as part of the walkaround to ensure proper abatement or to determine abatement progress, if the citations are a final, unstayed order of the Industrial Board of Appeals. Follow-up and monitoring activities do not constitute a separate inspection when they are conducted as part of another investigation. No separate OIS Inspection should be created. Follow-ups will normally be conducted within three years.
- D. 8. a. (4) (a) Record all facts pertinent to an apparent failure to abate, repeated or willful violation on the appropriate compliance worksheets, as described in D.8.a.(5).
- D. 8. a. (4) (b) Determine if a letter of abatement previously received from the employer accurately described the correction of a previously cited violation.
- D. 8. a. (4) (c) Apparent violations shall be brought to the attention of employer and employee representatives at the time they are documented.
- D. 8. a. (5) Record all facts pertinent to an apparent violation on the appropriate compliance worksheets. Apparent violations shall be brought to the attention of employer and employee representatives at the time they are documented.
- D. 8. a. (5) (a) All notes, observations, analysis, and other information shall be either recorded on the worksheet or attached to it.
- D. 8. a. (5) (a) 1 Because this documentation is required for each instance on an alleged violation, the CSHO shall normally use one worksheet to describe each instance as it is noted.

- D. 8. a. (5) (a) 2 If identical violations of the same standard or of several related standards are noted in one general location in the establishment and if the documentation is essentially the same, all of those violations may be treated as a single instance description and only one worksheet need be completed for that instance.
- D. 8. a. (5) (a) 3 Photographs, videotapes, sketches, and descriptions that are attached to the worksheet are part of the inspection record and shall be noted on the form. The original field notes, as a basic documentation of the violation, shall be attached to the worksheet and retained in the case file. See OSHA Instruction ADM 12.5, Pages D-8 and 9, for filing arrangement.
- D. 8. a. (5) (b) The CSHO shall provide as much detailed information as practical to establish the specific characteristics of each violation as follows:
- D. 8. a. (5) (b) 1 Describe the observed hazardous conditions or practices (i.e., the facts which constitute a hazardous condition, operation or practice and the essential facts as to how and/or why a standard is allegedly violated). Specifically identify the hazards to which employees have been or could be exposed. Describe the type of accident which the violated standard was designed to prevent in this situation, or note the name and exposure level of any contaminant or harmful physical agent to which employees are, have been or could be exposed. If more than one type of accident or exposure could reasonably be predicted to occur, describe the one which would result in the most serious injury illness. For the type of accident described, include:
- D. 8. a. (5) (b) 1 a All factors about the violative condition which could significantly affect the nature and severity of the resulting injuries, (e.g., "fall of 20 feet (6 meters) onto protruding rebar"; "fall into water-filled excavation").
- D. 8. a. (5) (b) 1 b Other factors which could affect the probability that an injury would occur, such as:
- X Proximity of the workers to the point of danger of the operation.
- X Stress producing characteristics of the operation (e.g., speed, heat, repetitiveness, noise, position of employee).
- D. 8. a. (5) (b) 1 c For contaminants and physical agents, any additional facts which clarify the nature of employee exposure.
- D. 8. a. (5) (b) 1 d The identification of the equipment and process which pose the hazards, i.e., serial numbers, equipment types, trade names, manufacturers, and etc. Include a sketch when

appropriate.

D. 8. a. (5) (b) 1 e

The specific location of the violation:

- X Building No. 3, second floor, column no. 6.
- X Machine Shop, N.E. corner, Department 12.
- X Foundry, N.W. corner, shakeout area.

D. 8. a. (5) (b) 1 f

State the nature of the more serious types of injury or illness which it is reasonably predictable and could result from the accident or health exposure.

- X Thus, the entry for the "fall from 20 feet (6 meters) onto protruding rebar" might read "death from multiple injuries." For exposure to asbestos, the entry might read "asbestosis, cancer and death."
- X Broad categories of injuries and health effects (such as "electric shock, "burns", or "lacerations") shall be qualified to indicate whether the injuries or health effects are major or minor.
- X In identifying the illnesses which a standard regulating exposure to an air contaminant or harmful physical agent is designed to prevent in a particular worksite, it may be necessary to consider not only the level of exposure but also the frequency and duration of exposure to the contaminant or agent.

D. 8. a. (5) (b) 1 g

Any specific measurements taken during the inspection (e.g., "20 ft. (6 m) distance from top of scaffold platform to ground level"; "employee standing 2 ft. (60 cm) from unguarded floor edge"; "employee seated 2 ft. (60 cm) from source of metal fumes") which will further document the nature of the hazardous conditions and operations.

- X Describe how measurements were taken during the inspection.
- X Identify the measuring techniques and equipment used and those who were present; i.e., employee or employer representative who observed the measurements being taken
- X Include calibration dates and description of calibration procedures used, if appropriate.

- D. 8. a. (5) (b) 1 h Exposure facts so as to present a picture of employee exposure to the hazard for each particular occupation, including:
- X The occupation and the employer of the exposed employees if the employer is different from the one on the corresponding NYPESH-1.
 - X The number of exposed employees in that occupation.
 - X The length of time that the alleged violation has existed.
 - X The duration and frequency that the employees are exposed (e.g., 2 hr./wk.).
 - X If necessary, signed and dated witness statements shall be obtained and attached to the worksheet.

EXAMPLE: A radial arm saw has been on a construction site for 3 months and has never been guarded during that time. All of the employer's 14 carpenters on the job sue the saw. One of the carpenters is John Doe. Total use of the saw on a daily basis is approximately 4 hours.

- D. 8. a. (5) (b) 1 i Any facts which establish that the employer knew of the hazardous condition or could have known of that condition with the exercise of reasonable diligence. Enter any facts which show that:
- X The employer actually knew of the hazardous condition which constitutes the violation. In this regard, a supervisor represents the employer and supervisory knowledge amounts to employer knowledge.
 - X The employer could have known of the hazardous condition if all reasonable steps had been taken to identify hazards to which employees may have been exposed.

NOTE: If the CSHO has reason to believe that the violation may be a willful violation, facts shall be included to show that the employer knew that the condition existed and, in addition, knew that, by law, he had to do something to abate the hazard (e.g., the employer was previously cited for the same

condition; a CSHO has already told the employer about the requirement; knowledge of the requirement was brought to the employer's attention by an employee safety committee, and etc.). Also, include facts showing that, even if he was not consciously violating the Act, the employer was aware that the violative condition existed and made no reasonable effort to eliminate it.

Any pertinent employer or employee remarks made during the walkaround and/or the closing conference, especially comments directly related to the instance described.

- X Include employer comments which may be characterized as admissions of the specific violations described.
- X Include any other facts which may assist in evaluating the situation or in reconstructing the total picture in preparation for testimony in possible legal actions.
- X Include any additional comments (by the CSHO), particularly any explanation of abatement of dates when necessary (e.g., when longer than 5 days for a serious violation or when an abatement period exceeding 30 days is recommended for an item).

D. 8. a. (5) (b) 2 If employee exposure (either to safety or health hazards) is not observed, state facts on which the determination is made that an employee has been or could be exposed. In appropriate cases, state what the employer could have or should have done to be in compliance. When violations are grouped, describe the reason for grouping. If a specific type of hazard exposure is caused by the combination of violations, describe it in sufficient detail.

D. 8. a. (5) (b) 3 If the exposing employer neither created nor controlled the violative condition, state the name and relationship of the responsible party; e.g., prime contractor, electrical subcontractor, building owner or equipment lessor. Describe any steps taken by the exposing employer to have the condition corrected as described under Multi-employer Worksites, Legitimate Defense, Chapter V, F.2.

D. 8. b. Health Inspections. There are special documentation requirements for health inspections. (See Appendix, Narrative, NYPESH-1A Form, Industrial Hygiene Inspection Outline.) During such inspections, the CSHO shall:

D. 8. b. (1) Record all relevant information concerning potential exposure to chemical

substances or physical hazards such as symptomatology, duration and frequency of the hazard, pertinent employee comments, sources of potential health hazards, locations of employees pertinent to the inspection, types of engineering controls, use of personal protective devices including respirators, ear and eye protection, clothing, etc.; and collect Material Safety Data Sheets where available and appropriate.

- D. 8. b. (2) Observe employee activities throughout the establishment, concentrating particularly on potentially hazardous areas, and
- D. 8. b. (2) (a) Estimate number of employees at each operation to be evaluated, indicating whether they are engaged in stationary or transient activities.
- D. 8. b. (2) (b) Interview employees.
- D. 8. b. (2) (c) Record the duration and frequency of cyclic work processes, describing potential exposures during each phase of the cycle.
- D. 8. b. (3) Request and evaluate information on the following aspects of the employer's occupational safety and health program (findings shall be discussed in detail at the closing conference):
 - D. 8. b. (3) (a) Monitoring. The employer's program for monitoring safety and health hazards in the establishment should include a program for self-inspection. The CSHO shall discuss the employer's maintenance schedules and inspection records. Additional information shall be obtained concerning such employer activities as sampling and calibration procedures, ventilation measurements, preventive maintenance programs for engineering controls, laboratory services, use of industrial hygienists and accredited laboratories. Compliance with the monitoring requirement of any applicable standard shall be determined.
 - D. 8. b. (3) (b) Medical. The CSHO shall determine whether the employer provides the employees with replacement and periodic medical examinations. The medical examination protocol shall be requested to determine the extent of the medical examinations and, if applicable, compliance with the medical surveillance requirements of any applicable standard.
 - D. 8. b. (3) (c) Record keeping. The CSHO shall determine the extent of the employer's record keeping program. This is not to be limited to PESH required records, but shall be extended to information pertinent to the inspection such as:
 - D. 8. b. (3) (c) 1 If records pertaining to employee exposure and medical records are being preserved in accordance with 29 CFR 1910.1020, and
 - D. 8. b. (3) (c) 2 Where a specific standard has provisions for employee access to the records, whether the results of environmental measurements and medical examinations are accessible to the affected employees.

- D. 8. b. (3) (d) Compliance. The employer's compliance program may include engineering, work practice and administrative controls and the use of personal protective equipment. The CSHO shall identify as follows:
- D. 8. b. (3) (d) 1 Engineering Controls. Pertinent engineering controls consist of substitution, isolation, ventilation and equipment modification.
- D. 8. b. (3) (d) 2 Work Practice and Administrative Controls. These control techniques include personal hygiene, housekeeping practices and rotation of employees.
- D. 8. b. (3) (d) 2 a There should be a program of employee training and education to utilize work practice controls effectively. Where pertinent, the CSHO shall obtain a detailed description of such controls.
- D. 8. b. (3) (d) 2 b The CSHO shall evaluate the overall effect of such practices and programs, considering the employees' knowledge of their exposures.
- D. 8. b. (3) (d) 2 c Rotation of employees as an administrative control requires employer knowledge of the extent and duration of exposure.
- D. 8. b. (3) (d) 3 Personal Protective Equipment. An effective personal protective equipment program should exist in the plant. A detailed evaluation of the program shall be made to determine compliance with the specific standards which require the use of protective equipment (e.g., 29 CFR 1910.95, 1910.132, 1910.134).
- D. 8. b. (3) (e) Regulated Areas. The CSHO shall investigate compliance with the requirements for regulated areas as specified by certain standards.
- D. 8. b. (3) (e) 1 Regulated areas must be clearly identified and known to all appropriate employees.
- D. 8. b. (3) (e) 2 The regulated area designations must be maintained according to the prescribed criteria of the applicable standard.
- D. 8. b. (3) (f) Emergency Procedures. The CSHO shall evaluate the employer's emergency program.
- D. 8. b. (3) (f) 1 When standards provide that specific emergency procedures be developed where certain hazardous substances are handled, the evaluation shall determine if:
- D. 8. b. (3) (f) 1 a Potential emergency conditions are included in the written plan.
- D. 8. b. (3) (f) 1 b Emergency conditions have been explained to employees.

- D. 8. b. (3) (f) 1 c There is a training scheme for the protection of affected employees including use and maintenance or personal protective equipment.
- D. 8. b. (3) (f) 2 Where hazardous substances are handled for which there are not standards requiring emergency procedures, the CSHO shall, nevertheless, determine if such procedures have been established. (See OSHA Instruction CPL 2-2.45.)
- D. 8. b. (4) Collecting Samples. The CSHO shall determine as soon as possible after the start of the inspection whether sampling is required by utilizing the information collected during the walk around and from the pre-inspection review.
- D. 8. b. (4) (a) If sampling is necessary, a sampling strategy shall be developed by considering potential chemical and physical hazards, number of samples to be taken, and the operations and locations to be sampled.
- D. 8. b. (4) (a) 1 There shall be no undue delay between development of the sampling strategy and the actual sampling or between receipt of the results of spot or screen sampling and full-shift sampling, when the results indicate its necessity. (See C.1.d.)
- D. 8. b. (4) (a) 2 If a delay of more than 5 working days is unavoidable, the reasons for the delay shall be included in the case file. Such situations shall be handled in accordance with C.1.d.(3).
- D. 8. b. (4) (b) When work schedules other than the usual 8-hour day are encountered, such as four 10-hour days per week, the following procedures shall be used when the standard itself does not cover such exposures:
- D. 8. b. (4) (b) 1 Sampling for 8-hour exposure levels shall be performed as usual; separate sampling shall be conducted to determine any additional exposure beyond the 8 hours.
- D. 8. b. (4) (b) 2 The results from the 8-hour sampling shall be compared to the Permissible Exposure Level (PEL) to determine whether or not an overexposure exists.
- D. 8. b. (4) (b) 3 If it appears that the 8-hour exposure limits do not provide adequate protection from health hazards when longer workday schedules are used, the District Supervisor shall contact the Program Manager for additional instructions on further sampling that may be indicated as well as for guidance on evaluation of sampling data.
- D. 8. b. (4) (b) 4 The Program Manager, in such cases, shall contact the appropriate resources for assistance in determining appropriate sampling procedures and in evaluating the resulting data.

- D. 8. b. (4) (c) If either the employer or the employee representative requests sampling results, summaries of the results shall be provided to the requesting representative as soon as practicable after consultation with the supervisor.
- D. 8. c. Taking Photographs and/or Videotapes. Photographs and/or videotapes shall be taken whenever the CSHO judges there is a need. Developed photographs shall be properly labeled and placed in the case file. Videotapes shall be properly labeled and stored.
- D. 8. c. (1) Do not use videotaping or flash equipment in hazardous atmospheres.
- D. 8. c. (2) Ensure that flash equipment does not unexpectedly startle employees.
- D. 8. c. (3) Any individual whose words may be recorded shall be advised of the fact that videotape recordings also capture sound.
- D. 8. d. Interviews. A free and open exchange of information between the CSHO and employees is essential to an effective inspection. Interviews provide an opportunity for employee or other individuals to point out hazardous conditions and, in general, to provide assistance as to what violations of the Act may exist and what abatement action should be taken.
- D. 8. d. (1) Purpose. Part 802.2 authorizes the CSHO to question any employee privately during regular working hours in the course of a PESH inspection. The purpose of such interviews is to obtain whatever information the CSHO deems necessary or useful in carrying out the inspection effectively. Such interviews, however, shall be conducted within reasonable limits and in a reasonable manner and shall be kept as brief as possible. Individual interviews are authorized even when there is an employee representative.
- D. 8. d. (2) Employee Right of Complaint. Even when employees are represented on the walkaround, the CSHO shall consult with any employee who desires to discuss a possible violation. Upon receipt of such information, the CSHO shall investigate the alleged violation, where possible, and record the findings.
- D. 8. d. (2) (a) Part 802 affords any employee an opportunity to bring any condition believed to violate a standard of Section 27-a(3) of the Act to the attention of the CSHO during an inspection.
- D. 8. d. (2) (b) In certain instances, the employer and/or the employee walkaround representative may not be able to provide all the necessary information regarding an accident or possible violation. The CSHO shall consult with employees while conducting the walkaround inspection and shall arrange for interviews, where these are considered useful, with employee who may have knowledge of pertinent facts.
- D. 8. d. (3) Time and Location. Interviews normally will be conducted during the walk around; however, they may be conducted at any time during an inspection.
- D. 8. d. (3) (a) Workplace. If requested by the employee and considered useful by the CSHO, additional consultation shall be scheduled at a mutually convenient time. Interviews shall be scheduled to afford minimum interference with

the employee's duties and the employer's business operations.

- D. 8. d. (3) (b) Other Than Workplace. Interviews may be held at the employee's home, the PESH District Office, or at any other suitable place in the community where privacy can be maintained.
- D. 8. d. (4) Privacy. At the time of the interview, employees shall be informed that the interview is to be in private. Whenever an employee expresses a preference that an employee representative be present for the interview, the CSHO shall make a reasonable effort to honor that request. Any employer objection to private interviews with the employees shall be construed as a refusal of entry and handled in accordance with the procedures in D.1.d.(1).
- D. 8. d. (5) Interview Statements. Interview statements shall be obtained whenever the CSHO determines that such statements would be useful in documenting adequately an apparent violation.
- D. 8. d. (5) (a) Interviews shall normally be reduced to writing, and the individual shall be encouraged to sign and date the statement. The CSHO shall assure the individual that the statement will be held confidential to the extent allowed by law. Following are some examples of situations where the CSHO shall normally obtain written statements:
 - D. 8. d. (5) (a) 1 When there is an actual or potential controversy between the employer and employee as to a material fact concerning a violation.
 - D. 8. d. (5) (a) 2 When there is a conflict or difference among employee statements as to the facts.
 - D. 8. d. (5) (a) 3 When there is a potential willful or repeated violation.
 - D. 8. d. (5) (a) 4 In accident investigations, when attempting to determine if apparent violations(s) existed at the time of the accident.
- D. 8. d. (5) (b) Interview statements shall normally be written in the first person and in the language of the individual. The wording of the statement shall be understandable to the individual and reflect only what has been brought out in the interview.
 - D. 8. d. (5) (b) 1 Any changes or corrections shall be initialed by the individual; otherwise, the statement shall not be changed, added to or altered in any way.
 - D. 8. d. (5) (b) 2 The statements shall end with wording such as: "I have read the above, and it is true to the best of my knowledge." The statement shall also include the following: "I request that my statement be held confidential to the extent allowed by law." The individual, however, may waive confidentiality. The individual shall sign and date the statement and the CSHO shall then sign it as a witness.

- D. 8. d. (5) (b) 3 If the individual refuses to sign the statement, the CSHO shall note such refusal on the statement. The statement shall, nevertheless, be read to the individual and an attempt made to obtain agreement. A note that this was done shall be entered into the case file.
- D. 8. d. (5) (c) A transcription of a recorded statement shall be made if necessary; the transcription shall meet the requirements of D.8.d.(5)(a) and (b).
- D. 8. e. Employer Abatement Assistance.
- D. 8. e. (1) Policy. CSHOs shall offer appropriate abatement assistance during the walkaround as to how workplace hazards might be eliminated. The information shall provide guidance to the employer in developing acceptable abatement methods or in seeking appropriate professional assistance. CSHOs shall not imply PESH endorsement of any product through the use of specific product names when recommending abatement measures. The issuance of citations shall not be delayed.
- D. 8. e. (2) Disclaimers. The employer shall be informed that:
 - D. 8. e. (2) (a) The employer is not limited to the abatement methods suggested by PESH.
 - D. 8. e. (2) (b) The methods explained are general and may not be effective in all cases; and
 - D. 8. e. (2) (c) The employer is responsible for selecting and carrying out an effective abatement method, and maintaining the appropriate documentation.
- D. 8. f. Special Circumstances.
- D. 8. f. (1) Areas Requiring Immunization. If, during an inspection, a non-immunized CSHO encounters an area requiring immunization, the CSHO shall not enter that area but shall note a description of the area, immunization required, employees exposed, location and other pertinent information in the case file.
- D. 8. f. (1) (a) Nonimmunized CSHO. The CSHO shall consult with the supervisor about scheduling a properly immunized CSHO for an immediate or later inspection, as applicable. The CSHO shall then complete the inspection of all other areas of the establishment.
- D. 8. f. (1) (b) Nonimmunized Walkaround Representative. If, during an inspection, a properly immunized CSHO finds that walkaround representatives of employers and employees are not properly immunized and, therefore, not authorized in the area, a reasonable number of employees and the supervisor of that area shall be consulted concerning workplace health and safety. (See B.7. for additional information.)
- D. 8. f. (2) Violations of Other Laws. If a CSHO observes apparent violations of laws enforced by other government agencies, such cases shall be referred to the

appropriate agency. Referrals shall be made using appropriate procedures.

- D. 9. Closing Conference. At the conclusion of an inspection, the CSHO shall conduct a closing conference with the employer and the employee representatives. (On multi-employer worksites, the CSHO shall decide whether separate closing conferences will be held with each employer representative.) A joint closing conference shall be held with the employer and the employee representatives whenever practicable. Where either party wishes to have a separate conference or where it is not practicable to hold a joint closing conference, separate closing conferences shall be held. A written summary of each conference shall be included in the case file. A copy of the written summaries will be available from the District Supervisor upon request by the employer or the employee representatives.

NOTE: When conducting separate closing conferences for employers and employee representatives (where either party has declined to have a joint closing conference with the other party), CSHOs shall normally hold the conference with employee representatives first, unless the employee representative requests otherwise. This procedure will ensure that worker input is received before employers are informed of violations and proposed citations

- D. 9. a. General. The CSHO shall describe the apparent violations found during the inspection and indicate the applicable sections of the standards which may have been violated. During the closing conference, both the employer and the employee representatives shall be advised of their rights to participate in any subsequent conferences, meetings or discussions.
- D. 9. a. (1) Since the CSHO may not have sample results prior to the first closing conference, a second closing conference shall be held by telephone or in person to inform the employer and the employee representatives whether the establishment is in compliance.
- D. 9. a. (1) (a) If the results indicate noncompliance, apparent violations, correction procedures, and interim methods of control shall be discussed.
- D. 9. a. (1) (b) Even if the employer is in compliance, sample results which equal or exceed 50 percent of the permissible exposure limit and any recommendations of the CSHO on good safety and health practices shall be discussed with the employer and the employee representatives.
- D. 9. a. (2) When closing conferences are delayed pending receipt of sampling data or for any other reason, the employee representative shall be afforded an opportunity to participate in such delayed conferences.
- D. 9. a. (3) The strengths and weaknesses of the employer's occupational safety and health program shall be discussed at the closing conference.
- D. 9. a. (4) During the discussion of apparent violations the CSHO shall note any comments on the violation worksheet and obtain input for establishing correction dates.
- D. 9. a. (5) The CSHO shall advise the employee representatives that:
- D. 9. a. (5) (a) Under Industrial Board of Appeals regulations, if the employer contests,

the employees have a right to elect "party status" before the Industrial Board of Appeals.

- D. 9. a. (5) (b) They must be notified by the employer if a notice of contest is filed.
- D. 9. a. (5) (c) They have Sec 27-1(10)(b) rights. (See D.9.b.(12).)
- D. 9. a. (5) (d) They have a right to contest the abatement date. (See D.9.b.(6)(a) 2.) Such contest must be in writing and must be filed within 60 working days after receipt of the citation.
- D. 9. b. Specific. During the closing conference the CSHO shall explain the responsibilities and courses of action available to the employer if a citation is received. The CSHO shall then briefly discuss the information in the "Employer Rights and Responsibilities" (SH 907) and "Closing Conference" (SH 904) booklet and answer any questions. All matters discussed during the closing conference shall be documented in the case file, including a note describing printed materials distributed. Materials can be provided on electronic media.
- D. 9. b. (1) Citation Issued. The original citation shall be sent to the Chief Executive Officer (CEO) of the government entity being inspected. For New York State and New York City employers, the head of the Agency is considered the CEO. The CSHO will inform the site manager that the citations will be mailed to the CEO, but that this does not relieve them of the requirement to post the citation in the workplace. Additional copies of the citations shall be sent to any employer representative (such as the Agency Safety and Health Officer) as requested by the employer or his representative. A copy shall be sent to the worksite. In the case of a non-fixed worksite, a copy will be sent to the employers headquarters.

PESH is required to send all original Notices of Violation and Failure to Abate notices certified mail, return receipt requested. The green cards must be kept in the case file so that they will be available to the attorneys in the event of an appeal. All other copies of Notices will may be sent by regular mail, or preferably, by e-mail. The first interim bill must accompany the Failure to Abate notice so that PESH will have proof that they received their penalty assessment.
- D. 9. b. (1) (a) The SH 907 shall also be provided with each copy of the citation, and the employer shall be urged to read both the citation and the publication carefully. If the employer has any questions regarding a citation, the employer may contact the District Supervisor at the address on the citation.
- D. 9. b. (1) (b) The employer's right to an informal conference and information on the right to contest any violation or the abatement period is included on the NOV cover page.
- D. 9. b. (2) Citation Posting. The citation or a copy must be posted at or near the place where each violation occurred to inform the employees of hazards to which they may be exposed. If, because of the nature of the employer's operation, it is not practical

to post the citation at or near the place where each violation occurred, the citation must be posted in a prominent place where it will be readily observed by all affected employees. The citation must remain posted for 3 working days or until the violation is corrected, whichever is longer.

- D. 9. b. (2) (a) If the citation is amended as a result of an informal conference or other procedure, a copy of the amended citation must be posted along with a copy of the original citation.
- D. 9. b. (2) (b) Even if contested, a copy of the citation still must be posted.
- D. 9. b. (2) (c) If there is an authorized employee representative at the establishment, copies of the original citation and any subsequent citation amendments shall be sent to that representative as soon as possible after receipt of these document by the employer. The appropriate informal conference letter shall be sent with each copy of the citation.
- D. 9. b. (3) Complying with Citation. If the employer does not contest the citation, it becomes a final order, then:
- D. 9. b. (3) (a) The cited conditions must be abated by the dates set in the citation.
- D. 9. b. (4) Informal Conference. The CSHO shall advise those attending the closing conference:
- D. 9. b. (4) (a) That a request for an informal conference with the PESH District Supervisor is strongly encouraged. The informal conference provides an opportunity to:
- D. 9. b. (4) (a) 1 Resolve disputed citations and Failure to Abate issuances without the necessity of recourse to the contest litigation process which can be time consuming and expensive;
- D. 9. b. (4) (a) 2 Obtain a more complete understanding of the specific safety or health standards which apply;
- D. 9. b. (4) (a) 3 Discuss ways to correct the apparent violations;
- D. 9. b. (4) (a) 4 Discuss problems with proposed abatement dates;
- D. 9. b. (4) (a) 5 Discuss problems concerning employee safety and health practices;
- D. 9. b. (4) (a) 6 Learn more of other PESH program projects and services available;
- D. 9. b. (4) (a) 7 Obtain answers to other questions.
- D. 9. b. (4) (b) That, if a citation is issued, an informal conference or the request for one does not extend the 60 day period in which the employer or the employee

representative may contest.

- D. 9. b. (4) (c) That an oral statement of disagreement with or intent to contest a citation, penalty or abatement date during an informal conference will not take the place of the required written Notice of Intent to Contest.
- D. 9. b. (4) (d) That the employer representative(s) have the right to participate in any informal conference or negotiations between the Program Manager or District Supervisor and the employees.
- D. 9. b. (4) (e) That the employee representative(s) have the right to participate in any informal conference or negotiations between the Program Manager or District Supervisor and the employer in accordance with the guidelines given in G. of this chapter.
- D. 9. b. (5) Contesting Citation and Notification of Penalty. The CSHO shall advise the employer that the citation, the penalty and/or the abatement date may be contested if, in good faith, the employer does not agree to the citation, penalty or abatement date.
- D. 9. b. (5) (a) Notice of Contest. The CSHO shall tell the employer that, in order to contest, the Industrial Board of Appeals must be notified in writing within 60 days after receipt of the citation and notification of penalty. It shall be emphasized that a notice of intent to contest given orally will not satisfy this requirement to give written notification.

NOTE: The written notification must be postmarked no later than the 60th day after receipt of the citation, otherwise the citation has become a final order and PESH has no jurisdiction to modify it.

- D. 9. b. (5) (a) 1 Employer Contest. This written notification, called a Notice of Intent to Contest, must clearly state what is being contested, which item of the citation, the penalty, the correction date, or any combination. The CSHO shall ask the employer to read the pamphlet (SH 907) accompanying the citation for additional details.
- D. 9. b. (5) (a) 1 a If the employer wishes only a later abatement date and there is a valid reason, the District Supervisor should be contacted. The District Supervisor may issue an amended citation changing an abatement date prior to the expiration of the 60 day period without the employer's filing a contest.
- D. 9. b. (5) (a) 1 b If the employer contests only the penalty or only some of the citation items, all uncontested items must still be abated by the dates indicated on the citation.
- D. 9. b. (5) (a) 2 Employee Contest. The CSHO shall indicate that the Act provides

that employees or their authorized representative(s) have the right to contest in writing any or all of the abatement dates set for a violation if they believe the date(s) to be unreasonable.

NOTE: The definition of employees' authorized representative appears at D.2., Note.

- D. 9. b. (5) (b) Contest Process. The CSHO shall explain that, any notice of intent to appeal is filed directly with the Industrial Board of Appeals. The Industrial Board of Appeals will then serve a copy upon the Commissioner of Labor by transmittal to the Department of Labor Counsel's office, the District Supervisor will forward a copy of the case file in preparation of filing an Answer with the Board.
- D. 9. b. (5) (b) 1 Notice of the time and place of a hearing shall be given by the Industrial Board of Appeals to the parties affected at least eight days in advance of such hearings. Every hearing shall be public unless otherwise ordered by the Industrial Board of Appeals.
- D. 9. b. (5) (b) 2 The hearing will be conducted by one or more Industrial Board of Appeals members or an employee of the Board designated as a Hearing Officer by the Board.
- D. 9. b. (5) (b) 3 The Hearing Officer shall within a reasonable time after the hearing transmit the record of the proceeding together with his report to the Board for decision. The Board shall make and issue to each affected party a decision which shall be in the form of a resolution adopted by a majority vote of the Board.
- D. 9. b. (6) Abatement Action. The CSHO shall explain the following:
 - D. 9. b. (6) (a) A follow-up inspection is scheduled after the final abatement date to verify compliance.
 - D. 9. b. (6) (b) When the citation permits an extended time for abatement, the employer must ensure that employees are adequately protected during this time. For example, the citation may require the immediate use of personal protective equipment by employees while engineering controls are being installed. The employer may be requested to send periodic progress reports on actions to correct these violations.
- D. 9. b. (8) Petition for Modification of Abatement Date (PMA). The CSHO shall advise the employer that abatement dates are established on the basis of the information available at the time the citations are issued. When uncontrollable events or other circumstances prevent the employer from meeting an abatement date, a petition may be submitted in writing for modifications of abatement dates no later than the close of the next working day following the expiration date of the abatement

period listed on the "Notice of Violation and Order to Comply" for each violation. Late filed PMAs may be accepted due to exceptional circumstances preventing an employer from filing the PMA. Further information on petitions for modifications of abatement dates is included in the pamphlet accompanying any citation that is received. Details may be obtained from the District Supervisor. (See E.10 and Chapter II, F.1.d.(2).)

- D. 9. b. (9) Follow-up Inspection. The CSHO shall explain that:
- D. 9. b. (9) (a) If the employer receives a citation, a follow-up inspection may be conducted to verify that the employer has:
 - D. 9. b. (9) (a) 1 Posted the citation as required.
 - D. 9. b. (9) (a) 2 Corrected the violations as required in the citation.
 - D. 9. b. (9) (a) 3 Adequately protected the employees during multi-step or lengthy abatement periods.
 - D. 9. b. (9) (a) 4 Taken appropriate administrative or engineering abatement steps in a timely manner.
- D. 9. b. (9) (b) The employer also has a continuing responsibility to comply with the Act. Any new violations discovered during a follow-up inspection will be cited. (See H. and Chapter II, F.1.c.)
- D. 9. b. (10) Failure to Abate. The CSHO shall explain that to achieve abatement by the date set forth in the citation, it is important that corrective efforts be promptly initiated. The employer shall be reminded that, under the Act, penalties per day per violation may be proposed if the employer is found during a follow-up inspection to have failed to abate by the time required on the Notice of Failure to Abate any violations which have not been contested.
- D. 9. b. (11) False Information. The CSHO shall explain that, if the employer knowingly provides false information relating to efforts to correct cited conditions or in records required to be maintained or in any other matter related to the Act, criminal penalties are specified in the Act and NYS Penal Law Article 175, Section 30.
- D. 9. b. (12) Employee Discrimination. The CSHO shall emphasize that the Act prohibits employers from discharging or discriminating in any way against an employee who has exercised any right under the Act, including the right to make safety or health complaints or to request a PESH inspection. Complaints from employees who believe they have been discriminated against will be evaluated by PESH. If the investigation discloses a probable violation of employee rights, PESH may initiate legal action on behalf of employees whose rights have been violated.
- D. 9. b. (13) Variance. The CSHO shall explain that the Act permits, and the bureau encourages, the employer to apply to PESH for a temporary variance from a

newly promulgated standard if the employer is unable to comply by the effective date because of the unavailability of materials, equipment, or technical personnel. The employer also is encouraged to apply for a permanent variance from a standard if the employer believes that the facilities or methods of operation at the establishments under consideration are at least as safe and healthful as would be ensured by the PESH standard. All variance applications must be submitted in writing and must include all applicable items specified in 12 NYCRR Part 803 - Variance Regulations. More complete information on variances may be obtained from the District Supervisor.

- D. 9. b. (14) Alternative Compliance Agreement. In situations where citations have been issued and the Public Employer proposes an alternative method of compliance PESH may enter into an alternative compliance agreement. PESH will enlist the services of the Division of Safety and Health's Engineering Services Unit (ESU) to assist in the review of the Employer's proposal. The Employer will submit their proposal for an alternative method of compliance to ESU who will review and then schedule a meeting to discuss and refine the proposal. The meeting attendees will be the Employer, affected Unions and PESH. The results of this meeting will be written up into an alternative compliance agreement to which all parties have agreed. PESH will conduct an inspection ensure the employer has complied with the alternative compliance agreement.
- D. 9. b. (15) De Minimis Violations. The CSHO shall discuss all conditions noted during walkaround considered to be de minimis, indicating that such conditions are subject to review by the District Supervisor in the same manner as apparent violations but, if finally classified as de minimis, will not be included on the citation. In addition, the CSHO shall explain to the employer and employee representatives that a condition is considered to be de minimis when it has no direct or immediate relationship to employee safety and health or when it is apparent that the employer is complying with the clear intent to the standard but deviates in a minor, technical, or trivial way. Employer comments shall be noted on the OSHA-1B. (See Chapter IV, B.6.)
- D. 9. b. (16) Referral Inspection. When applicable, the CSHO shall explain that apparent serious violations which have been observed during the inspection, but which are not within the scope of the CSHO's expertise, will be subject to referral to the supervisor and, as a result, additional inspections may be scheduled at a later date.
- D. 9. b. (17) PESH-funded State Consultation Services. The CSHO shall describe the State on-site consultation project as follows:
 - D. 9. b. (17) (a) It is directed at, but not limited to high-hazard establishments.
 - D. 9. b. (17) (b) It provides free off-site and on-site assistance including hazard surveys, assistance with correction of cited and uncited hazards, assistance with the employer's safety and health program, and training and education;
 - D. 9. b. (17) (c) The consultants safeguard trade secrets;
 - D. 9. b. (17) (d) It provides case file information to PESH enforcement staff only if the

employer does not correct serious hazards;

- D. 9. b. (17) (e) The availability and scheduling of such services may be limited because of its backlog, with priority given to abatement assistance and high hazard situations.
- D. 9. b. (18) Other Agency Services and Programs. The CSHO shall briefly explain the various other services and programs currently in effect in the bureau and shall provide copies of program descriptions to any interested employer. Examples are the following:
 - D. 9. b. (18) (a) Occupational Safety and Health Hazard Abatement Board. A seven member Board appointed by the Governor. Its purpose is to assist political subdivisions in abating hazards by reimbursing 75 percent of the cost of capital projects undertaken in order to comply with citations issued under PESH. HAB funding is not available for State Agencies.
 - D. 9. b. (18) (b) Employer Abatement Assistance. The employer shall be made aware in greater detail of PESH's commitment to aid as much as practicable in the process of correcting workplace hazards. Any questions regarding abatement can be discussed with the employer during the closing conference with more complete information provided as necessary as soon as possible after the completion of the inspection. (See F. for more details.)
 - D. 9. b. (18) (c) Training and Education Programs. The CSHO shall inform the employer of any OSHA-funded training and education programs that are available, including those from the OSHA Training Institute and those from other grantees.
- D. 9. b. (19) Reducing Employee Exposure. Employers shall be advised during the closing conference that, whenever reasonable, engineering, administrative or work practice controls must be instituted (or to reduce exposure to or below the permissible exposure limit). They are required in conjunction with personal protective equipment to further reduce exposure to the lowest practical level.
- D. 10 Case File Documentation.
 - D. 10. a. Case Contact Sheet The Case Contact Sheet (SH 515) contains a chronological record of significant actions taken affecting the case beginning with opening conference (or attempts to secure an opening conference) to the closing of the case. A case contact sheet (diary) shall be attached to the inside left cover of the case file. All actions associated with the case shall be recorded on the case contact sheet. (e.g., report writing dates, date samples sent to lab, date sample results received, all phone calls, all on-site visits, date sent to review, date reviewed, etc.)
 - D. 10. b. Narratives. All inspections will contain a narrative of the inspection. Narratives should address any specific reasons for the visit, ie., complaint, accident, referral, consultation, etc.. Narratives will include the following information.
 - D. 10. b. (1) Initial Inspection.

- D. 10. b. (1) (a) Brief description of workplace operations.
- D. 10. b. (1) (b) What attempts were made to contact union representatives if unavailable.
- D. 10. b. (1) (c) Operations inspected.
- D. 10. b. (1) (d) If operations are seasonal, what operations were not inspected.
- D. 10. b. (1) (e) What equipment was utilized by the inspector.
- D. 10. b. (1) (f) Programs/procedures reviewed & observations noted. Explain why programs are required or why not. Include brief description of what the employer is doing right and what is wrong with each program to the right of each applicable program.
- D. 10. b. (1) (g) Brief description of employer's safety & health program if one exists.
- D. 10. b. (1) (h) Addressed items of referral/complaint.
- D. 10. b. (1) (i) Explanation of violations that need additional justification such as means of egress, confined space, excavations, etc.
- D. 10. b. (1) (j) Industrial hygiene narratives must also include a sample results table that includes operation/job titles, substance sampled, results and applicable standards. Narrative should discuss if sampling is representative of exposure levels, duration of operations, type of sampling done (screen, area, personal), and any information pertinent to exposure.
- D. 10. b. (2) Monitoring Inspections.
- D. 10. b. (2) (a) Addressed progress being made on violations.
- D. 10. b. (2) (b) What assistance was provided.
- D. 10. b. (2) (c) Statements from employer/employees.
- D. 10. b. (3) Follow-up Inspections.
- D. 10. b. (3) (a) Observations on pending violations, including methods of abatement or reasons for non-compliance (notice of violations may be annotated in lieu of listing each violation complied in narrative)

Abatement.

- E. 1. Period. The abatement period shall be the shortest interval within which the employer can reasonably be expected to correct the violation. An abatement date shall be set forth in the citation as a specific date, not a number of days. When the abatement period is very short (i.e., 5 working days or less) and it is uncertain when the employer will receive the citation, the abatement date shall be set so as to allow for a mail delay and the agreed-upon abatement time.

When abatement has been witnessed by the CSHO during the inspection, the abatement period shall be "Corrected During Inspection" on the citation.

- E. 2. Reasonable Abatement Date. [A89-2] The establishment of an abatement date requires the exercise of maximum professional judgment on the part of the CSHO.
- E. 2. a. The exercise of this judgment will generally be based on data found during the inspection. In all cases, the employer shall be asked for any available information relative to the time required to accomplish abatement and/or any factors unique to the employer's operation which may have an effect on the time needed for abatement.
- E. 2. b. All pertinent factors shall be considered in determining what is a reasonable period. The following considerations may be useful in arriving at a decision.
 - E. 2. b. (1) The gravity of the alleged violation.
 - E. 2. b. (2) The availability of needed equipment, material, and/or personnel
 - E. 2. b. (3) The time required for delivery, installation, modification or construction.
 - E. 2. b. (4) Training of personnel.
- E. 3. Abatement Periods Exceeding 30 Calendar Days. Abatement periods exceeding 30 calendar days should not normally be necessary, particularly for safety violations. Situations may arise, however, especially for health violations, where extensive structural changes are necessary or where new equipment or parts cannot be delivered within 30 calendar days. Initial abatement dates in excess of one year from the citation issuance date may not be granted without approval from the Program Manager's Office.
 - E. 3. a. Based on the experience of the Engineering Services Unit, the following guidelines shall be applied in the CSHO's decision logic.
 - E. 3. a. (1) Abatement methods that will require the employer to obtain funding, drawing up architectural/engineering plans, large purchases of equipment and installation shall generally be granted up to six months.
 - E. 3. a. (2) Abatement periods shall not exceed one year under any circumstances. Progress reports from the employer can be requested in order to track their progress on abatement periods of six months to a year.
 - E. 3. a. (3) The reasons for an unusual abatement period will be documented in the case file and discussed at the closing conference.
 - E. 3. a. (4) For employees found to be exposed to air contaminants or noise in excess of the PESH standards, the violation for personal protective equipment, which is an interim measure of protection, shall have a relatively short abatement period (5-20 days would be average). The citations for engineering controls relative to this exposure will have much longer abatement dates due to the expenditures and structural modifications necessary, (several months up to one year). Administrative controls, which are simple changes in work practices, would be

similar to the date for personal protective equipment.

- E. 3. a. (5) For some of the more common violations written, the following range can be used as a guideline for establishing the abatement date:
- E. 3. a. (5) (a) Floor guarding, handrails, ladders - minor work 10-30 days.
- E. 3. a. (5) (b) Floor guarding, handrails, ladders - major work 4-6 months
- E. 3. a. (5) (c) means of egress up to 1 year
- E. 3. a. (5) (d) emergency action plan 30 days
- E. 3. a. (5) (e) flammables/combustibles - minor changes 5-30 days
- E. 3. a. (5) (f) flammables/combustibles - structural changes 2-6 months
- E. 3. a. (5) (g) PPE for fire fighters 2-4 months
- E. 3. a. (5) (h) other PPE 5-30 days
- E. 3. a. (5) (i) machine guarding for guards readily available 10-30 days
- E. 3. a. (5) (j) machine guarding for purchase or redesign 2-4 months
- E. 3. a. (5) (k) welding curtains 3-4 months
- E. 3. a. (5) (l) electrical - minor repair 0-10 days
- E. 3. a. (5) (m) electrical - major contract work 6-12 months
- E. 3. a. (5) (n) fire extinguishers 10-30 days
- E. 3. a. (5) (o) training 30-120 days
- E. 3. a. (5) (p) hazard communication program, MSDS's, labeling 30-90 days
- E. 3. a. (5) (q) hazard communication training 1-6 months

E. 4. Verification of Abatement. The District Supervisor is responsible for determining if abatement has been accomplished. When abatement is not accomplished during the inspection, verification shall be determined by a field follow-up inspection. Documentation shall be included in the case file describing the specific corrective action taken for each violation cited. (See D.9.b.(7)(a) and Chapter II, F.1.c.(3).)

E. 5. Effect of Contest Upon Abatement Period. Unless the employer has petitioned and been granted a stay of enforcement by the Industrial Board of Appeals, the abatement period continues from the time the citation was issued. (Refer to Chapter II, Section D.1.b.) If a stay is granted by the Board regarding the citation appealed, all proceedings against the employer with regard to this citation shall be stayed. No programmed or unprogrammed inspections relative to this citation can be conducted until a decision is rendered by the Board.

E. 5. a. Where the Industrial Board of Appeals or a court alters the abatement period, the abatement period as altered shall be the applicable abatement period.

E. 5. b. Where an employer has contested only the amount of the interim penalty, the abatement period continues to run unaffected by the contest.

E. 5. c. Where the employer does not contest, he must abide by the date set forth in the citation even if such date is within 60-day notice of contest period. Therefore, when the abatement period designated in the citation is 60 days or less and a notice of contest has not been filed, a follow-up inspection of the worksite may be conducted for purposed of determining whether abatement has been achieved within the time period set forth in the citation. A failure to abate citation may be issued on the basis of the CSHO's findings.

E. 6. Feasible Administrative, Work Practice and Engineering Controls in Health Inspections. Where applicable (generally, during health inspections), the CSHO shall discuss control methodology

with the employer during the closing conference.

- E. 6 a. Engineering Controls. Engineering controls consist of substitution, isolation, ventilation and equipment modification.
- E. 6 a. (1) Substitution may involve process change, equipment replacement or material substitution.
- E. 6 a. (2) Isolation results in the reduction of the hazard by providing a barrier around the material, equipment, process or employee. This barrier may consist of a physical separation or isolation by distance.
- E. 6 a. (3) Ventilation controls are more fully discussed in the OSHA Technical Manual, OSHA Instruction CPL 2-2.20B.
- E. 6 a. (4) Equipment modification will result in increased performance or change in character, such as the application of sound absorbent material.
- E. 6 b. Administrative Controls. Any procedure which significantly limits daily exposure by control or manipulation of the work schedule or manner in which work is performed is considered a means of administrative control. The use of personal protective equipment is not considered a means of administrative control.
- E. 6 c. Work Practice Controls. Work practice controls are a type of administrative controls by which the employer modifies the manner in which the employee performs assigned work. Such modification may result in a reduction of exposure through such methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job.
- E. 6 d. Feasibility. Abatement measures required to correct a citation item are feasible when they can be accomplished by the employer. The CSHO, following current directions and guidelines, shall inform the employer, where appropriate, that a determination will be made as to whether engineering or administrative controls are feasible.
- E. 6 d. (1) Types of Feasibility. In general there are two types of feasibility determinations that PESH must make with regard to potential abatement methods. Each will be discussed separately.
- E. 6 d. (2) Technical Feasibility. Technical feasibility is the existence of technical know-how as to materials and methods available or adaptable to specific circumstances which can be applied to cited violations with a reasonable possibility that employee exposure to occupational hazards will be reduced.
- E. 6 d. (2) (a) Sources which can provide information useful in making this determination are the following:
- E. 6 d. (2) (a) 1 Similar situations observed elsewhere where adequate engineering controls do, in fact, reduce employee exposure.
- E. 6 d. (2) (a) 2 Written source materials or conference presentations that indicate that equipment and designs are available to reduce employee

exposure in similar situations.

- E. 6 d. (2) (a) 3 Studies by a qualified consulting firm, professional engineer, industrial hygienist, or insurance carrier that show engineering controls are technically feasible.
- E. 6 d. (2) (a) 4 Studies and materials collected and prepared by the Program Manager's office.
- E. 6 d. (2) (a) 5 Equipment catalogs and suppliers that indicate engineering controls are technically feasible and are available.
- E. 6 d. (2) (a) 6 Information provided by other government agencies when their regulations apply to operations involved and which may affect or limit the design or type of controls that may be used for abatement.
- E. 6 d. (2) (b) PESH's experience indicates that feasible engineering or administrative controls exist for most hazardous exposures.
- E. 6 d. (2) (c) The Program Manager is responsible for making determinations that engineering or administrative controls are not feasible.
- E. 6 d. (3) Economic Feasibility. Economic feasibility means that the employer is financially able to undertake the measures necessary to abate the citations received. The CSHO shall inform the employer that although the cost of corrective measures to be taken will generally not be considered as a factor in the issuance of a citation, it will be considered during an informal conference or during settlement negotiations.
- E. 6 d. (3) (a) If the cost of implementing effective engineering, administrative, or work practice controls, or some combination of such controls, would seriously jeopardize the employer's financial condition so as to result in the probable shut down of the establishment or a substantial part of it, an extended abatement date shall be set when postponement of the capital expenditures would have a beneficial effect on the financial performance of the employer.
- E. 6 d. (3) (b) If the employer raises the issue that the company has other establishments or other locations within the same establishment with equipment or processes which, although not cited as a result of the present inspection, nevertheless would require the same abatement measures as those under citation, the economic feasibility determination shall not be limited to the cited items alone. In such cases, although the employer will be required to abate the cited items within time allowed for abatement, the opportunity to include both the cited and the additional items in a long-range abatement plan shall be offered.
- E. 6 e. Reducing Employee Exposure. Whenever feasible engineering, administrative or work practice controls can be instituted even though they are not sufficient to reduce exposure to or below the permissible exposure limit (PEL), nonetheless, they shall be required in

conjunction with personal protective equipment to reduce exposure to the lowest practical level.

- E. 7. Long-term Abatement Date for Implementation of Feasible Engineering Controls. In situations where it is difficult to set a specific abatement date when the citation is originally issued; (e.g., because of extensive redesign requirements consequent upon the employer's decision to implement feasible engineering controls and uncertainty as to when the job can be finished), the CSHO shall discuss the problem with the employer at the closing conference and, in appropriate cases, shall encourage the employer to seek a future informal conference with the District Supervisor when further information is available.
- E. 7. a. Final Abatement Date. The CSHO and the District Supervisor shall make their best judgement as to a reasonable abatement date. A specific date for final abatement shall, in all cases, be included in the citation. The employer shall not be permitted to propose an abatement plan setting his own abatement dates. If necessary, and appropriate petition may be submitted later by the employer to the District Supervisor to modify the abatement date. (See E.9.)
- E. 7. b. Employer Abatement Plan. The employer is required to submit an abatement plan outlining the anticipated long-term abatement procedures.
- E. 7. b. (1) Such a plan may be submitted for consideration by the District Supervisor before setting the citation abatement date.
- E. 7. b. (1) (a) In that case, the citation may be delayed for a brief period with a notation explaining the delay placed in the case file.
- E. 7. b. (1) (b) If it appears that the citation might be delayed beyond 1 month from the date of alleged violation, the citation shall be issued prior to full consideration of the plan; but the employer shall be given the opportunity to provide as much input as practicable in the setting of the abatement period.
- E. 7. b. (1) (b) 1 Whether or not a plan is submitted before issuing a citation, an abatement plan shall be provided for in the citation in addition to a final abatement date.
- E. 7. b. (1) (b) 2 When the plan is submitted, if the engineering or administrative corrections proposed by the employer appear to be all that are feasible based on the current technology, this fact may be stipulated and agreed to between PESH and the employer.
- E. 7. b. (1) (b) 2 a Such an agreement shall permit assurances in advance to the employer that the establishment will be in compliance where the provisions of the plan are fully implemented.
- E. 7. b. (1) (b) 2 b It shall be made clear in the agreement that the employer is not relieved from instituting further engineering (or administrative) controls as they become technically feasible, if it is likely that such further controls will lower employee exposure when exposure without personal

protective equipment (PPE) remains over the PEL.

- E. 7. b. (1) (b) 2 c In all situations where an agreement is proposed, the advice of the Department of Labor Counsel shall be sought on the legal implications.
- E. 7. b. (1) (b) 2 d If an agreement is acceptable, the Department of Labor Counsel shall be requested to assist in drafting the agreement.
- E. 7. b. (1) (b) 2 e A statement agreeing to provide the affected District Office with written periodic progress reports shall be part of the long-term abatement plan. (See Chapter II and Chapter V for monitoring requirements.)
- E. 8. Multi step Abatement. Citations with multi step abatement periods normally will be issued only in those situations in which ultimate abatement will require the implementation of feasible engineering controls, as distinguished from feasible administrative controls or the use of PPE. Multi step abatements shall be based on the conditions cited and related feasibility considerations.
- E. 8. a. General. A step-by-step program for abatement provides a tool for the CSHO to monitor abatement progress after a citation has been issued, for the employer to make abatement decisions and to set up schedules efficiently, and for the employees to understand the changes being made to the working environment.
- E. 8. a. (1) Although abatement of an air contaminant citation normally requires the implementation of feasible engineering and/or administrative controls, abatement may be accomplished in rare cases through the use of PPE, even when engineering or administrative controls are feasible (see E.8.c.(3)).
- E. 8. a. (2) In such cases the Program Manager shall approve final abatement through the use of PPE.
- E. 8. b. Interim and Long-range Abatement. When the cited employer is found to have no effective personal protection program, in addition to long-term abatement through the use of feasible administrative or engineering controls, proper abatement will include a short-term requirement that appropriate PPE be provided.
- E. 8. b. (1) The District Supervisor, in issuing the citation, shall set a short-range abatement date for prompt temporary protection to employees pending formulation and implementation of long-range feasible engineering and/or administrative controls. Short-range administrative controls and PPE shall be specified in the citation as the interim protection. (See Chapter V, Appendix E. for examples.)
- E. 8. b. (2) If it has been determined that the employer will use engineering controls to achieve abatement, a specific date shall be set by which the employer can reasonably be expected to implement engineering controls, including enough time for the development of engineering plans and designs for such controls, as well as necessary construction or installation time.

E. 8. c. Considerations. In providing for multi step abatement the following factors shall be taken into consideration:

E. 8. c. (1) In general, engineering controls afford the best protection to employees, and the employer shall be required to utilize such controls in all instances to the extent feasible. The noise standards and 12 NYCRR Part 800.5 require the use of either engineering or administrative controls if any such controls are feasible. Engineering and work practice controls are to be used in preference to respirators and other personal protective equipment. In certain circumstances, administrative controls can be successful in controlling employee exposure to contaminants; e.g., maintenance operations involving toxic substances can sometimes be performed at night in the absence of the usual production staff.

NOTE: Employee rotation is an administrative control that PESH prohibits as a method of complying with the permissible exposure limits of carcinogens in the following standards:

Asbestos	29 CFR 1910.1001(f)(2)(iv) 29 CFR 1926.58(g)(3)
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Cadmium	29 CFR 1910.1027(f)(1)(v) 29 CFR 1915.1027(f)(1)(v) 29 CFR 1926.63(f)(1)(iv)
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Ethylene Oxide	29 CFR 1910.1047(f)(2)(iv)
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HAZWOPER	29 CFR 1910.120(g)(1)(iii)
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MDA	29 CFR 1910.1050(g)(3) 29 CFR 1926.60(h)(4)
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E. 8. c. (2) Economic feasibility is a major issue to be considered when imposing such controls. Requirement that would threaten the economic viability of an entire SIC/NAICS classification cannot be considered economically feasible under the PESH Act.

E. 8. c. (3) PESH may decide not to require engineering controls for abatement but to allow the use of PPE to abate the violation, at least until such time as engineering controls become a less significant burden for the employer when the following conditions are met:

E. 8. c. (3) (a) If significant reconstruction of a single establishment involving a capital expenditure which would seriously jeopardize the financial condition of the employer is the only method whereby that employer could achieve effective engineering controls;

E. 8. c. (3) (b) If there are no feasible administrative or work practice controls;
and

E. 8. c. (3) (c) If adequate personal protective equipment or devices are available.

- E. 8. c. (4) Proper evaluation of the economic feasibility of engineering or administrative controls does not require the District Supervisor to understand all available economic information before deciding that the issue of potential economic infeasibility is involved. It is sufficient that the employer produce evidence of economic hardship adequate to convince the District Supervisor that abatement by such controls would involve considerable financial difficulty.
- E. 8. c. (5) Whenever an employer complains that an unbearable economic burden would result from implementation of engineering or administrative controls, the District Supervisor shall request evidence from the employer.
- E. 8. c. (5) (a) Such evidence shall address the reasonableness of the estimated costs of engineering or administrative controls, including installation, maintenance, and lost productivity, whenever applicable, as well as the progress of the employer compared to that of industry in installing such controls.
- E. 8. c. (5) (b) The relative costs of engineering or administrative controls versus PPE may also be provided. Such comparisons shall take replacement costs into account.
- E. 8. c. (6) The District Supervisor shall discuss the problem with the Program Manager, whenever appropriate. The Program Manager shall determine whether engineering controls are economically infeasible. In cases with potential state implications, the decision (together with supporting evidence) shall be brought to the attention of the Director of Safety and Health.
- E. 8. c. (7) In those limited situation where there are no feasible engineering or administrative controls, full abatement can be allowed by PPE.
- E. 9. Abatement Dates for Workplaces with Seasonal Employment. [A92-10] There are a number of public workplaces PESH inspects where the workplace is closed for part of the year and therefore employees are not exposed to the hazards identified either during a consultation or inspection. In setting abatement dates for violations found, PESH should take into consideration the feasibility of abating the violation. It may not be possible to achieve abatement until the facility reopens (for example a railing violation can be abated by sending maintenance workers to the closed facility; but a training violation cannot be corrected until workers return). The following procedures will be followed in determining abatement dates in these situations.
- E. 9. a. At the closing conference, discuss with management the feasibility of correcting the violation before it is closed or during the closed season. Since it is to the benefit of the employees to have violations corrected at the time the facility reopens, this should be the primary alternative for abatement. An agreement should be reached as to which violations can be complied before the facility closes, during the closed season, or after the facility reopens.
- E. 9. b. Based on the determination made above, abatement dates can be established using the normal abatement periods given for particular violations, with the following

modification.

- E. 9. b. (1) If the violation is to be corrected during the closed season, then the abatement date should be the date the facility reopens.
- E. 9. b. (2) If the violation cannot be corrected until after the workplace reopens, then the abatement period should start on the first day the facility reopens and extend for a reasonable number of days thereafter.
- E. 9. b. (3) If the violation can be complied before the facility closes, the abatement date can be established in the normal manner.
- E. 10. Petitions for Modification of Abatement Date (PMA). [SA 96-1] 12 NYCRR Part 804 governs the disposition of PMAs. If the employer requests additional abatement time after the 60day contest period has passed, the following procedures for PMAs are to be observed:
 - E. 10. a. Filing Date. A PMA must be filed in writing with the District Supervisor who issued the citation no later than the close of the next working day following the date on which abatement was originally required. Also any temporary variance petitions received by ESU will be sent to the appropriate District Office.
 - E. 10. b. Requirements for a PMA. If a letter is received from an employer requesting a modification of an abatement date, the District Supervisor shall ensure that all of the following five requirements listed in Part 804 are set forth in sufficient detail in the employer's petition:
 - E. 10. b. (1) All steps taken by the employer and the dates of such action in an effort to achieve compliance during the prescribed abatement period.
 - E. 10. b. (2) The specific additional abatement time estimated to achieve compliance.
 - E. 10. b. (3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.
 - E. 10. b. (4) Interim steps being taken to safeguard the employees against the cited hazard during the abatement period.
 - E. 10. b. (5) Written certification, including a copy of the posted and served petition and the date upon which such posting and service was made, that a copy of the petition addressing, as appropriate, each of the requirements set forth in (1) through (4) of this subsection:
 - E. 10. b. (5) (a) Has been posted in a conspicuous place near the location where the violation occurred or where all affected employees will have notice thereof. The petition shall remain posted for 10 working days.
 - E. 10. b. (5) (b) Has been served on the authorized representative of affected employees where affected employees are represented by an authorized representative.

(Note: Supervisors should send a copy of the PMA to the union statewide safety and health contact, if there is one)

- E. 10. c. Failure to Meet All Requirements. If the employer's letter does not meet all the requirements of E.10.c., a letter spelling out these requirements and identifying the missing elements shall be sent to the employer within 10 working days, specifying a reasonable amount of time for the employer to return the completed PMA.
- E. 10. c. (1) If no response is received or if the information returned is still insufficient, a second attempt (by telephone or in writing) shall be made. The employer shall be informed of the consequences of a failure to respond adequately; namely, that the PMA may not be granted and the employer may, consequently, be found in failure to abate.
- E. 10. c. (2) If the employer responds satisfactorily by telephone and the District Supervisor determines that the requirements for the PMA have been met, appropriate documentation shall be placed in the case file.
- E. 10. d. Abatement Efforts. The District Supervisor shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.
- E. 10. d. (1) Where engineering controls have been cited or required for abatement, a monitoring inspection shall be scheduled to evaluate the employer's abatement efforts. Failure to conduct a monitoring inspection shall be fully explained in the case file.
- E. 10. d. (2) Where no engineering controls have been cited but more time is needed for other reasons not requiring assistance from PESH, such as delays in receiving equipment, a monitoring visit need not normally be scheduled.
- E. 10. d. (3) Monitoring inspections shall be scheduled as soon as possible after the initial contact with the employer and shall not be delayed until actual receipt of the PMA. (E.9.b.(2).)
- E. 10. d. (4) The CSHO shall decide during the monitoring inspection whether sampling is necessary and, if so, to what extent, i.e., spot sampling, short-term sampling, or full-shift sampling.
- E. 10. d. (5) The CSHO shall include pertinent findings in the narrative along with recommendations for action. To reach a valid conclusion when recommending action, it is important to have all the relevant factors available in an organized manner. The following factors shall be considered:
 - E. 10. d. (5) (a) Progress reports or other indications of the employer's good faith, demonstrating effective use of technical expertise and/or management skills, accuracy of information reported by the employer, and timeliness of progress reports.

