State of Alaska
Department of Labor and Workforce Development
Division of Labor Standards and Safety

Effective December 4, 2015
AKOSH PD 16-03

AKOSH Field Operations Manual (FOM)

Executive Summary

This Instruction constitutes AKOSH's general enforcement policies and procedures manual for use by the field offices in conducting inspections, issuing citations and proposing penalties. This instruction has been amended to formally address several policy issues. Substantive changes include the following:

- Chapter 6 and chapter 8 were amended to clarify policies related to penalty payment methods for citations issued to public sector employers.
- Chapter 8 was amended to clarify policies related to limitations on settlement negotiations after the filing of a formal notice of contest.
- Chapter 11 was amended to clarify that AKOSH will endeavor to investigate the worksite for all fatalities and catastrophes, and that the Chief of AKOSH Enforcement must document the specific reasons in any such case where a site investigation is not conducted.

While AKOSH recognizes that OSHA recently revised the Federal Field Operations Manual as of October 1, 2015, and that these revisions will require additional analysis and amendments to the AKOSH FOM, the amendments in this update have been initiated as a result of guidance in the 2014 Federal Annual Monitoring Evaluation report and other policy discussions. AKOSH anticipates additional changes to the AKOSH FOM in the coming months.

Disclaimer

This manual is intended to provide instruction regarding some of the internal operations of the Alaska Occupational Safety and Health Administration (AKOSH), and is solely for the benefit of the AKOSH. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Alaska Department of Labor and Workforce Development or the State of Alaska. Statements which reflect current Occupational Safety and Health Review Board, federal OSHA Review Commission, or court precedents do not necessarily indicate acquiescence with those precedents.

TABLE OF CONTENTS

Chapter 1. Introduction

Chapter 2. Program Planning

Chapter 3. Inspection Procedures

Chapter 4. Violations

Chapter 5. Case File Preparations and Documentation

Chapter 6. Penalties and Debt Collection

Chapter 7. Post-Citation Procedures and Abatement Verification

Chapter 8. Settlements

Chapter 9. Complaint and Referral Processing

Chapter 10. Industry Sectors

- **I. Agriculture**

Chapter 11. Imminent Danger, Fatality, Catastrophe and Emergency Response

Chapter 12. Specialized Inspection Procedures

- **I. Multi-Employer Workplace/site Policy [Reserved]**
- **II. Temporary Labor Camps**

Chapter 13. Legal Issues

Chapter 1

INTRODUCTION

I. Purpose.

The Alaska Department of Labor and Workforce Development (DOLWD), Occupational Safety and Health (AKOSH) program is charged with on-site workplace safety and health compliance enforcement activity for private and public sector employers. The AKOSH Field Operations Manual (FOM) provides procedures for maintaining effectiveness, consistency and quality in the conduct of field workplace safety and health inspections. It is expected that these procedures will be revised periodically to maintain efficiency and address programmatic issues.

II. Scope.

This Instruction applies AKOSH Enforcement Section personnel.

III. Definitions and Terminology.

A. Alaska Occupational Safety and Health Laws (AKOSH laws).

The body of Alaska statutes from AS 18.60.010 through AS 18.60.105.

B. Alaska Administrative Code (AAC)

Regulations adopted to provide additional definition to Alaska Occupational Safety and Health Laws.

C. Assistant Attorney General (AAG)
The legal representative for AKOSH.

D. The Act.

This term refers to the Occupational Safety and Health Act of 1970 (29 United States Code 651).

E. Code of Federal Regulations (CFR)

This term applies to regulations adopted to provide additional definition to the Act.

F. Compliance Safety and Health Officer (CSHO).

This term refers to Safety Engineers, Safety Compliance Officers, and Industrial Hygienists.

G. **He/She** and **His/Hers**.

The terms *he* and *she*, as well as *his* or *her*, when used throughout this manual, are interchangeable. That is, male(s) applies to female(s), and vice versa.

H. **Professional Judgment**.

All AKOSH employees are expected to exercise their best judgment as safety and health professionals and as representatives of the Alaska Department of Labor and Workforce Development in every aspect of carrying out their duties.

I. **Workplace, Jobsite** and **Worksite**.

The terms *workplace*, *jobsite* and *worksite* are interchangeable. *Workplace* is used more frequently in general industry, while jobsite and *worksite* are more commonly used in the construction industry.

Chapter 2
PROGRAM PLANNING

I. Introduction.

AKOSH's mission is to reduce and eliminate workplace hazards and the incidence of workplace safety and health accidents by promulgating and enforcing standards and regulations; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health and the development of comprehensive safety and health management systems. Effective and efficient use of resources requires careful, flexible planning and execution.

II. AKOSH Responsibilities.

A. Providing Assistance to Small Employers.

1. In 1996, the Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA) to respond to the concern expressed by the small business community that Federal regulations were too numerous and complex, and that small business needed special assistance in understanding and complying with those regulations.

2. AKOSH operates a federally-approved occupational safety and health program to provide guidance and compliance assistance in addition to enforcement actions to reduce workplace illnesses, injuries and fatalities. These programs must contain procedures to answer inquiries by small entities (small businesses). These programs also provide information on and advice about compliance with the statutes and regulations; interpretations; and applications of the law to specific sets of facts supplied by the small entity.

B. AKOSH Outreach Program.

AKOSH maintains an outreach program appropriate to local conditions and needs. Functions include compliance assistance services in developing compliance safety and health management systems, training and education services, referral services, cooperative programs, abatement assistance, and technical services.

C. Responding to Requests for Assistance.

AKOSH shall make every effort to respond to all requests for assistance given available resources, but priority will be given to requests from small employers with less than 50 employees.

III. AKOSH Cooperative Programs Overview.

AKOSH offers a number of avenues for businesses and organizations to work cooperatively with the Agency. Compliance Officers are expected to discuss the various

cooperative programs with employers at the closing of an enforcement inspection or whenever an employer makes a request for such information.

A. Voluntary Protection Program (VPP).

The Voluntary Protection Program (VPP) is designed to recognize and promote effective safety and health management. A hallmark of VPP is the principle that management, labor, and AKOSH can work together in pursuit of a safe and healthy workplace. A VPP participant is an employer that has successfully designed and implemented a health and safety management system at its worksite.

NOTE: See CSP 03-01-003 (AKOSH PD 08-12), Voluntary Protection Programs (VPP): Policies and Procedures Manual*, dated March 25, 2003, for additional information.*

B. AKOSH Consultation and Training Program.

1. The AKOSH Consultation and Training program operates through a mix of state funding and Section 21(d) and 23(g) agreements where state funds are matched with Federal OSHA funding.

   a. The AKOSH Consultation and Training Program offers a variety of services at no cost to employers. These services include assisting in the development and implementation of an effective safety and health management system, and offering training and education to the employer and employees at the worksite. Smaller businesses in high hazard industries or those involved in hazardous operations receive priority. CSHO's are expected to provide this information to employers upon request or during closing conference meetings.

2. **Safety and Health Achievement Recognition Program (SHARP)**.

   a. Another program that recognizes employers' efforts to create a safe workplace and exempts them from inspection is the Safety and Health Achievement Recognition Program (SHARP). This program is administered by the State Onsite Consultation Program but is funded under Section 21(d) of the Act.

   b. SHARP is designed to provide incentives and support those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from OSHA programmed inspections.

      NOTE: See CSP 02-00-001, Consultation Policies and Procedures Manual, *dated August 6, 2001, for additional information.*

C. Strategic Partnerships

Organizations can enter into Strategic Partnerships with AKOSH to address specific safety and health issues. In these partnerships, AKOSH enters into extended,

voluntary, cooperative relationships with groups of employers, employees, and employee representatives (sometimes including other stakeholders, and sometimes involving only one employer) in order to encourage, assist, and recognize efforts to eliminate serious hazards and to achieve a high level of employee safety and health.

IV. Enforcement Program Scheduling.

AKOSH's priority system for conducting inspections is designed to allocate available resources as effectively as possible. The Chief of AKOSH Enforcement or designee will ensure that inspections are scheduled within the framework of this chapter, that they are consistent with strategic objectives, and that appropriate documentation of scheduling practices is maintained.

The Chief of AKOSH Enforcement or designee will also ensure that AKOSH resources are effectively distributed during inspection activities. If an inspection is of a complex nature, the Chief of AKOSH Enforcement or designee may consider utilizing additional AKOSH resources or may request assistance from federal OSHA special teams (e.g., the Health Response Team).

A. Inspection Priority Criteria.

Generally, priority of accomplishment and of assigning staff resources for inspection categories is as shown in Table 2-1 below:

Table 2-1: Inspection Priorities

Priority	Category
First	Imminent Danger
Second	Fatality or Accident resulting in hospitalization of one or more employee
Third	Complaints/Referrals
Fourth	Follow-up/Monitoring
Fifth	Special Emphasis Programmed Inspections (Including HHT)
Sixth	Public Sector programmed

1. Efficient Use of Resources.

Unprogrammed inspections should be scheduled and conducted prior to programmed inspections. Therefore, the first through the fourth priorities (above) will be conducted prior to programmed assignments.
This procedure does not prohibit the AKOSH Chief of Enforcement from making a programmed inspection assignment in conjunction with an unprogrammed assignment. Where the CSHO performs an unprogrammed assignment (e.g. complaint) in conjunction with a programmed inspection for the same site, only one inspection (OSHA-1) will normally be generated to address both assignments. If joint inspection assignments are made (i.e. safety and health), two inspections

(OSHA-1) will normally be generated to address both assignments; one for safety and one for health.

Deviations from this priority list are allowed so long as they are justifiable, lead to the efficient use of resources, and promote effective employee protection. Inspection scheduling deviations must be documented in the case file.

2. Inspection Scheduling.

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

a. Unprogrammed inspections (excluding follow-ups and monitoring) should be scheduled with the following priorities:

i. Reports of alleged imminent danger situations from any source, including referrals and complaints regardless of formality;
ii. Fatalities/Catastrophes (see FOM Chapter 11 for detailed information related to FAT/CAT investigations);
iii. Media and employer reports of accidents involving serious injuries or hazards of a serious nature;
iv. Formal complaints assigned for inspection by the supervisor, CSHO referrals (including referrals based upon discrimination complaints) with serious hazards and referrals from other safety and health agencies with serious hazards;
v. Formal complaints with non-serious hazards assigned for inspection by the supervisor;
vi. Nonformal complaints assigned for inspection by the supervisor.

3. **Follow-up Inspections**.

In cases where follow-up inspections are necessary, they shall be conducted as promptly as resources permit. In general, follow-up inspections shall take priority over all programmed inspections and any unprogrammed inspection in which the hazards are anticipated to be other-than-serious.

A. Follow-up inspections are **required** in the following situations, unless excepted under B. of this section:

1. Willful violations;
2. Repeat violations;
3. Failure to abate notifications;
4. Citations related to an imminent danger situation;
5. When the employer fails to respond to a request for notification of abatement action by letter or other means after having been contacted several times;
6. Whenever the Chief of AKOSH Enforcement or designee believes that particular circumstances (e.g., the number and/or the type of violations, past history of the employer, complex engineering controls, etc.) indicate

the need for a follow-up based on documentation and/or recommendations of the CSHO; and

7. Severe Violator Enforcement Program (SVEP) qualified cases – See AKOSH PD 10-13, dated September 15, 2010.

B. Exceptions to required follow-up inspections.

It will not be necessary to conduct a follow-up inspection if any of the following applies:

1. A follow-up inspection will not be necessary where unquestionable proof of abatement has been presented, e.g., when the CSHO observed and documented the correction of the cited condition during the inspection.

2. The Chief of AKOSH Enforcement or designee 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. Written signed statements are preferred; however, verbal communications are acceptable if summarized by division personnel in a written memorandum for the case file.

3. Where a recommended follow-up inspection has not been conducted within 90 working days of the final abatement date, and the case has become a final order, the case file may be administratively closed by the CSHO after consultation with the Chief of AKOSH Enforcement or designee. All administratively closed case files will contain verification of abatement as well as documentation of reasons why the follow-up inspection was not conducted.

4. 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 should not be scheduled until after most, if not all, of the abatement dates set forth for the serious violations in the citation(s) have passed. If the employer has taken satisfactory corrective action, additional follow-up activity normally should not be scheduled unless the Chief of AKOSH Enforcement or designee believes that complex engineering controls or other special factors involved in the case warrant such activity.

5. The scheduling of follow-up inspections may be affected in various ways by potential or actual employer contests, depending on the status of the Notice of Contest.

6. Follow-up inspections may be conducted during the 15 working day period granted to contest the citation or request an informal conference, provided the date set for abatement has passed and the employer has not actually filed a notice of contest or requested an informal conference. Normally, only those conditions considered ***high gravity serious*** will subject an employer to being scheduled for follow-up during the contest period. If such a follow-up inspection reveals a failure to abate, a Notification of Failure to Abate Alleged Violation (AS 18.60.095(d)) may be issued immediately without regard to contest period of the initial citation.

7. When a citation is currently under contest, a follow-up inspection will not be scheduled regarding the contested items. If the employer contests the proposed penalty but not the underlying citation, a follow-up inspection normally should not be conducted unless the violations are considered high gravity and the supervisor decides that a follow-up is necessary. If a follow-up inspection is conducted at establishments involved in proceedings before the Occupational Safety and Health Review Board, the CSHO will explain in the opening conference that the inspection will not involve matters before the Review Board.
8. When the notice of contest is withdrawn, the proceeding is settled, or the final order is entered, the abatement period begins. Thereafter, a follow-up inspection may be scheduled as appropriate.

4. Monitoring Inspections.

When a monitoring inspection is necessary, the priority is the same as for a follow-up inspection.

5. Employer Information Requests.

Contacts for technical information initiated by employers or their representatives will not trigger an inspection, nor will such employer inquiries protect the requesting employer against inspections conducted pursuant to existing policy, scheduling guidelines and inspection programs.

6. Reporting of Imminent Danger, Catastrophe, Fatality, Amputations, Accidents, Referrals or Complaints.

The AKOSH Chief of Enforcement or designee will act in accordance with established inspection priority procedures.

NOTE**:** See Section V. of this chapter, *Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling*, for additional information.

A. Effect of Contest.

If an employer has contested a citation and/or a penalty from a previous inspection at a specific worksite, and the case is still pending before the Review Board, the following guidelines apply to additional inspections of the employer at that worksite:

1. If the employer has contested the penalty only, the inspection will be scheduled as if there were no contest;

2. If the employer has contested the citation itself or any items therein, then programmed and unprogrammed inspections may be scheduled, but all issues under contest will be excluded from the inspection unless a potential imminent danger is involved.

B. Enforcement Exemptions and Limitations.

1. In providing funding for OSHA, Congress has consistently placed restrictions on enforcement activities for two categories of employers: small farming operations and small employers in low-hazard industries. Congress may place exemptions and limitations on OSHA activities through the annual Appropriations Act.

2. Before initiating an inspection of an employer in these categories the Chief of AKOSH Enforcement will evaluate whether the Appropriations Act for the fiscal year would prohibit the inspection. Where this determination cannot be made beforehand, the CSHO will determine the status of the small farming operation or a small employer in a low-hazard industry upon arrival at the workplace. If the prohibition applies, the inspection may not be funded with federal OSHA grant funds.

   NOTE: See CPL 02-00-051 (AKOSH PD 05-09), Enforcement Exemptions and Limitations under the Appropriation Act*, dated May 28, 1998, for additional information.*

C. Home-Based Worksites.

1. AKOSH will not perform any inspections of an employee's home office located in the employee's residence. A home office is defined as office work activities in a home-based setting/worksite (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).

2. AKOSH will only conduct inspections of other home-based worksites, such as home manufacturing operations that occur within a residence, 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.

D. Inspection/Investigation Types.

1. **Unprogrammed**.
   a. Inspections scheduled in response to alleged hazardous working conditions identified at a specific worksite are classified as unprogrammed. This type of inspection responds to:

      - Imminent Dangers; Fatalities/catastrophes;
      - Follow up;
      - Complaints; and
      - Referrals.

   b. It also includes follow-up and monitoring inspections scheduled by the Chief of AKOSH Enforcement or designee.

NOTE: This category includes all employers/employees directly affected by the subject of the unprogrammed inspection activity, and is especially applicable on multi-employer worksites.

NOTE: Not all complaints and referrals qualify for an inspection. See Chapter 9, Complaint and Referral Processing*, for additional information.*

NOTE: See CPL 02-00-124, Multi-Employer Worksite Citation Policy*, dated December 10, 1999, for additional information.*

2. **Unprogrammed Related**.
   a. Inspections of employers at multi-employer worksites whose operations are not directly addressed by the subject of the conditions identified in a complaint, accident, or referral are designated as unprogrammed related.
   b. 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.

3. **Programmed**.

   Inspections of worksites which have been scheduled based upon objective or neutral selection criteria are programmed inspections, such as the High Hazard Targeting System (HHT). The worksites are selected according to statewide and national scheduling plans for safety and for health or under local, regional, and national special emphasis programs.

   See AKOSH PD 11-04, *High Hazard Targeting System*, April 5, 2011.

4. **Program Related**.

   Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment, such as a low injury rate employer at a worksite where programmed inspections are being conducted for all high rate employers.

V. Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling.

Enforcement procedures relating to unprogrammed activity are located in subject specific chapters of this manual:

- ► Imminent Danger, see Chapter 11, *Imminent Danger, Fatality, Catastrophe, and Emergency Response*.
- ► Fatality/Catastrophe, see Chapter 11, *Imminent Danger, Fatality, Catastrophe, and Emergency Response.*
- ► Emergency Response, see Chapter 11, *Imminent Danger, Fatality, Catastrophe, and Emergency Response.*
- ► Complaint/Referral Processing, see Chapter 9, *Complaint and Referral Processing*.

- ► Whistleblower Complaints, see Chapter 9, *Complaint and Referral Processing*.
- ► Follow-ups and Monitoring, see Chapter 7, *Post-Citation Procedures and Abatement Verification*.

VI. Programmed Inspections.

A. High Hazard Targeting (HHT) Program.

In order to achieve AKOSH's goal of reducing the number of injuries and illnesses that occur at individual worksites, the High Hazard Targeting (HHT) program directs enforcement resources to those worksites where the highest rate of injuries and illness have occurred. The HHT is AKOSH's primary programmed inspection plan for non-construction worksites. The HHT Program is based on the data collected by the Alaska Division of Worker's Compensation.

NOTE: For in-depth information on how the HHT program works see AKOSH's most recent High Hazard Targeting Program (Currently AKOSH PD 11-04, April 5, 2011).

B. Scheduling for Construction Inspections.

Due to the mobility of the construction industry, the transitory nature of construction worksites, and the fact that construction worksites frequently involve more than one employer, inspections are scheduled from a list of construction worksites rather than construction employers. All construction projects in Anchorage, Juneau and Fairbanks are targeted for potential inspection. The AKOSH Chief of Enforcement oversees the selection of worksites based on data from Plans Room Reports and Wage and Hour Section data on public construction projects outside of Anchorage, Juneau and Fairbanks. The AKOSH Chief of Enforcement is responsible for scheduling programmed construction inspections to maximize efficiency and funding for worksites outside Anchorage, Juneau and Fairbanks.

The AKOSH Chief of Enforcement is responsible for ensuring the contractors approved under the AK-CHASE Partnership Program are given a lower priority for programmed inspections.

NOTE: See CPL 02-00-141 (AKOSH PD 07-06), Inspection Scheduling for Construction*, dated July 14, 2006.*
NOTE: See AKOSH PD 04-03 Alaska Construction Health and Safety Excellence (AK CHASE) Partnership Project.

C. Strategic and Special Emphasis Programs (SEPs).

Strategic and Special Emphasis Programs provide for programmed inspections of establishments in industries with potentially high injury or illness rates that are not covered by other programmed inspection scheduling systems or, if covered, where the potentially high injury or illness rates are not addressed to the extent considered adequate under the specific circumstances. SEPs are also based on potential exposure

to health hazards. Strategic and special emphasis programs can include strategic plan programs, National Emphasis Programs, Regional Emphasis Programs and Local Emphasis Programs adopted by AKOSH.

1. **Identification of Special Emphasis Programs**.

   The description of the particular Special Emphasis Program shall be identified by one or more of the following:

   a. Specific industry;
   b. Trade/craft;
   c. Substance or other hazard;
   d. Type of workplace operation;
   e. Type/kind of equipment; and
   f. Other identifying characteristic.

2. **Special Emphasis Program Scope**.

   The reasons for and the scope of a Special Emphasis Program shall be described; and may be limited by geographic boundaries, size of worksite, or similar considerations.

3. **Pilot Programs**.

   National or local pilot programs may also be established under Special Emphasis Programs. Such programs may be conducted for the purpose of assessing the actual extent of suspected or potential hazards, determining the feasibility of new or experimental compliance procedures, or for any other legitimate reason.

D. National Emphasis Programs (NEPs).

OSHA develops National Emphasis Programs to focus outreach efforts and inspections on specific hazards in a workplace and AKOSH will adopt NEP's when circumstances illustrate that doing so would be an effective use of resources for eliminating or reducing significant employee exposure to workplace illnesses and or injuries.

E. Local Emphasis Programs (LEPs) and Regional Emphasis Programs (REPs).

AKOSH may establish LEPs and REPs generally based on knowledge of local industry hazards or local industry injury/illness experience.

NOTE: See CPL 04-00-001, Procedures for Approval of Local Emphasis Programs (LEPs)*, dated November 10, 1999, for additional information (AKOSH PD 00-03).*

F. Other Special Programs.

AKOSH may develop programs to cover special categories of inspections which are not covered under the HHT Program or under a Special Emphasis Program.

G. Inspection Scheduling and Interface with Cooperative Program Participants.

1. Employers who participate in voluntary compliance programs may be exempt from programmed inspections and eligible for inspection deferrals or other enforcement incentives. The Chief of AKOSH Enforcement or designee will determine whether the employer is actively participating in a Cooperative Program that would impact inspection and enforcement activity at the worksite being considered for inspection. Where possible, this determination should be made prior to scheduling the inspection.

2. Information regarding a facility's participation in the following programs should be available prior to scheduling inspection activity:

   a. VPP Program;
   b. Pre-SHARP and SHARP Participants;
   c. AKOSH Strategic Partnerships; and
   d. Consultation Deferrals.

3. Voluntary Protection Program.

a. AKOSH VPP Manager Responsibilities.

The AKOSH Chief of Consultation or designated VPP manager must keep the Chief of AKOSH Enforcement or designee informed regarding VPP applicants and the status of participants in the VPP. This will prevent unnecessary scheduling of programmed inspections at VPP sites and ensure efficient use of resources. Information should include the following determinations:

- That the site can be removed from the programmed inspection list. Such removal may occur no more than 75 days prior to the onsite evaluation;
- Of the site's approval for the VPP program;
- Of the site's withdrawal or termination from the VPP program; and
- If the VPP Manager is the first person notified by the site of an event requiring enforcement, the VPP Manager must instruct the site to contact the AKOSH Enforcement office.

b. Programmed Inspections and VPP Participation.

- Inspection Deferral.
  Approved sites must be removed from any programmed inspection lists for the duration of participation, unless a site chooses otherwise. The

applicant worksite will be deferred starting no more than 75 calendar days prior to the commencement of its scheduled pre-approval onsite review.

- Inspection Exemption.
  The exemption from programmed inspections for approved VPP sites will continue for as long as they continue to meet VPP requirements. Sites that have withdrawn or have been terminated from VPP will be returned to the programmed inspection list, if applicable, at the time of the next inspection cycle.

c. **Unprogrammed Enforcement Activities at VPP Sites**.

When AKOSH receives a complaint, or a referral other than from the AKOSH VPP onsite team, or is notified of a fatality, catastrophe, or other event requiring an enforcement inspection at a VPP site, the AKOSH Chief of Enforcement or designee must initiate the inspection following normal AKOSH enforcement procedures.

- The AKOSH Chief of Enforcement must immediately notify the AKOSH Chief of Consultation or VPP Manager of any fatalities, catastrophes or other accidents or incidents occurring at a VPP worksite that require an enforcement inspection; as well as of a referral or complaint that concerns a VPP worksite, including complaint inquiries that would receive a letter response. If the VPP is a federal site, the OSHA Alaska Area Office should be notified.

- The inspection will be limited to the specific issue of the unprogrammed activity. If citations are issued as a result of the inspection, a copy of the citation will be sent to the AKOSH VPP Manager. See CSP 03-01-003 (AKOSH PD 08-12), *Voluntary Protection Programs (VPP): Policies and Procedures Manual*, dated March 25, 2003.

- The Chief of AKOSH Enforcement will send the VPP Manager a copy of any report resulting from an enforcement case.

4. **Consultation**.

a. **Consultation Visit in Progress**.

- If an onsite consultation visit is in progress, it will take priority over AKOSH programmed inspections. An onsite consultation visit will be considered "in progress" in relation to the working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions thereof. If an onsite consultation visit is already in progress it will terminate when the following AKOSH compliance inspections are about to take place:

- Imminent danger inspection;
- Fatality/catastrophe inspection;
- Complaint inspections; and/or
- Other critical inspections, as determined by the Director of Labor Standards and Safety or Commissioner of Labor and Workforce Development.

NOTE: Other "such critical inspections" may include, but are not limited to, referrals as defined in Chapter 9, Complaint and Referral Processing. *Following an evaluation of the hazards alleged in a referral, if the Division Director determines that enforcement action is required prior to the end of an abatement period established by the state consultation project, the consultation visit in progress shall be immediately terminated to allow for an enforcement inspection.*

- For purposes of efficiency and expediency, an employer's worksite shall not be subject to concurrent consultation and enforcement-related visits. The following excerpts from CSP 02-00-002 (AKOSH PD 08-07), *Consultation Policies and Procedures Manual, Chapter 7: Relationship to Enforcement*, dated January 18, 2008, to clarify the interface between enforcement and consultation activity at the worksite:

  - **Full Service OnSite Consultation Visits.**

    While a worksite is undergoing a full service onsite consultation visit for safety and health, programmed enforcement activity may not occur until after the end of the worksite's visit "in progress" status.

  - **Full Service Safety or Health OnSite Consultation Visits.**

    An onsite consultation visit "in progress" is discipline-related, whether for safety **or** health; programmed enforcement activity may not proceed until after the end of the worksite's visit "in progress" status, and is limited to the discipline examined, safety or health.

  - **Limited Service OnSite Consultation Visits**.

    If a worksite is undergoing a limited service onsite consultation visit, whether focused on a particular type of work process or a hazard, programmed enforcement activity may not proceed while the consultant is at the worksite. The re-scheduled enforcement activity must be limited only to those areas that were not addressed by the scope of the consultative visit (posted list of hazards).

  - **Enforcement Follow-Up and Monitoring Inspections.**

    If an enforcement follow-up or monitoring inspection is scheduled while a worksite is undergoing an onsite consultation visit, the

inspection shall not be deferred; however, its scope shall be limited only to those areas required to be covered by the follow-up or monitoring inspection. In such instances, the consultant must halt the onsite visit until the enforcement inspection is completed. In the event AKOSH issues a citation(s) as a result of the follow-up or monitoring inspection, an onsite consultation visit may not proceed until the citation(s) becomes a final order(s).

b. OnSite Consultation and 90-Day Deferral.

If an establishment has requested an initial full-service comprehensive consultation visit for safety or health from the State OSHA Consultation Program, and that visit has been scheduled by the State Program, an HHT inspection may be deferred for 90 calendar days from the date of the notification by the State Program to the AKOSH Enforcement Program. If a site is particularly difficult to access and, due to no fault of the employer, a consultation visit cannot be conducted within 90 days from the request, the Chief of AKOSH Enforcement will request a determination from the Director of Labor Standards and Safety before scheduling a programmed inspection.

AKOSH may, however, in exercising its authority to schedule inspections, assign a lower priority to worksites where consultation visits are scheduled.

NOTE: See CSP 02-00-002 (AKOSH PD 08-07), Consultation Policies and Procedures Manual*, Chapter 7: Relationship to Enforcement, dated January 18, 2008, for additional information.*

5. Pre-Safety and Health Achievement Recognition Program (Pre-SHARP) Status.

a. Those employers who do not meet the SHARP requirements, but who exhibit a reasonable promise of achieving agreed-upon milestones and time frames for SHARP participation, may be granted Pre-SHARP status. Pre-SHARP participants receive a full service, comprehensive consultation visit that involves a complete safety and health hazard identification survey, including a comprehensive assessment of the worksite's safety and health management system.

b. The deferral time frame recommended by the State Consultation Project Manager must not exceed a total of 18 months from the expiration of the latest hazard correction due date(s), including extensions. Upon achieving Pre-SHARP status, employers may be granted a deferral from AKOSH programmed inspections. The following types of incidents can trigger an AKOSH enforcement inspection at Pre-SHARP sites:

- Imminent danger;
- Fatality/catastrophe; and
- Formal complaints.

6. **Safety and Health Achievement Recognition Program (SHARP).**

SHARP is designed to provide support and incentives to those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from OSHA programmed inspections, see 29 CFR §1908.7(b)(4).

a. **Duration of SHARP Status**.

All initial approvals of SHARP status will be for a period of up to two years, commencing with the date the Commissioner of Labor and Workforce Development approves an employer's SHARP application. After the initial approval, all SHARP renewals will be for a period of up to three years.

b. **AKOSH Inspection(s) at SHARP Worksites**.

As noted above, employers that meet all the requirements for SHARP status will have the names of their establishments deleted from AKOSH's Programmed Inspection Schedule. However, pursuant to 29 CFR §1908.7(b)(4)(ii), the following types of incidents can trigger an OSHA enforcement inspection at SHARP sites: imminent danger; fatality/catastrophe; or formal complaints.

NOTE: See CSP 02-00-002 (AKOSH PD 08-07), Consultation Policies and Procedures Manual, *Chapter 8: OSHA's Safety and Health Achievement Recognition Program (SHARP) and Pre-SHARP, dated January 18, 2008, for additional information.*

7. **AKOSH Strategic Partnership Program (ASP).**

a. **Deferral from Programmed Inspection List for Non-Construction ASPs**.
AKOSH may offer up to a six-month deferral from programmed inspections to AKOSH Strategic Partnership (ASP) participants upon their entry into a partnership. During the deferral period, the partner must commit to make workplace safety and health improvements or seek compliance assistance to improve workplace safety and health in accordance with its responsibilities under the AKOSH Laws.

For a majority of ASP agreements, the beginning of the deferral period will be the effective date of the partnership agreement. However, in situations where sites join the partnership on a staggered basis, the deferral period begins at the site's actual entry into the partnership. The partnership agreement should clearly address the issue of ASP participant effective/entry dates and whether any enforcement inspection deferral will be allowed.

b. **Programmed Inspection with a Limited Scope**.

At AKOSH's discretion, an establishment operated by a strategic partner may receive an inspection in which the focus is limited to hazardous areas, operations, conditions or practices at the establishment. The limited scope inspection must focus on the significant worksite and industry-specific hazards based on an analysis of information available, such as:

- Alaska Worker's Compensation and BLS injury and illness data;
- Site and corporate injury and illness data; and
- Site accident audit and inspection data.

- For inspections with limited scope, the workplace hazards to be addressed will be determined by AKOSH with input from the partner(s). AKOSH may expand the scope of the inspection based on information gathered during the inspection process.

- To gain a limited scope inspection as a benefit, the establishment must have undergone an onsite non-enforcement verification inspection within one year of the date of the programmed inspection.

c. Deletion from Programmed Inspection List.

- **Non-Construction.**

  Following a comprehensive onsite AKOSH inspection conducted to meet ASP verification requirements, an establishment operated by an ASP partner will be deleted from programmed inspection lists for the period of time established for deletions in the then-current AKOSH High Hazard Targeting directive.

  If the ASP is designed to comprehensively address a hazard covered by the Act, the Chief of AKOSH Enforcement or designee, with the approval of the Director of Labor Standards and Safety, may extend the deletion for one year if the partner continues to meet the conditions of the ASP agreement and demonstrates improved performance in areas measured by the ASP.

- **Construction.**

  - An ASP agreement may provide that following an appropriate number of comprehensive onsite enforcement inspections conducted to verify satisfaction of ASP requirements, the sites, or portions of sites, over which the employer/partner exercises control is exempt from programmed inspection for a period of up to one year. This exemption is limited to the terms of the specific ASP agreement between the employer and AKOSH, within AKOSH jurisdiction. However, it should be noted that if a serious or imminent danger condition is observed by enforcement personnel or reported to AKOSH, the partner should be inspected and cited.