- E. 10. d. (5) (b) The employer's assessment of the hazards by means of surveys performed by in-house personnel, consultants and/or the employer's insurance agency.
- E. 10. d. (5) (c) Other documentation collected by District Office personnel, including verification of progress reports, success and/or failure of abatement efforts, and assessment of current exposure levels of employees.
- E. 10. d. (5) (d) Employer and employee interviews.
- E. 10. d. (5) (e) Specific reasons for requesting additional time including specific plans for controlling exposure and specific calendar dates.
- E. 10. d. (5) (f) Personal protective equipment.
- E. 10. d. (5) (g) Medical programs.
- E. 10. d. (5) (h) Emergency action plans.

NOTE: Not all these factors will be pertinent in every PMA review. Neither are all the factors listed which must be considered in every case.

- E. 10. d. (6) Employer Contact after Issuance of "Notice of Violation and Order to Comply" (NOV). CSHOs shall maintain contact with the employer to insure that identified hazards are corrected in a timely and appropriate manner. All contacts, including a brief description of events, and specifics of all telephone conversations, shall be recorded on the Case Contact Sheet. Lengthy conversations or remarks may be documented by a "memo to file" which is included in the case file and noted on the case contact sheet.
- E. 10. d. (6) (a) The CSHO shall contact the employer after the NOV has been received and documented by the returned certified mail receipt (green card) to inquire if the employer has any questions or concerns regarding the hazards identified in the NOV.
- E. 10. d. (6) (b) The CSHO shall contact the employer approximately midway through the abatement period to check on the progress towards abatement and to offer further assistance to the employer if necessary.
- E. 10. d. (6) (c) The CSHO shall contact the employer prior to the final abatement date to evaluate compliance efforts and/or difficulties encountered towards achieving abatement. Employers having difficulty in achieving compliance with a violation shall be advised of the "Petition for Modification of Abatement Date" (PMA) process prior to the assigned abatement date for each particular violation. Assistance in completion of the PMA shall be provided by the CSHO as needed and noted on the case contact sheet.
- E. 10. e. Delayed Decisions. Although PESH policy is to handle PMAs as expeditiously as possible, there are cases where the District Supervisor's decision on the PMA is delayed

because of deficiencies in the PMA itself, a decision to conduct a monitoring inspection and/or the need for Program Manager involvement. Requests for additional time (e.g., 45 days) for the District Supervisor to formulate a position shall be sent to the Industrial Board of Appeals through the Department of Labor Counsel. A letter conveying this request shall be sent at the same time to the employer and the employee representatives.

- E. 10. f. District Office Position on the PMA. After 15 working days following the PMA posting, the District Supervisor shall determine the District Office position, agreeing with or objecting to the request. This shall be done within 10 working days following the 15 days (if additional time has not been requested from the Industrial Board of Appeals). The following action shall be taken:
- E. 10. f. (1) If the PMA requests an abatement date which is 6 months or less from the abatement date on the citation, the District Supervisor has the authority to approve or object to the petition.
- E. 10. f. (2) Any PMA requesting an abatement date which is more than 6 months from the abatement date on the citation requires the approval of the Program Manager as well as the District Supervisor.
- E. 10. f. (3) If the PMA is approved, the District Supervisor shall notify the employer and employee representatives by letter.
- E. 10. f. (4) If, after a second contact with the employer, the information required under E.10.b. continues to be substantially insufficient, the District Supervisor shall contact the Program Manager who, after consultation with the Department of Labor Counsel, shall dismiss the PMA.
- E. 10. f. (5) If supporting evidence justifies it (e.g., employer has taken no meaningful abatement action at all, or has otherwise exhibited bad faith), the District Supervisor or the Program Manager, as appropriate and after consultation with the Department of Labor Counsel, shall deny the PMA. Both the employer and the employee representatives shall be notified of this action by letter, with return receipt requested.
- E. 10. f. (5) (a) When appropriate, after consultation with the Department of Labor Counsel, a failure to abate notification may be issued in conjunction with the denial of the PMA.
- NOTE: If no objection is filed within the time frame in E.10.g., the PMA is automatically granted even if not explicitly approved.
- E. 10. g. Employee Objections. Affected employees or their representatives may file an objection in writing to an employer's PMA with the District Supervisor within 10 working days of the date of posting of the PMA by the employer or its service upon an authorized employee representative.
- E. 10. g. (1) Failure to file such a written objection with the 10-working-day period constitutes a waiver of any further right to object to the PMA.

- E. 10. g. (2) If an employee or an employee representative objects to the extension of the abatement date, all relevant documentation shall be sent to the Industrial Board of Appeals through Counsel's Office.
- E. 10. g. (2) (a) Confirmation of this action shall be mailed (return receipt requested) to the objecting party as soon as it is accomplished.
- E. 10. g. (2) (b) Notification of the employee objection shall be mailed (return receipt requested) to the employer on the same day that the case file is forwarded to the Industrial Board of Appeals.
- E. 10. h. PESH Plans of Operations. [SA96-1] 12 NYCRR Part 804 establishes regulations for the petition of modification of abatement date to be used by public employers who wish to have their abatement date extended. Previously., PMA's had been processed as temporary variances by our Engineering Services Unit (ESU).
- E. 10. h. (1) The PMA will be sent by the employer to the District Office that issued the Notice of Violation. Also, any temporary variance petitions received by ESU will be sent to the appropriate District Office.
- E. 10. h. (2) In order to be valid, the PMA must be complete and must be received within the specified time period (see Part 804.3). If the PMA is not complete (see Part 804.2), the District Supervisor will return the petition with notations specifying the information needed to complete the application. A later filed petition must be accompanied by the employer's statement of exceptional circumstances explaining the delay and will be immediately forwarded to the Program Manager to determine further action.
- E. 10. h. (3) The supervisor will enter the next PMA number in the PMA log (located in the PESH Shared Folder).
- E. 10. h. (4) The District Supervisor will evaluate safety petitions and the Associate Industrial Hygienist will evaluate health petitions for reasonableness. The District Office will contact the Program Manager for any technical assistance needed in their evaluation. The Program Manager will consult with the Engineering Services Unit, as necessary. If the Program Manager determines that the petition is technically complex, the District Office will be instructed to forward the PMA to the Engineering Services Unit. After the Engineering Services Unit completes its evaluation, it will return the PMA with their recommendations to the Program Manager. The PMA will be processed as in steps 10a below.
- E. 10. h. (5) If upon evaluation of the PMA, the District Office determines that the request is not justified or the employer is asking for more time than necessary, it may be appropriate to call an informal conference with the employer and employee representatives. This would, in most cases, not be appropriate when an informal conference has already been held. At this meeting, the discussion may result in the employer withdrawing the PMA voluntarily or modifying the period of time requested. If the PMA is withdrawn, the District Office will so notify the Program Manager's office. If the time period is changed, the PMA application will be revised and resubmitted.

- E. 10. h. (6) For PMA's requesting an extension of six (6) months or less, the District Office will make the approval by checking the box on the first page of the petition.

NOTE: The District Office cannot exercise their approval power until 15 working days from the date on page 2 of the petition.

- E. 10. h. (7) Copies of the PMA are distributed as follows:
- the employer
 - the Program Manager
 - the District Office case file.

- E. 10. h. (8) The OIS must be updated with the extended abatement date.

- E. 10. h. (9) If the petitioner is requesting more than six (6) months, the District Office shall consult with the Program Manager's Office prior to granting the petition and the case file shall be so noted.

- E. 10. h. (10) If the District Office determines that a petition should be denied the Program Manager's Office shall be consulted and the case file so noted. In the event that a PMA is denied the Employer must be informed of his right to appeal to the Industrial Board of Appeals.

- E. 10. h. (11) If an employee or authorized employee representative files an objection to the PMA with the District Office within the specified time period (Part 804.5 - ten working days of posting and service of the PMA, whichever is later), such objections will be taken into consideration in the determination of granting the PMA. If the PMA is granted in whole or in part, the employee's application, the petition, citation and any objections shall be forwarded to Counsel's Office through the Program Manager for referral to the Industrial Board of Appeals (Part 804.7). Counsel's Office will within ten days forward the PMA, citation and employee objection to the Industrial Board of Appeals.

NOTE: The SH 906 "Employee Rights" and SH 907 "Employer Rights" pamphlets have been revised to include information on the availability of PMA's and employee contests. Field staff will need to explain these additional rights to the employer/employee representatives at the closing conference.

Although the employer/employee representatives are entitled to both the informal conference and PMA/employee objection procedure, we should encourage that they take advantage of the informal conference initially which will expedite any disagreements with the abatement date.

Employer Abatement Assistance.

- F. 1. Policy. CSHOs shall offer appropriate abatement assistance during the walkaround as to how

workplace hazards might be eliminated. The information shall provide guidance to the employer in developing acceptable abatement methods or in seeking appropriate professional assistance.

- F. 2. Type of Assistance. The type of abatement assistance provided will depend on the needs of the employer and the complexity of the hazard. Where standards specify abatement methods, such as guarding of belts and pulleys, the CSHO shall, at a minimum, ensure that the employer is aware of the specifications. For more complex problems, the CSHO shall offer general information on types of controls or procedures commonly used to abate the hazard. Alternative methods shall be provided whenever possible. (See E.6. for more specific requirements on health inspections.)
- F. 3. Disclaimers. The employer shall be informed that:
 - F. 3. a. The employer is not limited to the abatement methods suggested by PESH;
 - F. 3. b. The methods explained are general and may not be effective in all cases; and
 - F. 3. c. The employer is responsible for selecting and carrying out an effective abatement method.
- F. 4. Procedures. Information provided by PESH to assist the employer in identifying possible methods of abatement for alleged violations shall be provided to the employer as it becomes available or necessary. The issuance of citations shall not be delayed.
 - F. 4. a. Assistance Provided During An Inspection. CSHOs shall utilize their knowledge and professional experience in providing the employer with abatement assistance during the inspection.
 - F. 4. a. (1) Before leaving an inspection site and, preferably, during the walkaround when an apparent violation is noted, CSHOs shall determine whether the employer wishes to discuss possible means of abating apparent violations. The discussion may continue at the closing conference.
 - F. 4. a. (2) CSHOs shall briefly document abatement information provided to the employer.
 - F. 4. b. Assistance Provided After An Inspection. If a CSHO cannot provide assistance during an inspection or if the employer has abatement questions after the inspection, the District Supervisor shall ensure that additional information, if available, is obtained and provided as soon as possible to the employer. Any communications with the employer shall be documented in the case file.
- F. 5. Services Available to Employers. Employers requesting abatement assistance shall be informed that PESH is willing to work with them even after citations have been issued. In addition, employers shall be made aware of the availability of PESH-funded State Consultation Services for which they may qualify. (See D.9.b.(17).)

Informal Conferences. [SA90-2]

- G. 1. General. The employer, any affected employee or the employee representative may request an

informal conference.

NOTE: An informal conference may not be scheduled after receipt of a written Notice of Intent to Contest without the prior approval of the Department of Labor Counsel. If the intent to contest is not clear, the District Supervisor shall contact the employer for clarification.

- G. 2. Procedures. Whenever an informal conference is requested by the employer, an affected employee or the employee representative, both parties shall be afforded the opportunity to participate fully. If the requesting party objects to the attendance of the other party, separate informal conferences may be held. During the conduct of a joint informal conference, separate or private discussions shall be permitted if either party so requests.
- G. 2. a. Notification of Participants. After an informal conference has been scheduled, the District Supervisor shall notify the affected parties of the date, time and place, by telephone and, if considered useful in writing using a SH-902 Informal Conference Notification form. See Chapter III Appendix.
- G. 2. a. (1) The employer shall be requested to complete and post the form found at the end of the informal conference letter until after the informal conference has been held.
- G. 2. a. (2) Documentation of the District Supervisor's actions notifying the parties of the informal conference shall be placed in the case file.
- G. 2. a. (3) In the future when scheduling an Informal Conference send a courtesy copy to the following union representatives in addition to the representative you dealt with locally. [PM Memo 5-1-02]

Director, Occupational Safety and Health
Civil Service Employees Association
143 Washington Avenue
Albany, New York 12210

Director, Occupational Safety and Health
Public Employees Federation, AFL-CIO
1168-70 Troy-Schenectady Road
P.O. Box 12414
Albany, New York 12212-2414

Health and Safety Specialist
NYS United Teachers
159 Wolf Road
Albany, New York 12205

Director of Safety and Health, District 1
Communication Workers of America
216 W 14 ST
New York, New York 10011

- G. 2. b. Telephone Conferences. The Bureau believes that better settlements can be arrived at by means of personal conferences between the District Supervisor and the employer; consequently, informal conferences shall normally not be held by telephone.
- G. 2. b. (1) When circumstances exist (e.g., the employer or the employee representatives would be required to travel long distances, there is insufficient time remaining for travel) which the District Supervisor believes will justify a telephone conference, such circumstances shall be documented in the case file.
- G. 2. b. (2) If a telephone conference is held, all of the procedures regarding notification of affected parties, participation of PESH officials, conduct of the conference, documentation of discussions, and decision-making, outlined in G.2.a., c., d., and e., shall be followed as far as practicable.
- G. 2. b. (3) The reasons justifying any departures from those procedures shall be explained in the case file.
- G. 2. c. Participation by PESH Officials. The inspecting CSHOs and their supervisors shall be notified of an upcoming informal conference and, if practicable, given the opportunity to participate in the informal conference. They shall be advised of any changes made by the District Supervisor in the event that they were unable to participate.
- G. 2. c. (1) In complex cases, in order to ensure that discussions of any possible settlement or modifications to the citation(s) and/or penalty may be completely and accurately recalled, at least one other PESH employee (in addition to the District Supervisor) may be present at the informal conference. This employee may be the CSHO, supervisor, a clerical staff member, or other assigned person.
- G. 2. c. (2) A second PESH staff member (compliance officer, supervisor, or other assigned person) shall attend all informal conferences in the following situations:
- G. 2. c. (2) (a) Cases which are so lengthy or complex that an additional individual is needed to provide assistance to the principal PESH representative.
- G. 2. c. (3) The District Supervisor shall ensure that notes are made indicating the basis for any decisions taken at or as a result of the informal conference. It is appropriate to tape record the informal conference and to use the tape recording in lieu of written notes, but the tape recording is not a substitute for the second PESH conference participant under (2) above.
- G. 2. d. Conduct of the Informal Conference. The District Supervisor shall conduct the informal conference in accordance with the following guidelines:
- G. 2. d. (1) Opening Remarks. The opening remarks shall include discussions of the following:
- G. 2. d. (1) (a) Purpose of the informal conference.
- G. 2. d. (1) (b) Rights of participants.

- G. 2. d. (1) (c) Contest rights and time restraints.
- G. 2. d. (1) (d) Limitations, if any.
- G. 2. d. (1) (e) Settlements of cases.
- G. 2. d. (1) (f) Other relevant information.
- G. 2. d. (2) Conference. The conference shall include discussion of any relevant matters including citations, safety and health programs, conduct of the inspection, means of correction, and penalties, in accordance with the following:
 - G. 2. d. (2) (a) All parties shall be encouraged to participate fully so their views can be properly considered.
 - G. 2. d. (2) (b) Positions on all issues discussed shall be fully considered before making a determination regarding possible settlement of the case in accordance with current PESH procedures.
 - G. 2. d. (2) (c) PESH representatives shall make every effort to assist both the employer and the affected employees and/or their representatives to improve safety and health in the workplace.
 - G. 2. d. (2) (d) If the District Supervisor states any views on the legal merits of the employer's contentions, it should be made clear that those views are personal opinions only.
- G. 2. d. (3) Closing. At the conclusion of the discussion the main issues and potential courses of action shall be summarized. A copy of the summary, together with any other relevant notes or tapes of the discussion made by the District Supervisor, shall be placed in the case file.
- G. 2. e. Decisions. At the termination of the informal conference, the District Supervisor shall make a decision as to what action is appropriate in the light of facts brought up during the conference.
 - G. 2. e. (1) When preparing to make a decision to settle a case, the District Supervisor shall make a reasonable effort to obtain the views of the employee representative, if there is one and if he/she was not in attendance at the conference. (There is no need to contact the employee representative if only a penalty adjustment is involved.)
 - G. 2. e. (2) Changes to citations, penalties or abatement dates normally shall be made in accordance with current PESH procedures; the reasons for such changes shall be documented in the case file.
 - G. 2. e. (3) Employers shall be informed that they are required by 29 CFR 1903.19 to post copies of all amendments to the citation resulting from informal conferences. Employee representatives must also be provided with copies of such documents.

This regulation covers amended citations, citation withdrawals.

- G. 2. e. (4) Affected parties shall be notified of the results and/or decisions of the informal conference in accordance with current PESH procedures. See Chapter III Appendix.
- G. 2. e. (5) The CSHOs who conducted the inspection and their supervisors shall be informed of the results and/or amended citations.
- G. 2. f. PESH Informal Conference Policy and Operation.
- G. 2. f. (1) An informal conference is a means through which the Supervising Safety and Health Inspector and an employer, employee, or an authorized representative of the employees meet and discuss issues arising from an inspection and the resultant "Notice of Violation and Order to Comply".
- G. 2. f. (2) A request for an informal conference can be made by phone or letter within 20 working days from the date of issuance given on the Notice.
- G. 2. f. (3) If the conference is requested by the employer, an employee or the authorized representative will be afforded an opportunity to participate at the discretion of the Supervisor. If the conference is requested by an employee or the authorized representative, the employer will be afforded an opportunity to participate at the discretion of the Supervisor. However, if the conference involves a possible alteration of an order or a change in the abatement period, both the employer and the employee representative must be given an opportunity to attend.
- G. 2. f. (4) If an order is altered in any way, or if an abatement date is extended as a result of the conference, the reasons therefore will be recorded appropriately and kept on file; in addition, an amended Notice will be issued to the employer, who must post a copy of such order at the workplace.
- G. 2. f. (5) For modified abatement dates the OIS must be updated and the Notice of Violation modified.
- G. 2. f. (6) Any party may be represented by counsel at such informal conference.
- G. 2. f. (7) On receipt of a request for an informal conference from an employer, employee or the employee representative by letter, the District Supervisor will telephone the requester to make arrangements for the conference; at the same time, the District Supervisor will discuss the issues briefly with the requester in order to resolve the issues at this point, if possible. If the problem cannot be resolved at this point, the District Supervisor will schedule a conference and will prepare an "Informal Conference Notification", SH-902 to confirm the date, time and place of the conference. See manual item 5999; SH-902. Note: If the request for an informal conference is made by phone, the District Supervisor will discuss the issues briefly. If the problem cannot be resolved, proceed as above.
- G. 2. f. (8) The District Supervisor will decide at this point whether or not the other parties should be notified of the conference. (For example, (1) an issue initiated by an

employer which might result in a revision of an existing order, or an extension of an abatement date would require that affected employees or their representatives be notified of the conference; the decision to attend such conference rests with them; (2) if an employee representative wishes to discuss in confidence, certain aspects of the inspection which do not affect violations or abatement period, the District Supervisor, at his discretion, may hold such conference without notifying the employer.)

- G. 2. f. (9) If the District Supervisor decides that no other party needs to attend the conference, such decision and reason therefore will be recorded on the "Informal Conference Report", SH-903. See manual item 5999; SH-903. To notify affected parties of the conference, the District Supervisor will send a copy of the SH-902 which was sent to the party requesting such conference.
- G. 2. f. (10) If the subject of the conference is an order, an abatement extension, or any other issue in which the inspector/hygienist was directly involved, the District Supervisor will discuss such issues with the inspector/hygienist. The District Supervisor may request the inspector/hygienist to attend the conference if he can contribute to the solution of the problem.
- G. 2. f. (11) The District Supervisor will conduct the conference in an informal manner; affected parties invited to the conference, if any, should be encouraged to participate in the discussion. On completion of the conference, pertinent remarks will be recorded on the SH-903.
- G. 2. f. (12) If the subject of the conference was one or more orders and such orders are revised, or the abatement dates are changed at the conference, the District Supervisor will record the facts of the case and the reasons for such changes on the SH-903; in addition, the District Supervisor will prepare a new "Notice of Violation and Order to Comply" NYPESH-2, marked "NOTICE DATED _____ AMENDED" in all cases of change in content of the Notice previously issued. (The new Notice will include only the revised orders numbered in the same sequence as the corresponding orders appeared on their original Notice; the new Notice must be posted next to the existing Notice at the employer's worksite.)
- G. 2. f. (13) The District Supervisor will inform all parties participating in the informal conference about other avenues of appeal, that is, appeal to the Industrial Board of Appeals, under Labor Law Section 101, and the variance procedure, under Labor Law Section 27-a and PMAs and employee contests under 12 NYCRR Parts 804 & 805. Also, if appropriate, the employer will be informed of the availability of funds from the Hazard Abatement Board for removal of violations which would require expenditures of capital funds. A statement indicating such rights were explained to participants should be included on the SH-903. See Chapter III Appendix.

Follow-up Inspections.

- H. 1. Inspection Procedures. The primary purpose of a follow-up inspection is to determine if the

previously cited violations have been corrected. Normally, there shall be no additional inspection activity unless, in the judgment of the CSHO, there have been significant changes in the workplace which warrant further inspection activity. In such a case, the supervisor shall be consulted.

- H. 2. Failure to Abate. A failure to abate exists when the employer has not corrected a violation for which a citation has been issued or has not complied with interim measures involved in a multi-step abatement within the time given.
- H. 2. a. Initial Follow-up. The initial follow-up is the first follow-up inspection after issuance of the citation.
- H. 2. a. (1) If a violation is found not to have been abated, the CSHO shall inform the employer that the employer is subject to a Notification of Failure to Abate Alleged Violation and proposed daily penalties while such failure or violation continues.
- H. 2. a. (2) Failure to comply with enforceable interim abatement dates involving multi-step abatement shall be subject to a Notification of Failure to Abate Alleged Violation.
- H. 2. a. (3) Where the employer has implemented some controls, but other technology was available which would have brought the levels of airborne concentrations or noise to within the regulatory requirements, a Notification of Failure to Abate Alleged Violation normally shall be issued. If the employer has exhibited good faith, a late PMA for extenuating circumstances may be considered in accordance with E.9.a.(2).
- H. 2. a. (4) Where an apparent failure to abate by means of engineering controls is found to be due to technical infeasibility, no failure to abate notice shall be issued; however, if proper administrative controls, work practices or personal protective equipment are not utilized, a Notification of Failure to Abate Alleged Violation shall be issued.
- H. 2. a. (5) There may be times during the initial follow-up when, because of an employer's flagrant disregard of a citation or an item on a citation, or other factors, it will be apparent that additional administrative enforcement actions will be futile. In such cases, action shall be initiated under Section 27-a(6)(d) of the Act. The District Supervisor shall notify the Program Manager of all the circumstances of the case for referral to the Department of Labor Counsel's Office.
- H. 2. b. Second Follow-up. Any subsequent follow-up after the initial follow-up dealing with the same violations is a second follow-up.
- H. 2. b. (1) After the Notification of Failure to Abate Alleged Violation has been issued, the District Supervisor shall allow a reasonable time for abatement of the violation before conducting a second follow-up. The CSHO shall conduct the second follow-up immediately following the FTA abatement date or sooner if the employer calls to inform PESH that abatement has been completed and to stop penalty. If the employer contests the proposed daily penalties, a follow-up

inspection shall still be scheduled to ensure correction of the original violation.

H. 2. b. (2) If the second follow-up inspection reveals the employer still has not corrected the original violations, the District Supervisor shall immediately contact the Program Manager, in writing, detailing the circumstances so the matter can be referred to the Department of Labor Counsel for action, as appropriate, in the NYS Supreme Court in accordance with Section 27-a(6)(d) of the Act.

H. 2. b. (3) Prosecution Process. After the second follow-up, if the violations are not complied, the District Supervisor will prepare a transmittal memo to the Program Manager referring the case for judicial process under an Article 78 proceeding

H. 2. b. (3) (a) The following documents shall be forwarded at the same time:

- * Notice of Violation and Order to Comply.
- * Failure to Abate Notice
- * Case Contact Sheet
- * Report Narrative (original and follow-ups)
- * Violation worksheets (front and back)
- * Interim penalty bill(s)
- * Right to Know checklist (if violations exist)
- * Air/Noise sampling sheets (if applicable)

Copies of all green certified mail cards indicating what documents had been mailed with the card(s). Any other pertinent documents or correspondence from the case file, such as correspondence to and from the employer.

A contact person from management and their phone number should be included.

H. 2. b. (3) (b) NYS Right to Know Law: The SH 922 is used to document violations of Article 28 of the Labor Law which are identified during the inspection when evaluating the employer's Hazard Communication/NYS "Right to Know" Program. The checklist must include a comment section, instances of "toxic substances" used, as defined in Article 28.

The SH 922 must include in each case referred for violations of the Hazard Communication Standard. If there are no Right to Know (RTK) violations, but there are Hazard Communication violations, an appropriate explanation for the discrepancy shall be included in the report Narrative.

H. 2. b. (3) (c) All cases referred to the Program Manager's Office will be transmitted to the Department of Labor Counsel for legal action. The cases will also be entered onto a computerized tracking system and assigned a case number.

H. 2. b. (3) (c) 1 Each month the District Supervisor will receive a listing of cases where the Department of Labor Counsel's office is requesting a reinspection to verify compliance. The District Supervisor will give priority to assigning these cases as he/she would for other follow-up inspections. Upon completion of the reinspection two (2) copies of the report and penalty bill (either the final bill, SH

919.1 or current interim bill SH 919) will be sent to the Program Manager.

- H. 2. b. (3) (c) 1 a Cases not complied at this stage will be forwarded to the Attorney General's office to obtain judgement. The reinspection report shall include sufficient information and documentation pertaining to the employer's failure to comply.
- H. 2. b. (3) (c) 1 b Cases complied at this stage will be closed out on the tracking system and the Department of Labor Counsel's office will be notified to cease all legal action.
- H. 3. Reports. The applicable identification and description sections of the NYPESH-1B/1B-1H Form shall be used for documenting the failure to correct violations during follow-up inspections. The correction of violations may be documented on the OIS Inspection Report form or in the Narrative portion of the case file.
- H. 3. a. Proper Documentation. The correction circumstances observed by the CSHO shall be specifically described in the Inspection report, including any applicable dimensions, materials, specifications, personal protective equipment, engineering controls, measurements or readings, or other conditions. Brief terms such as "corrected" or "in compliance" will not be accepted as proper documentation for violations having have been corrected. When appropriate this written description shall be supplemented by a photograph and/or a videotape to illustrate correction circumstances. Only the item description and identification blocks need be completed on the follow-up Inspection report with an occasional inclusion of an applicable employer statement concerning correction under the employer knowledge section, if appropriate.
- H. 3. b. Sampling. The CSHO conducting a follow-up inspection to determine compliance with violations of air contaminants and noise standards shall decide whether sampling is necessary, and if so, what kind; i.e., spot sampling, short-term sampling or full-shift sampling. If there is reasonable probability of an issuance of a Notification of Failure to Abate Alleged Violation, full-shift sampling is required.
- H. 3. c. Narrative. The CSHO shall include in the narrative the findings pursuant to the inspection, along with recommendations for action. In order to reach a valid conclusion when recommending action, it is important to have all the pertinent factors available in an organized manner.
- H. 3. d. Failure to Abate. In the event that any item has not been abated, complete documentation shall be included in the Narrative.
- H. 4. Follow-up Files. The follow-up inspection reports shall be included with the original (parent) case file.
- I. Conduct of Monitoring Inspection (PMAs and Long-Term Abatement).
- I. 1. General. An inspection shall be classified as a monitoring inspection when a safety/health inspection is conducted for one or more of the following purposes:

- I. 1. a. To determine the progress an employer is making toward final correction.
- I. 1. b. To ensure that the target dates of a multi-step abatement plan are being met.
- I. 1. c. To ensure that an employer's petition for the modification of abatement dates is made in true and good faith and that the employer has attempted to implement necessary controls as expeditiously as possible.
- I. 1. d. To ensure that the employees are being properly protected until final controls are implemented.
- I. 1. e. To ensure that the terms of a permanent variance are being carried out.
- I. 1. f. Alternative Compliance Agreement
- I. 1. g. To provide abatement assistance for items under citation.
- I. 2. Procedures. Monitoring inspections shall be conducted in the same manner as follow-up inspections described under H of this chapter.

GENERAL INSPECTION PROCEDURES CHAPTER III APPENDIX

Additional Comments (Included on SH 914).

Include in this section any supportive information from the opening or closing conference substantiating the employer's general attitude, any general admission of violations and any agreement about abatement dates. Note any unusual circumstances encountered during any phase of the inspection. Indicate the scope of the inspection and the reasons justifying it. If advance notice was given, explain why, to whom and the date such notice was given. Use this space for any of the other items on the Form which require additional comment. In general, place in this space any relevant comments related to the inspection or called for by other guidelines in the FOM.

- A. 1. Industrial Hygiene (IH) Inspection Outline. This inspection outline is to be used during all health inspections as a guide for the collection of information that is required according to the FOM but which is not recorded on other forms included in the case file. The outline is intended as a guide for completion of the case file. Current information which is included and readily accessible elsewhere in the case file or in other case files need not be rewritten although a reference will usually be appropriate. All currently accurate information that will be necessary or useful for the review process shall be included; the outline is not intended merely to generate additional paperwork. A narrative covering the item 20, Additional Comments, for all health inspections. Additional blank pages can be used if necessary.
- A. 1. a. Nature and Scope of the Inspection.
- A. 1. a. (1) Reason for inspection if not fully indicated on the Inspection report
- A. 1. a. (2) Background information including everything of current concern to the present inspection; e.g., open citations, variances, etc.;
- A. 1. a. (3) Information concerning the scope of the inspection; and, if a complete health inspection is not to be conducted, a brief explanation of the reasons why not.
- A. 1. b. Opening Conference.
- A. 1. b. (1) Operations observed during the initial walkaround including:
 - A. 1. b. (1) (a) Significant process information including information on all potentially hazardous operations observed, including both chemicals used (with their approximate volumes, when significant) and physical agents encountered which may (potentially) affect employee health;
 - A. 1. b. (1) (b) Location of potentially exposed employees with an indication as to whether or not sampling is to be conducted and, if not, why not;
 - A. 1. b. (1) (c) Proposed action and/or conclusions relating to potential hazards and complaint or referral items (e.g., citations will be issued, sampling will be conducted or is not necessary, a safety referral will be made, no additional action, etc.) together with supporting reasons.

- A. 1. b. (2) Plant layout including a sketch made during the initial walkaround if the establishment does not have a layout chart or the equivalent available; the sketch shall include, as a minimum, building numbers or names, pertinent operation (process) areas with type of operation or process (including flow chart) indicated, distribution of major process equipment, including any engineering or administrative controls (when pertinent) and relative dimensions of the work area.

- A. 2. Occupational Health Program. An adequate description of the employer's health program shall be included in each case file. Supporting notes shall include CSHO observations of program enforcement as well as relevant comments made by management or employees regarding safeguards, precautions, protective equipment, routine procedures used for protection in plant processed, training efforts, experience of employee illness or symptoms, etc. Specific comments shall be made on each of the following program elements, as appropriate:
 - A. 2. a. Monitoring program (who, how analysis, schedules and results);
 - A. 2. b. Medical program (frequency, protocols and records);
 - A. 2. c. Education and training programs (extent, emergency procedures);
 - A. 2. d. Record keeping program (types, duration and accessibility to employees);
 - A. 2. e. Compliance program (hazard control):
 - A. 2. e. (1) Engineering/administrative controls;
 - A. 2. e. (2) PPE program;
 - A. 2. e. (3) Regulated area procedures;
 - A. 2. e. (4) Emergency procedures;
 - A. 2. e. (5) Written compliance plan;
 - A. 2. f. Personal hygiene facilities and practices;
 - A. 2. g. Labeling and posting policy and procedures.

- A. 3. Closing Conference(s). Closing conference(s) including any pertinent details, such as whether a joint conference was held with employer and employee representatives as well as comments regarding explanations given (and to whom) on available inspection results, discussions of general control guidelines and recommendations made (with date), and other general comments, including comments on good faith and cooperation. Notes regarding additional closing conferences shall also be included here.

Report Narratives.

All reports must have a narrative which contains the following information.

- B. 1. Purpose and scope of inspection.
- B. 2. Date inspection initiated.
- B. 3. Date of opening conference.
- B. 4. Opening conference attendees [names & titles].
- B. 5. What union members participated and what attempts were made to contact union representatives if unavailable.
- B. 6. What information was distributed.
- B. 7. Date(s) of walk around inspection.
- B. 8. Who accompanied you on walkaround, and who declined to participate.
- B. 9. Brief description of workplace operations.
- B. 10. Review of injury and illness records
- B. 11. What operations were inspected.
- B. 12. If operations are seasonal, indicate ones not inspected.
- B. 13. What equipment was used.
- B. 14. Programs/procedures reviewed and observations noted.
- B. 15. Date of closing conference.
- B. 16. Who attended closing conference.
- B. 17. Notation that penalty information and appeal rights were explained.
- B. 18. Any other pertinent information as necessary.
- B. 19. A brief description of the employer's safety and health program if one exists, and the hazard communication/RTK program, if one exists.
- B. 20. The narrative should address any specific reasons for the visit, i.e., complaint, accident, referral, consultation.
- B. 21. Industrial hygiene narratives must also include a sample results table that includes operation/job titles, substance sampled, results and applicable standards. Narrative should discuss if sampling is representative of exposure levels, duration of operations, type of sampling done (screen, area, personal), and any information pertinent to exposure.
- B. 22. Narratives will be recorded on the SH 914 by all enforcement personnel. Consultants will write this information out in paragraph style to be attached to the employer cover letter sent with all

consultations.

- B. 23. Follow-up reports will include a narrative similar to the initial narrative with particular attention to observations on pending violations, including method of abatement or reasons for non-compliance. Other significant changes to workplace operations or new hazards observed shall be addressed.

"UNSAFE" Notice for Machinery, etc. The DOSH 415 tag is used to provide a means to identify machinery, equipment, devices, areas, buildings or structures which are unsafe and constitute a dangerous condition, and to inform the employer, employees and the public that items so identified may not be used.

- C. 1. Preparation. By CSHO, after approval by the District Supervisor - use as many as needed to adequately mark the machinery, equipment, device, area, building or structure. If more than one Notice is required, number each one, e.g., if four notices are used, number as follows: 1 of 4, 2 of 4, etc., in upper left hand corner of front under the seal.

- C. 2. Entries.

- C. 2. a. On Attachment.

- C. 2. a. (1) MACHINERY, EQUIPMENT, DEVICE, AREA, BUILDING, STRUCTURE, ETC. - name, number (if any) and/or description of the machine, equipment, device, area, building, structure to which the Unsafe Notice is to be attached.

- C. 2. a. (2) NOTICE ATTACHED BY - name of CSHO preparing and attaching the Notice.

- C. 2. a. (3) DATE - month, day and year when CSHO attaches the Notice.

- C. 2. a. (4) LOCATION OF UNSAFE CONDITION - complete address where the machine, equipment, device, area, building, or structure is located.

- C. 2. a. (5) NAME AND TITLE OF PERSON SENT THE NOTICE OF VIOLATION - the name and title of person to whom the "Notice of Violation and Order to Comply" was sent.

- C. 2. a. (6) ADDRESS - business address of person named in item 5.

- C. 2. a. (7) ADDRESS COMMUNICATIONS TO - check the address for the appropriate District Office and write the telephone number of the office in the space provided.

- C. 2. b. On Removal.

- C. 2. b. (1) NOTICE REMOVED BY - name and title of CSHO removing the Notice from the machinery, equipment, device, area, building, or structure.

- C. 2. b. (2) DATE - month, day and year when the CSHO removes the Notice.

- C. 3. Disposition by CSHO.

- C. 3. a. On Attachment. Attach to the machine, equipment, device, or post in an area, building or structure which has been found to have an unsafe condition.
- C. 3. b. On Removal. After unsafe condition has been corrected, remove the Notice from the machine, equipment, device, area, building, or structure and forward to the District Office for filing in the case file.

Right to Know Compliance Checklist.

- D. 1. Purpose. To provide a means for the PESH Bureau to record inspection findings regarding the Right to Know Law and regulations, to provide the public employer with a copy, and to transmit the findings to Department of Labor Counsel’s office.
- D. 2. Preparation. By CSHO
- D. 3. Entries.
 - D. 3. a. NAME OF FACILITY AND UNIT (PREMISES) INSPECTED - name of the facility and the specific unit of that facility inspected, e.g., Pilgrim State Hospital - Laundry Unit, Hempstead Refuse Disposal Plant.
 - D. 3. b. ADDRESS - address of facility or unit (premises) inspected named in item 1, e.g., One Main Street, Room 1100, Brooklyn, NY, Zip.
 - D. 3. c. NAME OF INSPECTOR - name of the CSHO preparing checklist. If a different inspector conducts a compliance visit that name should also appear, e.g., J. Brown/C. A. Arthur.
 - D. 3. d. DISTRICT - name of the PESH district in which the facility is located, e.g., Syracuse.
 - D. 3. e. INSPECTION VISIT - the date of the inspection is noted under 1, 2, or 3 whichever is appropriate for the visit number.
 - D. 3. f. CHECKBOX - checkbox is marked in the appropriate column if the violation exists during visit 1, 2, or 3.
 - D. 3. g. COMMENTS - pertinent comments, if any. **Section must include examples of toxic substances or products employees are exposed to.**
- D. 4. Disposition
 - D. 4. a. Initial.
 - D. 4. a. (1) By Inspector
 - D. 4. a. (1) (a) Copy to public employer at the closing conference or sent by mail or email after the conference.
 - D. 4. a. (1) (b) Original maintained for the case file.

- D. 4. a. (2) By District Office
- D. 4. a. (2) (a) Copy attached to Notice of Violation and filed in Tickler file by last abatement date.
- D. 4. a. (2) (b) Copy retained in establishment case file.
- D. 4. a. (2) (c) In the event there are no hazard communication standard violations, then a copy is sent to the Program Manager for forwarding to the Department of Labor Counsel's Office.
- D. 4. b. Subsequent.
- D. 4. b. (1) By Inspector
- D. 4. b. (1) (a) Copy- taken on follow-up visit (as long as there are non-complied Hazard Communication standard orders).
- D. 4. b. (2) By District Office
- D. 4. b. (2) (a) When all follow-up visits that have outstanding Hazard Communication violations are concluded, a copy is sent to the Program Manager for forwarding to the Department of Labor Counsel's Office.
- D. 4. b. (2) (b) A copy of the form is retained for the case file.

Photo Mounting Worksheet Form.

- E. 1. General. This form shall be used by the CSHO to mount photographs taken during an inspection.
- E. 2. Instructions. The required information related to each photograph shall be supplied as follows:
 - E. 2. a. Inspection Number. Enter the inspection number
 - E. 2. b. Photo ID Number. Enter the appropriate roll and frame number (roll/frame) of the photo
 - E. 2. c. Date/Time. Enter the date and time that the photo was taken.
 - E. 2. d. Citation Number. From the Inspection Report Form, enter the number of the citation in which the employer was cited for the violation depicted in the photograph. If no specific violation is pictured, enter N/A.
 - E. 2. e. Item Number. From the Inspection Report Form, enter the item number of the violation depicted in the photograph.
 - E. 2. f. Instance Number. From the Inspection Report Form enter the instance of the violation depicted in the photograph.

- E. 2. g. Location: (Photo and Photographer). Describe (or diagram) the position of the photographer in relation to the hazard depicted and locate the hazard in the worksite. Identify the photographer by name, if other than the primary CSHO assigned to the inspection.
- E. 2. h. Description. Describe in appropriate detail the violation depicted, and the environment of the worker; identify employees photographed (unless already identified on the related Inspection Report) and any other relevant factors. If, during the analysis of the photo, the CSHO discovers violations not noted during the inspection, these shall be noted; and the employer informed of the problem so that it may be corrected. This shall be done even though that violation is not included in any citation issue for that inspection.
- E. 2. i. Confidential Materials. Mark "x" in the block provided if a trade secret could be revealed by the photograph. This is necessary for disclosure determinations and must be supported on the related Worksheet, Inspection report Form. Future printing of this Form will differentiate "Trade Secret" from security classified materials.

PHOTO MOUNTING WORKSHEET

Inspection Number	
Photo ID Number	
Date/Time	
Citation Number	
Item Number	
Instance Number	
Location (Photo and Photographer)	
Description	
Confidential Materials	

F. (reserved)

Inspection Case File Activity Diary or Case Contact Sheet (Suggested Format)(SH 515)

- G. 1. General. The Inspection Case Contact Sheet is designed to provide a ready record and summary of all actions relating to a case.
- G. 1. a. As directed in Chapter I, C.3.1., it shall include a chronological record of significant actions taken affecting the case, beginning with the opening conference and ending with the closing of the case when all outstanding penalties have been paid and abatement requirements have been met.
- G. 1. b. Maintenance/completion of the diary is the responsibility of any individual having activity on the case. All contacts with the employer and other persons or entities involved in the case shall be noted.
- G. 2. Instructions. The Inspection Case Contact Sheet shall be displayed prominently in the case file for audit purposes, and shall contain at least the types of information specified below at G.2.a - g. If using the model form, complete it in accordance with the instructions that follow.
- G. 2. a. Employer. The name of the employer shall be entered in the first block at the top of the form and shall correspond with the name recorded in OIS Inspection Report.
- G. 2. b. Inspection Location. The site address shall be entered in this block, corresponding with the address given in OIS Inspection Report.
- G. 2. c. Inspection Number. The inspection number from OIS shall be entered in this block.
- G. 2. d. Date. Enter the date of each significant action being recorded.
- G. 2. e. Action. Briefly describe the action taken.
- G. 2. f. Initials. Enter the initials of the person recording the action.
- G. 2. g. Pagination. The Inspection Case Contact Sheet may comprise as many pages as needed. If more than one sheet is used, number the pages consecutively in the upper right-hand corner and show the number of pages.
- H. Recording High Hazard Establishments in OIS. See Chapter II for the high hazard establishment list. For all inspections, the CSHO shall check this list to see if the SIC/NAICS code for that workplace is on the list. If so, then "Inspection Classification-Local Emphasis Program on the NYPESH-1 shall be checked "HH" (High Hazard). [A94-4] in OIS.

INFORMAL CONFERENCE NOTIFICATION

Date and Time: [Date and time]

Place: [Establishment]
[Address]
[City], NY

Requested By: [Requester]
[Title]

Subject of Conference:
Establishment: [Establishment]
Inspection#: [Inspection Number]
Topic: [Topic]

Affected Parties Notified:

[Name]
[Title]
[Address]

In accordance with your request, an informal conference will be held on the date, time and place shown above. You may send a representative and be accompanied by counsel if you so desire.

If you are unable to attend at this time, please notify me as soon as possible at the above address.

Sincerely;

[Supervisor Name]
Supervising Inspector

SH 902

NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with PESH to discuss the violation(s) issued on [Date of NOV]. The conference will be held at the PESH office located at New York PESH- [City], [street address] - Room [Room #], [City], NY, [zip] on [Date of Conference] at [Time]. Employees and/or representatives of employees have a right to attend an informal conference.

INFORMAL CONFERENCE REPORT

1. **DATE OF CONFERENCE:** [Date of conference]

2. **REQUESTING PARTY:**

- EMPLOYER
- EMPLOYEE
- EMPLOYEE REP.

3. **PARTIES NOTIFIED OF CONFERENCE:**

- EMPLOYER
- EMPLOYEE
- EMPLOYEE REP.

4a. **EMPLOYER'S NAME AND ADDRESS:**

[Employer's name]
[employers address]
[town], NY [zip]

4b. **UNIT INSPECTED, NAME AND ADDRESS:**

[establishment name]
[establishment address]
[town], NY

NAMES AND TITLES OF PARTIES ATTENDING CONFERENCE:

5a. **EMPLOYER:**

[employer representatives]

5b. **EMPLOYEE OR EMPLOYEE REPRESENTATIVES:**

[employee representatives]

6. **FINDINGS:**

[findings]

7. **DETERMINATION:**

[determination]

8. **REVISED ORDERS PREPARED:** [yes or no] DATE:

9. **EMPLOYER ADVISED OF CHOICES:**

- VARIANCE
- IBA
- HAB
- N/A

10. **SIGNATURE AND TITLE OF PERSON CONDUCTING CONFERENCE:**

[Name of Supervisor]
SUPERVISING SAFETY AND HEALTH INSPECTOR

CHAPTER IV

VIOLATIONS

Basis of Violations.

- A. 1. (a) (1) Standards and Regulations. Section 27-a(3)(a)(2) of the PESH Act states that each employer has a responsibility to comply with the occupational safety and health standards promulgated under the Act. The specific standards and regulations are found in Title 29 Code of Federal Regulations (CFR) 1900 series. Subparts A and B of 29 CFR 1910 specifically establish the source of all the standards which are the basis of violations. The standards are subdivided as follows:

Part - 1910	Subsection - 1910.23(a)
Subpart - D	Paragraph - 1910.23(c)(1)
Section - 1910.23	Subparagraph - 1910.23(c)(1)(i)

NOTE: The most specific subdivision of the standard shall be used for citing violations.

- A. 1. (a) (2) Standards Incorporated by Reference. Section 27-a(3) of the Act states that each employer shall comply with the safety and health standards promulgated under this Section. This includes standards incorporated by reference. For example, the American National Standard Institute (ANSI) standard A92.2-1969, "Vehicle Mounted Elevating and Rotating Work Platforms," including appendix, is incorporated by reference as specified in 29 CFR 1910.67. Only the mandatory provisions, i.e., those containing the word "shall" or other mandatory language of standards incorporated by reference, are adopted as standards under the Section.
- A. 1. b. Definition and Application of Horizontal and Vertical Standards. Vertical standards are those standards which apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment or installations. Horizontal standards are those standards which apply when a condition is not covered by a vertical standard. Within both horizontal and vertical standards there are general standards and specific standards.
- A. 1. b. (1) General standards are those which address a category of hazards and whose coverage is not limited to a special set of circumstances; e.g., 29 CFR 1910.132(a), 29 CFR 1910.212(a)(1) or (a)(3)(ii), 29 CFR 1910.307(b) and 29 CFR 1926.28(a).
- A. 1. b. (2) Specific standards are those which are designed to regulate a specific hazard and which set forth the measures that the employer must take to protect employees from that particular hazard; e.g., 29 CFR 1910.23(a)(1) and 29 CFR

1926.451(d)(10).

- A. 1. b. (3) There are two types of vertical standards:
- A. 1. b. (3) (a) Standards that apply to particular industries (Maritime, Construction, etc.) and standards that apply to particular sub-industries as contained in Subpart R of 29 CFR 1910 for sawmills, wood pulping, laundries, etc., and
- A. 1. b. (3) (b) Standards that state more detailed requirements for certain types of operations, equipment, or equipment usage than are stated in another (more general) standard in the same part; e.g., requirements in 29 CFR 1910.213 for woodworking machinery.
- A. 1. b. (4) If a CSHO is uncertain whether to cite under a horizontal or a vertical standard when both apply, the supervisor shall be consulted. The following general guidelines apply:
 - A. 1. b. (4) (a) When a hazard in a particular industry is covered by both a vertical (e.g., 29 CFR 1915) standard and a horizontal (e.g., 29 CFR 1910) standard, the vertical standard shall take precedence. This is true even if the horizontal standard is more stringent.
 - A. 1. b. (4) (b) If the particular industry does not have a vertical standard that covers the hazard, then the CSHO shall use the horizontal (general industry) standard.
 - A. 1. b. (4) (c) When a hazard within general industry (29 CFR 1910) is covered by both a horizontal (more general) standard and a vertical (more specific) standard, the vertical standard takes precedence. For example, in 29 CFR 1910.213 the requirement for point of operation guarding for swing saws is more specific than the general machine guarding requirements contained in 29 CFR 1910.212. However, if the swing saw is used only to cut material other than wood, 29 CFR 1910.212 is applicable.
 - A. 1. b. (4) (d) In addition, industry vertical standards take precedence over equipment vertical standards. Thus, if the swing saw is in a sawmill, the more specific standard for sawmills is 29 CFR 1910.265 rather than 29 CFR 1910.213.
 - A. 1. b. (4) (e) In situations covered by both a horizontal (general) and a vertical (specific) standard where the horizontal standard appears to offer greater protection, the horizontal (general) standard may be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical (specific) standard. To determine whether or not there is a conflict of inconsistency between the standards, a careful analysis of the intent of the two standards must be performed. The results of the analysis

must show that the vertical standard does not address the precise hazard involved, even though it may address related or similar hazards.

EXAMPLE: In tiered structural steel erection, 29 CFR 1926.105(a) may not be cited for interior fall distances of more than 25 ft. above the temporary flooring since that specific situation is covered by 29 CFR 1926.760(a)(1) for fall distances of more than 15 ft.

- A. 1. b. (4) (f) When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO shall focus attention on the activity in which the employer is engaged at the establishment being inspected rather than the nature of the employer's general business.
- A. 1. b. (4) (g) Hazards found in construction work that are not covered by a specific 29 CFR 1926 standard shall not normally be cited under a 29 CFR 1910 standard unless that standard has been identified as being applicable to construction. (29 CFR 1910.1020, Access to Employee Exposure and Medical Records, has been identified as applicable to construction.)
- A. 1. b. (4) (g) 1 "Construction work" means work for construction, alteration and/or repair, including painting and decorating, and includes both contract and noncontract work (See 29 CFR 1926.13.)
- A. 1. b. (4) (g) 2 If any question arises as to whether an activity is deemed to be construction for purposes of the Act, the Program Manager shall be consulted.
- A. 1. b. (4) (g) 3 For hazards found in construction, the District Supervisor shall obtain the approval of the Program Manager before citing violations of 29 CFR 1910 standards that have not been identified as applicable to construction. (See Chapter XII, B.1.b. for more guidelines.)
- A. 1. b. (5) Citing of Similar PESH Standards. Under no circumstances should two standards be cited for the same exact hazard or deficiency. PESH has no policy for grouping violations and assesses a penalty for each violation not complied. Therefore, the policy outlined has a significant impact on the total penalty assessed against an employer. PESH's intent is to penalize the employer only once for each hazardous condition he fails to correct. The following guidelines shall be used in determining what standard to cite.
- A. 1. b. (5) (a) The most specific subdivision of the standard shall be used for citing violations. For example, an employer has not provided MSDSs. 1910.1200(g)(1) in part requires employers to have MSDSs for each hazardous chemical. 1910.1200(g)(8) requires employers to maintain MSDSs. Citing both paragraphs would be a duplication. The CPL for Hazard Communication instructs the inspector to cite paragraph

1200(g)(1).

- A. 1. b. (5) (b) Application of Horizontal and Vertical Standards. Vertical standards apply to specific industries and horizontal standard over a certain hazard without regard to a particular industry. The criteria for which standard applies is covered in the FOM. For example, a fire department has no medical screening program. 1910.156(b)(2) requires that a determination be made that fire brigade members be physically able to perform the work and use the equipment. In this example, the horizontal standard 1910.134(e)(1) should be cited as per FOM, paragraph A.1.(a)(4)(e). The horizontal standard is not inconsistent with the vertical standard and it appears to offer greater protection, i.e., the medical program would address the ability to perform duties and wear a respirator.
- A. 1. b. (5) (c) Alternative Standards. The FOM discusses the use of alternative standards when writing citations. This is another method of citing similar standards that may be used by PESH. This would result in one violation issued with one penalty if not complied.
- A. 1. c. Violation of Variances. The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in paragraph 8 of the PESH Act.
- A. 1. c. (1) An employer will not be subject to citation if the observed condition is in compliance with either the granted variance or the controlling standard. In the event that the employer is not in compliance with the requirements of the variance, a violation of the standard shall be cited with a reference in the citation to the variance provision that has not been met.
- A. 1. c. (2) If, during the course of a compliance inspection, the CSHO discovers that the employer has filed an application for variance regarding a condition which is determined to be an apparent violation of the standard, this fact shall be reported to the supervisor who will obtain information concerning the status of the variance request.
- A. 2. General Duty Requirements. Section 27-a(3) of the PESH Act requires that "Every employer shall: (1) furnish to each of it's employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety and health of its employees."
- A. 2. a. Evaluation of Potential 27-a(3) Situations. In general, the Industrial Board of Appeals and court precedent has established that the following elements are necessary to prove a violation of the general duty clause:
 - (1) The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;

- A. 2. a. (2) The hazard was recognized;
- A. 2. a. (3) The hazard was causing or was likely to cause death or serious physical harm; and
- A. 2. a. (4) There was a reasonable and adequate method to correct the hazard.

A. 2. b. Discussion of 27-a(3) Elements. The above four elements of a Section 27-a(3) violation are discussed in greater detail as follows:

A. 2. b. (1) A Hazard To Which Employees Were Exposed. A general duty citation must involve both a serious hazard and exposure of employees.

A. 2. b. (1) (a) Hazard. A hazard is a danger which threatens physical harm to employees.

A. 2. b. (1) (a) 1 Not the Lack of a Particular Abatement Method. In the past some Section 27-a(3) citations have incorrectly alleged that the violation is the failure to implement certain precautions, corrective measures or other abatement steps rather than the failure to prevent or remove the particular hazard. It must be emphasized that Section 27-a(3) does not mandate a particular abatement measure but only requires an employer to render the workplace free of certain hazards by any reasonable and adequate means which the employer wishes to utilize.

A. 2. b. (1) (a) 1 a In situations where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the District Supervisor shall consult with the Program Manager for assistance in articulating the hazard properly.

EXAMPLE 1. Employees doing sanding operations may be exposed to the hazard of fire caused by sparking in the presence of magnesium dust. One of the abatement methods may be training and supervision. The "hazard" is the exposure to the potential of a fire; it is not the lack of training and supervision.

EXAMPLE 2. In another situation a danger of explosion due to the presence of certain gases could be remedied by the use of nonsparking tools. The hazard is the explosion hazard due to the presence of the gases; it is not the lack of nonsparking tools.

EXAMPLE 3. In a hazardous situation involving high pressure gas where the employer has failed to train employees properly, has not installed the proper high pressure equipment, and has improperly installed the

equipment that is in place, there are three abatement measures which the employer failed to take; there is only one hazard (viz., exposure to the hazard of explosion due to the presence of high pressure gas) and hence only one general duty clause citation.

A. 2. b. (1) (a) 1 b Where necessary, the Program Manager shall consult with the Department of Labor Counsel.

A. 2. b. (1) (a) 2 The Hazard Is Not a Particular Accident. The occurrence of an accident does not necessarily mean that the employer has violated Section 27-a(3) although the accident may be evidence of a hazard. In some cases a Section 27-a(3) violation may be unrelated to the accident. Although accident facts may be relevant and shall be gathered, the citation shall address the hazard in the workplace, not the particular facts of the accident.

EXAMPLE: A fire occurred in a workplace where flammable materials were present. No employee was injured by the fire itself but an employee, disregarding the clear instructions of his supervisor to use an available exit, jumped out of a window and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard causing or likely to cause death or serious physical harm, but the action of the employee may be an instance of unpreventable employee misconduct. The citation should deal with the fire hazard, not with the accident involving the employee who broke his leg.

A. 2. b. (1) (a) 3 The Hazard Must Be Reasonably Foreseeable. The hazard for which a citation is issued must be reasonably foreseeable.

A. 2. b. (1) (a) 3 a All the factors which could cause a hazard need not be present in the same place at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.

EXAMPLE: If combustible gas and oxygen are present in sufficient quantities in a confined area to cause an explosion if ignited but no ignition source is present or could be present, no Section 27-a(3) violation would exist. If an ignition source is available at the workplace and the employer has not taken sufficient safety precautions to preclude its use in the confined area, then a foreseeable hazard may exist.

A. 2. b. (1) (a) 3 b It is necessary to establish the reasonable foreseeability of the general workplace hazard, rather than the particular hazard which led to the accident.

EXAMPLE: A titanium dust fire may have spread from one room to another only because an open can of gasoline was in the second room. An employee who usually worked in both rooms was burned in the second room from the gasoline. The presence of gasoline in the second room may be a rare occurrence. It is not necessary to prove that a fire in both rooms was reasonably foreseeable. It is necessary only to prove that the fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

- A. 2. b. (1) (b) The Hazard Must Affect the Cited Employer's Employees. The employees exposed to the Section 27-a(3) hazard must be the employees of the cited employer.
- A. 2. b. (1) (b) 1 An employer who may have created, contributed to, and/or controlled the hazard normally shall not be cited for a Section 27-a(3) violation if his own employees are not exposed to the hazard. (See Chapter V, F.2.c.)
- A. 2. b. (1) (b) 2 In complex situations, such as multi-employer worksites, where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the District Supervisor shall consult with the Program Manager and Department of Labor Counsel to determine the sufficiency of the evidence regarding the employment relationship.
- A. 2. b. (1) (b) 3 The fact that an employer denies that exposed employees are his/her employees does not necessarily decide the legal issue involved. Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays these employees may not be the determining factor.
- A. 2. b. (2) The Hazard Must be Recognized. Recognition of a hazard can be established on the basis of industry recognition, employer recognition, or "common-sense" recognition. The use of common-sense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by satisfactory evidence and adequate documentation in the file as follows:
 - A. 2. b. (2) (a) Industry Recognition. A hazard is recognized if the employer's industry recognizes it. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a Section 27-a(3) violation. Although evidence of recognition by the employer's specific branch within an industry is preferred, evidence that

the employer's industry recognizes the hazard may be sufficient. The District Supervisor shall consult with the Program Manager on this issue. Industry recognition of a particular hazard can be established in several ways:

- A. 2. b. (2) (a) 1 Relevant statements by safety or health experts who are familiar with the industry.
- A. 2. b. (2) (a) 2 Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry.
- A. 2. b. (2) (a) 3 Manufacturer's warnings on equipment which are relevant to the hazard.
- A. 2. b. (2) (a) 4 Statistical or empirical studies conducted by the employer's industry which demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees should also be considered if the employer or the industry has been made aware of them.
- A. 2. b. (2) (a) 5 Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity.
- A. 2. b. (2) (a) 6 State and local laws or regulations which apply in the jurisdiction where the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended.
- A. 2. b. (2) (a) 6 a In cases where State and local government agencies have codes or regulations covering hazards not addressed by PESH standards, the District Supervisor, upon consultation with the Program Manager, shall determine whether the hazard is to be cited under Section 27-a(3) or referred to the appropriate local agency for enforcement.

EXAMPLE. A safety hazard on a personnel elevator in a factory may be documented during an inspection. It is determined that the hazard is not clearly citable under Section 27-a(3) but there is a local code which addresses this hazard and a local agency actively enforces the code. The situation normally shall be referred to the local enforcement agency in lieu of citing Section 27-a(3).
- A. 2. b. (2) (a) 7 Standards issued by the American National Standards Institute (ANSI), the National Fire Protection Agency (NFPA), and other private standard-setting organizations, if the relevant industry participated on the committee drafting the standards. Otherwise,

such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards which discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. It must be emphasized, however, that these private standards cannot be enforced like PESH standards. They are simply evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.

- A. 2. b. (2) (a) 8 NIOSH criteria documents; the publications of EPA, the National Cancer Institute, and other agencies; OSHA hazard alerts; the OSHA Technical Manual; and articles in medical or scientific journals by persons other than those in the industry, if used only to supplement other evidence which more clearly establishes recognition. Such publications can be relied upon only if it is established that they have been widely distributed in general, or in the relevant industry.
- A. 2. b. (2) (b) Employer Recognition. A recognized hazard can be established by evidence of actual employer knowledge. Evidence of such recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the PESH inspection.
- A. 2. b. (2) (b) 1 Memorandums, safety rules, operating manuals or operating procedures, and collective bargaining agreements may reveal the employer's awareness of the hazard. In addition, accident, injury and illness reports prepared for PESH, workmen's compensation, or other purposes may show this knowledge.
- A. 2. b. (2) (b) 2 Employee complaints or grievances to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.
- A. 2. b. (2) (b) 3 The employer's own corrective action may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford any significant protection to the employees.
- A. 2. b. (2) (c) Common-Sense Recognition. If industry or employer recognition of the hazard cannot be established in accordance with (a) and (b), recognition can still be established if it is concluded that any reasonable person would have recognized the hazard. This theory of recognition shall be used only in flagrant cases.

EXAMPLE: In a general industry situation, a court has held that any reasonable person would recognize that it is hazardous to dump bricks from an unenclosed chute into an alleyway between buildings which is 26 feet (7.8 meters) below and in which unwarned employees work. (In construction, Section 27-a(3) could not be cited in this situation because 29 CFR 1926.252 or 1926.852 applies.)

- A. 2. b. (3) The Hazard Was Causing or Was Likely to Cause Death or Serious Physical Harm. This element of a Section 27-a(3) violation is identical to the substantial probability element of a serious violation under Section 27-a(6) of the Act. Serious physical harm is defined in B.1. of this chapter. This element of a Section 27-a(3) violation can be established by showing that:
 - A. 2. b. (3) (a) An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or
 - A. 2. b. (3) (b) If an accident occurred, the likely result would be death or serious physical harm. For example, an employee is standing at the edge of an unguarded piece of equipment, 25 feet (7.6 meters) above the ground. Under these circumstances if the falling incident occurs, death or serious physical harm (e.g., broken bones) is likely.
 - A. 2. b. (3) (c) In a health context, establishing serious physical harm at the cited levels may be particularly difficult if the illness will require the passage of a substantial period of time to occur. Expert testimony is crucial to establish that serious physical harm will occur for such illnesses. It will generally be easier to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. In general, the following must be shown to establish that the hazard causes or is likely to cause death or serious physical harm when such illness or death will occur only after the passage of a substantial period of time:
 - A. 2. b. (3) (c) 1 Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels reasonably could occur;
 - A. 2. b. (3) (c) 2 Illness reasonably could result from such regular and continuing employee exposure; and
 - A. 2. b. (3) (c) 3 If illness does occur, its likely result is death or serious physical harm.
- A. 2. b. (4) The Hazard Can Be Corrected by a Reasonable and Adequate Method. To establish a Section 27-a(3) violation the bureau must identify a method which is reasonable, adequate, available and likely to correct the hazard. The information shall indicate that the recognized hazard, rather than a particular accident, is preventable.

- A. 2. b. (4) (a) If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a Section 27-a(3) citation may be issued. A citation shall not be issued merely because the bureau knows of an abatement method different from that of the employer, if the bureau's method would not reduce the hazard significantly more the employer's method. It must also be noted that in some cases only a series of abatement methods will alleviate a hazard. In such a case all the abatement methods shall be mentioned.
- A. 2. b. (4) (b) Reasonable and adequate abatement methods can be established by reference to:
- A. 2. b. (4) (b) 1 The employer's own abatement method which existed prior to the inspection but was not implemented;
- A. 2. b. (4) (b) 2 The implementation of reasonable and adequate abatement measures by the employer after the accident or inspection;
- A. 2. b. (4) (b) 3 The implementation of abatement measures by other companies;
- A. 2. b. (4) (b) 4 The recommendations by the manufacturer of the hazardous equipment involved in the case; and
- A. 2. b. (4) (b) 5 Suggested abatement methods contained in trade journals, private standards and individual employer standards. Private standards shall not be relied on in a Section 27-a(3) citation as mandating specific abatement methods.
- A. 2. b. (4) (b) 5 a For example, if an ANSI standard deals with the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the buildup of materials which create the gas and the provision of ventilation, the ANSI standard may be used as evidence of the existence of reasonable and adequate abatement measures.
- A. 2. b. (4) (b) 5 b The citation for the example given shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a reasonable and adequate abatement method existed; e.g., preventing the buildup of gas by providing an adequate ventilation system. It would not be correct to issue a citation alleging that the employer failed to prevent the buildup of materials which could create the gas and failed to provide a ventilation system as both of these are abatement methods, not hazards.

- A. 2. b. (4) (b) 6 Evidence provided by expert witnesses which demonstrates the reasonableness and adequacy of abatement methods. Although it is not necessary to establish that the industry recognizes a particular abatement method, such evidence shall be used if available.
- A. 2. c. Use of the General Duty Clause. The general duty provisions shall be used only where there is no standard that applies to the particular hazard involved as outlined in 29 CFR 1910.5(f).
- A. 2. c. (1) The general duty clause may be applied in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard. An example of a hazard covered only partially by a standard would be a confined space situation where an employee could be subject to an overexposure of an air contaminant covered under 12 NYCRR Part 800.5 or to an atmosphere containing less than 16-percent oxygen. The latter condition could legitimately be cited under the general duty clause with the former cited under the appropriate standard.
- A. 2. c. (2) The general duty clause may be applicable to some types of employment which are inherently dangerous (fire brigades, emergency rescue operations, confined space entry, etc.). Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards which are likely to cause death or serious physical harm. These steps include anticipation of hazards which may be encountered, provision of appropriate protective equipment, and prior provision of training, instruction, and necessary equipment. An employer who has failed to take appropriate steps on any of these or similar items and has allowed the hazard to continue to exist may be cited under the general duty clause (if not covered under a standard).
- A. 2. d. Limitations on Use of the General Duty Clause. Section 27-a(3) is to be used only within the guidelines given in A.2.a. of this chapter.
- A. 2. d. (1) Section 27-a(3) Shall Not Be Used When a Standard Applies to a Hazard. Both 29 CFR 1910.5(f) and legal precedent establish that Section 27-a(3) may not be used if a PESH standard applies to the hazardous working condition.
- A. 2. d. (1) (a) Prior to issuing a Section 27-a(3) citation, the standards must be reviewed carefully to determine whether a standard applies to the hazard. If a standard applies, the standard shall be cited rather than Section 27-a(3). Prior to the issuance of a Section 27-a(3) citation, a notation shall be made in the file to indicate that the standards were reviewed and no standard applies.
- A. 2. d. (1) (b) If there is a question as to whether a standard applies, the District Supervisor shall consult with the Program Manager. The Department of Labor Counsel will assist the Program Manager in determining the

applicability of the standard.

- A. 2. d. (1) (c) Section 27-a(3) may be cited in the alternative when a standard is also cited to cover a situation where there is doubt as to whether the standard applies to the hazard.
- A. 2. d. (1) (c) 1 If the issue of the applicability of a specific standard is raised in a subsequent informal conference or notice of contest proceeding, the District Supervisor shall consult with the Program Manager, who shall refer the matter to the Department of Labor Counsel for appropriate legal advice.
- A. 2. d. (1) (c) 2 If, on the other hand, the issue of the preemption of the general duty clause by a standard is raised in a subsequent informal conference or notice of contest proceeding, the District Supervisor shall consult with the Program Manager, who shall refer the matter to the Department of Labor Counsel for appropriate legal advice.
- A. 2. d. (2) Section 27-a(3) Shall Not Normally Be Used To Impose a Stricter Requirement Than That Required by the Standard. For example, if the standard provides for a permissible exposure limit (PEL) of 5 ppm, even if data establishes that a 3 ppm level is a recognized hazard, Section 27-a(3) shall not be cited to require that the 3 ppm level be achieved. If the standard has only a time-weighted average permissible exposure level and the hazard involves exposure above a recognized ceiling level, the District Supervisor shall consult with the Program Manager, who shall discuss any proposed citation with the Department of Labor Counsel.
- NOTE: An exception to this rule may apply if it can be documented that "an employer knows a particular safety or health standard is inadequate to protect his workers against the specific hazard it is intended to address." International Union, U.A.W. v. General Dynamics Land Systems Div., 815 F.2d 1570 (D.C. Cir. 1987). Such cases shall be subject to pre-citation review.
- A. 2. d. (3) Section 27-a(3) Shall Normally Not Be Used to Require an Abatement Method Not Set Forth in a Specific Standard. A specific standard is one that refers to a particular toxic substance or deals with a specific operation, such as welding. If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, Section 27-a(3) shall not be cited to require medical surveillance.
- A. 2. d. (4) Section 27-a(3) Shall Not Be Used to Enforce "Should" Standards. If a Section 6(a) standard or its predecessor, such as an ANSI standard, uses the work "should", neither the standard nor Section 27-a(3) shall ordinarily be cited with respect to the hazard addressed by the "should" portion of the standard.
- A. 2. d. (5) Section 27-a(3) Shall Not Normally Be Used to Cover Categories of Hazards

Exempted by a Standard. Although no hard and fast general rule can be stated concerning the use of Section 27-a(3) to cover specific categories of hazards, types of machines, operations, or industries exempted from coverage by a standard, Section 27-a(3) shall normally not be cited if the reason for the exemption is the lack of a hazard.

- A. 2. d. (5) (a) If, on the other hand, the reason for the exemption is that the drafters of the standard (or source document) declined to deal with the exempt category for reasons other than the lack of a hazard, the general duty clause may be cited if all the necessary elements for such a citation are present.
- A. 2. d. (5) (b) District Supervisors shall evaluate the circumstances of special situations in accord with guidelines stated herein and consult with the Program Manager to determine whether a Section 27-a(3) citation can be issued in those special cases.
- A. 2. d. (6) Alternative Standards. There are a number of general standards which shall be considered for citation rather than Section 27-a(3) in certain situations which initially may not appear to be governed by a standard.
- A. 2. d. (6) (a) If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard shall be cited. In general industry, 29 CFR 1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE.
- A. 2. d. (6) (b) For a health hazard, the particular toxic substance standards, such as asbestos and coke oven emission, shall be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in 12 NYCRR Part 800.5 may apply in general industry and those contained in 29 CFR 1926.55 may apply in construction.
- A. 2. d. (6) (c) Another standard which may possibly be cited is 29 CFR 1910.134(a) which deals with the hazards of breathing harmful air contaminants not covered under 12 NYCRR Part 800.5 or another specific standard and requires the use of feasible engineering controls and the use of respirators where engineering controls are not feasible.
- A. 2. d. (6) (d) In addition, 29 CFR 1910.141(g)(2) may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and 29 CFR 1910.132(a) may be cited when toxic materials are absorbed through the skin.
- A. 2. d. (6) (e) The foregoing standards as well as others which may be applicable shall be considered carefully before issuing a Section 27-a(3) citation for a

health hazard.

- A. 2. e. Classification of Violations Cited Under the General Duty Clause. Only those hazards alleging serious violations may be cited under the general duty clause (including willful and/or repeated violations which would otherwise qualify as serious violations, except for their willful or repeated nature). Non-serious citations shall not be issued for violations based on the general duty clause.
- A. 2. f. Procedures for Implementation of Section 27-a(3) Enforcement. To ensure that all citations of the general duty clause are fully justified, the following procedures shall be carefully adhered to.
 - A. 2. f. (1) Gathering Evidence and Preparing the File. The evidence necessary to establish each element of a Section 27-a(3) violation shall be documented in the file. This includes all photographs, videotapes, sampling data, witness statements and other documentary and physical evidence necessary to establish the violation. Additional documentation includes why it was common knowledge, why it was detectable, why it was recognized practice and supporting statements or reference materials.
 - A. 2. f. (1) (a) If copies of documents relied on to establish the various Section 27-a(3) elements cannot be obtained before issuing the citation, these documents shall be accurately quoted and identified in the file so they can be obtained later if necessary.
 - A. 2. f. (1) (b) If experts are needed to establish any elements of the violation, the experts shall be consulted before the citation is issued and their opinions noted in the file. The file shall also contain their addresses and telephone numbers.
 - A. 2. f. (1) (c) The file shall contain a statement that a search has been made of the standards and that no standard applies to the cited condition.
 - A. 2. f. (1) (d) On all citations of Section 27-a(3) for ergonomic hazards, add the following qualifying statement to the citation:

"In this instance, the hazard described below may cause serious physical harm, but is not likely to cause death."
 - A. 2. f. (1) (e) Section 27-a(3) should be cited separately for different hazards. This does not apply to instances of the same hazard or different elements of a program to address one hazard.
 - A. 2. f. (2) Pre-Citation Review. The District Supervisor shall ensure that all proposed Section 27-a(3) citations undergo pre-citation review as follows:
 - A. 2. f. (2) (a) The Program Manager shall be consulted prior to the issuance of all Section 27-a(3) citations where such consultation is required by the procedures in the paragraphs under A.2. or where complex issues or

exceptions to those procedures are involved. The Program Manager shall ensure that such Section 27-a(3) citations are issued only in appropriate circumstances after consultation with the Department of Labor Counsel and, when appropriate with the Director.

- A. 2. g. Reporting Hazards Not Covered by a Standard. The supervisor shall evaluate all alleged general duty clause violations to determine whether they should be referred to the DOSH Director for the development of new or revised standards. Those violations considered to be candidates for development or revision of a standard shall be forwarded by the District Supervisor to the Program Manager.
- A. 3. Employee Exposure. A hazardous condition which apparently violates a PESH standard or the general duty clause shall be cited only when employee exposure can be documented and substantiated.
- A. 3. a. Definition of Employee. Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees may not be the determining factor. Determining the employer of an exposed person may be a very complex question, in which case the District Supervisor shall seek the advice of the Program Manager through the Department of Labor Counsel.
- A. 3. b. Observed Exposure. Employee exposure is established if the CSHO witnesses, observes, or monitors exposure of an employee to the hazardous or suspected hazardous condition. Although the use of adequate personal protective equipment does not alter the external conditions of employee exposure, such exposure may be cited only where the standard requires engineering, administrative (including work practice) controls.
- A. 3. c. Unobserved Exposure. Where employee exposure is not observed, witnessed, or monitored by the CSHO, employee exposure is established if it is determined through witness statements or other evidence that exposure to a hazardous condition has occurred or continues to occur.
- A. 3. c. (1) Past Exposure. In fatality/catastrophe (or other "accident") investigations, employee exposure is established if the CSHO determines, through written statements or other evidence, that exposure to a hazardous condition occurred at the time of the accident. In other circumstances where the CSHO determines that exposure to hazardous conditions has occurred in the past, such exposure may serve as the basis for a violation when:
 - A. 3. c. (1) (a) The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur.
 - A. 3. c. (1) (b) It is reasonably predictable that employee exposure to a hazardous condition could recur when:
 - A. 3. c. (1) (b) 1 Employee exposure has occurred in the previous 6 months.

- A. 3. c. (1) (b) 2 The hazardous condition is an integral part of an employer's recurring operations; and
- A. 3. c. (1) (b) 3 The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.
- A. 3. c. (1) (c) When employee exposure is not observed, such as during an accident fatality investigation or due to intermittent operations, employee exposure may be established through employee statements and other evidence. This is applicable in cases of safety or health hazards associated with the use of machinery, equipment, or hazardous materials; however it is insufficient evidence for issuance of citations regarding noise or air-contaminant standards. Such violations can only be adequately documented by full shift personal sampling. In addition, as stated in A.3.c.(2)(d), if the employer has an effective policy or program in place that prevents the employee exposure, then a citation will not be issued.
- A. 3. c. (2) Potential Exposure. The possibility exists that an employee could be exposed to a hazardous condition may be cited when the employee can be shown to have access to the hazard. Potential employee exposure could include one or more of the following:
 - A. 3. c. (2) (a) When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements and it is reasonably predictable that employee exposure could occur.
 - A. 3. c. (2) (b) When a safety or health hazard would pose a danger to employees simply by employee presence in the area and it is reasonably predictable that an employee could come into the area during the course of the work, to rest or to eat at the job site, or to enter or to exit from the assigned workplace.
 - A. 3. c. (2) (c) When a safety or health hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is reasonably predictable that an employee could use the equipment or be exposed to the hazardous materials in the course of work.
 - A. 3. c. (2) (d) If the investigation reveals an adequately enforced employer policy or program which would prevent employee exposureBincluding accidental exposureBto the hazardous condition, the CSHO would not ordinarily find it reasonably predictable that employee exposure could occur and would, therefore, not recommend issuing a citation in relation to the particular condition.
- A. 3. d. Documenting Employee Exposure. The CSHO shall fully document exposure for every apparent violation. This includes such items as:
 - A. 3. d. (1) Comments by the exposed employees, the employer (particularly the immediate

supervisor of the exposed employee), other witnesses (especially other employees or members of the exposed employee's family);

- A. 3. d. (2) Signed statements;
- A. 3. d. (3) Photographs and/or videotapes; and
- A. 3. d. (4) Documents (e.g., autopsy reports, police reports, job specifications, etc.).
- A. 4. Regulatory Requirements. Violations of Part 801 and Part 802 shall be documented and cited when the employer does not comply with the posting requirements, the record keeping requirements, and the reporting requirements of the regulations contained in these subparts. (See Chapter VI, B. 16.)

NOTE: If the District Supervisor becomes aware of an incident required to be reported under Part 801.9 through some means other than an employer report prior to the elapse of the 8 hours reporting period and an inspection of the incident is made, a violation for failure to report does not exist.

- A. 5. Hazard Communication. 29 CFR 1910.1200 applies to manufacturers and importers of hazardous chemicals even though they themselves may not have employees exposed. Consequently, any violations of that standard by manufacturers or importers shall be documented and cited, irrespective of employee exposure at the manufacturing or importing location. (See OSHA Instruction CPL 2-2.38C.)

B. Types of Violations.

- B. 1. Serious Violations. Section 6 of the Act provides A... a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."
- B. 1. a. The CSHO shall take four steps to make the determination that a violation is serious. The first three steps determine whether there is a substantial probability that death or serious physical harm could result from an accident or exposure relating to the violative condition. (The probability that an accident or illness will occur is not to be considered in determining whether a violation is serious.) The fourth step determines whether the employer knew or could have known of the violation.
- B. 1. a. (1) The violation classification need not be completed for each instance; only once for each full item, or, if items are grouped, once for the group.
- B. 1. a. (2) If the full item consists of multiple instances or grouped items, the classification shall be based on the most serious item. (See Chapter VI, B.9.)
- B. 1. b. The four-step analysis as outlined below is necessary to make the determination that an

apparent violation is serious. Apparent violations of the general duty clause shall also be evaluated on the basis of these steps to ensure that they represent serious violations. The four elements the CSHO shall consider are as follows:

- B. 1. b. (1) Step 1. The types of accident or health hazard exposure which the violated standard or the general duty clause is designed to prevent.
- B. 1. b. (1) (a) The CSHO need not establish the exact way in which an accident, or health hazard exposure would occur. The exposure or potential exposure of an employee is sufficient to establish that an accident or health hazard exposure could occur. However, the CSHO shall note the facts which could affect the severity of the injury or illness resulting from the accident or health hazard exposure.
- B. 1. b. (1) (b) If more than one type of accident or health hazard exposure exist which the standard is designed to prevent, the CSHO shall determine which type could reasonably be predicted to result in the most severe injury or illness and shall base the classification of the violation on that determination.
- B. 1. b. (1) (c) The following are examples of a determination of the type of accident or health hazard exposure which a violated standard is designed to prevent:
- B. 1. b. (1) (c) 1 Employees are observed working at the unguarded edge of an open-sided floor 30 feet (9 meters) above the ground in apparent violation of 29 CFR 1926.500(d)(1). This regulation requires that the edge of the open-sided floor be guarded by standard railings. The type of accident which the violated standard is designed to prevent involves an employee falling from the edge of the floor, 30 feet (9 meters) to the ground below.
- B. 1. b. (1) (c) 2 Employees are observed working in an area in which debris is located in apparent violation of 29 CFR 1915.91(b). The type of accident which the violated standard is designed to prevent involves an employee tripping on debris.
- B. 1. b. (1) (c) 3 An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to beryllium at .004mg/M³ in apparent violation of 12 NYCRR Part 800.5. This is .002mg/M³ above the PEL of health hazard exposure which the violated standard is designed to prevent.
- B. 1. b. (1) (c) 4 An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to acetic acid at 20 ppm in violation of 12 NYCRR Part 800.5. This is 10 ppm above the PEL of health hazard exposure which the violated standard is designed to prevent.

- B. 1. b. (2) Step 2. The type of injury or illness which could reasonably be expected to result from the type of accident or health hazard exposure identified in Step 1.
- B. 1. b. (2) (a) In making this determination, the CSHO shall consider all factors which would affect the severity of the injury or illness which could reasonably be predicted to result from an accident or health hazard exposure. The CSHO shall not give consideration at this point to factors which relate to the probability that an injury or illness will occur. The following are examples of a determination of the types of injuries which could reasonably be predicted to result from an accident:
- B. 1. b. (2) (a) 1 If an employee falls from the edge of an open-sided floor 30 feet (9 meters) to the ground below, that employee could break bones, suffer a concussion, or experience other more serious injuries.
- B. 1. b. (2) (a) 2 If an employee trips on debris, that employee could experience abrasions or bruises, but it is only marginally predictable that the employee could suffer a substantial impairment of a bodily function. If, however, the area were littered with broken glass or other sharp objects, it would be reasonable to predict that an employee who tripped on debris could suffer a deep cut which could require suturing.
- B. 1. b. (2) (b) For conditions involving exposure to air contaminants or harmful physical agents, the CSHO shall consider the concentration levels of the contaminant or physical agent in determining the types of illness which could reasonably result from the condition. The Chemical Information Manual, OSHA Instruction CPL 2-2.43A, shall be used to determine toxicological properties of substances listed as well as a Health Code Number. Health Code Numbers for overexposures are [Serious 1-13] and [Non-serious 13+]. A preliminary violation classification shall be assigned in accordance with the instructions given in C.6.a. of this section.
- B. 1. b. (2) (c) In order to support a preliminary classification of serious, PESH must establish a prima facie case that exposure at the sampled level would, if representative of conditions to which employees are normally exposed, lead to illness. Thus the CSHO must make every reasonable attempt to show that the sampled exposure is in fact representative of employee exposure under normal working conditions. The CSHO shall, therefore, identify and record all available evidence which indicates the frequency and duration of employee exposure. Such evidence would include:
- B. 1. b. (2) (c) 1 The nature of the operation from which the exposure results.
- B. 1. b. (2) (c) 2 Whether the exposure is regular and on-going or of limited frequency and duration.

- B. 1. b. (2) (c) 3 How long employees have worked at the operation in the past.
- B. 1. b. (2) (c) 4 Whether employees are performing functions which can be expected to continue.
- B. 1. b. (2) (c) 5 Whether work practices, engineering controls, production levels and other operating parameters are typical of normal operations.
- B. 1. b. (2) (d) Where such evidence is difficult to obtain or where it is inconclusive, the CSHO shall estimate the frequency and duration from the evidence available. In general, if the evidence tends to indicate that it is reasonable to predict that regular, ongoing exposure could occur, the CSHO shall presume such exposure in determining the types of illness which could result from the violative condition. The following are examples of determination of types of illnesses which could reasonably result from a health hazard exposure:
- B. 1. b. (2) (d) 1 If an employee is exposed regularly and continually to beryllium at .004mg/M³, it is reasonable to predict that berylliosis or cancer could result.
- B. 1. b. (2) (d) 2 If an employee is exposed regularly and continually to acetic acid at 20 ppm, it is reasonable to predict that the illness which could result, viz., irritation to nose, eyes, throat, would not involve serious physical harm.
- B. 1. b. (3) Step 3. Whether the results of the injury or illness identified in Step 2 could include death or serious physical harm.
- B. 1. b. (3) (a) In making this determination, the CSHO shall utilize the following definition of "serious physical harm":
- B. 1. b. (3) (a) 1 Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, acute or chronic. Injuries involving such impairment would usually require treatment by a medical doctor. Examples of injuries which constitute such harm include:
 - B. 1. b. (3) (a) 1 a Amputation (loss of all or part of a bodily appendage which includes the loss of bone).
 - B. 1. b. (3) (a) 1 b Concussion.
 - B. 1. b. (3) (a) 1 c Crushing (internal, even though skin surface may be intact).
 - B. 1. b. (3) (a) 1 d Fracture, simple or compound.

- B. 1. b. (3) (a) 1 e Burn or scald, including electric and chemical burns.
- B. 1. b. (3) (a) 1 f Cut, laceration, or puncture involving significant bleeding and/or requiring suturing.
- B. 1. b. (3) (a) 2 Illnesses that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body. Some examples of such illnesses include cancer, silicosis, asbestosis, byssinosis, hearing impairment, central nervous system impairment and visual impairment. Examples of illness which constitute serious physical harm include:
- B. 1. b. (3) (a) 2 a Cancer.
- B. 1. b. (3) (a) 2 b Poisoning (resulting from the inhalation, ingestion or skin absorption of a toxic substance which adversely affects a bodily system).
- B. 1. b. (3) (a) 2 c Lung diseases, such as asbestosis, silicosis, anthracosis.
- B. 1. b. (3) (a) 2 d Hearing loss.
- B. 1. b. (3) (b) The following are examples of determinations of whether the types of injury or illnesses which could reasonably result from an accident or health hazard exposure could include death or serious physical harm:
- B. 1. b. (3) (b) 1 If an employee, upon falling 30 feet (9 meters) to the ground, suffers broken bones or a concussion, that employee would experience substantial impairment of the usefulness of a part of the body and would require treatment by a medical doctor. This injury would constitute serious physical harm.
- B. 1. b. (3) (b) 2 If an employee, tripping on debris, suffers a bruise or abrasion, that employee would not experience substantial reduction of the usefulness of a part of the body nor would that employee require treatment by a medical doctor. This injury would not be serious. However, if the employee would most likely suffer a deep cut of the hand, the use of the hand would be substantially reduced and would require suturing by a medical doctor. This injury would then be serious.
- B. 1. b. (3) (b) 3 If an employee, following exposure to beryllium at .004mg/M³, develops berylliosis or cancer, life would be shortened and breathing capacity would be significantly reduced. The illness would constitute serious physical harm.
- B. 1. b. (3) (b) 4 If an employee is exposed regularly and continually to acetic acid at 20 ppm, the irritation that would result from this exposure would

not normally be considered to constitute serious physical harm.

- B. 1. b. (4) Step 4. Whether the employer knew, or with the exercise of reasonable diligence, could have known of the presence of the hazardous condition.
- B. 1. b. (4) (a) The knowledge requirement is met if it is determined that the employer actually knew of the hazardous condition which constituted the apparent violation.
- B. 1. b. (4) (a) 1 In this regard, the supervisor represents the employer and a supervisor's knowledge of the hazardous condition amounts to employer knowledge. The CSHO shall record any evidence which establishes that the employer knew of the hazardous condition on the appropriate worksheet.
- B. 1. b. (4) (a) 2 In cases where the employer may contend that the supervisor's own conduct constituted an isolated event of employee misconduct, the CSHO shall attempt to determine the extent to which the supervisor was trained and supervised so as to prevent such conduct.
- B. 1. b. (4) (b) If, after reasonable attempts to do so, it cannot be determined that the employer has actual knowledge of the hazardous condition, the knowledge requirement is met if the CSHO is satisfied that the employer could have known through the exercise of reasonable diligence. As a general rule, if the CSHO was able to discover a hazardous condition, it can be presumed that the employer could have discovered the same condition through the exercise of reasonable diligence. The CSHO shall record any evidence which substantiates that the employer could have known of the hazardous condition with the exercise of reasonable diligence on the appropriate worksheet.
- B. 2. Non-serious Violations. This type of violation shall be cited in situations where the accident or illness that would be most likely to result from a hazardous condition would probably not cause death or serious physical harm but would have a direct and immediate relationship to the safety and health of employees.
- B. 3. Willful Violations. The following definitions and procedures apply whenever the CSHO suspects that a willful violation may exist. Willful violations are to be issued in only very limited circumstances. Willful violations may be issued for hazards that are considered serious or non-serious. A General Duty clause violation may be classified as willful, as long as all other criteria outlined in Chapter IV of the FOM are met.. A willful violation is defined as a violation under the Act where evidence shows that the employer committed an intentional and knowing violation. A violation cannot be classified as willful unless there is strong evidence that both of the following elements are present:

* That the employer had knowledge of the hazardous condition

* That the employer did not make a reasonable attempt to eliminate the condition.

All evidence demonstrating that these elements exist must be documented on the violation worksheet. The implementation of this category of violation does not change the procedures for imminent danger violations.

B. 3. a. A willful violation exists under the Act where the evidence shows either an intentional violation of the Act or plain indifference to its requirements.

B. 3. a. (1) The employer committed an intentional and knowing violation if:

B. 3. a. (1) (a) An employer representative was aware of the requirements of the Act, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements.

B. 3. a. (1) (b) An employer representative was not aware of the requirements of the Act or standards, but was aware of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement.

B. 3. a. (2) The employer committed a violation with plain indifference to the law where:

B. 3. a. (2) (a) Higher management officials were aware of a PESH requirement applicable to the employer's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

B. 3. a. (2) (b) Employer supervisory officials were aware of a continuing compliance problem but made little or no effort to avoid violations.

EXAMPLE: Repeated issuance of citations addressing the same or similar conditions.

B. 3. a. (2) (c) An employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives.

B. 3. a. (2) (d) Finally, in particularly flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if he or she had possessed it.

B. 3. b. It is not necessary that the violation be committed with a bad purpose or an evil intent to

be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.

- B. 3. c. The CSHO shall carefully develop and record in OIS, all evidence available that indicates employer awareness of and the disregard for statutory obligations or of the hazardous conditions. Willfulness could exist if an employer is advised by employees or employee representatives of an alleged hazardous condition and the employer makes no reasonable effort to verify and correct the condition. Additional factors which can influence a decision as to whether violations are willful include:
 - B. 3. c. (1) The nature of the employer's business and the knowledge regarding safety and health matters which could reasonably be expected in the industry.
 - B. 3. c. (2) The precautions taken by the employer to limit the hazardous conditions.
 - B. 3. c. (3) The employer's awareness of the Act and of the responsibility to provide safe and healthful working conditions.
 - B. 3. c. (4) Whether similar violations and/or hazardous conditions have been brought to the attention of the employer.
 - B. 3. c. (5) Whether the nature and extent of the violations disclose a purposeful disregard of the employer's responsibility under the Act.
- B. 3. d. The determination of whether to issue a citation for a willful or repeated violation will frequently raise difficult issues of law and policy and will require the evaluation of complex factual situations. Accordingly, a citation for a willful violation shall not be issued without consultation with the Program Manager, who shall contact the Director and Assistant Director, and as appropriate, discuss the matter with the Department of Labor Counsel.
- B. 3. e. The following procedure will be established for follow-up and referral to Department of Labor Counsel for willful cases.
 - B. 3. e. (1) A PMA may still be granted on a willful or repeat citation, but the Supervisor will notify the Program Manager of all such requests. All PMAs will be carefully reviewed before being granted.
 - B. 3. e. (2) PESH will conduct the follow-up inspection within 10 working days of the final abatement date.
 - B. 3. e. (3) If the follow-up inspection reveals that the order has not been complied, a Failure to Abate citation will be issued, as in the usual manner. The abatement period on the FTA citation will be 10 working days. However, at this time, the case will also be referred for prosecution. No FTA follow-up inspection will be conducted unless requested by Department of Labor Counsel and such requests will be kept to a minimum.

- B. 3. e. (4) Department of Labor Counsel will send one letter to the employer requesting a response within 10 working days. The letter from Counsel will include a statement foreclosing any action other than affirmation by the employer that the violation has been corrected.
- B. 3. e. (5) In all cases where there is no response to Counsel or a Failure to Abate reinspection indicates non-compliance, referral to the Attorney General's Office will be made immediately.
- B. 3. e. (6) The Attorney General's Office will then initiate prosecution expeditiously.
- B. 3. f. Due to this expeditious treatment of willful violations, it is extremely important that the CSHO discuss the gravity of the situation with the employer at the closing conference. The employer should be made aware at that time of the strict prosecution process that will be adhered to if he fails to correct the violation by the abatement date. Every effort should be made by PESH to obtain compliance by the abatement date and to provide technical assistance where needed.
- B. 4. Criminal/Willful Violations. Article 5, Section 63.3 of the Executive Law gives the Attorney General's office the authority to investigate and prosecute an employer who has been found to commit a criminal offense.
- B. 4. a. The District Supervisor, in coordination with the Program Manager and Department of Labor Counsel, shall carefully evaluate all cases involving workers' deaths to determine whether they involve criminal violation of Article 5, Section 63.3 of the Executive Law.
- B. 4. b. In cases where an employee's death has occurred which may have been caused by a willful violation of a PESH standard, the supervisor shall be consulted prior to the completion of the investigation to determine whether evidence exists and whether further evidence is necessary to establish the elements of a criminal/willful violation. The District Supervisor shall consult with the Program Manager and, if appropriate, with the Department of Labor Counsel after the initial determination has been made concerning possible willful violation.
- B. 4. c. The Program Manager will evaluate the case file for possible criminal/willful violations and then send the case to the Attorney General's office. If the Attorney General's investigation reveals criminal offenses, he shall prosecute the employer under the relevant sections of the penal law, which establishes penalties for particular crimes.
- B. 4. d. The District Supervisor shall normally issue a civil citation in accordance with current procedures even if the citation involves allegations under consideration for criminal prosecution. The Program Manager shall be notified of such cases, and they shall be forwarded to the Department of Labor Counsel as soon as practical for possible referral to the Attorney General's office.
- B. 4. e. When a willful violation is related to a fatality, the District Supervisor shall ensure the case file contains documentation regarding the decision not to make a criminal referral.

The documentation should indicate which elements of a criminal violation make the case unsuitable for criminal referral. For example, the case file documentation could state the evidence gathered for a specific criminal/willful element did not meet the greater burden of proof for criminal prosecution.

B. 5. Repeated Violations. An employer may be cited for a repeated violation if that employer has been cited previously for a substantially similar condition and the citation has become a final order.

B. 5. a. Identical Standard. Generally, similar conditions can be demonstrated by showing that in both situations the identical standard was violated.

EXCEPTION: Previously a citation was issued for a violation of 29 CFR 1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of 29 CFR 1910.132(a) for not requiring the use of head protection (hard hats). Although the same standard was involved, the hazardous conditions found were not substantially similar and therefore a repeated violation would not be appropriate.

B. 5. b. Different Standards. In some circumstances, similar conditions can be demonstrated when different standards are violated.

EXAMPLE: A citation was previously issued for a violation of 29 CFR 1910.28(d)(7) for not installing standard guardrails on a tubular welded frame scaffold platform. A recent inspection of the same establishment reveals a violation of 29 CFR 1910.28(c)(14) for not installing guardrails on a tube and coupler scaffold platform. Although there may be different standards involved, the hazardous conditions found could be substantially similar and therefore a repeated violation would be appropriate.

B. 5. c. Geographical Limitations. For purposes of determining whether a violation is repeated, the following criteria shall apply:

B. 5. c. (1) High Gravity Serious Violations. When high gravity serious violations are to be cited, the District Supervisor shall obtain a history of citations previously issued to this employer at all of his identified establishments, statewide, within the same two-digit SIC/NAICS code. If these violations have been previously cited within the time limitations described in B.5.d. and have become a final order of the Industrial Board of Appeals, a Repeated Citation shall be issued. Under special circumstances, the Program Manager, in consultation with the Department of Labor Counsel, may also issue citations for repeated violations without regard for the SIC/NAICS code.

B. 5. c. (2) Violations of Lesser Gravity. When violations of lesser gravity than high gravity serious are to be cited, Bureau policy is to encourage the District Supervisor to obtain a statewide inspection history whenever the circumstances of the current inspection will result in a large number of serious, repeat, or willful citations. This is particularly so if the employer is known to have establishments statewide

and if significant citations have been issued against the employer in other areas, or at other mobile worksites.

- B. 5. c. (2) (a) Although such a history would be useful for almost all inspections, the Bureau recognizes that the resource demands, if such histories were to be required in every case, would be higher than the resources available.
- B. 5. c. (2) (b) If, for any reason, a history is obtained, that history may be used to support a repeated violation for any violation found during the current inspection (not just high gravity serious). All violations found in the current inspection may be cited as repeated if the citation history shows that they have previously been cited.
- B. 5. c. (2) (c) Where a statewide inspection history has not been obtained, the following criteria regarding geographical limitations shall apply:
- B. 5. c. (2) (c) 1 Multi facility Employer. A Multi facility employer shall be cited for a repeated violation if the violation recurred at any worksite within the same PESH District Office jurisdiction.

EXAMPLE: Where the construction site extends over a large area and/or the scope of the job is unclear (such as road building), that portion of the workplace specified in the employer's contract which falls within the District Office jurisdiction is the establishment. If an employer's activities at a job site are performed in two or more District Office jurisdictions, a violation in Area A cannot serve as the basis for a repeated violation in Area B. If, on the other hand, an employer has several worksites within the same District Office jurisdiction, a citation of a violation at Site A will serve as the basis for a repeated citation in Area B.
- B. 5. c. (2) (c) 2 Long shoring Establishment. A Long shoring establishment will encompass all Long shoring activities of a single stevedore within any single port area. Long shoring employers are subject to repeated violation citations based on prior violations occurring anywhere.
- B. 5. c. (2) (c) 3 Other Maritime Establishments. Other maritime employers covered by PESH standards (e.g., shipbuilding, ship repairing) are Multi facility employers as defined in 1 above.
- B. 5. d. Time Limitations. Although there are no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation, the following policy shall be followed.

A citation will be issued as a repeated violation if:

- a. The citation is issued within three (3) years of the final order date of the previous citation or within three (3) years of the final abatement date, whichever is later; and
- b. If the previous citation was contested, within three (3) years of the Industrial Board of Appeal's final order or the Court of Appeals final mandate.

- B. 5. e. PESH Requirements. A repeat violation is one in which the employer has been cited before for a substantially similar condition. A repeat violation may be issued under the following circumstances:
 - B. 5. e. (1) The violation must have been previously cited for the employer.
 - B. 5. e. (2) If there is no fixed establishment, a violation can be considered repeat if it has occurred before by that employer.
 - B. 5. e. (3) Violations are considered repeat if a search of the past history of that employer indicates that the same PESH section or substantially the same hazard had been cited at any time. There is no statutory limitations upon the length of time sustaining a repeat.
 - B. 5. e. (4) Repeat violations will be considered for both serious and non-serious hazards.
 - B. 5. e. (5) In order to properly document a repeat violation, the case file must contain a copy of the prior citation which serves as the basis for the repeated citation.
 - B. 5. e. (6) The employer shall be informed of the previous violation by notation in the AVD portion of the repeat citation.
 - B. 5. e. (7) A repeat violation may be considered willful and classified as a Willful. In such cases, the employer has prior knowledge since he has been cited in the past three years. However, this category will only be used if the other two elements for willful are in place.
 - B. 5. e. (8) The following procedure will be established for follow-up and referral to Department of Labor Counsel for willful cases.
 - B. 5. e. (8) (a) A PMA may still be granted on a willful or repeat citation, but the Supervisor will notify the Program Manager of all such requests. All PMAs will be carefully reviewed before being granted.
 - B. 5. e. (8) (b) PESH will conduct the follow-up inspection within 10 working days of the final abatement date.
 - B. 5. e. (8) (c) If the follow-up inspection reveals that the order has not been complied, a Failure to Abate citation will be issued, as in the usual manner. The abatement period on the FTA citation will be 10 working days. However, at this time, the case will also be referred for prosecution. No FTA

follow-up inspection will be conducted unless requested by Department of Labor Counsel and such requests will be kept to a minimum.

- B. 5. e. (8) (d) Department of Labor Counsel will send one letter to the employer requesting a response within 10 working days. The letter from Counsel will include a statement foreclosing any action other than affirmation by the employer that the violation has been corrected.
- B. 5. e. (8) (e) In all cases where there is no response to Counsel or a Failure to Abate reinspection indicates non-compliance, referral to the Attorney General's Office will be made immediately.
- B. 5. e. (8) (f) The Attorney General's Office will then initiate prosecution expeditiously.
- B. 5. e. (8) (g) For repeated, non-serious violations the normal follow-up and prosecution procedure will be followed.
- B. 5. e. (9) Due to this expeditious treatment of repeat violations, it is extremely important that the CSHO discuss the gravity of the situation with the employer at the closing conference. The employer should be made aware at that time of the strict prosecution process that will be adhered to if he fails to correct the violation by the abatement date. Every effort should be made by PESH to obtain compliance by the abatement date and to provide technical assistance where needed.
- B. 5. f. Repeated vs. Willful. Repeated violations differ from willful violations in that they may result from an inadvertent, accidental or ordinarily negligent act. Where a repeated violation may also meet the criteria for willful but not clearly so, a citation for a repeated violation shall normally be issued.
- B. 5. g. Repeated vs. Failure to Abate. A failure to abate situation exists when an item of equipment or condition previously cited has never been brought into compliance and is noted at a later inspection. If, however, the violation was not continuous (i.e., if it had been corrected and then reoccurred), the subsequent occurrence is a repeated violation.
- B. 5. h. District Supervisor Responsibilities. After the CSHO makes the initial recommendation that the violation be cited as "repeated" the District Supervisor shall:
 - B. 5. h. (1) Ensure the violation meets the criteria outlined in the preceding subparagraphs of this section.
 - B. 5. h. (2) Ensure that the case file includes a copy of the prior violation citation which serves as the basis for the repeated citation. If the prior violation citation is not available, the basis for the repeated citation shall, nevertheless, be adequately documented in the case file.
 - B. 5. h. (3) In questionable circumstances when it is not clear that the violation meets the criteria outlined in this section, consult with the Program Manager before issuing

a repeated citation.

- B. 5. h. (4) If a repeated citation is issued, ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation, either by telephone or by notation in the AVD portion of the citation, using the following or similar language:

THE (COMPANY NAME) WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD (NAME PREVIOUSLY CITED STANDARD) WHICH WAS CONTAINED IN PESH INSPECTION NUMBER _____, CITATION NUMBER _____, ITEM NUMBER _____, ISSUED ON (DATE).

- B. 6. De Minimis Violations. De Minimis violations are violations of standards which have no direct or immediate relationship to safety or health. Whenever de minimis conditions are found during an inspection, they shall be documented in the same way as any other violation but shall not be included on the citation.

- B. 6. a. Explanation. The criteria for finding a de minimis violation are as follows:

- B. 6. a. (1) An employer complies with the clear intent of the standard but deviates from its particular requirements in a manner that has no direct or immediate relationship to employee safety or health. These deviations may involve distance specifications, construction material requirements, use of incorrect color, minor variations from record keeping, testing, or inspection regulations, or the like.

EXAMPLE #1: 29 CFR 1910.27(b)(1)(ii) allows 12 inches (30 centimeters) as the maximum distance between ladder rungs. Where the rungs are 13 inches (33 centimeters) apart, the condition is de minimis.

EXAMPLE #2: 29 CFR 1910.28(a)(3) requires guarding on all open sides of scaffolds. Where employees are tied off with safety belts in lieu of guarding, often the intent of the standard will be met, and the absence of guarding may be de minimis.

EXAMPLE #3: 29 CFR 1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

- B. 6. a. (2) An employer complies with a proposed standard or amendment or a consensus standard rather than with the standard in effect at the time of the inspection and the employer's action clearly provides equal or greater employee protection or the employer complies with a written interpretation issued by the OSHA Regional or National Office.

- B. 6. a. (3) An employer's workplace is at the "state of the art" which is technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.
- B. 6. b. Professional Judgement. Maximum professional discretion must be exercised in determining the point at which noncompliance with a standard constitutes a de minimis violation.
- B. 6. c. District Supervisor Responsibilities. District Supervisors shall ensure that the de minimis violation meets the criteria set out in B.6.a.
- B. 6. d. PESH Requirements. PESH will now use this classification of violation, under the circumstances described below.
 - B. 6. d. (1) When a PESH staff directive has been issued indicating a de minimis violation of a particular standard when certain conditions exist. For example, Staff Directive A92-5 discusses an OSHA de minimis classification of 1910.1030(f)(2)(i) for first aiders when certain criteria is met.
 - B. 6. d. (2) When an employer meets other criteria as described in the FOM, this shall be brought to the attention of the Supervisor or Associate. The Program Manager's Office shall be contacted for approval to classify the violation as de minimis.
 - B. 6. d. (3) The condition shall be fully described on the violation worksheet with reference to any staff directives that pertain to the subject. Upon review and approval by the Supervisor or Associate and the Program Manager's office, a notation will be made on the violation worksheet not to issue the violation.
 - B. 6. d. (4) During the inspection, the CSHO shall discuss all conditions considered to be de minimis, indicating that this is subject to review by the District office and the Program Manager's office. If finally classified as de minimis, the condition will not appear on the citation. The CSHO shall explain to management and employee representatives the definition of a de minimis.

Health Standard Violations.

- C. 1. General. The classification of health violations involves the exercise of maximum professional judgement. All relevant factors must be carefully considered when making classification decisions.
- C. 2. Citation of Ventilation Standards. In cases where a citation of a ventilation standard may be appropriate, consideration shall be given to standards intended to control exposure to recognized hazardous levels of air contaminants, to prevent fire or explosions, or to regulate operations which may involve confined space or specific hazardous conditions. In applying these standards, the following guidelines shall be observed:

- C. 2. a. Health-Related Ventilation Standards. An employer is considered in compliance with a health-related airflow ventilation standard when the employee exposure does not exceed appropriate airborne contaminant standards; e.g., the PELs prescribed in 12 NYCRR 800.5.
- C. 2. a. (1) Where an over-exposure to an airborne contaminant is detected, the appropriate air contaminant engineering control requirement shall be cited; e.g., 29 CFR 1910.1000(e). In no case shall citations of this standard be issued for the purpose of requiring specific volumes of air to ventilate such exposures.
- C. 2. a. (2) Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. Where a specific standard has been violated and an actual or potential hazard has been documented, a citation shall be issued.
- C. 2. b. Fire- and Explosion-Related Ventilation Standards. Although they are not technically health violations, the following guidelines shall be observed when citing fire- and explosion-related ventilation standards:
 - C. 2. b. (1) Adequate Ventilation. In the application of fire- and explosion- related ventilation standards, PESH considers that an operation has adequate ventilation when both of the following criteria are met:
 - C. 2. b. (1) (a) The requirement of the specific standard has been met.
 - C. 2. b. (1) (b) The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

EXCEPTION: Certain standards specify violations when 10 percent of the LEL is exceeded. These standards are found in maritime and construction exposures.
 - C. 2. b. (2) Citation Policy. If 25 percent (10 percent when specified for maritime or construction operations) of the LEL has been exceeded and:
 - C. 2. b. (2) (a) The standard requirements have not been met, the standard violation normally shall be cited as serious.
 - C. 2. b. (2) (b) There is no applicable specific ventilation standard, Section 27-a(3) of the Act shall be cited in accordance with the guidelines given in A.2. of this chapter.
- C. 2. c. Special Conditions Ventilation Standards. The primary hazards in this category are those resulting from confined space operations.
 - C. 2. c. (1) Overexposure need not be shown to cite ventilation requirements found in the standards themselves.

- C. 2. c. (2) Other hazards associated with confined space operations, such as potential oxygen deficiency or toxic overexposure, must be adequately documented before a citation may be issued.
- C. 3. Violations of the Noise Standard. Current enforcement policy regarding 29 CFR 1910.95(b)(1) allows employers to rely on personal protective equipment and a hearing conservation program rather than engineering and/or administrative controls when hearing protectors will effectively attenuate the noise to which the employee is exposed to acceptable levels as specified in Tables G-16 or G-16a of the standard. Professional judgement is necessary to supplement the general guidelines provided here.
 - C. 3. a. Citations for violations of 29 CFR 1910.95(b)(1) shall be issued when engineering and/or administrative controls are feasible, both technically and economically; and
 - C. 3. a. (1) Employee exposure levels are so high that hearing protectors alone may not reliably reduce noise levels received by the employee's ear to the levels specified in Tables G-16 or G-16a of the standard. Given the present state of the art, hearing protectors which offer the greatest attenuation may not reliably be used when employee exposure levels border on 100 dBA (See OSHA Instruction CPL 2-2.35A, Appendix.); or
 - C. 3. a. (2) The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.

NOTE: See Chapter III for guidelines on technical and economic feasibility. The Program Manager's Office can provide additional information on engineering control costs and technological feasibility when requested by the Program Manager.

 - C. 3. b. A control is not reasonably necessary when an employer has an ongoing hearing conservation program and the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees. (In making this decision such factors as the exposure levels in question, the number of employees tested, and the duration of the testing program shall be taken into consideration.)
 - C. 3. c. When employee noise exposures are less than 100 dBA but the employer does not have an ongoing hearing conservation program or the results of audiometric testing indicate that the employer's existing program is not working, the CSHO shall consider whether:
 - C. 3. c. (1) Reliance on an effective hearing conservation program would be less costly than engineering and/or administrative controls.
 - C. 3. c. (2) An effective hearing conservation program can be established or improvements can be made in an existing hearing conservation program which could bring the employer into compliance with Tables G-16 or G-16a.

- C. 3. c. (3) Engineering and/or administrative controls are both technically and economically feasible.
 - C. 3. d. If noise levels received by the employee's ear can be reduced to the levels specified in Tables G-16 or G-16a by means of hearing protectors and an effective hearing conservation program, citations under the hearing conservation program shall normally be issued rather than citations requiring engineering controls.
 - C. 3. d. (1) If improvements in the hearing conservation program cannot be made or, if made, cannot be expected to reduce exposure sufficiently and feasible controls exist, a citation under 1910.95(b)(1) shall normally be issued.
 - C. 3. d. (2) The District Supervisor shall discuss such cases with the Program Manager prior to issuing a citation. If the Program Manager agrees that controls are justifiable, a citation shall be issued.
 - C. 3. e. When hearing protection is required but not used and employee exposure exceeds the limits of Table G-16, 29 CFR 1910.95(i)(2)(i) shall be cited and classified as serious (see C.3.h.) whether or not the employer has instituted a hearing conservation program. 29 CFR 1910.95(a) shall no longer be cited except in the case of the oil and gas drilling industry.
- NOTE: Citations of 29 CFR 1910.95(i)(2)(ii)(b) shall also be classified as serious.
- C. 3. f. If an employer has instituted a hearing conservation program and a violation of the hearing conservation amendment (other than 1910.95 (i)(2)(i) or (i)(2)(ii)(b)) is found, a citation shall be issued if employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dB.
 - C. 3. g. If the employer has not instituted a hearing conservation program and employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dB, a citation for 1910.95(c) only shall be issued.
 - C. 3. g. (1) [IH 93-5] Whenever an employer is required to institute a hearing conservation program (i.e., TWA levels exceed either 85dBA or 90dBA) and has not done so, citations shall be written in accordance with the following guidelines.
 - C. 3. g. (1) (a) There is a complete absence of a hearing conservation program (sampling, medical testing, training, ppe), then cite 1910.95(c)(1).
 - C. 3. g. (1) (b) There is a program, but one or more of the four elements is missing, then cite each section not instituted: 1910.95(d)(1), 1910.95(g)(1), 1910.95(i)(1), 1910.95(k)(1).
 - C. 3. g. (1) (c) Under no circumstances would PESH cite 1910.95(c)(1) and the specific paragraphs of 1910.95(d) through (m) with the exception of 1910.95(i)(2)(i) as discussed in C.3.f.

- C. 3. h. Violations of 1910.95(i)(2)(i) from the hearing conservation amendment may be grouped with violations of 29 CFR 1910.95(b)(1) and classified as serious when an employee is exposed to noise levels above the limits of Table G-16 and:
 - C. 3. h. (1) Hearing protection is not utilized or is not adequate to prevent overexposure to an employee; or
 - C. 3. h. (2) There is evidence of hearing loss which could reasonably be considered:
 - C. 3. h. (2) (a) To be work-related, and
 - C. 3. h. (2) (b) To have been preventable, at least to some degree, if the employer had been in compliance with the cited provisions.
- C. 3. i. When an employee is overexposed but effective hearing protection is being provided and used, an effective hearing conservation program has been implemented and no feasible engineering or administrative controls exist, a citation shall not be issued.
- C. 3. j. PESH Noise Enforcement Guidelines for Police Departments. [A97-7] The following policy applies for police officers who perform firearms qualifications one or two times a year for no more than an hour or so per time. In instances such as these where an officer is found to be exposed to noise levels above the 85 dBA action level, the following policies will apply.
 - C. 3. j. (1) A hearing conservation program is required to be in place and shall contain the following elements:
 - C. 3. j. (1) (a) A noise monitoring program shall be in place to identify employees who should be included in the hearing conservation program.
 - C. 3. j. (1) (b) All officers must wear hearing protection when working on or near the firing range.
 - C. 3. j. (1) (c) Annual training must be provided and must include:
 - C. 3. j. (1) (c) 1 The effects of noise on hearing.
 - C. 3. j. (1) (c) 2 The purpose of hearing protection, the advantages and disadvantages of various types of hearing protection, and instructions on the selection, fitting, use, and care of it.
 - C. 3. j. (2) The CSHO will determine if the employer has provided annual audiometric testing to the officers. If audiometric testing has not been provided, the CSHO will consider the lack of audiometric testing as de minimis if all the items in paragraph C. 3. j. (1) have been satisfactorily implemented.
 - C. 3. j. (2) (a) If annual audiometric testing has not been performed and all the items in

paragraph C. 3. j. (1) have not been instituted then the CSHO will issue the appropriate citations for lack of a hearing conservation program. Included with this citation, the employer shall be instructed that if the employer complies with paragraph C. 3. j. (1), the citation will be considered complied.

- C. 3. j. (2) (b) The CSHO will also advise the employer of the benefits of annual audiometric testing and encourage the implementation of such a program. The employer will be given the option of either instituting all the element of paragraph C. 3. j. (1) or institute a Hearing Conservation Program which includes annual audiometric testing for officers. The CSHO will highly recommend to the employer the use of dual hearing protection (i.e., wearing both ear muffs and ear plugs in combination) to provide additional protection.
- C. 3. j. (3) Police departments that have officers who have regular exposure to job-related firearm noise (i.e., range officers, officers in special weapons and tactics units, etc.) or to other documented, job-related, overexposures to noise sources are required to have a complete hearing conservation program in place, including the requirement to provide annual audiograms for these officers.
- C. 4. Violations of the Respirator Standard. When considering a citation for respirator violations, the following guidelines shall be observed:
 - C. 4. a. In Situations Where Overexposure Does Not Occur. Where an overexposure has not been established:
 - C. 4. a. (1) But an improper type of respirator is being used (e.g., a dust respirator being used to reduce exposure to organic vapors), a citation under 29 CFR 1910.134(d)(1)(i) shall be issued, provided the CSHO documents that an overexposure is possible.
 - C. 4. a. (2) And one or more of the other requirements of 29 CFR 1910.134 is not being met; e.g., an unapproved respirator is being used to reduce exposure to toxic dusts, generally a de minimis violation shall be recorded in accordance with PESH procedures. (Note that this policy does not include emergency use respirators.) The CSHO shall advise the employer of the elements of a good respirator program as required under 29 CFR 1910.134.
 - C. 4. a. (3) In exceptional circumstances a citation may be warranted if an adverse health condition due to the respirator itself could be supported and documented. Examples may include a dirty respirator that is causing dermatitis, a worker's health being jeopardized by wearing a respirator due to an inadequately evaluated medical condition or a significant ingestion hazard created by an improperly cleaned respirator.
 - C. 4. b. In Situations Where Overexposure Does Occur. In cases where an overexposure to an air contaminant has been established, the following principles apply to citations of 1910.134:

- C. 4. b. (1) 29 CFR 1910.134(a)(2) is the general section requiring employers to provide respirators ". . . when such equipment is necessary to protect the health of the employee" and requiring the establishment and maintenance of a respiratory protection program which meets the requirements outlined in 29 CFR 1910.134(c). Thus, if no respiratory program at all has been established, 1910.134(a)(2) alone shall be cited; if a program has been established and some, but not all, of the requirements under 1910.134(c) are being met, the specific standards under 1910.134(c) that are applicable shall be cited.
- C. 4. b. (2) An acceptable respiratory protection program includes all of the elements of 29 CFR 1910.134; however, the standard is structured such that essentially the same requirement is often specified in more than one section. In these cases, the section which most adequately describes the violation shall be cited.
- C. 5. Violations of Air Contaminant Standards (29 CFR 1910.1000 Series). The standard itself provides several requirements. Effective November 15, 1993, PESH promulgated the 1989 Permissible Exposure Limits as a State Standard. Violations of this shall be cited under 12 NYCRR Part 800.5.
- C. 5. a. PESH does not have a policy for grouping violations for the purposes of penalty calculation, citations of this Section shall be written as follows:
 - C. 5. a. (1) Cite Part 800.5 and in the instance description, refer to the appropriate sections of 1910.1000 (a) through (d) that are in violation. Multiple air contaminants should be listed as separate instances under one violation item.
 - C. 5. a. (2) Failure to provide and/or use respirators will be issued as a separate violation item and would carry a separate penalty if the employer did not comply.
 - C. 5. b. 29 CFR 1910.1000(a) through (d) provide ceiling values and 8-hour time-weighted averages (threshold limit values) applicable to employee exposure to air contaminants.
 - C. 5. c. 29 CFR 1910.1000(e) provides that to achieve compliance with those exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When such controls do not achieve full compliance, protective equipment shall be used. Whenever respirators are used, their use shall comply with 29 CFR 1910.134.
 - C. 5. d. 29 CFR 1910.134(a) provides that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used. Their use shall comply with requirements contained in 29 CFR 1910.134 which provide for the type of respirator and the proper maintenance.
 - C. 5. e. The situation may exist where an employer must provide feasible engineering controls as well as feasible administrative controls (including work practice controls) and personal protective equipment. 29 CFR 1910.1000(e) has been interpreted to allow employers to implement feasible engineering controls and/or administrative and work practice controls

in any combination the employer chooses provided the abatement means chosen eliminates the overexposure.

- C. 5. f. Where engineering and/or administrative controls are feasible but do not or would not reduce the air contaminant levels below the applicable ceiling value or threshold limit value, the employer, nevertheless, must institute such controls. Only where the implementation of all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels will the use of personal protective equipment constitute satisfactory abatement. In such cases, usage of personal protective equipment shall be mandatory.

- C. 6. Classification of Violations of Air Contaminant Standards. When it has been established that an employee is exposed to a toxic substance in excess of the PEL established by OSHA standards (without regard to the use of respirator protection), a citation for exceeding the air contaminant standard shall be issued. The violation shall be classified as serious or non-serious on the basis of the requirements in the Chemical Information Manual, OSHA Instruction CPL 2-2.43A, and the use of respiratory protection at the time of the violation. Classification of violations is dependent upon the determination that the illness is reasonably predictable at that exposure level, whether the illness is serious or non-serious and that the employer knew or could have known through reasonable diligence that a hazardous condition existed.

- C. 6. a. Principles of Classification. Exposure to a substance shall be considered serious if the exposure could cause impairment to the body as described in B.1.b.(3).

- C. 6. a. (1) In general, substances having a single health code of 13 or less shall be considered as serious at any level above the Permissible Exposure Limit (PEL). Substances in categories 6, 8, and 12, however, are not considered serious at levels where only mild, temporary effects would be expected to occur.

- C. 6. a. (2) Substances causing irritation (i.e., categories 14 and 15) shall be considered non-serious up to levels at which "moderate" irritation could be expected.

- C. 6. a. (3) For a substance (e.g., cyclohexanol), having multiple health codes covering both serious and non-serious effects, a classification of non-serious shall be applied up to the level at which a serious effect(s) could be expected to occur.

- C. 6. a. (4) For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH recommended value, but no OSHA PEL, a citation for exposure in excess of the recommended value shall be considered under Section 27-a(3) of the Act in accordance with the guidelines given in A.2.

- C. 6. a. (5) If an employee is exposed to concentrations of a substance below the PEL, but in excess of a recommended value (e.g., ACGIH TLV or NIOSH recommended value), a citation for inhalation cannot normally be issued. The CSHO shall advise the employer that a reduction of the PEL has been recommended.

- C. 6. a. (6) For a substance having an 8-hour PEL with no ceiling PEL but which a ceiling ACGIH TLV or NIOSH ceiling value has been recommended, the case shall be

referred to the Program Manager in accordance with A.2.d.(2) of this chapter. If no citation is to be issued, the CSHO shall, nevertheless, advise the employer that a ceiling value has been recommended.