- This program is available only where the partner has an effective safety and health management system fully compliant with applicable regulations including 29 CFR §1926.20 and §1926.21, as adopted under the Alaska Administrative Code, and the effectiveness of the system has been confirmed during the verification inspections described above. For recordkeeping purposes, the official date of the comprehensive onsite enforcement (verification) inspection is the opening conference. Therefore, the beginning of the deletion period is the date of the opening conference of the verification inspection(s).

Chapter 3

INSPECTION PROCEDURES

I. Inspection Preparation.

The conduct of effective inspections requires judgment in the identification, evaluation, and documentation of safety and health conditions and practices. Inspections may vary considerably in scope and detail depending on the circumstances of each case.

II. Inspection Planning.

It is important that the Safety Compliance Officer or Industrial Hygienist (CSHO) adequately prepare for each inspection. Due to the wide variety of industries and associated hazards likely to be encountered, pre-inspection preparation is essential to the conduct of a quality inspection.

A. Review of Inspection History.

1. Compliance Officers will carefully review data available for information relevant to the establishment scheduled for inspection. This may include inspection files and source reference material relevant to the industry. CSHOs will conduct a search of business and corporate licensing and registration websites maintained by the Alaska Department of Commerce and Economic Development and also conduct an establishment search by accessing the IMIS database. CSHOs should use name variations and address-matching in their establishment search to maximize their efforts due to possible company name changes and status (e.g., LLC, Inc.).

B. Review of Cooperative Program Participation.

CSHOs will access the AKOSH homepage to obtain information about employers who are currently participating in cooperative programs. CSHOs will verify whether the employer is a current program participant during the opening conference. CSHOs will be mindful of whether they are preparing for a programmed or unprogrammed inspection, as this may affect whether the inspection should be conducted and/or its scope. See Paragraph V.D. of this chapter, *Review of Voluntary Compliance Programs.*

C. Safety and Health Issues Relating to CSHOs.

1. Hazard Assessment.

- If the employer has a written certification that a hazard assessment has been performed pursuant to 29 CFR §1910.132(d), the CSHO shall request a copy. If the hazard assessment itself is not in writing, the CSHO shall ask the person who signed the certification to describe all potential workplace hazards and

then select appropriate protective equipment. If there is no hazard assessment, the CSHO will determine potential hazards from sources such as the OSHA 300 Log of injuries and illnesses and shall select personal protective equipment accordingly.

2. Respiratory Protection.

CSHOs must wear respirators when and where required, and must care for and maintain respirators in accordance with the CSHO training provided.

a. CSHOs should conduct a pre-inspection evaluation for potential exposure to chemicals. Prior to entering any hazardous areas, the CSHO should identify those work areas, processes, or tasks that require respiratory protection. The hazard assessment requirement in 29 CFR §1910.132(d) does not apply to respirators; see CPL 02-02-054 (AKOSH PD 01-02), *Respiratory Protection Program Guidelines*, dated July 14, 2000. CSHOs should review all pertinent information contained in the establishment file and appropriate reference sources to become knowledgeable about the industrial processes and potential respiratory hazards that may be encountered. During the opening conference, a list of hazardous substances should be obtained or identified, along with any air monitoring results. CSHOs should determine if they have the appropriate respirator to protect against chemicals present at the work site.

b. CSHOs must notify their supervisor or the respiratory protection program administrator:

- If a respirator no longer fits well (CSHOs should request a replacement that fits properly);
- If CSHOs encounter any respiratory hazards during inspections or on-site visits that they believe have not been previously or adequately addressed during the site visit; or
- If there are any other concerns regarding the program.

3. Safety and Health Rules and Practices.

Section 29 CFR §1903.7(c) requires that CSHOs comply with all safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by AKOSH standards or by the employer for the protection of employees.

4. Restrictions.

CSHOs will not enter any area where special entrance restrictions apply until the required precautions have been taken. It shall be the Chief of AKOSH Enforcement's responsibility to determine that an inspection may be conducted without exposing the CSHO to hazardous situations and to procure whatever materials and equipment are needed for the safe conduct of the inspection.

D. Advance Notice.

1. Policy.

a. Alaska Statute 18.60.085 contains a general prohibition against a person providing advance unauthorized notice of an AKOSH enforcement inspection. AKOSH regulates many conditions that are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, unauthorized advance notice is prohibited and subject to criminal prosecution punishable by a fine of not more than $7,000 or by imprisonment for not more than 180 days, or by both.

b. Advance Notice Exceptions.

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. Advance notice of inspections may be given with the authorization of the AKOSH Chief of Enforcement or designee and only in the following situations:

- In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible;
- When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary;
- To ensure the presence of employer and employee representatives or other appropriate personnel who are needed to aid in the inspection; and
- When giving advance notice would enhance the probability of an effective and thorough inspection; e.g., in complex fatality investigations.

c. Delays.

Advance notice exists whenever AKOSH sets up a specific date or time with the employer for the CSHO to begin an inspection. Any delays in the conduct of the inspection shall be kept to an absolute minimum. Lengthy or unreasonable delays shall be brought to the attention of the Chief of AKOSH Enforcement or designee. Advance notice generally does not include non-specific indications of potential future inspections.

In unusual circumstances, the Chief of AKOSH Enforcement or designee may decide that a delay is necessary. In those cases the employer or the CSHO shall notify affected employee representatives, if any, of the delay and shall keep them informed of the status of the inspection.

2. Documentation.

The conditions requiring advance notice and the procedures followed shall be documented in the case file.

E. Pre-Inspection Compulsory Process.

1. AS 18.60.083(b) 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." AS 18.60.083(b) authorizes the agency to issue administrative subpoenas to obtain relevant information.

2. Although AKOSH generally does not seek warrants without evidence that the employer is likely to refuse entry, the Chief of AKOSH Enforcement or designee may 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 include evidence of denied entry in previous inspections, or awareness that a job will only last a short time or that job processes will be changing rapidly.

3. Administrative subpoenas may also be issued prior to any attempt to contact the employer or other person for evidence related to an AKOSH inspection or investigation. See Chapter 15, *Legal Issues*

F. Expert Assistance.

1. The Chief of AKOSH Enforcement or designee shall arrange for a specialist and/or specialized training, preferably from within OSHA, to assist in an inspection or investigation when the need for such expertise is identified.

2. OSHA specialists may accompany CSHOs or perform their tasks separately. CSHOs must accompany outside consultants. OSHA specialists and outside consultants shall be briefed on the purpose of the inspection and personal protective equipment to be utilized.

II. Inspection Scope.

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

A. Comprehensive.

A comprehensive inspection is a substantially complete and thorough inspection of all potentially hazardous areas of the establishment. An inspection may be deemed comprehensive even though, as a result of professional judgment, not all potentially hazardous conditions or practices within those areas are inspected.

B. Partial.

A partial inspection is one whose focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment.

1. A partial inspection may be expanded based on information gathered by the CSHO during the inspection process consistent with the Act and Area Office priorities.

2. CSHOs shall use pre-determined criteria from their offices to determine the necessity for expanding the scope of an inspection, based on information gathered during records or program review and walkaround inspection.

III. Conduct of Inspection.

C. Time of Inspection.

1. Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise.

2. The Chief of AKOSH Enforcement or designee and the CSHO shall determine if alternate work schedules are necessary regarding entry into an inspection site during other than normal working hours.

B. Presenting Credentials.

1. At the beginning of the inspection, the CSHO shall locate the owner representative, 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.

2. When neither the person in charge nor a management official is present, contact may be made with the employer to 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 should normally not exceed one hour. On occasions when the CSHO is waiting for the employer representative, the workforce may begin to leave the jobsite. In this situation the CSHO should contact the Chief of AKOSH Enforcement or designee for guidance. If the person in charge at the workplace cannot be determined, record the extent of the inquiry in the case file and proceed with the physical inspection.

C. Refusal to Permit Inspection and Interference.

Alaska Statute 18.60.083 provides that CSHOs may enter without delay and at reasonable times any establishment within AKOSH jurisdiction for the purpose of conducting an inspection. Unless the circumstances constitute a recognized legal exception to the warrant requirement (i.e., consent, third party consent, plain view, open field, or exigent circumstances) 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.

NOTE: On a military base or other Federal Government facility, the following guidelines do not apply. Instead, a representative of the controlling authority shall be informed of the contractor's refusal and asked to take appropriate action to obtain cooperation. On a state-operated facility, the Commissioner of the controlling

department shall be informed of the refusal and asked to take appropriate action to obtain cooperation.

1. Refusal of Entry or Inspection.

a. 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, an attempt shall be made to obtain as much information as possible about the establishment. See Chapter 15, *Legal Issues*, for additional information.

b. 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 Chief of AKOSH Enforcement or designee. The Chief of AKOSH Enforcement shall notify the Director of Labor Standards and Safety and the Assistant Attorney General assigned to handle AKOSH cases.

c. If the employer raises no objection to inspection of certain portions of the workplace but objects to inspection of other portions, this shall be documented. Normally, the CSHO shall continue the inspection, confining it only to those certain portions to which the employer has raised no objections.

d. In either case, the CSHO shall advise the employer that the refusal will be reported to the Chief of AKOSH Enforcement or designee and that the agency may take further action, which may include obtaining compulsory legal processes under 8 AAC 61.020.

e. On multi-employer worksites, valid consent can be granted by the owner, or another employer with employees at the worksite, for site entry.

2. Employer Interference.

Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the CSHO shall determine 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, private employee interviews, or the refusal to allow attachment of sampling devices.

a. Forcible Interference with Conduct of Inspection or Other Office Duties.

Whenever an AKOSH 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.

(i) If a CSHO is assaulted while attempting to conduct an inspection, they shall contact the proper authorities such as the Alaska State Troopers or local police and immediately notify the Chief of AKOSH Enforcement.

(ii) Upon receiving a report of such forcible interference, the Chief of AKOSH Enforcement or designee shall immediately notify the Director.

(iii) If working at an offsite location, CSHOs should leave the site immediately pending further instructions from the Chief of AKOSH Enforcement or designee.

3. Obtaining Compulsory Process

If it is determined, upon refusal of entry or refusal to produce evidence required by subpoena, that a warrant will be sought, the Chief of AKOSH Enforcement shall proceed according to guidelines and procedures established for warrant applications. See 8 AAC 61.020(c) and Chapter 13, *Legal Issues*.

D. Employee Participation.

CSHOs shall advise employers that AS 18.60.087 require that an employee representative be given an opportunity to participate in the inspection.

1. CSHOs shall determine as soon as possible after arrival whether the employees at the inspected worksite are represented and, if so, shall ensure that employee representatives are afforded the opportunity to participate in all phases of the inspection.

    i. If an employer resists or interferes with participation by employee representatives in an inspection and the interference cannot be resolved by the CSHO, the resistance shall be construed as a refusal to permit the inspection and the Chief of AKOSH Enforcement or designee shall be contacted.

E. Release for Entry.

1. CSHOs shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information.

2. CSHOs may obtain a pass or sign a visitor's register, 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.

F. Bankrupt or Out of Business.

1. If the establishment scheduled for inspection is found to have ceased business and there is no known successor, the CSHO shall report the facts to the Chief of AKOSH Enforcement or designee.

2. If an employer, although bankrupt, is continuing to operate on the date of the scheduled inspection, the inspection shall proceed.

3. An employer must comply with the Act until the day the business actually ceases to operate.

G. Employee Responsibilities.

1. AS 18.60.075(b) states: "An employee shall comply with occupational safety and health standards and all regulations issued under AS 18.60.010 – 18.60.105 that are applicable to the employee's own actions and conduct." Alaska law does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

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 Chief of AKOSH Enforcement who shall consult with the Director.

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. 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.

H. **Strike or Labor Dispute**.

Plants or establishments may be inspected regardless of the existence of labor disputes, such as work stoppages, strikes or picketing. If the CSHO identifies an unanticipated labor dispute at a proposed inspection site, the Chief of AKOSH Enforcement or designee shall be consulted before any contact is made.

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.

2. **Unprogrammed Inspections**.

a. Unprogrammed inspections (complaints, fatalities, referrals, etc.) will be performed during strikes or labor disputes. However, the credibility and veracity of any complaint shall be thoroughly assessed by the Chief of AKOSH Enforcement or designee prior to scheduling an inspection.

b. If there is a picket line at the establishment, CSHOs shall attempt to locate and inform the appropriate union official of the reason for the inspection prior to initiating the inspection.

c. During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute.

I. **Variances**.

The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in AS 18.60.077.

1. An employer will not be subject to citation if the observed condition is in compliance with an existing variance issued to that employer.

2. In the event that an employer is not in compliance with the requirement(s) of the issued variance, a violation of the applicable standard shall be cited with a reference in the citation to the variance provision that has not been met.

IV. Opening Conference.

A. General.

CSHOs shall attempt to inform all affected employers of the purpose of the inspection, provide a copy of the complaint if applicable, and include any employee representatives, unless the employer objects. The opening conference should be brief so that the compliance officer may quickly proceed to the walkaround. Conditions of the worksite shall be noted upon arrival, as well as any changes that may occur during the opening conference. At the start of the opening conference, CSHOs will provide both the employer and the employee representative(s) copies of their rights during the inspection, including the opportunity to participate in the physical inspection of the workplace.

CSHOs shall request a copy of the written certification that a hazard assessment has been performed by the employer in accordance with §1910.132(d). CSHOs should then ask the person who signed the certification about any potential worksite exposures and select appropriate personal protective equipment.

1. Attendance at Opening Conference.

a. CSHOs shall conduct a joint opening conference with employer and employee representatives unless either party objects.

b. If there is objection to a joint conference, the CSHO shall conduct separate conferences with employer and employee representatives.

2. Scope of Inspection.

CSHOs shall outline in general terms the scope of the inspection, including the need for private employee interviews, physical inspection of the workplace and records, possible referrals, rights during an inspection, discrimination complaints, and the closing conference(s).

3. **Video/Audio Recording**.

CSHOs shall inform participants that a video camera and/or an audio recorder may be used to provide a very clear visual and/or audio record of the inspection, and that the videotape and audiotape may be used in the same manner as handwritten notes and photographs in AKOSH inspections.

NOTE: If an employer clearly refuses to allow videotaping during an inspection, CSHOs shall contact the Chief of AKOSH Enforcement to determine if videotaping is critical to documenting the case. If it is, this may be treated as a denial of entry.

4. **Immediate Abatement**.

CSHOs should explain to employers the advantages of immediate abatement, including that there are no certification requirements for violations quickly corrected during the inspection. See Chapter 7, *Post-Inspection Procedures and Abatement Verification*.

5. **Abbreviated Opening Conference**.

An abbreviated opening conference shall be conducted whenever the CSHO believes that circumstances at the worksite dictate the walkaround begin as promptly as possible.

a. In such cases, the opening conference shall be limited to presenting credentials, purpose of the visit, explanation of rights, and a request for employer and employee representatives. All other elements shall be fully addressed in the closing conference.

b. Pursuant to AS 18.60.087, the employer and the employee representatives shall be informed of the opportunity to participate in the physical inspection of the workplace.

B. Review of Appropriation Act Exemptions and Limitation.

CSHOs shall determine if the employer is covered by any exemptions or limitations noted in the current Appropriations Act. See CPL 02-00-051 (AKOSH PD 98-11), *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998.

C. Review Screening for Process Safety Management (PSM) Coverage.

CSHOs shall request a list of the chemicals on site and their respective maximum intended inventories. CSHOs shall review the list of chemicals and quantities, and determine if there are highly hazardous chemicals (HHCs) listed in §1910.119, Appendix A or flammable liquids or gases at or above the specified threshold quantity. CSHOs may ask questions, conduct interviews, or a walkaround to confirm the information on the list of chemicals and maximum intended inventories.

1. If there is an HHC present at or above threshold quantities, CSHOs shall use the following criteria to determine if any exemptions apply:

    a. CSHOs shall confirm that the facility is not a retail facility, oil or gas well drilling or servicing operation, or normally unoccupied remote facility (§1910.119(a)(2)). If the facility is one of these types of establishments, PSM does not apply.

    b. If management believes that the process is exempt, CSHOs shall ask the employer to provide documentation or other information to support that claim.

2. According to §1910.119 (a)(1)(ii), a process could be exempt if the employer can demonstrate that the covered chemical(s) are:

    a. Hydrocarbon fuels used solely for workplace consumption as a fuel (e.g., propane used for comfort heating, gasoline for vehicle refueling), if such fuels are not a part of a process containing another highly hazardous chemical covered by the standard, or

    b. Flammable liquids stored in atmospheric tanks or transferred, which are kept below their normal boiling point without the benefit of chilling or refrigeration.

    NOTE: Current OSHA policies for applying exemptions can be found on the OSHA website.

D. Review of Voluntary Compliance Programs.

Employers who participate in selected voluntary compliance programs may be exempted from programmed inspections. CSHOs shall determine whether the employer falls under such an exemption during the opening conference.

1. AKOSH On-Site Consultation Visits.

a. In accordance with 29 CFR §1908.7 and Chapter VII of CSP 02-00-002 (AKOSH PD 02-04), *The Consultation Policies and Procedures Manual*, CSHOs shall ascertain at the opening conference whether an AKOSH consultation visit is in progress. A consultation Visit in Progress extends from the beginning of the opening conference to the end of the correction due dates (including extensions).

b. An on-site consultation visit in progress has priority over programmed inspections. Imminent danger investigations, fatality/catastrophe investigations, complaint investigations, and other critical inspections as determined by the Commissioner of Labor and Workforce Development shall take priority over the consultation visit in progress. Before engaging in a general schedule enforcement inspection, the CSHO shall contact the Chief of AKOSH Enforcement in the event the employer asserts an exemption under the conditions of 8 AAC 61.425.

2. **Safety and Health Achievement Recognition Program (SHARP)**.

a. Upon verifying that the employer is a current participant, the CSHO shall notify the Chief of AKOSH Enforcement or designee so that the company can be removed from the AKOSH HHT Inspection Schedule for the approved exemption period; which begins on the date the Commissioner approves the employer's participation in SHARP.

b. The initial exemption period is one year. The renewal exemption period is one or two years, based on the recommendation of the Consultation Project Manager.

3. **Voluntary Protection Program (VPP)**.

Inspections at a VPP site may be conducted in response to referrals, formal complaints, fatalities, and catastrophes.
NOTE: A Compliance Officer who was previously a VPP on-site team member cannot conduct an enforcement inspection at that VPP site for the following 2 years or until the site is no longer a VPP participant, whichever occurs first. See CSP 03-01-003, Voluntary Protection Programs (VPP): Policies and Procedures Manual*, dated April 18, 2008 (AKOSH PD 08-12).*

E. Disruptive Conduct.

CSHOs may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection. See 29 CFR §1903.8(d) for general guidance. If disruption or interference occurs, the CSHO shall contact the Chief of AKOSH Enforcement or designee as to whether to suspend the walkaround or take other action. The employee representative shall be advised that during the inspection matters unrelated to the inspection shall not be discussed with employees.

F. Classified Areas.

In areas containing information classified by an agency of the U.S. Government in the interest of national security, only persons authorized to have access to such information may accompany a CSHO on the inspection. See 29 CFR §1903.8(d) for general guidance.

V. Review of Records.

A. Injury and Illness Records.

1. **Collection of Data**.

a. At the start of each inspection or investigation, the CSHO shall review the employer's injury and illness records for three prior calendar years, record the information on a copy of the OSHA-300 screen, and enter the employer's data using the applicable databases such as the OIS Application, or IMIS Application on the NCR (micro). In addition CSHO's should consider

Worker's Compensation data maintained by the Alaska Division of Worker's Compensation.

b. CSHOs shall use these data to calculate the Days Away, Restricted, or Transferred (DART) rate and to observe trends, potential hazards, types of operations and work-related injuries

2. Information to be Obtained.

a. CSHOs shall request copies of the OSHA-300 Logs, the total hours worked and the average number of employees for each year, and a roster of current employees.

b. If CSHOs have questions regarding a specific case on the log, they shall request the OSHA-301s or equivalent form for that case.

c. CSHOs shall check if the establishment has an on-site medical facility and/or the location of the nearest emergency room where employees may be treated.

NOTE: The total hours worked and the average number of employees for each year can be found on the OSHA-300A for all past years.

3. Automatic DART Rate Calculation.

CSHOs will not normally need to calculate the Days Away, Restricted, or Transferred (DART) rate since it is automatically calculated when the OSHA-300 data are entered into the micro. If one of the three years is a partial year, so indicate and the software will calculate accordingly.

4. Manual DART Rate Calculation.

If it is necessary to calculate rates manually, the CSHO will calculate the DART Rates onsite using the following procedures. The DART rate includes cases involving days away from work, restricted work activity, and transfers to another job.

The formula is:

(N/EH) x (200,000) where:

- ***N*** is the number of cases involving days away and/or restricted work activity and job transfers.

- ***EH*** is the total number of hours worked by all employees during the calendar year; and

- ***200,000*** is the base number of hours worked for 100 full-time equivalent employees.

EXAMPLE 3-1: Employees of an establishment (XYZ Company), including management, temporary and leased workers, worked 645,089 hours at XYZ company. There were 22 injury and illness cases involving days away and/or restricted work activity and/or job transfer from the OSHA-300 Log (total of column H plus column I). The DART rate would be (22÷645,089) x (200,000) = 6.8.

5. **Construction**.

   For construction inspections/investigations, only the OSHA-300 information for the prime/general contractor need be recorded where such records exist and are maintained. It will be left to the discretion of the Chief of AKOSH Enforcement or the CSHO as to whether OSHA-300 data should also be recorded for any of the subcontractors.

B. Recording Criteria.

Employers must record new work-related injuries and illnesses that meet one or more of the general recording criteria or meet the recording criteria for specific types of conditions.

1. Death;
2. Days Away from Work;
3. Restricted Work;
4. Transfer to another job;
5. Medical treatment beyond first aid;
6. Loss of consciousness;
7. Diagnosis of a significant injury or illness; or
8. Meet the recording criteria for Specific Cases noted in §1904.8 through §1904.11.

C. Recordkeeping Deficiencies.

1. If recordkeeping deficiencies are suspected, the CSHO and the Chief of AKOSH Enforcement or designee may request assistance from the OSHA Regional Recordkeeping Coordinator. If there is evidence that the deficiencies or inaccuracies in the employer's records impairs the ability to assess hazards, injuries and/or illnesses at the workplace, a comprehensive records review shall be performed.

2. Other information related to this topic:

   a. See CPL 02-00-135 (AKOSH PD 05-10), *Recordkeeping Policies and Procedures Manual*, dated September 3, 2004, and CPL 02-02-072, *Rules of Agency Practice and Procedure concerning OSHA Access to Employee Medical Records for Policy Regarding Review of Medical and Exposure Records*, dated August 22, 2007.

b. Other AKOSH programs and records will be reviewed including hazard communication, lockout/tagout, emergency evacuation and personal protective equipment. Additional programs will be reviewed as necessary.

c. Many standard-specific directives provide additional instruction to CSHOs requesting certain records and/or documents at the opening conference.

VI. Walkaround Inspection.

The main purpose of the walkaround inspection is to identify potential safety and/or health hazards in the workplace. CSHOs shall conduct the inspection in such a manner as to avoid unnecessary personal exposure to hazards and to minimize unavoidable personal exposure to the extent possible.

A. Walkaround Representatives.

Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives, and will generally include those designated by the employer and employee. 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. See 29 CFR §1903.8(a) for general reference purposes.

1. Employees Represented by a Certified or Recognized Bargaining Agent.

During the opening conference, the highest ranking union official or union employee representative onsite shall designate who will participate in the walkaround. OSHA regulation 29 CFR §1903.8(b), as adopted under the Alaska Administrative Code, gives the CSHO the authority to resolve all disputes as to whom is the representative authorized by the employer and employees. Section 29 CFR §1903.8(c) states that the representative authorized by the employees shall be an employee of the employer. If in the judgment of the CSHO, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany CSHOs during the inspection.

2. No Certified or Recognized Bargaining Agent.

Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for AKOSH inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on the walkaround. If

selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.

3. **Safety Committee**.

   Employee members of an established plant safety committee or employees at large may designate an employee representative for AKOSH inspection purposes.

B. Evaluation of Safety and Health System.

The employer's safety and health system shall be evaluated to determine its good faith for the purposes of penalty calculation. See Chapter 6, *Penalties and Debt Collection*.

C. Record All Facts Pertinent to a Violation.

1. Safety and health alleged violations shall be brought to the attention of employer and employee representatives at the time they are documented.

2. CSHOs shall record, at a minimum, the identity of the exposed employee(s), the hazard to which the employee(s) was exposed, the employee's proximity to the hazard, the employer's knowledge of the condition, and the manner in which important measurements were obtained and how long the condition has existed. It will generally not be sufficient to rely solely on the argument that, through due diligence, the employer should have known of the alleged violative condition, so the CSHO should pursue detailed and specific statements from witnesses or other documentation to demonstrate employer knowledge.

3. CSHOs will document interview statements in a thorough and accurate manner; including names, dates, times, locations, type of materials, positions of pertinent articles, witnesses, etc.

   NOTE: If employee exposure to hazards is not observed, the CSHO shall document facts on which the determination is made that an employee has been or could be exposed. See *Chapter 4,* Violations *and Chapter 5,* Case File Preparation and Documentation.

D. Testifying in Hearings.

CSHOs may be required to testify in hearings on AKOSH's behalf, and shall be mindful of this fact when recording observations during inspections. The case file shall reflect conditions observed in the workplace as accurately and detailed as possible.

E. Trade Secrets.

A trade secret, as referenced in AS 18.60.099, includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.

1. **Policy**.

   It is essential to effective enforcement that CSHOs and AKOSH personnel preserve the confidentiality of all information and investigations which might reveal a trade secret.

2. **Restriction and Controls**.

   When the employer identifies an operation or condition as a trade secret, it shall be treated as such. Information obtained in such areas, including all negatives, photographs, videotapes, and AKOSH documentation forms, shall be labeled:

   "CONFIDENTIAL TRADE SECRET INFORMATION"

   Under AS 18.60.099, all information reported to or obtained by CSHOs in connection with any inspection or other activity which contains or which might reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other AKOSH officials

   If the employer objects to the taking of photographs and/or videotapes because trade secrets would or may be disclosed, CSHOs should advise the employer of the protection against such disclosure afforded by AS 18.60.099 and 18 USC 1905. If the employer still objects, CSHOs shall contact the Chief of AKOSH Enforcement or designee.

F. Collecting Samples.

1. CSHOs shall determine early in the inspection whether sampling such as, but not limited to, air sampling and surface sampling is required, by utilizing the information collected during the walk around and from the pre-inspection review.

2. Summaries of the results shall be provided on request to the appropriate employees, including those exposed or likely to be exposed to a hazard, employer representatives and employee representatives.

G. Photographs and Videotapes.

1. Photographs and/or videotapes, whether digital or otherwise, shall be taken whenever CSHOs determine there is a need. The documentation of an alleged violation through photographic and or video evidence is required when possible and the CSHO should make efforts to ensure that various angles and distances are used to document hazards, conditions and employee exposures along with documenting the use and results of other devices such as measuring devices.

   a. Photographs that support violations shall be properly labeled, and may be attached to the appropriate narrative description in the case file (OSHA-1B).

b. CSHO shall ensure that any photographs relating to confidential or trade secret information are identified as such and are kept separate from other evidence.

2. All film and photographs or videotape shall be retained in the case file. If lack of storage space does not permit retaining the film, photographs or videotapes with the file, they may be stored elsewhere with a reference to the corresponding inspection. Videotapes shall be properly labeled. For more information regarding guidelines for case file documentation with video, audio and digital media, see OSHA Instruction CPL 02-00-098 (AKOSH PD 93-5), *Guidelines for Case File Documentation for Use with Videotapes and Audiotapes*, dated October 12, 1993, and any other directives related to photograph and videotape retention.

H. 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 through the Chief of AKOSH Enforcement.

I. Interviews of Non-Managerial Employees.

A free and open exchange of information between CSHOs and employees is essential to an effective inspection. Interviews provide an opportunity for employees to supply valuable factual information concerning hazardous conditions, including information on how long workplace conditions have existed, the number and extent of employee exposure(s) to a hazardous condition, and the actions of management regarding correction of a hazardous condition.

1. Background.

a. AS 18.60.083(a)(2) authorizes CSHOs to question **any employee privately** during regular working hours or at other reasonable times during the course of an AKOSH inspection. The purpose of such interviews is to obtain whatever information CSHOs deem necessary or useful in carrying out inspections effectively. The mandate to interview employees in private is AKOSH's right.

b. Employee interviews are an effective means to determine if an advance notice of inspection has adversely affected the inspection conditions, as well as to obtain information regarding the employer's knowledge of the workplace conditions or work practices in effect prior to, and at the time of, the inspection. During interviews with employees, CSHOs should ask about these matters.

c. CSHOs should also obtain information concerning the presence and/or implementation of a safety and health system to prevent or control workplace hazards.

d. If an employee refuses to be interviewed, the CSHO shall use professional judgment, in consultation with the Chief of AKOSH Enforcement or designee, in determining the need for the statement.

2. Employee Right of Complaint.

CSHOs may consult with any employee who desires to discuss a potential violation. Upon receipt of such information, CSHOs shall investigate the alleged hazard, where possible, and record the findings.

3. Time and Location of Interview.

CSHOs are authorized to conduct interviews during regular working hours and at other reasonable times, and in a reasonable manner at the workplace. Interviews often occur during the walkaround, but may be conducted at any time during an inspection. If necessary, interviews may be conducted at locations other than the workplace. CSHOs should consult with the Chief of AKOSH Enforcement if an interview is to be conducted someplace other than the workplace. Where appropriate, AKOSH has the authority to subpoena an employee to appear at for an interview.

4. Conducting Interviews of Non-Managerial Employees in Private.

CSHOs shall inform employers that interviews of non-managerial employees will be conducted in private. CSHOs are entitled to question such employees in private regardless of employer preference. If an employer interferes with a CSHOs ability to do so, the CSHO should request that the Chief of AKOSH Enforcement consult with Asst. Attorney General to determine appropriate legal action. Interference with a CSHO's ability to conduct private interviews with non-managerial employees includes, but is not limited to, attempts by management officials or representatives to be present during interviews.

5. Conducting Employee Interviews.

a. General Protocols.

- At the beginning of the interview CSHOs should identify themselves to the employee by showing their credentials, and provide the employee with a business card. This allows employees to contact CSHOs if they have further information at a later time.

- CSHOs should explain to employees that the reason for the interview is to gather factual information relevant to a safety and health inspection. It is not appropriate to assume that employees already know or understand the agency's purpose. Particular sensitivity is required when interviewing a non-English speaking employee. In such instances, CSHOs should initially determine whether the employee's comprehension of English is sufficient to permit conducting an

effective interview. If an interpreter is needed, CSHOs should contact the Chief of AKOSH Enforcement for assistance.

- Every employee should be asked to provide his or her name, home address and phone number. CSHOs should request identification and make clear the reason for asking for this information.

- CSHOs shall inform employees that AKOSH has the right to interview them in private and of the protections afforded under AS 18.60.089.

- In the event an employee requests that a representative of the union be present, CSHOs shall make a reasonable effort to honor the request.

- If an employee requests that his/her personal attorney be present during the interview, CSHOs should honor the request and, before continuing with the interview, consult with the Area Director for guidance.

- Rarely, an attorney for the employer may claim that individual employees have also authorized the attorney to represent them. Such a situation creates a potential conflict of interest. CSHOs should ask the affected employees whether they have agreed to be represented by the attorney. If the employees indicate that they have, CSHOs should consult with the Chief of AKOSH Enforcement, who will contact the Director and the Assistant Attorney General for guidance.

b. Interview Statements.

Interview statements of employees or other persons shall be obtained whenever CSHOs determine that such statements would be useful in documenting potential violations. Interviews shall normally be reduced to writing and written in the first person in the language of the individual. If possible, the CSHO shall get the employee to fill out the statement in their own hand-writing. Employees shall be encouraged to sign and date the statement.

- Any changes or corrections to the statement shall be initialed by the individual. Statements shall not otherwise be changed or altered in any manner.

- Statements shall include the words, **"I request that my statement be held confidential to the extent allowed by law"** and end with the following; **"I have read the above, and it is true to the best of my knowledge."**

- If the person making the declaration refuses to sign, the CSHO shall note the refusal on the statement. The statement shall, nevertheless, be

read back to the person in an attempt to obtain agreement and the CSHO should note any agreement or comments in the case file.