- C. 6. b. Effect of Respirator Protection Factors. The CSHO shall consider protection factors for the type of respirator in use as well as the possibility of overexposure if the respirator fails. If protection factors are exceeded and if the potential for overexposure exists, a citation for failure to control excessive exposure shall be issued.
- C. 6. c. Additive and Synergistic Effects. Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination shall be evaluated using the formula found in 29 CFR ' 1910.1000(d)(2).
 - C. 6. c. (1) The use of this formula requires that the exposures have an additive effect on the same body organ or system. Caution must be used in applying the additive formula, and prior consultation with the Program Manager is required.
 - C. 6. c. (2) If the CSHO suspects that synergistic effects are possible, it shall be brought to the attention of the supervisor, who shall refer the question to the Program Manager. If it is decided that there is a synergistic effect of the substances found together, the violations shall be grouped, when appropriate, for purposes of increasing the violation classification severity and/or the penalty.
- C. 7. Violations of the Hazard Communication Standard. Reserved.
- C. 8. Citing Improper Personal Hygiene Practices. The following guidelines apply when citing personal hygiene violations.
 - C. 8. a. Ingestion Hazards. A citation under 29 CFR 1910.141(g)(2) and (4) shall be issued where there is reasonable probability that, in areas where employees consume food or beverages (including drinking fountains), a significant quantity of a toxic material may be ingested and subsequently absorbed.
 - C. 8. a. (1) For citations under 29 CFR 1910.141(g)(2) or (4) wipe sampling results shall be adequately documented to establish a serious hazard.
 - C. 8. a. (2) Where, for any substance, a serious hazard is determined to exist due to the potential of ingestion or absorption of the substance for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under Section 27-a(3) of the Act.
 - C. 8. a. (3) Such citations do not depend on measurements of airborne concentrations.
 - C. 8. b. Absorption Hazards. A citation for exposure to materials which can be absorbed through the skin or which can cause a skin effect (e.g., dermatitis) shall be issued where appropriate personal protective equipment (clothing) is necessary but not worn. (See 29

CFR 1910.1000, Table Z-1, substances marked "skin".) The citation shall be issued under 29 CFR 1910.132(a) as either a serious or non-serious citation according to the hazard.

- C. 8. b. (1) Such citations do not depend on measurements of airborne concentrations.
- C. 8. b. (2) If a serious skin absorption or dermatitis hazard exists which cannot be eliminated with protective clothing, a 27-a(3) citation may be considered. Engineering or administrative (including work practice) controls shall be required in these cases to prevent the hazard.
- C. 8. c. Wipe Sampling. In general, wipe sampling (not air sampling) will be necessary to establish the presence of a toxic material posing a potential absorption or ingestion hazard. (See the OSHA Technical Manual for sampling procedures.)
- C. 8. d. Issuing Citation. There are two primary considerations when issuing a citation of an ingestion or absorption hazard, such as a citation for lack of protective clothing:
 - C. 8. d. (1) A health risk exists as demonstrated by one of the following:
 - C. 8. d. (1) (a) A potential for an illness, such as dermatitis, and/or
 - C. 8. d. (1) (b) The presence of a toxic material that can be ingested or absorbed through the skin or in some other manner. (See the Chemical Information Table.)
 - C. 8. d. (2) The potential that the toxic material can be ingested or absorbed, e.g., that it can be present on the skin of the employee, can be established by evaluating the conditions of use and determining the possibility that a health hazard exists.
 - C. 8. d. (3) The conditions of use can be documented by taking both qualitative and quantitative results of wipe sampling into consideration when evaluating the hazard.
- C. 8. e. Supporting Citation. There are four primary considerations which must be met to support a citation:
 - C. 8. e. (1) The potential for ingestion or absorption of the toxic material must exist.
 - C. 8. e. (2) The ingestion or absorption of the material must represent a health hazard.
 - C. 8. e. (3) The toxic substance must be of such a nature and exist in such quantities as to pose a serious hazard. The substance must be present on surfaces which have hand contact (such as lunch tables, cigarettes, etc.) or on other surfaces which, if contaminated, present the potential for ingestion or absorption of the toxic material (e.g., a water fountain).
 - C. 8. e. (4) The protective clothing or other abatement means would be effective in

eliminating or significantly reducing exposure.

- C. 8. f. Biological Monitoring. If the employer has been conducting biological monitoring, the CSHO shall evaluate the results of such testing. The results may assist in determining whether a significant quantity of the toxic material is being ingested or absorbed through the skin.
- C. 8. g. Determination of Source. Prior to the issuance of a citation, the CSHO shall carefully investigate the source or cause of the observed hazards to determine if some type of engineering, administrative or work practice control, or combination thereof, may be applied which would reduce employee exposure.
- C. 9. Classification of Violations for the New Health Standards. In general, classification decisions regarding violations of the exposure limits of the new health standards shall be governed by the Chemical Information Manual.
- D. Universal Violations. Due to the nature of public sector structure and organization, it is appropriate under certain circumstances to issue violations specifying that the hazardous condition exists at all locations under the control of that employer. These are called universal violations.
 - D. 1. A "universal" or "employer-wide" order is defined as a citation issued against an employer citing a violation that exists in more than one work location under the control of that employer. On occasion, PESH has received employee complaints of this nature. The purpose of the following is to establish a uniform policy for investigation and issuance of such citations.
 - D. 2. Universal orders will be issued only under limited circumstances. The Program Manager must be notified upon initial receipt of a complaint of this type so that investigation strategy can be discussed before the inspection takes place. Before issuance, the District Supervisor will call the Program Manager to review the inspection findings. The DOSH Director and Assistant Director will also be consulted before approval to issue the citation is given. If appropriate, Counsel's Office may be contacted by the Program Manager to verify that the citation is adequately substantiated and correctly phrased to include specification of the standard violated, instance description and abatement date. The Program Manager may request to review the case file at this time.
 - D. 3. Adequate documentation must be contained in the case file in order to substantiate a universal citation. The following guidelines will be used in investigating a universal complaint.
 - D. 3. a. An opening conference must be held at the central office or headquarters of the employer so that there is union and management personnel present who represent all the worksites being included in the inspection.
 - D. 3. b. The employer must concede that the condition exists at all similar work locations under his control. If this is not accomplished, then this must be verified by PESH by some other form of documentation including, but not limited to, employee statements. This may require the CSHO to visit a representative number of worksites.

- D. 3. c. Universal orders may be appropriate in a case of a hazardous condition arising from the construction design of machinery and equipment that has been uniformly installed in all work locations. The CSHO would need to verify this through information obtained from the employer's engineering or maintenance offices and staff. PESH must ensure that the same work operation occurs at all locations.
- D. 3. d. Such an order may apply to an employer policy generated from their central offices which affects the administration of a safety and health practice required by the OSHA standards. For example, a Fire Department's policy on providing protective equipment at no cost to the fire fighters would be an appropriate circumstance for a universal citation.
- D. 3. e. A universal order is only appropriate when it is known that there are employees at other locations that are exposed to the same hazard. The citation must specify in the instance description the category of locations or job titles of the employees exposed.
- D. 3. f. The abatement period may in some cases be longer than usual to allow the employer a reasonable time to correct the hazard in all work locations. However, this would not be true for violations that deal with changes in policy and practices. Nor would the abatement period be longer for implementation of control measures in many worksites when there are maintenance staff at those locations who can make the required corrections expeditiously. Therefore, appropriate abatement dates will be determined on a case by case basis.
- D. 3. g. In the case of a citation addressing conditions requiring a physical modification, the follow-up procedure will be to conduct a representative number of random, unannounced reinspections. Not every location will be inspected, but the employer is required to abate the violation in all locations. For violations related to a written program change, one follow-up can be conducted where the employer produces the required program.
- D. 3. h. Union representatives and employees will be relied upon to report to PESH uncomplied orders in work locations not inspected. The order will be re-issued at that specific worksite in such cases as a repeat, if the original case file has been closed and as a failure to abate if it has not been closed.
- D. 3. i. The employer will be required to post the "Notice of Violation and Order to Comply" in each workplace that the violation applies to, whether or not that location has had the onsite inspections.
- D. 3. j. If universal orders are issued to an employer with worksites under other District office jurisdictions, copies of that citation must be sent to those District offices. This will be done centrally from the Program Manager's office.
- D. 3. k. A copy of all universal citations will be sent to the Program Manager after issuance.
- D. 4. Universal orders will only be used in limited circumstances and will normally not be considered in the following circumstances.

- D. 4. a. A universal order will not be issued for an employee work practice violation, such as the wearing of protective equipment. This can only be issued when the CSHO has observed the violation or interviewed employees. PESH cannot determine if proper procedures and work practices are carried out by the employees without visiting each location, due to variability of employee behavior. The issue of the employer's system-wide policy on providing protective equipment is addressed in item J.3.d..
- D. 4. b. For violations of noise or air-contaminant overexposures, samples still need to be collected at each worksite because there is usually variation from one work location to the next. Universal orders cannot be considered for exposure violations.
- D. 4. c. Universal orders can only be issued on a hazard communication program only when the employer has not developed and implemented a program at all. If the employer has a written program, but there are deficiencies in the area of labeling, MSDSs or the effectiveness of training, where there can be variability in effectiveness at each worksite, a universal order is not appropriate.

CHAPTER V

CITATIONS

Pre-Citation Consultation.

- A. 1. General. In order to ensure uniformity, consistency, and the legal adequacy of a limited category of citation items, there shall be appropriate consultation between District Supervisors, Program Managers, and Department of Labor Counsel. Consultation may also be required with OSHA Region II, and the Directorate of Compliance Programs.
- A. 2. Procedures. Consultation in accordance with regional procedures shall occur when the citation items could involve important, novel or complex litigation in which the District Supervisor would expect the investment of major litigation resources.
 - A. 2. a. Categories of cases where consultation shall occur are as follows:
 - A. 2. a. (1) All willful violations and certain general duty clause citations in accordance with the instructions given in Chapter IV especially those presenting novel or complex questions of law, such as 27-a(3) health citations;
 - A. 2. a. (2) Cases arising under newly promulgated safety and health standards;
 - A. 2. a. (3) Cases of significant public concern such as catastrophes;
 - A. 2. a. (4) Cases which are likely to become major litigation vehicles in the development of PESH law;
 - A. 2. a. (5) Categories of cases designated by the Department of Labor Counsel and the Director as being appropriate for pre-citation consultation for reasons of litigation strategy or the elimination of unnecessary duplication of effort;
 - A. 2. a. (6) [A99-6] A copy of any proposed violations in a DOL occupied facility will be provided to the Program Manager's office for review and transmittal to the DOSH Director for approval. No notice of violation or report is to be issued until approval is received from the DOSH Director.
 - A. 2. a. (7) In addition, the District Supervisor may request appropriate consultation with the Program Manager or the Department of Labor Counsel in other cases not listed in the above categories.
 - A. 2. b. Pre-citation consultation shall be conducted at the earliest stage possible of a PESH

investigation in order to assist in developing an investigation strategy, particularly in cases involving fatalities, catastrophes and cases of significant public concern. (See OSHA Instruction CPL 2.80)

- A. 2. c. If a case involves some citation items which warrant pre-citation consultation and others which do not, the District Supervisor may issue the routine citation items promptly and delay the issuance only of those items which require pre-citation consultation.
- A. 2. d. Where required as a result of pre-citation consultation, the District Supervisor will undertake additional investigation, which may involve obtaining expert assistance.
- A. 2. e. Nothing in the above procedures shall affect PESH's responsibility and final authority to issue citations.

Writing Citations.

- B. 1. General. Section 27-a(6)(a) of the Act controls the writing of citations.
- B. 1. a. Section 27-a(6)(a). "...the Commissioner...shall with reasonable promptness issue a citation to the employer." The time which has elapsed from the completion of the inspection or investigation until the issuance of citation(s) shall be closely monitored and kept as short as possible by the District Supervisor. The District Supervisor's goal is to issue citations within 6 months of the occurrence of the violation.
 - B. 1. a. (1) The District Supervisor shall issue citations as soon as practicable after an inspection for safety violations and for health violations which do not require laboratory analysis of samples.
 - B. 1. a. (2) When potential health violations require the receipt of laboratory results before they can be cited, a later citation shall be issued as soon as possible after the results are received in the District Office.
- B. 2. Specific Instructions. The proper writing of citations is an essential part of the enforcement process. Specific instructions on how to complete the Citation and Notice of Violation, are contained in the OSHA Information System (OIS) Manual.
- B. 2. a. Standards and Regulations. After identifying a hazardous condition, the CSHO shall review existing standards and regulations to ensure that the hazardous condition noted is covered within the scope and application of the standard. Citations shall not be issued unless the citation is based on mandatory language in PESH standards and, when applicable, in referenced standards. Standards legally incorporated by reference have the same force and effect as PESH standards.
- B. 2. b. SAVEs Manual. The Standard Alleged Violation Elements (SAVEs) are incorporated into a manual that is used in conjunction with automated citation processing procedures. (See OSHA Instructions CPL 2032A, 2.34 and 2.35.) Instructions on the use of SAVEs

are contained in Chapter V, Appendix.

- B. 2. c. Alternative Standards. In rare cases, the same factual situation may present a possible violation of more than one standard. For example, the facts which support a violation of 29 CFR 1910.28(a)(1) may also support a violation of 1910.132(a) if no scaffolding is provided when it should be and the use of safety belts is not required by the employer.
- B. 2. c. (1) Where it appears that more than one standard is applicable to a given factual situation and that compliance with any of the applicable standards would effectively eliminate the hazard, it is permissible to cite alternative standards using the words "in the alternative." A reference in the citation to each of the standards involved shall be accompanied by a separate Alleged Violation Description (AVD) which clearly alleges all of the necessary elements of a violation of that standard.
- B. 2. c. (2) Where violations are alleged in the alternative, only one penalty, not one penalty for each standard cited, shall be proposed for the violative condition.

NOTE: Section 27-a(3) may be cited in the alternative when a specific standard is cited to cover situations where the cited standard may not apply. (See Chapter IV, A.2.d.(1)(c); but see also A.2.c.(1).)
- B. 2. d. Ordering of Violations on the Citation. Violations shall be written in the numerical order in which they appear in the standards.

Combining of Violations.

- C. 1. Definition. For the purposes of this section the following definition shall apply:
- C. 1. a. Combining. The gathering of all instances of violations of a specific standard into one citation item during the inspection/investigation of a single establishment or work site.
- C. 2. Combining. Violations of a single standard having the same classification found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Different options of the same standard shall normally also be combined. Each instance of the violation shall be separately set out within that item of the citation. Non-serious violations of a standard may be combined with serious violations of the same standard when appropriate.
- C. 2. a. Except for standards which deal with many unrelated hazards (e.g., Tables Z-1, Z-2 and Z-3 cited under 29 CFR 1910.1000 (a), (b), or (c)), the same standard may not be cited more than once on a single citation. The same standard may be cited on different citations on the same inspection, however.
- C. 2. b. For the purpose of applying these guidelines in the construction industry, an establishment is normally the site of the construction job; e.g., the building site, the dam site, etc. Where the construction site extends over a large geographical area; e.g., road building, the entire site shall be considered a single establishment; and all instances of the

same violation with the same classification discovered during a single inspection shall normally constitute one alleged violation.

EXAMPLE 1. During the inspection of a single establishment, the CSHO documents five instances of unguarded open-sided platforms in five different locations throughout the facility in serious violation of 29 CFR 1910.23(c)(1). These five instances of the violation are combined into one serious citation item containing five subparts (a, b, c, d, e).

EXAMPLE 2. During the inspection of a single establishment, the CSHO documents three instances of unguarded open-sided platforms and two instances of platforms without required toe-boards in different locations throughout the facility in serious violation of 29 CFR 1910.23(c)(1). These five instances of the violation are combined into one serious citation item using the two options of 29 CFR 1910.23(c)(1) listed in the SAVEs Manual.

EXAMPLE 3. During the inspection of a single establishment, the CSHO documents five instances of unguarded open-sided platforms in five different locations throughout the facility. Three instances are classified as serious and two as non-serious. The three serious instances are combined into one serious item. The two non-serious instances are either combined into one non-serious item or grouped with the serious item, when appropriate.

Employer/Employee Responsibilities.

- D. 1. Section 27-a(3)(b) of the Act. "Every employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Section which are applicable to his own actions and conduct."
- D. 1. a. The Act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
- D. 1. b. Although the employer is not the absolute guarantor or insurer of all employee actions, reasonable steps must be taken by the employer to protect employees from hazards that may result from failure to comply with the standards; e.g., informing employees of hazards and how to protect themselves, enforcing safety and health rules, and the like.
- D. 2. Employee Refusal to Comply. In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the District Supervisor who shall consult with the Program Manager. Under no circumstances is the CSHO to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. The CSHO is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with the Act. Concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge.

Affirmative Defenses.

- E. 1. Definition. An affirmative defense is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proved by the CSHO.
- E. 2. Burden of Proof. Although affirmative defenses must be proved by the employer at the time of the hearing, PESH must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. The CSHO, therefore, shall keep in mind the potential affirmative defenses that the employer may make and, when appropriate, attempt to gather contrary evidence.
- E. 3. Explanations. The following are explanations of the more common affirmative defenses with which the CSHO shall become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.

E. 3. a. Unpreventable Employee Misconduct or "Isolated Event". The violative condition was:

E. 3. a. (1) Unknown to the employer; and

E. 3. a. (2) In violation of an adequate work rule which was effectively communicated and uniformly enforced.

EXAMPLE: An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts which the CSHO shall document may include: Who removed the guard and why? Did the employer know that the guard had been removed? How long or how often had the saw been used without guards? Did the employer have a work rule that the saw guards not be removed? How was the work rule communicated? Was the work rule enforced?

E. 3. b. Impossibility. Compliance with the requirements of a standard is:

E. 3. b. (1) Functionally impossible or would prevent performances of required work; and

E. 3. b. (2) An application of a variance would be inappropriate.

EXAMPLE: During the course of the inspection an unguarded table saw is observed. The employer states that the nature of its work makes a guard unworkable. Facts which the CSHO shall document may include: Would a guard make performance of the work impossible or merely more difficult? Could a guard be used part of the time? Has the employer attempted to use guards? Has the employer considered alternative means or methods of avoiding or reducing the hazard?

E. 3. c. Greater Hazard. Compliance with a standard would result in greater hazards to

employees than noncompliance and:

- E. 3. c. (1) There are no alternative means of employee protection; and
- E. 3. c. (2) An application of a variance would be inappropriate.

EXAMPLE: The employer indicates that a saw guard had been removed because it caused particles to be thrown into the operator's face. Facts which the CSHO shall consider may include: Was the guard used properly? Would a different type of guard eliminate the problem? How often was the operator struck by particles and what kind of injuries resulted? Would safety glasses, a face mask, or a transparent shelf attached to the saw prevent injury? Was operator technique at fault and did the employer attempt to correct it? Was a variance sought?

- E. 3. d. Documentation Requirements. Where it becomes evident, either from statements made during the inspection by the employer or other persons or from the circumstances surrounding the apparent violation(s) that one or more of the above affirmative defenses may be an issue, the CSHO shall make reasonable efforts to gather and record facts relevant to the defense. The CSHO shall bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the supervisor. Where it appears that each and every element of an affirmative defense is present, the District Supervisor may decide, after consultation with the Program Manager and the Department of Labor Counsel, that a citation shall not be issued.

F. Service of PESH Citations [A94-5][A94-7][A94-20][A99-6]

- F. 1. This is to clarify the procedures for issuing citations, failure to abate notices and penalty bills (collectively referred to as "PESH Notices"). NYS Department of Labor Counsel's Office has determined that all legal documents must be served on the responsible person of the public entity in order to minimize IBA and court challenges.
- F. 2. Original PESH Notice. The original copy of the PESH Notice of Violation (NOV) must be sent to the person responsible for that government entity. In addressing the PESH Notice, all that is necessary is the **title** of the responsible person, the name of the government entity, and the address where the responsible person is located. It is not necessary to include the name of the responsible person, the title is sufficient. This address must not include the specific department or facility that was inspected nor the inspection site address. The responsible person is defined below.
 - F. 2. a. State Agencies. Head of the agency, in most cases is a Commissioner. The state agency listing is maintained as a separate document as it is regularly updated.
 - F. 2. b. Local Government and Authorities. The chief executive officer, e.g. the mayor of a city or village, the supervisor of a town, the school superintendent of a school district, the county executive/county administrator/county board chairman of a county, the executive director of an authority. A current list of New York City agencies and authorities in New

York State is maintained as a separate document as updates in contact information is regularly performed.

- F. 2. c. Volunteer Fire Departments.
- F. 2. c. (1) Fire Departments established by a city or village work directly for the political subdivision. Citations will be addressed to the mayor of the city or village.
- F. 2. c. (2) A town that establishes a fire district is under the control of the Board of Fire Commissioners. Citations will be addressed to the Board of Fire Commissioners.
- F. 2. c. (3) A town that establishes a fire protection district contracts with a not for profit fire corporation. Citations will be addressed to the president of the fire corporation. The towns that the fire corporation service will not be cited. The fire corporation is considered an "instrumentality" of the state or its political subdivisions and will be responsible for paying the cost of abatement and any related penalties.
- F. 2. d. Designee of the Responsible Person. It is legally permissible for the responsible person to appoint a designee to receive all PESH Notices in their behalf. The responsible person must make this request in writing to the Program Manager's Office. The Program Manager will notify the appropriate office to modify their future records accordingly. This designee will receive all PESH Notices in lieu of the responsible person. All Notices shall indicate the office and title of the designee instead of the title of the responsible person. This will remain in effect until repealed in writing by the responsible person.
- F. 2. e. Other Copies of PESH Notices.
- F. 2. e. (1) A copy of the PESH Notice will be mailed to a local management representative at the worksite that was inspected. This will assure that the notice is posted and that local management has every opportunity to take action as required in the notice.
- F. 2. e. (2) The CSHO will record the names and e-mail addresses of employer representatives for that government entity who have requested a copy of the PESH Notice of Violation and Order to Comply and enter such information on the Contacts Info tab – Additional Citation Mailings on the Inspection report for electronic transmission of a copy of the Notice. This will serve to assure that prompt action is taken to eliminate the hazard to employees. CSHOs will enter the name and mailing address for those employer representatives requesting a copy without e-mail capability on the Contact Transmission of the Notice will be recorded on the Case Contact Sheet.
- F. 2. e. (3) The CSHO will record the names and e-mail addresses of those employee

representatives with affected employees for that government entity and enter such information on the OIS Inspection report – Contact Info-Additional citation mailings the Contacts "Additional Citation Mailings" for electronic transmission of a copy of a Notice of Violation and Order to Comply. This will serve to assure that affected employees are informed of hazards in the workplace. CSHOs will enter the name and mailing address for those employee representatives without e-mail capability as above.. Transmission of the Notice will be recorded on the Case Contact Sheet.

- F. 3. Mailing of PESH Notices. The original NOV, , and the Final Bill must be mailed to the responsible person by certified mail, return receipt. Interim bills will not be mailed certified. The certified mail receipt (white copy) will be kept in the case file. When the District office receives the green card which is proof of service, this card must be placed in the case file securely so that it will be available in the event of an IBA or court challenge. Copies of PESH Notices sent to other locations will not be sent via certified mail.
- G. Issuing Citations - Special Circumstances.
- G. 1. Follow-up Inspections. Follow-up inspections may be conducted during the 60 day notice of contest period provided the employer has not actually filed such a notice. If such a follow-up inspection reveals a failure to abate, and the time specified for abatement was passed, a Notification of Failure to Abate Alleged Violation may be issued immediately without regard to the contest period of the initial citation.
- G. 2. Multi-employer Worksites. On multi-employer worksites, both construction and non-construction, citations normally shall be issued to employers whose employees are exposed to hazards (the exposing employer).
- G. 2. a. Additionally, the following employers normally shall be cited, whether or not their own employees are exposed:
- G. 2. a. (1) The employer who actually creates the hazard (the creating employer);
- G. 2. a. (2) The employer who is responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer);
- G. 2. a. (3) The employer who has the responsibility for actually correcting the hazard (the correcting employer).
- G. 2. b. It must be shown that each employer to be cited has knowledge of the hazardous condition or could have had such knowledge with the exercise of reasonable diligence. (See Chapter IV, B.1.b.(4).)
- G. 2. c. Prior to issuing citations to an exposing employer, it must first be determined whether the available facts indicate that employer has a legitimate defense to the citation, as set forth below:

- G. 2. c. (1) The employer did not create the hazard;
- G. 2. c. (2) The employer did not have the responsibility or the authority to have the hazard corrected;
- G. 2. c. (3) The employer did not have the ability to correct or remove the hazard;
- G. 2. c. (4) The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his/her employees are exposed;
- G. 2. c. (5) The employer has instructed his/her employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it when the hazard was known or with the exercise of reasonable diligence could have been known.
- G. 2. c. (5) (a) Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard.
- G. 2. c. (5) (b) When extreme circumstances justify it, the exposing employer shall have removed his/her employees from the job to avoid citation.

NOTE: All of these items must be documented in the case file. (See Chapter III, D.8.a.(5)(b)3.)

- G. 2. d. If an exposing employer meets all the conditions in F.2.c., that employer shall not be cited. If all employers on a worksite with employees exposed to a hazard meet these conditions, then the citation shall be issued only to the employers who are responsible for creating the hazard and/or who are in the best position to correct the hazard or to ensure its correction. In such circumstances the controlling employer and/or the hazard-creating employer shall be cited even though no employees of those employers are exposed to the violative condition. (See, however, F.2.e.) Penalties for such citations shall be appropriately calculated as indicated in Chapter VI, , using the exposed employees of all employers as the number of employees for probability assessment.
- G. 2. e. In the case of general duty clause violations, only employer(s) whose own employees are exposed to the violation may be cited. (See Chapter IV, A.2.b.(1)(b).)
- G. 3. Writing Citations Under 1910.1030 Bloodborne Pathogens. This instruction supplements OSHA Instruction CPL 2-2.44D, regarding inspection procedures for occupational exposure to bloodborne pathogens. The purpose is to clarify what paragraphs to cite for various deficiencies. If no protective measures have been implemented, cite more than just 1910.1030(c)(1)(i).
- G. 3. a. Complete absence of a written plan.
- G. 3. a. (1) Paragraph(s) cited. 1910.1030(c)(1)(i).

- G. 3. a. (2) Comments. Cite when no provisions are in writing even if implemented (for example, vaccines have been offered).
- G. 3. b. Complete absence of a written plan and complete absence of implementation of protective measures.
- G. 3. b. (1) Paragraphs(s) cited. 1910.1030(c)(1)(i); 1910.1030(d)(2)(i); 1910.1030(d)(3)(i); 1910.1030(d)(4)(i); 1910.1030(f)(2)(i); 1910.1030(g)(1)(i) or 1910.1030(g)(1)(ii); 1910.1030(g)(2)(i); 1910.1030(h)(1)(i); 1910.1030(h)(2)(i).
- G. 3. b. (2) Comments. Paragraph "e" would be cited only in specific workplaces, see 1910.1030(e).
- G. 3. c. There is a written plan but there are deficiencies in the plan.
- G. 3. c. (1) Paragraph(s) cited. 1910.1030(c)(1)(ii)(A) and/or (B) and/or (C).
- G. 3. c. (2) Comments. Cite the provisions not in writing even if they had been implemented.
- G. 3. d. Specific requirements have not been implemented, regardless of whether or not it is addressed in the written plan.
- G. 3. d. (1) Paragraph(s) cited. Appropriate sections of 1910.1030(d), (e), (f), (g), or (h).
- G. 3. d. (2) Comments. Also cite the appropriate section of 1910.1030(c)(1)(ii)(A), (B), or (C) if this same provision is not in writing.
- G. 3. e. HBV vaccinations have not been offered.
- G. 3. e. (1) Paragraph(s) cited. 1910.1030(f)(2)(i).
- G. 3. e. (2) Comments. This is more specific than 1910.1030(f)(1)(i) and is therefore preferable.
- G. 3. f. An employee has had an exposure incident and no followup or inadequate followup conducted.
- G. 3. f. (1) Paragraph(s) cited. 1910.1030(f)(3) or appropriate section(s) of this paragraph.
- G. 3. f. (2) Comments. If the workplace has not yet had an exposure incident, PESH can only address the lack of a followup program by citing 1910.1030(c)(1)(ii)(B) if it is not in their written program.
- G. 3. g. An employer has employees who render first-aid as a collateral duty only and the employer has not offered pre-vaccination nor has the employer instituted the provisions for a de minimis classification.

- G. 3. g. (1) Paragraph(s) cited. 1910.1030(f)(2)(i); 1910.1030(c)(1)(ii)(B), and (C); 1910.1030(g)(2) (appropriate sections).
- G. 3. g. (2) Comments. Other paragraphs may also be cited where appropriate for other program deficiencies.
- G. 4. Writing Citations Under 1910.146 Confined Spaces. Any violation of the Permit Required Confined Space (PRCS) standard could lead to a condition which might result in death or serious physical harm to employees. Accordingly, the classification of violations of the PRCS standard shall normally **not** be classified as "Non-serious".
- G. 4. a. If the employer has PRCS and has not taken any action as required by the standard, the following violations should be issued.
- G. 4. a. (1) 1910.146(c)(1) - The employer has not evaluated the workplace to determine if any spaces are PRCS. This applies to all general industry workplaces with confined spaces, whether or not they are covered by other specific PESH standards. The instance description must identify at least one PRCS observed by the CSHO.
- G. 4. a. (2) 1910.146(c)(2) - The employer has PRCSs and has not informed their employees of the danger.
- G. 4. a. (3) 1910.146(c)(3) - Employees do not enter the permit spaces, but the employer has not taken effective measures to prevent its employees from entering.
- G. 4. a. (4) 1910.146(c)(4) - Employees enter the permit spaces and the employer has not developed and implemented a written permit space entry program that complies with all applicable paragraphs under 1910.146.
- G. 4. a. (4) (a) The instance description for violations of 1910.146(c)(4) shall include the following language after identifying the location and specific operations or conditions: "A written permit space entry program that complies with paragraphs (d), (e), (f), (g), (h), (i), (j), and (k) of this section was not developed and implemented."
- G. 4. a. (5) 1914.146(c)(6) - Cite this only when the employer had initially performed an evaluation and had failed to perform a reevaluation of the space to identify new hazards after there had been a change in the use or configuration of the space.
- G. 4. a. (6) 1910.146(c)(8)(i) - Cite if the employer will have a contract employer enter the permit space and the employer has not informed the contractor that the workplace contains permit spaces and that entry must only proceed when a permit program in compliance with 1910.146 us in place.
- G. 4. a. (7) Employers with PRCS who have decided to use alternative procedures in lieu of a

permit system.

- G. 4. a. (7) (a) 1910.146(c)(5)(i) - applicable paragraphs (A) - (F) for deficiencies in the employer's documentation for meeting the conditions for exemption from a permit status.
- G. 4. a. (7) (b) 1910.146(c)(5)(ii) - applicable paragraphs (A) -(H) when entry procedures under this exemption are deficient.
- G. 4. a. (8) PRCS reclassified by the employer.
- G. 4. a. (8) (a) 1910.146(c)(7)(i) - The employer incorrectly reclassified the space or took action to reclassify the space as a non-permit space, but did so in a manner that did not eliminate all the hazards.
- G. 4. a. (8) (b) 1910.146(c)(7)(iii) - The employer did not adequately document the basis for determining that all the hazards in a PRCS have been eliminated.
- G. 4. a. (9) If the employer has a written program as required in paragraph 1910.146(c)(4), but it is deficient, cite the specific deficiencies as described in paragraph 1910.146(d).
- G. 4. a. (10) If the employer has implemented a permit system but the conditions under which the permit is issued and/or canceled is deficient, cite: 1910.146(e), specific paragraph(s).
- G. 4. a. (11) If the employer has a permit system but the information on the permit is deficient, cite: 1910.146(f), specific paragraph(s).
- G. 4. a. (12) If the employer's training was deficient in some aspect, based on a review of the records and interviews with employees, cite: 1910.146(g), specific paragraph(s). Also 1910.146(g)(1) would be cited if employees are unfamiliar with the duties they are to perform as specified in paragraphs (h), (i), and (j).
- G. 4. a. (13) If the employer's procedures during work in the PRCS were deficient cite: 1910.146(h), (i), (j), specific paragraphs as they relate to the work assignments of the employees.
- G. 4. a. (14) Rescue Services.
- G. 4. a. (14) (a) Onsite Rescue Services. If the employer plans to provide on-site rescue, but has not described nor implemented the procedures to be followed in his written confined space programs, cite: 1910.146(d)(9), as well as paragraphs 1910.146(k)(1)(i)-(v).
- G. 4. a. (14) (b) Outside Rescue Services. If the outside rescue organization representative indicates that they plan to respond to calls for the purpose of rescuing entrants from a PRCS and have taken no action with respect to the safety

of the rescue personnel, cite: 1910.146(k)(1)(i)-(iv). (Cite rescue organization rather than host facility)

- G. 4. a. (14) (c) There is no specific requirement in 1910.146 mandating a written rescue plan. However a written plan for the rescue organization will significantly reduce the hazard to the rescuers and should be strongly encouraged.
- G. 4. a. (14) (d) Host Employer. When the employer intends to call outside rescue services to a confined space during emergencies but has not made provisions for this nor contacted the rescue organization, cite: 1910.146(d)(9) and 1910.146(k)(1)(iv) - (v).
- G. 4. b. Alternative Abatement. In cases where the citations are being issued and it is possible for the employer to comply by using alternative procedures or reclassification of the space, the citation shall include the following information at the end of the 1910.146 violations: (i.e., after the last [final] citation only, not after each citation.)

"In lieu of a full permit program, the employer may choose to use alternative procedures as specified in section 1910.146(c)(5) or reclassify the space as specified in section 1910.146(c)(7). If either of these methods is utilized, the employer must develop and maintain documentation as required in paragraph 1910.146(c)(5) or (c)(7)." [CSHO can alter above paragraph if necessary (i.e., if reclassification isn't an option for a particular employer, then leave out references to (c)(7) and reclassifying space.)
- G. 5. Rabies Exposure Citations. The following requirements apply when citing potential exposure to rabies virus. Employers must comply with the provisions of these requirements whenever an employee has occupational exposure to any mammal, unless it is known that the animal is not infected; i.e. the animal has been vaccinated or isolated for a period of at least four weeks.
- G. 5. a. Personal protective equipment - 1910.132 (personal protective equipment; for construction sites only - 1926.28)
- G. 5. b. Biohazard bags for transporting road kills and lab specimens - 1910.141.
- G. 5. c. Labeling of animal cage used in transport - 1910.145.
- G. 5. d. Exposure incident is an employee exposure record; medical program records are employee medical records - 1910.1020.
- G. 5. e. Training and education for construction workers exposed to harmful animals - 1926.21(b)(4).
- G. 5. f. Both exposure incident and subsequent infection should be recorded as illness - SH 900.
- G. 5. g. [A93-22] General Duty Clause may be cited when the requirements described below are found to be missing or deficient - Section 27-a(3)(a). All applicable abatement methods identified as correcting the same hazard shall be issued under a single Section 27-a(3)(a)

citation.

- G. 5. g. (1) Recognition for purposes of citing Section 27-a(3)(a) is recognition of the hazard of being infected with the rabies virus. The possibility of infection among workers exposed to the rabies virus is well recognized. The NYS Public Health Law recognizes the seriousness of this hazard by requiring the reporting of suspected rabid animals and employees exposed to them.

The U.S. Public Health Service equally recognizes the hazard and recommends the use of Biosafety Level 2 practices for all activities that pose an infection hazard to humans (i.e. universal precautions).

- G. 5. g. (2) Citation verbiage. Workers (specific categories, such as Animal Control Officer, Police Officer, etc.) were exposed to the hazard of being infected with the rabies virus through possible direct contact with [saliva] of potentially rabid animals [such as raccoons] being introduced into open cuts or wounds in the skin or via mucous membranes. In applying this paragraph, fundamental distinctions between private and public employment have been recognized. Reasonable and adequate abatement methods for reducing this hazard, among others, are: (List abatement methods).

The following are examples of reasonable and adequate abatement methods. The non-use of any of these methods is likely to result in the continued existence of a serious hazard and may, therefore, allow citation under Section 27-a(3)(a):

- a) Training. A comprehensive training program including proper handling practices, personal protective equipment, the etiology and modes of transmission of the disease, decontamination and avoidance of animal/saliva contact shall be implemented.
- training shall be provided to all workers who are assigned tasks where there is occupational exposure to rabies.
- b) Pre-Vaccination. The facility's RCP regarding rabies vaccination shall address all circumstances warranting such vaccinations and shall identify employees at high risk of exposure to rabies. All such employees shall be offered pre-exposure rabies vaccinations free of charge, at a place and time convenient to the employees and in the amount and frequency prescribed by the Centers for Disease Control.
- The criteria for pre-exposure vaccination shall be conducted in accordance with Table 1 which is extracted from the recommendations of the Centers for Disease Control, MMWR, Vol.40, No. RR-3 March 22, 1991, page 3.
 - The CDC does not recommend routine booster immunization or serology for persons in the "infrequent" risk category. However,

the NYS Department of Health recommends a booster every two years for such persons. Employers shall be informed of the State Health Department's recommendation.

- c) Follow-up Procedures after an Exposure Incident. Workers who have occupational exposure (all categories listed in Appendix A) and experienced an exposure incident shall be offered post-exposure vaccination and other treatment in accordance with the recommendations of the Centers for Disease Control. The follow-up shall take place as soon as possible and at no cost to the employee.
 - Pre-exposure immunization does not eliminate the need for prompt post-exposure prophylaxis following an exposure; it only reduces the post-exposure regimen.
 - Tetanus prophylaxis and measures to control bacterial infection shall be considered part of the follow-up procedures, where appropriate.
- d) Hand-Washing. After removing gloves, hands or other skin surfaces shall be washed thoroughly and immediately after contact with body fluids.
 - All workers who's assigned tasks requires the handling of known vectors shall be advised to thoroughly wash their hands after every possible exposure, even when no scratch or bite has occurred. Simple wound cleansing has been shown to reduce markedly the likelihood of contracting rabies.
- e) Decontamination. Tools, cages and other surfaces potentially contaminated with infectious saliva or body fluids must be disinfected with a 10% solution of sodium hypochlorite (household bleach) in water.

G. 6. Writing Citations for Enforcement of Electrical Power Generation and Distribution Apparel Standard 1910.269(1)(6). [A95-10] During inspection of electric power generation, transmission, and distribution worksites, CSHOs will request employers to demonstrate compliance with applicable performance-oriented requirements of paragraph 1910.269(1)(6). This request shall be made to determine whether an employer: has appropriate policies and guidelines on the selection, care, and use of apparel; informs employees of these policies and guidelines; and, ensures that these policies and guidelines are followed. CSHOs shall determine what steps are taken by an employer to ensure that employees do not wear clothing that increases injury. CSHOs shall verify compliance by reviewing documentation, performing visual inspections, and interviewing employees.

G. 6. a. Employees wearing of exposed conductive articles when performing work within reaching distance of exposed, energized parts, unless they have rendered such articles of apparel non-conductive. (i.e. metal rings may be removed or covered so as to eliminate the contact hazard.) Cite 1910.269(1)(6)(i).

- G. 6. b. Employees exposed to flames or electric arcs have not been trained regarding apparel-related hazards covered by paragraph 1910.269(l)(6). Cite 1910.269(l)(6)(ii).
- G. 6. c. Employees exposed to electric arcs or flame wearing the following apparel. Cite 1910.269(l)(6)(iii).
 - (1) Any clothing not flame resistant or flame-retardant-treated, if the clothing can ignite under the electric arc and flame exposure conditions found at the workplace.
 - (2) Clothing made from acetate, nylon, polyester, or rayon, alone or in blends, unless the employer demonstrates that the fabric has been treated to withstand the conditions that may be encountered, that is, made flame resistant or flame-retardant-treated, or that the clothing is worn in a manner that eliminates the hazard involved. (If a prohibited material is worn as one of multiple layers of clothing, hazard still may be present.)
- G. 7. Citing Lyme Disease Exposure and Prevention. [A00-2] Lyme Disease is a bacterial infection which if left untreated, has the potential to cause serious physical harm. Public employees who have frequent or prolonged exposure to tick vector environments in the performance of their assigned duties may include among other titles, DPW workers, park employees, State DOT workers, DEC rangers and foresters, animal control officers, engineers and surveyors. The implementation of the Centers for Disease Control (CDC) recommendations will be required under Section 27-a(3)(a)(1) in the counties that the NYS Health Department or CDC identifies as areas where the disease is endemic. Currently most counties are listed as high or moderate risk excepting a swath through central New York. An updated list will be obtained periodically.
- G. 7. a. The PESH enforcement policy will require the employer to provide an educational program which includes: signs and symptoms of infection, the importance of seeking medical attention, self-inspection procedures for attached ticks at the conclusion of each work day, proper methods of removal of attached ticks, proper clothing for protection, and proper use of insect repellents and insecticides.
- G. 7. b. General Duty Citations shall be worded as follows:

The Employer did not furnish to each of its employees, employment and a place of employment which was free from recognized hazards that are causing or were likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees. In applying this paragraph, fundamental distinctions between private and public sector employment have been recognized.

A. (list occupations or job titles), during the performance of their assigned duties are exposed to the hazard of contracting Lyme Disease while working in tick habitat areas identified as having a high or moderate risk of harboring the tick vector of Lyme Disease. This hazard is recognized by the Centers For Disease Control in their June 4, 1999

publication, "Recommendations for the Use of Lyme Disease Vaccine, Recommendations of the Advisory Committee on Immunization Practices". This hazard is not likely to cause death, but is likely to cause substantial illness and impairment if not identified and treated promptly.

Reasonable and adequate methods to abate this hazard include, but are not limited to:

Implement an educational program for employees with exposure which includes the signs and symptoms of Lyme Disease infection, the importance of seeking immediate medical attention, self inspection for attached ticks at the conclusion of each work day when exposure to tick habitat occurred, the proper method of removal of attached ticks, proper clothing for work in tick habitat, proper use of repellants and insecticides.

H. Amending or Withdrawing Citation and Notification of Penalty in Part or In Its Entirety.

H. 1. Citation Revision Justified. Amendments to or withdrawal of a citation shall be made when information is presented to the District Supervisor which indicates a need for such revision under certain conditions which may include:

H. 1. a. Administrative or technical error.

H. 1. a. (1) Citation of an incorrect standard.

H. 1. a. (2) Incorrect or incomplete description of the alleged violation.

H. 1. b. Additional facts establish a valid affirmative defense.

H. 1. c. Additional facts establish that there was no employee exposure to the hazard.

H. 1. d. Additional facts establish a need for modification of the correction date, penalty, or reclassification of citation items.

H. 2. Citation Revision Not Justified. Amendments to or withdrawal of a citation shall not be made by the District Supervisor under certain conditions which include:

H. 2. a. Valid notice of contest received. (See, however, H.3.)

H. 2. b. The 60 working days for filing a notice of contest has expired and the citation has become a final order.

H. 2. c. Employee representatives have not been given the opportunity to present their views unless the revision involves only an administrative or technical error.

H. 2. d. Editorial and/or stylistic modifications.

H. 3. Procedures for Amending or Withdrawing Citations. The following procedures are to be followed in amending or withdrawing citations:

- H. 3. a. Withdrawal of or modifications to the citation and notification of penalty, shall normally be accomplished by means of an informal settlement agreement and shall follow the guidelines in H. Examples of exceptions are changes initiated by the District Supervisor without an informal conference (e.g., changes of the type referred to in G.1.a.). In such cases the procedure given below shall be followed.
- H. 3. b. If proposed amendments to citation items change the classification of the items; e.g., serious to non-serious, the original citation items shall be withdrawn and new, appropriate citation items issued.
- H. 3. c. The amended Notice of Violation and Order to Comply (NYPESH-2) shall clearly indicate that:
 - H. 3. c. (1) The employer is obligated under the Act to post the amendment to the citation along with the original citation until the amended violation has been corrected or for 3 working days, whichever is longer;
 - H. 3. c. (2) The period of contest of the amended portions of the NOV will begin from the day following the date of receipt of the amended Notice of Violation and Order to Comply; and
 - H. 3. c. (3) The contest period is not extended as to the unamended portions of the original citation.
- H. 3. d. A copy of the original citation shall be attached to the amended Notice of Violation and Order to Comply when the amended form is forwarded to the employer.
- H. 3. e. When circumstances warrant it, a citation may be withdrawn in its entirety by the District Supervisor. Justifying documentation shall be placed in the case file. If a citation is to be withdrawn, the following procedures apply:
 - H. 3. e. (1) A letter withdrawing the Notice of Violation and Order to Comply shall be sent to the employer. The letter shall refer to the original citation and penalty, state that they are withdrawn and direct that the letter be posted by the employer for 3 working days in those locations where the original citation was posted.
 - H. 3. e. (2) When applicable to the specific situation (e.g., an employee representative participated in the walkaround inspection, the inspection was in response to a complaint signed by an employee or an employee representative, or the withdrawal resulted from an informal conference or settlement agreement in which an employee representative exercised the right to participate), a copy of the letter shall also be sent to the employee or the employee representative as appropriate.
- H. 3. f. The instructions contained in this section, with appropriate modification, are also applicable to the amendment of the Notice of Failure to Abate Alleged Violation,

NYPESH-2B.

- H. 3. g. The assistance of the Program Manager shall be sought when amendments cause complicated drafting problems.

I. Settlement of Cases by District Supervisors.

- I. 1. General. The informal conference process will be used to clarify the correction of hazards and to address any administrative or technical errors in the citations issued. PESH does not engage in negotiations or settlement agreements with employers. Cases may be referred to Department of Labor Counsel through the Program Manager's Office when the informal conference fails to resolve the issue.
- I. 2. Department of Labor Counsel's Office may enter into penalty settlement negotiations. If a penalty reduction settlement is reached amounting to more than 50 percent, Counsel's office must obtain approval from the Director of DOSH.

CITATIONS CHAPTER V

APPENDIX

SAVES and AVDs

General.

The proper writing of citations is an essential part of the enforcement process. Specific instructions on how to complete the Notice of Violation and Order to Comply, are contained in the OIS Enforcement Users Manual.

SAVES Manual.

The Standard Alleged Violation Elements (SAVES) are maintained in OIS. There are Federal and Local SAVES. Federal SAVES are produced by OSHA and District Offices can add Local SAVES.

- B. 1. Purpose. The SAVES are designed to achieve the following goals:
 - B. 1. a. Improve the quality of alleged violation descriptions.
 - B. 1. b. Establish uniformity through standardized wording in Alleged Violation Descriptions (AVDs).
 - B. 1. c. Promote uniform interpretation and application of standards
 - B. 1. d. Ensure legal adequacy of alleged violation descriptions.
 - B. 1. e. Decrease lag time between inspection and citation.
 - B. 1. f. Reduce CSHO and clerical time on case file preparation.
 - B. 1. g. Reduce typographical and grammatical errors in citations.
- B. 2. Scope. The term SAVE is used to describe that portion of an alleged violation description which can be stored within OIS and retrieved as needed. As it appears in the citation, an AVD is a complete description of an alleged violation consisting of a SAVE and other necessary variable elements applicable to a specific violation.
 - B. 2. a. The SAVES stored in OIS does not include variable information. It lists the needed items of variable information in memory-jogger form under the SAVE.
 - B. 2. b. If the inspection is a fatality/catastrophe investigation or other "after-the-fact" investigation, the AVD must include the date and time of employee exposure.
 - B. 2. c. For multi step abatements, the variable information must include a description of each step together with the date by which that step must be completed. These will appear on the NOV

NOTE: SAVES is not to be used as a substitute for the standards/regulations.

- B. 3. General Instructions. CSHOs using the OIS SAVES shall:
 - B. 3. a. Determine from the PESH Safety and Health Standards/Regulations which specific standard/regulation is to be cited.
 - B. 3. b. Search the OIS SAVES for a corresponding SAVE. If one is listed, ensure that it is appropriate for the apparent violation noted. This is accomplished by comparing the SAVE with the standard/regulation.
 - B. 3. c. Select the appropriate SAVE.
 - B. 3. d. Insert the variable information required to complete the AVD. Include the date that the violation was observed if the inspection took more than one day to complete.
- B. 4. SAVES Options. A SAVE option identifies a different requirement within a single standard/regulation.
 - B. 4. a. If more than one requirement is covered by a single standard/regulation, these may be listed as options in the OIS SAVES. Two or more options for the same standard/regulation shall not be listed on a citation as separate violations.
 - B. 4. b. SAVES have not been drafted for all possible combinations of violations of a standard. The options given may be combined in either of two ways:
 - B. 4. b. (1) One method is to write a new Local SAVE including all the required information.
 - B. 4. b. (2) The preferred method is to combine the applicable options by listing each such option as an individual subitem of a single alleged violation. The item number is listed as 1a, 1b, etc.

NOTE: The CSHO shall not confuse this combining procedure with the instructions for grouping violations.

- B. 5. Violations Without SAVES. If there is not a SAVE that covers the alleged violation, the CSHO is required to develop the alleged violation description using the following format:
 - B. 5. a. Past tense in all wording.
 - B. 5. b. Plural wording; e.g., operators.
 - B. 5. c. Use (a), (b), (c), etc., for sublocations.
 - B. 5. d. Positive factual statements (eliminate "failed to" and "employer failed to").

Examples. The following are some examples of how the SAVES are properly used:

- C. 1. SAVE for 1910.213(n)(3). This SAVE is not in the word processing system.
- C. 1. a. As it Appears in the OIS SAVES.
29 CFR 1910.213(n)(3): Hoods or suitable guards were not provided to prevent the hands of the operator from coming in contact with the in-running rolls of feed rolls on _____:

 - (a) (LOCATION)(IDENTIFY SPECIFIC OPERATION(S) AND/OR CONDITION(S)) (DESCRIBE HAZARD(S) WHERE NECESSARY)

NOTE: INDICATE WHETHER PLANING, MOLDING, STICKING, AND/OR MATCHING MACHINES ARE TO BE CITED.

- C. 1. b. What the CSHO Must Specify.
- C. 1. b. (1) Illustration 1.
- C. 1. b. (1) (a) Insert appropriate machine identification in body of SAVE; e.g., "planing machine."
- C. 1. b. (1) (b) Enter appropriate variable information: Shop A, Northwest corner; e.g., Apex Planing Machine (serial #363-21).
- C. 1. b. (2) Illustration 2.
- C. 1. b. (2) (a) Insert appropriate machine identification in body of SAVE: "Molding machine".
- C. 1. b. (2) (b) Enter appropriate variable information: Shop B, South wall - Baylor Molding Machine (serial #63546).
- C. 1. b. (3) Illustration 3.
- C. 1. b. (3) (a) If a combination of the same types of hazards on different machines covered by the same standard is noted during an inspection, insert appropriate machine identifications in body of SAVE: "planing machine" and "molding machine".
- C. 1. b. (3) (b) Enter appropriate variable information:
 - (a) Shop A, Northwest corner - Apex Planing Machine (serial #363-21).
 - (b) Shop B, South wall - Baylor Molding Machine (serial #63546).
- C. 1. c. Completed AVD (For Illustration 3) As It Appears on the Citation.

29 CFR 1910.213(n)(3): Hoods or suitable guards were not provided to prevent the hands of the operators from coming in contact with the in-running rolls of feed rolls on planing machine and molding machine:

(a) Shop A, Northwest Corner - Apex Planing Machine (serial #363-21).

(b) Shop B, South wall - Baylor Molding Machine (serial #63546).

C. 2. SAVE for 1910.22(a)(2). There are two options for this SAVE; however, only one of these options is illustrated.

C. 2. a. As It Appears in the SAVE.

OPTION 1

L14b

29 CFR 1910.22(a)(2): Floors of workrooms were not maintained, as far as possible, in a dry condition:

(a) (LOCATION)(IDENTIFY SPECIFIC OPERATION(S) AND/OR CONDITION(S))(DESCRIBE HAZARD(S) WHERE NECESSARY)

C. 2. b. What the CSHO Must Specify.

C. 2. b. (1) Enter appropriate variable information: Machine shop, east end - water on floor around the "Dumas" injection machine.

C. 2. b. (2) Describe the hazard: A slippery condition subjecting employees to injury from falls.

C. 2. c. Completed AVD as It Appears on the NOV

29 CFR 1910.22(a)(2): Floors of workrooms were not maintained, as far as possible, in a dry condition:

(a) Machine shop, east end - water on floor around the "Dumas" injection machine resulting in a slippery condition.

C. 3. SAVE for a Standard with a General Requirement.

C. 3. a. As It Appears in the SAVE.

OPTION 1

29 CFR 1910.132(a): Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:

(a) (LOCATION)(IDENTIFY SPECIFIC OPERATION(S) AND/OR CONDITION(S))(DESCRIBE HAZARD(S) WHERE NECESSARY)

- C. 3. b. What the CSHO Must Specify.
- C. 3. b. (1) Identify type of protective equipment needed; e.g., wire mesh gloves.
- C. 3. b. (2) Enter appropriate variable information: Deboning Department, main deboning table.
- C. 3. b. (3) Describe the hazard: Cuts to hands or body or employees cutting themselves.
- C. 3. c. Completed AVD as It Appears on the Notice of Vioation.

29 CFR 1910.132(a): Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:

- (a) Deboning Department, main deboning table, wire mesh gloves were not used to protect workers from the hazard of cutting themselves as a result of knives slipping during repeated boning operations.

- C. 4. SAVE for a Standard Incorporated by Reference.

- C. 4. a. As It Appears in the SAVE.

29 CFR 1910.101(b), Section 3.3.8, Compressed Gas Association Pamphlet P-1-1965, as adopted by 29 CFR 1910.101(b): Compressed gas cylinders were stored near elevators, gangways or in locations where heavy moving objects could strike or fall on them:

- (a) (LOCATION)(IDENTIFY SPECIFIC OPERATION(S) AND/OR CONDITION(S))(DESCRIBE HAZARD(S) WHERE NECESSARY)

NOTE: APPLIES TO CYLINDERS ONLY, NOT TO WELDING, CUTTING AND BRAZING AS GIVEN IN 1910.252

- C. 4. b. What the CSHO Must Specify.
- C. 4. b. (1) Insert the appropriate section number of the adopted standard, and the name of the adopted standard; e.g., 191.101(b), Section 3.3.8, Compressed Gas Association Pamphlet P-1-1965.
- C. 4. b. (2) Enter appropriate variable information: Main cylinder filling station, east end, adjacent to rampway used by powered industrial trucks.
- C. 4. c. Completed AVD as It Appears on the Notice of Violation.

29 CFR 1910.101(b), Section 3.3.8, Compressed Gas Association Pamphlet P-1-1965, as adopted by 29 CFR 1910.101(b): Compressed gas cylinders were stored near elevators, gangways or in locations where heavy moving objects could strike or fall on them:

- (a) Main cylinder filling station, east end, adjacent to rampway used by powered industrial trucks and subject to being struck by them.

C. 5. SAVE for Citation of the General Duty Clause.

C. 5. a. As It Appears in the SAVE.

Section 27-a(3)(1) of the New York State Labor Law: The employer did not furnish to each of its employees, employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety, or health of its employees. In applying this paragraph, fundamental distinctions between private and public employment have been recognized.

- (a) IDENTIFY THE HAZARD. DESCRIBE THE CONDITIONS OR PRACTICES WHICH ARE CREATING THE HAZARD. IDENTIFY THE SPECIFIC OPERATION INVOLVED AND LOCATION. PROVIDE ONE REASONABLE AND ADEQUATE ABATEMENT METHOD WHICH IS ACCEPTABLE TO CORRECT THE HAZARD. THE STATEMENT SHOULD READ:

"ONE REASONABLE AND ADEQUATE ABATEMENT METHOD, AMONG OTHERS, TO CORRECT THIS HAZARD IS..."

NOTE: See Chapter IV for determining the propriety of a 27-a(3)(1) citation.

C. 5. b. Section 27-a(3)(1) Violation.

Employees are entering a baling press box to clear out paper and cardboard that had jammed the baler. The machine is not electrically shut down and locked out and the ram is not blocked. Therefore, the employees are exposed to the hazard of inadvertent activation of the press ram which could cause death or serious injury. PESH does not have a lockout standard that applies to the hazard. This hazard can be cited as a violation of Section 27-a(3)(1) of the Labor Law if it can be established that:

- C. 5. b. (1) There is not an applicable PESH standard.
- C. 5. b. (2) Employees are exposed to a hazard that could cause serious physical harm.
- C. 5. b. (3) The hazard is recognized by the industry.
- C. 5. b. (4) There are reasonable and adequate methods to correct the hazard.

C. 5. c. What the CSHO Must Specify.

- C. 5. c. (1) Identify the recognized hazard: Death or serious injuries resulting from inadvertent activation of the baling press ram.

- C. 5. c. (2) Give a method of correcting the hazard that is reasonable and adequate: Establish and enforce a plant lockout procedure.
- C. 5. c. (3) Enter the appropriate variable information: Mill basement, baling press room.
- C. 5. c. (4) Identify the consensus standard upon which the Sec 27-a(3)(1) citation is based.
- C. 5. d. Completed AVD as It Appears on the Notice of Violation.

Section 27-a(3)(1) of the New York State Labor Law: The employer did not furnish to each of its employees, employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety, or health of its employees. In applying this paragraph, fundamental distinctions between private and public employment have been recognized.

(a) Employees were exposed to death or serious physical harm from inadvertent activation of the baling press ram while freeing the box from paper jams. Among other methods, one reasonable and adequate abatement method to correct this hazard is to establish and enforce an adequate plant lockout procedure such as that stipulated by ANSI Z244.1-1982, Section 4 and 5, American National Standard of Minimum Safety Requirements for Lockout/Tagout of Energy Sources for Personnel Protection. Essential elements of the lockout procedure would include:

- C. 5. d. (1) Open and lock out the main power disconnect for the machine and bleed off any residual energy;
- C. 5. d. (2) Provide each potentially exposed employee working in the area with separate lock and key to be placed on the lockout means;
- C. 5. d. (3) Establish a written lockout policy, including procedures to be followed and training for all affected employees, both maintenance and operational crews;
- C. 5. d. (4) Periodically evaluate the program and strictly enforce all its provisions.

NOTE: Other elements may be added or revisions made to ones listed in the example as conditions dictate.

C. 6. An Example of Combining SAVES.

1a 29 CFR 1910.215(a)(4): Grinding machinery was not used with work rests to support off-hand grinding work:

(a) Northwest corner of machine shop - Black & Decker bench grinder, serial #24693.

- 1b 29 CFR 1910.215(a)(4): Work rests on grinding machine were not adjusted closely to the wheel with a maximum opening of one-eighth inch:

Northwest corner of machine shop - Shopcraft stand grinder serial #10096, work rest 1 inch from wheel (left wheel).

C. 7. An Example of Combining and Grouping SAVEs.

THE FOLLOWING ALLEGED VIOLATIONS HAVE BEEN GROUPED BECAUSE THEY INVOLVE SIMILAR OR RELATED HAZARDS THAT MAY INCREASE THE POTENTIAL FOR (INJURY RESULTING FROM AN ACCIDENT) OR (ILLNESS).

- 1a 29 CFR 1910.107(b)(1): Spray booths were not substantially constructed of steel, concrete or masonry:

- (a) Paint shop, wood constructed paint spray booth.

- 1b 29 CFR 1910.107(b)(5)(i): The average air velocity over the open face of the paint spray booths was less than 100 linear feet per minute:

Paint shop, paint spray booth, 60 linear feet per minute.

- 1c 29 CFR 1910.107(b)(5)(i): There were no visible gauges, audible alarms or pressure activated devices installed on paint spray booths to indicate or ensure that the required air velocity was maintained:

- Paint shop, paint spray booth.

- 1d 29 CFR 1910.107(c)(7): Electric lamps outside of but within 20 feet of spraying areas, and not separated therefrom by partitions, were not protected from physical damage by suitable guards or by location:

10 linear feet from the northwest corner of the paint spray booth, large finished 4' x 8' panels were handled and stacked directly beneath lights 9 feet above the floor.

D Citing Health Violations. In general, health citations are structured in the same manner as illustrated in the examples in C.1. through 7. Health citations have certain characteristics that need to be highlighted.

D. 1. Citations. Health citations shall have item numbers identifying each standard violated. Within each item cited, instances observed which relate to that item shall be listed.

D. 1. a. When one or more employees are exposed to different contaminants in 12 NYCRR Part 800.5, separate items shall describe the violations of the different contaminants. For example, overexposure to iron oxide fume (on a welder) and zinc oxide fume (on a ladle operator) or overexposure (on a pourer) to both iron oxide and zinc oxide fumes would result in two separate items and two separate penalties on one serious citation.

- D. 1. b. When more than one employee is exposed to the same hazard, the operations would be listed as separate instances for the same item. For example, overexposure to silica at different operations (sand slinger, shakeout operator, and muller) would result in one item with three instances and one penalty on a serious citation.
- D. 1. c. When one or more employees are exposed to several contaminants covered by several standards, separate items shall describe the violations of the different contaminants. For example, overexposure to lead, silica and iron oxide on one employee would result in three separate items and three separate penalties on one serious citation.
- D. 2. Specific Instructions. When using SAVES for health citations, the CSHO must include certain additional information in the alleged violation description over and above that required for safety citations in general. The following items must be identified in the variable information portion of the SAVE:
 - D. 2. a. The exposure levels found during sampling for hazardous substances or for physical hazards and the dates on which the sampling was performed. For grouped items, when exposure information is identical, it is not necessary to repeat this information for each citation item. It will be sufficient to specify exposure conditions for the first item of the grouped citation and reference that item for the other items. (See E.4 and E.5 of this Appendix.)
 - D. 2. b. The more significant health effects of hazardous substances. (See the Chemical Information Manual, OSHA Instruction CPL 2-2.43.)
 - D. 2. c. Feasible engineering controls. Engineering controls shall be identified as existing and shall be presented in general outline. They shall be described as being one set of a number of possible methods, unless the facts indicate that these are the only feasible engineering controls.
 - D. 2. d. Feasible administrative or work practice controls, if appropriate, using the guidelines given above for engineering controls to describe the controls.

Examples of Health SAVES.

The use of health SAVES is illustrated in the following examples:

- E. 1. SAVE for a Standard with a General Requirement.
- E. 1. a. As It Appears in the SAVE.

OPTION 1

29 CFR 1910.132(a): Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:

- (a) (LOCATION)(IDENTIFY SPECIFIC OPERATION(S) AND/OR CONDITION(S))(DESCRIBE HAZARD(S) WHERE NECESSARY)

- E. 1. b. What the CSHO Must Specify.
- X Identify type of equipment needed; e.g., gloves impervious to hazardous substance.
 - X Identify health hazard and its effects; e.g., Scotch Brand Resin 5230, a serious skin irritant and sensitizer.
 - X Identify the part of the body that was unprotected; e.g., the wrists and lower arms.
- E. 1. c. Completed AVD as It Appears on the Notice of Violation
- 29 CFR 1910.132(a): Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:
- (a) An employee working in the Fluidizer Room handling Scotch Brand Resin 5230 which is a serious skin irritant and sensitizer was wearing cotton gloves which were not impervious to the resin and did not protect the wrists and lower arms.
- E. 2. SAVE for a Respirator Violation.
- E. 2. a. As It Appears in the SAVE.
- L3f6
 29 CFR 1910.134(c)(1)(viii): The users of respirators were not instructed and trained in the proper use of respirators and their limitations:
- (a) (LOCATION, OPERATION AND/OR SPECIFIC RESPIRATORS)
- E. 2. b. What the CSHO Must Specify.
- X Identify the hazardous substance to which employees are exposed; e.g., silica.
 - X Identify the exposure level; e.g., in a sample containing 20% respirable quartz, a TWA of 1.4 mg/M³.
 - X Identify the type of respirator used and any deficiencies noted; e.g., MSA Comfo II respirator with one strap removed and cartridges designed for use with organic vapors.
 - X Identify the specific hazard under the standard cited; e.g., employee had not been trained in how to wear the respirator and was not familiar with the hazards of silica.
- E. 2. c. Completed AVD as It Appears on the Notice of Violation.

29 CFR 1910.134(c)(1)(viii): The users of respirators were not instructed and trained in the proper use of respirators and their limitations:

- (a) An employee was exposed to silica dust with 20% respirable quartz at a TWA of 1.4 mg/M³, while chipping and grinding castings at the Number 7 Work Station in the Number 4 Grinding Enclosure in the Cleaning Room. The employee was not instructed in the proper use of the respirator and its limitations as evidenced by the fact that he was wearing an MSA Comfo II respirator which had one strap removed. Further the employee was not familiar with the health hazards of silica: February 23, 1988.

E. 3. SAVE for a Ventilation Violation.

E. 3. a. As It Appears in the SAVE.

29 CFR 1910.94(d)(9)(i): Employees working in and around open surface tank operations were not instructed as to job hazards and first aid procedures or personal protection applicable to these hazards:

- (a) (LOCATION, TANK, CONDITIONS AND/OR CONTAMINANTS)

E. 3. b. What the CSHO Must Specify.

X Identify tanks involved; e.g., cadmium, nickel and chrome plating tanks.

X Identify the hazards involved and their effects; e.g., mixing cyanide salts with acid producing hydrogen cyanide, an asphyxiant.

E. 3. c. Completed AVD as It Appears on the Citation.

29 CFR 1910.94(d)(9)(i): Employees working in and around open surface tank operations were not instructed as to job hazards and first aid procedures or personal protection applicable to these hazards:

An employee working in the Plating Room near the cadmium, nickel and chrome plating tanks was exposed to the hazards of hydrogen cyanide and was not familiar with the hazard of mixing cyanide salts with acid nor with established emergency procedures.

E. 4. SAVEs for a Noise Violation.

E. 4. a. As They Appear in the SAVE

29 CFR 1910.95(b)(1): Employees were subjected to sound levels exceeding those listed in Table G-16 of Subpart G of 29 CFR 1910 and feasible administrative or engineering controls were not utilized to reduce sound levels:

- (a) (LOCATION)(IDENTIFY SPECIFIC OPERATIONS OR DEPARTMENT AND THE NUMBER OF EMPLOYEES EXPOSED)(DESCRIBE CONDITIONS INCLUDING DATE, SHIFT, NOISE LEVELS, SAMPLING PERIOD)(PROVIDE GENERAL METHODS OF CONTROL)

29 CFR 1910.95(i)(2)(i): The wearing of hearing protectors was not ensured for employees exposed to sound levels exceeding those listed in Table G-16 of 29 CFR 1910.95 as required by 29 CFR 1910.95(b)(1):

(LOCATION)(IDENTIFY SPECIFIC OPERATIONS AND/OR DEPARTMENTS AND THE NUMBER OF EMPLOYEES INVOLVED)(DESCRIBE CONDITIONS INCLUDING NOISE LEVELS, SAMPLING PERIOD AND DATES)

NOTE: Abatement normally will be multi step. Abatement steps shall be noted as follows:

ABATEMENT NOTE:

STEP 1: As an interim protective measure and when administrative or engineering controls fail to reduce sound levels to within the levels of Table G-16, effective hearing protection shall be provided and used by all exposed employees. In addition, an effective hearing conservation program in accordance with 29 CFR 1910.95(c) through (n) shall be maintained.

STEP 2: A written detailed plan of abatement shall be submitted to the District Supervisor outlining a schedule for the implementation of engineering and/or administrative measures to control employee exposures to noise as referenced in this citation. This plan shall include, at a minimum, target dates for the following actions which must be consistent with the dates required by this citation:

Evaluation of engineering control options;

Selection of optimum control method and completion of design;

Procurement, installation and operation of selected control measures;

Testing and acceptance or modification/redesign of controls.

All proposed control measures shall be evaluated for each particular use by a competent industrial hygienist or other technically qualified person. 90-day progress reports are required during the abatement period.

NOTE: The 90-day requirement for the submission of progress reports may be shortened or lengthened by the District Supervisor depending on the specific circumstances.

STEP 3: Abatement shall have been completed by the implementation of feasible engineering and/or administrative controls upon verification of their effectiveness in achieving compliance.

E. 4. b. What the CSHO Must Specify.

- * Identify the exposure level; e.g., Employee exposed to continuous noise levels at 196% of the allowable 8-hour time weighted average sound level (90 dBA). The equivalent dBA level of the 196% is approximately 97 dBA. The sampling was performed for 356 minutes during one shift on June 19, 1988. Zero exposure was assumed for the unsampled period of time (124 minutes).
- * Outline the more significant health effects of overexposure.
- * Document applicable control methods in general.
- * Other appropriate abatement notes as indicated in the variable elements portion of the SAVE. (See also E.4.c. following.)

E. 4. c. Completed AVD as It Appears on the Notice of Violation

THE FOLLOWING ALLEGED VIOLATIONS HAVE BEEN GROUPED BECAUSE THEY INVOLVE SIMILAR OR RELATED HAZARDS THAT MAY INCREASE THE POTENTIAL FOR ILLNESS.

- 1a 29 CFR 1910.95(b)(1): Employees were subjected to sound levels exceeding those listed in Table G-16 of Subpart G of 29 CFR 1910 and feasible administrative or engineering controls were not utilized to reduce sound levels:
- (a) Seven (7) transfer operators in the conveyor building, No. 100, were exposed to continuous noise levels at 196% of the permissible daily noise exposure (8-hour time weighted average sound level of 90 dBA) or an equivalent sound level of approximately 97 dBA during the 356 minute sampling period on 06/19/88; exposure calculations included a zero increment for the 124 minutes not sampled.

General methods of control applicable in these circumstances include, but are not limited to, the following:

- (1) Air intake muffling or isolation and vibration isolation on the Roots-Connersville blower model 52, serial number 100x, located in the blower room, level 2.

- (2) Provision of a soundproof observation room/booth for operators.

- 1b 29 CFR 1910.95(i)(2)(i): The wearing of hearing protectors by employees who were exposed to sound levels exceeding those listed in Table G-16 of this section and who are required by paragraph 1910.95(b)(1) to wear personal protective equipment was not ensured:

Transfer operators as described in item 1a.

ABATEMENT NOTE:

STEP 1: Due 6/30/88

As an interim protective measure and when administrative or engineering controls fail to reduce sound levels to within the levels of Table G-16, effective hearing protection shall be provided and used by all exposed employees. In addition, an effective hearing conservation program in accordance with 29 CFR 1910.95(c) through (n) shall be maintained.

STEP 2: Due 8/19/88

A written detailed plan of abatement shall be submitted to the District Supervisor outlining a schedule for the implementation of engineering and/or administrative measures to control employee exposures to noise as referenced in this citation. This plan shall include, at a minimum, target dates for the following actions which must be consistent with the date required by this citation:

Evaluation of engineering/administrative control options;

Selection of optimum control methods and completion of design;

Procurement, installation and operation of selected control measures;

Testing and acceptance or modification/redesign of controls.

All control measures shall be evaluated for each particular use by a technically qualified person.

STEP 3: Due 12/19/88

Correction shall have been completed by the implementation of feasible engineering and/or administrative controls upon verification of their effectiveness in achieving compliance.

CHAPTER VI

PENALTIES

General Policy.

The penalty structure provided under Section 27-a(6) of the Act is designed primarily to provide an incentive toward correcting violations voluntarily, not only to the offending employer but, more especially, to other employers who may be guilty of the same infractions of the standards or regulations.

- A. 1. PESH has always taken the position that penalties are not designed primarily as punishment for violations nor as a source of income for the Bureau. Penalty amounts should be sufficient to serve as an effective deterrent to violations.
- A. 2. The penalty structure outlined in this section is designed as a general guideline. The District Supervisor may deviate from this guideline if warranted, to achieve the appropriate deterrent effect.

Situations Where a Penalty May or May Not Be Assessed.

- B. 1. Alternative Compliance Agreement. The Engineering Services Unit (ESU) will receive and process all variances/alternative compliance agreement and notify the Program Manager's office. The Program Manager will notify the appropriate District office.
- B. 1. a. Request for Alternative Compliance Agreement Filed Before the Abatement Date. Uncorrected violations that are the subject of an alternative compliance request will not be assessed a penalty until the Department issues a decision on the alternative compliance request. Follow-up inspections will be held in abeyance until the alternative compliance agreement is issued or denied.
- B. 1. b. Alternative Compliance Request Filed after the Abatement Date. Alternative compliance request are normally not accepted when filed later than the day following the abatement date, unless accompanied by an explanation of extenuating circumstances for the delay in filing. This determination will be made by the ESU. If ESU determines the alternative compliance request is not acceptable, all penalties and enforcement action will proceed as normal. If ESU decides to accept the alternative compliance request, PESH will calculate a penalty starting from the day after the abatement date and stopping on the day the alternative compliance request was received by ESU. Such penalty will be recorded on the SH 919 as an interim bill. Additional penalties may be assessed later, based on the alternative compliance agreement decision as described in **B.1.c.** below.
- B. 1. c. Alternative Compliance Proposal.
- B. 1. c. (1) Alternative Compliance Agreement Granted: No penalty (or additional penalty) will be imposed unless a re-inspection reveals that the employer is not in

compliance with the terms of the alternative compliance agreement.

- B. 1. c. (2) Alternative Compliance Agreement Denied: The employer will be notified in writing by the Program Manager that he must comply with the original Notice of Violation and Order to Comply. The same abatement period will be re-instated as provided on the original Notice. The abatement period will begin on the day of the alternative compliance agreement decision. At the end of this time period, a follow-up will be scheduled in the normal manner. For violations still not complied by this stage, a reduction for good faith will normally not be applied to the penalty.
- B. 2. Petitions for Modification of Abatement Date (PMA). If a PMA has been granted, the new abatement date will serve as the final day of compliance for purposes of calculating the penalty.
- B. 3. Industrial Board of Appeals and Civil Practice Suit.
- B. 3. a. For cases appealed for the validity of the order, all enforcement action including follow-up inspections and penalties will continue as normal unless the employer has requested and is granted a stay of enforcement. For any violations verified by PESH but uncorrected before a stay has been granted, a penalty will be assessed from the final day of compliance to the date the stay was granted.

Upon decision by the Board or the Courts, an appropriate penalty will be calculated through coordination with Counsel and the Program Manager's office, if the violation has been upheld.
- B. 3. b. For cases appealed regarding the final penalty assessment, all collection activity will stop. If the employer has appealed an interim penalty, all enforcement actions regarding correction of the violation (including follow-ups and daily accruals of penalties) will continue as normal. When the violations are verified corrected, the District office will issue a final bill as usual and forward a copy of the final bill to the Program Manager's office. The Program Manager will forward the final bill to Counsel's office to be considered by the Board in resolving the case.
- B. 4. Capital Abatement Projects. Employers who file for reimbursement for capital abatement projects are still liable for penalties assessed if their abatement date has expired and they do not file for a PMA.
- B. 4. a. Hazard Abatement Board Responsibility (HAB).
- B. 4. a. (1) The employer will submit a proposed work plan to the HAB. If the abatement date is less than twelve (12) months from the date of submittal of the plan, a PMA must also be submitted at the same time to the HAB. HAB will forward the PMA to the PESH District office.
- B. 4. a. (2) The HAB will instruct the employer that he must continue to monitor the progress of the application so that an extension of the PMA can be filed in a timely

manner, if necessary. Employers who did not initially file a PMA must also monitor the progress of their application and file a PMA at the appropriate time.

B. 4. b. District Office Responsibility.

- B. 4. b. (1) The District office Supervisor shall process the PMA as usual. A copy of the approved PMA will be sent to HAB as well as the Engineering Services Unit (ESU).

Civil Penalties (Fines).

Penalties for failure to correct violations by the time fixed for compliance will be assessed by PESH. Non-serious violations left uncorrected may be assessed a penalty of up to \$50 per day until corrected. Serious violations may be assessed a penalty of up to \$200 per day until corrected. A violation that is classified as either willful or repeat and is not corrected will be assessed a penalty as normally calculated for serious or non-serious violations. The gravity of the violation will be higher, due to willful or repeat nature of the violation. Penalties will be calculated on calendar days, beginning with the day after the abatement date and continuing until compliance has been achieved and verified by PESH. At the end of each quarter a revised interim bill will be sent to the employer for all uncorrected violations. A copy of the interim bill will be placed in the case file.

- C. 1. Gravity of Violation. The gravity of the violation is the primary factor in determining penalty amounts. It shall be the basis for calculating the basic penalty for both serious and non-serious violations.
- C. 1. a. To determine the gravity of a violation the following three factors shall be considered:
- C. 1. a. (1) The probability that an injury or illness could occur as a result of the alleged violation.
- C. 1. a. (2) The severity of the injury or illness which could result from the alleged violation.
- C. 1. a. (3) If the violation was willfully committed or was a repeat violation shall also be considered in determining the gravity of the violation.
- C. 1. b. The size of the business, the good faith of the employer and the history of previous violations shall be taken into account in deciding whether the gravity-based penalty shall be reduced.
- C. 2. Probability Assessment - Safety. The probability that an injury or illness will result from an accident has no role in determining the classification of a violation but does affect the amount of the penalty to be proposed. The probability shall be estimated by considering five probability factors to which an appropriate numerical value shall be assigned in accordance with the relative contribution of each as follows: NOTE: Used for information not described on IH sampling forms.
- C. 2. a. Number of workers exposed:

- C. 2. a. (1) Each worker up to 10 (Values 1 - 10)
- C. 2. b. Frequency of Exposure:
- C. 2. b. (1) Any exposure up to once a week (Values 1 - 3)
- C. 2. b. (2) More than once a week up to a daily exposure (Values 4 - 7)
- C. 2. b. (3) Continuous daily exposure (Values 8 - 10)
- C. 2. c. Employee Proximity:
- C. 2. c. (1) Fringe of danger zone (Values 1 - 3)
- C. 2. c. (2) Near danger zone (Values 4 - 7)
- C. 2. c. (3) At the point of danger (Values 8 - 10)
- C. 2. d. Stress Factors (e.g., speed of operations, lighting, temperature, weather conditions, noise, housekeeping, etc.) which may influence the likelihood of an injury producing accident:
- C. 2. d. (1) Low stress/good conditions (Values 1 - 3)
- C. 2. d. (2) Medium stress/fair conditions (Values 4 - 7)
- C. 2. d. (3) High stress/poor conditions (Values 8 - 10)
- C. 2. e. Number of Instances. PESH will also factor into the probability quotient the number of instances of the violations that are found during the follow-up inspection:
- C. 2. e. (1) 0 - 10 Instances (Factors 1 - 3)
- C. 2. e. (2) 11 - 20 Instances (Factors 4 - 7)
- C. 2. e. (3) Greater than 20 Instances (Factors 8 - 10)
- C. 2. f. Other Factors which may affect significantly the probability of an injury-producing accident: NOTE: The lower the probability of an accident, the lower the number. The more factors that contribute to the possibility of an accident, the higher the number.
- C. 2. f. (1) If there are mitigating circumstances such as specific safety instructions, effective training program, existence of a comprehensive safety and health program, evidence of correction underway, warning signs, mandated use of protective gear, or mandatory controls providing some, though less than full protections, assign a low number of points to lower the probability. (Factors 1 - 5) (good factors)
- C. 2. f. (2) If there are additional contributing factors such as inappropriate safety instructions, inadequate training, poor or nonexistent safety and health program,

faulty equipment, etc., assign an appropriately higher number of points. (Factors 6 - 10) (bad factors)

- C. 2. g. If, in the opinion of the CSHO, any of the above factors do not significantly influence the probability of an injury-causing accident, that factor shall not be entered into the probability calculation.
- C. 2. h. If, on the other hand, use of a factor would tend to dilute the penalty excessively, that factor shall not be entered into the penalty calculation. For example, in a particularly dangerous trenching situation, when only one or two employees are exposed, it may not be appropriate to average in factor (1), number of employees exposed.
- C. 2. i. Total. Total the points assigned for each factor.
- C. 2. j. Probability Quotient. To determine overall probability, the factors used must be averaged. Divide total points assigned by the number of factors used. Any fractions shall be disregarded. The resulting number is called the "probability quotient".
- C. 2. j. (1) When strict adherence to the probability assessment procedures would result in an unreasonably high or low probability/severity quotient, the CSHO may use professional judgement to adjust the probability quotient accordingly. Such decisions shall be adequately documented.
- C. 2. k. Severity Factor. The classification of the alleged violations as serious or non-serious, in accordance with the instructions in Chapter IV of the FOM, is based on the severity of the injury or illness which could result from the violation. This classification constitutes the first step in determining the gravity of the violation. The most serious type of injury or illness which is reasonably predictable as a result of the type of accident or health hazard exposure shall be assigned a severity factor in accordance with the following:
 - C. 2. k. (1) Category I. Non-serious violations. (Severity 0)
 - C. 2. k. (2) Category II. Injuries/Illnesses not resulting in hospitalization or temporary, reversible illnesses requiring minor supportive treatment. (Severity 1 - 3)
 - C. 2. k. (3) Category III. Injury/Illnesses resulting in hospitalization or temporary, reversible illnesses with a variable but limited period of disability. (Severity 4 - 7)
 - C. 2. k. (4) Category IV. Injuries involving permanent disability or chronic, irreversible illnesses or death. (Severity 8 - 10)

NOTE: Categories II, III, and IV apply to serious violations. The penalty for non-serious violations shall be calculated using 0 as the severity factor.

- C. 2. 1. Willful or Repeat Factor. This factor applies to calculating probability assessment.
- C. 2. 1. (1) Willful. Serious or non-serious violations may also be classified as willful, if they meet the criteria as described in the FOM, Chapter IV and PESH Directive A90-5

and 92-14.

- C. 2. 1. (2) Repeat. Serious or non-serious violations may also have been issued previously to the same employer and are therefore repeated. The criteria for repeat of a serious or non-serious violation are described in the FOM, and PESH Directive A90-5.
- C. 2. 1. (3) Assign the following factors for these violations.
- C. 2. 1. (3) (a) Willful (serious) (Factors 9 - 10)
- C. 2. 1. (3) (b) Willful (non-serious) (Factors 8 - 10)
- C. 2. 1. (3) (c) Repeat (serious) (Factors 5 - 8)
- C. 2. 1. (3) (d) Repeat (non-serious) (Factor 5)
- C. 2. 1. (3) (e) No willful or repeat (Factor 0)
- C. 3. Probability Assessment - Health. The health rating factors should be used when the violation is related to sampling and measurements (air, noise, wipe, bulk, radiation) conducted by the CSHO or the employer with all other violations being calculated using the safety rating factors. Violations of the Bloodborne pathogen standard, Lyme disease, Rabies, TB, and other biological concerns are not related to sampling and measurement; however it appears appropriate to use the health rating factors for these topics. Therefore, PESH will make an exception, and use the health rating factors for 1910.1030 violations. To determine the probability that an illness could result from an overexposure to a health hazard, the CSHO shall consider the number of workers exposed, the duration of exposure, the use of personal protective equipment and the results of medical testing as noted below:
 - C. 3. a. Number of Workers Exposed:
 - C. 3. a. (1) Each worker up to 10 (Values 1 - 10)
 - C. 3. b. Duration of Exposure:
 - C. 3. b. (1) 1 to 8 hours per week (Values 1 - 3)
 - C. 3. b. (2) Over 8 hours per week but not continuous daily exposure (Values 4 - 7)
 - C. 3. b. (3) Continuous daily exposure (Values 8 - 10)
 - C. 3. c. Use of Appropriate Personal Protective Equipment (Other PPE):
 - C. 3. c. (1) Personal protective equipment utilized by all exposed employees, and a good program is in effect (Values 1 - 3)
 - C. 3. c. (2) Personal protective equipment utilized by some of the exposed employees but

with minor deficiencies in the program (Values 4 - 7)

- C. 3. c. (3) Personal protective equipment not utilized by any of the exposed employees (Values 8 - 10)
- C. 3. d. Evaluation of the Medical Surveillance Programs: (If there is no applicable surveillance program, this category shall not be considered. i.e., No medical surveillance program required by OSHA/PESH standard, e.g. 12 NYCRR 800.5 [PESH PELS])
 - C. 3. d. (1) The medical surveillance program effectively protects the employee (Values 1 - 3)
 - C. 3. d. (2) The medical surveillance program partially protects the employee (Values 4 - 7)
 - C. 3. d. (3) No medical surveillance program is in effect, (i.e., Medical surveillance program is requirement of standard, e.g. noise, lead, asbestos, bloodborne pathogens.) or the medical program does not effectively protect the employee (Values 8 - 10)
- C. 3. e. Number of Instances. PESH will also factor into the probability quotient the number of instances of the violations that are found during the follow-up inspection:
 - C. 3. e. (1) 0 - 10 Instances (Values 1 - 3)
 - C. 3. e. (2) 11 - 20 Instances (Values 4 - 7)
 - C. 3. e. (3) Greater than 20 Instances (Values 8 - 10)
- C. 3. f. Other Factors which may significantly affect the degree of probability of an illness:
 - C. 3. f. (1) If there are mitigating circumstances, such as specific health instructions, an effective training program, existence of a comprehensive safety and health program, evidence of correction underway, warning signs and labels or special procedures, mandated use of protective gear, or mandatory controls providing some, though less than full protection, assign a low number of points to lower the probability. (Factors 1 - 5) (good factors)
 - C. 3. f. (2) Similarly, assign an appropriately higher point count if there are additional contributing circumstances, such as inappropriate health instructions, inadequate training, a poor or nonexistent health program. (Factors 6 - 10) (bad factors)
- C. 3. g. If, in the opinion of the CSHO, any of the above factors do not significantly influence the probability of an illness-producing accident, that factor shall not be entered into the probability calculation.
- C. 3. h. If, on the other hand, use of a factor would tend to dilute the penalty excessively, that factor shall not be entered into the penalty calculation. For example, in a confined space where there is insufficient oxygen to support life, even when only one or two employees

are exposed, it would not be appropriate to average in factor (1), number of employees exposed.

- C. 3. i. Total. Total the points assigned for each factor.
 - C. 3. j. Probability Quotient. To determine overall probability, the factors used must be averaged. Divide the total points assigned by the number of factors used. Any fractions shall be disregarded. The resulting number is called the "probability quotient".
 - C. 3. j. (1) When strict adherence to the probability assessment procedures would result in an unreasonably high or low probability/severity quotient, the CSHO may use professional judgement to adjust the probability quotient accordingly. Such decisions shall be adequately documented.
 - C. 3. k. Severity Factor. The classification of the alleged violations as serious or non-serious, in accordance with the instructions in Chapter IV of the FOM, is based on the severity of the injury or illness which could result from the violation. This classification constitutes the first step in determining the gravity of the violation. The most serious type of injury or illness which is reasonably predictable as a result of the type of accident or health hazard exposure shall be assigned a severity factor in accordance with the following:
 - C. 3. k. (1) Category I. Non-serious violations. (Severity 0)
 - C. 3. k. (2) Category II. Injuries/Illnesses not resulting in hospitalization or temporary, reversible illnesses requiring minor supportive treatment. (Severity 1 - 3)
 - C. 3. k. (3) Category III. Injury/Illnesses resulting in hospitalization or temporary, reversible illnesses with a variable but limited period of disability. (Severity 4 - 7)
 - C. 3. k. (4) Category IV. Injuries involving permanent disability or chronic, irreversible illnesses or death. (Severity 8 - 10)
- NOTE: Categories II, III, and IV apply to serious violations. The penalty for non-serious violations shall be calculated using 0 as the severity factor.
- C. 3. l. Willful or Repeat Factor. This factor applies to calculating probability assessment for safety and health violations as follows.
 - C. 3. l. (1) Willful. Serious or non-serious violations may also be classified as willful, if they meet the criteria as described in the FOM, and PESH Directive A90-5 and 92-14.
 - C. 3. l. (2) Repeat. Serious or non-serious violations may also have been issued previously to the same employer and are therefore repeated. The criteria for repeat of a serious or non-serious violation are described in the FOM, and PESH Directive A90-5.
 - C. 3. l. (3) Assign the following factors for these violations.

- C. 3. 1. (3) (a) Willful (serious) (Factors 9 - 10)
- C. 3. 1. (3) (b) Willful (non-serious) (Factors 8 - 10)
- C. 3. 1. (3) (c) Repeat (serious) (Factors 5 - 8)
- C. 3. 1. (3) (d) Repeat (non-serious) (Factor 5)
- C. 3. 1. (3) (e) No willful or repeat (Factor 0)
- C. 4. Gravity-based Quotient. The GBP for each violation is determined by averaging the probability quotient, severity factor, and willful/repeat factors. The sum is divided by three and results in the gravity-based (G/B) quotient. Any fractions shall be disregarded.
- C. 4. a. G/B quotients may be assigned in some cases without using the probability factors given in section C. when these factors cannot appropriately be used.
- C. 4. b. The gravity of a violation is equal to the Gravity-based quotient for that violation. Gravity shall be classified as follows:
 - C. 4. b. (1) High gravity violations are those with a gravity of 8 to 10.
 - C. 4. b. (2) Moderate gravity violations are those with a gravity of 4 to 7.
 - C. 4. b. (3) Low gravity violations are those with a gravity of 1 to 3.
- C. 5. Gravity-based Penalty. The gravity-based penalty (GBP) is the unadjusted penalty and is calculated in accordance with the following procedures:
 - C. 5. a. The G/B quotient is used to determine the GBP by consulting the penalty table. The penalty is found in the column marked GBP opposite the numerical G/B quotient which has been assigned to the specific violation.
 - C. 5. b. Penalty Table A shall be used for serious violations. Penalty Table B shall be used for non-serious violations.

PENALTY TABLE A B SERIOUS VIOLATIONS

Gravity-Based Quotient	Gravity-Based Penalty	Percent Reduction					
		10	20	30	40	50	60
1	20	18	16	14	12	10	8
2	40	36	32	28	24	20	16
3	60	54	48	42	36	30	24
4	80	72	64	56	48	40	32
5	100	90	80	70	60	50	40
6	120	108	96	84	72	60	48
7	140	126	112	98	84	70	56
8	160	144	128	112			
9	180	162	144				
10	200	180					

PENALTY TABLE B B NON-SERIOUS VIOLATIONS

Gravity-Based Quotient	Gravity-Based Base Penalty	Percent Reduction					
		10	20	30	40	50	60
1	10	9	8	7	6	5	4
2	20	18	16	14	12	10	8
3	30	27	24	21	18	15	12
4	40	36	32	28	24	20	16
5 - 10*	50	45	40	35	30	25	20

*When the Gravity-based quotient for an other-than-serious violation is between 5 and 10, the gravity-based penalty will be \$50.

- C. 6. Penalty Adjustment Factors. The GBP may be reduced by as much as 60 per cent depending upon the employer's "good faith," "size of business," and "history of previous violations." Up to 40-percent reduction is permitted for size; up to 10-percent reduction for good faith, and 10-percent for history.
- C. 6. a. Since these rates are based on the general character of a business and its safety and health performance, the factors generally shall be calculated only once for each employer. This shall be done after the classification and probability ratings have been determined for each violation and the general character of the employer's performance will be apparent.
- C. 6. b. Limits to the rate of penalty reduction for good faith, size and history of previous violations in the case of certain high probability, serious violations may necessitate lower reductions for such violations in some instances.
- C. 6. c. If a serious violation is classified as repeated, a penalty reduction for good faith and history shall not ordinarily be given since the employer has exhibited a lack of good faith and reflected a poor history by repeating a previously cited serious violation. A reduction for good faith and history may be applied to a repeated violation only when the violation occurs in spite of the employer's efforts to control it, as when employees have disobeyed the employer's orders.
- C. 6. d. For willful violations, although consideration shall be given to the penalty adjustment factors, there normally will be no penalty reduction due to the egregious nature of such violations.
- C. 6. e. The rate of penalty reduction for size of business, employer's good faith and employer's history of previous violations shall be calculated on the basis of the criteria described in the following paragraphs:
- C. 6. e. (1) Size. A maximum penalty reduction of 40 percent is permitted for small employers. "Size of an employer" shall be measured on the basis of the maximum number of employees controlled by an employer at all workplaces (i.e., total state agency, city, town or village employees.) at any one time during the previous 12 months. Information on the total number of an employer's employees can generally be obtained at the inspected worksite. However, on occasion it may be necessary to obtain or confirm the information from the employer's headquarters.
- C. 6. e. (1) (a) The rates of reduction to be applied are as follows:

<u>Employees</u>	<u>Percent reduction</u>
10 or fewer	40
11-25	30
26-60	20
61-100	10
More than 100	None

- C. 6. e. (1) (b) An employer's ability to pay a penalty shall not normally be investigated or considered in determining the penalty reduction for size of business.
- C. 6. e. (1) (c) When a small employer has one or more serious violations of high probability or a significant number of moderate probability which indicates a notable lack of concern for employee safety and health, the District Supervisor may determine that only a partial reduction in penalty shall be permitted for size of business.
- C. 6. e. (2) Good Faith. A penalty reduction of 10 percent is permitted in recognition of an employer's "good faith". Good faith is measured in terms of the following criteria. NOTE: For NYS agencies, this is based on on-site employer actions rather than statewide actions.
- C. 6. e. (2) (a) Evidence of genuine and effective safety and health efforts prior to the inspection. Such efforts need not involve a formalized program, especially for small businesses which frequently lack the resources to operate such a program. Factors which shall be considered in evaluating safety and health efforts, whether or not the business has a formal program, include:
 - C. 6. e. (2) (a) 1 The information describing the employer's safety and health program collected during the inspection and noted in the case file.
 - C. 6. e. (2) (a) 2 The overall condition of the workplace as reflected by the control or elimination of hazards, especially hazards of high gravity.
 - C. 6. e. (2) (a) 3 The extent to which control of or protection against cited hazards was attempted, even though inadequately; such attempts may include incomplete efforts to identify and implement feasible engineering and/or administrative controls for toxic substances and harmful physical agents.
 - C. 6. e. (2) (a) 4 The extent to which more serious injuries and illnesses have been investigated and steps taken to prevent their recurrence.
 - C. 6. e. (2) (a) 5 The presence of effective monitoring of health-hazard exposures.
 - C. 6. e. (2) (a) 6 The degree to which the employer, employees and their supervisors show knowledge and concern about safety and health in their actions, including effective training and supervision of employees regarding good work practices.
 - C. 6. e. (2) (a) 7 Up-to-date maintenance and review of injury/illness records.
 - C. 6. e. (2) (a) 8 Specific actions to prevent recurrence of recorded injuries and illnesses.

- C. 6. e. (2) (a) 9 The extent to which violations observed and injuries and illnesses which have occurred relate to hazards involving difficult, expensive and not widely known controls.
- C. 6. e. (2) (b) Evidence of a desire to comply with the Act during and after an inspection. Primary factors demonstrating such a desire are the speed and willingness with which the employer initiates correction of hazards noted during an inspection.
- C. 6. e. (2) (c) Reductions shall, in general, be made as follows.
- C. 6. e. (2) (c) 1 10 Percent. For employers who have implemented an effective safety and health program reflected by:
 - C. 6. e. (2) (c) 1 a Absence of all willful violations, repeated violations of a moderate or high gravity and high gravity serious violations.
 - C. 6. e. (2) (c) 1 b Absence of easily controlled serious injuries and illnesses.
 - C. 6. e. (2) (c) 2 No Reduction. For little safety and health effort with minimal effectiveness and for obvious reluctance to initiate correction of violation with indications that complete correction may not be made reflected by:
 - C. 6. e. (2) (c) 2 a Presence of willful or repeated or high gravity serious violations.
 - C. 6. e. (2) (c) 2 b Presence of easily controlled serious injuries or illnesses.
 - C. 6. e. (2) (c) 3 In cases where employers have indicated to PESH that the violations are complied and the subsequent follow-up inspection reveals they are not complied, the following reasoning shall be applied in assessing good faith:
 - C. 6. e. (2) (c) 3 a If none of the violations are complied, no reduction for good faith shall be given.
 - C. 6. e. (2) (c) 3 b If there is a partial abatement and it is apparent that the employer in good faith determined that the action taken was sufficient to comply, 10% reduction shall be given.
 - C. 6. e. (2) (c) 4 Since many employers will not fit exactly these general criteria for specific rates of reduction, professional judgment will be required to balance the important factors in determining an appropriate rate for a particular employer.
- C. 6. e. (3) History. A reduction of 10% is permitted in recognition of an employer's lack of

a significant history of previous violations. (Site specific, e.g. not state agencies in general.) The evaluation of an employer's history shall be based on whether there have been serious, repeated, or willful violations or a large number of non-serious violations of moderate or high gravity in previous PESH inspections and whether the current inspection shows a continuing poor performance. The 10% reduction in relation to history of previous violations shall be given when:

- C. 6. e. (3) (a) No previous PESH inspections and no PESH consultation visits have been conducted.
- C. 6. e. (3) (b) There has been previous PESH inspection resulting in violations, or consultation activity and there are:
 - C. 6. e. (3) (b) 1 No new serious violations of moderate or high gravity;
 - C. 6. e. (3) (b) 2 No willful violations and no repeated violations of a serious nature; or
 - C. 6. e. (3) (b) 3 Few serious violations of low gravity or repeated violations of a non-serious nature and few non-serious violations of a moderate or high gravity.
- C. 6. e. (3) (c) Otherwise, there is no reduction allowed.
- C. 6. e. (4) Total Penalty Adjustment Factor. The total reduction will normally be the sum of the reductions for each of the adjustment factors. For serious violations of high gravity the combined rate of penalty reduction for size, good faith, and history of previous violations shall be limited. Where the GB quotient for a specific, high-gravity, serious violation is as follows, the maximum penalty reduction for all adjustment factors combined shall be lowered as indicated in the following chart:

GB Quotient	Maximum Penalty Reduction
8	20%
9	10%
10	0%

- C. 7. Imminent Danger Situations. Detailed instructions and procedures for handling allegations of imminent danger situations are contained in Chapter VII. Penalties shall be assessed in accordance with the following:
 - C. 7. a. Classification. An imminent danger situation normally will involve a serious, willful or repeated violation.
 - C. 7. b. Proposed Penalties. The procedures given in this chapter for calculating and assessing proposed penalties shall be applied in the case of imminent danger situations, as appropriate. (NOT APPLICABLE TO FTAs)

- C. 8. Violations of Record keeping and Posting Requirements. Violations for record keeping and posting will fall under the same procedures for non-serious violations as previously described, using only those factors that would be applicable.
- C. 9. Criminal Penalties. Article 5, Section 63.3 of the Executive Law gives the Attorney General's office the authority to investigate and prosecute an employer who has been found to commit a criminal offense. The Program Manager will evaluate the case file for possible criminal/willful violations and then send the case to the Attorney General's office. If the Attorney General's investigation reveals criminal offenses, he shall prosecute the employer under the relevant sections of the penal law, which establishes penalties for particular crimes.
- C. 10. Handling Monies Received from Employers.
- C. 10. a. Responsibility of Supervisors. It is the responsibility of the District Supervisor to inform the employer of the PESH penalty policy at the time of the initial Notice of Violation and Order to Comply is issued. A SH Form 918 will be mailed with each citation for this purpose. It is also the responsibility of the District Supervisor to inform employers of all penalties assessed at the time the Failure to Abate Notice is issued and to send updated penalty assessments to employers on a quarterly basis. The SH 919 will be used for this purpose. When violations are verified corrected and a stop date(s) is determined, the District Supervisor will inform the employer of the final penalty amount using the SH Form 919.1.
- C. 10. b. Receiving Payments.
- C. 10. b. (1) The SH 919 and 919.1 instruct the employer to make all checks payable to the Commissioner of Labor, to write the Case Reference No. (which appears on the SH 919 and 919.1) on their check and to mail their check to the Program Manager's office in Albany, New York.
- C. 10. b. (2) The Program Manager's office is responsible for preparing all monies received for forwarding to the Accounting office using the SH 920 "Abstract for PESH Penalties" form. A copy of the Abstract will be mailed to the District Office for inclusion in the case file. The District Supervisor will ensure that all office records are updated and the case file is closed.

Operation of PESH Penalty Database. [A94-2, A94-3]

The database utilizes the mainframe computer which will allow electronic transfer of information from the Program Manager's office to the District offices. It will also provide a centralized database of information from which reports can be generated for statistical and tracking purposes. The information in this database is updated regularly and is available for OSHA monitoring purposes.

- D. 1. Signing on to the System. To sign on to the PESH Penalty System, do the following:
 - D. 1. a. Press the PAUSE key (or CLEAR key on some keyboards).

- D. 1. b. Press the PAUSE key again.
- D. 1. c. Type in the following, "pcss/pppp", where "pppp" is the four character printer identifier of the local printer you wish to use for the system's print function.
- D. 1. d. Press the ENTER key.
- D. 1. e. The screen that you receive should be the PESH PENALTY CALCULATION SUB-SYSTEM MAIN MENU.
- D. 2. Adding a New Inspection Record. When a Failure to Abate (NYPESH-2B) is to be issued, a penalty assessment must be initiated. All penalty bills will be generated from the DOL mainframe beginning with the initial bill which will be generated the day following the entry of a new record onto the system. The following steps will be taken to add a new record:
 - D. 2. a. Press PF10 to obtain a blank Penalty calculation screen, make appropriate entries and press PF10 to ADD.
 - D. 2. b. There are two possible results for a successful ADD. They are:
 - D. 2. b. (1) If the FEIN number matches an Establishment in the Billing Establishment File, the following message is displayed: "RECORD PROCESSED, BILLING ADDRESS ON FILE". The operator should Press PF6 to check the accuracy of the name and address of the Billing Establishment and then go to D.2.c.below.
 - D. 2. b. (2) If the FEIN number does not match an existing Billing Establishment record, the following message is displayed: "BILLING ADDRESS NOT ON FILE, PF7: ADD TO BILLING, PF2: SEARCH BILLING". The operator may wish to search the database to determine if there is an FEIN number on record for that establishment. A search will ensure that the operator has not mistakenly entered a wrong digit in the FEIN being added. If so, the operator can return to the Penalty Calculation Screen and correct the FEIN number and then go to D.2.c. below.
 - D. 2. c. Press PF11 to access the Violation Screen. A separate screen is used for each violation that is being assessed a penalty. Enter the appropriate information and press PF10 to ADD. Press PF10 to obtain another violation screen and continue.
 - D. 2. d. When a new inspection penalty record is added, the system is triggered to generate a new bill the next day. Two copies of the bill will be delivered to the Program Manager's office and mailed to the appropriate District office for mailing to the employer and case file. THE FAILURE TO ABATE NOTICE MUST NOT BE MAILED TO THE EMPLOYER UNTIL ACCOMPANIED BY THE PENALTY BILL. ALL FAILURE TO ABATE NOTICES AND INITIAL BILLS MUST BE SENT BY CERTIFIED MAIL, RETURN RECEIPT.
- D. 3. To Update an Inspection Record. When a final follow-up inspection has been conducted and all violations complied, the penalty inspection record will be updated by taking the following steps:

- D. 3. a. From the Sub-System Main Menu, enter the Inspection Number and press ENTER. The Penalty Calculation Screen for that inspection record will appear.
- D. 3. b. Press PF11 to branch to the violation file for that record. If more than one violation record exists for this record, the last Violation Screen will be displayed. Enter the END DATE (stop date from the SH 911) for each violation record. Press CONTROL to UPDATE. Press PF2 to go to the next previous violation screen and continue entering END DATE.
- D. 3. c. When an END DATE is entered for every violation, the system will generate a Final Bill the next day. Two copies of the bill will be delivered to the Program Manager's office. Two copies will be mailed to the appropriate District office for mailing to the employer and for the case file. ALL FINAL BILLS MUST BE SENT CERTIFIED MAIL.
- D. 3. d. Steps a. and b. above may be followed to make other changes or corrections to the record as needed, such as when some of the violations have been corrected but not all, or when entering payment received.
- D. 4. Closed Cases. Once the employer has paid his penalty or adjusted amount in full, the Program Manager's office will enter the PAYMENT and DATE on the Penalty Calculation Screen and the case will be automatically closed on the system. The record will not be deleted so that the information can be maintained for historical purposes.
- D. 5. To Print a Screen. Press PF3 to print the Penalty Calculation Screen, the Violation Screen, or the Billing Establishment Screen.
- D. 6. To Sign Off the System. Press the PAUSE key (or CLEAR on some keyboards).
- D. 7. To Return to the Main Menu. Press PF 12.
- D. 8. Definitions of Fields on Penalty Calculation Screen.
- D. 8. a. District: Enter last two digits of District Office.
- D. 8. b. Current Balance: System will enter automatically. It is the amount owed as of the current date, based on the total assessment, minus all payments to date or the adjusted amount, minus all payments to date.
- D. 8. c. Inspection No.: Inspection Number from the original NYPESH-1.
- D. 8. d. Status: C - closed, I - inactive, A - active, R - revised bill. The system will make this entry, PESH can also enter R status.

"A" means the case is active; that is, a penalty has been assessed. A final bill may or may not have been issued as yet. The case remains active until the final bill or settlement amount has been paid in full (the payment

figure equals the total assessment or adjusted amount).

"C" means the case is closed; that is, all penalties have been paid (current balance becomes \$0). The record will remain on the system for historical data collection purposes.

"I" means the case is inactive; that is, there is a penalty assessment that has been temporarily suspended due to a alternative compliance agreement petition. Cases will only reflect this status when this entry is made by the system due to entries made in the alternative compliance agreement fields.

"R" means that the system will generate a Revised Final Bill the following day. The District Office can make this entry or the system will automatically make this entry anytime a Final Bill had been issued and subsequent changes/deletions are made to the Violation Screen. After the Revised Bill is generated, the system will change the status back to "A".

- D. 8. e. FEIN: Enter Federal Employer Identification Number.
- D. 8. f. SIC/NAICS: Enter Standard Industrial Classification Code.
- D. 8. g. Estab. Site: Enter establishment name, including specific department or subdivision from the NYPESH-1, Item 8.
- D. 8. h. Address: Enter establishment inspection site from the NYPESH-1, Item 10.
Example: DPW Garage, City of Allenville, 42 Side St., Allenville, NY 14892.
- D. 8. i. Jurisdiction: Enter "S" for State government, "L" for Local government.
- D. 8. j. Initial Bill Date: System will enter automatically. This is the date the penalty record is first added.
- D. 8. k. Comply Date: System will enter automatically. It is entered when all the END DATES are filled in and is the latest END DATE from the Violation Screen.
- D. 8. l. Final Bill Date: The system will enter this automatically. It is the date that the system generates a Final Bill (the day following the comply date).
- D. 8. m. Payment History: Program Manager's office will enter payments. The total amount of each check received for a specific Inspection Number will be entered here.
- D. 9. Referral to Counsel.
- D. 9. a. Collection: Enter "Y" when case is referred for collection.

- D. 9. a. (1) Date: Enter date case referred for collection.
- D. 9. b. Appeal: Program Manager's office will enter "Y" when case appealed.
- D. 9. b. (1) Date: Program Manager's office will enter date appeal filed.
- D. 9. c. Adjustment Amount: Enter total penalty employer is required to pay as a result of action by Counsel or the IBA (usually entered by Program Manager's office).
- D. 9. d. Enforcement Halt: Enter "Y" when penalty assessment temporarily stopped due to permanent variance filed.
- D. 9. d. (1) Date: Enter date enforcement is halted.
- D. 9. e. Notes: Any other comments can be included here.
- D. 9. f. PRESS PF10 TO ADD.
- D. 9. g. NOTE: If fields are not entered, or entered incorrectly, the system will display a message and position the cursor.
- D. 10. Definitions of Fields on Billing Establishment Screen.
- D. 10. a. FEIN: System will enter establishment FEIN number.
- D. 10. b. Establishment: Enter establishment name from the NYPESH-1, Item 13; DO NOT include any departments, subdivisions, etc. of the employer. EXAMPLE: Mayor, City of Allenville, 112 Main St., Allenville, NY 14892
- D. 10. c. Address: Enter title and address for the person responsible for that government entity, in accordance with current PESH policy. Do not enter the name of the responsible person, only the title, from the NYPESH-1, Item 13.
- D. 10. d. Press PF7 to ADD.
- D. 10. e. NOTE: The Billing Establishment Record is the title and address of the public employer who receives all citations, FTAs and penalty bills. There is only one billing establishment record for each public employer, just as there is only one FEIN number for each public employer. Once a record is established, it can be branched to any inspection with that identical FEIN number. The correct billing establishment record must be entered, in accordance with current PESH guidelines for service of all legal documents on the responsible person for that entity.
- D. 11. Definitions of Fields on Violation Screen.

- D. 11. a. Inspection No.: System will enter automatically from Penalty Calculation Screen.
- D. 11. b. Violation No.: System will enter automatically from Penalty Calculation Screen.
- D. 11. c. Establishment: System will enter automatically from Penalty Calculation Screen.
- D. 11. d. Violation: Enter the violation code number; e.g. 1910.1200(g)(1).
- D. 11. e. Start Date: Enter the start date from the SH 911.
- D. 11. f. End Date: Enter the violation stop date from the final follow-up report and SH 911.
- D. 11. g. No. of Days: System will enter automatically.
- D. 11. h. Daily Amt.: Enter the per day penalty in whole dollars (do not use commas).
- D. 11. i. Amount Assessed: System will calculate automatically.
- D. 11. j. Alternative Compliance Agreement: Enter "Y" when an alternative compliance agreement has been filed. The system will default to "N" unless the operator changes the field to a "Y". A "Y" entry will require an END DATE be entered, which will stop the penalty assessment (see D.10. of this chapter.). The END DATE will be the date the alternative compliance agreement petition was filed. If a "Y" is entered by mistake, the record must be deleted and a new record created.
- D. 11. k. PRESS PF10 TO ADD.
- D. 12. Billing Process.
- D. 12. a. Initial Billing. The initial bill will be generated by the mainframe computer on the night the inspection record is created. Two copies of the bill will be delivered to the Program Manager's office the next day. The Program Manager's office will immediately mail two copies of the bill to the appropriate District office. The District office will mail out the bill with the NYPESH-2B, FTA notice and any other appropriate materials. THIS MAILING MUST BE CERTIFIED, RETURN RECEIPT.
- D. 12. b. Quarterly Billing. The mainframe will generate a bill for each active inspection record on the system at the end of every quarter. Two copies of each bill will be delivered to the Program Manager's office. From there two copies of each bill will be distributed to the appropriate District office for mailing. The District should make any additional copies as appropriate. Interim bills are not sent by certified mail.
- D. 12. c. Final Billing. The system will generate a final bill when the comply date on the penalty calculation screen is entered by the system. Two copies of the final bill will be delivered to the Program Manager's office the next day. Two copies of the bill will be sent to the District office for mailing. Mailing the bill by certified mail from the District office will

provide a method of assuring that the information has been properly entered and a final bill issued for that case.

Revised final bills may be issued by updating the violation record, START DATE, END DATE or DAILY ASSESSMENT fields. Anytime changes are made to the violation screen (including deletions of violations), the system will enter a status of "R" on the Penalty Calculation Screen and a Revised Final Bill will be generated the following day. The system will then change the status back to "A".

If for any reason the District office wants a Revised Final Bill without having made the specific changes described above, they may enter a status of "R" on the Penalty Calculation Screen and the system will generate the bill the following day and then change the status back to "A".

- D. 12. d. Special Instructions for Alternative Compliance Agreement. When a penalty has begun for a violation and the employer subsequently files for a alternative compliance agreement, the penalty assessment process must be temporarily halted. (See Chapter VI. B. 1- 3). By entering "Y" in the ALTERNATIVE COMPLIANCE AGREEMENT field on the Violation Screen, the system will know not to assess additional penalties for that violation only. On the Penalty Calculation Screen, an entry must be also made in the fields ENFORCEMENT HALT and DATE. Quarterly bills will continue if there are other violation records in the system for that inspection number. The system will automatically enter "I" in the status field on the Penalty Calculation Screen.

When an alternative compliance agreement decision has been issued, an additional penalty may be owed (See Chapter VI-2). In order to assess additional penalties, a new violation record has to be created for that violation, under the original inspection record.
- D. 12. e. Payment. The Program Manager's office will enter all payments received. When payment equals the current balance, the case automatically becomes closed and a "C" will appear in Status. A copy of the check abstract will be mailed to the District office for inclusion in the case file.
- D. 12. f. Collection Warning Letter. This procedure has been rescinded. [SA94-2] Cases will be referred for collection if the employer has not paid his penalty within 60 days of the issuance of the final bill, unless the penalty has been appealed to the IBA.
- D. 12. g. Tracking Reports. All DPIS reports will be delivered to the Program Manager's office for distribution.
- D. 12. g. (1) Supervisor's Report. A weekly report of all active cases where the final bill was issued greater than 65 days and there is no entry for COLLECTION under the REFERRAL TO COUNSEL area of the Penalty Calculation Screen. The Supervisor will use this report to identify cases that should now be referred for collection. The appropriate entries will be made on the Penalty Calculation Screen by the District office at the time of referral.
- D. 12. g. (2) Program Manager's Report. A monthly report of all cases where the final bill was

issued greater than 95 days and there is no entry for COLLECTION under the REFERRAL TO COUNSEL area of the Penalty Calculation Screen. The Program Manager will use this report to identify cases where the District office is delinquent in processing for collection.

Debt Collection Procedures.

- E. 1. Time Allowed for Payment of Penalties. The date when penalties become due and payable depends on whether or not the employer appeals to the Industrial Board of Appeals.(IBA)
- E. 1. a. Penalties Not Appealed. When the penalty is not appealed, all payments are due and payable 60 calendar days following issuance of the Final Bill (SH 919.1).
- E. 1. b. Penalties Appealed. When the penalty is appealed, the date penalties are due and payable will depend upon the settlement reached by Counsel's office or the decision issued by the Industrial Board of Appeals. NOTE: The Program Manager will notify the District Supervisor of all cases where the penalty is appealed. The Supervisor will take no further action regarding penalty payment until notified by the Program Manager.
- E. 2. Enforcement Proceedings. If payment is not received within 60 days, the Supervisor will refer the case to the Program Manager for legal action and update the penalty spreadsheet to reflect enforcement proceedings initiated.
- E. 2. a. A transmittal memo (Form Letter B) will be sent with the following case file documents to the Program Manager: (2 copies)
 - Notice of Violation and Order to Comply
 - Failure to Abate Notice
 - Case Contact Sheet
 - Violation Worksheet (front and back)
 - Final Bill (front and back)
 - Narrative reports for inspection and follow-up.
 - Copies of all green certified mail cards, indicating what documents had been mailed with the card(s).
 - Any other pertinent documents such as correspondence to and from the employer.
- NOTE: Any documents that had been previously sent with a referral for prosecution of the violations need not be submitted again, except for the Case Contact Sheet which will have additional entries since the time of the prosecution referral. There should also be additional green cards sent with the collection case.
- E. 2. b. If during the 60 day period the employer contacts the District Supervisor, all technical questions regarding the case shall be answered. If the employer wishes to have his penalty reduced, he shall be instructed that the case will be referred to Counsel and that an attorney will contact them.

- E. 2. c. The Program Manager will refer the case to the Deputy Commissioner for Legal Affairs using a transmittal letter (Form Letter C), after reviewing the case for technical accuracy and completeness. The case will be entered into the PESH/Counsel computerized case tracking system to track all further actions.
- E. 2. d. Counsel's office will assign an attorney to the case who will contact the employer and attempt to obtain payment. A settlement may be negotiated at this time. If a settlement can not be reached nor payment obtained, the case will be referred to the Attorney General's office if it is a local government entity where the Attorney General will litigate the matter. Payment of penalties from State Agencies will be handled through the Division of Budget.
- E. 2. e. The Program Manager will notify the District office of final disposition of the case. Adjustments to the final penalty amount will be recorded in the case file.

PENALTIES CHAPTER VI APPENDIX

The following forms are used for penalty calculation and notifications>

VIOLATION WORKSHEET

VIOLATION WORKSHEET INSTRUCTIONS

PENALTY ASSESSMENT FOR PUBLIC EMPLOYERS

PENALTY ASSESSMENT FOR PUBLIC EMPLOYERS - FINAL BILLING

PENALTY INFORMATION FOR PUBLIC EMPLOYERS

ABSTRACT FOR PESH PENALTIES

COLLECTION TRANSMITTAL LETTER TO PROGRAM MANAGER

COLLECTION TRANSMITTAL LETTER TO COUNSEL

VIOLATION WORKSHEET

ISSUE: () NOTICE () FTA

Page of

1. INSPECTION NUMBER		2. INSP/HYG NO.		3. DISTRICT OFFICE		4. DATE		5. INSTANCES ON PAGE		
6. TYPE OF VIOLATION		7. NOTICE NO.	8. ITEM NO.	9. ON SITE?		10. STANDARD ALLEGEDLY VIOLATED		11. NO. EXPOSED	12 NO. INSTANCES	13 REC
14. ABATEMENT PERIOD		SAVE MANUAL __G __C __M				SAVE ID (pg/item)				

17. AVD/Variable Information

18. GRAVITY BASED RATING

S A F E T Y		a. No. Employees	b. Frequency of Exposure	c. Proximity to Danger	d. Stress Factor	e. No. of Instances	f. Other Factors	g. Total	h. Prob Q	i. Severity Q	j. Willful/Repeat Q
	RATING										

H E A L T H		a. No. Employees	b. Duration of Exposure	c. Other PPE	d. Medical Surveillance	e. No. of Instances	f. Other Factors	g. Total	h. Prob Q	i. Severity Q	j. Willful/Repeat Q
	RATING										

19. PENALTY

a. Gravity Based Quotient	b. Gravity Based Penalty	c. Adjustment Factors				d. Proposed Adjusted Penalty Per Day	e. Date Penalty Starts
		1) Size	2) Good Faith	3) History	4) Total		

20 RATING EXPLANATION

PROBABILITY		RATING	RATIONALE
No. of Employees			
EXP	Frequency		
	Duration		
Proximity to Danger			
PPE			
Stress Factors			
Medical Surveillance			
No. of Instances			
Other Factors			
TOTAL			
Prob Q			
Sev Q			
Willful/Repeat Q			
TOTAL			
___ / 3 ___			
REDUCTION FACTORS			
Size			
Good Faith			
History			
TOTAL REDUCTION PERCENTAGE (SUM)			

21. VIOLATION DESCRIPTION

Briefly record any pertinent information related to the violation, the reason why the employer did not comply on the follow-up, etc.

Department
of
Labor

Division of Safety and Health
Public Employee Safety and Health Bureau
Forms
Violation Worksheet

5999:SH-911
4-27-93

PURPOSE: To provide (a) Inspectors and/or Hygienists with a means to organize or consolidate their findings related to violations found in the course of an inspection, and (b) the clerical staff with documentation needed to prepare a Notice of Violation or Failure to Abate Notice.

PREPARATION: By Inspector or Hygienist - original only for each standard violated (A single Worksheet may be used if the documentation for several instances of the same standard or for multiple standard is essentially the same.)

NOTE: Whenever used, the term Inspector refers to either an Inspector or Hygienist.

ENTRIES:

NOTE: Any reference in these instructions to the Field Operations Manual (FOM) include the Insert/Addendum to the FOM prepared by the PESH Bureau.

A. ISSUE - appropriate box is checked to indicate whether a "Notice of Violation and Order to Comply" (issued after an initial inspection or for additional violations found on a subsequent inspection) or a "Failure to Abate an Alleged Violation" (issued after the first follow-up inspection only)

NOTE: A checkmark, IN RED, should be used to indicate a FTA Notice.

B. PAGE ___ of ___ - the number of this page in the series, and the total number of pages in the series.

1. INSPECTION NUMBER - the preprinted number assigned to this inspection taken from the "Inspection Report" form.

2. INSP./HYG. NO. - identification number assigned to the inspector preparing the Worksheet.

3. DISTRICT OFFICE - the name of the district office in which the establishment being inspected is located.

4. DATE - month, date and year (expressed numerically) the Worksheet is prepared.

5. INSTANCES ON PAGE - the total number of instances of a standard found to be in violation, listed as follows:

SINGLE INSTANCE - place a slash mark (/) in this item.

SEVERAL INSTANCES - enter a letter or letters, starting with "a" and continuing alphabetically, to identify the total number of instances a violation is found at the establishment; for example, 5 instances would be written "a-e"; place a slash mark (/) after the last instance of the violation, i.e., "a-e/".

NOTE: This item is used to show all locations where the violation exists, regardless of the number of pages it takes to list these locations. **This item is completed on the first page and left blank on subsequent pages.**

6. TYPE OF VIOLATION - the alphabetical designation for the type of violation being reported is to be taken from the following list:

S for Serious W for Willful N for Non-serious R for Repeat

7. NOTICE NUMBER - a notice number is assigned for each type of violation found during an inspection using the following priority numbering system:

- a. Serious
- b. Willful
- c. Repeat
- d. Non-serious

NOTE: If one of the above types of violation is not found at an establishment, that violation type is deleted from the numbering system and the remaining violation types move up in the priority numbering system. That is, if a Notice of Violation is to be issued for serious and non-serious orders only, the notice with the serious orders would be numbered 1 and the notice with the non-serious orders would be numbered 2; if only non-serious orders are to be issued, the first three types are deleted from the numbering system, and the notice would be numbered 1.