- A transcription of any recorded statement shall be made when necessary to the case.

- Upon request, if a management employee requests a copy of his/her interview statement, one shall be given to them.

c. Alaska Statute AS 18.60.089(b) protects the identity of a person who provides notice of an alleged violation of AKOSH laws.

J. Multi-Employer Worksites.

On multi-employer worksites (in all industry sectors), more than one employer may be cited for a hazardous condition that violates an AKOSH standard. A two-step process must be followed in determining whether more than one employer is to be cited. See CPL 02-00-124 (AKOSH PD 00-06), *Multi-Employer Citation Policy*, dated December 10, 1999, for further guidance.

K. 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 agency, the Director of Labor Standards and Safety, or authorized Chief of AKOSH Enforcement or designee, may issue an administrative subpoena. See Chapter 15, *Legal Issues*.

L. Employer Abatement Assistance.

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 AKOSH endorsement of any product through use of specific product names when recommending abatement measures. The issuance of citations shall not be delayed.

2. Disclaimers.

The employer shall be informed that:

a. The employer is not limited to the abatement methods suggested by AKOSH;
b. The methods explained are general and may not be effective in all cases; and
c. The employer is responsible for selecting and carrying out an effective abatement method, and maintaining the appropriate documentation.

VII. Closing Conference.

A. Participants.

At the conclusion of an inspection, CSHOs shall conduct a closing conference with the employer and the employee representatives, jointly or separately, as circumstances dictate. The closing conference may be conducted on-site or by telephone as CSHOs deem appropriate. If the employer refuses to allow a closing conference, the circumstances of the refusal shall be documented in the OSHA-1A narrative and the case shall be processed as if a closing conference had been held.

*NOTE: When conducting separate closing conferences for employers and labor representatives (where the employer has declined to have a joint closing conference with employee representatives), 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 employ*ers are informed of violations and proposed citations. For construction inspection closings, see Section IX(B)(5) at page 3-31.

B. Discussion Items.

1. CSHOs shall discuss the apparent violations and other pertinent issues found during the inspection and note relevant comments on the OSHA-1B, including input for establishing correction dates.

2. CSHOs shall provide a copy of an AKOSH 12 form to the employer following an AKOSH Inspection, which explains the responsibilities and courses of action available to the employer if a citation is issued. The CSHO will request that the employer sign an AKOSH 12 form to be kept in the inspection file. All matters discussed during the closing conference shall be documented in the case file, including a note describing printed materials distributed.

3. CSHOs shall discuss the strengths and weaknesses of the employer's occupational safety and health system and any other applicable programs, and advise the employer of the benefits of an effective program(s) and provide information, such as, AKOSH's and OSHA's website, describing program elements.

4. Both the employer and employee representatives shall be advised of their rights to participate in any subsequent conferences, meeting or discussions, and their contest rights. Any unusual circumstances noted during the closing conference shall be documented in the case file.

5. Since CSHOs may not have all pertinent information at the time of the first closing conference, a second closing conference may be held by telephone or in person.

6. CSHOs shall advise employee representatives that:

a. Under 8 AAC 61.175(c) of the Occupational Safety and Health Review Board regulations, if an employer contests a citation, the employees have a right participate as a party in the proceedings by filing a written notice of participation with the board at least 20 days before the hearing. The notice must comply with the regulatory requirements in order to be granted by the board.

b. The employer should notify employees or their representatives if a notice of contest or a petition for modification of abatement date is filed;

c. Employees have rights prohibiting employer retaliation under AS 18.60.089; and

d. They have a right to contest the abatement date. Such contests must be in writing and must be postmarked within 15 working days after receipt of the citation by the employer. (See 8 AAC 61.150(a) and (b)

C. Advice to Attendees.

1. The CSHO shall advise those attending the closing conference that a request for an informal conference is encouraged as it provides an opportunity to:

   a. Resolve disputed citations and penalties without the need for litigation which can be time consuming and costly;
   b. Obtain a more complete understanding of the specific safety or health standards which apply;
   c. Discuss ways to correct the violations;
   d. Discuss issues concerning proposed penalties;
   e. Discuss proposed abatement dates;
   f. Discuss issues regarding employee safety and health practices; and
   g. Learn more of other AKOSH programs and services available.

2. If a citation is issued, an informal conference or the request for one does not extend the 15 working-day period in which the employer or employee representatives may contest.

3. Verbal disagreement with, or intent to, contest a citation, penalty or abatement date during an informal conference does not replace the required written Notice of Intent to Contest under 8 AAC 61.150(b), unless the employer specifically requests assistance with making the written notice of contest request and verbally outlines the elements required in 8 AAC 61.150(b) during the informal conference.

4. Employee representatives have the right to participate in informal conferences or negotiations between the Director of Labor Standards and Safety or Chief of AKOSH Enforcement and the employer in accordance with the guidelines given in Chapter 7, Section II., *Informal Conferences.*

D. Penalties.

CSHOs shall explain that any penalties must be paid within 15 working days after the employer receives a citation and notification of penalty. If, however, an employer contests the citation and/or the penalty, penalties need not be paid for the contested items until the final order date.

E. Abatement Assistance.

1. Where appropriate, CSHOs will discuss control methodology with the employer during the closing conference.

Engineering Controls - Consists of substitution, isolation, ventilation and equipment modifications
Administrative Controls – Any procedure that significantly limits daily exposure by control or manipulation of the work schedule or manner in which work is performed. The use of personal protective equipment is not considered a means of administrative control.
Work Practice Controls – A type of administrative control where the employer changes the way the employee performs assigned work, often improving work habits or sanitation and hygiene practices. Such modification may result in reducing exposure to hazards.
Technical Feasibility – The technical knowledge about materials and methods available or adaptable to specific circumstances, that can be applied to a cited violation with a reasonable possibility that employee exposure to occupational hazards will be reduced or eliminated.
Economic Feasibility – The employer demonstrates financial ability to undertake the measures necessary to abate the alleged violations.

2. **Documenting Claims of Infeasibility**.

   a. CSHOs shall document the underlying facts which give rise to an employer's claim of infeasibility.

   b. When economic infeasibility is claimed, 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 may be considered during an informal conference or during settlement negotiations.

   c. Complex issues regarding feasibility should be referred to the Chief of AKOSH Enforcement or designee for determination.

F. Reducing Employee Exposure.

Employers shall be advised that, whenever feasible, engineering, administrative or work practice controls must be instituted, even if they are not sufficient to eliminate the hazard (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.

G. Abatement Verification.

During the closing conference the Compliance Officer should thoroughly explain to the employer the abatement verification requirements. See Chapter 7, *Post Inspection Procedures and Abatement Verification*.

1. Abatement Certification.

Abatement certification is required for all citation item(s) which the employer received except for those citation items which are identified as "Corrected During Inspection."

2. Corrected During Inspection (CDI).

The violation(s) that will reflect on-site abatement and will be identified in the citations as "Corrected During Inspection" shall be reviewed at the closing conference.

3. Abatement Documentation.

Abatement documentation, the employer's physical proof of abatement, is required to be submitted along with each willful, repeat and designated serious violation. To minimize confusion, the distinction between abatement certification (i.e. statement) and abatement documentation (i.e. documentary evidence to demonstrate and illustrate that the hazardous conditions has been eliminated) should be discussed.

4. Placement of Abatement Verification Tags.

The required placement of abatement verification tags or the citation must also be discussed at the closing conference, if it has not been discussed during the walkaround portion of the inspection. See §1903.19(i).

5. Requirements for Extended Abatement Periods.

Where extended abatement periods are involved, the requirements for abatement plans and progress reports shall be discussed.

H. Employee Discrimination.

The CSHO shall emphasize that AS 18.60.089 prohibits employers from discharging or discriminating in any way against an employee who has exercised any right under Alaska occupational safety and health laws, including the right to make safety or health complaints or to request an AKOSH inspection.

VIII. Special Inspection Procedures.

A. Follow-up and Monitoring Inspections.

1. The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected. Monitoring inspections are conducted to ensure that hazards are being abated and employees protected, whenever a long period of time is needed for an establishment to come into compliance (or to verify compliance with the terms of granted variances). Issuance of willful, repeated and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations are examples of prime candidates for follow-up or monitoring inspections. These types of inspections will not normally be conducted when clear evidence of abatement is provided by the employer or employee representatives.

2. **Failure to Abate**.

   a. A failure to abate exists when a previously cited violation continues unabated and the abatement date has passed or the abatement date is covered under a settlement agreement, or the employer has not complied with interim measures within the allotted time specified in a long-term abatement plan.

   b. If previously cited items have not been corrected, a Notice of Failure to Abate Alleged Violation shall normally be issued. If a subsequent inspection indicates the condition has still not been abated, the Assistant Attorney General shall be consulted for further guidance.

      NOTE: If the employer has demonstrated a good faith effort to comply, a late Petition for Modification of Abatement (PMA) may be considered in accordance with Chapter 7, Section III, Petition for Modification of Abatement (PMA).

   c. If an originally cited violation has at one point been abated but subsequently recurs, a citation for a repeated violation may be appropriate.

3. **Reports**.

   a. For any items found to be abated, a copy of the previous OSHA-1B, OSHA-1B-IH, or citation can be notated with "corrected" written on it, along with a brief explanation of the abatement measures taken,. This information may alternately be included in the narrative of the investigative file.

   b. In the event that any item has not been abated, complete documentation shall be included on an OSHA-1B.

4. **Follow-up Files**.

   Follow-up inspection reports shall be included with the original (parent) case file.

B. Construction Inspections.

1. Standards Applicability.

The standards published as 29 CFR Part 1926 have been adopted as occupational safety and health standards under AS 18.60.010(a) and 8 AAC 61.1010(c). They shall apply to every employment and place of employment of every employee engaged in construction work, including non-contract construction.

2. Definition.

The term "construction work" as defined by 29 CFR §1926.32(g) means work for construction, alteration, and/or repair, including painting and decorating. These terms are also 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 Director of the Directorate of Construction shall be consulted through the Director of Labor Standards and Safety or Chief of AKOSH Enforcement.

3. Employer Worksite.

a. 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.

4. Upon Entering the Workplace.

a. CSHOs shall ascertain whether there is a representative of a Federal contracting agency at the worksite. If so, they shall contact the representative, advise him/her of the inspection and request that they attend the opening conference.

b. If the inspection is being conducted as a result of a complaint, a copy of the complaint is to be furnished to the general contractor and any affected sub-contractors.

5. Closing Conference.

Upon completion of the inspection, the CSHO shall confer with the general contractors and all appropriate subcontractors or their representatives, together or separately, and advise each one of all the apparent violations disclosed by the inspection to which each one's employees were exposed, or violations which the employer created or controlled. Employee representatives participating in the inspection shall also be afforded the right to participate in the closing conference(s).

Chapter 4

VIOLATIONS

I. Basis of Violations.

A. Standards and Regulations.

1. AS 18.60.075(a)(1) states that each employer has a responsibility to comply with occupational safety and health standards promulgated under AKOSH laws and regulations, which includes federal and national consensus 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 §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 Act.

2. 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 serve as the basis of violations. Standards are subdivided as follows per the preferred Federal Register nomenclature:

Subdivision Naming Convention	Example	Example
Title	29 CFR	8 AAC
Part	1910	61
Subpart	D	0620
Section	1910.23	a
Paragraph	1910.23(c)	
Paragraph	1910.23(c)(1)	
Paragraph	1910.23(c)(1)(i)	

NOTE: The most specific provision of a standard shall be used for citing violations.

3. **Definition and Application of Vertical and Horizontal Standards.**

Vertical standards are standards that apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment, or installations. Horizontal standards are other (more general) standards applicable to multiple industries. See §1910.5(c).

4. Application of Horizontal and Vertical Standards.

If a CSHO is uncertain whether to cite under a horizontal or a vertical standard when both may be applicable, the supervisor or the AKOSH Chief of Enforcement shall be consulted. The following guidelines shall be considered:

a. When a hazard in a particular industry is covered by both a vertical (e.g., 29 CFR 1915) and a horizontal (e.g., 29 CFR 1910) standard, the vertical standard shall take precedence even if the horizontal standard is more stringent.

b. 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 there is a conflict or inconsistency between the standards, an analysis of the intent of the two standards must be performed. For the horizontal standard to apply, 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 4-1**: When employees are connecting structural steel, §1926.501(b)(15) may not be cited for fall hazards above 6 feet since that specific situation is covered by §1926.760(b)(1) for fall distances of more than 30 feet.

c. If the particular industry does not have a vertical standard that covers the hazard, then the CSHO shall use the horizontal (general industry) standard.

d. When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO shall focus attention on the particular activity an employer is engaged in rather than on the nature of the employer's general business.

e. Hazards found in construction work that are not covered by a specific 29 CFR 1926 standard shall not normally be cited under 29 CFR 1910 unless that standard has been identified as being applicable to construction. See Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, 58 FR 35076 (June 30, 1993).

f. If a question arises as to whether an activity is deemed construction for purposes of the Act, contact the Chief of AKOSH Enforcement for potential referral to the Directorate of Construction (DOC). See §1910.12, Construction Work.

5. Violation of Variances.

The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in AS 18.60.077.

a. In the event that the employer is not in compliance with the requirements of the variance, a violation of the controlling standard shall be cited with a reference in the citation to the variance provision that has not been met.

b. If, during an inspection, CSHOs discover that an employer has filed a variance application regarding a condition that is an apparent violation of a standard, the Chief of AKOSH Enforcement or designee shall determine whether the variance request has been granted. If the variance has not been granted, a citation for the violative condition may be issued.

B. Employee Exposure.

A hazardous condition that violates an AKOSH standard or the general duty clause shall be cited only when employee exposure can be documented. The exposure(s) must have occurred within the six months immediately preceding the issuance of the citation to serve as a basis for a violation, except where the employer has concealed the violative condition or misled AKOSH, in which case the citation must be issued within six months from the date when AKOSH learns, or should have known, of the condition. The Assistant Attorney General should be consulted in such cases.

1. Determination of Employer/Employee Relationship.

Whether or not exposed persons are employees of a particular employer depends on several factors, the most important of which is who controls the manner in which employees perform their assigned work. The question of who pays these employees may not be the key factor. The following factors should be considered:

a. The degree of permanence of the working relationship;
b. Whether the alleged employee has a special skill and or specialized licenses;
c. Whether the alleged employee has an investment in tools or equipment used for their work or whether the alleged employer provides tools or equipment used by the alleged employee;
d. Whether the alleged employee has an opportunity for profit or loss in the performance of work for the alleged employer; and,
e. Whether the alleged employee employs other workers or hires other independent businesses to perform tasks for the alleged employer.

Determining the employer of exposed employees may be a complex issue, in which case the Director of Labor Standards and Safety or Chief of AKOSH Enforcement shall seek the advice of the Assistant Attorney General.

2. Proximity to the Hazard.

The actual and/or potential proximity of the employees to a hazard shall be thoroughly documented. (i.e., photos, measurements, employee interviews).

3. Observed Exposure.

a. Employee exposure is established if CSHOs witness, observe, or monitor the proximity or access of an employee to the hazard or potentially hazardous condition.

b. The use of personal protective equipment may not, in itself, adequately prevent employee exposures to a hazardous condition. Such exposures may be cited where the applicable standard requires the additional use of engineering and/or administrative (including work practice) controls, or where the personal protective equipment used is inadequate.

4. Unobserved Exposure.

Where employee exposure is not observed, witnessed, or monitored by CSHOs, employee exposure may be established through witness statements or other evidence that exposure to a hazardous condition has occurred or may continue to occur.

a. Past Exposure.

In fatality/catastrophe (or other "accident/incident") investigations, prior employee exposure(s) may be established if CSHOs establish, through written statements or other evidence, that exposure(s) to a hazardous condition occurred at the time of the accident/incident. Additionally, prior exposures may serve as the basis for a violation when:

- The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur;
- It is reasonably predictable that employee exposure to a hazardous condition could recur when:
    - The employee exposure has occurred in the previous six months;
    - The hazardous condition is an integral part of an employer's normal operations; and
    - The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.

b. Potential Exposure.

Potential exposure to a hazardous condition may be established if there is evidence that employees have access to the hazard, and may include one or more of the following:

- When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements;

- When a hazard would pose a danger to employees simply by their presence in an area and it is reasonably predictable that they could come into that area during the course of the work, to rest or to eat, or to enter or exit from an assigned work area; or

- When a 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 again use the equipment or be exposed to the materials in the course of work; *however*

- If the inspection reveals an adequately communicated *and* effectively enforced safety policy or program that would prevent or minimize employee exposure, including accidental exposure to the hazardous condition, it would not be reasonably predictable that employee exposure could occur. In such circumstances, no citation should be issued in relation to the condition.

c. Documenting Employee Exposure.

CSHOs shall thoroughly document exposure, both observed and unobserved, for each potential violation. This includes:

- Statements by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (other employees who have observed exposure to the hazardous condition), union representatives, engineering personnel, management, or members of the exposed employee's family;

- Recorded statements or signed written statements;

- Photographs, videotapes, and/or measurements; and

- All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, OSHA-300/301, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies, etc.).

C. Regulatory Requirements.

Violations of 29 CFR Part 1903 and Part 1904 shall be documented and cited when an employer does not comply with posting, recordkeeping, and reporting requirements of the regulations contained in these parts as provided by agency policy. See also CPL 02-00-111 (AKOSH PD 96-9), *Citation Policy for Paperwork and Written Program Violations*, dated November 27, 1995.

NOTE: If prior to the lapse of the 8-hour reporting period, the Chief of AKOSH Enforcement *becomes aware of an incident required to be reported under §1904.39 through means other than an employer report, there is no violation for failure to report.*

D. Hazard Communication.

Section 1910.1200 requires chemical manufacturers and importers to assess the hazards of chemicals they produce or import, and applies to these employers even though they may not have their own employees exposed. Violations of this standard by manufacturers or importers shall be documented and cited, irrespective of any employee exposure at the manufacturing or importing location. See CPL 02-02-038, *Inspection Procedures for the Hazard Communication Standard*, dated March 20, 1998.

E. Employer/Employee Responsibilities.

1. Employer Responsibilities.

AS 18.60.075(a) states: "An employer shall do everything necessary to protect the life, health, and safety of employees including, but not limited to

(1) Complying with all occupational safety and health standards and regulations adopted by the department…"

In addition, paragraph (4) of this statute states

"(4) furnishing to each employee employment and a place of employment that are free from recognized hazards that, in the opinion of the commissioner, are causing or are likely to cause death or serious physical harm to the employees."

2. Employee Responsibilities.

a. AS 18.60.075(b) states: "An employee shall comply with occupational safety and health standards and all regulations issued under AS 18.60.010 – 18.60.105 that are applicable to the employee's own actions and conduct." Alaska statutes do not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

b. 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 Chief of AKOSH Enforcement or designee who shall consult with the Director of Labor Standards and Safety.

c. The CSHO is expected to obtain information to ascertain whether the employer is exercising appropriate oversight of the workplace to ensure compliance with Alaska's occupational safety and health laws. Concerted refusals by employees to comply will not ordinarily bar the issuance of a

citation where the employer has failed to exercise its authority to adequately supervise employees, including taking appropriate disciplinary action.

3. Affirmative Defenses.

An affirmative defense is a claim which, if established by the employer, will excuse it from a violation which has otherwise been documented by the CSHO. Although affirmative defenses must be proved by the employer at the time of the hearing, CSHOs should preliminarily gather evidence to evaluate and/or rebut an employer's potential argument supporting any such defenses. The CSHO should discuss significant evidence in support of an affirmative defense with the Chief of AKOSH Enforcement. See Chapter 5, Section VI, *Affirmative Defenses,* for additional information.

4. Multi-Employer Worksites.

On multi-employer worksites in all industry sectors, more than one employer may be cited for a hazardous condition that violates an AKOSH standard. For specific and detailed guidance, see the multi-employer policy contained in CPL 02-00-124, *Multi-Employer Citation Policy*, dated December 10, 1999.

IX. Serious Violations.

A. AS 18.60.095(b)

AS 18.60.095(b) provides that "…a serious violation is considered to exist if alleged violations creates in the place of employment a substantial probability of death or serious physical harm. However, a serious violation is not considered to exist if the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

B. Establishing Serious Violations.

1. CSHOs shall consider four factors in determining whether a violation is to be classified as serious. The first three factors address whether there is a substantial probability that death or serious physical harm could result from an accident/incident or exposure relating to the violative condition. The **probability** that an incident or illness will occur is not to be considered in determining whether a violation is serious, but is considered in determining the relative gravity of the violation. The fourth factor addresses whether the employer knew or could have known of the violative condition.

2. The classification of a violation need not be completed for each instance. It should be done once for each citation or, if violation items are grouped in a citation, once for the group.

3. If the citation consists of multiple instances or grouped violations, the overall classification shall normally be based on the most serious item.

4. The four-factor analysis outlined below shall be followed in making the determination whether a violation is serious. Potential violations of the general duty clause shall also be evaluated on the basis of these steps to establish whether they may cause death or serious physical harm.

C. Four Steps to be Documented.

1. Type of Hazardous Exposure(s).

The first step is to identify the type of potential exposures to a hazard that the violated standard or the general duty clause is designed to prevent.

a. CSHOs need not establish the exact manner in which an exposure to a hazard could occur. However, CSHOs shall note all facts which could affect the probability of an injury or illness **resulting** from a potential accident or hazardous exposure.

b. If more than one type of hazardous exposure exists, CSHOs shall determine which hazard could reasonably be predicted to result in the most severe injury or illness and shall base the classification of the violation on that hazard.

c. The following are examples of some types of hazardous exposures that a standard is designed to prevent:

EXAMPLE 4-2: Employees are observed working at the unguarded edge of an open-sided floor 30 feet above the ground in apparent violation of §1926.501(b)(1). The regulation requires that the edge of the open-sided floor be guarded by standard guardrail systems. The type of hazard the standard is designed to prevent is a fall from the edge of the floor to the ground below.

EXAMPLE 4-3: Employees are observed working in an area in which debris is located in apparent violation of §1915.91(b). The type of hazard the standard is designed to prevent here is employees tripping on debris.

EXAMPLE 4-4: An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to methylene chloride at 100 ppm in apparent violation of §1910.1052. This is 75 ppm above the PEL mandated by the standard.

2. The Type of Injury or Illness.

The second step is to identify the most serious injury or illness that could reasonably be expected to result from the potential hazardous exposure identified in Step 1.

a. In making this determination, CSHOs shall consider all factors that would affect the severity of the injury or illness that could reasonably result from the exposure to the hazard. CSHOs shall not give consideration at this point to factors relating to the **probability** that an injury or illness will occur.

b. The following are examples of types of injuries that could reasonably be predicted to result from exposure to a particular hazard:

   EXAMPLE 4-5: If an employee falls from the edge of an open-sided floor 30 feet to the ground below, the employee could die, break bones, suffer a concussion, or experience other serious injuries that would substantially impair a body function.

   EXAMPLE 4-6: If an employee trips on debris, the trip may cause 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 is littered with broken glass or other sharp objects, it is reasonably predictable that an employee who tripped on debris could suffer deep cuts which could require suturing.

c. 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 that could reasonably result from the exposure. CPL 02-02-043, *The Chemical Information Manual*, dated July 1, 1991, shall be used to determine both toxicological properties of substances listed and a Health Code Number.

d. In order to support a classification of serious, a determination must be made that exposure(s) at the sampled level could lead to illness. Thus, CSHOs must document all evidence demonstrating that the sampled exposure(s) is representative of employee exposure(s) under normal working conditions, including identifying and recording the frequency and duration of employee exposure(s). Evidence to be considered includes:

   - The nature of the operation from which the exposure results;
   - Whether the exposure is regular and on-going or is of limited frequency and duration;
   - How long employees have worked at the operation in the past;
   - Whether employees are performing functions which can be expected to continue; and
   - Whether work practices, engineering controls, production levels, and other operating parameters are typical of normal operations.

e. Where such evidence is difficult to obtain or inconclusive, CSHOs shall estimate frequency and duration of exposures from any evidence available. In general, if it is reasonable to infer that regular, ongoing exposures could occur, CSHOs shall consider such potential exposures in determining the types of illness that could result from the violative condition. The following

are some examples of illnesses that could reasonably result from exposure to a health hazard:

EXAMPLE 4-7: If an employee is exposed regularly to methylene chloride at 100 ppm, it is reasonable to predict that cancer could result.

EXAMPLE 4-8: If an employee is exposed regularly to acetic acid at 20 ppm, it is reasonable that the resulting illnesses would be irritation to eyes, nose and throat, or occupational asthma with chronic rhinitis and sinusitis.

3. Potential for Death or Serious Physical Harm.

The third step is to determine whether the type of injury or illness identified in Step 2 could include death or a form of serious physical harm. In making this determination, the CSHO shall utilize the following definition of "serious physical harm:"

> *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, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional.*

a. Injuries that constitute serious physical harm include, but are not limited, to:

- Amputations (loss of all or part of a bodily appendage);
- Concussion;
- Crushing (internal, even though skin surface may be intact);
- Fractures (simple or compound);
- Burns or scalds, including electric and chemical burns;
- Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing;
- Sprains and strains; and
- Musculoskeletal disorders.

b. Illnesses that constitute serious physical harm include, but are not limited, to:

- Cancer;
- Respiratory illnesses (silicosis, asbestosis, byssinosis, etc.);
- Hearing impairment;
- Central nervous system impairment;
- Visual impairment; and
- Poisoning.

c. The following are examples of injuries or illnesses that could reasonably result from an accident/incident or exposure and lead to death or serious physical harm:

EXAMPLE 4-9: If an employee falls 15 feet to the ground, suffers broken bones or a concussion, and experiences substantial impairment of a part of the body requiring treatment by a medical doctor, the injury would constitute serious physical harm.

EXAMPLE 4-10: If an employee trips on debris and because of the presence of sharp debris or equipment suffers a deep cut to the hand requiring suturing, the use of the hand could be substantially reduced. This injury would be classified as serious.

EXAMPLE 4-11: An employee develops chronic beryllium disease after long-term exposure to beryllium at a concentration in air of 0.004 mg/m^3, and his or her breathing capacity is significantly reduced. This illness would constitute serious physical harm.

*NOTE: The key determination is the likelihood that death or serious harm will result **IF** an accident or exposure occurs.* ***The likelihood of an accident occurring is addressed in penalty assessments and not by the classification.***

4. Knowledge of Hazardous Condition.

The fourth step is to determine whether the employer knew or, with the exercise of reasonable diligence, could have known, of the presence of the **hazardous condition**. However, AKOSH CSHO's are discouraged from applying the reasonable diligence standard, unless there is no other more specific evidence of employer knowledge available.

a. The knowledge requirement is met if it is established that the employer actually knew of the hazardous condition constituting the apparent violation. Examples include the employer saw the condition, an employee or employee representative reported it to the employer, or an employee was previously injured by the condition and the employer knew of the injury. CSHOs shall record any/all evidence that establishes employer knowledge of the condition or practice.

b. If it cannot be determined that the employer has actual knowledge of a hazardous condition, the knowledge requirement may be established if there is evidence that the employer could have known of it through the exercise of reasonable diligence. CSHOs shall record any evidence that substantiates that the employer could have known of the hazardous condition. Examples of such evidence include:

- The violation/hazard was in plain view and obvious;
- The duration of the hazardous condition was not brief;

- The employer failed to regularly inspect the workplace for readily identifiable hazards; and
- The employer failed to train and supervise employees regarding the particular hazard.

c. The actual or constructive knowledge of a supervisor who is aware of a violative condition or practice can usually be imputed to the employer for purposes of establishing knowledge. In cases where the employer contends that the supervisor's own conduct constituted an isolated event of employee misconduct, the CSHO shall attempt to determine whether the supervisor violated an established work rule, and the extent to which the supervisor was trained in the rule and supervised regarding compliance to prevent such conduct.

X. General Duty Requirements.

A. Evaluation of General Duty Requirements (AS 18.60.075(a)(4).

In general, Review Board and court precedent have established that the following elements are necessary to prove a violation of the general duty clause:

- The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
- The hazard was recognized;
- The hazard was causing or was likely to cause death or serious physical harm; and
- There was a feasible and useful method to correct the hazard.

A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer's **own** employees.

B. Elements of a General Duty Requirement Violation.

1. Definition of a Hazard.

a. The hazard in an AS 18.60.075(a)(4) citation is a *workplace condition* or practice to which employees are exposed, creating the *potential for death or serious physical harm* to employees.

b. These conditions or practices must be **clearly stated in a citation** so as to apprise employers of their obligations and must be ones the employer can reasonably be expected to prevent. The hazard must therefore be defined in terms of the **presence of hazardous conditions or** practices that present a particular danger to employees.

2. Do Not Cite the Lack of a Particular Abatement Method.

a. General duty clause citations are not intended to allege that the violation is a failure to implement certain precautions, corrective actions, or other abatement measures but rather addresses the failure to prevent or remove a particular hazard. AS 18.60.075(a)(4) therefore does not mandate a particular abatement measure but only requires an employer to render the workplace free of recognized hazards by any feasible and effective means the employer wishes to utilize.

b. In situations where a question arises regarding distinguishing between a dangerous workplace condition or practice and the lack of an abatement method, the Chief of AKOSH Enforcement shall consult with the Director of Labor Standards and Safety or designee, or Assistant Attorney General for assistance in correctly identifying the hazard.

EXAMPLE 4-12: Employees are conducting sanding operations that create sparks in the proximity of magnesium dust (workplace condition or practice) exposing them to the serious injury of burns from a fire (potential for physical harm). One proposed method of abatement may be engineering controls such as adequate ventilation. The "hazard" is sanding that creates sparks in the presence of magnesium that may result in a fire capable of seriously injuring employees, not the lack of adequate ventilation.

EXAMPLE 4-13: Employees are operating tools that generate sparks in the presence of an ignitable gas (workplace condition) exposing them to the danger of an explosion (physical harm). The hazard is use of tools that create sparks in a volatile atmosphere that may cause an explosion capable of seriously injuring employees, not the lack of approved equipment.

EXAMPLE 4-14: In a workplace situation involving high- pressure machinery that vents gases next to a work area where the employer has not installed proper high-pressure equipment, has improperly installed the equipment that is in place, and does not have adequate work rules addressing the dangers of high pressure gas, there are three abatement measures the employer has failed to take. However, there is only one hazard (i.e., employee exposure to the venting of high-pressure gases into a work area that may cause serious burns from steam discharges).

3. The Hazard is Not a Particular Accident/Incident.

a. The occurrence of an accident/incident does not necessarily mean that the employer has violated AS 18.60.075(a)(4), although the accident/incident may be evidence of a hazard. In some cases an AS 18.60.075(a)(4) violation may be unrelated to the cause of the accident/incident. Although accident/incident facts may be relevant and shall be documented, the citation shall address the **hazard in the workplace that existed prior to the accident/incident**, not the particular facts that led to the occurrence of the accident/incident.

EXAMPLE 4-15: A fire occurred in a workplace where flammable materials were present. No one was injured by the fire 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 must address the underlying workplace fire hazard, not the accident/incident involving the employee.

4. **The Hazard Must be Reasonably Foreseeable**.

The hazard for which a citation is issued must be reasonably foreseeable. All of the factors that could cause a hazard need not be present in the same place or at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.

EXAMPLE 4-16: 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 AS 18.60.075(a)(4) violation would exist. However, if the employer has not taken sufficient safety precautions to preclude the presence or use of ignition sources in the confined area, then a foreseeable hazard may exist.

NOTE: It is necessary to establish the reasonable foreseeability of the workplace hazard, rather than the particular circumstances that led to an accident/incident.

EXAMPLE 4-17: A titanium dust fire spreads from one room to another because an open can of gasoline was in the second room. An employee who usually worked in both rooms is burned in the second room as a result of the gasoline igniting. The presence of gasoline in the second room may be a rare occurrence. However, it is not necessary to demonstrate that a fire in both rooms could reasonably occur, but only that a fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

5. **The Hazard Must Affect the Cited Employer's Employees**.

a. The employees exposed to the AS 18.60.075(a)(4) hazard must be the employees of the cited employer. An employer who may have created, contributed to, and/or controlled the hazard normally shall not be cited for an AS 18.60.075(a)(4) violation if his own employees are not exposed to the hazard.

b. 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 Chief of AKOSH Enforcement shall consult with the Director of Labor Standards and Safety or designee and

the Assistant Attorney General to determine the sufficiency of the evidence regarding the employment relationship.

c. The fact that an employer denies that exposed workers are his/her employees is not necessarily determinative of the employment relationship issue. 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 employees in and of itself may not be the determining factor to establish a relationship. CSHO's must document who controls the alleged employees and other factors such as whether they provide tools or equipment or the alleged employer provides the tools or equipment, whether the work requires a special skill, whether the alleged employee employs other workers on the site, and other factors.