8. ITEM NUMBER - starting with the number A1", sequentially number each violation (in ascending numerical order of the standards violated)

9. ON - SITE? - mark "X" in this box if the violation documented on this form was included in a citation issued to the employer on site.

10. STANDARD ALLEGEDLY VIOLATED - orders issued to remove violations of the labor law, standards or rules and regulations of the Commissioner shall be designated as follows and in the order shown:

For violations of the standards - 29 CFR, part (i.e., A1910", A1915", A1917", A1918", A1926", and A1928"), followed by the section, paragraph, subparagraph and subdivision where applicable. The paragraph, subparagraph, and subdivision of the standard should be enclosed in parentheses, e.g., 29 CFR 1910.217(b)(4)(ii);

For Title 12, Official Compilation of Codes, Rules and Regulations of the State of New York (except Code Rules - see NOTE below) - 12 NYCRR followed by the part number and subdivision; e.g., 12 NYCRR 801.2; and

For labor law violations – "Sec." followed by the section number and subdivision, e.g., Sec 27-a (3)(a) (1)

NOTE: Code Rules or other recognized standards may be used to support the existence of a "recognized hazard", however, the order must be written under Labor Law Section 27-a, subdivision 3a (1), the general duty clause. All orders issued under the general duty clause must be approved by the Program Manager before issuance.

11. NO. EXPOSED - total number of employees exposed to the hazard covered by the violation in all locations where the violation is found (this item is completed on the first page and a slash mark entered on subsequent pages); avoid double-counting of employees, where possible.

NOTE: **For Regulatory Violations** - such as posting or record keeping, list the total number of employees in the establishment.

For Hygiene Inspections - if the original number of employees estimated to be potentially overexposed has changed since sampling results were obtained, enter the current estimate on the Worksheet.

12. NO. INSTANCES - total number of instances, by type of violation, for each standard violated.

NOTE: This number represents ALL SOURCES of exposure to the hazard. That is, if a machine guarding order is written for 5 out of 8 table saws, the total number of instances is 5. Identifying information on the specific saws (e.g., location, serial#, brand name, etc.) must be listed in the AVD/Variable Information item.

13. REC (Related Event Code) - an appropriate code is entered if any instance of this violation is due to an event shown on the list below; if there is no related event, draw a slash in this box; if more than one code applies, use only the one most important code from the priority order listed below:

- I ' related to an imminent danger
- A ' related to an accident, fatality, or catastrophe
- C ' related to a complaint
- R ' related to a referral
- V ' related to a variance

14. ABATEMENT PERIOD - the period of time given to abate the violation; if a multi-step violation is to be issued, list the final abatement date ONLY in this item.

15. SAVE MANUAL - (Standard Alleged Violation Elements) - mark an "X" in the applicable box to indicate in which manual the appropriate SAVE is found; that is: G ' General Industry (includes regulatory SAVES), C ' Construction, M ' Maritime, "N/A", if no SAVE exists for the standard being cited.

NOTE: Detailed instructions related to SAVES are given in Chapter V Appendix of the Field Operations Manual (FOM)

16. SAVE ID (PG/ITEM) - the page and item number which identifies the appropriate SAVE; the item number should be enclosed in a parentheses, e.g., "351 (2)".

17. AVD/VARIABLE INFORMATION -

AVD (Alleged Violation Description) -

NO SAVE EXISTS - provide appropriate text to be used to issue the violation(s) found;

SAVE EXISTS BUT DESCRIPTION REQUIRED - provide specific text which describes the type of hazard found.

NOTE: For fatality/catastrophe investigations or any other "after the fact" investigation, include the date and time of the incident and/or employee exposure in this item.

VARIABLE INFORMATION - summarize and enter the applicable information from the Violation Description item and/or sampling form(s) to provide a description of the variable conditions of this standard and/or instance; if there is more than one instance of the violation, precede each instance description with an identifying letter beginning with "a" and continuing alphabetically. Examples for various types of entries are given in the FOM.

18. GRAVITY BASED RATING - This item is completed only if violations remain unabated after a follow-up inspection.

Assign an appropriate numerical value(s), determined in accordance with the FOM, for all applicable factors (i.e., a - f); if it is not obvious from the field documentation why a factor/value is selected, note the reason for such selection in the "Rationale" section of the "Rating Explanation" item.

- a. NUMBER OF EMPLOYEES - the total number of employees exposed to the violation/instance.
- b. FREQUENCY OF EXPOSURE - (Safety Only) - a value which indicates the frequency of employee exposure to the hazard described in this violation/instance; can be used for health violations not supported by sampling (reference Chapter VI of the FOM)

DURATION OF EXPOSURE - (Health Only) - a value which indicates the duration of employee exposure to the hazard described in this violation/instance.

- c. PROXIMITY TO DANGER - (Safety Only) - a value which indicates the proximity of the exposed employee(s) to the hazard described in the violation/instance; can be used for health violations not supported by sampling (reference Chapter VI of the FOM).

OTHER PPE - (Health Only) - the value which indicates the extent to which personal protective equipment is used.

- d. STRESS FACTORS - (Safety Only) - a value which indicates the working conditions which may influence the likelihood of an accident resulting in an injury: can be used for health violations not supported by sampling (reference Chapter VI of the FOM).

MEDICAL SURVEILLANCE - (Health Only) - a value which indicates the evaluation of the medical surveillance program.

- e. NUMBER OF INSTANCES - a value which indicates the number of instances of the violation.
 - f. OTHER FACTORS - a value which indicates other factors which may significantly affect the probability of an illness.
 - g. TOTAL - the total of all values entered in sections A-F.
 - h. PROBABILITY QUOTIENT - divide the total given in section AG" by the number of entries listed in sections A-F and enter the quotient in this section - disregard fractions.
 - i. SEVERITY QUOTIENT - the value which represents the severity of the injury or illness which could result from the violation/instance on this Worksheet.
 - j. WILLFUL/REPEAT QUOTIENT - a value which represents the willful or repeat factor, if any
19. PENALTY - This item is completed only if violations remain unabated after a follow-up inspection.

NOTE: It will be necessary for you to reference Chapter VI of the FOM and the Inserts/Addendum prepared by the PESH Bureau in order to complete some of the entries in this item.

- a. GRAVITY BASED QUOTIENT - a value which is determined by adding the entries listed in 18 H (Probability Quotient), and 18 I (Severity Quotient), and 18 J (Willful/Repeat Quotient) if any, then, divide the total by three.
- b. GRAVITY BASED PENALTY - a value taken from either Table A (for serious violations) or Table B (for non-serious violations) in the FOM.
- c. ADJUSTMENT FACTORS - determine the rate of penalty reduction(s) according to the guidelines in the FOM.
 - i. SIZE - the rate of penalty reduction based on an employer's "size of business".
 - ii. GOOD FAITH - the rate of penalty reduction based on an "employer's good faith".
 - iii. HISTORY - the rate of penalty reduction based on an "employer's history of previous violations".
 - iv. TOTAL - total amount by which the penalty rate will be reduced which is determined by adding all entries listed in c.1 -c.3
- d. PROPOSED ADJUSTED PENALTY PER DAY - the proposed adjusted penalty taken from the appropriate penalty table in the FOM.
- e. DATE PENALTY STARTS - the first calendar day following the abatement date for this violation.

20. RATING EXPLANATION -

Probability - no entry required since column is a listing of the categories shown in item 18 A - J.

Rating - copy all entries shown in item 18;

- a. TOTAL - add the values shown in Prob. Q, Sev. Q and Willful/Rep. Q, if any, and place this value in the box.
- b. Division Sign - enter a three before the division sign when a value is listed in Prob. Q, Sev. Q and Willful/Rep. Q.
- c. Blank Box - the value determined by dividing the total given in (a) above by the number entered before the division sign in (b) above.

Rationale - briefly explain (in the space provided for each category) all factors related to the assessment of a penalty, the reason a rating was given, etc.

21. VIOLATION DESCRIPTION - briefly record the specific details of a violation(s), why a violation remains uncomplied, and any other pertinent information which has a bearing on the violation(s)/inspection.

DISPOSITION

Original only - forward along with all related case documents to the Supervisor for review prior to being sent to the clerical staff for typing of the Notice of Violation or Failure to Abate Notice.



**STATE OF NEW YORK - DEPARTMENT OF LABOR
DIVISION OF SAFETY AND HEALTH
PUBLIC EMPLOYEE SAFETY AND HEALTH BUREAU**

**NOTICE TO COMPLY WITH SECTION 27-a
OF THE NEW YORK STATE LABOR LAW**

Date:
Reference Number:

TO EMPLOYER:

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PENALTY ASSESSMENT FOR PUBLIC EMPLOYERS

A follow-up inspection by staff of the PESH Bureau has disclosed that violations issued on a "Notice of Violation and Order to Comply" (NYPESH-2) were not complied by the abatement date listed on the Notice.

THEREFORE, A PENALTY AMOUNT IS ASSESSED for each uncomplied violation listed on the "Notification of Failure to Abate Violation and Order to Comply" (NYPESH-2B). The PER DAY penalty started as of the day after the abatement day given on the Notice of Violation (NYPESH-2) and will continue to accrue until the violation is complied. All complied violations must be verified by the PESH Bureau.

Penalty this period	\$
Penalties owed previous period	\$
Payments received to date	\$
Total Penalties owed to date	\$

The specific violations and daily assessments on which this total penalty is based are set forth on the reverse of this notice. Payments made to date are reflected in the computation above.

In payment of the penalty assessed, please proceed as follows:

- X prepare a certified check or money order, made payable to the Commissioner of Labor; (Note: State Agencies may submit a Journal Voucher.)
- X write the **REFERENCE NUMBER** shown above on the check or money order to insure that the penalty payment is credited to the correct inspection;
- X submit the penalty payment to the following address:

NYS DEPARTMENT OF LABOR
Division of Safety and Health
Public Employee Safety and Health Bureau
State Office Campus - Building 12 - Room 158
Albany, NY 12240

An Order to Comply and Final Billing will be issued after all violations have been corrected and will reflect the total penalty amount due and owing.

SH 919

APPEAL PROCESS - In accordance with appeal instructions set forth on the previously served Notice of Violation and Order to Comply, appeal of the underlying violations which are the basis of the penalties set forth above, must have been taken within 60 days of the issuance of the Notice of Violation and Order to Comply. Issues relating to the amount of the daily penalty or the length of time during which violations remain unabated will be appealable within 60 days of the issuance of the Order to Comply and Final Billing which will be mailed to you following confirmation by the Department of Labor of the abatement of all outstanding violations.

PLEASE KEEP IN MIND THAT THE PENALTY ASSESSED FOR EACH VIOLATION WILL ACCUMULATE ON A DAILY BASIS UNTIL EACH VIOLATION IS COMPLIED AND SUCH COMPLIANCE IS VERIFIED BY PESH STAFF. THE NEXT BILL WILL NOT BE ISSUED UNTIL THE BEGINNING OF THE NEXT QUARTER.

FOR THE COMMISSIONER OF LABOR

Deputy Commissioner of Labor
Worker Protection

By:



**STATE OF NEW YORK - DEPARTMENT OF LABOR
DIVISION OF SAFETY AND HEALTH
PUBLIC EMPLOYEE SAFETY AND HEALTH BUREAU**

**NOTICE TO COMPLY WITH SECTION 27-a
OF THE NEW YORK STATE LABOR LAW**

Date:
Reference Number:

TO EMPLOYER:

[] _____

FINAL BILLING

[] _____

PENALTY ASSESSMENT FOR PUBLIC EMPLOYERS

A follow-up inspection by staff of the PESH Bureau has disclosed that violations issued on a "Notice of Violation and Order to Comply" (NYPESH-2) were not complied by the abatement date listed on the Notice.

THEREFORE, A PENALTY AMOUNT WAS ASSESSED for each uncomplied violation listed on the "Notification of Failure to Abate Violation and Order to Comply" (NYPESH-2B). The PER DAY penalty started as of the day after the abatement day given on the Notice of Violation (NYPESH-2) and continued to accrue until the violation was complied and verified by the PESH Bureau. The specific violations and daily assessments on which this total penalty is based are set forth on the reverse of this notice. Payments made to date are reflected in the computation below. This represents the final total of all penalties owed with regard to this inspection.

Penalty this period	\$
Penalties owed previous period	\$
Payments received to date	\$
Total Penalties owed to date	\$

THEREFORE IT IS ORDERED that the employer must comply with the provisions of the Labor Law by remitting to the Commissioner of Labor the total sum as indicated above, and it is further

ORDERED that this Order, issued after all violations have been corrected, reflects the total penalty amount due and owing and in the event it is not paid within 60 days following the service of this Order upon the employer, and no petition has been filed by the employer with the for review of this determination, said Order may be filed with the County Clerk where the employer resides or has a place of business, and the Clerk shall without further notice enter judgement pursuant to S27-a(6)(d) of the New York State Labor Law in the total amount indicated above with the stated rate of interest from the date thereof until payment.

SH 919.1

In payment of the penalty assessed, please proceed as follows:

- X prepare a certified check or money order, made payable to the Commissioner of Labor; (Note: State Agencies may submit a Journal Voucher.)
- X write the **REFERENCE NUMBER** shown above on the check or money order to insure that the penalty payment is credited to the correct inspection;
- X submit the penalty payment to the following address:

NYS DEPARTMENT OF LABOR
Division of Safety and Health
Public Employee Safety and Health Bureau
State Office Campus - Building 12 - Room 158
Albany, NY 12240

If you are aggrieved by this Order you may appeal within 60 days from the date issued, to the Industrial Board of Appeals as provided by Section 101 of the Labor Law. Your appeal should be addressed to the Industrial Board of Appeals, State Office Campus, Building 12 Room 116, Albany, NY 12240, as prescribed by its Rules of Procedure, a copy of which may be obtained upon request to the Board.

FOR THE COMMISSIONER OF LABOR

By:
Deputy Commissioner of Labor
Worker Protection

STATE OF NEW YORK - DEPARTMENT OF LABOR
DIVISION OF SAFETY AND HEALTH
PUBLIC EMPLOYEE SAFETY AND HEALTH BUREAU



PENALTY INFORMATION FOR PUBLIC EMPLOYERS

Effective immediately, any violation listed on a "Notice of Violation and Order to Comply" (NYPESH-2) which is not complied by the abatement date given on the Notice is subject to a PER DAY penalty assessment.

The penalty amount will be assessed as follows:

<u>TYPE OF VIOLATION</u>	<u>PENALTY AMOUNT</u>
Non-serious	Up to \$50.00 PER DAY
Serious	Up to \$200.00 PER DAY

At the time of the follow-up inspection, any violation(s) which is uncomplied will be assessed a penalty amount. The exact amount of the penalty for each violation will be listed on the "Notification of Failure to Abate Violation" (NYPESH-2B) issued after the follow-up inspection. The daily penalty will start the day after the abatement date given on the Notice of Violation (NYPESH-2) and continue to accrue until the violation(s) is complied and such compliance is verified by the PESH Bureau. The district office which issued the Notice should be notified, in writing, when violations have been complied.

In addition to the ongoing penalty assessment, the Commissioner of Labor will take formal action in accordance with the provisions of the Labor Law for all violations which are uncomplied by the Date of Final Inspection (item 15) listed on the Failure to Abate Notice (NYPESH-2B).

SH-918(7-90)

ABSTRACT FOR PESH PENALTIES

TO: Administrative Finance Bureau, Albany

FROM: PESH Bureau, Albany

Abstract Check #	Check Amount	Date Received	Case Reference #	Establishment Name	Check #/ Money Ord #	Check/Money Order Date

CENTRAL OFFICE:

Total Number of Checks: _____

Total Amount of Remittance: _____

Recorded by: _____
Signature

Date: _____

ACCOUNTING OFFICE:

Total Number of Checks: _____

Total Amount of Remittance: _____

Recorded by: _____
Signature

Date: _____

INTER-OFFICE MEMORANDUM

[DATE]

TO: Program Manager **OFFICE:** Albany

FROM: **OFFICE:**

SUBJECT: Judicial Process - Penalty Collection

CASE REFERENCE NO.:

EMPLOYER: FEIN:

FACILITY: COUNTY:

DATE VIOLATIONS COMPLIED:

DATE OF FINAL BILLING:

TOTAL PENALTIES OWED: \$

CASE PREVIOUSLY REFERRED FOR PROSECUTION: YES NO

IF YES: DATE PREVIOUSLY REFERRED:
AND
ATTORNEY ASSIGNED:

EMPLOYER CONTACTED DISTRICT OFFICE: YES NO

IF YES: DATE OF CONTACT:

NAME AND TITLE OF EMPLOYER:

PHONE NUMBER:

SUMMARY OF CONVERSATION:

CC: Case File

NEW YORK STATE

DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

DATE:

TO: Counsel's Office
Deputy Comm. For Legal Affairs

FROM: PESH Program Manager

SUBJECT: JUDICIAL PROCESS
Penalty Collection

CASE NO.: REF #:

EMPLOYER:

FACILITY:

DATE VIOLATIONS COMPLIED:

DATE OF FINAL BILLING:

TOTAL PENALTIES OWED: \$

CASE PREVIOUSLY REFERRED FOR PROSECUTION: () YES () NO

IF YES: DATE PREVIOUSLY REFERRED:

AND

ATTORNEY ASSIGNED:

CHAPTER VII

IMMINENT DANGER

General.

- A. 1. Definition. Section 27-a(7)(a) of the Act defines imminent danger as ". . . any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this section."
- A. 2. Requirements. The following conditions must be met before a hazard becomes an imminent danger:
 - A. 2. a. Death or serious physical harm must be threatened. Serious physical harm is impairment of the body such as to render the part of the body affected functionally useless or substantially reduced in efficiency. (See Chapter IV, B.1.b.(3)(a)1 for the complete definition and examples.)
 - A. 2. b. For a health hazard there must be a reasonable expectation that toxic substances or other health hazards are present and exposure to them will cause harm to such a degree as to shorten life or cause substantial reduction in physical or mental efficiency even though the resulting harm may not manifest itself immediately.
 - A. 2. c. The threat must be immediate or imminent. The required imminence would be present where it is reasonable to believe that death or serious physical harm could occur within a short time; i.e., before PESH could respond through complaint, referral or programmed inspection procedures.

Pre-inspection Procedures for Handling Imminent Danger Situations.

- B. 1. When an Imminent Danger Report Is Received by the Field. Any allegation of imminent danger received by a PESH office shall be handled in accordance with the following procedures:
 - B. 1. a. The District Supervisor shall immediately determine whether there is a reasonable basis for the allegation and alert the Program Manager and the Department of Labor Counsel to the situation.
 - B. 1. b. If the imminent danger allegation appears to have merit, the District Supervisor shall make an evaluation of the inspection requirements and select a CSHO to conduct the inspection.

- B. 1. c. Imminent danger investigations shall be scheduled the same day that the report is received, if possible, but not later than the employer's next working day after receipt of the report.
- B. 1. d. The inspection of a workplace believed to contain an imminent danger shall be thoroughly planned and expeditiously accomplished in accordance with the procedures given in this chapter.
- B. 1. e. When an immediate inspection as required by B.1.c. cannot be made, the District Supervisor or CSHO shall contact the employer immediately, obtain as many pertinent details as possible concerning the situation and attempt to have any employees affected by imminent danger voluntarily removed. A record of what steps, if any, the employer intends to initiate in order to eliminate the danger shall be attached to the case file. Such notification shall be considered advance notice and shall be handled in accordance with the procedures given in C.2.a. of this chapter and in Chapter III, C.
- B. 2. Technical Considerations. The District Supervisor and the CSHO selected to perform the inspection shall review the known facts and ascertain what technical equipment and personnel may be necessary to conduct the inspection.
- B. 2. a. In highly complex situations, consideration shall be given to use of specialists from State Technical Support Staff, staff from other Districts, Division of Safety and Health staff, staff of the National Institute for Occupational Safety and Health and other governmental agencies, or, if the situation warrants their use, specialists from outside government. Should the decision be made to use experts, the procedures given in Chapter III, B.5. shall be followed.
- B. 2. b. Calibration and testing of equipment to be used shall be currently valid.
- B. 2. c. If samples are required to determine whether there is an imminent danger situation, rapid analysis is essential.
- B. 2. c. (1) The District Supervisor shall make advance arrangements with local reputable laboratories for rapid analysis of samples from suspected imminent danger situations which require immediate action.
- B. 2. c. (2) Where it would be more expeditious, samples should be sent to:
 ALS Environmental
 4388 Glendale Milford Rd.
 Cincinnati, Ohio 45242
- B. 2. c. (3) Registered or certified airmail or other available rapid means of transit shall be used. The laboratory shall be advised by telephone (800-458-1493 or 513-733-5336) or FAX (513-733-5347) of the pertinent shipping or mailing information, including the number of samples, the type of analysis required and the date by which the results are needed.

- B. 2. c. (4) The package or envelope containing the sample(s) shall be marked "URGENT".
- B. 3. Scheduling. Any allegation of imminent danger received by a PESH office, whether written or oral, shall be handled on a highest priority basis. Other commitments, weekends, holidays, leave and other considerations cannot interfere with the expedited and thorough handling of these cases.
- B. 3. a. As indicated in B.1.a. through c, the imminent danger allegation shall be evaluated immediately and, if appropriate, scheduled for investigation as soon as possible. Except in extraordinary circumstances, the inspection shall be conducted no later than the employer's next workday after receipt of the report of imminent danger.
- B. 3. b. When the time necessary to obtain special equipment or technical personnel for inspection would unduly delay the inspection, it may nevertheless be advisable to schedule and conduct a preliminary inspection within the time limits given in the preceding subparagraph. The required equipment and/or personnel can be brought in later.

Inspection.

- C. 1. Scope. Any alleged imminent danger situation brought to the attention of or discovered by the CSHO shall be inspected immediately, whether or not the inspection was initiated in response to an allegation of imminent danger. Additional inspection activity should take place only after resolution of the imminent danger situation. After the imminent danger situation has been resolved, a determination shall be made by the District Supervisor as to what extent the inspection should be expanded based on the guidelines found in Chapter II, F.1.b.
- C. 2. Procedures. Any inspection that involves an imminent danger situation shall be conducted as expeditiously as possible. The opportunity to accompany the CSHO shall be offered to employer and employee representatives unless the imminence of the hazard makes it impractical to delay inspection in order to afford any or all such representatives time to reach the area of the alleged imminent danger. CSHO will interview employer representatives, employee representatives, employees and any other witnesses in accordance with Chapter III to document whether a hazard existed and if corrective action had been taken prior to arrival of the CSHO.
- C. 2. a. Advance Notice. The regulations (Part 802.4) authorize advance notice of an inspection of an apparent imminent danger situation to enable the employer to eliminate the dangerous condition as quickly as possible.
- C. 2. a. (1) Where an immediate inspection cannot be made, the CSHO shall give notice of the impending inspection to the employer after the known facts have been reviewed with the District Supervisor and it has been concluded that advance notice would speed the elimination of the hazard.

- C. 2. a. (2) If advance notice is given to the employer, it shall also be given to the authorized employee representative. If the inspection is in response to a Sec 27-a(5)(a) complaint, advance notice shall also be given to the complainant unless such a procedure will cause a delay in speeding the elimination of the hazard.
- C. 2. b. Refusal to Permit Inspection. If a CSHO is refused entry while attempting to investigate an alleged imminent danger complaint, a warrant shall be obtained as quickly as possible.
- C. 3. Elimination of the Imminent Danger. As soon as it is concluded that conditions or practices exist which constitute an imminent danger, the employer shall be so advised and requested to notify his employees of the danger and remove them from the area of imminent danger. It is the duty of the CSHO at the site of an imminent danger situation to encourage the employer to do whatever is possible to eliminate the danger.
- C. 3. a. Voluntary Elimination of the Imminent Danger. The employer may voluntarily and permanently eliminate the imminent danger as soon as it is pointed out. In such cases, no imminent danger proceeding need be instituted; and, therefore, no UNSAFE Tag, DOSH 415 shall be completed although an appropriate citation shall be issued.
- C. 3. a. (1) What Constitutes Voluntary Elimination. Although there may be instances in which the employer will not be able to eliminate the danger permanently as soon as it is pointed out, the CSHO shall nevertheless consider that voluntary elimination of the danger has been accomplished when the employer:
 - C. 3. a. (1) (a) Has removed employees from the danger area; and
 - C. 3. a. (1) (b) Has given satisfactory assurance that the dangerous condition will have been eliminated before permitting employees to work in the area as evidenced by one of the following:
 - C. 3. a. (1) (b) 1 After removal of employees immediate corrective action is initiated designed to bring the dangerous condition, practice, means or method of operation or process into compliance, which, when completed, would permanently eliminate the dangerous condition; or
 - C. 3. a. (1) (b) 2 The acceptable promise of the employer that:
 - C. 3. a. (1) (b) 2 a Permanent corrective action will be taken as soon as possible, and
 - C. 3. a. (1) (b) 2 b Employees will not be permitted to work in the area of the imminent danger until the condition is permanently corrected; or
 - C. 3. a. (1) (b) 3 The acceptable promise of the employer that:
 - C. 3. a. (1) (b) 3 a Permanent corrective action will be taken as soon as

possible, and

- C. 3. a. (1) (b) 3 b Where personal protective equipment can eliminate the imminent danger, such equipment will be issued and its use enforced until the condition is permanently corrected.

NOTE: A promise from an employer is acceptable only in certain limited instances in which the employer has adequately established credibility in the CSHO's professional judgement.

- C. 3. a. (2) Action Where Voluntary Elimination is Accomplished. If the employer agrees and proceeds to eliminate the imminent danger immediately and permanently as outlined in C.3.a.(1), the CSHO and any other technical support staff present shall advise the employer to the maximum extent possible. However, the employer is ultimately responsible for determining the manner in which the hazardous condition is to be eliminated.

- C. 3. a. (2) (a) If elimination of the imminent danger is achieved voluntarily, the CSHO shall make the appropriate notation on the Inspection Report. Appropriate citation(s) shall be issued regarding the hazard. (See Chapters IV, V.)

- C. 3. a. (2) (b) The CSHO shall inform affected employees or their authorized representative(s) that, although an imminent danger had existed, the CSHO has determined that such danger no longer exists. They shall also be informed of the steps to be taken by the employer to eliminate the dangerous condition.

- C. 3. a. (2) (c) No UNSAFE Tag DOSH 415, shall be prepared and no imminent danger proceedings instituted when voluntary elimination of the imminent danger as outlined in C.3.a.(1) is accomplished.

- C. 3. b. Action Where Voluntary Elimination Is Not Accomplished. If the employer either cannot or does not voluntarily eliminate the hazard as discussed in C.3.a, the following procedures shall be observed:

- C. 3. b. (1) The CSHO shall call the District Supervisor, who shall decide:

- C. 3. b. (1) (a) Whether to contact the Department of Labor Counsel through the Program Manager to obtain a Temporary Restraining Order (TRO) and

- C. 3. b. (1) (b) Whether to post the UNSAFE Tag DOSH 415.

NOTE: The CSHO has no authority either to order the closing down of the operation or to direct employees to leave the area of the imminent danger or the workplace.

- C. 3. b. (2) If it is not feasible to contact the District Supervisor, the CSHO shall contact the Department of Labor Counsel through the Program Manager and shall contact the

District Supervisor as soon as possible thereafter.

- C. 3. b. (3) The Program Manager and the Department of Labor Counsel shall make immediate arrangements for the initiation of court action.
- C. 3. b. (4) The CSHO shall give first priority in scheduling activities to preparing for litigation in imminent danger matters.
- C. 4. Issuing Notice of Alleged Imminent Danger. If the employer does not immediately eliminate the imminent danger or give satisfactory assurance that the danger will be voluntarily eliminated before any employee exposure occurs, the CSHO shall contact the District Supervisor for approval to complete and post the UNSAFE Tag DOSH 415 immediately.
- C. 4. a. The District Supervisor shall not authorize this action without prior consultation with the Department of Labor Counsel through the Program Manager.
- C. 4. b. The UNSAFE Tag DOSH 415 does not constitute a citation of alleged violation or a notice of proposed penalty. It is only a notice that an imminent danger is believed to exist and that the Commissioner of Labor will be seeking a court order to restrain the employer from permitting employees to work in the area of the danger until it is eliminated.
- C. 4. c. The original UNSAFE Tag DOSH 415 shall be signed and posted at or near the area in which the exposed employees are working. A copy shall be signed and attached to the inspection report, NYPESH-1 Form.
- C. 4. d. Where there is not a suitable place for posting the UNSAFE Tag DOSH 415, the employer(s) shall be requested to provide a means for posting.
- C. 4. e. If there is reason to believe that the employees may not see the notice, the CSHO shall orally inform the affected employees of the location of the UNSAFE Tag DOSH 415, after taking adequate precautions not to be exposed to the danger.
- C. 4. f. The employer shall be advised that Section 27-a(7)(a) of the Act gives the State jurisdiction to restrain any condition or practice which is an imminent danger to employees.
- C. 5. Reporting the Issuance of UNSAFE Tag DOSH 415. Program Manager shall ensure that the Director of DOSH is promptly notified before a temporary restraining order is sought when a District Supervisor has issued an UNSAFE Tag DOSH 415 for safety or health hazards. The following items shall be reported:
 - C. 5. a. Name and address of establishment.
 - C. 5. b. Number of employees affected.
 - C. 5. c. Violative condition.

- C. 5. d. District Office and CSHO involved.

Citations.

- D. 1. Citations. After an imminent danger has been found, appropriate citations shall be completed in accordance with the procedures contained in Chapters IV, V and VI. All violations discovered during the inspection shall be cited whether or not they relate to the imminent danger situation.
- D. 2. Effect of Court Action. No citation shall be issued when court action is being or will be pursued relative to the issuance of an UNSAFE Tag DOSH 415 without prior clearance from the Program Manager and the Department of Labor Counsel.

Follow-up Inspection.

- E. 1. Court Action. Where a court has issued an injunction in an imminent danger situation, the follow-up inspection shall take place immediately after the court order has been issued to determine if the employer is complying with the terms of the order. (Other guidelines pertaining to follow-up inspections are set forth in Chapter III.)
- E. 2. No Court Action. Where no court proceeding has been initiated because the imminence of the danger has been voluntarily eliminated in accordance with the provisions of C.3.a.(1) but permanent correction of the condition has not been achieved at the time of the inspection, appropriate citations shall be issued promptly and a follow-up inspection conducted on the date set for abatement.
- E. 3. Immediate Correction. Where the dangerous condition has been permanently corrected at the time of the inspection, the District Supervisor shall determine whether a follow-up inspection is necessary in accordance with the guidelines given in Chapter II.

A. Removal of UNSAFE Tag DOSH 415. (See C.3.)

If an UNSAFE Tag DOSH 415 has been posted at the worksite in accordance with the procedures given in C.4, the CSHO shall remove the notice as soon as the imminent danger situation has been eliminated or it has been determined that a temporary restraining order will not be sought. (See C.3.)

CHAPTER VIII

FATALITY/CATASTROPHE INVESTIGATIONS

General.

- A. 1. Policy. All job-related fatalities and catastrophes, however reported, shall be investigated as thoroughly and expeditiously as resources and other priorities permit.
- A. 1. a. PESH Fatality and Reportable Accident Procedures. The following instructions are to be implemented immediately whenever PESH professional staff are investigating any fatalities or accidents.
 - A. 1. a. (1) Individual becomes aware of fatality or reportable accident by any source.
 - A. 1. a. (2) Enter information into OIS as an Unprogrammed Activity (UPA).
 - A. 1. a. (3) Notify the Program Manager I.
 - A. 1. a. (4) The Program Manager will notify the Director, Assistant Director, Commissioner, and the Communications Office with preliminary details.
 - A. 1. a. (5) Gather information and commence inspection as immediately as possible, if fatality appears to be occupationally related.
 - A. 1. a. (6) The Supervisor will advise the Program Manager's office of preliminary details of the accident/fatality when it becomes available, but no later than the next day, and if inspection was conducted. Enter preliminary information from inspection into OIS.
 - A. 1. a. (7) The Program Manager will provide these details to the Director's Office, Deputy Commissioner and Communications office. A copy of the Unprogrammed Activity FAT/CAT Report shall be transmitted to the Program Manager's office.
 - A. 1. a. (8) The Supervisor will ensure that the investigation continues and is completed in a timely fashion; if any problems arise appropriate legal avenues should be pursued.
 - A. 1. a. (9) At the completion of the field investigation an exit conference will be held informing employer and employee representatives that the findings will be developed and violations will be formulated and reviewed, after which a closing conference will be held.
 - A. 1. a. (10) The field staff should complete the case file and the supervisor should review and

forward to the appropriate Program Manager I for review. The Program Manager I will brief the Program Manager II after their review.

- A. 1. a. (11) After review by the Program Manager II, the closing conference shall be held and the case file shall be prepared for service on the employer. OIS will be updated.
- A. 1. a. (12) When the narrative is in a final form and notices of violations are prepared and ready for mailing, transmit a copy of the narrative, violation, and Inspection Report electronically to the Program Manager II prior to mailing.
- A. 1. a. (13) Upon confirmation of receipt of narrative and violations by the Program Manager II, they can be mailed out.

A. 2. Definitions. The following definitions apply for purposes of this chapter:

- A. 2. a. Fatality. An employee death resulting from a work-related incident or exposure; in general, from an accident or illness caused by or related to a workplace hazard.
- A. 2. b. Catastrophe. The hospitalization of two or more employees resulting from a work-related incident; in general, from an accident or illness caused by a workplace hazard. [A96-5]

NOTE: "Accidents involving significant publicity" or any other accident not involving a fatality or a catastrophe, however reported, shall be considered as either a complaint or a referral, depending on the source of the report, and shall be handled according to the directions given in Chapter IX. Accidents discovered from a records review or during the walkaround on a programmed inspection shall be handled as part of the programmed inspection in accordance with Chapter II, F.2.b.

- A. 2. c. Hospitalization. To be admitted as an inpatient to a hospital or equivalent medical facility for examination or treatment.
- A. 2. d. Reporting. Public employers shall report to the nearest District Office within 8 hours of learning of a fatality or catastrophe. District Supervisors shall report all job-related fatalities and catastrophes that appear to be within PESH's jurisdiction as soon as they become aware of them to the Program Manager, who shall inform the Director.

A. 3. Fatality/Catastrophe Investigations. Upon initial contact the employer shall be informed that an investigation will be conducted and extensive interviews with witnesses will be necessary. The purpose of an accident investigation shall be explained; namely, to determine:

- A. 3. a. The cause of the accident.
- A. 3. b. Whether a violation of PESH safety or health standards related to the accident occurred.
- A. 3. c. What effect the standard violation had on the occurrence of the accident.

- A. 3. d. If PESH standards should be revised to correct the hazardous working condition that led to the accident.

Action.

- B. 1. Pre-investigation Activities. It is essential to the proper conduct of a fatality or catastrophe investigation that preparations be carefully made. PESH will often be the subject of public scrutiny in the conduct of such investigations, and it is imperative that they be complete and professionally competent. [A01-12]
- B. 1. a. District Supervisor. If the fatality or catastrophe appears to require a PESH investigation (i.e., it is or may be occupationally related and PESH's jurisdiction is not preempted), the District Supervisor shall ensure that the required OIS entries are completed and shall report the event to the Program Manager, who shall furnish all pertinent information to the DOSH Director, DOSH Assistant Director, Commissioner of Labor, and the Communications office, as soon as it is verified that the fatality/catastrophe has occurred.
- B. 1. b. Preliminary Investigation. The District Supervisor, upon notification of an accident involving a fatality or catastrophe, shall gather as much information as is available prior to scheduling an inspection. If possible, this shall be done immediately through discussion with the person reporting the accident. If knowledge of the accident is received through the media or sources other than a representative of the employer, the employer shall be contacted as soon as possible to obtain additional information whenever the supervisor believes that such contact will result in a more effective inspection. Such contact shall be considered advance notice and the procedures for advance notice shall be followed. (See Chapter III, C.2.)
- B. 1. c. Investigation Team. If an investigation team composed of experts in specific disciplines is required, the District Supervisor shall so advise the Program Manager. If resources beyond those available within the District Office will be required to compose the team, the Program Manager shall determine the composition of the team and shall direct the investigation or delegate someone to serve as authorized State representative. The team, as directed by the Program Manager or designated representative, shall proceed promptly to the scene and shall function as a unit in all phases of the investigation until officially directed to return to normal functions.
- B. 1. d. Selection of CSHO. If the Program Manager and the District Supervisor determine that an investigation team effort is not required, a CSHO with expertise in the particular industry or operation involved in the accident or illness shall be selected by the District Supervisor and sent to the establishment as immediately as possible.
- B. 1. e. Equipment. Prior to leaving for the accident scene the team or CSHO, as applicable, shall select the test equipment and the personal protective equipment necessary to support the investigation.

NOTE: Emergency testing equipment or special accident investigation instruments

or protective clothing need not be set aside in State and District Offices for emergency or accident investigation use only. All equipment shall be available for regular use at any time provided it is available if needed for fatality/catastrophe investigations.

- B. 1. f. Other Agency. If another Federal or State agency is responsible for or participating in the investigation, the Program Manager and the District Supervisor shall ensure that the CSHO and/or team members are fully instructed in PESH's relationship with the other agency and each agency's areas of responsibility.
- B. 2. Investigation Procedures. Every reasonable effort shall be made to determine the cause of the accident. Otherwise, the same general policies and inspection procedures contained in Chapter III are applicable for the investigation of fatalities and catastrophes, except as otherwise provided in this chapter.
- B. 2. a. Scope. Fatality/catastrophe investigations shall include a complete investigation of the circumstances of the accident, consistent with the purposes outlined in A.3. above. During investigations which involve potential for criminal violations, emphasis must be placed on the "willfulness" of the violation. These investigations may be expanded at the discretion of the District Supervisor when any of the conditions described in Chapter II, F.1.b. exists.
- B. 2. b. Inspection Strategy When a Comprehensive Inspection Is To Be Performed. Depending on the circumstances surrounding the accident, it may be necessary to conduct a comprehensive inspection of the workplace, before, concurrent with, or after the accident investigation. Other areas or operations in the establishment may have hazards similar to those that caused the accident; and, if so, they shall be brought to the employer's attention immediately.
- B. 2. c. Abbreviated Opening Conference. In most cases, investigations of fatalities and catastrophes require that the CSHO get to the location of the alleged hazard as promptly as possible. Therefore, the CSHO shall reduce the time spent in the opening conference by limiting remarks to the bare essentials of identification, the purpose of the visit and the request for an escort by employee and employer representatives. The CSHO shall inform the employer that a records review will be conducted as soon as practicable after investigation of the accident. In addition, a more extensive discussion of other opening conference topics will be conducted at the closing conference.
- B. 2. d. Families of Victims. Family members of employees involved in fatal occupational accidents or illnesses shall be contacted at an early point in the investigation, given an opportunity to discuss the circumstances of the accident or illness, and provided timely and accurate information at all stages of the investigations as follows:

NOTE: All of the following require special tact and good judgment on the part of the CSHO. In some situations, these procedures should not be followed to the letter; e.g., in some small businesses, the employer, owner, or supervisor may be a relative of the victim. In such circumstances, such

steps as issuance of the form letter may not be appropriate without some editing.

- B. 2. d. (1) As soon as practicable after initiating the investigation, the CSHO shall attempt to compile a list of all of the accident victims and their current addresses, along with the names of individual(s) listed in the employer's records as next-of-kin (family member(s)) or person(s) to contact in the event of an emergency.
- B. 2. d. (2) An information (Next of Kin) letter to the "Estate of " the deceased shall be mailed within 5 working days of the time his/her identity has been established.
- B. 2. d. (2) (a) The issuance of this letter shall be documented on the case file diary sheet.
- B. 2. d. (2) (b) The minimum contents of this initial contact letter shall be as follows:
 - B. 2. d. (2) (b) 1 The purpose and scope of PESH's investigation.
 - B. 2. d. (2) (b) 2 A brief outline of PESH's civil enforcement process, including standards, citations, and penalty system.
 - B. 2. d. (2) (b) 3 A request for information relevant to the investigation. This request shall include an offer to meet personally with appropriate persons to discuss any information they may have to offer.
 - B. 2. d. (2) (b) 4 A statement offering PESH's assistance throughout the investigation. This assistance will be at a minimum:
 - B. 2. d. (2) (b) 4 a Being informed at inspection milestones; and
 - B. 2. d. (2) (b) 4 b The offer to meet personally to answer questions.
 - B. 2. d. (2) (b) 4 c Subject to FOIL, a free copy of the narrative report at the time the file is closed; i.e., after the investigation is completed and any resulting PESH enforcement proceedings have been concluded.
 - B. 2. d. (2) (c) If the next-of-kin or the emergency contact person(s) cannot be determined through the employment records or fellow-employee interviews, the District Supervisor shall make a reasonable effort to identify the next-of-kin through a search of police reports, hospital admission records, coroner's records, and newspapers.
 - B. 2. d. (2) (d) When the additional search does not identify a family member, the case file shall be documented to reflect the search and the extent to which it was carried out.
 - B. 2. d. (2) (e) If the letter is returned as undeliverable, the letter and envelope shall be

put in the case file and the date of return entered in the case file.

- B. 2. d. (3) The compliance officer, when taking a statement pursuant to B.2.d.(2)(b)3, shall explain that the interview will be kept confidential to the extent allowed by law. The greatest sensitivity and professionalism is required for such an interview. The information received must be carefully evaluated and corroborated during the investigation.
- B. 2. d. (4) Follow-up contact shall be maintained with a key family member or other contact person, so that the survivors can be kept up-to-date on the status of the investigation. Such contact can be by personal visit, telephone or letter, as requested, by the family member. These contacts shall be made at appropriate times;
 - (a) after the citation issuance,
 - (b) after an informal conference has been conducted,
 - (c) after a contest has been received, and
 - (d) when the case has been closed.
- B. 2. d. (5) The victim's family members shall be provided a copy of all citations issued as a result of the accident investigation within 5 working days of issuance.
- B. 2. d. (6) All PESH staff are cautioned, when discussing the Freedom of Information Law (FOIL) with the family, not to mislead them about the speed with which they can obtain a copy of the disclosable information prior to closing the case file. Staff are further cautioned that the employer's rights must be protected. There should be no premature release of facts or findings during any meeting with non-PESH personnel, before the investigation and subsequent litigation is completed.
- B. 2. e. Criminal. Article 5, Section 63.3 of the Executive Law gives the Attorney General's office the authority to investigate and prosecute an employer who is convicted of having willfully violated a PESH standard, rule or order when that violation caused the death of an employee. In an investigation of this type, therefore, the nature of the evidence available is of paramount importance. There shall be early and close liaison between the PESH investigator, the District Supervisor, the Program Manager and the Director in developing any finding which might involve a violation of Article 5, Section 63.3. A CSHO with criminal investigation training shall be assigned at an early stage to assist in developing the case.

Reports.

Refer to OSHA Instruction CPL 2.97, Fatality/Catastrophe Reports to the State Office (Flash Reports).

Special Situations.

- D. 1. Preemptions.

- D. 1. a. The supervisor shall be alerted to potential conflicts with other enforcement agencies. If a question arises, upon receipt of a complaint, referral or inquiry, the supervisor shall contact the Program Manager's office for guidance. If an inspection has already begun, the inspector shall interrupt the inspection and contact the supervisor for guidance.
- D. 1. b. The Program Manager's office shall consult the OSHA Directives System for Memorandums of Understanding that may be applicable. Counsel's office and the Director shall also be consulted.
- D. 1. c. If it is determined that PESH does not have jurisdiction, the case shall be referred to the appropriate agency if there is reason to believe that violations may exist.
- D. 2. Use of Expert Assistance. The decision as to the need for experts to assist in the conduct of the investigation shall be made as soon as possible after the Team/CSHO has arrived on site. The decision shall be made by the District Supervisor in consultation with the Program Manager upon the recommendation of the Team Leader/CSHO.
- D. 2. a. State Office Contact. If the Program Manager has no knowledge of or cannot locate an expert, the Director may be contacted for information regarding safety and health professionals within the Division of Safety and Health who are experts in their fields. Based on this information, the Program Manager shall contact the appropriate supervisor and request services of the expert. Experts shall normally be made available by their supervisors both for investigations of fatalities/catastrophes and for testifying in any subsequent legal proceedings.
- D. 2. b. Choice of Experts. PESH and OSHA Regional and Area personnel shall generally be the first choice of experts, rather than "outside" experts. Any available 21(d) consultation personnel shall be called upon as experts whenever appropriate.
- D. 2. b. (1) If an expert from another PESH district is required, the requesting District Supervisor shall coordinate with the supplying District Supervisor to make the necessary arrangements.
- D. 2. b. (2) If no State or Area experts are available, OSHA National Office personnel or National NIOSH personnel, in that order, are next in order of preference, followed by contract personnel.
- D. 2. b. (2) (a) If State Office personnel are to be used, the Program Manager shall contact the Director, who will make the arrangements with the Division concerned.
- D. 2. b. (2) (b) Arrangements for NIOSH experts shall be made by the Program Manager with the NIOSH Regional or National Office, as appropriate.
- D. 2. b. (2) (c) For contract personnel, the Program Manager shall make the necessary arrangements directly with the contractor.

- D. 2. b. (3) Outside experts shall generally be selected only when no one qualified is available from the above listed sources.
- D. 2. c. Other State Agency. If an expert from another State agency is required, the Program Manager shall contact the Regional Office or other appropriate office of the other agency to arrange the details, or the Director, to handle the request at the State level. If necessary, a letter to the appropriate State agency shall be prepared for the signature of the Commissioner of Labor to confirm telephone requests for such assistance.
- D. 2. d. Consultants. In general, a consultant or "outside expert" is a person from the private sector paid a fee for special expertise. Procedures for identifying and obtaining the services of a consultant shall be established by the Program Manager and approved by the Director.
- D. 2. e. Legal Advice. The advice of an attorney may be necessary at a very early stage of the investigation. The District Supervisor shall contact the Department of Labor Counsel through the Program Manager if assistance is required.
- D. 3. Rescue Operations. PESH has no authority to direct rescue operations--this is the responsibility of the employer and/or of local political subdivisions or State agencies. PESH does have the authority to monitor and inspect the working conditions of covered employees engaged in rescue operations to make certain that all necessary procedures are being taken to protect the lives of the rescuers. [A98-6, CPL 2-2.59A]
- D. 3. a. Consultation. PESH shall be available for consultation on the safest or most effective way to conduct rescue operations. This information, based on technical knowledge of competent PESH personnel at the scene, shall be given freely, if requested.
- D. 3. b. Rescue Operations. If the CSHO is aware that the employer intends to use some rescue procedure that may be in violation of a standard or the general duty clause and the CSHO believes other, less hazardous procedures are more desirable, the employer shall be advised of this belief. The employer shall be encouraged to use the personnel and facilities of local fire and police departments for their specialized knowledge and training in rescue operations.
- D. 3. c. Application of Standards. If rescue work is performed by the employer, PESH standards are applicable. The employer is required to take such steps as are necessary to eliminate, if at all possible, or to minimize recognized hazards likely to cause death or serious physical harm, considering the urgency in a particular rescue operation.
- D. 3. d. Emergency Situations. Emergencies created by fatalities or catastrophes generally necessitate immediate rescue work, fire fighting, etc., and any loss of time may increase injuries and/or fatalities. Therefore, when nonstandard equipment; e.g., tractors, bulldozers, etc., without rollover protection, is available for use in an emergency situation, PESH shall permit its use without citing the employer rather than cause a delay waiting for equipment which meets PESH standards. The use of such equipment by private employers shall be limited to the actual emergency situation of fighting fire,

rescue work, etc. Use in cleanup or reconstruction work shall warrant the issuance of citations when appropriate.

- D. 4. Public Information Policy. The PESH public information policy regarding response to fatalities and catastrophes is to explain State presence to the news media. It is not to provide a continuing flow of facts nor to issue periodic updates on the progress of the investigation.
- D. 4. a. District Supervisor. The District Supervisor or his designee shall normally refer all inquiries from the press to the Communications Office located in Albany, NY. The Communications Office will contact the Program Manager to obtain all requested information.
- D. 4. b. Information Officer. The principal role of the information officer at the scene is to brief reporters there that PESH has responded and is investigating. If a rescue operation is required, the information officer shall state, "PESH policy is to cooperate and assist wherever possible, but the direction of such operations will be left to those experienced in such matters."
- D. 4. c. Other Officials. The information officer shall inform the news media that the Commissioner of Labor, the Director of the Division of Safety and Health, the Director of Public Affairs and other appropriate officials are continually informed of developments.

Investigation Documentation. [A96-5, CPL 2.113]

All fatality and catastrophe investigations shall be documented and where pertinent, shall include the following.

- E. 1. Personal Data - Victim
- E. 1. a. Name
- E. 1. b. Address
- E. 1. c. Telephone
- E. 1. d. Age
- E. 1. e. Sex
- E. 1. f. Job Title
- E. 1. g. Date of Employment
- E. 1. h. Time in Position
- E. 1. i. Training for Job being performed at time of accident.
- E. 1. j. Employee Deceased/Injured

- E. 1. k. Nature of Injury - Fracture, Amputation, etc.
- E. 1. l. Prognosis of injured employee.
- E. 2. Accident Data.
- E. 2. a. How and why did accident occur.
- E. 2. b. Physical Layout
- E. 2. c. Sketches/Drawings
- E. 2. d. Measurements
- E. 2. e. Video/Photos - Identifying sources
- E. 3. Equipment Involved or Process.
- E. 3. a. Machine
- E. 3. b. Manufacturer
- E. 3. c. Model
- E. 3. d. Manufacturer's Instructions
- E. 3. e. Kind of Process
- E. 3. f. Condition
- E. 3. g. Misuse
- E. 3. h. Maintenance Program
- E. 3. i. Equipment Inspection (Logs, Reports)
- E. 3. j. Warning Devices (Detectors)
- E. 3. k. Tasks Performed
- E. 3. l. How often equipment used
- E. 3. m. Energy sources and disconnecting means identified
- E. 3. n. Supervision or instructions provided to employees involved in accident
- E. 4. Witnesses.

- E. 4. a. Public
- E. 4. b. Fellow Employees
- E. 4. c. Management
- E. 5. Safety and Health Program.
- E. 5. a. Does employer have a safety or health program?
- E. 5. b. Does the program address the type of hazard which resulted in the fatality/catastrophe?

CHAPTER IX

COMPLAINTS AND REFERRALS

Complaints.

- A. 1. General. Complaints in this chapter are limited to when a complaint is received and processed at the District Office, prior to an inspection, rather than when it is given to the CSHO at the time the establishment is being inspected.
- A. 1. a. Bureau Response. . Valid complaints (meeting the criteria of A.2.d. of this chapter) will receive an inspection, while those complaints which do not meet the criteria (in Accordance with A.2.e of this chapter) will be treated as follows:
 - A. 1. a. (1) An attempt will be made to have the complainant submit their complaint in a form which meets the requirements of A.2.d.
 - A. 1. a. (2) Complaints received for hazards that are covered by another DOSH enforcement unit or another agency will be referred in writing to the appropriate party upon receipt of the complaint.
- A. 1. b. Complainant Identity. The identity of the complainant shall be kept confidential unless otherwise requested by the complainant. No information shall be given to employers which would allow them to identify the complainant.
- A. 2. Definitions. The following definitions apply in this chapter:

- A. 2. a. Complaint. A complaint is a notice of a hazard or a violation of the Act, believed to exist in a workplace, given by an employee or a representative of employees.
- A. 2. a. (1) To constitute a complaint the notice must allege that a hazard exists in the workplace or that the Act (meaning a standard or the general duty clause) is being violated.
- A. 2. a. (1) (a) If the notice is vague and/or unable to be substantiated, the District Supervisor shall use every reasonable attempt to contact the person providing the information to obtain more specific information.
- A. 2. a. (1) (b) If the information provided has been addressed during a recent inspection or the District Supervisor determines that the hazard is not present (e.g., it has already been corrected), such a notice is not a valid complaint.
- A. 2. a. (2) The workplace must be within PESH's jurisdiction and not preempted under the Act.
- A. 2. b. Employee. For purposes of submitting a complaint, an employee is either of the following:
 - A. 2. b. (1) A present employee of the employer about whose establishment the complaint is being made.
 - A. 2. b. (2) A present employee of another employer if that employee is working at or near some other employer's workplace and is exposed to hazards of that workplace.
- NOTE: Former employees are not considered employees for purposes of submitting a complaint.
- A. 2. b. (3) Inmates are not considered employees covered under the PESH Act. (See Chapter IX Appendix A for sample letter for complaints from inmates.)
- A. 2. c. Representatives of Employees. For purposes of submitting a complaint, a representative of employees is any of the following:
 - A. 2. c. (1) An authorized representative of the employee bargaining unit, such as a certified or recognized labor organization;
 - A. 2. c. (2) An attorney acting for an employee;
 - A. 2. c. (3) Any other person acting in a bona fide representative capacity (e.g., a member of the employee's family or an elected official). In this situation, a complainant purporting to act as a representative of an employee shall be presumed to be so acting unless the CSHO obtains information that the complaint was not submitted with the knowledge of or on behalf of the employee.

- A. 2. d. Valid Complaint. To meet the complaint requirements outlined in Section 27(a)5 of the Act, a complaint shall:
 - A. 2. d. (1) Be written either on a Notice of Alleged Safety or Health Hazards (NYPESH-7 Form) or in a letter;
 - A. 2. d. (2) Allege that an imminent danger or a violation of a safety or health standard exists in the workplace;
 - A. 2. d. (3) Provide sufficient information regarding what the complaint is based upon. (This does not mean that the complaint must specify a particular standard; it need only specify a condition or practice that is hazardous and, if uncommon, why it is hazardous); and
 - A. 2. d. (4) Be signed by at least one employee or employee representative.
- A. 2. e. (1) Invalid Complaint: complaints that do not meet the validity criteria may be attributed to the following:
 - A. 2. e. (1) (a) A thorough evaluation of the complaint does not establish reasonable grounds to believe that the alleged violations can be classified as an imminent danger or that the alleged hazard is covered by a standard or, in the case of an alleged serious condition, by the general duty clause (Section 27-a(3)).
 - A. 2. e. (1) (b) The complaint concerns a workplace condition which has no direct relationship to safety or health and does not threaten physical harm (e.g., a violation of a record keeping or other regulation or a violation of a standard that is classified as de minimis).
 - A. 2. e. (1) (c) The complaint alleges a hazard which violates a standard but describes no actual workplace conditions and gives no particulars which would allow a proper evaluation of the hazard. In such a case the District Supervisor shall make a reasonable attempt to obtain such information.
 - A. 2. E. (1) (d) The workplace does not fall under PESH's jurisdiction.
- A. 3. Receiving Complaints. An incoming notice of hazards or alleged violations shall first be referred to a CSHO who shall obtain all available information from the person reporting it. The notice shall thereafter be forwarded to the supervisor to complete the evaluation.
- A. 3. a. Employee Rights. When an oral notice is received from an employee or employee representative, that person shall be informed of the right to file a complaint in writing under Section 27(a)5 and of the right, as a matter of law and PESH policy, to have the complainant's identity held confidential, if requested.
- A. 3. b. Workplace Inspections. The person giving notice shall be informed that signed

complaints generally lead to workplace inspections.

- A. 3. c. Formalizing Oral Complaints. If the person is filing a notice orally and makes a request to submit a written complaint, the supervisor or CSHO, after confirming that the complainant is an employee or employee representative, shall complete the NYPESH-7 Form to the extent possible prior to obtaining the complainant's signature.
- A. 3. d. Discrimination Complaint. The complainant shall be advised of the protection against discrimination afforded by Section 27-a(10)(b) of the Act and shall be informed of the procedure for filing a 27-a(10)(b) complaint. (See Chapter X for details)
- A. 3. e. Electronic Complaints. Electronic complaints received by an employee or an electronic complaint forwarded from OSHA will be treated as an "Oral Complaint". An attempt will be made to complete a NYPESH-7 complaint form and return it to the complainant with instructions to sign and return the complaint to the local PESH office. Complaints not returned will be filed in a non-action file attached to a copy of the e-mail to the complainant requesting signature.
- A. 4. Information Needed for Complaint Evaluation. If during the classification of the complaint the reviewing supervisor determines that the complaint is invalid the complainant should be contacted, when possible, either for additional facts or to verify facts supplied. The reviewing supervisor will then decide based upon the additional information whether or not there are reasonable grounds to believe that a violation exists and, if so, how it should be classified.
- A. 4. a. Taking Complaints. When the designated CSHO receives a complaint, by letter, in person, or over the telephone, the NYPESH-7 Form shall be completed. If the complainant wishes to submit a complaint, the person taking the complaint shall ask if the complainant is presently an employee or employee representative. If the complaint has been received in writing and has been signed, the complainant shall be contacted, if necessary, for answers to questions on the NYPESH-7, although the form need not be sent for signature.
- A. 4. b. Additional Information. Additional information is usually needed to improve the quality of the complaints and to aid in determining their classification and priority. Therefore, in completing item 8 on the NYPESH-7 Form, an attempt shall be made to obtain detailed answers to the following questions:
 - A. 4. b. (1) For All Complaints.
 - A. 4. b. (1) (a) Describe the unsafe or unhealthful conditions; identify the location. What is the nature of the exposure.
 - A. 4. b. (1) (b) What is the work being performed in the unsafe/unhealthful area? Identify, as well as possible, the type and condition of equipment in use, the materials (chemicals) being used, the process/operation involved, and the kinds of work being done near the hazardous area.

- A. 4. b. (1) (c) How often is this specific task performed which leads to the exposure? For how long at one time? How long has the condition existed? Has it been brought to the employer's attention? Have any attempts been made to correct the condition?
- A. 4. b. (1) (d) How many shifts are there? What time do they start? On which shift does the hazardous condition exist?
- A. 4. b. (1) (e) What personal protective equipment is required by the company for this task or job? Is it used by employees? Include all PPE and describe it as specifically as possible. Include the manufacturer's name and any identifying numbers.
- A. 4. b. (1) (f) How many people work in the establishment? How many are exposed to the hazardous conditions? What is their proximity to the hazardous task or job?
- A. 4. b. (1) (g) Is there an employee representative in the establishment? Include the name, address, and telephone number of the union and/or of the employee representative(s).
- A. 4. b. (1) (h) Identify the standard(s) apparently violated by the conditions described by the complainant.
- A. 4. b. (2) For Health Hazards.
- A. 4. b. (2) (a) Has the employer administered any tests (e.g. hearing, blood lead) to determine employee exposure levels to the hazardous conditions or substance? Describe these tests. What have been the results?
- A. 4. b. (2) (b) What engineering controls are in place in the area(s) in which the exposed employees work? For instance, are there any fans or acoustical insulation in the area which may reduce exposure to the hazard?
- A. 4. b. (2) (c) What administrative or work practice controls has the employer put into effect?
- A. 4. b. (2) (d) Do any employees have any symptoms which may have been caused by exposure to hazardous substances? Have any employees ever been treated by a doctor for a work-related disease or condition? What was it? Have there been any "near-miss" incidents?
- A. 4. b. (3) For Safety Hazards.
- A. 4. b. (3) (a) Under what adverse or hazardous conditions are employees required to work? (This should include conditions contributing to stress and other

probability factors.)