6. The Hazard Must Be Recognized.

Recognition of a hazard can be established on the basis of employer recognition, industry 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 the following evidence and adequate documentation in the file:

a. Employer Recognition.

- A recognized hazard can be established by evidence of actual employer knowledge of a hazardous condition or practice. Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the AKOSH inspection.

- Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. In addition, prior accidents/incidents, near misses known to the employer, injury and illness reports, or workers' compensation data, may also show employer knowledge of a hazard.

- Employer awareness of a hazard may also be demonstrated by prior AKOSH or Federal OSHA inspection history which involved the same hazard.

- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.

- An employer's own corrective actions 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 effective protection to the employees.

  NOTE: CSHOs are to gather as many of these facts as possible to support establishing an AS 18.60.075(a)(4) violation.

b. Industry Recognition.

- A hazard is recognized if the employer's relevant industry is aware of its existence. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of an AS 18.60.075(a)(4) violation. Although evidence of recognition by an employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient. The Chief of AKOSH Enforcement shall consult with the Director of Labor Standards and Safety or designee on this issue. Industry recognition of a hazard can be established in several ways:

  - Statements by safety or health experts who are familiar with the relevant conditions in industry (regardless of whether they work in the industry);

  - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;

  - Manufacturers' warnings on equipment or in literature that are relevant to the hazard;

  - Statistical or empirical studies conducted by the employer's industry that demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;

  - Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;

  - State and local laws or regulations that 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; and/or

- If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition. Otherwise, such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards that discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. However, these private standards **cannot** be enforced as AKOSH/OSHA standards, but they may be used to provide evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.

- In cases where State and local government agencies have codes or regulations covering hazards not addressed by AKOSH standards, the Chief of AKOSH Enforcement, upon consultation with the Director of Labor Standards and Safety or designee, shall determine whether the hazard is to be cited under AS 18.60.075(a)(4) or referred to the appropriate local agency for enforcement.

  EXAMPLE 4-18: A safety hazard on a personnel elevator in a factory is documented during an inspection. It is determined that the hazard may not be cited under AS 18.60.075(a)(4), but there is a local code that 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 AS 18.60.075(a)(4).

- References that may be used to supplement other evidence to help demonstrate industry recognition include the following:

  - NIOSH criteria documents.
  - EPA publications.
  - National Cancer Institute and other agency publications.
  - AKOSH and OSHA Hazard Alerts.
  - OSHA Technical Manual.

c. Common Sense Recognition.

If industry or employer recognition of the hazard cannot be established in accordance with (a) and (b), hazard recognition can still be established if a hazardous condition is so obvious that any reasonable person would have recognized it. This form of recognition should only be used in flagrant or obvious cases.

EXAMPLE 4-19: In a general industry situation, courts have held that any reasonable person would recognize that it is hazardous to

use an unenclosed chute to dump bricks into an alleyway 26 feet below where unwarned employees worked. In construction, AS 18.60.075(a)(4) could not be cited in this situation because §1926.252 or §1926.852 applies. In the context of a chemical processing plant, common sense recognition was established where hazardous substances were being vented into a work area.

7. **The Hazard Was Causing or Likely to Cause Death or Serious Physical Harm**.

   a. This element of an AS 18.60.075(a)(4) violation is virtually identical to the substantial probability element of a serious violation under AS 18.60.095. Serious physical harm is defined in Paragraph II.C.3. of this chapter.

   b. This element of an AS 18.60.075(a)(4) violation can be established by showing that:

      - An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or

      - If an accident/incident occurred, the likely result would be death or serious physical harm.

        EXAMPLE 4-20: An employee is standing at the edge of an unguarded floor 25 feet above the ground. If a fall occurred, death or serious physical harm (e.g., broken bones) is likely to result.

   c. In the health context, establishing serious physical harm at the cited levels may be challenging if the potential for illness/harm requires the passage of a substantial period of time. In such cases, expert testimony is crucial to establish there is probability that long-term serious physical harm will occur. It will generally be less difficult 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 time:

      - Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels could reasonably occur;

      - An illness reasonably could result from such regular and continuing employee exposures; and

      - If illness does occur, its likely result is death or serious physical harm.

8. The Hazard May be Corrected by a Feasible and Useful Method.

a. To establish an AS 18.60.075(a)(4) violation, the agency must also identify the existence of a measure(s) that is feasible, available, and likely to correct the hazard. Evidence regarding feasible abatement measures shall indicate that the recognized hazard, rather than a particular accident/incident, is preventable.

b. If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, an AS 18.60.075(a)(4) citation may be issued. A citation will not be issued merely because the agency is aware of an abatement method different from that of the employer, if the proposed method would not reduce the hazard significantly more than the employer's method. In some cases, only a series of abatement methods will materially reduce a hazard and then all potential abatement methods shall be listed. For example, an abatement note shall be included on the OSHA-1b and -2 such as "Among other methods, one feasible and acceptable means of abatement would be to ____." (Fill in the blank with the specified abatement recommendation.)

c. Examples of such feasible and acceptable means of abatement include, but are not limited, to:

- The employer's own abatement method,/ which existed prior to the inspection but was not implemented;

- The implementation of feasible abatement measures by the employer after the accident/incident or inspection;

- The implementation of abatement measures by other employers/companies; and

- Recommendations made by the manufacturer addressing safety measures for the hazardous equipment involved, as well as suggested abatement methods contained in trade journals, national consensus standards and individual employer work rules. National consensus standards shall not solely be relied on to mandate specific abatement methods.

EXAMPLE 4-21: An ANSI standard addresses the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the buildup of materials that create the gas and the provision of ventilation. The ANSI standard may be used as general evidence of the existence of feasible abatement measures.

In this example, the citation shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace

and that a feasible and useful abatement method existed; e.g., preventing the buildup of gas by providing an adequate ventilation system. It would not be correct to base the citation on the employer's failure to prevent the buildup of materials that could create the gas and to provide a ventilation system as both of these are abatement methods, not recognized hazards.

d. Evidence provided by expert witnesses may be used to demonstrate feasibility of abatement methods. In addition, although it is not necessary to establish that an industry recognizes a particular abatement measure, such evidence may be used if available.

C. Use of the General Duty Clause.

1. The general duty clause shall be used only where there is no standard that applies to the particular hazard and in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard. See §1910.5(f).

EXAMPLE 4-22: A hazard covered only partially by a standard would be construction employees exposed to a collapse hazard because of a failure to properly install reinforcing steel. Construction standards contain requirements for reinforcing steel in wall, piers, columns, and similar vertical structures, but do not contain requirements for steel placement in horizontal planes, e.g., a concrete floor. A failure to properly install reinforcing steel in a floor in accordance with industry standards and/or structural drawings could be cited under the general duty clause.

EXAMPLE 4-23: The powered industrial truck standard at §1910.178 does not address all potential hazards associated with forklift use. For instance, while that standard deals with the hazards associated with a forklift operator leaving his vehicle unattended or dismounting the vehicle and working in its vicinity, it does not contain requirements for the use of operator restraint systems. An employer's failure to address the hazard of a tipover (forklifts are particularly susceptible to tipovers) by requiring operators of powered industrial trucks equipped with restraint devices or seat belts to use those devices could be cited under the general duty clause. See CPL 02-01-028 (AKOSH PD 01-01), *Compliance Assistance for the Powered Industrial Truck Operator Training Standards*, dated November 30, 2000, for additional guidance.

2. The general duty clause may also be applicable to some types of employment that are inherently dangerous (fire brigades, emergency rescue operations, confined space entry, etc.).

a. Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards that are likely to cause death or serious physical harm. These steps include an

assessment of hazards that may be encountered, providing appropriate protective equipment, and any training, instruction, or necessary equipment.

b. An employer, who has failed to take such steps and allows its employees to be exposed to a hazard, may be cited under the general duty clause.

D. Limitations of Use of the General Duty Clause.

AS 18.60.075(a)(4) is to be used only within the guidelines given in this chapter.

1. AS 18.60.075(a)(4) Shall Not be Used When a Standard Applies to a Hazard.

As discussed above, AS 18.60.075(a)(4) may not be cited if an AKOSH standard applies to the hazardous working condition. If there is a question as to whether a standard applies, the Chief of AKOSH Enforcement shall consult with the Director of Labor Standards and Safety or designee. The Assistant Attorney General will assist the Director of Labor Standards and Safety or designee in determining the applicability of a standard prior to the issuance of a citation.

EXAMPLE 4-24: AS 18.60.075(a)(4) shall not be cited for electrical hazards as §1910.303(b) and §1926.403(b) require that electrical equipment is to be kept free from recognized hazards that are likely to cause death or serious physical hard to employees.

2. AS 18.60.075(a)(4) Shall Normally Not be Used to Impose a Stricter Requirement than that Required by the Standard.

EXAMPLE 4-25: A standard provides for a permissible exposure limit (PEL) of 5 ppm. Even if data establish that a 3 ppm level is a recognized hazard, AS 18.60.075(a)(4) shall not be cited to require that the lower 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 Chief of AKOSH Enforcement shall consult with the Director of Labor Standards and Safety or designee, who shall discuss any proposed citation with the Assistant Attorney General.

NOTE: An exception to this rule may apply if it can be proven that "an employer knows a particular safety or heath standard is inadequate to protect his employees against the specific hazard it is intended to address." See, Int. Union UAW v. General Dynamics Land Systems Division, *815 F.2d 1570 (D.C. Cir. 1987). Such cases shall be subject to pre-citation review.*

3. AS 18.60.075(a)(4) Shall Normally Not be Used to Require Additional Abatement Methods not Set Forth in an Existing Standard.

If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, AS 18.60.075(a)(4) shall not be cited to

additionally require medical surveillance. The Chief of AKOSH Enforcement shall evaluate the circumstances of special situations in accord with guidelines stated herein and consult with the Division Director to determine whether an AS 18.60.075(a)(4) citation can be issued in those special cases.

4. Alternative Standards.

The following standards shall be considered carefully before issuing a AS 18.60.075(a)(4) citation for a health hazard.

a. There are a number of general standards that shall be considered rather than AS 18.60.075(a)(4) in situations where the hazard is not covered by a particular standard. 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, §1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE.

b. For a health hazard, the particular toxic substance standard, such as asbestos and coke oven emissions, 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 §1910.1000 in general industry and in §1926.55 for construction.

c. Another general standard is §1910.134(a), which addresses the hazards of breathing harmful air contaminants not covered under §1910.1000 or another specific standard, and which may be cited for failure to use feasible engineering controls or respirators.

d. Violations of §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 §1910.132(a) where there is a potential for toxic materials to be absorbed through the skin.

E. Classification of Violations Cited Under the General Duty Clause.

Only hazards presenting serious physical harm or death may be cited under the general duty clause (including willful and/or repeated violations that would otherwise qualify as serious violations). Other-than-serious citations shall not be issued for general duty clause violations.

F. Procedures for Implementation of AS 18.60.075(a)(4) Enforcement.

To ensure that citations of the general duty clause are defensible, the following procedures shall be followed:

1. **Gathering Evidence and Preparing the File.**

   a. The evidence necessary to establish each element of an AS 18.60.075(a)(4) 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 evidence of specific and/or general awareness of a hazard, why it was detectable and recognized, and any supporting statements or reference materials.

   b. If copies of documents relied on to establish the various AS 18.60.075(a)(4) elements cannot be obtained before issuing the citation, these documents shall be accurately cited and identified in the file so they can be obtained later if necessary.

   c. If experts are necessary to establish any element(s) of an AS 18.60.075(a)(4) violation, such experts and Assistant Attorney General shall be consulted **prior to the citation being issued** and their opinions noted in the file.

2. **Pre-Citation Review.**

   The Chief of AKOSH Enforcement shall review and approve all proposed AS 18.60.075(a)(4) citations. These citations shall undergo additional pre-citation review as follows:

   a. The Division Director and Assistant Attorney General shall be consulted prior to the issuance of all AS 18.60.075(a)(4) citations where complex issues or exceptions to the outlined procedures are involved; and

   b. If a standard does not apply and all criteria for issuing a AS 18.60.075(a)(4) citation are not met, yet the Chief of AKOSH Enforcement determines that the hazard warrants some type of notification, a Hazard Alert Letter shall be sent to the employer and employee representative describing the hazard and suggesting corrective action.

XI. Other-than-Serious Violations.

This type of violation shall be cited in situations where the accident/incident or illness that would be most likely 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.

XII. Willful Violations.

A willful violation exists under the Act where an employer has demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee safety and health. The Chief of AKOSH Enforcement is expected to consult with the Director of Labor Standards and Safety when developing willful citations. The Assistant

Attorney General may be contacted for input prior to issuance of willful citations. The following guidance and procedures apply whenever there is evidence that a willful violation may exist:

A. Intentional Disregard Violations.

An employer commits an intentional and knowing violation if:

1. An employer was aware of the requirements of the Alaska occupational safety and health laws or of an applicable standard or regulation and was also aware of a condition or practice in violation of those requirements, but did not abate the hazard; or

2. An employer was not aware of the requirements of the Alaska occupational safety and health laws or standards, but had knowledge 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.

   NOTE: Good faith efforts made by the employer to minimize or abate a hazard may sometimes preclude the issuance of a willful violation. In such cases, CSHOs should consult the Chief of AKOSH Enforcement or designee if a willful classification is under consideration.

3. A willful citation also may be issued where an employer knows that specific steps must be taken to address a hazard, but substitutes its judgment for the requirements of the standard. See the internal memorandum on Procedures for Significant Cases, and CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation*, dated October 21, 1990.

   EXAMPLE 4-26: The employer was issued repeated citations addressing the same or similar conditions, but did not take corrective action.

B. Plain Indifference Violations.

1. An employer commits a violation with plain indifference to employee safety and health where:

   a. Management officials were aware of an AKOSH requirement applicable to the employer's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

   b. Company officials were aware of a plainly obvious hazardous condition but made little or no effort to prevent violations from occurring.

   EXAMPLE 4-27: The employer is aware of the existence of unguarded power presses that have caused near misses, lacerations and amputations in the past and does nothing to abate the hazard.

c. An employer was not aware of any legal requirement, but knows that a condition or practice in the workplace is a serious hazard to the safety or health of employees and makes 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, or complaints of employees or their representatives.

*NOTE: Voluntary employer self-audits that assess workplace safety and health conditions shall not normally be used as a basis of a willful violation. However, once an employer's self-audit identifies a hazardous condition, the employer must promptly take appropriate measures to correct a violative condition and provide interim employee protection. See OSHA's Policy on Voluntary Employer Safety and Health Self-Audits (*Federal Register*, July 28, 2000 (65 FR 46498)).*

d. Willfulness may also be established despite lack of knowledge of a legal requirement if circumstances show that the employer would have placed no importance on such knowledge.

EXAMPLE 4-28: An employer sends employees into a deep unprotected excavation containing a hazardous atmosphere without ever inspecting for potential hazards.

2. It is not necessary that the violation be committed with a bad purpose or malicious intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.

3. CSHOs shall develop and record on the OSHA-1B all evidence that indicates employer knowledge of the requirements of a standard, and any reasons for why it disregarded statutory or other legal obligations to protect employees against a hazardous condition. Willfulness may exist if an employer is informed by employees or employee representatives regarding an alleged hazardous condition and does not make a reasonable effort to verify or correct the hazard. Additional factors to consider in determining whether to characterize a violation as willful include:

a. The nature of the employer's business and the knowledge regarding safety and health matters that could reasonably be expected in the industry;

b. Any precautions taken by the employer to limit the hazardous conditions;

c. The employer's awareness of the Act and of its responsibility to provide safe and healthful working conditions; and

d. Whether similar violations and/or hazardous conditions have been brought to the attention of the employer through prior citations, accidents, warnings from

AKOSH, OSHA or officials from other government agencies or an employee safety committee regarding the requirements of a standard.

NOTE: This includes prior citations or warnings from OSHA State Plan officials.

4. Also, include facts showing that even if the employer was not consciously violating the Alaska occupational safety and health laws, it was aware that the violative condition existed and made no reasonable effort to eliminate it.

XIII. Criminal/Willful Violations.

AS 18.60.095(e) provides that "An employer who willfully or repeatedly violates a provision of AS 18.60.010 - .105 that is applicable to the employer or a standard or regulation adopted under AS 18.60.010 - .105, and the violation causes death to an employee, upon conviction, is punishable by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both. However, upon a second conviction after a prior conviction for a violation causing death, an employer is punishable by a fine of not more than $20,000, or by imprisonment for not more than one year, or by both. This subsection does not preclude prosecution of the employer under AS 11."See Chapter 6, Section XIII, *Penalties and Debt Collection*, regarding criminal penalties.

A. Chief of AKOSH Enforcement Coordination.

The Chief of AKOSH Enforcement, in coordination with the Assistant Attorney General, shall carefully evaluate all willful cases involving employee deaths to determine whether they may involve criminal violations of AS 18.60.095(e). Because the quality of the evidence available is of paramount importance in these investigations, there shall be early and close discussions between the CSHO, the Chief of AKOSH Enforcement, the Director of Labor Standards and Safety, and the Assistant Attorney General in developing all evidence when there is a potential AS 18.60.095(e) violation.

B. Criteria for Investigating Possible Criminal/Willful Violations

The following criteria shall be considered in investigating possible criminal/willful violations:

1. In order to establish a criminal/willful violation AKOSH must prove that:

    a. The employer violated an AKOSH standard.
    b. The violation was willful in nature.
    c. The violation caused the death of an employee. In order to prove that the violation caused the death of an employee, there must be evidence which clearly demonstrates that the violation was the direct cause of, or a contributing factor to, an employee's death.

2. If asked during an investigation, CSHOs should inform employers that any violation found to be willful that has caused or contributed to the death of an employee is evaluated for potential criminal referral to the Alaska District Attorney's Office.

3. Following the investigation, if the Chief of AKOSH Enforcement decides to recommend criminal prosecution, a memorandum shall be forwarded promptly to the Director of Labor Standards and Safety. It shall include an evaluation of the possible criminal charges, taking into consideration the burden of proof requiring that the case must be proven beyond a reasonable doubt. In addition, if correction of the hazardous condition is at issue, this shall be noted in the transmittal memorandum, because in most cases prosecution of a criminal/willful case stays the resolution of the civil case and its abatement requirements.

4. The Chief of AKOSH Enforcement shall normally issue a civil citation in accordance with current procedures even if the citation involves charges under consideration for criminal prosecution. The Director of Labor Standards and Safety shall be notified of such cases. In addition, the case shall be promptly forwarded to the Assistant Attorney General for possible referral to the Alaska Office of Special Prosecutions or to the Alaska District Attorney's Office.

C. Willful Violations Related to a Fatality

Where a willful violation is related to a fatality and a decision is made not to recommend a criminal referral, the Chief of AKOSH Enforcement shall ensure the case file contains documentation justifying that conclusion. The file documentation should indicate which elements of a potential criminal violation make the case unsuitable for referral.

XIV. Repeated Violations.

A. Federal and State Plan Violations.

1. An employer may be cited for a repeated violation if that employer has been cited previously for the same or substantially similar condition or hazard **and the citation has become a final order of the AKOSH Review Board or OSHA Review Commission**. A citation may become a final order by operation of law when an employer does not contest the citation, or pursuant to court decision or settlement.

B. Identical Standards.

Generally, similar workplace conditions or hazards can be demonstrated by showing that in both situations the identical standard was violated, but there are exceptions.

EXAMPLE 4-28: A citation was previously issued for a violation of §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 §1910.132(a) for not requiring the use of head protection (hardhats). Although the same

standard was involved, the hazardous conditions in each case are not substantially similar and therefore a repeated violation would not be appropriate.

C. **Different Standards**.

In some circumstances, similar conditions or hazards can be demonstrated even when different standards are violated.

EXAMPLE 4-29: A citation was previously issued for a violation of §1910.28(d)(7) for not installing standard guardrails on a tubular welded frame scaffold platform. A recent inspection of the same employer reveals a violation of §1910.28(c)(14) for not installing guardrails on a tube and coupler scaffold platform. Although different standards are involved, the conditions and hazards (falls) present during both inspections were substantially similar, and therefore a repeated violation would be appropriate.

NOTE: There is no requirement that the previous and current violations occur at the same workplace or under the same supervisor.

D. Obtaining Inspection History.

For purposes of determining whether a violation is repeated, the following criteria shall apply:

1. High Gravity Serious Violations.

a. When high gravity serious violations are to be cited, the Chief of AKOSH Enforcement shall obtain a history of citations previously issued to this employer at all of its identified establishments nationwide, within the same two digit Standard Industrial Classification (SIC) or three digit North American Industry Classification System (NAICS) code.

b. If these violations have been previously cited within the time limitations (described in Paragraph VII.E. of this chapter) and have become final orders, a repeated citation may be issued.

c. Under special circumstances, the Chief of AKOSH Enforcement, in consultation with the Assistant Attorney General, may also issue citations for repeated violations without regard for the SIC code.

2. Violations of Lesser Gravity.

When violations are of lesser gravity than high gravity serious, the Chief of AKOSH Enforcement should obtain a national inspection history whenever the circumstances of the current inspection would result in multiple serious, repeat, or willful citations. This is particularly essential if the employer is known to have establishments nationwide and has been subject to a significant case in other areas or at other mobile worksites.

E. Time Limitations.

1. 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 generally be followed.

   A citation will be issued as a repeated violation if:

   a. The citation is issued within 3 years of the final order date of the previous citation or within 3 years of the final abatement date, whichever is later; and

   b. If the previous citation was contested, within 3 years of the final order.

2. When a violation is found during an inspection and a repeated citation has previously been issued for a substantially similar condition, the violation may be classified as a second instance repeated violation with a corresponding increase in penalty.

   > **EXAMPLE 4-30**: An inspection is conducted in an establishment and a violation of §1910.217(c)(1)(i) is found. That citation is not contested by the employer and becomes a final order of the Commission on October 17, 2006. On December 8, 2008, a citation for repeated violation of the same standard was issued. The violation found during the current inspection may be treated as a second instance repeated.

3. In cases of multiple prior repeated citations, the Director of Labor Standards and Safety or designee shall be consulted for guidance.

F. Repeated v. Failure to Abate.

A failure to abate exists when a previously cited hazardous condition, practice or non-complying equipment has not been brought into compliance since the prior inspection (i.e., the violation is continuously present) and is discovered at a later inspection. If, however, the violation was corrected, but later reoccurs, the subsequent occurrence is a repeated violation.

G. Chief of AKOSH Enforcement Responsibilities.

After the CSHO makes a recommendation that a violation should be cited as repeated, the Chief of AKOSH Enforcement shall:

1. Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section;

2. Ensure that the case file includes a copy of the citation for the prior violation, the OSHA-1Bs describing the prior violation that serves as the basis for the repeated citation, and any other supporting evidence that describes the violation. If the prior violation citation is not available, the basis for the repeated citation shall, nevertheless, be adequately documented in the case file. The file shall also

include all documents showing that the citation is a final order and on what date it became final (i.e., if the case was not contested, the **certified mail card** (final 15 working days from employer's receipt of the citation), **signed Informal Settlement** (final 15 working days from when *both* parties signed) or **Formal Settlement Agreements and Notice of Docketing** (final 30 days after docketing date), or **Judge's Decision and Notice of Docketing** (final 30 days after docketing));

3. IMIS and OIS information shall not be used as the sole means to establish that a prior violation has been issued.

4. In circumstances when it is not clear that the violation meets the criteria outlined in this section, consult with the Director of Labor Standards and Safety or designee before issuing a repeated citation; and

5. 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 by notation in the Alleged Violation Description (AVD) portion of the citation, using the following or similar language:

> The (employer 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 AKOSH inspection number_____, citation number_____, item number_____ and was affirmed as a final order on (date), with respect to a workplace located at_____.

XV. Citing in the Alternative.

In rare cases, the same factual situation may present a possible violation of more than one standard.

EXAMPLE 4-33: The facts which support a violation of §1910.28(a)(1) may also support a violation of §1910.132(a), if no scaffolding is provided and the use of safety belts is not required by the employer.

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 AVD that clearly alleges all of the necessary elements of a violation of that standard. Only one penalty shall be proposed for the violative condition.

XVI. Combining and Grouping Violations.

A. Combining.

Separate violations of a single standard, for example 29 CFR §1910.212(a)(3)(ii), having the same classification found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Different options presented in the SAVEs 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.

NOTE: Except for standards which deal with multiple 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 normally be cited more than once on a single citation. However, the same standard may be cited on different citations based on separate classifications and facts on the same inspection.

B. Grouping.

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

1. Grouping Related Violations.

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

2. Grouping Other-than-Serious Violation Where Grouping Results in a Serious Violation.

When two or more violations are found which, if considered individually, represent other than serious violations, but together create a substantial probability of death or serious physical harm, the violations shall be grouped as a serious violation.

3. Where Grouping Results in High Gravity Other-than-Serious Violation.

Where the CSHO finds, during the course of the inspection, that a number of other-than-serious violations are present, the violations shall be considered in relation to each other to determine the overall gravity of possible injury resulting from an accident or incident involving the hazardous condition.

4. Penalties for Grouped Violations.

If penalties are to be proposed for grouped violations, the penalty shall be written across from the first violation item appearing on the OSHA-2.

C. When Not to Group or Combine.

1. Multiple Inspections.

Violations discovered during multiple inspections of a single establishment or worksite may not be grouped. Where only one OSHA-1 has been completed, an inspection at the same establishment or worksite shall be considered a single inspection even if it continues for a period of more than one day, or is discontinued with the intention of later resuming it.

2. Separate Establishments of the Same Employer.

The employer shall be issued separate citations for each establishment or worksite where inspections are conducted, either simultaneously or at different times. If CSHOs conduct inspections at two establishments belonging to the same employer and instances of the same violation are discovered during each inspection, the violations shall not be grouped.

3. General Duty Clause.

Because an AS 18.60.075(a)(4) citation covers all aspects of a serious hazard where no standard exists, there shall be no grouping of separate violations of this statute. This policy, however, does not prohibit grouping an AS 18.60.075(a)(4) violation with a related violation of a specific standard.

4. Egregious Violations.

Violations, which are proposed as instance-by-instance citations, shall not normally be combined or grouped. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, dated October 21, 1990.

XVII. Health Standard Violations.

A. Citation of Ventilation Standards.

In cases where a citation of a ventilation standard is appropriate, consideration shall be given to standards intended to control exposure to hazardous levels of air contaminants, prevent fire or explosions, or regulate operations that may involve confined spaces or specific hazardous conditions. In such cases, the following guidelines shall be observed:

1. Health-Related Ventilation Standards.

a. Where an over-exposure to an airborne contaminant is present, the appropriate air contaminant engineering control requirement shall be cited; e.g., 29 CFR §1910.1000(e). Citations of this standard shall not be issued to require specific volumes of air to reduce such exposures.

b. 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.

2. **Fire and Explosion-Related Ventilation Standards**.

Although not normally considered health violations, the following guidelines shall be observed when citing fire and explosion related ventilation standards:

a. **Adequate Ventilation**.

An operation is considered to have **adequate** ventilation when **both** of the following criteria are present:

- The requirement(s) of the specific standard has been met.
- The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

b. **Citation Policy**.

If 25 percent (10 percent when specified for maritime operations) of the LEL has been exceeded and:

- The standard's requirements have not been met, violations of the applicable ventilation standard normally shall be cited as serious.
- If there is no applicable ventilation standard, AS 18.60.075(a)(4) shall be cited in accordance with the guidelines in Section III of this chapter, General Duty Requirement.

B. 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 employees are exposed to acceptable levels. (See Tables G-16 or G-16a of the standard).

1. Citations for violations of 29 CFR §1910.95(b)(1) shall be issued when technologically and economically feasible engineering and/or administrative controls have not been implemented; and

   a. Employee exposure levels are so elevated that hearing protectors alone may not reliably reduce noise levels received to levels specified in Tables G-16 or G-16a of the standard. (e.g., Hearing protectors which offer the greatest attenuation may reliably be used to protect employees when their exposure levels border on 100 dba). See CPL 02-02-035, *29 CFR 1910.95(b)(1), Guidelines for Noise Enforcement; Appendix A*, dated December 19, 1983; or

b. The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.

2. 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, no additional controls may be necessary. In making this assessment, factors such as exposure levels present, number of employees tested, and duration of the testing program shall be considered.

3. When employee noise exposures are less than 100 dBA but the employer does not have an ongoing hearing conservation program, or results of audiometric testing indicate that the employer's existing program is inadequate, the CSHO shall consider whether:

   a. Reliance on an effective hearing conservation program would be less costly than engineering and/or administrative controls.

   b. An effective hearing conservation program can be established or improvements made in an existing program which could bring the employer into compliance with Tables G-16 or G-16a.

   c. Engineering and/or administrative controls are both technically and economically feasible.

4. If noise workplace levels can be reduced to the levels specified in Tables G-16 or 16a by means of hearing protectors along with an effective hearing conservation program, a citation for any missing program elements shall be issued rather than for lack of engineering controls. If improvements in the hearing conservation program cannot be made or, if made, cannot reasonably be expected to reduce exposures, but feasible controls exist to address the hazard, then 29 CFR §1910.95(b)(1) shall be cited.

5. When hearing protection is required but not used and employee exposures exceed the limits of Table G-16, 29 CFR §1910.95(i)(2)(i) shall be cited and classified as serious (see (8), below) 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.

6. Where an employer has instituted a hearing conservation program and a violation of one or more elements (other than 29 CFR §1910.95(i)(2)(ii)(b) or (i)(2)(ii)(b)) is found, citations for the deficient elements of the noise standard shall be issued if exposures equal or exceed an 8-hour time-weighted average of 85 dBA.

7. If an employer has not instituted a hearing conservation program and employee exposures equal or exceed an 8-hour time-weighted average of 85 dB, a citation for 29 CFR §1910.95(c) only shall be issued.

8. Violations of 29 CFR §1910.95(i)(2)(i) may be grouped with violations of 29 CFR §1910.95(b)(1) and classified as serious when employees are exposed to noise levels above the limits of Table G-l6 and:

   a. Hearing protection is not utilized or is not adequate to prevent overexposures; or

   b. There is evidence of hearing loss that could reasonably be considered:

      - To be work-related, and

      - To have been preventable, if the employer had been in compliance with the cited provisions.

9. No citation shall be issued where, in the absence of feasible engineering or administrative controls, employees are exposed to elevated noise levels, but effective hearing protection is being provided and used, and the employer has implemented a hearing conservation program.

XVIII. Violations of the Respiratory Protection Standard (29 CFR §1910.134).

If an inspection reveals the presence of potential respirator violations, CPL 02-00-120 (AKOSH PD 98-16), *Inspection Procedures for the Respiratory Protection Standard*, dated September 25, 1998, shall be followed.

XIX. Violations of Air Contaminant Standards (29 CFR §1910.1000).

A. Requirements under the standard:

1. Section 29 CFR §1910.1000(a) through (d) provides ceiling values and 8-hour time – weighted averages applicable to employee exposure to air contaminants.

2. Section 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, personal protective equipment shall be used. Whenever respirators are used, their use shall comply with §1910.134.

3. Section 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.

4. There may be cases where workplace conditions require that employers provide engineering controls as well as administrative controls (including work practice controls) **and** personal protective equipment. Section 29 CFR §1910.1000(e) allows employers to implement feasible engineering controls and/or

administrative and work practice controls in any combination, provided the selected abatement means eliminates the overexposure.

5. Where engineering and/or administrative controls are feasible but do not, or would not, reduce air contaminant levels below applicable ceiling values or threshold limit values, an employer must nevertheless institute such controls to reduce the exposure levels. In cases where the implementation of all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels, employers must additionally provide personal protective equipment to reduce exposures.

B. Classification of Violations of Air Contaminant Standards.

Where employees are exposed to a toxic substance in excess of the PEL established by AKOSH 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 other-than-serious on the criteria set forth in the Chemical Sampling Information web page and based on whether respirators are being used. Classification of these violations is dependent upon the determination that an illness is reasonably predictable at the measured exposure level.

1. Classification Considerations.

Exposure to regulated substances shall be characterized as serious if exposures could cause impairment to the body as described in-Paragraph II.C.3. of this chapter.

a. In general, substances having a single health code of 13 or less shall be considered as posing a serious health hazard 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.

b. Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which "moderate" irritation could be expected.

c. For a substance having multiple health codes covering both serious and other-than-serious effects (e.g., cyclohexanol), a classification of other-than-serious is appropriate up to levels where serious a health effect(s) could be expected to occur.

d. 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 may be considered under Section 5(a)(1) of the Act. Prior to citing a Section 5(a)(1) violation under these circumstances, it is essential that CSHOs document that a *hazardous exposure* is occurring or has occurred at the workplace, not just that a recognized occupational exposure

recommendation has been exceeded. See instructions in Section III of this chapter, *General Duty Requirements*.

e. 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), citations will not normally be issued. CSHOs shall advise employers that a reduction of the PEL has been recommended.

NOTE: An exception to this may apply if it can be documented that an employer knows that a particular safety or health standard fails to protect his workers against the specific hazard it is intended to address.

f. For a substance having an 8-hour PEL with no ceiling PEL but ACGIH or NIOSH has recommended a ceiling value, the case shall be referred to the Regional Administrator in accordance with Paragraph III.D.2. of this chapter. If no citation is issued, CSHO shall advise employers that a ceiling value is recommended.

2. Additive and Synergistic Effects.

a. Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination with each other shall be evaluated using the formula found in 29 CFR §1910.1000(d)(2). Use of this formula requires that exposures have an additive effect on the **same** body organ or system.

b. If CSHOs suspect that synergistic effects are possible they shall consult with their supervisor, who shall then refer the question to the Regional Administrator. If a synergistic effect of the cited substances is determined to be present, violations shall be grouped to accurately reflect severity and/or penalty.

XX. Citing Improper Personal Hygiene Practices.

The following guidelines apply when citing personal hygiene violations:

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.

1. For citations under29 CFR §1910.141(g)(2) and (4), wipe sampling results shall be taken to establish the potential for a serious hazard.

2. Where, for any substance, a serious hazard is determined to exist due to potential for ingestion or absorption 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 AS 18.60.075(a)(4).

B. Absorption Hazards.

A citation for exposure to materials that may be absorbed through the skin or can cause a skin effect (e.g., dermatitis) shall be issued where appropriate personal protective clothing is necessary, but is not provided or worn. If a serious skin absorption or dermatitis hazard exists that cannot be eliminated with protective clothing, an AS 18.60.075(a)(4) citation may be considered. Engineering or administrative (including work practice) controls may be required in these cases to prevent the hazard. See 29 CFR §1910.132(a).

C. Wipe Sampling.

In general, wipe samples, not measurements for air concentrations, will be necessary to establish the presence of a toxic substance posing a potential absorption or ingestion hazard. (See TED 01-00-015, *OSHA Technical Manual*, dated January 20, 1999, for sampling procedures.)

D. Citation Policy.

The following criteria should be considered prior to issuing a citation for ingestion or absorption hazards:

1. A health risk exists as demonstrated by one of the following:

    a. A potential for an illness, such as dermatitis, and/or

    b. The presence of a toxic substance that may be potentially ingested or absorbed through the skin. (See the Chemical Sampling Information web page.)
2. The potential for employee exposure by ingestion or absorption may be established by taking both qualitative and quantitative wipe samples. The substance must be present on surfaces that employees contact (such as lunch tables, water fountains, work areas etc.) or on other surfaces, which, if contaminated, present the potential for ingestion or absorption.

3. The sampling results must reveal that the substance has properties and exists in quantities that pose a serious hazard.

XXI. Biological Monitoring.

If an employer has been conducting biological monitoring, CSHOs shall evaluate the results of such testing. These results may assist in determining whether a significant quantity of the toxic substance is being ingested or absorbed through the skin.

Chapter 5

CASE FILE PREPARATION AND DOCUMENTATION

I. Introduction.

All necessary information relative to documentation of violations shall be obtained during the inspection, (including but not limited to notes, audio/videotapes, photographs, employer and employee interviews and employer maintained records). CSHOs shall develop detailed information for the case file to establish the specific elements of each violation.

II. Inspection Conducted, Citations Being Issued.

All case files must include the following forms and documents.

A. OSHA-1.

The CSHO shall obtain available information to complete the OSHA-1 and other appropriate forms.

B. OSHA-1A.

The OSHA-1A shall list the following:

1. Establishment Name;
2. Inspection Number;
3. Additional Citation Mailing Addresses;
4. Names and Addresses of all Organized Employee Groups;
5. Names, Addresses and Phone Numbers of Authorized Representatives of Employees;
6. Employer Representatives contacted and the extent of their participation in the inspection;
7. CSHO's evaluation of the Employer's Safety and Health System, and if applicable, a discussion of any penalty reduction for good faith;
8. A written narrative containing accurate and concise information about the employer and the worksite;
9. Date the closing conference(s) was held and description of any unusual circumstances encountered;
10. Any other relevant comments/information CSHOs believe may be helpful, based on his/her professional judgment;
11. Names, Addresses and Phone Numbers of other persons contacted during the inspection, such as the police, coroner, attorney, etc.;
12. Names and Job Titles of any individuals who accompanied the CSHO on the inspection;
13. Calculation of the DART rate (at least three full calendar years and the current year);

14. Discussion clearly addressing all items on the Complaint or Referral;
15. Type of Legal Entity [Indicate whether the employer is a corporation, partnership, sole proprietorship, etc. (Do not use the word "owner.") If the employer named is a subsidiary of another firm, indicate that.]; and
16. Coverage Information.

C. OSHA-1B.

1. A separate OSHA-1B should normally be completed for each alleged violation. Describe the observed hazardous conditions or practices, including all relevant facts, and all information pertaining to how and/or why a standard is violated. Specifically identify the hazard to which employees have been or could be exposed. Describe the type of injury or illness 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 potentially exposed. If employee exposure was not actually observed during the inspection, state the facts on which the determination was made (i.e., tools left inside an unprotected trench) that an employee has been or could have been exposed to a safety or health hazard.

2. The following information shall be documented:
   a. Explanation of the hazard(s) or hazardous condition(s);

   b. Identification of the machinery or equipment (such as equipment type, manufacturer, model number, serial number);

   c. Specific location of the hazard and employee exposure to the hazard;

   d. Injury or illness likely to result from exposure to the hazard;

   e. Employee proximity to the hazard and specific measurements taken, (describe how measurements were taken, identify the measuring techniques and equipment used, identify those who were present and observed the measurements being made, include calibration dates of equipment used);

   f. For contaminants and physical agents, any additional facts that clarify the nature of employee exposure. A representative number of Material Safety Data Sheets should be collected for hazardous chemicals that employees may potentially be exposed to;

   g. Names, addresses, phone numbers, and job titles for exposed employees;

   h. Approximate duration of time the hazard has existed and frequency of exposure to the hazard;

   i. Employer knowledge;

j. Any and all facts which establish that the employer actually knew of the hazardous condition, or what reasonable steps the employer failed to take (including regular inspections of the worksite) that could have revealed the presence of the hazardous condition. The mere presence of the employer in the workplace is not sufficient evidence of knowledge. There must be evidence that demonstrates why the employer reasonably could have recognized the presence of the hazardous condition. **Avoid relying on conclusory statements such as "reasonable diligence" to establish employer knowledge**. See Chapter 4, Paragraph II.C.4., *Knowledge of the Hazardous Condition*, for additional information.

- In order to establish that a violation may be potentially classified as willful, facts shall be documented to show either that the employer knew of the applicable legal requirements and intentionally violated them or that the employer showed plain indifference to employee safety or health (See Section V of Chapter 4, *Willful Violations*). For example, document facts that the employer knew that the condition existed and that the employer was required to take additional steps to abate the hazard. Such evidence could include prior OSHA citations, previous warnings by a CSHO, insurance company or city/state inspector regarding the requirements of the standard(s), the employer's familiarity with the standard(s), contract specifications requiring compliance with applicable standards, or warnings by employees or employee safety representatives of the presence of a hazardous condition and what protections are required by OSHA standards.

- Also include facts showing that even if the employer was not consciously or intentionally violating the Act, the employer acted with such plain indifference for employee safety that had the employer known of the standard, it probably would not have complied anyway. This type of evidence would include instances where an employer was aware of an employee exposure to an obviously hazardous condition(s) and made no reasonable effort to eliminate it.

- Any relevant comments made by the employer or employee during the walkaround or closing conference, including any employer comments regarding why it violated the standard, which may be characterized as admissions of the specific violations described; and

k. Include any other facts, which may assist in evaluating the situation or in reconstructing the total inspection picture in preparation for testimony in possible legal actions.

l. Appropriate and consistent abatement dates should be assigned and documented for abatement periods longer than 30 days. The abatement period shall be the shortest interval within which the employer can reasonably be expected to correct the violation. An abatement period should be indicated in the citation as a specific date, not a number of days. When abatement is

witnessed by the CSHO during an inspection, the abatement period shall be listed on the citation as "Corrected During Inspection."

m. The establishment of the shortest practicable abatement date requires the exercise of professional judgment on the part of the CSHO. Abatement periods exceeding 30 days shall **not** normally be offered, particularly for simple safety violations. Situations may arise, however, especially for complex health or program violations, where abatement cannot be completed within 30 days (e.g., ventilation equipment needs to be installed, new parts or equipment need to be ordered, delivered and installed or a process hazard analysis needs to be performed as part of a PSM program). When an initial abatement date is granted that is in excess of 30 calendar days, the reason should be documented in the case file.

3. Records obtained during the course of the inspection which the CSHO determines are necessary to support the violations.

4. For violations classified as repeated, the file shall include a copy of the previous citation(s) on which the repeat classification is based and documentation of the final order date of the original citation.

III. Inspection Conducted But No Citations Issued.

For inspections that do not result in citations being issued, a lesser amount of documentation may be included in the case file. At a minimum, the case file shall include the OSHA-1, the OSHA-1A, and a general narrative/statement that at the time of the inspection no conditions were observed in violation of any standard, and a complaint/referral response letter, if appropriate shall clearly address all of the item(s).

IV. No Inspection.

For "No Inspections," the CSHO shall include in the case file an OSHA-1, which indicates the reason why no inspection was conducted. If there was a denial of entry, the information necessary to obtain a warrant or an explanation of why a warrant is not being sought shall be included. The case file shall also include a complaint/referral response letter, if appropriate, which explains why an inspection was not conducted.

V. Health Inspections.

A. Document Potential Exposure.

In addition to the documentation indicated above, CSHOs shall document all relevant information concerning potential exposure(s) to chemical substances or physical agents (including, as appropriate, collection and evaluation of applicable Material Safety Data Sheets), such as symptoms experienced by employees, duration and frequency of exposures to the hazard, employee interviews, sources of potential health hazards, types of engineering or administrative controls implemented by the

employer, and personal protective equipment being provided by the employer and used by employees.

VI. Employer's Occupational Safety and Health System.

CSHOs shall request and evaluate information on the following aspects of the employer's occupational safety and health system as it relates to the scope of the inspection:

1. Monitoring.

The employer's system for monitoring safety and health hazards in the establishment should include a program for self-inspection. CSHOs shall discuss the employer's maintenance schedules and inspection records. Additional information shall be obtained concerning activities such as sampling and calibration procedures, ventilation measurements, preventive maintenance procedures for engineering controls, and laboratory services. Compliance with the monitoring requirements of any applicable substance-specific health standards shall be determined.

2. Medical.

CSHOs shall determine whether the employer provides the employees with pre-placement 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 substance-specific health standards.

3. Records Program.

CSHOs shall determine the extent of the employer's records program, such as whether records pertaining to employee exposure and medical records are being maintained in accordance with 29 CFR §1910.1020.

VII. Engineering Controls.

CSHOs shall identify any engineering controls present, including substitution, isolation, general dilution and local exhaust ventilation, and equipment modification.

VIII. Work Practice and Administrative Controls.

CSHOs shall identify any control techniques, including personal hygiene, housekeeping practices, employee job rotation, employee training and education. Rotation of employees as an administrative control requires employer knowledge of the extent and duration of exposure.

NOTE: Employee rotation is not permitted as a control under some standards.

IX. Personal Protective Equipment.

An effective personal protective equipment program should exist in the plant. A detailed evaluation of the program shall be documented to determine compliance with specific standards, such as, 29 CFR §1910.95, 1910.134, and 1910.132.

X. Regulated Areas.

CSHOs shall investigate compliance with the requirements for regulated areas as specified by certain standards. Regulated areas must be clearly identified and known to all appropriate employees. The regulated area designation must be maintained according to the prescribed criteria of the applicable standard.

XI. Emergency Action Plan.

CSHOs shall evaluate the employer's emergency action plan when such a plan is required by a specific standard. When standards provide that specific emergency procedures be developed where certain hazardous substances are handled, CSHO's evaluation shall determine if: potential emergency conditions are included in the written plan, emergency conditions are explained to employees and there is a training program for the protection of affected employees, including use and maintenance of personal protective equipment.

XII. Affirmative Defenses.

An affirmative defense is a claim which, if established by the employer and found to exist by the CSHO, will excuse the employer from a citation that has otherwise been documented.

A. Burden of Proof.

Although employers have the burden of proving any affirmative defenses at the time of a hearing, CSHOs must anticipate when an employer is likely to raise an argument supporting such a defense. CSHOs shall keep in mind all potential affirmative defenses and attempt to gather evidence, particularly when an employer makes an assertion that would indicate raising a defense/excuse against the violation(s). CSHOs shall bring all documentation of hazards and facts related to possible affirmative defenses to the attention of the Chief of AKOSH Enforcement or designee.

B. Explanations.

The following are explanations of common affirmative defenses.

1. Unpreventable Employee or Supervisory Misconduct or "Isolated Event."

a. To establish this defense in most jurisdictions, employers must show all the following elements:

- A work rule adequate to prevent the violation;

- Effective communication of the rule to employees;
- Methods for discovering violations of work rules; and
- Effective enforcement of rules when violations are discovered.

b. CSHOs shall document whether these elements are present, including if the work rule at issue tracks the requirements of the standard addressing the hazardous condition.

EXAMPLE 5-1: An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts to be documented 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 the guard?
- Were there any supervisors in the area while the saw was operated without a guard?
- Did the employer have a work rule that the saw only be operated with the guard on?
- How was the work rule communicated to employees?
- Did the employer monitor compliance with the rule?
- How was the work rule enforced by the employer when it found noncompliance?

2. Impossibility/Infeasibility of Compliance.

Compliance with the requirements of a standard is impossible or would prevent performance of required work **and** the employer took reasonable alternative steps to protect employees or there are no alternative means of employee protection available.

EXAMPLE 5-2: An unguarded table saw is observed. The employer states that a guard would interfere with the nature of the work. Facts to be documented include:

- Would a guard make performance of the work impossible or merely more difficult?
- Could a guard be used some of the time or for some of the operations?
- Has the employer attempted to use a guard?
- Has the employer considered any alternative means of avoiding or reducing the hazard?

3. Greater Hazard.

Compliance with a standard would result in a greater hazard(s) to employees than would noncompliance **and** the employer take reasonable alternative protective

measures, or there are no alternative means of employee protection. Additionally, an application for a variance would be inappropriate.

EXAMPLE 5-3: The employer indicates that a saw guard had been removed because it caused the operator to be struck in the face by particles thrown from the saw. Facts to be documented include:

- Was the guard initially properly installed and used?
- Would a different type of guard eliminate the problem?
- How often was the operator struck by particles and what kind of injuries resulted?
- Would personal protective equipment such as safety glasses or a face shield worn by the employee solve the problem?
- Was the operator's work practice causing the problem and did the employer attempt to correct the problem?
- Was a variance requested?

XIII. Interview Statements.

A. Generally.

Interview statements of employees or other individuals shall be obtained to adequately document a potential violation. While video and/or audio recording is strongly recommended to ensure the accuracy of statements, witness statements shall normally be in writing and the individual shall be encouraged to sign and date the statement. During management interviews, CSHOs are encouraged to take verbatim, contemporaneous notes whenever possible as these tend to be more credible than later general recollections.

B. CSHOs shall obtain written statements when:

1. There is an actual or potential controversy as to any material facts concerning a violation;
2. A conflict or difference among employee statements as to the facts arises;
3. There is a potential willful or repeated violation; and,
4. When attempting to determine if potential violations existed at the time of the accident (for accident investigations).

C. Language and Wording of Statement.

Interview statements shall normally be written in the first person and in the language of the individual when feasible. (Statements taken in a language other than English shall be subsequently translated.) The wording of the statement shall be understandable to the individual and reflect only the information that has been brought out in the interview. The individual shall initial any changes or corrections to the statement; otherwise, the statement shall not be modified, added to or altered in any way. The statement shall end with the wording: "I have read the above, or the

statement has been read to me, and it is true to the best of my knowledge." Where appropriate, the statement shall also include the following: "I request that my statement be held confidential to the extent allowed by law." Only the individual interviewed may later waive the confidentiality of the statement. The individual shall sign and date the interview statement and the CSHO shall sign it as a witness.

D. Refusal to Sign Statement.

If the individual refuses to sign the statement, the CSHO shall note such refusal on the statement. Statements shall be read to the individual and an attempt made to obtain an agreement. A note to this effect shall be documented in the case file. Recorded statements shall be transcribed whenever possible.

E. Video and Audiotaped Statements.

Interview statements should be videotaped or audiotaped whenever possible. Although not necessary, it is advised to get the consent of the person being interviewed before recording the interview. The statement shall be reduced to writing in egregious, fatality/catastrophe, willful, repeated, failure to abate, and other significant cases so that it may be signed. CSHOs are encouraged to produce the written statement for correction and signature as soon as possible, and identify the transcriber.

F. Administrative Depositions.

When necessary to document or develop investigative facts, a management official or other individual may be administratively deposed.

NOTE: See Chapter 3, Paragraph VII.I.4., Interviews of Non-Managerial Employees, *for additional guidance regarding interviews of non-managerial employees.*

XIV. Paperwork and Written Program Requirements.

In certain cases, violations of standards requiring employers to have a written program to address a hazard or make a written certification (e. g., hazard communication, personal protective equipment, permit required confined spaces and others) are considered paperwork deficiencies. However, in some circumstances, violations of such standards may have an adverse impact on employee safety and health. See CPL 02-00-111 (AKOSH PD 96-9), *Citation Policy for Paperwork and Written Program Requirement Violations*.

XV. Guidelines for Case File Documentation for Use with Videotapes and Audiotapes.

The use of videotaping as a method of documenting violations and of gathering evidence for inspection case files is encouraged. Certain types of inspections, such as fatalities, imminent danger and ergonomics shall include videotaping. Other methods of documentation, such as handwritten notes, audiotaping, and photographs, continue to be acceptable and are encouraged to be used whenever they add to the quality of the

evidence and whenever videotaping equipment is not available. See CPL 02-00-098 (AKOSH PD 93-5), *Guidelines for Case File Documentation for use with Videotapes and Audiotapes*, dated October 12, 1993.

XVI. Case File Activity Diary Sheet.

All case files shall contain an activity diary sheet, which is designed to provide a ready record and summary of all actions relating to a case. It will be used to document important events or actions related to the case, especially those not noted elsewhere in the case file. Diary entries should be clear, concise and legible and should be dated in chronological order to reflect a timeline of the case development. Information provided should include, at a minimum, the date of the action or event, a brief description of the action or event and the initials of the person making the entry. When a case file is completed, the CSHO must ensure that it is properly organized. See ADM 03-01-005, OSHA Compliance Records, dated August 3, 1998.

XVII. Citations.

AS 18.60.091 and 8 AAC 61.110 addresses the form and issuance of citations.

AS 18.60.091(a) provides: "… Each citation shall be in writing and shall describe with particularity the nature of the violation including a reference to the provision of AS 18.60.010 – 18.60.105 or any order or regulation alleged to have been violated, and must fish a reasonable time for abatement of the violation…"

A. Statute of Limitations.

AS 18.60.091(c) provides. "…A citation may not be issued for a particular violation under this section after the expiration of 180 days following the discovery of the violation by the department or correction of a violation."

B. Issuing Citations.

1. Citations shall be sent by certified mail. Hand delivery of citations to the employer or an appropriate agent of the employer, or use of a mail delivery service other than the United States Postal Service, may be used **in addition** to certified mail if it is believed that these methods would effectively give the employer notice of the citation. A signed receipt shall be obtained whenever possible. The circumstances of delivery shall be documented in the diary sheet.

2. Citations shall be mailed to employee representatives after the Certified Mail Receipt card is received by the Area Office. Citations shall also be mailed to any employee upon request and without the need to make a written request under the Alaska Public Records Act. In the case of a fatality, the family of the victim shall be provided with a copy of the citations without charge or the need to make a written request.

XVIII. Amending/Withdrawing Citations and Notification of Penalties.

1. Amendment Justification.

Amendments to, or withdrawal of, a citation shall be made when information is presented to the Chief of AKOSH Enforcement or designee, which indicates a need for such action and may include administrative or technical errors such as:

a. Citation of an incorrect standard;
b. Incorrect or incomplete description of the alleged violation;
c. Additional facts not available to the CSHO at the time of the inspection establish a valid affirmative defense;
d. Additional facts not available to the CSHO at the time of the inspection establish that there was no employee exposure to the hazard; or
e. Additional facts establish a need for modification of the abatement date or the penalty, or reclassification of citation items.

2. When Amendment is not Appropriate.

Amendments to, or withdrawal of, a citation shall not be made by the Chief of AKOSH Enforcement for any of the following:

a. Timely Notice of Contest received;
b. The 15 working days for filing a Notice of Contest has expired and the citation has become a Final Order; or
c. Employee representatives were not given the opportunity to present their views (unless the revision involves only an administrative or technical error).

XIX. Procedures for Amending or Withdrawing Citations.

The following procedures apply whenever amending or withdrawing citations.

NOTE: The instructions contained in this section, with appropriate modifications, are also applicable to the amendment of the OSHA-2B, Notification of Failure to Abate Alleged Violation.

1. Withdrawal of, or modifications to, the citation and notification of penalty, shall normally be accomplished by means of Informal or Formal Settlement Agreements.

2. In exceptional circumstances, the Chief of AKOSH Enforcement or Director of Labor Standards and Safety or designee may initiate a change to a citation and notification of penalty without an informal conference. If proposed amendments to citation items (individual violations) change the original classification of the items, such as willful to repeated, the original items shall be withdrawn and the new, appropriate items will be issued. The amended Citation and Notification of Penalty Form (OSHA-2) shall clearly indicate that 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 three working days, whichever is longer.

3. The 15 working day contest period for the amended portions of the citation will begin on the day following the day of receipt of the amended Citation and Notification of Penalty.

4. The contest period is not extended for the unamended portions of the original citation. A copy of the original citation shall be attached to the amended Citation and Notification of Penalty Form when the amended form is forwarded to the employer.

5. When circumstances warrant, the Chief of AKOSH Enforcement or Director of Labor Standards and Safety or designee may withdraw a citation and notification of penalty in its entirety. Justification for the withdrawal must be noted in the case file. A letter withdrawing the Citation and Notification of Penalty shall be sent to the employer. The letter, signed by the Chief of AKOSH Enforcement or designee, shall refer to the original citation and notification of penalty, state that they are withdrawn and direct that the employer post the letter for three working days in the same location(s) where the original citation was posted. When applicable, a copy of the letter shall also be sent to the employee representative(s) and/or complainant.

XX. Inspection Records.

A. Generally.

1. Inspection records are any record made by a CSHO that concern, relate to, or are part of, any inspection, or are a part of the performance of any official duty.

2. All official forms and notes constituting the basic documentation of a case must be part of the case file. All original field notes are part of the inspection record and shall be maintained in the file. Inspection records also include photographs (including digital photographs), negatives of photographs, videotapes, DVDs and audiotapes. Inspection records are the property of the United States Government and not the property of the CSHO and are not to be retained or used for any private purpose.

B. Release of Inspection Information.

The information obtained during inspections is confidential, but may be disclosable or non-disclosable based on criteria established in the Alaska Public Records Act. Requests for release of inspection information shall be directed to the Chief of AKOSH Enforcement or designee.

C. Classified and Trade Secret Information.

1. Any classified or trade secret information and/or personal knowledge of such information by agency personnel shall be handled in accordance with AKOSH regulations. Trade Secrets are matters that are not of public or general knowledge. A trade secret, as referenced in AS 18.60.099, includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. .

2. It is essential to the effective enforcement of the Alaska Occupational Safety and Health laws that CSHOs and all AKOSH personnel preserve the confidentiality of all information and investigations which might reveal a trade secret. When the employer identifies an operation or condition as a trade secret, it shall be treated as such (unless, after following proper procedures, including consulting with the Asst. Attorney General's Office, AKOSH determines that the matter is not a trade secret). Information obtained in such areas, including all negatives, photographs, videotapes and documentation forms shall be labeled:

   "CONFIDENTIAL TRADE SECRET INFORMATION"

3. Under AS 18.60.099, all information reported to or obtained by CSHOs in connection with any inspection or other activity which contains or may reveal a trade secret shall be kept confidential.

4. If the employer objects to the taking of photographs and/or videotapes because trade secrets would or may be disclosed, CSHOs should advise employers of the protection against such disclosure afforded by AS 18.60.099. If the employer still objects, CSHOs shall contact Chief of AKOSH Enforcement for guidance.

Chapter 6

PENALTIES AND DEBT COLLECTION

General Penalty Policy.

The penalty structure in AS 18.60.095 is designed primarily to provide an incentive for preventing or correcting violations voluntarily, not only to the cited employer, but to other employers.

I. Civil Penalties.

A. Statutory Authority for Civil Penalties.

AS 18.60.095 provides AKOSH with statutory authority to propose civil penalties for violations of AS 18.60.010 – 18.60.105. Civil penalties encourage compliance and deter violations. **Proposed penalties** are the penalty amounts AKOSH issues with citation(s).

1. AS 18.60.095(a) provides that any employer who willfully or repeatedly violates the Act may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

2. AS 18.60.095(b) provides that any employer who has received a citation for an alleged violation of the Act which is determined to be of a serious nature shall be assessed a civil penalty of up to $7,000 for each violation.

3. AS 18.60.095(c) provides that, when the violation is specifically determined not to be of a serious nature, a proposed civil penalty of up to $7,000 may be assessed for each violation.

4. AS 18.60.095(d) provides that any employer who fails to correct a violation for which a citation has been issued, may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

5. AS 18.60.095(g) provides that, when a violation of a posting requirement is cited, a civil penalty of up to $7,000 shall be assessed for each violation.

B. Appropriation Act Restrictions.

In providing funding for OSHA, Congress has placed restrictions on enforcement activities regarding two categories of employers: small farming operations and small employers in low-hazard industries. The Appropriations Act contains limits for OSH Act activities on a year-by-year basis.

NOTE: See CPL 02-00-051 (AKOSH PD 05-09), Enforcement Exemptions and Limitations under the Appropriations Act, *issued May 28, 1998, for additional*

information. Appendix A of that directive contains the list of low-hazard industries, which is updated annually.

C. Minimum Penalties.

The following policies apply:

1. AS 18.60.095(a) provides that the minimum proposed penalty for any willful violation (serious or other than serious) shall not be less than $5,000.

2. When the proposed penalty for a serious violation (citation item) would amount to less than $100, a $100 penalty shall be proposed for that violation (In the case of public sector employers who qualify for a negotiated informal settlement agreement as outlined in Chapter 8, the proposed penalty may correlate to an equivalent or greater investment toward improving workplace safety and health).

3. When the proposed penalty for an other-than-serious violation (citation item), or a regulatory violation other than a posting violation, would amount to less than $100, no penalty shall be proposed for that violation.

D. Maximum Penalties.

The civil penalty amounts included in Section 17 are generally maximum amounts before any permissible reductions are taken.

Table 6-1 below summarizes the maximum amounts for proposed civil penalties:

Table 6-1: Maximum Amounts for Civil Penalties

Type of Violation	Penalty Maximum
Serious	$7,000 per violation
Other-Than-Serious	$7,000 per violation
Willful or Repeated	$70,000 per violation
Posting Requirements	$7,000 per violation
Failure to Abate	$7,000 per day unabated beyond the abatement date [generally limited to 30 days maximum]

II. Penalty Factors.

AS 18.60.095(h) provides that penalties shall be assessed giving due consideration to four factors:

- ► The **gravity** of the violation;
- ► **Size** of the employer's business;

► The **good faith** of the employer; and

► The employer's **history** of previous violations.

A. Gravity of Violation.

The gravity of the violation is the primary consideration in determining penalty amounts. It shall be the basis for calculating the basic penalty for serious and other-than-serious violations. To determine the gravity of a violation, the following two assessments shall be made:

► The severity of the injury or illness which could result from the alleged violation.

► The probability that an injury or illness could occur as a result of the alleged violation.

1. Severity Assessment.

The classification of an alleged violation as serious or other-than-serious is based on the severity of the potential injury or illness and is the first step. The following categories shall be considered in assessing the severity of potential injuries or illnesses:

a. For Serious:

- High Severity: Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.

- Medium Severity: Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited period of disability.

- Low Severity: Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.

b. For Other-Than-Serious:

Minimal Severity: Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the most serious injury or illness that could reasonably be expected to result from an employee's exposure would not be low, medium or high severity and would not cause death or serious physical harm.

2. Probability Assessment.

The probability that an injury or illness will result from a hazard has no role in determining the classification of a violation, but does affect the amount of the proposed penalty.

a. Probability shall be categorized either as greater or as lesser.

- **Greater Probability**: Results when the likelihood that an injury or illness will occur is judged to be relatively high.

- **Lesser Probability**: Results when the likelihood that an injury or illness will occur is judged to be relatively low.

b. How to Determine Probability.

The following factors shall be considered, as appropriate, when violations are likely to result in injury or illness:

- Number of employees exposed;

- Frequency of exposure or duration of employee overexposure to contaminants;

- Employee proximity to the hazardous conditions;

- Use of appropriate personal protective equipment;

- Medical surveillance program;

- Youth and inexperience of employees, especially those under 18 years old; and

- Other pertinent working conditions.

EXAMPLE 6-1: Greater probability may include an employee exposed to the identified hazard for four hours a day, five days a week. Lesser probability may be present when an employee is performing a non-routine task with two previous exposures within the previous year and no injuries or illnesses are associated with the identified hazard.

c. Final Probability Assessment.

All of the factors outlined above shall be considered in determining a final probability assessment.

When adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the assessment may be adjusted at the

discretion of the AKOSH Chief of Enforcement as appropriate. Such decisions shall be fully explained in the case file.

3. Gravity-Based Penalty (GBP).

a. The gravity-based penalty (GBP) for each violation shall be determined by combining the severity assessment and the final probability assessment.

b. GBP is an unreduced penalty and is calculated in accordance with the procedures below.

NOTE: Throughout the FOM when the term "unreduced penalty" is used, it is the same as GBP.

4. Serious Violation & GBP.

a. The gravity of a violation is defined by the GBP:

- A **high gravity** violation is one with a GBP of $5,000 or greater.
- A **moderate gravity** violation is one with a GBP of $2,000, $2,500 or $3,500.
- A **low gravity** violation is one with a GBP of $1,500.

b. The highest gravity classification (high severity and greater probability) shall normally be reserved for the most serious violative conditions, such as those situations involving danger of death or extremely serious injury or illness.

c. If the AKOSH Chief of Enforcement determines that it is appropriate to achieve the necessary deterrent effect, a GBP of $7,000 may be proposed instead of $5,000. Such discretion should be exercised based on the facts of the case and the reasons should be adequately explained in the case file.

d. For serious violations, the GBP shall be assigned on the basis of the following scale in Table 6-2:

Severity + Probability = GBP

Table 6-2: Serious Violations

Severity	Probability	GBP	Gravity	IMIS Code
High	Greater	$5,000 (or $7,000)	High	10
Medium	Greater	$3,500	Moderate	5
Low	Greater	$2,500	Moderate	5

High	Lesser	$2,500	Moderate	5
Medium	Lesser	$2,000	Moderate	5
Low	Lesser	$1,500	Low	1

5. Other-Than-Serious Violations & GBP.

a. For other-than-serious safety and health violations, there is only minimal severity.

b. If the Chief of AKOSH Enforcement determines that it is appropriate to achieve the necessary deterrent effect, a GBP of $7,000 may be proposed. Such discretion should be exercised based on the facts of the specific case and the reasons should be adequately explained in the case file.