- A. 4. b. (3) (b) Have any employees been injured as a result of this hazardous condition? Have there been any "near-miss" incidents?
- A. 5. Evaluating Complaints. All complaints shall be evaluated by the supervisor.
- A. 5. a. Classification. Immediately upon receipt of a notice reporting a hazard or an alleged violation, the supervisor shall decide if the notice meets the definition of a complaint and document the classification of valid or invalid complaint in the case file.
- A. 5. b. Gravity. The supervisor shall evaluate all complaints as soon as they have been determined to be valid for the gravity of the alleged hazard (e.g. imminent danger, serious, safety etc.) in accordance with Chapter IX, A 7.
- A. 5. c. Both Safety and Health Hazards Alleged. When a complaint alleges both safety and health hazards, the complaint shall be referred to both safety and health supervisors for evaluation. They shall coordinate the handling of the complaint. Supervisors shall maximize the use of cross-trained CSHOs to conduct complaint inspections involving both safety and health hazards.
- A. 5. d. Response to Person Reporting. Whenever the District Supervisor decides that a notice which fails to meet the definition of a complaint given in A.2.a. will not be responded to, a letter shall be sent to the person submitting the notice (certified with return receipt) communicating that decision and the reasons for it.
- A. 5. d. (1) The person shall be informed that they have a right to request further clarification of the decision from the District Supervisor and, if still dissatisfied, the person may request that the Program Manager investigate and determine if the District Supervisor's decision was made in accordance with current policy.
- A. 5. d. (2) The complainant should be furnished with a copy of that procedure and assisted to such extent as may be reasonable.
- A. 6. Responding to Complaints Alleging Imminent Danger Conditions. Any complaint which, in the professional opinion of the District Supervisor constitutes an imminent danger, as defined in Chapter VII, shall be inspected irrespective of whether or not it meets the formality requirements of Section 27-a(5)(a). It shall be inspected the same day received, where possible, but not later than the employer's next working day after receipt of the complaint.
- A. 7. Responding to Complaints. All complaints meeting the requirements of Section 27-a(5)(a) of the Act shall be responded to by letter or scheduled for workplace inspection.
- A. 7. a. Determination. Upon determination by the Supervisor that a complaint is valid, a letter shall be sent or an inspection shall be scheduled in accordance with the priorities in A.7.c.

- A. 7. b. Other than Serious Hazard Determination. Upon determination by the Supervisor that the hazard is other than serious, a letter may be sent to the employer (attached). The letter shall require an employer's response within ten (10) business days (attached), including documentation, along with verification that the PESH letter has been posted at the workplace. If the employer fails to respond to above requirements, a PESH inspection will be conducted. In addition, at the time the employer is notified by PESH, a letter is sent to the complainant (attached) indicating that the employer has been notified of the complaint and that PESH is awaiting proof of compliance by the employer. Upon receipt of proof of compliance from the employer, PESH will send an additional letter to the complainant (attached) and include the employer's correspondence and proof of compliance.
- A. 7. c. Priorities for Responding by Inspections to Complaints. Inspections resulting from complaints shall be conducted according to the following priority:
- A. 7. c. (1) Complaints, other than imminent danger, shall be given a priority based upon the classification and the gravity of the alleged hazards as defined in Chapters IV and VI.
- A. 7. c. (2) Serious complaints shall be investigated on a priority basis within 10 days. With discretion by the Supervisor, response to other-than-serious complaints can be initiated with the process of the letter to the employer. Letters to the employer should be sent soon after the decision to send a letter, preferably within 1 to 2 days.
- A. 7. c. (3) If resources do not permit investigations within 20 days, a letter to the complainant shall explain the delay and shall indicate when an investigation may occur. The complainant shall be asked to confirm the continuation of the alleged hazardous conditions.
- A. 7. c. (4) If a late complaint inspection is to be conducted, the District Supervisor may contact the complainant to ensure that the alleged hazards are still existent.
- A. 8. Scope of Inspection. The PESH policy will be as follows: [E90-1]
- A. 8. a. Safety Complaint Inspection. The inspection of a safety complaint shall be a comprehensive inspection for any workplace whose SIC/NAICS code appears on the Safety High Hazard List that appears in Chapter II Appendix of the FOM, unless a safety programmed inspection has been conducted in this same workplace within the past 12 months if resources permit. When a safety inspection has been performed in the last 12 months, the new inspection will be restricted to the items on the complaint only. However, as always, if the CSHO observes additional serious hazards during this inspection, they must address these. Also, if anyone at the worksite brings to his/her attention other potential hazards, these must also be investigated as a part of the same inspection.
- A. 8. b. Health Complaint Inspections. The inspection of a health complaint will be a

comprehensive inspection for any workplace whose SIC/NAICS code appears on the Health High Hazard List that appears in Chapter II Appendix of the FOM. All workplaces with these SIC/NAICS codes are considered health high hazard and, therefore, may present potential serious hazards. If a complaint inspection is being investigated in a workplace where a comprehensive industrial hygiene inspection has been conducted in the past 12 months if resources permit, the new inspection will be restricted to the items on the complaint only. As with the safety complaint inspections, whenever it has been determined that only the complaint will be investigated, the CSHO must address any additional serious hazards that are observed. If anyone brings to their attention other potential hazards, these must also be addressed as a part of the same inspection.

- A. 9. Procedures. In general, the procedures in Chapter III shall be followed in conducting complaint inspections. Particular attention, however, is directed to the following special requirements for complaint investigations:
 - A. 9. a. Copy of the Complaint. A sanitized copy of the complaint shall be given to the employer and employee representative at the opening conference.
 - A. 9. a. (1) In the case of a multi-employer worksite, such as a construction site, a copy of every complaint, including those against subcontractors, shall be provided to the general contractor as well as to the employer against whom the complaint has been filed.
 - A. 9. a. (2) A copy of every complaint against the general contractor or against one or more of the subcontractors shall be provided, if possible, to each subcontractor whose employees may be exposed to the alleged hazard.
 - A. 9. b. Identity of Complainant. Section 27-a(5)(a) of the Act requires that, if the complainant so requests, names shall be deleted from the employer's copy of the complaint. If handwritten, the complaint shall be typed, and reworded if necessary, so that the identity of the complainant cannot be discerned by the employer. The Program Manager or the District Supervisor may decide, as a matter of general policy, that names shall be deleted from all complaints unless the complainant explicitly requests that his or her name be revealed.
 - A. 9. c. Walkaround Rights. In a complaint inspection the walkaround rights of an employer and an employee representative shall be applicable in accordance with Chapter III. The employee representative will be chosen according to the procedures in Chapter III and, thus, the complainant will not necessarily be the employee representative for walkaround purposes.
 - A. 9. d. Results of Inspection to Complainant. After the completion of an inspection based on a complaint, the complainant shall be informed of the results as follows:
 - A. 9. d. (1) Each complainant shall be notified of any issued citations on an attached copy of the NOV issued as a result of the complaint inspection and/or with a sufficiently detailed description of the findings and why they did or did not result in a citation.

- A. 9. d. (2) Except for cases involving changes of penalty only, the complainant shall be informed of any subsequent modification of the citation due to an informal conference, a settlement agreement, a decision of the Industrial Board of Appeals, or a court, together with the reasons for the modification.
- A. 9. e. Notification of Delays. If unusual delays are met in issuing a citation resulting from a complaint inspection, the complainant and, if appropriate, the employee representative shall be informed of such delays. A delay of more than 30 working days following the inspection would warrant such notification.
- A. 9. f. Citation Not Warranted. If the District Supervisor determines that a citation is not warranted, the complainant shall be informed in writing of such determination as outlined in A.9.d.(1).
- A. 9. f. (1) The complainant shall be told of his or her right to seek further clarification for the determination from the District Supervisor if any questions remain.
- A. 9. f. (2) At the same time, the complainant shall also be informed that, if dissatisfaction with the determination still remains after further conversation with the District Supervisor, the person may request the Program Manager investigate and determine if the District Supervisor's decision was made in accordance with current policy.
- A. 9. f. (2) (a) It is PESH's policy to grant the right of informal review by the Program Manager of such determination.
- A. 9. f. (2) (b) The rules of procedure for obtaining such a review are specified in FOM Ch III G.
- A. 9. f. (3) PESH has administratively extended the same right of informal review to cover the complainant's disagreement with any substantive element of the outcome of the inspection.
- A. 9. g. Communication to Complainant. Written communications to a complainant shall be sent to the employee's home address unless specific instructions have been given that such mail be sent to the place of employment.

Referrals.

- B. 1. General. As a rule, referrals will be handled in a manner similar to that of complaints.
- B. 2. Definitions. For purposes of this chapter, a referral is normally distinguished from a complaint by the source providing information on the alleged hazard.

- B. 2. a. Notices of hazards or alleged violations originated by the sources listed in b. of this section shall be considered as referrals except as noted in B (3). All other notices of hazards shall be considered as complaints. Complaints received by other government agencies and simply forwarded to PESH for action are complaints since they do not originate with the agency or its employees. (See B.2.b.(4).)
- B. 2. b. Origination of Referrals. Referrals may originate from the following sources:
 - B. 2. b. (1) CSHO Referrals. Serious hazards shall normally be investigated by the CSHO who observes them (after consultation with the supervisor if required). On occasion, however, special expertise may be needed to assess the hazard. This may be obtained through the referral process.
 - B. 2. b. (1) (a) Types of Referrals. There are two types of CSHO referrals.
 - B. 2. b. (1) (a) 1 Safety (Health to Safety or Safety to Safety).
 - B. 2. b. (1) (a) 2 Health (Safety to Health or Health to Health).
 - B. 2. b. (1) (b) Subject of CSHO Referrals. Generally, CSHO referrals shall be limited to potentially serious hazards observed during an inspection or visible from or in public areas, such as streets, highways or the public areas of business premises. Such observed hazards shall be documented adequately for review by the supervisor.
 - B. 2. b. (1) (c) Circumstances. There are circumstances when a CSHO referral may be necessary or appropriate, such as the following:
 - B. 2. b. (1) (c) 1 The CSHO lacks the necessary expertise.
 - B. 2. b. (1) (c) 2 The CSHO observing the hazard is already assigned to an inspection of higher priority.
 - B. 2. b. (1) (c) 3 The CSHO observes specific evidence of imminent danger or serious hazards at a worksite not programmed for an inspection.
 - B. 2. b. (1) (c) 4 Equipment necessary for an inspection is not available at the time.
 - B. 2. b. (1) (c) 5 Efficient utilization of District Office resources requires that a referral be made; e.g., the size of the workplace, the number of employees involved, the length of time likely to be required for an inspection, the extent of hazards observed, etc.
 - B. 2. b. (1) (c) 6 The observations occur outside the CSHO's normal working hours.

NOTE: For inspection classification purposes, if a CSHO lacks the expertise to handle all complaint items or to complete an imminent

danger or fatality/catastrophe investigation or for some other reason requires assistance from another CSHO, such assistance shall be counted as part of the original complaint, imminent danger or fatality/catastrophe and not as a referral. Such assistance shall not be counted as a separate inspection unless another discipline is involved (e.g., safety to health or health to safety).

- B. 2. b. (2) Re-inspection Referrals. When a serious citation is withdrawn because of incomplete or erroneous inspection information, administrative error which cannot be corrected through an amendment to the citation or some other legitimate reason, the District Supervisor, after consulting with the Program Manager, shall handle the re-inspection of such cases as CSHO referrals whenever there is reason to believe that the violative conditions continue to exist. (See Chapter II, F.1.c.(2)(e).) If a re-inspection is not to be conducted, the reasons shall be documented in the case file.
- B. 2. b. (3) Safety and Health Agency Referrals. This category includes referrals from NIOSH, consultation programs and 27-a(10) investigators. Referrals from State or local Health Departments, medical doctors and safety and/or health professionals from other Federal/State Agencies are also included in this category when they involve potentially serious employee exposures directly within the professional expertise of the person making the referral.

NOTE: For purposes of assigning an inspection priority, referrals from these sources will be considered as equivalent to CSHO referrals, although not counted as such by IMIS.
- B. 2. b. (4) 27-a(10) Complaint Referrals. District Supervisors may decide to recommend certain safety and/or health complaints from former employees (discrimination complaints which also allege hazardous working conditions or violations of PESH regulations) for investigation under the procedures in A.3.d.
- B. 2. b. (4) (a) If originally received in the District Office and referred to the 27-a(10) personnel for handling of the discrimination complaint as outlined in Chapter X, C.1, such a complaint will already have been recorded on a NYPESH-7 Form in the District Office and classified as a complaint if it also included a notice which meets the definition of "complaint".
- B. 2. b. (4) (b) If the complaint was filed originally with 27-a(10) personnel, it shall be recorded on a NYPESH-7 Form by the District Office and classified as a complaint.
- B. 2. b. (5) Other Government Agency Referrals. Notifications of hazards observed and reported (referred) to PESH by other Federal, State or local government agencies or their employees; e.g., Federal Grain Inspection Service, Nuclear Regulatory Commission, local building inspectors, fire marshals, etc., are included in this

category.

- B. 2. b. (5) (a) Such notifications are referrals when nongovernment employees are exposed to the alleged hazards. (See, however, B.2.b.(3).)
- B. 2. b. (6) Media Reports. Reports of accidents involving serious injury or of potentially serious workplace hazards in the media shall be considered as referrals. "Reports" shall be understood to include news items reported in the media as well as hazards reported directly to PESH by media sources. Thus newspaper or magazine articles, photographs or news items reported over radio or television are examples of media reports as well as calls to the District Office by reporters.
- B. 2. b. (7) Employer Reports. Employer reports of accidents, other than fatalities and catastrophes, or incidents, whether required by standard or regulation or not, shall be considered as referrals.
- B. 2. c. Referral inspections are un-programmed inspections and, except for complaints received from 27-a(10) personnel, shall be recorded in the District Office in OIS as a Referral UPA.
- B. 3. Procedures. Each referral shall be evaluated as thoroughly as possible in accordance with the guidelines for evaluating complaints given in A.4. and A.5, to determine whether there are reasonable grounds to believe that a safety or health hazard exists. If so, the hazard shall be classified as imminent danger, serious or non-serious. Referrals to be inspected shall be assigned a priority by the supervisor according to the severity of the alleged hazard.
- B. 3. a. When the CSHO observes an imminent danger situation under the circumstances outlined in B.2.b.(1)(c)3, the supervisor shall be contacted immediately, if practicable. Otherwise, an inspection shall be conducted without delay and the supervisor informed as soon as possible after the inspection has been initiated.
- B. 3. b. The District Supervisor may decide that a government agency referral identifies a hazard of such a potentially serious nature that it warrants an inspection. Such referrals shall be placed in the same inspection priority as media reports.
- B. 3. c. In the case of media reports, reasonable efforts to corroborate the information contained in the report shall be made whenever necessary. Specifically, the supervisor shall attempt, before scheduling an inspection, to determine if the incident is related to an apparent violation of a standard. This may be done by carefully reviewing the facts as reported by the media or, when indicated by the particular circumstances, by contacting a third party such as the police, the ambulance service or, in rare cases, by calling the employer.
- B. 3. d. Media reports of non-serious hazards will not normally require a Bureau response.
- B. 3. e. Employer reports of accidents other than fatalities or catastrophes normally shall be handled when it is determined that such an employer report identifies a hazard of such a

potentially serious nature that it warrants an inspection. If so, such referrals shall be placed in the same inspection priority as media reports.

- B. 3. f. Employer reports of incidents involving chemical spills or other releases to which employees may have been potentially exposed shall normally be scheduled for an inspection within 5 days if the potential exposure is determined to have been sufficiently serious to warrant an inspection.
- B. 3. g. Except for 27-a(10) referrals as noted in B.2.b.(3), referrals will not normally result in an inspection unless they involve potentially serious hazards. Consequently, referrals scheduled for inspection shall be investigated as soon as resources allow.
- B. 3. h. Although no letter of acknowledgment of receipt will be necessary, a letter transmitting the results shall be sent to any referring safety and health agency or other government agency whenever a referral inspection is conducted.
- B. 3. i. The scope of referral inspections shall include a complete investigation of the circumstances of the referral. These investigations may be expanded at the discretion of the District Supervisor when any of the conditions described in Chapter II, F.1.b. exist, but see Chapter III, D.1.d.(5)(b).
- B. 3. j. A case file shall be set up for each referral as it is received. This case file shall contain a copy of the completed Referral UPA, all documentation supporting the evaluation and classification of the referral and subsequent action documents. If an inspection is eventually performed, all of the material will be absorbed into the inspection case file.
- B. 4. Referrals to other DOSH units and Other Regulatory Agencies.
- B. 4. a. Whenever PESH observes a hazard or receives a complaint that describes hazards that are covered by another unit within DOSH, a referral to the appropriate unit will be made in writing immediately. This hold true even in cases where PESH will be conducting an inspection in the future to investigate complaint items under PESH jurisdiction.
- B. 4. b. The same procedure as described above shall be followed for making referrals to other regulatory agencies.
- B. 4. c. This policy does not prevent PESH from making referrals based on workplace observations, after an inspection has been conducted. Referrals in this situation should be submitted as soon as the inspector returns to the office and should not be delayed due to report writing and typing.

CHAPTER IX APPENDIX A
SAMPLE INMATE RESPONSE LETTER

[Date]

Dear [Name]:

The "Notice of Alleged Safety or Health Hazards" that you submitted concerning the [Establishment] was received on [Date Complaint Received].

As you may be aware, Section 27-a of the New York State Labor Law was established to regulate occupational safety and health hazards to which public employees are potentially exposed. Under the Law, inmates are not defined as public employees and therefore we do not have jurisdiction to initiate an inspection in this case.

You may wish to bring this matter to the attention of the Commission of Corrections at 80 South Swan Street – 12th Floor, Albany, New York 12210 or you may contact Prisoner's Legal Services at 301 South Allen Street, Albany, New York 12208.

APPENDIX B

Non-Serious Complaint Response Letters

Letter to Employer

[date]

[Employer name and address]

Dear

On [date], the New York State Department of Labor, Public Employee Safety and Health Bureau (PESH) received a notice of [safety and/or health] hazards at your worksite at: [location]

The specific nature of the alleged hazards is as follows: [nature of hazard]

We have not determined whether the hazards, as alleged, exist at your workplace, and we do not intend to conduct an inspection at this time. However, since allegations of violations and/or hazards have been made, we request that you immediately investigate the alleged conditions and make any necessary corrections or modifications. Please advise me in writing, no later than ten (10) business days from receipt of this letter of the results of your investigation. You must provide supporting documentation of your findings, including any applicable measurements or monitoring results, and photographs/video which you believe would be helpful, as well as a description of any corrective action you have taken or are in the process of taking, including any previously corrected conditions relative to this complaint. Please fax your response, if possible, to [fax number]

If corrections are required and cannot be made immediately, please advise this office of the time you will need to make the corrections, by indicating a specific abatement date. Include in the notification any interim measures you will take to protect the employees until the conditions are completely corrected. After the corrections are completed, please provide a detailed description of the final abatement as indicated above.

It is our goal to assure that hazards are promptly identified and eliminated. Please take immediate corrective action where needed. We encourage employee participation in investigating and responding to any alleged hazard. If we do not receive a response from you by [date] indicating what appropriate action has been taken or that no hazard exists and why, a PESH inspection will be conducted.

An inspection may include a review of, including but not limited to, the following: injury and illness records, hazard communication, personal protective equipment, emergency action or

response, bloodborne pathogens, confined space entry, lockout, and related safety and health issues.

NYS DOL PESH offers consultation services, without charge, to assist in resolving all occupational safety and health issues. To discuss or request the consultation services, contact PESH at the following address: [address of your D.O.]

You are requested to post a copy of this letter where it will be readily accessible for review by all of your employees, and return a copy of the signed Certificate of Posting to this office. In addition, you are requested to provide a copy of this letter and your response to it to a representative of any recognized employee union or safety committee if these are at your facility. Failure to do this may also result in an on-site inspection. The complainant has been furnished a copy of this letter and will be advised of your response. The PESH Act provides protection for employees against discrimination because of their involvement in protected safety and health related activity.

If you have any questions concerning this matter, please contact this office at the below address. Your personal support and interest in the safety and health of your employees is appreciated.

Sincerely,

[name of supervisor]

[title]

Certificate of Posting

Complaint Number: 202161527

Date of Posting: _____

Date Copy Given to an
Employee Representative: _____

On behalf of the employer, I certify that a copy of the complaint letter received from New York State Department of Labor Public Employee Safety and Health (PESH) has been posted in a conspicuous place, where all affected employees will have notice, or near such location where the violation occurred, and such notice has been given to each authorized representative of affected employees, if any. This notice was or will be posted for a minimum of ten (10) working days or until any hazardous conditions found are corrected.

Signature: _____

Title: _____

Letter to Complainant – Response From Employer

[date]

[complainant name & address]

Dear

[name of employer] has advised me that the hazards you identified in your complaint have been investigated. The employer states that [describe results of employer's investigation, if hazard was found to exist and steps taken to correct]. A copy of the employer's letter is enclosed.

With this information, PESH feels the case can be closed on the grounds that the hazardous conditions have been corrected (or no longer exist). If you do not agree that the hazards have been satisfactorily abated, please contact us by [date]. If we do not hear from you within that time, we will assume that the hazard has been corrected or eliminated and we will take no further action with respect to this case.

Your action on behalf of safety and health in the workplace is sincerely appreciated.

Respectfully,

[name of supervisor]

[title]

Enclosure

Letter to Complainant – Not Inspecting

[date]

[complainant name & address]

Dear

In response to your complaint of health and/or safety hazards at:

The New York State Department of Labor, Public Employee Safety and Health Bureau has notified your employer, requesting that appropriate action be taken to correct the hazards identified. Enclosed is a copy of that letter for your information.

We have not revealed your identity to the employer. When we receive additional information from the employer, a copy of that information will be forwarded to you.

The PESH Act, Article 2, Section 27-a of the New York State Labor Law provides protection for employees against discrimination because of their involvement in protected safety and health related activity. If you believe you are being treated differently or action is being taken against you because of your safety or health activity, you may file a complaint with PESH. You should file this complaint as soon as possible, since PESH can only accept complaints filed within 30 days of the alleged discriminatory action.

Your continued interest in workplace safety and health is appreciated.

Respectfully,

[name of supervisor]

[title]

Enclosure

Complaint Not Valid Letter

[date}

[name and address]

Dear []:

We have received your PESH-7, Notice of Alleged Safety or Health Hazards with respect to [].

Section 27-a of the New York State Labor Law was established to regulate occupational safety and health hazards to which public employees are potentially exposed. Unfortunately, your complaint does not meet the requirements and description of a safety and health hazard under NYS Code or Rules or under federal OSHA standards.

We are returning your complaint without further action. Thank you for your interest in the safety and health of your worksite.

Very truly yours,

[]
Supervising Safety & Health Inspector

Enclosure

CHAPTER X

DISCRIMINATION COMPLAINTS

Section 27-a.10 of the New York State Labor Law provides, in part, that any public employee who believes that they have been discharged, disciplined or otherwise discriminated against as a result of filing a complaint, or instituting or causing to be instituted, any proceeding related to Section 27-a, or testifying or being about to testify in any such proceeding, may file a discrimination complaint with the Commissioner of Labor within 30 days of the alleged discriminatory actions. The Department will notify the complainant within 90 days of its determination after conducting an investigation.

The filing of a discrimination complaint does not diminish any rights held by the employee under any Law, Rule, Regulation or collective bargaining agreement. An employee may and should pursue all avenues of redress.

Taking a complaint

Who Can File a Complaint:

A current or former public employee, or their representative, may contact PESH regarding an alleged violation of Section 27-a.10. The complaint process can be initiated either in person, by telephone, letter, fax or email. The Complainant can also use an employee representative certified to represent employees pursuant to Article 14 of the Civil Service Law.

Complaint Intake:

Complainants may contact any Department of Labor PESH District Office to file a discrimination complaint. Complaints should be taken by a PESH Supervisor, or Supervisor Designee. All complaint information should be entered onto a complaint intake form (attached) and as much information as possible should be collected from the Complainant.

The Supervisor or Supervisor Designee should record the following basic information concerning the complaint on the complaint intake form:

- The employer's name, address, phone number, chief executive officer, employee's supervisor and their direct telephone numbers.
- The Complainant's full name, email address, address and phone number(s) - both home and work.

- Date of Complaint (this may be the date the intake form was initiated, walk-in of the Complainant, letter, fax or email). The date must be entered as this will be used to determine if the complaint was initiated within the 30-day allowed time period.
- Date of adverse action(s).
- A brief summary of the alleged discriminatory action (that includes protected activity, employer knowledge, adverse action and chronology). The Complainant should be asked if they are aware of previous PESH inspections and document the information collected.

Anonymity:

The Complainant should be asked if it is all right to share their name and information with the employer. If the Complainant does not wish to have his/her name revealed to the employer, it shall be explained to the Complainant that this will significantly hamper the investigation since we will not be able to ask for personnel records and other pertinent information. If the Complainant wishes to remain anonymous, the details of the complaint will be modified to maintain the anonymity of the Complainant, and then provide it to the employer for their response.

OSHA Filing:

The Complainant should be informed that filing a complaint with OSHA may be another option to pursue. The Supervisor or Supervisor Designee shall document that they informed the Complainant of their option to file with OSHA.

Below are the federal statutes that may also have overlapping protections from discrimination for public employees:

- *Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §2651
- *International Safe Container Act (ISCA), 46 U.S.C. §80507
- *Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105
- *Clean Air Act (CAA), 42 U.S.C. §7622
- *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9610
- *Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367
- *Safe Drinking Water Act (SDWA), 42 U.S.C. §300j- 9(i)
- *Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971
- *Toxic Substances Control Act (TSCA), 15 U.S.C. §2622
- *Energy Reorganization Act (ERA), 42 U.S.C. §5851
- *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. §42121
- *Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act (SOX), 18 U.S.C. §1514A (SOX)
- *Pipeline Safety Improvement Act (PSIA), 49 U.S.C. §60129
- *Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109

- *National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142
- *Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. §2087
- *Affordable Care Act (ACA), 29 U.S.C. §218C
- *Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank *Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. §5567
- *Seaman’s Protection Act, 46 U.S.C. §2114 (SPA), as amended by Section 611 of the *Coast Guard Authorization Act of 2010, P.L. 111-281
- *FDA Food Safety Modernization Act (FSMA), 21 U.S.C. §399d

Voluntary Withdrawal:

The Complainant may request, either verbally or in writing, to voluntarily withdraw their complaint at any time during the investigation. While not required, the investigator should ask the Complainant to complete the discrimination complaint withdrawal form (see attached). The Investigator will notify the District Supervisor of this request and will mail the discrimination complaint voluntary withdrawal letter to the Complainant (certified mail return receipt requested). The Investigator should inform the Complainant that by withdrawing the complaint, they have waived their right to a determination made by the Department of Labor as to whether their complaint is valid under the New York State Labor Law. This notification must be documented in the case file. A copy of the signed letter should be placed in the file.

A. Screening a Complaint

Timeliness:

Complaints must be filed within 30 days of the alleged discriminatory actions. All contact is required to be made within thirty (30) days of the alleged adverse action which generally begins when the employee has knowledge that adverse action has occurred or will take place. If the adverse action is of a continuing nature, such as harassment or blacklisting, the time period begins when the last act of discrimination occurs. The first day that the 30 days begins to run is the day after the employee obtained knowledge of the alleged adverse action. Generally, the date a complaint is considered filed is the date of the Complainant’s first attempt to make contact with PESH. For complaints sent by mail, the date filed is the date of the postmark. If the postmark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a federal/State holiday, the next business day will count as the last day of the 30 day filing period.

Untimely complaints will not be processed, and the Complainant will be notified of this in writing using the Administrative Closure Letter (see attached). It should be noted on the case intake form that the case was closed and the reasons.

If the Complainant refuses to accept the determination to administratively close the case, the investigator should conduct a closing conference with the complainant explaining their appeal rights and that further investigation will not be conducted. This conference may be conducted with the Complainant in person or by telephone. A letter detailing the Complainant’s appeal

rights should be sent to the Complainant (certified mail return receipt requested) by the PESH Supervisor and the case administratively closed, noting that the Complainant did not agree.

Complainants may have the 30-day period extended if:

- The employer has misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is of a continuing nature. This includes situations in which the employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate their rights. For example, when an employer repeatedly assured the Complainant that they would be reinstated so that the complainant reasonably believed that they would be restored to their former position, an extension of the 30-day period may be appropriate.
- PESH has no record of the time a complaint was filed. The investigator should determine if there is proof (ex: post-marked correspondence or telephone memo) that the complainant contacted PESH within the 30 day filing period.
- The employee is unable to file within the statutory time period due to a debilitating illness or injury. Conditions should be such that a reasonable person with the same type of illness or injury would not have been able to pursue a complaint. The period should be extended a reasonable amount based upon the employee's illness or injury.
- The employee is unable to file within the required time due to a natural disaster such as a snowstorm or flood. Conditions should be such that a reasonable person under the same or similar circumstances would not have been able to pursue a complaint. The period should be extended for a reasonable amount based upon the circumstances surrounding the natural disaster.
- The Complainant was unaware of the 30-day filing requirements, **and** the establishment where the Complainant worked lacked a PESH poster.

Complaints may not have the 30-day period extended for the following reasons:

- Ignorance of the statutory filing period (Where a PESH poster was properly posted.)
- Filing of unemployment compensation claims.
- Filing a discrimination complaint (e.g., EEOC) or lawsuit (e.g., in court).
- Filing a worker's compensation claim.
- Filing a private negligence or damage suit.

- Filing a grievance or arbitration action.
- The pendency of grievance-arbitration proceedings or filing with another agency.

Applicability:

The employee must have participated in an activity protected by Article 2, Section 27-a, of the New York State Labor Law (which include filing a complaint, instituting or causing to be instituted any proceeding relating to 27-a, or testifying or being about to testify in any such proceeding or if employer discovers employee's request for safety information).

Public Employee:

The employee must have worked for a public employer within the coverage of Section 27-a of the Labor Law.

B. Docketing a Complaint

Upon the receipt of a Complaint alleging discrimination, the complaint intake form will be referred for initiation of a possible investigation.

The complaint intake form and supporting information will be sent to the Discrimination Program Manager for review. Upon this review, a decision will be made on how to proceed with the case. Complaints, not meeting acceptable intake criteria, will be sent with a limited ROI for counsel's office review. Clear non-merit cases will result in withdraw requests to the complainant or will be closed administratively.

Complaints which meet acceptable intake criteria and having potential merit will be referred by the Discrimination Program Manager for an investigative conference and/or investigative interviews.

The Supervisor:

- Upon receipt of Discrimination Program Manager determination that an investigative conference and/or investigative interviews should be performed, the Supervisor or assigned investigator sends a letter (certified mail return receipt requested) notifying the Complainant that the complaint has been reviewed, given an official designation (i.e., case name and number), and assigned to an investigator. The letter will also include the PESH discrimination questionnaire and standard release form. A stamped return envelope should be included for the return of the PESH discrimination questionnaire and standard release form.
- Send an employer notification letter to the Chief Executive Officer or head of the state or local government agency, as well as the local manager of the site (certified mail return receipt requested), or designated representative (e.g., attorney) notifying the employer that a complaint alleging discrimination has been filed by the Complainant and requesting

that the employer submit a written position statement regarding the allegations within ten (10) business days from the date on the letter. Unless the Complainant has requested anonymity, the employer should be provided a copy of the Complaint. A request for an extension of time, for the employer to provide its written position statement, may be made to the PESH investigator for an additional ten (10) business days.

- The certified mail receipt number will be identified on the letters and the receipts stapled to the file copy of the letters to maintain accountability. PESH offices without ready access to postal services will send the letter by an overnight delivery service.

The Investigator:

- Within five (5) business days of receipt of the discrimination complaint, the investigator should contact the Complainant by phone or in person, request the complainant return the completed PESH Discrimination Questionnaire and Standard Release form, Schedule investigative conference or interviews as soon as possible, and enter the case into IMIS.
- Records all case related activities on the case activity log including phone calls, receipt of e-mails, letters, interviews, etc.
- Schedules investigative conference and/or employer and witness interviews.
- Begins gathering evidence for the case.

Upon completion of the investigation and Program Manager review of the ROI and case file copy, Counsel's Office or the Administrative Adjudications Unit Attorney:

- Reviews the case, notifies the Investigator, and provides advice, as appropriate, on the handling of the investigation.
- Upon the request of PESH, provide specific suggestions to the investigator on areas for further investigation regarding the case.

C. Investigations

The purpose of the investigation is to determine if evidence exists which demonstrates the Complainant suffered some form of adverse action as a result of their engaging in an activity that is protected by Section 27-a of the Labor Law. Adverse action may include, but is not limited to:

- Discharge
- Demotion

- Letters of reprimand
- Differential treatment (e.g., hostile work environment)
- Lay off
- Failure to hire
- Failure to promote

An adverse employment action does not include changes in workforce assignment for a valid business reason, a counseling memorandum, or a change which does not constitute a change in the terms and conditions of the Complainant's employment (e.g., a petty, slight, or minor annoyance). The investigation should collect any information that establishes a connection or link between the protected activity and the adverse employment action. This link can be demonstrated by identifying hostility toward the Complainant, proximity in the time between the protected activity and the adverse action or disparate treatment of the Complainant. Information from the employer should be gathered by providing the Employer with the opportunity to present evidence and submit a position statement. The employer's reasons for taking any adverse employment actions should be investigated and documented in the file.

Complainant Interview:

It is recommended that this interview be done in person, away from the Complainant's work site, and without the employer's knowledge. However, given geographic and time constraints the interview may be conducted over the phone. During the interview, the investigator should work with the Complainant to address any missing information on the PESH Discrimination Questionnaire and Standard Release form. Once completed, the Investigator should review the questionnaire. If the Complainant needs to obtain further information, an additional five (5) days may be allowed.

During the interview, the Investigator should:

- Identify the remedy the Complainant is seeking and, if appropriate, the Complainant should be informed if the remedy is attainable under Section 27-a.
- Identify as many witnesses having firsthand knowledge, including telephone numbers, home addresses, etc., as possible.
- Advise the Complainant if terminated or laid off by the employer, of their obligation to search for work and keep records of interim earnings.

The Investigator should document the interview in writing, provide the Complainant with a copy of the written record of the interview for the Complainant's signature, so as to ensure that it accurately reflects the Complainant's statements. During the investigation, modifications to the complaint can be accepted as long as the modification reasonably relates to the original

complaint, and the investigation has not yet been concluded.

If the Complainant's questionnaire is not completed at the time of the interview, the Complainant must be told that it must be received within five (5) business days following the interview or the case will be administratively closed. If the questionnaire is not received within five (5) business days, the Investigator should notify their Supervisor, who will send a certified first class letter to the Complainant informing them that the case will be administratively closed unless the Investigator is contacted in the next five (5) business days. If the Complainant does not respond within five (5) business days, the Supervisor will administratively close the file and notify the PESH Discrimination Program Manager. The attempts to contact the Complainant should be documented in the file and the PESH Discrimination Program Manager should notify Counsel's Office or the Administrative Adjudications Unit of the investigation's closure.

The Investigator should obtain information from the Complainant to determine if the Complaint contains the elements of a Prima Facie Case of discrimination. If the protected activity involves a work refusal, the Investigator should obtain information relative to the work refusal provision in 29 CFR 1977.12 which provides the employee the right to refuse to perform an assigned task if the employee:

- Has a reasonable apprehension of death or serious injury
- Refuses in good faith
- Has no reasonable alternative
- Indicates there was sufficient time to eliminate the condition through regular statutory enforcement channels
- Sought from their employer, where possible, a correction of a dangerous condition, and was unable to obtain one.

Employer Position Statement and Evidence:

As described above, the employer should be notified that a complaint alleging discrimination has been filed by the Complainant and request that the employer submit a written position statement regarding the allegations within ten (10) business days. A Designation of Representative form (attached) should be completed by the Employer's representative to document his or her involvement. Unless the Complainant requests anonymity, the employer should be provided a copy of the Complaint and the completed questionnaire so that they are aware of the allegations made against them and have the opportunity to adequately respond. If the employer's counsel is to be involved, the Investigator will inform the Employer that future contact in the matter will be through such representative. If the Complainant requests anonymity, the Employer should be provided with a sanitized copy of the complaint. The Employer should have the opportunity to provide, along with its position statement, any evidence or arguments that it deems appropriate to respond to the allegations contained in the Complaint. Should additional information or documentation be needed from the employer

after a review of the Position Statement (e.g. personnel, payroll and other pertinent files kept by the Employer at any level of supervision including affirmative action files), the Investigator may send the employer a letter requesting such information or documentation, and setting a date by which such information should be provided not to exceed ten (10) business days. An employer's failure to respond to the request for a position statement and to the request for additional information in a timely manner will be deemed a "no response" and the investigation will proceed with a determination made solely upon information from the investigation.

Witness Interviews:

Based upon the information provided by the Complainant and the Employer, the Investigator should conduct interviews with employee witnesses to the alleged discrimination, or with the Employer's designated representative. The employer should be notified in advance of the requirement to produce current employees as witnesses for an interview. Witness interviews may be conducted through an Investigative Conference or, if investigative circumstances warrant, through individual interviews of witnesses.

Investigative Conference:

The Investigator or a representative from the Administrative Adjudications Unit may hold a discrimination conference at which the Complainant, the Employer, and any witnesses identified by the Investigator, meet jointly to respond to allegations and information from each other. This will help to expedite the collection of information and understanding of the situation, while providing the parties the opportunity to respond to allegations and assertions made in real time. The conference should be held at a neutral location, preferably a Department of Labor office. However, with concurrence of the Complainant, it may be held at the worksite. Employee representatives may participate if requested by the Complainant.

The Investigator or the Administrative Adjudications Unit will conduct the conference by asking questions of witnesses or parties, and providing the parties, at the conclusion of each witness' questioning, the opportunity to respond and provide additional information to the Investigator. The parties are not to be permitted to ask each other or witnesses questions directly. All questions must be asked by the Investigator. At the discretion of the Investigator or the representative of the Administrative Adjudications Unit, witnesses may be sequestered during the conference so as to not hear the questions that are posed to other witnesses. Both the Complainant and the employer will have the opportunity to make closing comments based on the information provided during the investigation and discrimination conference, and the parties will be afforded the opportunity to submit written arguments or documentation in support of such closing comments within five (5) business days of the conference. A notice of conference (attached) should be provided to the Complainant, employer and all witnesses a minimum of two weeks prior to the discrimination conference. It is not anticipated that the DOL will render a decision at the conclusion of the discrimination conference, however, it is expected that all evidence to prove or disprove the allegations will be provided or collected by the Inspector by the conclusion of the conference.

Individual Witness Interviews:

If, in the judgment of the Investigator and after consultation with their Supervisor, the case would more appropriately be handled through individual interviews of witnesses, such interviews should be conducted expeditiously. Such interviews should be conducted at the worksite unless requested by the witness or parties for an alternate location. If the Employer requests time to consult legal counsel or denies entry until counsel can be present, a return visit may be arranged. During those interviews, the Investigator should discuss the complaint and request information that provides evidence relating to the discrimination complaint. During all interviews, the Investigator should document the interview in writing, provide the person being interviewed with a copy of the written record for review and signature, so as to ensure that it accurately reflects their statements.

After written arguments and/or documentation in support of closing comments have been received following the investigative conference and/or employer and witness interviews, the Complainant will be contacted to allow for a potential rebuttal or additional information. At this time, a closing conference will be conducted and documented in the file (case contact and ROI) and the report of investigation will be completed and submitted for review.

The closing conference may be conducted by phone or in person and will:

- Provide the complainant with an opportunity to present any additional evidence deemed relevant
- Allow time for questions from the complainant
- Discuss the strengths and weaknesses of the case and what actions may be taken in the future. (it is not necessary to disclose the investigator's determination at this stage because it is subject to counsel's determination)
- Advise that the determination, at this point, is a recommendation subject to review.
- Inform the complainant of their right to appeal and the time limitation for doing so.

D. Determinations

Once the Investigator and his/her supervisor believe that the investigation is complete, they will provide the electronic ROI and the file copy to the Discrimination Program Manager for review. The ROI and case file copy will be forwarded to Counsel's Office or the Administrative Adjudications Unit by the Discrimination Program Manager for a determination as to the merits of the Complaint. Should, after review of Counsel, additional information be necessary for a determination or other resolution of the complaint, Counsel's Office or the Administrative Adjudications Unit will provide additional guidance and details of the information that is needed to the Investigator for further investigation in accordance with this Chapter. If Counsel's Office or the Administrative Adjudications Unit determines the investigation is complete, the Investigator will document this in the file and close the investigation.

All information collected by the Investigator must be provided to Counsel's Office or the Administrative Adjudications Unit. Upon the receipt of a completed investigation file, Counsel's Office or the Administrative Adjudications Unit will determine if there has been discrimination of the Complainant and enter into discussions with the Complainant and the Employer's Counsel to settle the case, or take appropriate action to refer the case to the Office of the Attorney General in accordance with Section 27-a.10 of the Labor Law. If no discrimination has been determined to have occurred, Counsel's Office or the Administrative Adjudications Unit will issue a determination to the Complainant notifying them of such and providing them with their right to appeal such determination to the Industrial Board of Appeals within 60 days of the receipt of the determination. Such appeal should be addressed to:

Industrial Board of Appeals
State Office Campus, Building 12, Room 116
Albany, NY 12240

E. Voluntary Settlement Agreements

This section covers policy and procedures for the effective negotiation and documentation of how to settle a case at the District level.

For all cases it is best to come to a voluntary resolution of disputes that are fair and equitable. Investigators are encouraged to try to reach an agreement between the Complainant and the Employer to avoid litigation, where possible.

Settlement Procedure:

Full Restitution:

What is considered to be full restitution will vary from case to case. The appropriate remedy in each individual case must be carefully explored and documented by the Investigator. One hundred percent relief should be sought during settlement negotiations wherever possible, but investigators are not required to obtain all possible remedies if the complainant accepts less than full restitution in order to more quickly resolve the case. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass and is not necessarily limited to any or all of the following:

- Reinstatement to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement.
- "Front pay" is a term referring to future wage losses, calculated from the end date of back-wages, and projected to an agreed-upon future date. Front pay may be used in lieu of reinstatement when one of the parties wish to avoid reinstatement and the other agrees.
- Wages lost due to the adverse action, offset by interim earnings. That is, any wages earned in the complainant's attempt to mitigate his or her losses are subtracted from the full back wages (NOTE: Unemployment compensation benefits may never be considered as an offset to back pay).
- Removal of warnings, reprimands, or derogatory references resulting from the protected activity which have been placed in the complainant's personnel file or other records.
- The Employer's agreement to provide a neutral reference to potential employers of the complainant.
- Posting of a notice to employees stating that the respondent agreed to comply with the relevant discrimination statute and that the complainant has been awarded appropriate relief.

- Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, vested fund or profit-sharing losses, or property loss resulting from missed payments.
- Pain and suffering. Such damages need factual support, such as medical bills, proof of the loss of a home, evidence supporting a reasonable inference of loss of reputation, etc.
- An agreed-upon lump-sum payment to be made at the time of the signing of the settlement agreement.

The Standard PESH Settlement Agreement:

Whenever possible, the parties should be encouraged to utilize PESH's standard settlement agreement containing all of the core elements outlined below. (See sample PESH settlement agreement at the end of this chapter.) This will ensure that all issues within PESH's jurisdiction are properly addressed. The settlement must contain all of the following core elements of a settlement agreement:

- Be in writing.
- Stipulate that the employer agrees to comply with the relevant statute(s).
- Address the alleged retaliation.
- Specify the relief obtained.
- Address a constructive effort to alleviate any chilling effect, where applicable, such as a posting or an equivalent notice. If a posting or notice is not required, the Report of Investigation (ROI) must contain an explanation of why the action is considered unnecessary.
- Adhere to these core elements which should not create a barrier to achieving an early resolution and adequate remedy for the complainant, but according to the circumstances, concessions may sometimes be made. Exceptions to the above policy are allowable if approved in a *pre-settlement* discussion with the Program Manager and Counsel's office. All pre-settlement discussions with the Program Manager must be documented in the case file and the Report of Investigation (ROI).
- Document in the file all appropriate relief and damages to which the complainant is entitled. If the settlement does not contain a make-whole remedy, the justification must be documented and the complainant's concurrence must be noted in the ROI.
- Address the adverse impact on co-workers in instances where the employee does not return to the workplace. Although posting of a settlement agreement, standard poster and/or notice to employees, is an important remedy, it may also be an impediment to a settlement. Other efforts to address the adverse effect on co-workers, such as employer training, may be available and should be explored.

Stay consistent with the language of the standard agreement , but realize that certain sections may be removed to fit the circumstances of the complaint or the stage of the investigation. Those sections that can be omitted or included, with Program Manager approval include:

- *POSTING OF NOTICE* (See sample of Notice to Employees at the end of this chapter.)
- *COMPLIANCE WITH NOTICE*
- *GENERAL POSTING*
- *NON-ADMISSION* (Inclusion should depend on the stage of the investigation. If the investigation is complete and the case has merit, then this clause should be omitted.)

The contents of other sections of the agreement, such as the following, are variable according to circumstance.

- *REINSTATEMENT*

* Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have earned but for the alleged retaliation, which he has declined/accepted.

* Reinstatement is not an issue in this case. Respondent is not offering, and Complainant is not seeking, reinstatement.

- *MONIES*

* Respondent agrees to make Complainant whole by payment of \$ ____ (less normal payroll deductions).

* Respondent agrees to pay Complainant a lump sum of \$ _____. Complainant agrees to comply with applicable tax laws requiring the reporting of income.

All agreements utilizing PESH's standard settlement agreement shall be recorded in the IMIS as "Settled."

PESH settlements should generally not be altered beyond the options outlined above. Any changes to the standard PESH settlement agreement language, beyond the few options noted above, must be approved in a pre-settlement discussion with the Program Manager and Counsel's Office. The addition of provisions often found in "general releases" is never an option in PESH settlement agreements. For example, PESH's standard settlement agreement may never include a confidentiality clause or a waiver of future employment.

Settlements to which PESH is not a Party:

Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, without PESH's participation. Because PESH favors voluntary resolution of disputes through alternative dispute resolution processes, PESH's policy is to defer to adequate privately negotiated settlements. However, settlements reached between the parties must be reviewed and approved by the Program Manager and Counsel's Office to ensure that the terms of the settlement are fair, adequate, reasonable, and consistent with the purpose and intent of the Act (in the public interest). Approval of the settlement demonstrates PESH's consent and achieves the consent of all three parties. However, PESH's authority over settlement agreements is limited to the statutes within its jurisdiction. Therefore, PESH's approval only relates to the terms of the agreement pertaining to the referenced statute under

which the complaint was filed. Investigators should make every effort to explain this process to the parties early in the investigation to ensure they understand PESH's involvement in any resolution reached after a complaint has been initiated.

- In most circumstances, issues are better addressed through a PESH agreement, and if the parties are amenable to signing one as well, the PESH settlement must incorporate the relevant (approved) parts of the two-party agreement by reference in the PESH agreement. This is achieved by inserting the following paragraph in the PESH agreement: "Respondent and Complainant have signed a separate agreement encompassing matters not within the NYS Department of Labor Public Employee Safety and Health Bureau's (PESH's) jurisdiction. PESH's authority over that agreement is limited to the statutes within its jurisdiction. Therefore, PESH approves and incorporates in this agreement only the terms of the other agreement pertaining to Article 2, Section 27-a of the New York State Labor Law. [You may also modify the sentence to identify the specific sections or paragraph numbers of the agreement that are under PESH's jurisdiction.]" These cases must be recorded in the IMIS as "Settled."
- If PESH approves a settlement agreement, it constitutes the final order of the Department of Labor and may be enforced according to NYS rules and regulations. The approval letter must include the following statement: "The New York State Department of Labor's authority over this agreement is limited to the statutes within its jurisdiction. Therefore, The New York State Department of Labor, Public Employee Safety and Health Bureau, only approves the terms of the agreement pertaining to the 'Act'" (the sentence may identify the specific sections or paragraph numbers of the agreement that are relevant, that is, under the Secretary's jurisdiction). These cases must be recorded in the IMIS as "Settled Other."
- A copy of the reviewed agreement must be retained in the case file and the parties should be notified that PESH will not disclose documents contained in the file unless required under the Freedom of Information Law (FOIL) or subpoena. The parties may also be informed that the bureau's current policy is that it is PESH's policy to withhold all agreements under the program effectiveness prong of exemption of FOIL.

If an impasse is reached, such that no approvable agreement is signed, the parties should be informed that the investigation shall proceed. If the parties refuse to submit their independently negotiated settlement for approval, and the complainant submits a request to withdraw the case, the case shall be closed. The findings must include the statement that the parties reached a settlement that was not submitted for review and therefore not approved by PESH.

Criteria by which to Review Private Settlements:

In order to ensure that settlements are fair, adequate, reasonable, and in the public interest, Program Managers must carefully review unredacted settlement agreements in light of the particular circumstances of the case.

PESH will not approve a provision that states or implies that PESH or NYS DOL is party to a confidentiality agreement.

PESH will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future. Accordingly, although a complainant may waive the right

to recover future or additional benefits from actions that occurred prior to the date of the settlement agreement, a complainant cannot waive the right to file a complaint based either on those actions or on future actions of the employer. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to or shall prevent or interfere with Complainant's non-waivable right to engage in any future activities protected under the whistleblower statutes administered by PESH."

PESH will not approve a "gag" provision that restricts the complainant's ability, unless subpoenaed, to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to or must prevent, impede or interfere with Complainant's providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency."

PESH shall ensure that the complainant's decision to settle is voluntary.

If the settlement agreement contains a waiver of future employment, the following factors must be considered and documented in the ROI. In addition, the agreement and ROI must be reviewed and approved by the NYS DOL Counsel's Office.

- The breadth of the waiver. Does the employment waiver effectively prevent the complainant from working in his or her chosen field in the locality where he or she resides? Consideration should include whether the complainant's skills are readily transferable to other employers or industries. Waivers that more narrowly restrict future employment, for example, to a single employer or its subsidiaries or parent company may generally be less problematic than broad restrictions such as any employers at the same worksite or any companies with which the respondent does business.
- The investigator must ask the complainant, "Do you feel that, by entering this agreement, your ability to work in your field is restricted?" If the answer is yes, then the follow-up question must be asked, "Do you feel that the monetary payment fairly compensates you for that?" The complainant also should be asked whether he or she believes that there are any other concessions made by the employer in the settlement that, taken together with the monetary payment, fairly compensates for the waiver of employment. The ROI must document the complainant's replies and any discussion thereof.
- The amount of the remuneration. Does the complainant receive adequate consideration in exchange for the waiver of future employment?
- The strength of the complainant's case. How strong is the complainant's retaliation case, and what are the corresponding risks of litigation? The stronger the case and the more likely a finding of merit, the less acceptable a waiver, unless very well remunerated. Consultation with NYS DOL Counsel may be advisable.
- Complainant's consent. PESH must ensure that the complainant's consent to the waiver is knowing and voluntary. The ROI must document the complainant's replies and any discussion thereof.

- If the complainant is represented by counsel, the investigator must ask the attorney if he or she has discussed this provision with the complainant.
- If the complainant is not represented, the investigator shall ask the complainant if he or she understands the waiver and if he or she accepted it voluntarily. Particular attention should be paid to whether or not there is other inducement--either positive or negative--that is not specified in the agreement itself, for example, if threats were made in order to persuade the complainant to agree, or if additional monies or forgiveness of debt were promised as additional incentive.
- Any other relevant factors in the particular case will be considered. For example, does the employee intend to leave his or her profession, to relocate, to pursue other employment opportunities, or to retire? Has he or she already found other employment that is not affected by the waiver? In such circumstances, the employee may reasonably choose to forgo the option of reemployment in exchange for a monetary settlement.

Bilateral Agreements:

A *bilateral settlement* is one between the NYS Department of Labor (NYSDOL), signed by a Program Manager, and a *respondent-without the complainant's consent*-to resolve a complaint filed under PESH Article 2 Section 27-a.10. It is an acceptable remedy to be used only under the following conditions:

- The settlement is reasonable in light of the percentage of back pay and compensation for out-of-pocket damages offered, the reinstatement offered, and the merits of the case. That is, the higher the chance of prevailing in litigation, the higher the percentage of make-whole relief that should be offered. Although the desired goal is obtaining reinstatement and all of the back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief.
- The complainant refuses to accept the settlement offer. (The Final Investigative Report should fully set out the complainant's objections in the discussion of the settlement in order to have that information available when the case is reviewed by NYSDOL Counsel's Office.)
- If the complainant seeks punitive damages or damages for pain and suffering (apart from medical expenses), attempts to resolve these demands fail, and the final offer from the respondent is reasonable to PESH.

When presenting the proposed agreement to the complainant, the investigator should explain that there are potential risks and delays associated with litigation and that PESH may settle the case without the complainant's participation. This is also the time to explain that, once settled, the settlement resolves the case.

All potential bilateral settlement agreements and the ROIs accompanying them shall be reviewed and approved by the NYSDOL Counsel's Office. The bilateral settlement is then signed by both the respondent and the Program Manager. Once settled, the case is entered in IMIS as "settled."

Documentation:

- Although each agreement will, by necessity, be unique in its details, in settlements negotiated by PESH, the general format and wording of the standard PESH agreement should be used.
- Investigators shall document in the file, and reference in the ROI, the rationale for the restitution obtained. If the settlement falls short of a full remedy, the justification must be explained, along with assurance that the complainant is aware of his or her potential remedy and has chosen to accept the lesser amount.
- Back pay computations must be included in the case file and referenced in the ROI, with explanations of calculating methods and relevant circumstances, as necessary.
- The interest rate used in computing a monetary settlement will be the rate charged by the Internal Revenue Service (IRS) for underpaid taxes. This rate is determined by using the Federal short-term rate, established in the first month of each calendar quarter, plus three percentage points. Changes to the Tax Underpayment Interest Rate can be obtained by calling the IRS at 1-800-8291040, checking the OWPP Intranet page or folder on the global drive, or by scrolling through the news releases on the IRS website, which at the time of publication is <http://www.irs.gov/newsroom/>.

Enforcement:

In any case that has settled, if the employer fails to comply with the settlement, this failure may be treated as a new instance of retaliation and require the opening of a new case. It may also be appropriate to issue merit findings in the original case or pursue direct enforcement of the settlement agreement in court, if the investigation resulted in a decision to make a merit determination prior to the settlement. The investigator and supervisor should confer with NYSDOL Counsel's office in considering these possibilities.

F. Reporting and Tracking of Cases

Each Investigator is responsible for tracking his/her cases and entering required information into the IMIS system and adhering to the established periods. The PESH Administrative Aide will track all discrimination cases for the purpose of meeting statutory periods and for reporting statistical information to the DOSH Director, OSHA and other interested parties. The Discrimination Investigator will ensure that copies of letters and memos are electronically sent to the Discrimination Program Manager.

G. Contents of all Case Files

- The file shall be organized with administrative memorandum and correspondence on the left side and evidentiary material on the right side
- Documents in the file should be arranged in chronological order. With the newest information on top, unless otherwise noted.

- Exhibits should be separated by means of blank paper dividers and number or letter tabs at the bottom of the first page of the exhibit. The level of detail in which the investigator breaks down the exhibits may vary from case to case depending on the complexity of the case.
- Attachments to statements should be tabbed on the right side of the page.

H. Training of Discrimination Investigators

- Course #1420: Whistleblower Investigation Fundamentals 1st Year
 - Course #1610: Interviewing Techniques for Whistleblower Investigators (may be substituted as equivalent with Investigative Interviewing Techniques, course 1310)
 - Course #1630: Written Communication and Report Writing for Whistleblower Investigators
 - ~~Course #2710:~~ Not for PESH staff. This course covers the federal statutes.
 - Course #2720: Whistleblower Complaint Resolution and Settlement Negotiations
-
- All Investigators assigned to conduct discrimination investigations will attend the OSHA Training Institute course Whistleblower Investigation. Additional courses, listed above, will be assigned as they become available. In addition, discrimination investigators will be required to attend all DOSH training that is given. Field training will be provided at the time of initial assignment by accompanying other experienced discrimination investigators.
 - All assigned investigators will keep an up-to-date Chapter X from the Field Operations Manual (FOM) and adhere to all procedures contained in the FOM, as well as adhere to the procedures outlined in all PESH Discrimination Staff Directives.

Sample Standard PESH Settlement Agreement On Following Page

In the matter of: **INSERT COMPLAINANT v. INSERT CONTROLLING CORPORATION(RESPONDENT)

Case No. **INSERT DISCRIMINATION CASE NUMBER

SETTLEMENT AGREEMENT

The undersigned Respondent and the undersigned Complainant, in the settlement of the above - captioned matter and subject to the approval of the Program Manager for the New York State Department of Labor Public Employee Safety and Health Bureau, hereby agree as follows:

Compliance with Acts. Respondent will not in any manner interfere with, restrain, or coerce Complainant or any other employee because such employee has filed any complaint or has instituted or caused to be instituted any proceeding under the jurisdiction of the New York State Department of Labor Public Employee Safety and Health Bureau, or has testified or is about to testify in any such proceedings or because of the exercise of such employee on behalf of himself or others of any rights afforded by any of these Acts.

Posting of Notice. Respondent will post in conspicuous places in and about its premises, including all places where notices to employees are customarily posted, and maintain for a period of at least 60 consecutive days from the date of posting, copies of the Notice attached hereto and made a part hereof, said Notice to be signed by a responsible official of Respondent organization and the date of actual posting to be shown thereon.

Compliance with Notice. Respondent will comply with all of the terms and provisions of said Notice.

General Posting. Respondent will permanently post in a conspicuous place in or about its premises, including all places where posters for employees are customarily posted, SH 908 (PESH poster).

Reinstatement. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have earned but for the alleged retaliation, which he has declined/accepted. [OR Reinstatement is not an issue in this case. Respondent is not offering, and Complainant is not seeking, reinstatement.]

Monies. Respondent agrees to make the Complainant whole by payment of \$ _____ (less normal payroll deductions). [OR Respondent agrees to pay Complainant a lump sum of \$ _____. Complainant agrees to comply with applicable tax laws requiring the reporting of income.]

Personnel Record. Respondent shall purge Complainant's personnel record of any derogatory references to Complainant's exercise of Complainant's rights under the jurisdiction of the New York State Department of Labor Public Employee Safety and Health Bureau.

Inquiries Concerning Complainant. Should any third parties, including prospective employers, inquire as to the employment of Complainant with the Respondent, Respondent agrees to refrain from any mention of Complainant's protected activity. Respondent agrees that nothing will be said or conveyed to

any third party that could be construed as damaging the name, character, or employment of Complainant.

Performance. Performance by both parties with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved.

Non-Admission. Employer's signing of this Agreement in no way constitutes an admission of a violation of any law or regulation under the jurisdiction of the New York State Department of Labor Public Employee Safety and Health Bureau. Nothing in this Agreement may be used against either party except for the enforcement of its terms and provisions.

Closure of Complaint. Complainant agrees that acceptance of this Agreement constitutes settlement in full of any and all claims against Controlling Corporation arising out of Complainant's complaint filed with PESH on [DATE FILED], and will cause the complaint to be closed.

This Agreement has been obtained and entered into without duress and in the best interest of all parties.

RESPONDENT: **INSERT CONTROLLING CORPORATION

(Signature) (Title) (Date)

COMPLAINANT: **INSERT NAME OF COMPLAINANT

(Signature) (date)

RECOMMENDED BY: ** INSERT NAME OF DISCRIMINATION INVESTIGATOR

(Signature) (date)
Investigator

APPROVED BY: **INSERT APPROVING AUTHORITY

(Signature) (date)
Program Manager
NYS DOL PESH

NOTICE TO EMPLOYEES

PURSUANT TO A SETTLEMENT AGREEMENT ENTERED INTO BY THE NYS DEPARTMENT OF LABOR, PUBLIC EMPLOYEE SAFETY AND HEALTH BUREAU

The employer agrees that it will not discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the NYS Public Employee Safety and Health Act (PESH Act) or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

The employer agrees that it will not advise employees against exercising rights guaranteed under the PESH Act, such as contacting, speaking with, or cooperating with Public Employee Safety and Health (PESH) officials either during the conduct of an occupational safety and health inspection of the employer's facilities or in the course of an investigation.

The employer agrees that it will not intimidate employees by suggesting or threatening that employee contact, conversation, or cooperation with PESH officials might result in closure of the employer's facilities, in loss of employment for the employees, or in civil legal action being taken against the employees.

[Name of CEO] Date
[Title of CEO]
[Name of Controlling Corporation]

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST BE NOT ALTERED, DEFACED, OR COVERED BY OTHER MATERIAL.

Copy of Excel Spreadsheet for computation available.