Table 6-3: Other-Than-Serious Violations

Severity	Probability	GBP
Minimal	**Greater**	**$1,000 - $7,000**
Minimal	**Lesser**	**$0**

6. Exception to GBP Calculations.

For some cases, a GBP may be assigned without using the severity and the probability assessment procedures outlined in this section when these procedures cannot appropriately be used. In such cases, the assessment assigned and the reasons for doing so shall be fully explained in the case file.

7. Egregious Cases.

In egregious cases, violation-by-violation penalties are applied. Such cases shall be handled in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990. Penalties calculated under this policy shall not be proposed without the concurrence of the Commissioner of Labor and Workforce Development.

8. Gravity Calculations for Combined or Grouped Violations.

Combined or grouped violations will be considered as one violation with one GBP. The following procedures apply to the calculation of penalties for combined and grouped violations:

*NOTE: Multiple violations of a single standard may be **combined** into one citation item. When a hazard is identified which involves interrelated violations of different standards, the violations may be **grouped** into a single item.*

a. Combined Violations.

The severity and probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete

the penalty calculations for each instance or sub item of a combined or grouped violation once the instance with the highest gravity is identified.

b. Grouped Violations.
The following shall be adhered to:

- **Grouped Severity Assessment**

  There are two considerations for calculating the severity of grouped violations:

  - The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item; AND

  - If the injury or illness that is reasonably predictable from the grouped items is more serious than that from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor.

- **Grouped Probability Assessment**

  There are two factors for calculating the probability of grouped violations:

  - The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness; AND

  - If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment.

B. Penalty Reduction Factors.

1. General.

a. Unless an alleged violation resulted in or contributed to a fatality or amputation or paralysis of a hand, foot, or limb, penalty reductions may exceed 100 percent, depending upon the employer's "size" (number of employees), "good faith," and "history of previous violations."

- A maximum of 60 percent (80 percent for employer with 10 or fewer employees for alleged serious willful violations) reduction is permitted for **size**;

- A maximum of 35 percent reduction for **good faith**; and

- 10 percent reduction may be given for **history**.

b. However, no penalty reduction can be more than 100 percent of the initial assessment. Since these reduction factors are based on the general character of an employer's safety and health performance, they shall be calculated only once for each employer.

c. While in certain egregious cases, the Chief of AKOSH Enforcement may determine that no reduction factors will be applied, after the classification (as serious or other-than-serious) and the gravity-based penalty have been determined for each violation, the penalty reduction factors (for size, good faith, history) shall be applied subject to the following limitations:

- Penalties proposed for violations classified as **repeated** shall be reduced only for size.

- Penalties proposed for violations classified as **willful**, shall be reduced only for size and history.

- Penalties proposed for **serious** violations classified as high severity/greater probability **shall be reduced only for size and history**.

2. Size Reduction.

a. Unless an alleged violation resulted or contributed to a fatality or amputation or paralysis of a hand, foot, or limb, a maximum penalty reduction of 60 percent is permitted for small employers (80 percent for serious willful violations, see Table 6-6). "Size of employer" shall be calculated on the basis of the maximum number of employees of an employer at **all** workplaces nationwide, including State Plan States, at any one time during the previous 12 months.

b. The rates of reduction to be applied are as follows except for alleged violations that resulted or contributed to a fatality or amputation or paralysis of a hand, foot, or limb which must be calculated under paragraph (d) of this section.

Employees	Percent reduction
1-25	60
26-100	40
101-250	20
251 or more	None

c. When an employer with 1-25 employees has one or more serious violations of high gravity or a number of serious violations of moderate gravity indicating a lack of concern for employee safety and health, the CSHO may recommend that only a partial reduction in penalty shall be permitted for size. If the AKOSH Chief of Enforcement approves the partial reduction, the justification is to be fully explained in the case file.

d. The rates of reduction based on employer size for accidents resulting in or contributing to a fatality; amputation or paralysis of a hand, foot, or limb; or, loss of an eye are reduced as follows.

Employees	Percent reduction
1-25	30
26-100	20
101-250	10
251 or more	None

3. Good Faith Reduction.

A penalty reduction is permitted in recognition of an employer's effort to implement an effective safety and health management system in the workplace. The following apply to reductions for good faith:

a. Reduction Not Permitted.

- No reduction shall be given for **high gravity serious violations**.
- No reduction shall be given if a **willful violation** is found. Additionally, where a willful violation has been documented, no reduction for good faith can be applied to **any** of the violations found during the same inspection.
- No reduction shall be given for **repeated violations**. If a repeated violation is found, no reduction for good faith can be applied to **any** of the violations found during the same inspection.
- No reduction shall be given if a **failure to abate violation** is found during an inspection. No good faith reduction shall be given for any violation in the inspection in which the FTA was found.
- No reduction shall be given to employers being cited under abatement verification for **failure to certify abatement**.
- No reduction shall be given to employers being cited under abatement verification for **failure to notify employees and tagging movable equipment.**

- No reduction shall be given if the employer has **no safety and health management system**, or if there are **major deficiencies** in the program.

- No reduction shall be given for citations related to accidents that result in or contribute to a **fatality, amputation or paralysis of hand, foot or limb, or loss of an eye**.

b. Twenty-Five Percent Reduction.

A 25 percent reduction for "good faith" normally requires a written safety and health management system. In exceptional cases, CSHOs may recommend a full 25 percent reduction for employers with 1-25 employees who have implemented an effective safety and health management system, but has not reduced it to writing.

To qualify for this reduction, the employer's safety and health management system must provide for:

- Appropriate management commitment and employee involvement;

- Worksite analysis for the purpose of hazard identification;

- Hazard prevention and control measures;

- Safety and health training; and

- Where **young persons** (i.e., less than 18 years old) are employed, the CSHO's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.

- Where **persons who speak limited or no English** are employed, the CSHO's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.

  *NOTE: One example of an effective safety and health management system is given in Safety and Health Program Management Guidelines; Issuance of Voluntary Guidelines (*Federal Register, *January 16, 1989 (54 FR 3904)).*

c. Fifteen Percent Reduction.

A 15 percent reduction for good faith shall normally be given if the employer has a documented and effective safety and health management system, with only incidental deficiencies.

EXAMPLE 6-2: An acceptable program should include minutes of employee safety and health meetings, documented employee safety and health training sessions, or any other evidence of measures advancing safety and health in the workplace.

d. Ten Percent Additional Reduction for AKOSH Strategic Partnership Participation.

- AKOSH may provide an additional 10 percent reduction for good faith **in addition to the normal available reductions** where the employer is an AKOSH Strategic Partnership (ASP) site.

- Employers in ASP sites, must have taken specific significant steps beyond those mentioned in the Twenty-Five Percent Reduction, and have achieved a high level of employee protection.

- In order to qualify for the reduction, the Chief of AKOSH Enforcement shall consult with the Chief of AKOSH Consultation and Training to determine if the employer is in good standing with the partnership agreement. The reduction will not be allowed to strategic partner employers found to not be in good standing.

- In cases where the total penalty reduction is 100 percent or more, the minimum penalty provisions shall apply.

- This is an additional good faith reduction; it will not apply unless the employer first qualifies for the 25 percent reduction.

e. Allowable Percentages.

Only these percentages (10%, 15%, 20%, 25% or 35%) may be used to reduce penalties due to the employer's good faith; this includes the possible additional 10 percent reduction for qualifying participants in AKOSH's ASP program.

4. History Reduction.

a. Allowable Percent.

A reduction of 10 percent shall be given to employers who have not been cited by OSHA nationwide, or by any State Plan state for any serious, willful, or repeated violations in the prior three years.

b. Time Limitation and Final Order.

The three-year history of no prior citations (both Federal and State) shall be calculated from the opening conference date of the current inspection. Only citations that have become a final order within the three years immediately before the opening conference date shall be considered.

c. Reduction Will Not be Given.

- For a repeated violation, or
- To employers who fail to adequately certify abatement, or

5. Total Reduction.

The total reduction will normally be the sum of the reductions for each factor. Table 6-4 provides an overview of the percent of penalty reductions applicable to serious, other-than-serious, and repeated violations.

6. Penalty Table.

Table 6-4 may be used for determining appropriate reduced penalties for serious and other-than-serious violations.

Table 6-4: Penalty Table

Percent Reduction	Penalty in Dollars							
0	$1,000	$1,500	$2,000	$2,500	$3,000	$3,500	$5,000	$7,000
10	$900	$1,350	$1,800	$2,250	$2,700	$3,150	$4,500	$6,300
15	$850	$1,275	$1,700	$2,125	$2,550	$2,975	$4,250*	$5,950*
20	$800	$1,200	$1,600	$2,000	$2,400	$2,800	$4,000	$5,600
25	$750	$1,125	$1,500	$1,875	$2,250	$2,625	$3,750*	$5,250*
30	$700	$1,050	$1,400	$1,750	$2,100	$2,450	$3,500	$7,900
35	$650	$975	$1,300	$1,625	$1,950	$2,275	$3,250*	$4,550*
40	$600	$900	$1,200	$1,500	$1,800	$2,100	$3,000	$4,200
45	$550	$825	$1,100	$1,375	$1,650	$1,925	$2,750*	$3,850*
50	$500	$750	$1,000	$1,250	$1,500	$1,750	$2,500	$3,500
55	$450	$675	$900	$1,125	$1,350	$1,575	$2,250*	$3,150*
60	$400	$600	$800	$1,000	$1,200	$1,400	$2,000	$2,800

65	$350	$525	$700	$875	$1,050	$14,225	$1,750*	$2,450*
70	$300	$450	$600	$750	$900	$1,050	$1,500	$2,100
75	$250	$375	$500	$625	$750	$875	$1,250*	$1,750*
85	$150	$225	$300	$375	$450	$525	$750*	$1,050*
95	$100	$100	$100	$125	$150	$175	$250*	$350*

* These figures represent penalty amounts that would not normally be proposed for high gravity serious violations because no reduction for good faith is made in such cases. They may occasionally be applicable for other-than-serious violations where the Chief of AKOSH Enforcement or designee has determined a high unreduced penalty amount to be warranted.

III. Repeated Violations.

A. General.

1. Each repeated violation shall be evaluated as serious or other-than-serious, based on current workplace conditions, and not on hazards found in the prior case.

2. A Gravity-Based Penalty (GBP) shall then be calculated for repeated violations based on facts noted during the current inspection.

3. Only the reduction factor for size, appropriate to the facts at the time of the reinspection, shall be applied.

   NOTE: AS 18.60.095(a) provides that an employer who repeatedly violates the Act may be assessed a civil penalty of not more than $70,000 for each violation.

B. Penalty Increase Factors.

The amount of any increase to a proposed penalty for repeated violations shall be determined by the size of the employer's business.

1. Small Employers.

For employers with 250 or fewer employees nationwide, the GBP shall be multiplied by a factor of 2 for the first repeated violation and multiplied by 5 for the second repeated violation. The GBP may be multiplied by 10 in cases where the AKOSH Chief of Enforcement determines that it is necessary to achieve the deterrent effect. The reasons for imposing a high multiplier factor shall be explained in the file.

2. Large Employers.

For employers with more than 250 employees nationwide, the GBP shall be multiplied by a factor of **5** for the first repeated violation and, by **10** for the second repeated violation.

C. Other-than-Serious, No Initial Penalty.

For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP penalty of $200 shall be proposed for the first repeated violation, $500 for the second repeated violation, and $1,000 for a third repetition.

NOTE: These penalties shall not be subject to the Penalty Increase factors as discussed in Paragraph III.*B. of this chapter.*

D. Regulatory Violations.

1. For calculating the GBP for regulatory violations, see Paragraph III.A.5. and Section X.

2. For repeated instances of regulatory violations, the initial penalty shall be multiplied by 2 for the first repeated violation and multiplied by 5 for the second repeated violation. If the Chief of AKOSH Enforcement determines that it is necessary to achieve the proper deterrent effect, the initial penalty may be multiplied by 10.

IV. Willful Violations.

AS 18.60.095(a) provides that an employer may be assessed a civil penalty of not more than $70,000 for each willful violation, but not less than $5,000 for each willful violation. See *Minimum Penalties* at Paragraph I.C. of this chapter.

A. General.

1. Each willful violation shall be classified as serious or other-than-serious.
2. There shall be no reduction for good faith.
3. In no case shall the proposed penalty for a willful violation (serious or other-than-serious) after reductions be less than $5,000.

B. Serious Willful Penalty Reductions.

Unless an alleged violation resulted or contributed to a fatality, amputation or paralysis of at least one hand, foot, or limb, the reduction factors for size for serious willful violations shall be applied as shown in the following chart. This chart helps minimize the impact of large penalties for small employers with 50 or fewer employees. However, in no case shall the proposed penalty be less than the statutory minimum, i.e., $5,000 for these employers.

NOTE: For violations that are not serious willful, use the size chart in Paragraph III.B.2.

Employees	**Percent reduction**
10 or fewer	80
11-20	60
21-30	50
31-40	40

41-50	30
51-100	20
101-250	10
251 or more	0

The reduction factor for history shall be applied.

For an alleged violation resulting in or contributing to a fatality or amputation or paralysis of foot, hand or limb, the following penalty reduction schedule shall be used:

Employees	**Percent reduction**
10 or fewer	40
11-20	30
21-30	25
31-40	20
41-50	15
51-100	10
101-250	5
251 or more	0

The proposed penalty shall then be determined from Table 6-6.

Table 6-6: Penalties to be Proposed for Serious Willful Violations

Total percent reduction for size and/or history	High Gravity	Moderate Gravity	Low Gravity
0%	$70,000	$55,000	$40,000
10%	$63,000	$49,500	$36,000
20%	$56,000	$44,000	$32,000
30%	$49,000	$38,500	$28,000
40%	$42,000	$33,000	$24,000
50%	$35,000	$27,500	$20,000
60%	$28,000	$22,000	$16,000
70%	$21,000	$16,500	$12,000
80%	$14,000	$11,000	$8,000
90%	$7,000	$5,500	$5,000

C. Willful Regulatory Violations.

1. For calculating the GBP for regulatory violations, see Paragraph III.A.5. and Section X for other-than-serious violations.

2. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after reduction for size and history, be less than $5,000.

3. For egregious cases, see AKOSH PD 10-13, *Severe Violator Enforcement Program,* dated September 15, 2010 (CPL 02-00-149).

V. Penalties for Failure to Abate.

A. General.

1. Failure to Abate penalties shall be proposed when:

   a. A previous citation issued to an employer has become a final order of the Commission; and

   b. The condition, hazard or practice found upon re-inspection is the same for which the employer was originally cited and has never been corrected by the employer (i.e., the violation was continuous).

2. The citation has to have become a final order.

B. Calculation of Additional Penalties.

1. Unabated Violations.

A GBP for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon reinspection. This recalculated GBP, however, shall not be less than that proposed for the item when originally cited.

a. EXCEPTION: When the CSHO believes and documents in the case file that the employer has made a good faith effort to correct the violation and had an objective reasonable belief that it was fully abated, the AKOSH Chief of Enforcement may reduce or eliminate the daily proposed penalty.

b. For egregious cases see CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990.

2. No Initial Proposed Penalty.

In instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the AKOSH Chief of Enforcement. In no case shall the GBP be less than $1,000 per day.

3. Size Only Permissible Reduction Factor.

Only the reduction factor for size – based upon the circumstances noted during the reinspection – shall be applied to arrive at the daily proposed penalty.

4. Daily Penalty Multiplier.

The daily proposed penalty shall be multiplied by the number of calendar days that the violation has continued unabated, except as provided below:

a. The number of days unabated shall be counted from the day following the abatement date specified in the citation or the final order. It will include all calendar days between that date and the date of reinspection, excluding the date of reinspection.

b. Normally the maximum total proposed penalty for failure to abate a particular violation shall not exceed **30** times the amount of the daily proposed penalty.

c. At the discretion of the AKOSH Chief of Enforcement, a lesser penalty may be proposed. The reasoning for the lesser penalty shall be fully explained (e.g., achievement of an appropriate deterrent effect) in the case file.

d. If a penalty in excess of the normal maximum amount of **30** times the amount of the daily proposed penalty is deemed necessary by the AKOSH Chief of Enforcement to deter continued non-abatement, the case shall be treated pursuant to the violation-by-violation (egregious) penalty procedures established in CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990.

C. Partial Abatement.

1. When a citation has been partially abated, the AKOSH Chief of Enforcement may authorize a reduction of 25 to 75 percent to the amount of the proposed penalty calculated as outlined above.
2. When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty shall take into consideration the extent of the abatement efforts.

   EXAMPLE 6-3: Where three out of five instances have been corrected, the daily proposed penalty (calculated as outlined above, without regard to any partial abatement) may be reduced by 60 percent.

VI. Violation-by-Violation (Egregious) Penalty Policy.

A. Penalty Procedure.

Each instance of noncompliance shall be considered a separate violation with individual proposed penalties for each violation. This procedure is known as the egregious or violation-by-violation penalty procedure.

B. Case Handling.

Such cases shall be handled in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990.

C. Calculation of Penalties.

Penalties calculated using the violation-by-violation policy shall not be proposed without the concurrence of the Commissioner of Labor and Workforce Development.

VII. Significant Enforcement Actions.

A. Definition/Scope.

A significant enforcement action (aka significant case) is one which results from an investigation in which the total proposed penalty is $100,000 or more. The Commissioner of Labor and Workforce Development shall be consulted prior to issuing a significant case penalty.

B. Multi-employer Worksites.

Several related inspections involving the same employer, or involving more than one employer in the same location (such as multi-employer worksites) and submitted together, may also be considered to be a significant enforcement action if the total aggregate penalty is $100,000 or more.

VIII. Penalty and Citation Policy for posting requirements.

AS 18.60.095(g) provides that any employer who violates any of the posting requirements shall be assessed a civil penalty of up to $7,000 for each violation (this includes recordkeeping violations). The following policy and procedure document must also be consulted for an in-depth review of these policies: CPL 02-00-111 (AKOSH 96-9), *Citation Policy for Paperwork and Written Program Requirement Violations*, issued November 27, 1995. Gravity-Based Penalties (GBPs) for regulatory violations, including posting requirements, shall be reduced for size and history (excluding willful violations, see Chapter 4, Section V, *Willful Violations*).

A. Posting Requirements

Penalties for violation of posting requirements shall be proposed as follows:

1. Failure to Post the AKOSH Notice (Poster) AS 18.60.068

A citation for failure to post the AKOSH Notice is warranted if:

a. The pattern of violative conditions for a particular establishment demonstrates a consistent disregard for the employer's responsibilities under AKOSH laws; AND

b. Interviews show that employees are unaware of their rights under the Act; OR

c. The employer has been previously cited or advised by AKOSH of the posting requirement.

If the criteria above are met and the employer has not displayed (posted) the notice furnished by AKOSH, an other-than-serious citation shall normally be issued. The GBP for this alleged violation shall be $1,000.

2. Failure to Post a Citation - AS 18.60.091(c).

a. If an employer received a citation that was not posted as prescribed in AS 18.60.091(c), an other-than-serious citation shall normally be issued. The GBP shall be $1,000, unless evidence demonstrates that the failure to post was intentional and then the minimum GBP shall be $3,000.

b. For information regarding the OSHA-300A form, see CPL 02-00-135 (AKOSH PD 05-10), *Recordkeeping Policies and Procedures Manual*, December 30, 2004.

B. Advance Notice of Inspection – AS 18.60.085.

When an employer has received advance notice of an inspection, the person providing unauthorized notice is subject to criminal prosecution punishable by a fine of not more than $7,000 or by imprisonment for not more than 180 days or by both.

C. Abatement Verification Regulation Violations – AS 18.60.093(b).

1. General.

a. The penalty provisions of AS 18.60.095 apply to all citations issued under this statute. Only the reduction factor for size shall apply when assessing penalties.

b. See Chapter 7, *Post-Citation Inspection Procedures and Abatement Verification*, for detailed guidance.

2. Penalty for Failing to Certify Abatement.

a. A penalty for failing to submit abatement certification documents, 8 AAC 61.142 and 29 CFR §1903.19(c)(1), shall be $1,000, reduced only for size.

b. A penalty for failure to submit abatement verification documents will not exceed the penalty for the entire original citation.

c. No “Good Faith” or “History” reductions shall be given to employers cited for failure to certify abatement.

3. Penalty for Failing to Notify and Tagging.

a. Penalties for not notifying employees and tagging movable equipment 29 CFR §1903.19 [paragraphs (g)(1), (g)(2), (g)(4), (i)(1), (i)(2), (i)(3), (i)(5) and (i)(6)] as adopted in 8 AAC 61.142(a) will follow the same penalty structure (GBP of $3,000) as for Failure to Post a Citation.

b. No "Good Faith" or "History" reductions shall be given to employers for failure to notify employees and tagging movable equipment.

D. Injury and Illness Records and Reporting under AS 18.60.030(7) and 8 AAC 61.1010(a) which adopts 29 CFR Part 1904.

1. Part 1904 violations are always other-than-serious.

2. Repeated and Willful penalty policies in paragraphs V.D. and VI.C., respectively, of this Chapter, may be applied to recordkeeping violations.

3. OSHA's egregious penalty policy may be applied to recordkeeping violations. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990.

4. See CPL 02-00-135 (AKOSH PD 05-10), *Recordkeeping Policies and Procedures Manual*, dated December 30, 2004; specifically Chapter 2, Section II, *Inspection and Citation Procedures*.

IX. Failure to Provide Access to Medical and Exposure Records – §1910.1020.

A. Proposed Penalties.

If an employer is cited for failing to provide access to records as required under 29 CFR §1910.1020 for inspection and copying by any employee, former employee, or authorized representative of employees, a GBP of $1,000 shall normally be proposed for each record (i.e., either medical record or exposure record, on an individual employee basis). A maximum GBP of $7,000 may be proposed for such violations in accordance with AS 18.60.095(c).

EXAMPLE 6-4: If the evidence demonstrates that an authorized employee representative requests both exposure and medical records for three employees and the request was denied by the employer, a citation would be issued for six instances (i.e., one medical record and one exposure record (total two) for each of three employees) of a violation of 29 CFR §1910.1020, with a GBP of $6,000.

B. Use of Violation-by-Violation Penalties.

The above policy does not preclude the use of violation-by-violation or per employee penalties where higher penalties are appropriate. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990.

X. Criminal Penalties.

A. AKOSH law provides criminal penalties in the following cases:

1. Willful violation of an AKOSH standard, rule, or order causing the death of an employee; AS 18.60.095(e);
2. Giving unauthorized advance notice; AS 18.60.085;
3. Knowingly giving false information; AS 18.60.095(f); and

B. Courts.

Criminal penalties are the sole jurisdiction of the Alaska Court System and must be pursued in conjunction with the Department of Law.

XI. Handling Monies Received from Employers.

A. Responsibility of the Chief of AKOSH Enforcement.

Pursuant to its statutory authority, it is AKOSH policy to collect all penalties owed to the government. The Chief of AKOSH Enforcement is responsible for:

1. Informing employers of AKOSH's debt collection procedures;
2. Collecting assessed penalties from employers;
3. Reporting penalty amounts collected and those due;
4. Calculating interest and other charges on overdue penalty amounts;
5. Referring cases with uncollected penalties to the contracted collection agency;
6. Transferring selected cases to the AAG for legal action and subsequently tracking such cases;
7. Mailing collected monies in accordance with the State of Alaska revenue procedures; and
8. Reviewing bankruptcy filings and initiating debt cancellation proceedings when necessary.

B. Receiving Payments.

The Chief of AKOSH Enforcement shall be guided by the following with regard to penalty payments:

1. Methods of Payment.

Employers assessed penalties shall remit the total payment by certified check, personal check, company check, postal money order, bank draft or bank money order, payable to **AKOSH**. Payment in cash shall not be accepted. Upon request of the employer and for good cause, alternate methods of payment are permissible, such as payments in installments.

2. Identifying Payment.

3. Adjustment to Payments.

The following adjustments shall be made prior to transmitting the payment instrument to Depository. See Paragraph XIII.B.6. of this chapter, *Depositing Payments*.

a. If the payment instrument is not dated, the date received shall be entered as the date of payment.

b. If the payment instrument has differing numeric and written amounts, the written amount shall be credited and the instrument deposited. If the written amount is obviously incorrect or differs from the amount referenced in the accompanying correspondence, the payment instrument shall be returned to the employer via certified mail for correction.

c. If the payment instrument does not include the establishment name, the name shall be inserted on the face of the payment instrument.

d. If the payment instrument includes the notation, "Payment in Full," whether or not the notation is incorrect, the payment shall be deposited.

e. If the payment instrument is unsigned, the payment shall be deposited.

f. If an employer mistakenly makes the payment payable to an official of AKOSH by name, it shall be endorsed as follows:

- Postal Money Orders – follow instruction on reverse of the money order.

- All others – enter on reverse:

  Pay to the order of AKOSH

  _____(Signature)
  (Typewritten name of payee)

4. Incorrect, Unhonored, or Foreign Payments.

a. Incorrectly dated payments shall be handled as follows:

- If the payment instrument is dated 10 days or more after the date of receipt, it is to be returned to the employer.
- If the payment instrument is dated less than 10 but more than 3 days after the date of receipt, it is to be held for deposit on the day it is dated.
- Payment instruments dated 3 or fewer days after the date of receipt are to be deposited under AKOSH procedures.

- If the payment instrument is dated more than six months prior to the current date, it is to be returned to the employer via certified mail.

b. Payment instruments which have been returned without payment, due to insufficient funds, shall be returned to the employer via certified mail.

c. Payments drawn on non-U.S. banks are to be deposited.

5. Endorsing Payments.

All payment instruments shall be endorsed as follows:

<u>Pay to the Order of:</u>
Key Bank Alaska
For Deposit Only To
State of Alaska
Alaska Occupational
Safety and Health

6. Depositing Payments.

All payments shall be kept in a safe place and, unless otherwise indicated, deposited daily.

7. Records.

A copy of the penalty payment instrument shall be included in the case file. Additional accounting records shall also be included in the case file in accordance with current procedures.

C. Refunds.

In cases of later penalty modifications by AKOSH or by the Review Board or a court, refunds to the employer shall be made by the Department of Labor and Workforce Development.

XII. Debt Collection Procedures.

The date when penalties become due and payable depends on whether or not the employer contests.

1. Uncontested Penalties.

When citations and/or proposed penalties are uncontested, the penalties are due and payable 15 working days following the employer's receipt of the Citation and Notification of Penalty or, in the case of Informal Settlement Agreements, 15 working days after the date of the last signature unless a later due date for payment of penalties is agreed upon in the settlement.

2. **Contested Penalties**.

When citations and/or proposed penalties are contested, the date penalties are due and payable will depend upon whether the case is resolved by a settlement agreement, an administrative law judge decision, a Board decision, or a court judgment. See Chapter 13, Section VIII., *Citation Final Order Dates*, for additional information.)

3. **Partially Contested Penalties**.

When only part of a citation and/or a proposed penalty is contested, the due date for payment as stated in paragraph XII.1., *Uncontested Penalties*, shall be used for the uncontested items and the due date stated in Paragraph XIV.B.2., *Contested Penalties*, for the contested items.

NOTE: This provision notwithstanding, formal debt collection procedures will not be initiated in partially contested cases until a final order for the outstanding citation items has been issued.

A. Notification Procedures.

It is AKOSH policy to notify employers (the "Notice") that debts are payable and due, and to inform them of AKOSH's debt collection procedures prior to assessing any applicable delinquent charges. A copy of the "Notice" stating AKOSH's debt collection policy, including assessment of interest, additional charges for nonpayment and administrative costs, shall be included with each Citation and Notification of Proposed Penalty, OSHA-2 Form, sent to employers. A copy of the "Notice" shall be retained in the case file.

B. Notification of Overdue Debt.

The Chief of AKOSH Enforcement shall send a demand letter to the employer when the debt has become delinquent and shall retain a copy of the demand letter in the case file. A debt becomes delinquent **30 calendar days after the due date**, which is the same as the **final order date** as stated in Chapter 13, Section VIII., *Citation Final Order Dates*.

1. **Uncontested Case with Penalties.**

If payment of any applicable penalty is not received within 30 calendar days after the date of the expiration of the 15 working day contest period, or 15 working days after the date of the last signature (unless a later due date for payment of penalties is agreed upon in the settlement) if an Informal Settlement Agreement has been signed, a demand letter shall be mailed.

2. **Contested Case with Penalties.**

If payment of any applicable penalty is not received within 30 calendar days after the Review Board's **Order** approving a Formal Settlement Agreement, 60 calendar days after the **Notice of Docketing**, 90 calendar days after the **Notice of Board Decision**, or 120 calendar days after date of the judgment of the Alaska Superior Court, and no appeal of the case has been filed by either AKOSH or the employer, the Chief of AKOSH Enforcement shall either send a demand letter or a letter notifying the employer that the AKOSH fine is past due (without assessing late fees and updating the IMIS as if a default letter had been sent).

3. Exceptions to Sending the Demand Letter.

The demand letter will not be sent in the following circumstances:

a. The employer is currently making payments under an approved installment plan or other satisfactory payment arrangement. Such plan or arrangement shall be set forth in writing and signed by the employer and the Chief of AKOSH Enforcement.

*NOTE: If the employer enters into a **written** plan establishing a set payment schedule within one calendar month of the due date, but subsequently fails to make a payment within one calendar month of its scheduled due date, a payment default letter shall be sent to the employer. If the employer fails to respond satisfactorily to that letter within one month, the unpaid portion of the debt shall be handled in accordance with Paragraph XIII.4.,* Assessment Procedures.

b. The employer has partially contested the case (even if the penalty has not been contested). In such circumstances a demand letter shall not be sent until a final order has been issued.

C. Assessment of Additional Charges.

Additional charges shall be assessed in accordance with Alaska law.

1. Interest.

When applicable, interest on the unpaid principal amount shall be assessed on a monthly basis at the current annual rate if the debt has not been paid within one calendar month of the date on which the debt (penalty) became due and payable (i.e., the date of the final order). Interest is not assessed if an acceptable repayment schedule has been established in a written plan by the due date.

NOTE: Interest and delinquent charges are not compounded; only the unpaid balance of the penalty amount is used to calculate these additional charges.

XIII. Assessment Procedures.

If the penalty has not been paid by the delinquent date (i.e., within one calendar month of the due date), the Chief of AKOSH Enforcement shall implement the following procedures:

1. If applicable, interest shall be assessed at the current interest rate on the unpaid balance of the debt. The rate of interest shall remain fixed for the duration of the debt.

   NOTE: Interest will generally only be due upon an order from the OSH Review Board or Court of competent jurisdiction.

2. The demand letter shall be sent to the employer requesting immediate payment of the debt. The demand letter shall show the total amount of the debt, including the unpaid penalty amount, interest and administrative costs.

3. Employers may respond to the demand letter in several ways:

   a. The entire debt may be paid. In such cases no further collection action is necessary.

   b. A repayment plan may be submitted or offered; after a set payment schedule has been approved by the Chief of AKOSH Enforcement, no additional charges shall be levied against the debt as long as payments are timely made in accordance with the approved schedule. See note under Paragraph XIII.3.B.a. of this chapter, *Exceptions to Sending Demand Letter*. If payments are not made on schedule, the unpaid portion of the debt shall be treated in accordance with Paragraph XIV.F.

   c. A partial payment may be made; the unpaid portion of the debt shall be treated in accordance with Paragraph XIV.F. of this chapter.

4. If any portion of the debt remains unpaid after one calendar month from the time the demand letter was sent to the employer, the Chief of AKOSH Enforcement shall institute one of the following:

   a. Outstanding debts less than $100 may be written off.

   b. If the employer made a payment after receiving the demand letter, AKOSH may:

      - Send a receipt letter or contact the employer to request the balance due on the debt
      - Refer the case to collections

   c. Outstanding debts with a current debt of $100 or more shall be referred to collections.

5. After a case has been referred for collection, the Chief of AKOSH Enforcement has no further responsibilities with regard to penalty collection related to that case except to track the successful collection of the penalty.

6. If, after a case has been referred to collections, the employer sends a payment to AKOSH, the case is subsequently contested or new information regarding the debt or employer is obtained, the Chief of AKOSH Enforcement shall contact the collection agency to avoid further action.

7. The responsibility for closing the case remains with the Chief of AKOSH Enforcement. Once final collection action has been completed, the case may be closed whenever appropriate.

XIV. Application of Payments.

Payments that are for less than the full amount of the debt shall be applied to satisfy the following categories in order of priority:

1. Administrative charges;
2. Delinquent charges;
3. Interest;
4. Outstanding principal.

XV. Uncollectible Penalties.

There may be cases where a penalty cannot be collected, regardless of any action that has been or may be undertaken. Examples might be when a demand letter is not deliverable, a company is no longer in business and has no successor, or the employer is bankrupt. In such cases, the Chief of AKOSH Enforcement **shall notify** the Director and recommend the debt be written off as “bad debt”. In bankruptcy cases, the Chief of AKOSH Enforcement may also seek the advice of the Assistant Attorney General to determine whether to file a Proof of Claim with the Bankruptcy Court.

Chapter 7

POST-CITATION PROCEDURES AND ABATEMENT VERIFICATION

I. Contesting Citations, Notifications of Penalty or Abatement Dates.

CSHOs shall advise the employer that the citation, the penalty and/or the abatement date may be contested in cases where the employer does not agree to the citation, penalty or abatement date or any combination of these.

A. Notice of Contest.

CSHOs shall inform employers that if they intend to contest, the Chief of AKOSH Enforcement must be notified in writing and such notification must be postmarked no later than the 15th working day after receipt of the citation and notification of penalty (working days are Monday through Friday, excluding State of Alaska holidays), otherwise the citation becomes a final order of the Board. See AS 18.60.093(a). AKOSH has no authority to modify the contest period, but the Board may allow a late notice of contest upon adequate motion from the employer under 8 AAC 61.150(f). Employers may also be apprised that their notice of contest can be sent electronically via email to the Chief of AKOSH Enforcement within the 15 working day period and provide employers the email address(es). It shall be emphasized that oral notices of contest do not satisfy the requirement to give written notification.

NOTE: AKOSH shall forward notice of contest documentation to the Occupational Safety and Health Review Board and the Assistant Attorney General.

1. An employer's Notice of Intent to Contest must clearly state what is specifically being contested. Pursuant to 8 AAC 61.150(b), a notice of contest must contain 1) a specification of the citation, proposed penalty, or abatement date being contested; 2) a concise statement of fact giving the reason for the contest; and 3) any views or arguments on any issue of fact or law presented.

    a. If the employer only requests a later abatement date and there are valid grounds to consider the request, the Chief of AKOSH Enforcement should be contacted. The Chief of AKOSH Enforcement may issue an amended citation changing an abatement date prior to the expiration of the 15 working day period.

    b. If the employer contests only the penalty or some of the citation items, all uncontested items must still be abated by the dates indicated on the citation and the corresponding penalties paid within 15 days of notification.

2. CSHOs shall inform the employer 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.

B. Contest Process.

The CSHO shall explain that when a Notice of Intent to Contest is properly filed, the Chief of AKOSH Enforcement is required to forward the case to an independent adjudicatory agency, (Review Board) at which time the case is considered to be in litigation.

1. AKOSH will normally cease all investigatory activities once an employer has filed a notice of contest. Any action relating to a contested case must first have the concurrence of the Assistant Attorney General.

2. Upon receipt of the Notice of Intent to Contest, the Review Board assigns the case to an administrative law judge, who will schedule a hearing in a public place close to the workplace.

II. Informal Conferences.

A. General.

1. Pursuant to8 AAC 61.155, the employer, any affected employee, or the employee representative may request an informal conference for the purpose of discussing any issues raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest.

2. The informal conference will be conducted within the 15 working day contest period. The conference or any request for such a conference shall not operate as a stay of the 15 working day contest period.

3. If the employer's intent to contest is not clear, the Chief of AKOSH Enforcement or designated representative will make an effort contact the employer for clarification.
4. Informal conferences may be held by any means practical, but meeting in person is preferred.

B. Assistance of Counsel.

In the event that an employer is bringing its attorney to an informal conference, the Director of Labor Standards and Safety or his or her designee may contact the Assistant Attorney General's Office assistance.

C. Opportunity to Participate.

1. If an informal conference is requested by the employer, an affected employee or his representative may be afforded the opportunity to participate. If the

conference is requested by an employee or an employee representative, the employer may be afforded an opportunity to participate.

2. If the affected employee or employee representative chooses not to participate in the informal conference, an attempt will be made to contact that party and to solicit their input prior to the informal conference. Attempts to contact the party should be noted in the case file.

   NOTE: In the event of a settlement, it is not necessary to have the employee representative sign the informal settlement agreement.

3. If any party objects to the attendance of another party or the Director of Labor Standards and Safety or designee believes that a joint informal conference would not be productive, separate informal conferences may be held.

4. During the conduct of a joint informal conference, separate or private discussions will be permitted if either party so requests.

D. Notice of Informal Conferences.

Director of Labor Standards and Safety or designee shall document in the case file notification to the parties of the date, time and location of the informal conference. In addition, the Case File Diary Sheet shall indicate the date of the informal conference.

E. Posting Requirement.

1. The Director of Labor Standards and Safety or designee will ask the employer at the beginning of the informal conference whether the form in the citation package indicating the date, time, and location of the conference has been posted as required.

2. If the employer has not posted the form, the Director of Labor Standards and Safety or designee may postpone the informal conference until such action is taken.

F. Conduct of the Informal Conference.

The informal conference will be conducted in accordance with the following guidelines:

1. **Conference Subjects**.

   a. Purpose of the informal conference;
   b. Rights of participants;
   c. Contest rights and time constraints;
   d. Limitations, if any;
   e. Potential for settlements of citations; and

f. Other relevant information (e.g., if no employee or employee representative has responded, whether the employer has posted the notification form regarding the informal conference, etc.).

2. Subjects Not to be Addressed.

a. No opinions regarding the legal merits of an employer's case shall be expressed during the informal conference.
b. There should be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the Department of Law for criminal prosecution.

3. Closing Remarks.

a. At the conclusion of the conference, all main issues and potential courses of action will be summarized and documented.
b. A copy of the summary, together with any other relevant notes of the discussion made by the Director of Labor Standards and Safety or designee, will be placed in the case file.

III. Petition for Modification of Abatement Date (PMA).

An employer may file a petition for modification of abatement date when it has made a good faith effort to comply with abatement requirements, but such abatement has not been completed due to circumstances beyond its control. See 8 AAC 61.135. If the employer requests additional abatement time after the 15 working day contest period has passed, the following procedures for PMAs are to be observed:

A. Filing.

A PMA must be filed in writing and must include the following information:

1. all steps taken by the employer and the dates of that action, in an effort to achieve compliance during the prescribed abatement period;
2. the specific additional abatement time necessary in order to achieve compliance;
3. the reasons the 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;
4. all available interim steps being taken to safeguard the employees against the cited hazard during the abatement period;
5. a certification that a copy of the petition has been posted and, if appropriate, served on the authorized representative of affected employees, in accordance with (d) of this section, and a certification of the date upon which the posting and service were made.

A PMA for the abatement date must be filed with the director no later than the close of the next working day following the date on which abatement was originally required. A later-filed petition must be accompanied by the employer's statement of exceptional circumstances explaining the delay.

At the time of filing the petition with the director, a copy of the petition must be posted in a conspicuous place where all affected employees will have notice of it or near each location where the violation occurred. The petition must remain posted for a period of 10 days, Where affected employees are represented by an authorized representative, the representative must be served with a copy of the petition.

B. Objection to PMA

Affected employees or their representatives may file an objection in writing to the petition with the director. Failure to file an objection within 10 working days of the date of posting of the petition or of service upon an authorized representative will constitute a waiver of any further right to object to the petition.

C. Approval of PMA

The commissioner or authorized representative will not act on the petition until the expiration of at least 15 working days from the date the petition was filed with the director.

If a petition is objected to by the commissioner or authorized representative or affected employees, the petition, citation, and any objections will be forwarded to the Board for a hearing and decision on the petition within three days after the expiration of the 15 working day period.

An employer whose petition for modification of an abatement date is heard by the board will have the burden of proof to demonstrate that it has made a good-faith effort to comply with the abatement requirements of the citation but that abatement has not been completed because of factors beyond the employer's reasonable control.

IV. OSHA's Abatement Verification Regulation, 29 CFR §1903.19 as adopted by AKOSH under 8 AAC 61.142.

A. Important Terms and Concepts.

1. Abatement.

a. Abatement means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by AKOSH during an inspection.

b. For each inspection, except follow-up inspections, AKOSH shall open an employer-specific case file. The case file remains open throughout the inspection process and is not closed until AKOSH is satisfied that abatement has occurred. If abatement was not completed, annotate the circumstances or reasons in the case file and enter the proper code in the IMIS.

c. Employers are required to verify in writing that they have abated cited conditions, in accordance with 29 CFR §1903.19.

2. Abatement Verification.

Abatement verification includes abatement certification, documents, plans, and progress reports.

3. Abatement Certification.

Employers must certify that abatement is complete for each cited violation. The written certification must include: the employer's name and address; the inspection number; the citation and item numbers; a statement that the information submitted is accurate; signature of the employer or employer's authorized representative; the date and method of abatement for each cited violation; and a statement that affected employees and their representatives have been informed of the abatement.

4. Abatement Documents.

Documentation submitted must establish that abatement has been completed, and include evidence such as the purchase or repair of equipment, photographic or video evidence of abatement or other written records verifying correction of the violative condition.

5. Affected Employee.

Affected employee means those employees who are exposed to the hazards(s) identified as violations(s) in a citation.

6. Final Order Dates.

a. Uncontested Citation Item.

For an uncontested citation item, the final order date is the day following the fifteenth working day after the employer's receipt of the citation.

b. Contested Citation Item.

For a contested citation item, the final order date is as follows:

- The thirtieth day after the date on which a decision or order of a Review Board administrative law judge has been docketed with the Board, unless a member of the Board has directed review; or

- Where review has been directed, the thirtieth day after the date on which the Board issues its decision or order disposing of all or pertinent part of a case; or

- The date on which a federal appeals court issues a decision affirming the violation in a case in which a final order of Review Board has been stayed.

c. Informal Settlement Dates.

The final order date is when, within the 15 working days to contest a citation, the ISA is signed by **both** parties. See also Chapter 15, Section XIII, *Citation Final Order Dates*.

7. Abatement Dates.

a. Uncontested Citations.
For uncontested citations, the abatement date is the later of the following dates:

- The abatement date identified in the citation;
- The extended date established as a result of an employer's filing for a Petition for Modification of Abatement (PMA); or
- The date established by an informal settlement agreement.

b. Contested Citations.

For contested citations for which the Review Board has issued a final order, the abatement date is the later of the following dates:

- The date identified in the final order for abatement;
- Where there has been a contest of a violation or abatement date (not penalty), the date computed by adding the period allowed in the citation for abatement to the final order date; or
- The date established by a formal settlement agreement.

c. Contested Penalty Only.

Where an employer has contested only the proposed penalty, the abatement period continues to run unaffected by the contest. The abatement period is subject to the time periods set forth above.

8. Movable Equipment.

a. Movable equipment means a hand-held or non-hand-held machine or device, powered or non-powered, that is used to do work and is moved within or between worksites.

b. Hand-held equipment is equipment that is hand-held when operated and can generally be picked up and operated with one or two hands, such as a hand grinder, skill saw, portable electric drill, nail gun, etc.

V. Worksite.

a. For the purpose of enforcing the Abatement Verification regulation, the worksite is the physical location specified within the "Alleged Violation Description" of the citation.

b. If no location is specified, the worksite shall be the inspection site where the cited violation occurred.

A. Written Certification.

The Abatement Verification Regulation, §1903.19**,** requires those employers who have received a citation(s) for AKOSH law violation(s) to certify in writing that they have abated the hazardous condition for which they were cited and to inform affected employees of their abatement actions.

B. Verification Procedures**.**

The verification procedures to be followed by an employer depend on the nature of the violation(s) identified and the employer's abatement actions. The abatement verification regulation establishes requirements for the following:

1. Abatement Certification
2. Abatement Documentation
3. Abatement Plans
4. Progress Reports
5. Tagging for Movable Equipment

C. Supplemental Procedures.

Where necessary, AKOSH supplements these procedures with follow-up inspections and onsite monitoring inspections. For additional information see Section XII of this chapter, *OnSite Visits: Procedures for Abatement Verification and Monitoring*.

D. Requirements.

Except for the application of warning tags or citations on movable equipment (29 CFR §1903.19(i)), the abatement verification regulation does not impose any requirements on the employer until a citation item has become a final order of the Review Board. For moveable hand-held equipment, the warning tag or citation must

be attached immediately after the employer receives the citation. For other moveable equipment, the warning tag or citation must be attached prior to moving the equipment within or between worksites.

VI. Abatement Certification.

A. Minimum Level.

Abatement certification is the minimum level of abatement verification and is required for all violations once they become Review Board final orders. An exception exists where the CSHO observed abatement during the onsite portion of the inspection and the violation is listed on the citation as "Corrected During Inspection (CDI)" or "Quick-Fix." See Paragraph VII.D. of this chapter, *CSHO Observed Abatement*.

B. Certification Requirements.

The employer's written certification that abatement is complete must include the following information for each cited violation:

1. The date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement;
2. The employer's name and address;
3. The inspection number to which the submission relates;
4. The citation and item numbers to which the submission relates;
5. A statement that the information submitted is accurate; and
6. The signature of the employer or the employer's authorized representative.

A non-mandatory example of an abatement certification letter is available in Appendix A of the Abatement Verification Regulation (29 CFR §1903.19).

C. Certification Timeframe.

1. All citation items which have become final orders, regardless of their characterizations, require written abatement certification within 10 calendar days of the abatement date.

2. A PMA received and processed in accordance with the guidance of the FOM will suspend the 10-day time period for receipt of the abatement certification for the item for which the PMA is requested.

    a. Thus, no citation will be issued for failure to submit the certification within 10 days of the abatement date.

    b. If the PMA is denied, the 10-day time period for submission to AKOSH begins on the day the employer receives notice of the denial.

VII. Abatement Documentation.

More extensive documentation of abatement is required for the most serious violations. When a violation requires abatement documentation, in addition to certifying abatement, the employer must submit documents demonstrating that abatement is complete.

A. Required Abatement Documentation.

Pursuant to 29 CFR §1903.19, documentation of abatement is required for the following:

1. Willful violations;

2. Repeat violations; and

3. Serious violations where AKOSH determines that such documentation is necessary as indicated on the citation. For further information see Paragraph VII.C. of this chapter, *Abatement Documentation for Serious Violations*.

B. Adequacy of Abatement Documentation.

1. Abatement documentation must be accurate and describe or portray the abated condition adequately. It may be submitted in electronic form, if approved by the Chief of AKOSH Enforcement.

2. The abatement regulation does not mandate a particular type of documentary evidence for any specific cited conditions.

3. The adequacy of the abatement documentation submitted by the employer will be assessed by AKOSH using the information available in the citation and the Agency's knowledge of the employer's workplace and history.

4. Examples of documents that demonstrate that abatement is complete include, but are not limited to:

   a. Photographic or video evidence of abatement;
   b. Evidence of the purchase or repair of equipment;
   c. Evidence of actions taken to abate;
   d. Bills from repair services;
   e. Reports or evaluations by safety and health professionals describing the abatement of the hazard or a report of analytical testing;
   f. Documentation from the manufacturer that the article repaired is within the manufacturer's specifications;
   g. Records of training completed by employees if the citation is related to inadequate employee training; and
   h. A copy of program documents if the citation was related to a missing or inadequate program, such as a deficiency in the employer's respirator or hazard communication program.

5. Abatement documentation (photos, employer programs, etc.) shall be retained in accordance with ADM 03-01-005, *OSHA Compliance Records*, dated August 3, 1998.

C. Abatement Documentation for Serious Violations.

1. High Gravity Serious Violations.

a. AKOSH policy is generally that all high gravity serious violations will require abatement documentation.

b. Where, in the opinion of the Chief of AKOSH Enforcement, abatement documentation is not required for a high gravity serious violation, the reasons for this must be set forth in the case file.

2. Moderate or Low Gravity Serious Violations.

Moderate or low gravity serious violations should not normally require abatement documentation, except that the Chief of AKOSH Enforcement will require evidence of abatement for moderate and low gravity serious violations under the following circumstances:

a. If the establishment has been issued a citation for a willful violation or a failure-to-abate notice for any standard which has become final order in the previous three years; or

b. If the employer has any history of a violation that resulted in a fatality or an OSHA-300 log entry indicating serious physical harm to an employee in the past three years. The standard being cited must be similar to the standard cited in connection with the fatality or serious injury or illness.

D. CSHO Observed Abatement.

1. Employers are not required to certify abatement for violations which they promptly abate during the onsite portion of the inspection and observed by the CSHO.

a. The Chief of AKOSH Enforcement may use discretion in extending the “24 hour” time limit to document abated conditions during the inspection.

b. Observed abatement will be documented on the Violations Summary Form (OSHA-1B and/or OSHA-1B(IH)), for each violation and must include the date and method of abatement.

2. If the observed abatement is for a violation that would normally require abatement documentation by the employer, the documentation in the case file must also indicate that abatement is complete. Where suitable, the CSHO may use

photographs or video evidence. For additional information regarding adequacy of abatement documentation, see Paragraph VII.B. of this chapter, *Adequacy of Abatement Documentation*.

3. When the abatement has been witnessed and documented by the CSHO, a notation reading "Corrected During Inspection" shall be made on the citation. Immediate abatement of some violations may qualify for penalty reductions under AKOSH's "Quick-Fix" incentive program. These incentives are discussed with the employer during the opening conference. See Chapter 6 .

VIII. Monitoring Information for Abatement Periods Greater than 90 Days.

A. Abatement Periods Greater that 90 Days.

For abatement periods greater than 90 calendar days, the regulation allows the Area Director flexibility in either requiring or not requiring monitoring information.

1. The requirement for abatement plans and progress reports must be specifically associated to the citation item to which they relate.

2. Progress reports may not be required unless abatement plans are specifically required.

3. Note that Paragraphs (e) and (f) of §1903.19 have limits: the Chief of AKOSH Enforcement is not allowed to require an abatement plan for abatement periods less than 91 days or for citations characterized as other-than-serious.

4. The regulation places an obligation on employers, where necessary, to identify how employees are to be protected from exposure to the violative condition during the abatement period. One way of ensuring that interim protection is included in the abatement plan is to note this requirement on the citation. See 29 CFR §1903.19, Non-Mandatory Appendix B, for a sample of an Abatement Plan and Progress Report.

B. Abatement Plans.

1. The Chief of AKOSH Enforcement may require an employer to submit an abatement plan for each qualifying cited violation.

   a. The requirement for an abatement plan must be indicated in the citation.

   b. The citation may also call for the abatement plan to include interim measures.

2. Within 25 calendar days from the final order date, the employer must submit an abatement plan for each violation that identifies the violation and the steps to be taken to achieve abatement. The abatement plan must include a schedule for completing the abatement and, where necessary, the methods for protecting

employees from exposure to the hazardous conditions in the interim until the abatement is complete (29 CFR §1903.19(e)(2)).

3. In cases where the employer cannot prepare an abatement plan within the allotted time, a PMA must be submitted by the employer to amend the abatement date.

C. Progress Reports.

1. An employer that is required to submit an abatement plan may also be required to submit periodic progress reports for each cited violation. In such cases, the citation must indicate:

   a. That periodic progress reports are required and the citation items for which they are required;
   b. The date on which an initial progress report must be submitted, which may be no sooner than 30 calendar days after the due date of an abatement plan;
   c. Whether additional progress reports are required; and
   d. The date(s) on which additional progress reports must be submitted.

2. For each violation, the progress report must identify in a single sentence if possible, the action taken to achieve abatement and the date the action was taken. There is nothing in this policy or the regulation prohibiting progress reports as a result of settlement agreements.

D. Special Requirements for Long-Term Abatement.

1. Long-term abatement is abatement which will be completed more than one year from the citation issuance date.
2. The Chief of AKOSH Enforcement must require the employer to submit an abatement plan for every violation with an abatement date in excess of one year.
3. Progress reports are mandatory and must be required at a minimum every six months. More frequent reporting may be required at the discretion of the Chief of AKOSH Enforcement.

IX. Employer Failure to Submit Required Abatement Certification.

A. Actions Preceding Citation for Failure to Certify Abatement.

1. If abatement certification, or any required documentation, is not received within 13 calendar days after the abatement date (the regulation requires filing within 10 calendar days after the abatement date; and another 3 calendar days is added for mailing), the following procedures should be followed:

   a. Remind the employer by telephone of the requirement to submit the material and tell the employer that a citation will be issued if the required documents are not received within 7 calendar days after the telephone call.
   b. During the conversation with the employer, determine why it has not complied and document all communication efforts in the case file. Discuss

AKOSH's PMA policy and explain that a late petition to modify the abatement date can be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.

c. Issue a follow-up letter to the employer the same day as the telephone call.
d. The employer may be allowed to respond via fax or email where appropriate.

2. If the certification and/or documentation are not received within the next 7 calendar days, a single other-than-serious citation will be issued.

3. Normally citations for failure to submit abatement certification for violations of 29 CFR §1903.19(c) shall not be issued until the above procedures have been followed and the employer has been provided additional opportunity to comply. These pre-citation procedures also apply when abatement plans or progress reports are not received within 13 days of the due date.

B. Citation for Failure to Certify.

1. Citations for failure to submit abatement verification (certification, documentation, abatement plans or progress reports) can be issued without formal follow-up activities by following the procedures identified below.

2. A single other-than-serious citation will be issued combining all the individual instances where the employer has not submitted abatement certification and/or abatement documentation.

   a. This "other" citation will be issued under the same inspection number which contained the original violations cited.

   b. The abatement date for this citation shall be set 30 days from the date of issuance.

   NOTE: Each violation of 29 CFR §1903.19(c), (d), (e), or (f) with respect to each original citation item is a separate item.

3. For those situations where the abatement date falls within the 15 day informal conference time period, and an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation's characterization or abatement period is to be modified.
4. For those rare instances where the reminder letter is returned to AKOSH by the Post Office as undeliverable and telephone contact efforts fail, the Chief of AKOSH Enforcement has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certification.

C. Certification Omissions.

1. An initial minor or non-substantive omission in an abatement certification (e.g., lack of a definitive statement stating that the information being submitted is accurate) should be considered a de minimis condition of the regulation.

2. If there are minor deficiencies, such as omitting the inspection number, signature or date, the employer should be contacted by telephone to verify that the documents received were the ones they intended to submit. If so, the AKOSH date stamp can serve as the date on the document.

3. A certification with an omitted signature should be returned to the employer to be signed.

D. Penalty Assessment for Failure to Certify.

The penalty provisions of AS 18.60.095 apply to all citations issued under this regulation. See Chapter 6, *Penalties and Debt Collection*, for additional information.

X. Tagging for Movable Equipment.

A. Tag-Related Citations.

Tag-related citations must be observed by CSHOs prior to the issuance of a citation for failure to initially tag cited movable equipment.

1. See 29 CFR §1903.19, Non-mandatory Appendix C, for a sample warning tag. AKOSH must be able to prove the employer's initial failure to act (tag the movable equipment upon receipt of the citation).

2. Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation may be issued for failure to maintain the tag or copy of the citation using 29 CFR §1903.19(i)(6).

B. Equipment Which is Moved.

Tags are intended to provide an interim form of protection to employees through notification for those who may not know of the citation or the hazardous condition.

1. For non-hand-held equipment, CSHOs should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement (29 CFR §1903.19(i)) because the tagging provision is triggered upon *movement of* the equipment.

2. For hand-held equipment, employers must attach a warning tag or copy of the citation *immediately* after the employer's receipt of the citation. The attachment of the tag is not dependent on any *subsequent* movement of the equipment.

XI. Failure to Notify Employees by Posting.

A. Evidence.

Like tag-related citations, CSHOs shall investigate an employer's failure to notify employees by posting.

B. Location of Posting.

Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees (29 CFR §1903.19(g)(2)) the employer may post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives. Employers may also communicate by other means with affected employees and their representatives regarding abatement activities.

C. Other Communication.

The CSHO must determine not only whether the documents or summaries were appropriately posted, but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used.

XII. Abatement Verification for Special Enforcement Situations.

A. Construction Activity Considerations.

1. Construction activities pose situations requiring special consideration.

    a. Construction site closure or hazard removal due to completing of the structure or project will only be accepted as abatement without certification where the area office CSHO verifies the site closure/completion and where closure/completion effectively abates the condition cited.

    b. In all other circumstances, the employer must certify to AKOSH that the hazards have been abated by the submission of an abatement certification. In rare cases the verification may have to cease and the abatement action closed through cessation of work or verification with the general contractor of the site to verify abatement.

2. Equipment-related and all program-related (e.g., crane inspection, hazard communication, respirator, training, competent person, qualified persons, etc.) violations *will always* require employer certification of abatement regardless of construction site closure.

3. Where the violation specified in a citation is the employer’s general practice of failing to comply with a requirement (e.g., the employer routinely fails to provide fall protection at its worksites), closure/completion of the individual worksite will not be accepted as abatement.
4. Where a follow-up inspection to verify abatement is deemed necessary, AKOSH will determine the most efficient approach to conducting the inspection.

B. Follow-Up Policy for Employer Failure to Verify Abatement under 29 CFR §1903.19 as adopted under 8 AAC 61.142.

Follow-up or monitoring inspections would not normally be conducted when evidence of abatement is provided by the employer or employee representatives. For further information on exceptions for Severe Violator Enforcement Program (SVEP) cases, see AKOSH PD 10-13, September 15, 2010 - OSHA Instruction CPL 02-00-149 Severe Violator Enforcement Program (SVEP), June 18, 2010.

NOTE: For further information on extended abatement periods, see Section VIII, Monitoring Information for Abatement Periods Greater than 90 Days*, and Section XIV,* Monitoring Inspections*, both of this chapter.*

1. Where the employer has not submitted the required abatement certification or documentation within the time permitted by the regulation, the Chief of AKOSH Enforcement has discretion to conduct a follow-up inspection.

2. Submission of inadequate documents may also be the basis for a follow-up inspection.

3. This inspection should not generally occur before the end of the original 15 day contest period except in unusual circumstances.

XIII. OnSite Visits: Procedures for Abatement Verification and Monitoring.

A. Follow-Up Inspections.

The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected.

B. Severe Violator Enforcement Program (SVEP) Follow-Up.

- For any inspection issued on or after June 18, 2010, which results in an SVEP case, an enhanced follow-up inspection will normally be conducted even if abatement of the cited violations has been verified. The primary purpose of follow-up inspections is to assess both whether the cited violation(s) were abated and whether the employer is committing similar violations.
- If there is a compelling reason not to conduct a follow-up inspection, the reason must be documented in the file.
- Grouped and combined violations from the original inspection will be counted as one violation for SVEP purposes.
- For further information on exceptions for Severe Violator Enforcement Program (SVEP) cases, see AKOSH PD 10-13, September 15, 2010 - OSHA Instruction CPL 02-00-149 Severe Violator Enforcement Program (SVEP), June 18, 2010.

C. Initial Follow-Up.

1. The initial follow-up is the first follow-up inspection after issuance of the citation.

2. 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 additional daily penalties while such failure or violation continues.
3. Failure to comply with enforceable interim abatement dates involving multi-step abatement shall be subject to a Notification of Failure to Abate Alleged Violation.
4. Where the employer has implemented some controls, but the control measures were inadequate during follow-up monitoring, and other technology was available which would have brought the process into compliance, 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.
5. 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.

D. Second Follow-Up.

1. Any subsequent follow-up after the initial follow-up inspection dealing with the same violations is considered a second follow-up.

    a. After the Notification of Failure to Abate Alleged Violation has been issued, the Area Director shall allow a reasonable time for abatement of the violation before conducting a second follow-up. The employer must ensure that employees are adequately protected by other means until the violations are corrected.

    b. If the employer contests the proposed additional daily penalties, a follow-up inspection shall still be scheduled to ensure correction of the original violation.

2. If a second follow-up inspection reveals the employer still has not corrected the original violations, a second Notification of Failure to Abate Alleged Violation with additional daily penalties shall be issued if the Chief of AKOSH Enforcement, after consultation with the Director of Labor Standards and Safety and Assistant Attorney General, believes it to be appropriate.

3. If a Notification of Failure to Abate Alleged Violation and additional daily penalties are not to be proposed because of an employer's flagrant disregard of a citation or an item on a citation, the Chief of AKOSH Enforcement shall immediately contact the Director of Labor Standards and Safety, in writing, detailing the circumstances so the matter can be referred to the Assistant Attorney General for action, as appropriate.

E. **Follow-Up Inspection Reports**.

1. Follow-up inspection reports shall be included with the original initial inspection case file. The applicable identification and description sections of the OSHA-1B/1B(IH) Form shall be used for documenting correction of willful, repeated, and serious violations and failure to correct items during follow-up inspections.

2. If Serious, Willful, or Repeat violation items were appropriately grouped in the OSHA-1B/1B(IH) in the original case file, they may be grouped on the follow-up OSHA-1B; otherwise, individual OSHA-1B/1B(IH) forms shall be used for each item. The correction of other-than-serious violations may be documented in the narrative portion of the case file.

3. Documentation of Hazard Abatement by Employer.

a. The hazard abatement observed by the CSHO shall be specifically described in the OSHA-1B/1B(IH) form, including any applicable dimensions, materials, specifications, personal protective equipment, engineering controls, measurements or readings, or other conditions.

b. Brief terms such as “corrected” or “in compliance” will not be accepted as proper documentation for violations having been corrected.

c. When appropriate, this written description shall be supplemented by a photograph and/or a videotape to illustrate correction circumstances.

d. Only the item description and identification blocks need be completed on the follow-up OSHA-1B/1B(IH) with an occasional inclusion of an applicable employer statement concerning correction under the employer knowledge section, if appropriate.

4. Sampling.

a. CSHOs conducting a follow-up inspection to determine abatement of violations of air contaminant or noise standards, shall decide whether sampling is necessary and if so, what kind (i.e., spot sampling, short-term sampling, or full-shift sampling).

b. If there is reasonable probability that a Notification of Failure to Abate Alleged Violation will be issued, full-shift sampling is required to verify exposure limits based on an 8-hour time-weighted average.

5. Narrative.

The CSHO must include in the narrative the findings pursuant to the inspection, along with recommendations for action. In order to make a valid recommendation, it is important to have all the pertinent factors available in an organized manner.

6. Failure to Abate.

In the event that any item has not been abated, complete documentation shall be included on an OSHA-1B.

XIV. Monitoring Inspections.

A. General.

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:

- ► Abatement dates in excess of one year.
- ► A petition for modification of abatement date (PMA).
- ► To ensure that terms of a permanent variance are being carried out.
- ► At the request of an employer requesting technical assistance granted by the Area director.

B. Conduct of Monitoring Inspection (PMAs and Long-Term Abatement).

Monitoring inspections shall be conducted in the same manner as follow-up inspections. An inspection shall be classified as a monitoring inspection when a safety/health inspection is conducted for one or more of the following purposes:

- ► Determine the progress an employer is making toward final correction.
- ► Ensure that the target dates of a multi-step abatement plan are being met.
- ► Ensure that an employer's petition for the modification of abatement dates is made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible.
- ► Ensure that the employees are being properly protected until final controls are implemented.
- ► Ensure that the terms of a permanent variance are being carried out.
- ► Provide abatement assistance for items under citation.

C. Abatement Dates in Excess of One Year.

1. Monitoring visits shall be scheduled to check on progress made whenever abatement dates extend beyond one year from the issuance date of the citation.

2. These inspections shall be conducted approximately every six months, counted from the citation date, until final abatement has been achieved for all cited violations.

   a. If the case has been contested, the final order date shall be used as a starting point, instead of the citation date.

   b. A settlement agreement may specify an alternative monitoring schedule.

3. If the employer is submitting satisfactory quarterly progress reports and the Chief of AKOSH Enforcement 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 twelve months.

    1. 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.

D. Monitoring Abatement Efforts.

1. The Chief of AKOSH Enforcement shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.

2. 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.

3. Where no engineering controls have been cited but more time is needed for other reasons not requiring assistance from AKOSH, such as delays in receiving equipment, a monitoring visit need not normally be scheduled.

4. 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.

5. CSHOs 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.

6. CSHOs 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 factors to be considered may include, but are not limited to the following:

    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.

    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.

c. Other documentation collected by AKOSH personnel including verification of progress reports, success and/or failure of abatement efforts, and assessment of current exposure levels of employees.

d. Employer and employee interviews.

e. Specific reasons for requesting additional time including specific plans for controlling exposure and specific calendar dates.

f. Personal protective equipment.

g. Medical programs.

h. Emergency action plans.