QUARTERLY BACKPAY COMPUTATION FOR:

Reference for back pay interest rates:

<http://www.opm.gov/oca/pay/BACKPAY/HTML/BACKPAY.asp>

Period From:		To:		
Year		Quarter		
Gross Earnings per day	0	# Working Days	0	
Gross Backpay				\$0.00
Interim Earnings		\$0.00		
Expenses for Quarter		\$0.00		
Net Interim Earnings				\$0.00
Net Backpay for Quarter				\$0.00
Annual Interest Rate	0.00%	Interest Rate per Quarter	0.00%	
# Qtrs Since Discharge	0	Interest Owed for Quarter	\$0.00	
Total Owed for Quarter				\$0.00

Year		Quarter		
Gross Earnings per day	0	# Working Days	0	
Gross Backpay				\$0.00
Interim Earnings		\$0.00		
Expenses for Quarter		\$0.00		
Net Interim Earnings				\$0.00
Net Backpay for Quarter				\$0.00
Annual Interest Rate	0.00%	Interest Rate per Quarter	0.00%	
# Qtrs Since Discharge	0	Interest Owed for Quarter	\$0.00	
Total Owed for Quarter				\$0.00

Year		Quarter		
Gross Earnings per day	0	# Working Days	0	
Gross Backpay				\$0.00
Interim Earnings		\$0.00		
Expenses for Quarter		\$0.00		
Net Interim Earnings				\$0.00
Net Backpay for Quarter				\$0.00
Annual Interest Rate	0.00%	Interest Rate per Quarter	0.00%	
# Qtrs Since Discharge	0	Interest Owed for Quarter	\$0.00	
Total Owed for Quarter				\$0.00

Year		Quarter		
Gross Earnings per day	0	# Working Days	0	
Gross Backpay				\$0.00
Interim Earnings		\$0.00		
Expenses for Quarter		\$0.00		
Net Interim Earnings				\$0.00
Net Backpay for Quarter				\$0.00
Annual Interest Rate	0.00%	Interest Rate per Quarter	0.00%	
# Qtrs Since Discharge	0	Interest Owed for Quarter	\$0.00	

Total Owed for Quarter	\$0.00
Total Amount Owed for All Quarters	\$0.00
Additional Claim	\$0.00
Total Amount Owed	\$0.00

Reference for backpay interest rates:

<http://www.opm.gov/oca/pay/BACKPAY/HTML/BACKPAY.asp>

Calculate BackPay on Backpay Spreadsheet.

Definitions:

GROSS EARNING PER DAY: Total taxable earnings complainant would have earned per day during the quarter if he/she had remained in discharging employer's employment.

WORKING DAYS: Total number of working days (including paid holidays) complainant would have worked during the quarter if he/she had remained in discharging employer's employment.

GROSS BACKPAY: Total taxable earnings complainant would have earned during the quarter if he/she had remained in discharging employer's employment.

INTERIM EARNINGS: Total taxable earnings complainant earned from interim employment (other employers) during the quarter.

EXPENSES:

- (a) Incurred in searching for interim employment; e.g., mileage at the current IRS rate per driving mile, toll and long distance telephone calls, employment agency fees, other job registration fees, meals and lodging if traveled away from home, bridge tolls, moving expenses, etc., and/or;
- (b) Incurred as a condition of accepting and retaining interim job; e.g., special tools and equipment, safety clothing, union fees, employment agency payment, mileage for the greater distance than from discharging employer's location, special subscriptions, mandated special training and education costs, special lodging costs, etc.

NET INTERIM EARNINGS: Interim earnings reduced by expenses.

- 1. Compute and enter total interim earnings.
- 2. Subtract expenses from total interim earnings.
- 3. Enter difference at "Net Interim Earnings."

NET BACKPAY: Subtract "Net Interim Earnings" from "Gross Backpay" and enter difference at "Net Backpay for Quarter".

INTEREST: Begins with quarter in which the discrimination occurred.

- 1. Enter annual interest rate for quarter.
- 2. Enter one-fourth current annual interest rate to determine quarterly interest rate.
- 3. Enter number of quarters since the complainant's discharge. Include the quarter of the discharge but do not include the current quarter.
- 4. Multiply quarterly interest rate X number of quarters X net backpay for quarters to determine interest owed for quarter.
- 5. Perform the above calculations for each quarter from the date of discharge to present. No interest is owed during the quarter in which payment is made.

ADDITIONAL CLAIMS: Nontaxable and other benefits, e.g., out-of-pocket medical expenses, vested fund restoration, profit sharing or stock purchase options, annuity adjustments, etc. These amounts are

computed and paid separately from backpay with interest thereon but no withholding therefrom. Vested fund restitution (pension, health benefits, etc.) is paid directly to the particular funds.

SETTLEMENT APPROVAL LETTER TO COMPLAINANT

[Date]

[Complainant Name]

[Mailing address]

[City, State, Zip]

Re: [Employer/Complainant/Case Number #####]

Dear [Mr./Ms. Complainant]:

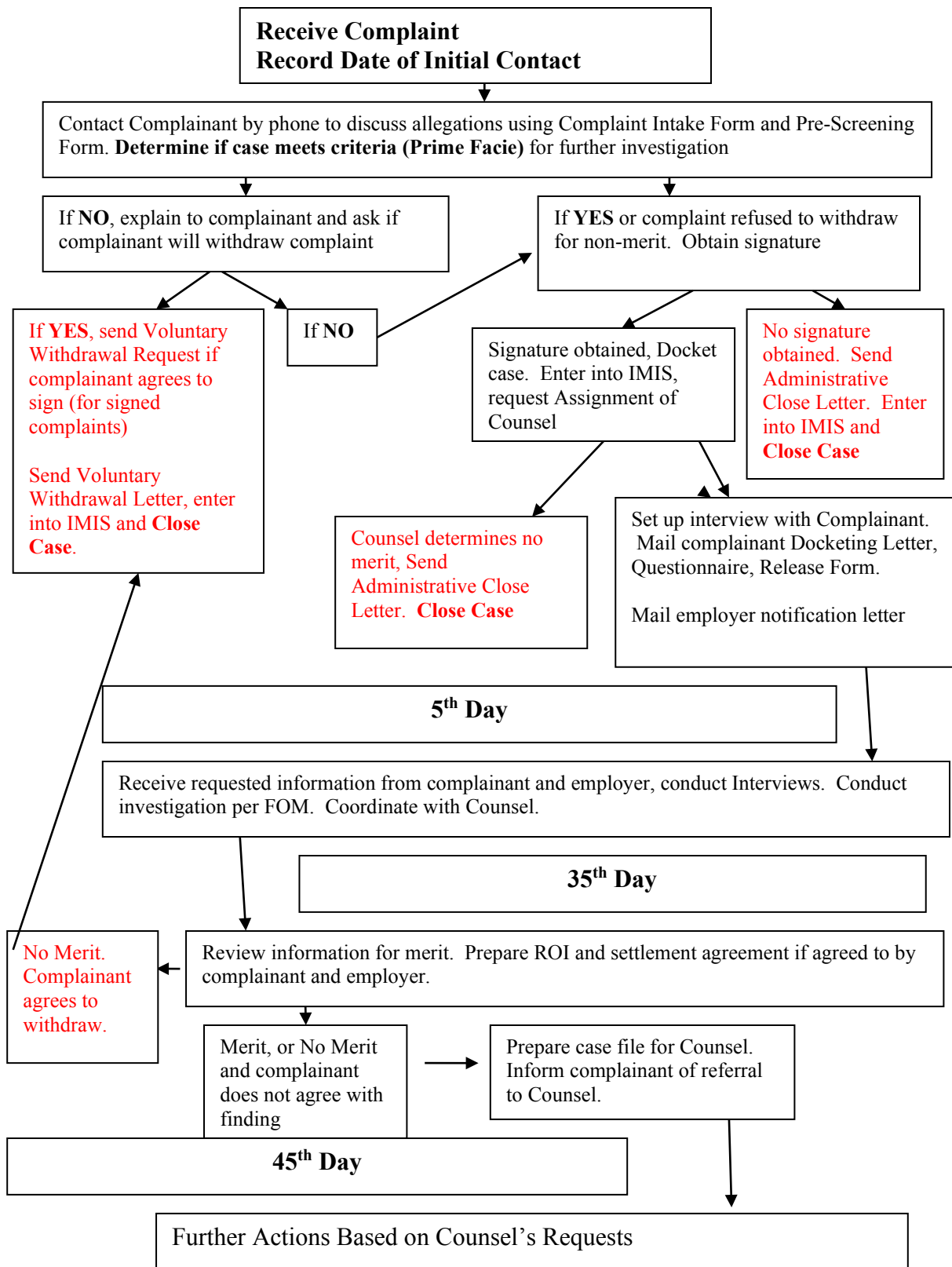
This is to advise you that pursuant to the settlement agreement between the parties, received by this office on [date], the NYS Department of Labor Public Employee Safety and Health Administration (PESH) is closing the investigation of the above-referenced complaint, which was filed with this office under Article 2 Section 27-a of the New York State Labor Law. PESH's authority over settlement agreements is limited to the statutes within its jurisdiction. Therefore, we hereby approve only the terms of the agreement pertaining to the Act. The settlement constitutes the final order of the Commissioner of Labor and may be enforced in accordance with the Act and its implementing regulations.

Thank you for your cooperation in successfully resolving this matter. If at any time you have questions or require information regarding employee rights or employer responsibilities under Article 2 Section 27-a of the New York State Labor Law administered by PESH, please contact this office.

Sincerely,

Program Manager
PESH

cc: [Employer's attorney if represented]
NYS DOL – Director, DOSH (electronic copy)
NYS DOL – Counsel's Office (electronic copy)
PESH Discrimination Program Manager (electronic copy)
PESH Administrative Assistant (electronic copy)
Investigator (case file)



PESH Discrimination Complaint Intake Form

Name of Person Taking Complaint		Date Received	Time Received
Related Inspection Number, if appropriate		Date of Filing	
Complainant Prefers to Remain Anonymous <input type="checkbox"/>		Date of Adverse Action	
Complainant Information			
Full name- Last First Middle			
Address			
City		State	Zip
Home Phone Number		E-mail	
Work Phone Number			
Additional Phone Number			
Summary of the alleged retaliation (protected activity, respondent knowledge, adverse action, Nexus)			
Respondent Information			
Name of Employer		Name of Chief Executive Officer	
Address			
City		State	Zip
Name of Complainant Supervisor		Name of Contact Person / Phone #	
Phone 1		E-mail	
Phone 2			
Other Contacts			
# of employees		Unionized? If yes provide Name of Union and Contact Information	
Signature of Complainant →			

	x
--	---

PESH Screening Form

Case Name and Number	Investigator Name	
	Yes / No	Specific Information
Timeliness: Is this complaint filed timely, within 30 days. Is extending the 30-day time period applicable		
Jurisdiction: Is this employer covered by PESH. Is the complaint covered by 27-a.10 or a Federal Whistleblower Statute?		
Protected Activity: Did the complainant engage in an activity protected under 27-a-10? What was the protected activity?		
Knowledge: Did the employer or deciding official have knowledge of the protected activity?		
Adverse Action: Did the Complainant sustain any damages? Would the employer's actions result in a "chilling effect" on other employees?		
Nexus: What was the causal link between the protected activity and the adverse action? What was the time between the protected activity and adverse action? Was there animosity between the complainant and management? Other?		
Pretext: What was management's reason or what does the complainant think management will say is the reason for the adverse action? Did they follow past practice or policy? Were other similarly situated employees treated the same?		
Investigator's Recommendation		

New York State Department of Labor

Voluntary Discrimination Complaint Withdrawal Request

This form is provided for the assistance of any complainant and is not intended to constitute the exclusive means by which a withdrawal may be registered with the New York State Department of Labor.

The undersigned complainant wishes to withdraw the discrimination complaint, filed under Section 27-a.10 of the New York State Labor Law, Case Number _____.

This withdrawal request is submitted voluntarily by the undersigned.

I understand that I have the right to a determination by the NYS Department of Labor, subject to appeal, and I waive that right. _____

(Initials)

(Complainant's Signature)

(Typed or Printed Name)

(Date)

Withdrawal Request Received By:

Discrimination Investigator

Date

Voluntary Withdrawal Letter to Complainant

[date]

[complainant name]

[mailing address]

[City, State, Zip]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
First Class Mail

Re: [Complainant Name vs Employer Name]

Case Number: [IMIS Case Number]

I understand that you discussed this matter with [name of investigator], the investigator assigned to this matter who advised you that Section 27-a.10 protects employees of the public sector who have complained about safety and health in their work place, or participate in the furtherance of safety and health activities.

This complaint in the above referenced matter has been withdrawn by you and this case has been closed. Withdrawing the complaint waives your right to a determination made by the Department of Labor as to whether their complaint is valid under New York State Labor Law.

If at anytime you need information on employee rights and employer responsibilities under Section 27-a.10 of the Public Employee Safety and Health Act, please feel free to contact this office by mail or telephone.

Sincerely,

[name of district supervisor]

Supervising Safety & Health Inspector

cc: PESH Program Manager (electronic copy)
PESH Discrimination Program Manager (electronic copy)
PESH Administrative Assistant (electronic copy)
[name of lawyer assigned] Counsel's Office (electronic copy)
[investigator name] (case file)

DESIGNATION OF REPRESENTATIVE SAMPLE FORM

NYS DEPARTMENT OF LABOR

PUBLIC EMPLOYEE SAFETY AND HEALTH

DESIGNATION OF REPRESENTATIVE

[Complainant] v. [Employer] Case Number: [xxxxxxxx]
--

TO:

[Investigator's name], Investigator NYS Department of Labor – PESH [Address]
--

The undersigned hereby enters his appearance as representative of:

In the above captioned matter:

_____ Signature of Representative	Representative's Address and ZIP Code
_____ Type or Print Name	
_____ Title	
_____ Date	
	_____ Area Code Telephone Number
	E-mail address: _____

ASSIGNMENT OF COUNSEL MEMO (SENT ELECTRONICALLY)

NEW YORK STATE

DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

[date]

TO: Counsel's Office
THRU: PESH Discrimination Program Manager
FROM: [district supervisor]
SUBJECT: Assignment of Counsel
PESH Discrimination Case
[Complainant Last Name] vs. [Employer]
Case Number: [IMIS case number]

Attached is a PESH discrimination complaint received by this office on [Date filed], Complaint Intake and Screening forms.

Could you please assign an attorney to this case to review the complaint and contact the investigator assigned to this case within the next week?

The investigator is: [investigator name]
[office phone]
[cell phone]
[e-mail]

Thank you for your attention to this matter.

cc: PESH Program Manager
PESH Discrimination Program Manager
PESH Administrative Assistant
Investigator (case file)

[Docketing Letter]

[Date]

[Complainant name]

[Street Address]

[City], NY zip

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
First Class Mail

Re: [Complainant Name vs Employer Name]

Case Number: [IMIS Case Number }

On [date filed] you contacted us regarding alleged safety and health discrimination in your workplace under Section 27-a.10 of the New York State Labor Law. In order to proceed with this investigation, you must complete and return the enclosed complaint questionnaire within five business days. You should also include any additional information that you feel is pertinent and not covered in the questionnaire.

Please save any evidence bearing on your complaint such as notes, minutes, letters, discharge slips, pay stubs, etc., and have them ready when the investigator, named below, meets with you. It will be helpful for you to write a brief factual account of what happened and to prepare a list of the names, addresses, and telephone numbers of the potential witnesses, together with a brief summary of what each witness should know about your case.

Every effort will be made to thoroughly review and evaluate your complaint as expeditiously as possible. Your cooperation is critical to ensure as complete an investigation as possible. It is your responsibility to advise the investigator of any changes in your address and/or telephone number. Please address all correspondence and questions to:

[Investigator's Name]

[Address]

[Phone Number]

[e-mail address]

If you do not return the complaint questionnaire within five business days, your complaint may be dismissed.

We are also notifying the employer named in the complaint about the filing of the complaint and that we are conducting an investigation into your allegations. PESH will provide to you (or to your legal counsel if you are represented by counsel, or to your authorized representative) a copy of the employer's official response to PESH that are responsive to your discrimination complaint. In addition, PESH will disclose to the parties in this case any other information relevant to the resolution of the case, because evidence submitted by the parties shall be presented and the opposing party provided the opportunity to fully respond.

Please note that it is your right, and the right of any party, to be represented by counsel or other representatives in this matter. In the event you choose to have a representative appear on your behalf,

please have your representative complete the Designation of Representative form enclosed and forward it promptly.

You are expected to cooperate in the investigation of your complaint and failure to do so may cause your complaint to be dismissed due to lack of cooperation on your part.

Sincerely;

Supervising Safety & Health Inspector

Enc. Questionnaire
 Release form
 Designation of Representative

 Postage-Paid Return Envelope

cc Discrimination Program Manager (electronic copy w/o enclosures)
 Counsel's Office (electronic copy w/o enclosures)
 [Investigator's Name] (for case file)

Case Administratively Closed for Untimeliness of Complaint Filing

[date]

[complainant name]

[mailing address]

[City, State, Zip]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
First Class Mail

Re: [Complainant Name vs Employer Name]

Case Number: [IMIS Case Number]

This is to confirm your telephone conversation on [date] with [investigator's name]. It is my understanding that we are unable to pursue your complaint because you failed to file within the thirty-day period allowed by Article 2 Section 27-a. 10 of the New York State Labor Law. Therefore, we are administratively closing our files on your claim.

You have the right to appeal this determination within 60 days of receipt of this letter to the NYS Industrial Board of Appeals. The appeal should be addressed to:

Industrial Board of Appeals
W. Averell Harriman State Office Campus
Building 12
Room 116
Albany, New York 12240

The Industrial Board of Appeals website containing their rules and procedures may be accessed at:
<http://www.labor.state.ny.us/iba/documents/rulesp.pdf>

I regret that we are unable to assist you in this matter.

Sincerely,

[name of district supervisor]
Supervising Safety & Health Inspector

cc: PESH Program Manager (electronic copy)
PESH Discrimination Program Manager (electronic copy)
PESH Administrative Assistant (electronic copy)
[name of lawyer assigned] Counsel's Office (electronic copy)
[investigator name] (case file)

**NYS DEPARTMENT OF LABOR
PESH DISCRIMINATION QUESTIONNAIRE**

Instructions: Print or type each answer in black or blue ink. Answer each question completely. If you need additional space write on the back of the page or attach sheets as needed. Be sure to include copies of any documents you feel are pertinent to your case. Please make sure that you sign and date **this** questionnaire before you return it.

Please answer the questions to the best of your knowledge. **Do not, however, initiate your own investigation. Any questions which you cannot answer should be left blank. This document must be returned to the investigator within five (5) business days.**

1. Name: _____ Date: _____
(First) (MI) (Last)

Home Address: _____
(number) (street) (apt.#)

City: _____ State: _____ Zip Code: _____

Date of Birth _____

Date of Hire _____

Telephone Number/s (include area code):

Home _____

Work _____

Cell _____

Other _____

E-Mail Address _____

Name and Phone # of your Union Representative

2. Employer : _____

Employer Address: _____
(number) (street)

City: _____ State: _____ Zip Code: _____

Phone _____

Name of contact person, title and phone

3. Address where you report to work? If different from above

4. How many employees work at your worksite? _____

5. What type of facility is this? i.e. Highway, Parks, School, Social Service, DPW, ect.

6. What was your first date of employment in your current position? _____

If applicable; When was your last date of employment? _____

Were you on probation? _____

7. What department do/did you work in? _____

a. What is/was your job title? _____

b. Briefly describe your duties _____

8. What retaliatory action was taken against you? For example: Termination, Suspension, Loss of Overtime, Other action that resulted in loss of pay, Disciplinary procedures, Harassment, etc
(Attach additional sheets if necessary)

9. Date your employer took this action? _____

10. Who took this action against you? _____

11. In your opinion, *why* did the employer take adverse actions against you? What did you do, or what does the employer think you did, that caused your employer or supervisor to retaliate against you? Try to list events in chronological order. Include dates, time, witnesses and other information that would support your allegation.

(Attach additional sheets if necessary)

12. What will *your employer* say is the reason the adverse action was taken against you?

For example:

a- Excessive absenteeism or tardiness

b- Confrontations with supervisor, other employees, the public, others

c- Violations of workplace rules or code of conduct.

(Attach additional sheets if necessary)

13. Have any of the above incidences been documented in your personal file?

14. Does your employer admit that they took these actions against you? If yes answer question 15.

15. What evidence or information do you have that will support your allegation?

16. Who is/was your immediate supervisor at the time of the adverse action?

(name and title)

17. What is or was your wage rate? \$_____per_____ (week, month, hour, etc.)

a. When was your last pay raise?_____ Type:(contractual, merit, cost of living)

b. Usual number of hours per week worked? _____

c. How many hours of overtime usually worked? _____

d. Overtime pay rate? _____

18. Are you still working for the same employer against whom you are filing this complaint? If yes, in what capacity? (Title and work location if it has changed.)

19. If you were terminated, provide a copy of the Letter of Termination. *and*

a. Where have you worked since leaving this employer? (start with present employment)

b. When did you begin subsequent employment? _____

c. Where have you applied for jobs?

d. Did you file for unemployment compensation?

20. If you filed Safety or Health complaints with your *employer*, answer the following?

a. What was the complaint?

b. Who did you make the complaint to?

c. When?

d. Did any one else know you made the complaint? Who? (name, address, position)

(1) Will they testify?

e. Did anyone else complain about the same or similar issue?

(1) Who?

(2) Were they retaliated against?

21. If you filed a complaint regarding this particular safety and health issue with PESH or any other agency? (State, Federal, OSHA, DEC, EPA etc.) answer questions (a-e)

a. Who did you file with?

b. What was the result of your complaint? Was there an inspection?

c. When?

d.. Who knew you complained? (name, address, position)

(1) How did they know?

(2) Are there any witnesses who will testify to this? If yes, please forward name, address and position.

e. Did anyone else file a complaint with PESH or any other agency? (State, Federal, OSHA, etc.)

(1) Who? (name, address, position)

(2) Who else knew that the complaint was filed?

(3) Result?

22. Did you refuse to perform an assigned task or work assignment? If No , go to question 23, If yes, cover questions a through j.

a. What was the work you refused to perform?

b. When did you refuse the work?

c. Why did you refuse the work?

d. Who was the supervisor (Complete name and title.)

e. What was the result of your refusal to work?

(1) Were there any witnesses? (Name, address, and position)

a) Will they testify?

f. Did anyone else refuse to do the same task?

(1) Who? (Name, address, and position)

(2) What was the result?

g. Was the assignment you refused part of your normal work activity?

(1) Had you ever refused to perform this or any other task before?

a) What was the task

b) When did you refuse to perform the task?

c) How was it different this time?

h. When were you first told to do this assignment or that you would have to do it?
(Give a date and time.)

(1) What did you do about it?

(2) Did you call PESH?

A) If you did not call PESH please explain why not.

B) If you called PESH , what were you told?

C) Did you call or speak to anyone else, such as someone in higher supervision, another agency, etc

D) If you called someone else, who did you call, what were you told and what actions were taken.

E) If you did not call or contact anyone else, explain why.

i. Did anyone else do the work that you refused to do?

(1) Who? (Name, address and position)

(2) When?

(3) Was the work different from when you were told to do it?

(4) Why didn't those employee/s refuse to do the work?

j. Was there any other work that you could have done at the time you refused to perform the assigned task?

(1) What?

(2) Did you offer to do it?

(3) Were you given the opportunity to do it?

23. Do you belong to a Labor Union? Yes_____ No_____ If yes what union? (name and local number)

a. Are you an officer in the union? Yes_____ No_____ If you are what is your position.

24. Did you file a Union Grievance?
(Please provide a copy of grievance)

a. When was it filed?

b. What is the status of the grievance?

c. What is the name, address, and telephone number of the union representative?

d. If not accepted, why not?

e. When was your last performance evaluation? Please provide a copy.

f. Were there other performance evaluations? If yes, please provide a copy.

g. Is there written employee handbook, or are there written polices and/or rules? Please provide two copies for review if available.

25. Has anyone else been disciplined for the same or similar offense for which you were disciplined?
If yes , answer a-b

a. Who, when, what were the offense(s), and what was the disciplinary action?

b. Have you or the others committed the same or similar acts previously?

(1) If so, who, when, how many times, and what was the disciplinary action?

26. Is there anything else your employer will tell us about you?

27. List the names, addresses, and telephone numbers of any witnesses not previously given. Briefly explain what each witness will testify to:

28. Is there anything else you want us to know about in connection with your complaint?

29. What relief are you seeking to mitigate the alleged discriminatory action?

Please note: The remedy you seek will be noted, but be advised that PESH may not be capable of attaining the requested remedy. If you were terminated or laid off by the employer, you have an obligation to search for work and keep records of interim earnings.

I certify that the information that I have provided in this questionnaire is true and correct to the best of my knowledge and belief.

Signature and Date

STANDARD RELEASE FORM

I hereby give the New York State Department of Labor, Public Employee Safety and Health Bureau, and its representatives, permission to have access to my personnel, payroll and other pertinent files kept on me by my employer at any level of supervision including affirmative action files.

NAME

SIGNATURE

SOCIAL SECURITY NUMBER

DATE

WITNESS SIGNATURE AND DATE

NAME

SIGNATURE

DATE

WITNESS STATEMENT

I _____
(Name) (Address)

understand that this statement will be held in confidence until such time as I may be called to testify in a court proceeding, at which time it may be produced upon demand of opposing council. Additionally, this statement may be made available to other agencies if it will assist them in the performance of their statutory functions. Upon the closing of this case, this statement may be subject to disclosure only in accordance with applicable statute(s) and agency policy.

Statement begins, Page1 begins:

[Multiple horizontal lines for text entry]

Page 1 ends

WITNESS STATEMENT CONTINUED

Page # _____

Page # _____ Begins

Page# _____ Ends

WITNESS STATEMENT CONTINUED

Page # _____

Page # _____ Begins

Page# ____ Ends
Statement Ends

I have read and had the opportunity to correct this statement consisting of _____ pages, and those facts are true and correct to the best of my knowledge and belief.

Signature of Witness: _____

Date: _____

Letter to Complainant for Failure to Provide Requested Information

[Date]

[Complainant name]

[Street Address]

[City], NY zip

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
First Class Mail

Re: [Complainant Name vs Employer Name]

Case Number: [IMIS Case Number }

On [date of docketing letter], this office sent you a letter, complaint questionnaire, and standard release form regarding your allegation of safety and health discrimination under Section 27-a.10 of the New York State Labor Law. More than five business days have passed since that time and we have not received your completed questionnaire and/or to date, efforts to reach you by telephone for purposes of scheduling an in-person interview have been unsuccessful.

Please be advised that if you do not respond to this letter by phone or in writing within five business days from the date or receipt, your complaint will be dismissed and the case file will be administratively closed.

The investigator assigned to this case is [name of investigator]. You may reach him at:

[Investigator's Name]

[Address]

[Phone Number]

[e-mail address]

Sincerely,

Supervising Safety and Health Inspector

cc Discrimination Program Manager (electronic copy w/o enclosures)

Counsel's Office (electronic copy w/o enclosures)

[Investigator's Name] (for case file)

Employer Notification Letter

[Date]

[Name of Employer]

[Street Address]

[City, State ZIP]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
First Class Mail

Re: [Complainant Name vs Employer Name]

Case Number: [IMIS Case Number }

The New York State Department of Labor hereby serves you notice that a complaint has been filed by [Complainant's name] with the Public Employee Safety and Health Bureau, alleging a violation of Section 27-a.10 of the New York State Labor Law.

A copy of the complaint is enclosed.

Please note that a full and complete written account of the facts and a statement of your position in response to the complainant's allegation that you have discriminated against [Complainant's name] in violation of the Act must be submitted within ten (10) business days from your receipt of this letter. Please note that PESH will disclose to the parties in this case any information relevant to the resolution of the case, because evidence submitted by the parties must be tested and the opposing party provided the opportunity to fully respond. If information provided contains personal, identifiable information about individuals other than Complainant, such information, where appropriate, will be redacted before disclosure.

Please note that a full and complete initial response, supported by appropriate documentation, may serve to help achieve early resolution of this matter. Voluntary adjustment of meritorious complaints can be effected by way of a settlement agreement at any time.

This case has been assigned to [Name of Investigator], Discrimination Investigator. Please address all correspondence and communications regarding this investigation to the assigned investigator.

[Investigator's Name]

[Address]

[Phone Number]

[e-mail address]

Attention is called to your right and the right of any other party to be represented by counsel or other representatives in this matter. In the event you choose to have a representative appear on your behalf, please have your representative complete the Designation of Representative form enclosed and forward it promptly.

In order to expedite our investigation, we request that you submit your written response within ten (10) business days of receipt of this letter. Failure to respond to all requests by the investigator within the given periods will be deemed "no response" on the part of management and our investigation will proceed without a position from you or your representative.

Sincerely,

Supervising Safety & Health Inspector

Enclosures:

Copy of Complaint

Designation of Representative

cc Discrimination Program Manager (electronic copy w/o enclosures)
 Counsel's Office (electronic copy w/o enclosures)
 [Investigator's Name] (for case file)

Voluntary Withdrawal Notice/Letter to Employer

[date]

[employer name]

[mailing address]

[City, State, Zip]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
First Class Mail

Re: [Complainant Name vs Employer Name]

Case Number: [IMIS Case Number]

The complaint in the above captioned matter has been withdrawn. The case in this matter has been closed.

If at any time, you have any questions or require information regarding employee rights and employer responsibilities under Article 2 Section 27-a.10 of the New York State Labor Law please feel free to contact this office by mail or telephone.

Sincerely,

[name of district supervisor]

Supervising Safety & Health Inspector

cc: PESH Program Manager (electronic copy)
PESH Discrimination Program Manager (electronic copy)
PESH Administrative Assistant (electronic copy)
[name of lawyer assigned] Counsel's Office (electronic copy)
[investigator name] (case file)

EMPLOYER NO-MERIT LETTER

[date]

[employer name]

[mailing address]

[City, State, Zip]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
First Class Mail

Re: [Complainant Name vs Employer Name]

Case Number: [IMIS Case Number]

The complaint in the above –captioned matter has been dismissed by this office. However, the complainant can appeal this dismissal with the NYS Industrial Board of Appeals within sixty (60) days of the dismissal date. In the event that no appeal action is taken by the complainant, this case will be considered closed.

If at any time, you have any questions or require any information regarding employee rights and employer responsibilities under Article 2 Section 27-a.10 of the New York State Labor Law, please feel free to contact this office by mail or telephone.

Sincerely,

[district supervisor name]

Supervising Safety and Health Inspector

cc: PESH Program Manager (electronic copy)
PESH Discrimination Program Manager (electronic copy)
PESH Administrative Assistant (electronic copy)
[name of lawyer assigned] Counsel's Office (electronic copy)
[investigator name] (case file)

Telephone Log

Case #	Case Name

CASE TELEPHONE LISTING				
NAME	TITLE	WORK NUMBER	HOME NUMBER	CALL NOTES

Case Activity Log

Case #	Case Name	
Date	Comments	Initials

SUBMITTAL OF DISCRIMINATION CASE FILE TO COUNSEL MEMO

NEW YORK STATE

DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

[date]

TO: [Lawyer assigned]
Counsel's Office

FROM: [district supervisor]

SUBJECT: PESH Discrimination Case
Re:[Complainant Last Name] v [employer]
Case Number: [imis case number]

Enclosed please find a copy of the investigation case file for the above referenced discrimination case.

Please contact [name of investigator], the investigator assigned to the case, if you need any additional information.

encl.

cc: Program Manager (electronically w/ copy of ROI only)
PESH Discrimination Program Manager (electronically w/ copy of ROI only)
PESH Administrative Assistant (electronically w/ copy of ROI only)
Investigator (for case file)

Report of Investigation (ROI)

[complainant last name] v [employer name]

Case # [IMIS case number]

Investigator Name: [name of investigator]

e-mail address: [investigator email address]

Phone #: [investigator phone #]

Date Filed -

Complainant -

Represented by -

Respondent -

Represented By -

Allegation / Protected Activity / Adverse Action

Jurisdiction: (*Public Employer and Violation of Section 27-a.10*)

Timeliness of the Complaint

Employer Knowledge

Employer Defense or Pretext

Nexus

List of Witnesses

Chronology

Investigative Findings

Analysis

Summation

Recommendation

Contents of Case File (where applicable)

Case name: [name of case]

Case #: [imis case number]

Reverse Chronological Order (Newest Information on top)

Left Side of File	Administrative Memos and Correspondence
EXHIBIT A	Other Correspondence - None
EXHIBIT B	Government / Internal Correspondence
EXHIBIT C	Correspondence to Respondent - None
EXHIBIT D	Correspondence to Complainant
EXHIBIT E	Case Contact / Activity Log
Right Side of File	(Exhibits order – 1 on bottom – 10 on top)
EXHIBIT 1	IMIS Case Summary Work Sheet
EXHIBIT 2	Field Notes
EXHIBIT 3	Case File Telephone Listing
EXHIBIT 4	Witness Statements / Other Supporting Documents
EXHIBIT 5	Respondent’s Response/Other Supporting Documents
EXHIBIT 6	Complainant’s Supporting Documents
EXHIBIT 7	Standard Release Form
EXHIBIT 8	Complainant’s Questionnaire
EXHIBIT 9	Complainant’s Statement
EXHIBIT 10	PESH Screening Form
EXHIBIT 11	Case Intake Form/Initial Contact Information/Complaint Letter
	Report of Investigation (ROI)
	Add or Subtract as many rows as needed
	Contents of Case File Sheet

Contents of Case File (where applicable)

Case name: [name of case]

Case #: [imis case number]

Reverse Chronological Order (Newest Information on top)

Left Side of File	Administrative Memos and Correspondence
EXHIBIT A	Other Correspondence - None
EXHIBIT B	Government / Internal Correspondence
EXHIBIT C	Correspondence to Respondent - None
EXHIBIT D	Correspondence to Complainant
EXHIBIT E	Case Contact / Activity Log
Right Side of File	(Exhibits order – 1 on bottom – 10 on top)
EXHIBIT 1	IMIS Case Summary Work Sheet
EXHIBIT 2	Field Notes
EXHIBIT 3	Case File Telephone Listing
EXHIBIT 4	Witness Statements / Other Supporting Documents
EXHIBIT 5	Respondent’s Response/Other Supporting Documents
EXHIBIT 6	Complainant’s Supporting Documents
EXHIBIT 7	Standard Release Form
EXHIBIT 8	Complainant’s Questionnaire
EXHIBIT 9	Complainant’s Statement
EXHIBIT 10	PESH Screening Form
EXHIBIT 11	Case Intake Form/Initial Contact Information/Complaint Letter
	Report of Investigation (ROI)
	Add or Subtract as many rows as needed
	Contents of Case File Sheet

CHAPTER XI

TEMPORARY LABOR CAMP INSPECTIONS

There are no temporary labor camps within the jurisdiction of PESH.

CHAPTER XII

CONSTRUCTION

General CSHO Responsibilities.

CSHO responsibilities for construction inspections are the same as for general inspections. (See Chapter III.) Special situations arising in the construction industry are discussed in this chapter.

Standards.

- B. 1. Applicability. The standards issued under the Construction Safety Act and published as 29 CFR 1926 have been adopted as occupational safety and health standards under Section 27-a(4) of the Act. They shall apply to every employment and place of employment of every employee engaged in construction work, including noncontract construction work.
- B. 1. a. Definition. The term "construction work" means work for construction, alteration, and/or repair, including painting and decorating. These terms are discussed in 29 CFR 1926.13. If any question arises as to whether an activity is deemed to be construction for purposes of the Act, The Program Manager shall be consulted.
- B. 1. b. Part 1910 Standards Applicable to Construction. Many Part 1910 standards are applicable to construction work. The Program Manager shall ensure that they are enforced as appropriate, consistent with their scope and definitions.
 - B. 1. b. (1) 29 CFR 1910.1020, Access to Employee Exposure and Medical Records, has been identified as applicable to construction.
 - B. 1. b. (2) The District Supervisor shall not cite a 1910 standard other than one identified by the Program Manager as applicable to construction work. (See Chapter IV, A.1.a.(4).)
 - B. 1. b. (3) PESH will normally follow OSHA procedures as outlined in the FOM for the application of either the General Industry or Construction Standards. However, in some circumstances a public workplace with a general industry SIC/NAICS may have specific work assignments that fall into the definition of construction. In that case, PESH will use its discretion to apply the more protective standard on a case by case basis.
- B. 2. Enforcement. In the event of violations, citations shall be issued and penalties assessed in accordance with procedures set forth in Chapters IV, V, and VI.

Employer Worksite.

- C. 1. General. Inspections of employers in the construction industry are not easily separable into distinct worksites. The worksite is generally the site where the construction is being performed (e.g., the building site, the dam site). Where the construction site extends over a large geographical area (e.g., road building), the entire job will be considered a single worksite. In cases when such large geographical areas overlap between District Offices, generally only operations of the employer within the jurisdiction of any District Office will be considered as the worksite of the employer.
- C. 2. Beyond Single District Office. When a construction worksite extends beyond a single District Office and the CSHO wants to extend the investigation, the Program Manager shall approve such an extension at the recommendation of the District Supervisor.
- C. 3. Administrative Convenience. The definition of worksite in this chapter is only for administrative convenience and has no effect upon the issuance of failure to abate notifications or repeat citations which are governed by Chapters III, H.2. and IV, B.5. For instructions regarding multi-employer worksites, see Chapter V, F.

Advance Notice.

- D. 1. General. The same general policies and procedures and advance notice set forth in Chapter III, C. are applicable to construction inspections. Thus, in general, advance notice will be given only where it will enhance the effectiveness of the inspection.
- D. 2. Authorized. When advance notice is authorized, the CSHO shall contact the general contractor's office by telephone. If there is more than one general contractor (e.g., if two or more general contractors have formed a joint venture for purposes of the job in question), the CSHO shall attempt to ascertain the identity of all such general contractors and contact each of them. The general contractor(s) shall be told to advise all subcontractors working on the job that the inspection will take place. The general contractor shall also be asked to advise the labor organizations representing employees and to instruct each subcontractor to take similar action, in accordance with the requirement of Part 802.4. Where there are no labor organizations or other representatives of employees, advance notice need not be given to the employees.

Entry of the Workplace.

- E. 1. Severe Weather Conditions. If severe weather conditions encountered during an inspection cause construction activities to shut down, the inspection shall be continued when weather permits. If the work continues and the weather creates

hazardous working conditions, these facts shall be reported, since they may be the subject of citations and proposed penalties based on a specific standard or, if no such standard is applicable, the general duty clause.

- E. 2. Opening Conference. In conducting the opening conference the CSHO shall follow the procedures outlined in Chapter III, D.3. Upon arrival at the construction site, the CSHO shall contact the "prime" or general contractor's representative in charge of the job; usually, this will be the superintendent or project manager. The CSHO shall advise this individual that the purpose of this visit is to make an inspection of the worksite in order to determine compliance with the requirements of the PESH Act.
- E. 2. a. Subcontractors. Normally, there will be several subcontractors at the site. In such cases, the individual in charge shall be asked to identify them and to provide the name of the individual in charge of each subcontractor's operations at the site. This person shall also be requested to notify such individuals immediately of the inspection and to ask them to assemble in the general contractor's office or some other suitable place to discuss the inspection with the CSHO. Although the inspection shall not be postponed or substantially delayed because of the unavailability of one (or more) representatives, a subcontractor who has not been notified at all of the inspection of his premises shall not be included in the inspection.
- E. 2. b. Employee Representatives. Authorized representatives of employees for each contractor and subcontractor, if any, shall be informed of the inspection and invited to an opening conference. That conference may be a joint conference with employers at the option of the employers.
- E. 2. c. Closing Conference. The CSHO shall advise all employers and employee representatives that a closing conference will be held with each of them following the complete inspection, and request that each of them arrange to have a representative available.
- E. 2. d. Responsibilities for Common Services. At the opening conference, or at some other suitable time during the inspection, the CSHO shall ascertain who is responsible for providing such special services as common sanitation, eating facilities, first aid, etc., available to all employees on the worksite. Even though arrangements have been made for one subcontractor or for the general contractor to provide common services, each employer is responsible for his/her own employees in this regard. Any or all of the employers can be cited for lack of such services.
- E. 2. e. Complaints. If the inspection is being conducted as a result of a complaint, a copy of the complaint is to be furnished as follows:
 - (1) A copy of every complaint, including complaints against subcontractors, shall be provided to the general contractor.

- E. 2. e. (2) A copy of every complaint against the general contractor shall, if possible, be provided to every subcontractor whose employees may be exposed to the alleged hazard.
- E. 2. e. (3) A copy of every complaint against a subcontractor shall be provided to that subcontractor and, if possible, to others whose employees may be exposed to the alleged hazard.
- E. 2. e. (4) Care shall be taken to protect the identity of the complainant including the typing of handwritten complaints and the covering of all signatures.
- E. 2. e. (5) For further details see procedures outlined in Chapter IX, A.
- E. 3. Selecting Employer and Employee Representatives. The CSHO shall conduct a walkaround inspection in accordance with the provisions of Chapter III, D.8.
- E. 3. a. Authorized Representative. Each employer is entitled to select an authorized representative to accompany the CSHO during the inspection. Similarly, the employees of each employer have the right to select an authorized representative for this purpose. If the job is unionized, then the labor organization representing the employees shall select the authorized employee representative. If there is no representative, the CSHO shall normally interview a reasonable number of employees to determine whether hazards exist. A reasonable number of employees shall include at least some employees of each employer and each craft on the job.
- E. 3. b. Employee Interviews. Pursuant to Part 802.5, during the walkaround the CSHO shall consult with individual employees as well as the employee representative concerning working conditions, as judged appropriate by the CSHO.
- E. 3. c. Walkaround Provisions. The main difficulty in implementing the walkaround provisions on construction sites derives from the fact that in the usual situations there will be numerous employers on the job. If all employers and groups of employees selected a different representative to accompany the CSHO on the inspection, the group participating in the inspection could be so large that work on the worksite might be disrupted and the effectiveness of the inspection would be diminished.
- E. 3. c. (1) An attempt shall be made to encourage employer and employees to select, respectively, a limited number of representatives for accompaniment purposes. It shall be pointed out by the CSHO that this arrangement makes an effective inspection possible without diminishing the accompaniment rights. If any matter comes up during the course of the inspection that requires special knowledge, the representative of the appropriate employer or employees shall be called in to participate in that phase of the inspection.

- E. 3. c. (2) The CSHO may also divide the inspection into separate phases; e.g., excavation work followed by electrical work, and so forth. If this procedure is followed, the number of employer and employee representatives for each phase of the inspection can be limited to those immediately involved. The CSHO shall avoid, to the extent possible, inspecting the same area of the worksite more than once.
- E. 3. d. Too Many Representatives. The CSHO shall conduct the inspection accompanied by the representatives designated by the employers and employees. However, if during the course of the inspection, the CSHO determines that, because of the large number of persons involved, the inspection is not being conducted in an effective manner or that work is being unduly disrupted, the participants shall be advised that walkaround representation is discontinued and instead a reasonable number of employees will be interviewed. If the participants then agree to a limited number of representatives for accompaniment purposes, the CSHO shall resume the inspection with such representatives.

Closing Conference.

- F. 1. General. Upon completion of the inspection, the CSHO shall confer with the general contractors and all appropriate subcontractors or their representatives, together or separately, at their option, and advise each one of all the apparent violations disclosed by the inspection to which each one's employees were exposed. The closing conference with each general contractor and subcontractor may be a joint conference with employer and employee representatives. (See Chapter III, D.9, for further details.)
- F. 2. Contractor Names and Addresses. The CSHO shall make certain before leaving the worksite that he/she has obtained the names and addresses of the general contractor and all other employers at the worksite who may be cited for violations.

Citations and Penalties.

- G. 1. Mailing. Upon the completion of citations, the original NYPESH-2 for each employer shall be sent to the Chief Executive Officer of the employer; duplicate copies shall be sent to the worksite.
- G. 2. Where to Post Citations. At many construction sites, the employer (whether prime contractor or subcontractor) provides a trailer or other worksite office. Where such a facility is provided and employees are likely to be in the vicinity of the facility on a daily basis, the citation shall be posted at that location.
- G. 2. a. Other Location. A copy of the citation shall also be posted at any other

location of the employer where employees are required to report on a daily basis. In some situations, such a location would be the employer's main or branch office; in other situations, such as highway construction, the location would be the place where employees actually work.

- G. 2. b. No Place to Post Citation. Where no obvious place for posting the citations exists (such as in highway construction where the trailer may be a considerable distance away and employees do not report to the trailer) the employer shall be required to furnish a suitable object on which to post the citation in a conspicuous location or immediately adjacent to the worksite. In any case, where the citation will be exposed to rain or snow, the citation shall be protected from the elements.

CHAPTER XIII

FEDERAL AGENCY SAFETY AND HEALTH PROGRAMS

PESH has no jurisdiction over Federal Agencies.

CHAPTER XIV

DISCLOSURE

Disclosure is covered by the New York State Freedom of Information Law (FOIL).

Policy and Information Release.

- A. 1. Policy. (Memo 3-3-92) Counsel's Office, as Record Access Officer, has analyzed and, in some areas, modified the previous FOIL policies involving access to the records of the Division of Labor Standards and other program units of the Department. It is likely that such revision will continue to take place. While many of these changes have been mentioned piecemeal in memoranda and individual FOIL responses, there has been no overall statement as to the present policies in this area. This confusion is also a product of the fact that the FOIL statute itself, while clear in its intention, is less than perfectly clear in its specific application. Accordingly, there is occasional misunderstanding and confusion among program staff. The Department's present FOIL policies are as follows:
 - A. 1. a. Policy Statements, Opinion Letters to the Regulated Community, Other Explanatory or Interpretive Material. This material will be released. If narrowed to a particular subject area, copies will be supplied. If a broad demand is made for "all interpretive memos" or similar language, and a requester refuses to narrow the request, the requester will be advised that because the request potentially involves voluminous documents, the Department will be unable to respond without a further narrowing of the request. (Note: opinion letters and/or memoranda from Counsel's Office to program staff are not within this category and will be disclosable only under rare circumstances.)
 - A. 1. b. Investigatory Files.
 - A. 1. b. (1) Information ordinarily not disclosable:
 - A. 1. b. (1) (a) The identity of complainants in child labor cases; and PESH cases.
 - A. 1. b. (1) (b) The identity of the claimant where an employer would not necessarily know, by the nature of the claim, the identity of a claimant. For example, where a former employee claims vacation pay and that is the only claim against the employer, that claim form will be disclosed with

appropriate personal privacy redactions. Likewise, where an employee complains about a lack of meal breaks which affects numerous employees, that complainant's identity will not ordinarily be disclosed.

- A. 1. b. (1) (c) Those portions of records that reveal personal information about individuals which is not already known by a requester. For example, an employer/requester will be provided with unredacted information about employees which includes social security numbers and dates of birth but such information would ordinarily be redacted if supplied to an outside party;
- A. 1. b. (1) (d) Those portions of Records/case file that reveal personal information about a witness or complainant will be redacted to protect their identify and preserve their confidentiality.
- A. 1. b. (1) (e) In the case of ongoing investigations, particularly if criminal prosecution is likely, information which would prejudice the investigation and/or which would jeopardize an impartial determination. Again, all exceptions to disclosure will be narrowly construed.
- A. 1. b. (1) (f) Certain intra-agency memoranda which do not involve factual summaries (Note: this exception will be very narrowly construed as required by statute and case law). For example, opinions and/or memoranda prepared by Counsel's Office, which are protected as attorney work-product, under attorney-client privilege, and/or as pre-decisional intra-agency material.
- A. 1. b. (2) Records ordinarily disclosable: Orders; compliance conference records; notices of labor law violations; underpayment computation and recapitulation sheets; violation reports; narrative reports; file correspondence; and other material not specifically exempted from disclosure.
- A. 1. b. (3) Comments:
- A. 1. b. (3) (a) Whether an investigatory file is open or closed, or whether or not a compliance conference has been scheduled is ordinarily immaterial to whether the documents in the file are releasable.
- A. 1. b. (3) (b) All staff are encouraged to forward any comments for consideration as to its concerns as to the release of any particular material in a specific case at the time it forwards

the requested information to Counsel's Office.

- A. 1. b. (3) (c) Counsel's Office will make all reasonable efforts to protect from disclosure material staff believe to be exempt based on the guidelines set forth herein or on other situation-specific information.
- A. 1. b. (3) (d) However, the trend in FOIL litigation is toward disclosure, and the Department bears the burden of proving to a court that its reliance on a claimed exemption is reasonable. In the absence of such a showing, not only can the Department be compelled to disclose the documents, it can also be penalized by being ordered to pay attorney fees and/or other damages under the Public Officers Law and the Equal Access to Justice Act.
- A. 1. b. (3) (e) If a request is made for a specific document in a file, Counsel's Office request that staff forward a copy of that document rather than the entire file. Where there is a question as to the specific information requested, the whole file will, of course, still have to be forwarded.
- A. 1. b. (3) (f) Inasmuch as most routine investigative reports are fully disclosable, report writing should be done with this fact in mind. To the extent that there may be information which is pertinent to the Department's purposes, but not necessarily the kind of material the Department wants to release as part of a "foilage" report, perhaps such information can be recorded in field notes or other clearly intra-agency documents which are not subject to disclosure. For example, "discussion" type commentary could be articulated in a separate memo to the file, rather than as part of an investigative report, so as to be readily severable from releasable documents.
- A. 1. b. (3) (g) The above policies are consistent with the FOIL policies long followed in most units of the Department of Labor and, more importantly, are consistent with the provisions of Article 6 of the Public Officers Law and its caselaw.
- A. 2. Information Release. This is to set forth the PESH policy for release of inspection information to employers, unions, and other interested parties.
- A. 2. a. Citations.
- A. 2. a. (1) As has been the policy, copies of all citations will be sent to the Clearinghouse. No other case file documents are to be sent to the Clearinghouse.

- A. 2. a. (2) The original citation is sent to the Chief Executive Officer of the employer.
- A. 2. a. (3) A copy of the citation is sent to the management representative at the worksite or the representative he designates.
- A. 2. a. (4) In some cases a copy is also sent to a management safety and health representative as specifically instructed in previous memos from the Program Manager.
- A. 2. a. (5) For all other interested parties, requests for citations will be processed through FOIL.
- A. 2. b. Narrative Report.
- A. 2. b. (1) Accidents and Fatalities. Upon request by an employee directly involved in the accident, a copy can be sent to him directly. For all other requests, FOIL procedures will apply.
- A. 2. b. (2) Complaint Inspections. Upon request by complainant, authorized employee representative or management representative, a copy may be sent directly to the requester. The complainant is automatically sent a copy of the SH 917/916. For all other parties, FOIL procedures will apply.
- A. 2. b. (3) Programmed Inspections. Upon request by authorized employee representative or management representative, a copy may be sent directly to the requester. For all other parties, FOIL procedures will apply.
- A. 2. c. Other Case File Documents.
- A. 2. c. (1) Upon request by authorized employee representative or management representative, a copy may be sent directly to the requester. For all other parties, FOIL procedures will apply.

Procedures. (Memo 11-4-97 J. Tracy) Counsel's Office is responsible for Freedom of Information Law (FOIL) requests for the Department. Because Department program units usually have custody of records that are requested, Counsel's Office needs to obtain and review these documents/records to determine the appropriate response to each request that is received. To facilitate processing of the high volume of requests, please observe the following guidelines in handling FOIL requests.

- B. 1. If a FOIL request is sent originally to Counsel's Office from an outside party, use the file number assigned by Counsel's Office on all correspondence. Counsel's Office can locate files only by file number or last name of the requester. Counsel's Office referral memo contains the file number and some "standard" responses. Frequently this request memo can be used by a program office to

respond to Counsel's Office. (Appendix A)

- B. 2. If an office receives a FOIL request directly from an outside party by letter or e-mail, it will not have a file number. The Public Officers Law requires, at a minimum, acknowledgment of FOIL requests within five business days of receipt. You should prepare and mail or e-mail the sample acknowledgment to the requester, (Appendix B), then forward the request, a copy of the acknowledgment, and all responsive documents through the Program Manager's Office to Counsel's Office. If the requested documents are not readily available, forward the request and acknowledgment and indicate in your transmittal memo the date by which you expect to forward the documents to Counsel's Office.
- B. 3. Read the request carefully and furnish to Counsel's Office all information which is responsive to the request. In some instances the requests are broad or otherwise unclear and it will not be possible to know which documents are within the scope of the request. If you need clarification, you may call the requester directly. Make a note of any such clarification in the transmittal of responsive material to Counsel's Office. In the alternative, you may ask the attorney assigned to the FOIL request to obtain clarification from the requester.
- B. 4. Send only copies to Counsel's Office in response to a request. Do not send original files or documents except when specifically requested to do so.
- B. 5. Forward only one copy of the material requested to Counsel's Office.
- B. 6. All material forwarded in response to a request must be accompanied by a transmittal memo which contains the Counsel's Office file number (see item B.1) and a listing of what is being furnished. Documents should be compiled in the same order as listed. (Appendix C).

NOTE: While you must furnish all documents/records which respond to the request, Counsel's Office does not necessarily release all documents/records which are forwarded. If there are concerns about releasing all or some of the material you forward, mention them in your transmittal memo or on the Counsel's Office referral memo which, as noted, frequently lends itself to double duty as the response transmittal memo.

CHAPTER XIV APPENDIX A

SAMPLE FOIL REQUEST FROM COUNSEL'S OFFICE

NEW YORK STATE

DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

[DATE]

To:

From: Counsel's Office, Albany

Subject: Freedom of Information Law Request
File No.

Attached please find a copy of the above-referenced FOIL request. Please furnish requested materials and a listing of same. Materials should be forwarded in the same order as listed. Indicate your response by checking on the appropriate line below.

NOTE: IF YOU HAVE ANY CONCERNS ABOUT RELEASABILITY, OR ARE AWARE OF OTHER PERTINENT INFORMATION RELATING TO THE REQUEST, PLEASE CALL ME OR MAKE A NOTE BELOW.

Please use the File No. shown above on all correspondence concerning this request.

Attachment

___ Requested materials attached.

___ Requested materials located elsewhere.
Please specify _____.

___ Additional time required for processing. Estimated completion date
_____.

___ After diligent search, requested materials cannot be located.

___ Additional information needed to effect meaningful search. Obtain clarification as to
_____.

___ Please call and discuss. Phone _____.

___ Other
_____.

___ No Records Found.

Countersigned by: _____

Date: _____

CHAPTER XIV APPENDIX B
SAMPLE ACKNOWLEDGMENT OF FOIL REQUEST

Dear [NAME]:

Your Freedom of Information Law request was received in this office on [ENTER DATE RECEIVED] and is being forwarded to the Records Access Officer for the Department of Labor, State Office Building Campus, Building 12, Room 509, Albany, New York 12240.

The Records Access Officer will communicate with you regarding your request.

CHAPTER XIV APPENDIX C
SAMPLE TRANSMITTAL MEMO TO COUNSEL'S OFFICE

NEW YORK STATE

DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

[Date]

To: Counsel's Office, Room 509, Building 12, Albany

Thru: PESH Program Manager

From:

Subject: Freedom of Information Law Request
File Name:
File No.

The following materials are forwarded in response to the above-referenced FOIL request.

- 1.
- 2.
- 3.
- 4.

CHAPTER XV

REVIEW COMMISSION

A. General.

The Industrial Board of Appeals (IBA) in the State of New York fulfills the function of the Occupational Safety and Health Review Commission. The employer or any party affected by a decision of the Commissioner of Labor may appeal that decision to the IBA. Appeals are filed directly with the IBA. The IBA has its own rules and procedures that it follows under 12 NYCRR Part 66 which has been approved as a part of the State's State Plan Supplement of 2200.

B. Transmittal of Notice of Appeal and Other Documents.

- B. 1. Notice of Appeal. In accordance with the Industrial Board of Appeals (IBA) Rules of Procedure and Practice (12 NYCRR Part 66), any party who wishes to file an appeal must file a written petition with the IBA at its Albany office, no later than sixty (60) calendar days after the issuance of the rule, regulation or order objected to.
- B. 1. a. Upon the filing of a petition, the Board shall serve a copy thereof upon the Commissioner of Labor by transmittal to the Department of Labor, Counsel's Office.
- B. 1. b. The IBA will also mail a copy of the petition to all employee representatives noted on the petition.
- B. 1. c. The IBA will also notify the Director of the Division of Safety and Health that a petition has been filed. Subsequently, the PESH Program Manager and District Office Supervisor will be notified.
- B. 2. Case File Documents. The District Office Supervisor will transmit to the Program Manager a copy of the entire case file, absent the OIS forms, as soon as possible. The Program Manager will forward this to Counsel's Office so that an answer to the petition can be prepared.
- B. 3. Petitions for Modification of Abatement Dates (PMAs). In accordance with 12 NYCRR Part 804.7, PMAs that are granted when affected employees or their representatives have objected, shall be forwarded by the Program Manager to the IBA within ten (10) working days.

C. Transmittal of File to Department of Labor Counsel.

- C. 1. Information Required in Case File. The Industrial Board of Appeals Rules of Procedure require "fact pleading" in the Department of Labor Counsel's filing of a complaint, mandating that a complaint concerning contested alleged violations have each violation set out in a separate numbered paragraph containing specified information. The District Supervisor shall therefore ensure that each of the following items have been adequately addressed in the case file when it is submitted to the Department of Labor Counsel:
 - C. 1. a. What provision of the Act, standard, regulation, rule, or order was violated and the item and citation number in which the alleged violation is set forth.
 - C. 1. b. The factual basis for each allegation necessary to establish that the standard, regulation, or rule applies, and what scope or application provision governs its applicability.
 - C. 1. c. The factual basis for each allegation necessary to establish that the cited circumstances, conditions, practices, or operations violated the cited provisions of the Act, standard, regulation, rule, or order.
 - C. 1. d. Where pertinent, the factual basis for the allegation that employees had access or were exposed to the cited circumstances, conditions, practices, or operations.
 - C. 1. e. Evidence that the employer knew or could have known with the exercise of reasonable diligence of the cited circumstances, conditions, practices, or operations.
 - C. 1. f. Any allegation that the alleged violation is serious, or that the employer willfully committed the alleged violation.
 - C. 1. g. Any allegation that the employer repeatedly committed the alleged violation, each prior citation and item number that serves as the basis for the classification, and the date that each became a final order of the Industrial Board of Appeals.
 - C. 1. h. Evidence that the proposed penalty is appropriate, specifying the amount.
 - C. 1. i. Evidence that the proposed abatement date is reasonable, specifying the date.
- C. 2. Parties Served Notice of Contest. In addition to other information, the notice of contest filed by the employer must state the names and addresses of the parties personally served with the copy of the notice of contest.
 - C. 2. a. The Industrial Board of Appeals rules provide that the affected employees or authorized employee representatives shall be given an opportunity to participate as parties to PESH hearings.

D. Communications with Industrial Board of Appeals Employees.

There shall be no ex parte communication, with respect to the merits of any case not concluded, between the Board, including any member, officer, employee, or agent of the Board who is employed in the decisional process, and any of the parties or interveners. Thus, CSHOs, District Supervisors, Program Managers, or other field personnel shall refrain from any direct or indirect communication relevant to the merits of the case with Administrative Law Judges or any members or employees of the Board. All inquiries and communications shall be handled through the Department of Labor Counsel.

E. Dealings With Parties While Proceedings Are Pending Before the Commission.

- E. 1. Clearance with the Department of Labor Counsel. After the notice of contest is filed and the case is within the jurisdiction of the Board, there shall be no investigations of or conferences with the employer without clearance from the appropriate Department of Labor Counsel. Such requests shall be referred promptly to the Department of Labor Counsel for a determination of the advisability, scope and timing of any investigation, and the advisability of and participation in any conference. To the maximum extent possible, there shall be consultation with Counsel on questions of this nature so as to ensure no procedural or legal improprieties.

- E. 2. Inquiries. Once a notice of contest has been filed, all inquiries relating to the general subject matter of the Notice of Violation and Order to Comply raised by any of the parties of the proceedings, including the employer and affected employees or authorized employee representative, shall be referred promptly to the Department of Labor Counsel. Similarly, all other inquiries, such as from prospective witnesses, insurance carriers, other Government agencies, attorneys, etc., shall be referred to the Department of Labor Counsel.

NOTE: Cooperation with the Department of Labor Counsel in this area is important. There are practical advantages in having an attorney participate in these conferences. Moreover, serious questions of legal propriety could be raised about meetings with parties involved in hearings and litigation without the presence of counsel and about the discussion or disclosure to nonparties of any aspect of pending cases.

- E. 3. The Attorney handling the case may contact the District Supervisor to discuss the validity of the violation or appropriateness of the penalty. Amendments to the citation or penalty due to typographical errors or arithmetical errors may be made by the Supervisor without approval from the Program Manager's office. If the Supervisor believes that any modifications to the citations or penalties is appropriate due to a further technical review of the case file and/or due to a discussion with Counsel, the Program Manager's office must be contacted before amendments are made.