XV. Notification of Failure to Abatement.

A. Violation.

A Notification of Failure to Abate an Alleged Violation (OSHA-2B) shall be issued in cases where violations have not been corrected as required, as verified by an onsite inspection or follow-up inspection.

B. Penalties.

Failure to abate penalties shall be applied when an employer has not corrected a previously cited violation which had become a final order of the Board.

C. Calculation of Additional Penalties.

1. A Gravity Based Penalty (GBP) for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection.

2. Detailed information on calculating failure to abate (FTA) penalties is included in Chapter 6, *Penalties and Debt Collection*.

XVI. Case File Management.

A. Closing of Case File Without Abatement Certification.

The closing of a case file without abatement certification(s) must be justified through a statement in the case file by the Chief of AKOSH Enforcement or his/her designee, addressing the reason for accepting each uncertified violation as an abated citation.

B. Review of Employer-Submitted Abatement.

AKOSH will endeavor to review employer-submitted abatement verification materials as soon as possible but no later than 30 days after receipt. If the review will be delayed, notify the employer that the material will be reviewed by a certain date, and that the case will be closed if appropriate, after that time.

C. Whether to Keep Abatement Documentation.

Abatement documentation (photos, employer programs, etc.) shall be retained in accordance with OSHA Instruction ADM 03-01-005, *OSHA Compliance Records*, dated August 3, 1998.

XVII. Abatement Services Available to Employers.

Employers requesting abatement assistance shall be informed that AKOSH is willing to work with them even after citations have been issued and provides incentives for immediate onsite abatement of certain types of violations.

Chapter 8

SETTLEMENTS

I. Settlement of Cases by the Chief of AKOSH Enforcement

The Chief of AKOSH Enforcement is granted settlement authority and shall follow these instructions when negotiating settlement agreements.

A. General.

1. Except for egregious cases, or cases that affect other jurisdictions, The Chief of AKOSH Enforcement may enter into Informal Settlement Agreements with employers prior to the employer filing a written notice of contest.

   NOTE: After the employer has filed a written notice of contest, the Chief of AKOSH Enforcement may proceed toward a Formal Settlement Agreement with the concurrence and participation of the Assistant Attorney General.

2. The Chief of AKOSH Enforcement may amend abatement dates, reclassify violations (e.g., willful to serious, serious to other-than-serious), and modify or withdraw a penalty, a citation, or a citation item, where evidence establishes during the informal conference that the changes are justified.

3. The Chief of AKOSH Enforcement may actively negotiate the amount of proposed penalties, depending on the circumstances of the case and the particular improvements in employee safety and health that can be obtained.

4. Employers shall be informed that they are required by §1903.19 to post copies of all amendments or changes to citations resulting from informal conferences. Employee representatives must also be provided with copies of any agreements.

B. Pre-Contest Settlement (Informal Settlement Agreement).

Pre-contest settlement discussions will generally occur during or immediately following the information conference and prior to the expiration of the 15 working day contest period.

1. In the event that an employer is bringing an attorney to an informal conference, Chief of AKOSH Enforcement or their designees are encouraged to contact the AAG and ask for the assistance of counsel.

2. If a settlement is reached during the informal conference, an Informal Settlement Agreement (ISA) shall be prepared and the employer will be asked to sign it. It will be effective upon signature of both the employer and the Chief of AKOSH Enforcement (**who shall sign last**), provided the contest period has not expired. Both parties will date the documents on the day of actual signature.

3. If the employer is not present to sign the ISA, the Chief of AKOSH Enforcement shall send the agreement to the employer for signature. After signing, the employer must return the agreement to the Chief of AKOSH Enforcement by and delivery or via facsimile within the 15 day contest period.

    a. In every case, Chief of AKOSH Enforcement shall give employers notice in writing that the citation will become final and unreviewable at the end of the contest period, unless the employer signs the proposed agreement or files a written notice of contest.

    b. If an employer wishes to make any changes to the text of the agreement, the Chief of AKOSH Enforcement must agree to and authorize the proposed changes prior to the expiration of the contest period.

        - If the changes proposed by the employer are acceptable to the Chief of AKOSH Enforcement, the exact language written into the agreement shall be mutually agreed upon. Employers shall be instructed to incorporate the agreed-upon language into the agreement, sign it, and return to AKOSH by hand delivery or via facsimile.

        - Annotations incorporating the exact language of any changes authorized shall be made to the retained copy of the agreement and signed and dated by the Chief of AKOSH Enforcement.

    c. Upon receipt of the ISA signed by the employer, the Chief of AKOSH Enforcement will ensure, prior to his/her signature, that any modifications to the agreement are consistent with the notations made in the case file.

        - In these cases, the citation record will then be updated in OIS in accordance with current procedures.

        - If an employer's changes substantially alter the original terms, the agreement signed by the employer will be treated as a notice of contest and handled accordingly. The employer will be informed of this as soon as possible.

    d. A reasonable time will be allowed for return of the agreement from the employer.

        - If an agreement is not received within the 15 day contest period, the Chief of AKOSH Enforcement will presume the employer did not sign the agreement, and the citation will be treated as a final order.

        - The employer will be required to certify that the informal settlement agreement was signed prior to the expiration of the contest period.

4. If settlement efforts are unsuccessful and the employer contests the citation, the Chief of AKOSH Enforcement will state the terms of the final settlement offer in the case file.

5. In the case of a public sector employer who requests an informal conference prior to contest, the Chief of AKOSH Enforcement shall discuss opportunities to consider alternative payments to satisfy proposed penalty assessments in connection with alleged violations in accordance with the requirements outlined in the April 30, 2015, AKOSH Enforcement Policy Memorandum for public sector employers. Provided the established criteria for the alternate penalty payment methodology are met and documented, the payment shall be deemed to satisfy the adjusted proposed penalty.

6. The penalty investment payments must be a documented investment in the equivalent or greater value of the initial adjusted proposed penalty after any customary and appropriate reductions for cooperation, timely hazard abatement, and other factors.

7. The penalty investment must address workplace safety and health hazards and improvements beyond the hazards at issue in the citation(s).

8. The employer must agree to schedule and complete a comprehensive consultation visit at the site where the inspection was conducted or a site agreed to by the Chief of AKOSH Enforcement to have similar or greater potential workplace safety and health hazardous conditions.

C. Procedures for Preparing the Informal Settlement Agreement.

The ISA shall be prepared and processed in accordance with current AKOSH policies and practices. For guidance in determining final dates of settlement and Review Commission orders, see Chapter 13, Section VIII, *Citation Final Order Dates*.

D. Post-Contest Settlement (Formal Settlement Agreement).

Post-contest settlements will normally occur before the complaint is filed with the Review Commission.

1. Following the filing of a notice of contest, the Chief of AKOSH Enforcement shall (unless other procedures have been agreed upon) notify the AAG when it appears that negotiations with the employer may produce a settlement. This notification shall occur at the time the notice of contest transmittal memorandum is sent to the AAG.

   Upon approval from the AAG, the Chief of AKOSH may continue to participate in settlement discussions for up to 30 calendar days. The settlement negotiations will include express instructions that any proposed settlement agreement is tentative and must be approved by the AAG and

the OSH Review Board. If a settlement proposal is negotiated, a draft explaining the details shall be submitted to the AAG for approval and concurrence before the terms of the agreement are finalized. Any settlement negotiated after the notice of contest deadline shall be formally issued from Department of Law and must be approved by the OSH Review Board.

2. If a settlement is later requested by the employer, the Chief of AKOSH Enforcement will communicate the proposed terms to the AAG, who will then draft and execute the agreement.

Chapter 9

COMPLAINT AND REFERRAL PROCESSING

I. Safety and Health Complaints and Referrals.

C. Definitions.

1. **Complaint**.

Notice of an alleged safety or health hazard (over which AKOSH has jurisdiction), or a violation of the Act, submitted by a current employee or representative of employees.

2. **Formal Complaint**.

Complaint made by a current employee or a representative of employees that meets all of the following requirements:

a. Asserts that an imminent danger, a violation AKOSH laws, or a violation of an AKOSH standard exposes employees to a potential physical or health harm in the workplace;

b. Is reduced to writing or submitted on an OSHA-7 form; and

c. Is signed by at least one current employee or employee representative.

3. **Non-formal Complaint**.

Any complaint alleging safety or health violations that does not meet all of the requirements of a formal complaint identified above and does not come from one of the sources identified under the definition of Referral, below.

4. **Inspection**.

An onsite examination of an employer's worksite conducted by an AKOSH compliance officer, initiated as the result of a complaint or referral, and meeting at least one of the criteria identified in the section on Criteria Warranting an Inspection, below.

5. **Inquiry**.

A process conducted in response to a complaint or a referral that does not meet one of the identified inspection criteria. It does not involve an onsite inspection of the workplace, but rather the employer is notified of the alleged hazard(s) or violation(s) by telephone, fax, email, or by letter if necessary. The employer is then requested to provide a response, and AKOSH will notify the complainant of that response via appropriate means.

6. **Electronic Complaint**.

A complaint submitted via AKOSH's public website. All complaints submitted via AKOSH's public website are considered non-formal.

II. Permanently Disabling Injury or Illness.

1. An injury or illness that has resulted in permanent disability or an illness that is chronic or irreversible. Permanently disabling injuries or illnesses include, but are not limited to amputation, blindness, a standard threshold shift in hearing, lead or mercury poisoning, paralysis or third-degree burns.

III. Referral.

1. An allegation of a potential workplace hazard or violation received from one of the sources listed below.

   a. **CSHO referral** – information based on the direct observation of a CSHO. (On the OSHA-90, code 14A – *A. CSHO (Within Office)*.)

   b. **Safety and health agency referral** – from sources including, but not limited to: OSHA, NIOSH, Wage and Hour and Mechanical Inspection state programs, consultation, and state or local health departments, as well as safety and/or health professionals in other Federal agencies.

   c. **AS 18.60.089 complaint referral** – made by a whistleblower investigator when an employee alleges that he or she was retaliated against for complaining about safety or health conditions in the workplace, refusing to do an allegedly imminently dangerous task, or engaging in other activities related to occupational safety or health (Code 14A – *D. Discrimination*.)

d. **Other government agency referral** – made by other Federal, State, or local government agencies or their employees, including local police and fire departments. (As appropriate, code 14A – *E. Other Federal Agency, or G. State/Local Government.*)

e. **Media report** – either news items reported in the media or information reported directly to AKOSH by a media source. (Code 14A – *H. Media*.)

f. **Employer report** - of accidents other than fatalities and catastrophes. (Code 14A – *I. Other*.)

IV. Representative of Employees.

A. Any of the following:

a. An authorized representative of the employee bargaining unit, such as a certified or recognized labor organization.

b. An attorney acting for an employee.

c. Any other person acting in a bona fide representative capacity, including, but not limited to, members of the clergy, social workers, spouses and other family members, and government officials or nonprofit groups and organizations acting upon specific complaints and injuries from individuals who are employees.

NOTE: The representative capacity of the person filing complaints on behalf of another should be ascertained unless it is already clear. In general, the affected employee should have requested, or at least approved, the filing of the complaint on his or her behalf.

V. Classifying as a Complaint or a Referral.

A. Whether the information received is classified as a complaint or a referral, an inspection of a workplace is normally warranted if **at least one** of the conditions in the section *Criteria Warranting an Inspection* is met.

B. **Criteria Warranting an Inspection.**

An inspection is normally warranted if **at least one** of the conditions below is met (but see also Paragraph V.E. of this chapter, *Scheduling an Inspection of an Employer in an Exempt Industry*):

1. A valid formal complaint is submitted. Specifically, the complaint must be reduced to writing or submitted on an OSHA-7 form, be

signed by a current employee or representative of employees, and state the reason for the inspection request with reasonable particularity.

2. The information alleges that a permanently disabling injury or illness has occurred as a result of the complained of hazard(s), and there is reason to believe that the hazard or related hazards still exist.
3. The information alleges that an imminent danger situation exists.
4. The information concerns an establishment and an alleged hazard covered by a local, regional, or national emphasis program or the High Hazard Targeting Plan.
5. The employer fails to provide an adequate response to an inquiry, or the individual who provided the original information provides further evidence that the employer's response is false or does not adequately address the hazard(s).
6. The establishment that is the subject of the information has a history of egregious, willful, failure-to-abate, or repeated citations within AKOSH jurisdiction during the past three years, or is an establishment or related establishment in the SVEP. However, if the employer has previously submitted adequate documentation for these violations demonstrating that they were corrected and that programs have been implemented to prevent a recurrence of hazards, the Chief of AKOSH Enforcement will normally determine that an inspection is not necessary.
7. A whistleblower investigator requests that an inspection be conducted in response to an employee’s allegation that the employee was discriminated against for complaining about safety or health conditions in the workplace, refusing to perform an allegedly dangerous job or task, or engaging in other activities related to occupational safety or health.
8. If an inspection is scheduled or has begun at an establishment and a complaint or referral that would normally be handled via inquiry is received, that complaint or referral may, at the Chief of AKOSH Enforcement’s discretion, be incorporated into the scheduled or ongoing inspection. If such a complaint is formal, the complainant must receive a written response addressing the complaint items.
9. If the information gives reasonable grounds to believe that an employee under 18 years of age is exposed to a serious violation of a safety or health standard or a serious hazard, an onsite inspection

will be initiated if the information relates to construction, manufacturing, agriculture, or other industries as determined by the Chief of AKOSH Enforcement. Limitations placed on AKOSH's activities in agriculture by Appropriations Act provisions will be observed. See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998. A referral to Wage and Hour shall be initiated.

NOTE: The information does not need to allege that a child labor law has been violated.

10. The information received is a signed, written complaint from a current employee or employee representative that alleges a recordkeeping deficiency that indicates the existence of a serious safety or health violation.

B. **Scheduling an Inspection of an Employer in an Exempt Industry.**

In order to schedule an inspection of an employer in an exempt industry classification as specified by Appropriations Act provisions:
NOTE: See CPL 02-00-051 (AKOSH PD 98-11), Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998.*

1. The information must come directly from a current employee; OR

2. It must be determined and documented in the case file that the information came from a representative of the employee (see Paragraph I.A.9. of this chapter, *Representative of Employees*), with the employee's knowledge of the representative's intended action; OR

3. The inspection must be completed using only state funds.

C. **Information Received by Telephone.**

1. While speaking with the caller, AKOSH personnel will attempt to obtain the following information:
   a. Whether the caller is a current employee or an employee representative.

   b. The exact nature of the alleged hazard(s) and the basis of the caller's knowledge. The individual receiving the information must determine, to the extent possible, whether the information received describes an apparent violation of AKOSH standards or AKOSH laws.

   c. The employer's name, address, email address, telephone and fax numbers, as well as the name of a contact person at the worksite.

d. The name, address, telephone number, and email address of any union and/or employee representative at the worksite.

2. As appropriate, AKOSH will provide the caller with the following information:

a. Describe the complaint process, and if appropriate, the concepts of "inquiry" and "inspection," as well as the relative advantages of each.

b. If the caller is a current employee or a representative of employees, explain the distinction between a formal complaint and a non-formal complaint, and the rights and protections that accompany filing a formal complaint. These rights and protections include:
- The right to request an onsite inspection.
- Notification in writing if an inspection is deemed unnecessary because there are no reasonable grounds to believe that a violation or danger exists.

D. The right to obtain review of a decision not to inspect by submitting a request for review in writing.

E. Information received by telephone from a current employee is considered a non-formal complaint until that individual provides a signed copy of the information. The employee can send or fax a signed copy of the information, request that an OSHA-7 form be sent, or sign the information in person at an AKOSH Office. Normally a complainant has five working days to formalize an electronic complaint.

1. If appropriate, inform the complainant of rights to confidentiality in accordance with AS 18.60.088, and ask whether the complainant wishes to exercise this right. When confidentiality is requested, the identity of the complainant is protected regardless of the formality of the complaint.

2. Explain rights to employees under AS 18.60.089.

VI. Procedures for an Inspection.

1. Upon receipt of a complaint or referral, the Chief of AKOSH Enforcement (or his or her designee) will evaluate all available information to determine whether there are reasonable grounds to believe that a violation or hazard exists.

a. If necessary, reasonable attempts will be made to contact the individual who provided the information in order to obtain additional details or to clarify issues raised in the complaint or referral. See the Complaint Questionnaire beginning on page 9-17.

b. The Chief of AKOSH Enforcement may determine not to inspect a facility if he/she has a substantial reason to believe that the condition complained of is being or has been abated.

2. Despite the existence of a complaint, if the Chief of AKOSH Enforcement believes there are no reasonable grounds that a violation or hazard exists; no inspection or inquiry will be conducted.

   a. Where a formal complaint has been submitted, the complainant will be notified in writing of AKOSH's intent not to conduct an inspection, the reasoning behind the determination, and the right to have the determination reviewed under 29 CFR §1903.12. The justification for not inspecting will be noted in the case file.

   b. In the event of a non-formal complaint or referral, if possible, the individual providing the information will be notified by appropriate means of AKOSH's intent not to conduct an inquiry or inspection. The justification for not inspecting will be noted in the case file.

3. If the information contained in the complaint or referral meets at least one of the inspection criteria listed in Paragraph V.B. of this chapter, *Criteria Warranting an Inspection*, and there are reasonable grounds to believe that a violation or hazard exists, AKOSH is authorized to conduct an inspection.

   a. If appropriate, AKOSH will inform the individual providing the information that an inspection will be scheduled and that he or she will be advised of the results.
   b. After the inspection, AKOSH will send the individual a letter addressing each information item, with reference to the citation(s) or a sufficiently detailed explanation for why a citation was not issued.

4. If an inspection is warranted, it will be initiated as soon as resources permit. Inspections resulting from formal complaints of serious hazards will normally be initiated within five working days of formalizing.

VII. Procedures for an Inquiry.

1. If the complaint or referral does not meet the criteria for initiating an onsite inspection, AKOSH will conduct an “inquiry” by promptly contacting the employer to discuss the allegation(s), and fax or email a confirming letter.

2. If a non-formal complaint is submitted by a current employee or a representative of employees that does not meet any of the inspection criteria, the complainant may be given five working days to make the complaint formal.

a. The complainant may come into AKOSH offices and sign the complaint, or mail or fax a signed complaint letter to AKOSH. Additionally, an OSHA-7 form can be mailed or faxed to the complainant, if appropriate.

b. If the complaint is not made formal after five working days, after making a reasonable attempt to inform the complainant of the decision, AKOSH will proceed with the non-formal inquiry process.

3. The employer will be advised of what information is needed to answer the inquiry and encouraged to respond by fax or email. Employers are encouraged to do the following:

(a) Immediately investigate and determine whether the complaint or referral information is valid and make any necessary corrections or modifications.

(b) Advise the Chief of AKOSH Enforcement either in writing or via email within five working days of the results of the investigation into the alleged complaint or referral information. At the discretion of the Chief of AKOSH Enforcement, the response time may be longer or shorter than five working days, depending on the circumstances. Additionally, although the employer is requested to respond within the above time frame, the employer may not be able to complete abatement action during that time, but is encouraged to do so.

(c) Provide the Chief of AKOSH Enforcement with supporting documentation of the findings, including any applicable measurements or monitoring results, and photographs and/or videos that the employer believes would be helpful, as well as a description of any corrective action the employer has taken or is in the process of taking.

(d) Post a copy of the letter from AKOSH where it is readily accessible for review by all employees.

(e) Return a copy of the signed Certificate of Posting to AKOSH.

(f) If there is a recognized employee union or safety and health committee in the facility, provide it with a copy of AKOSH's letter and the employer's response.

4. As soon as possible after contacting the employer, a notification letter will be faxed to the employer, or mailed where no fax is available. Sample letters to complainants and employers are provided on the NCR and AKOSH may use these letter formats or develop customized letters. If email is an acceptable means of responding, this should be indicated in the notification letter and the proper email address should be provided.

5. If no employer response or an inadequate employer response is received after the allotted five working days, additional contact with the employer may be made before an inspection is scheduled. If the employer provides no response or an inadequate response, or if AKOSH determines from other information that the condition has not been or is not being corrected, an inspection will be scheduled.

6. The complainant will be advised of the employer's response, as well as the complainant's rights to dispute that response, and if the alleged hazard persists, of the right to request an inspection. When OSHA receives an adequate response from the employer and the complainant does not dispute or object to the response, an onsite inspection normally will not be conducted.

7. If the complainant is a current employee or a representative of employees and wishes to dispute the employer's response, the disagreement must be submitted in writing and signed, thereby making the complaint formal.

   a. If the employee disagreement takes the form of a written and signed formal complaint, see Paragraph VI. of this chapter, *Procedures for an Inspection*.

   b. If the employee disagreement does not take the form of a written and signed formal complaint, some discretion is allowed in situations where the information does not justify an onsite inspection. In such situations, the complainant will be notified of AKOSH's intent not to conduct an inspection and the reasoning behind the determination. This decision should be thoroughly documented in the case file.

8. If a signed complaint is received after the complaint inquiry process has begun, the Chief of AKOSH Enforcement will determine whether the alleged hazard is likely to exist based on the employer's response and by contacting the complainant. The complainant will be informed that the inquiry has begun and that the complainant retains the right to request an onsite inspection if he/she disputes the results and believes the hazard still exists.

9. The complaint must not be closed until AKOSH verifies that the hazard has been abated.

VIII. Complainant Protection.

A. Identity of the Complainant.

1. Upon request of the complainant, his or her identity will be withheld from the employer in accordance with AS 18.60.088(b).

No information will be given to the employer that would allow the employer to identify the complainant.

B. **Whistleblower Protection**.

a. AS 18.60.089 provides protection for employees who believe that they have been the subject of an adverse employment action in retaliation for engaging in activities related to workplace safety or health. Any employee who believes that he or she has been discharged or retaliated against by any person as a result of engaging in such activities may file a whistleblower complaint. The complaint must be filed within thirty days of the discharge or other retaliation.

b. Complainants should always be advised of their AS 18.60.089 rights and protections upon initial contact with OSHA and whenever appropriate in subsequent communications.

IX. Recording in IMIS.

Information about complaint inspections or inquiries must be recorded in IMIS following current instructions given in the IMIS manual. See OSHA Instruction IRT 01-00-007, *The IMIS Enforcement Data Processing Manual for Use with the NCR Computer System* (Table of Contents and Chapters 1 through 7), dated September 20, 1993.

X. Whistleblower Complaints.

A. AKOSH enforces the whistleblower or anti-retaliation provisions of AS 18.60.089. A desk reference summarizing these statutes can be found in the Whistleblower Investigations Manual on OSHA's Web site. These statutes generally provide that employers may not discharge or otherwise retaliate against an employee because the employee has reported an alleged violation related work place safety and health.

B. In the context of an OSHA enforcement action or a consultation activity, the complainant will be advised of the protection against retaliation afforded by AS 18.60.089. An AS 18.60.089 complaint may be in any form, including an oral complaint made to a CSHO. Thus, if a person alleges that he has suffered an adverse action because of activity protected under Section AS 18.60.089, CSHOs will record that person's identifying information and the date and time of this initial contact on an OSHA-87 form and forward it to the Chief of AKOSH Enforcement.

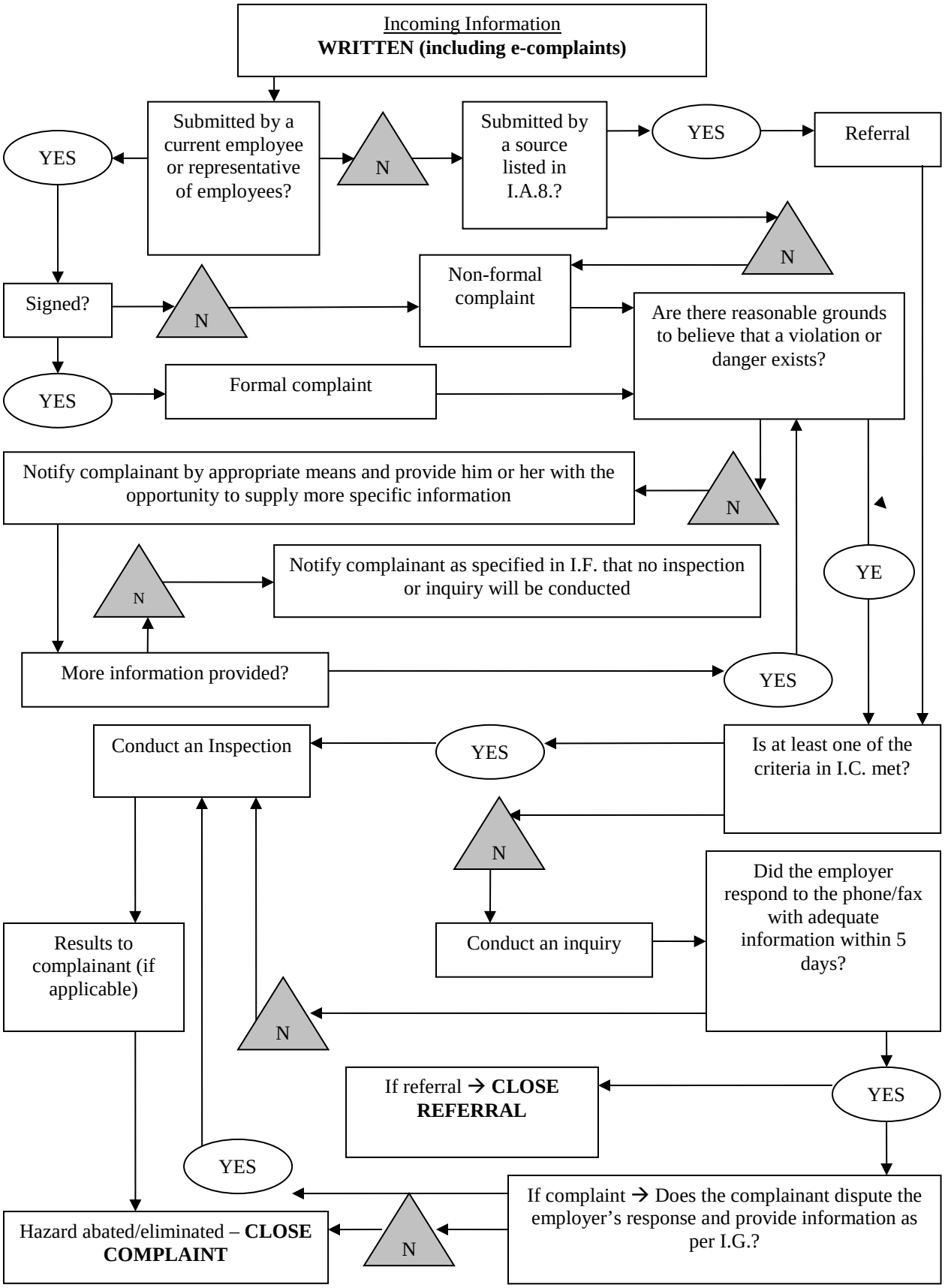
C. In State Plan States, employees may file occupational safety and health retaliation complaints with Federal OSHA, the State, or both. Federal OSHA normally refers such complaints to the State Plan States for investigation. OSHA's

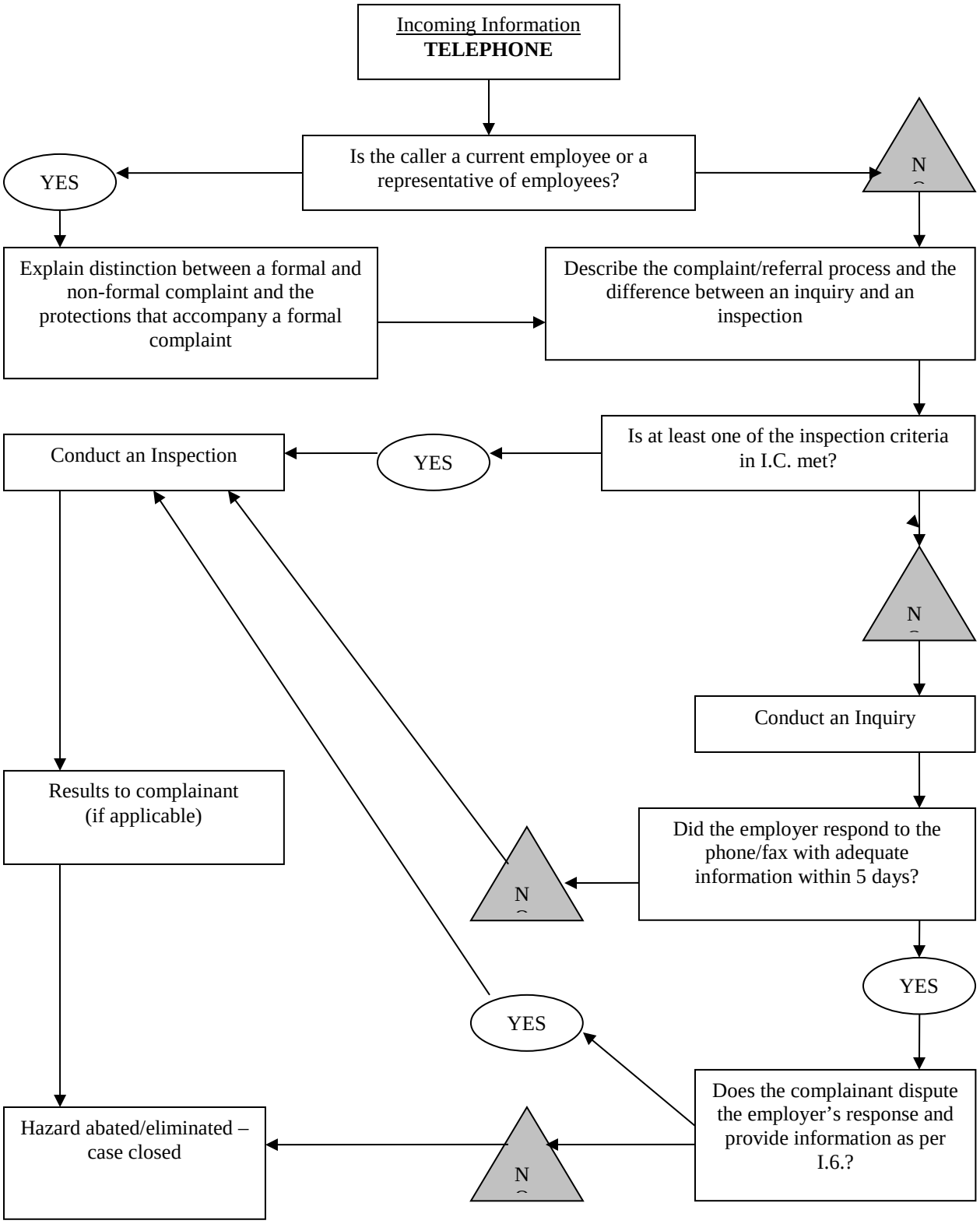
Whistleblower Manual outlines the Agency's referral/deferral policies for such complaints.

XI. Decision Trees.

A. See tree on page 9-15 for AKOSH enforcement action or consultation activity when information is obtained in writing.

B. See tree on page 9-16 for AKOSH enforcement action or consultation activity when information is obtained orally.


Incoming Information
WRITTEN (including e-complaints)
Submitted by a current employee or representative of employees?
YES
N
Submitted by a source listed in I.A.8.?
YES
Referral
N
Signed?
N
Non-formal complaint
Are there reasonable grounds to believe that a violation or danger exists?
YES
Formal complaint
Notify complainant by appropriate means and provide him or her with the opportunity to supply more specific information
N
YE
N
Notify complainant as specified in I.F. that no inspection or inquiry will be conducted
More information provided?
YES
Conduct an Inspection
YES
Is at least one of the criteria in I.C. met?
N
Did the employer respond to the phone/fax with adequate information within 5 days?
Results to complainant (if applicable)
Conduct an inquiry
N
If referral → CLOSE REFERRAL
YES
YES
If complaint → Does the complainant dispute the employer's response and provide information as per I.G.?
Hazard abated/eliminated – CLOSE COMPLAINT
N



Complaint Questionnaire

Obtain information from the caller by asking the following questions, where relevant.

For All Complaints:

1. What is the specific safety or health hazard?

_____

_____

_____

2. Has the hazardous condition been brought to the employer's attention? If so, when? How?

_____

_____

_____

3. How are employees exposed to this hazard? Describe the unsafe or unhealthful working conditions; identify the location.

_____

_____

_____

4. What work is done in the unsafe/unhealthful area? Identify, as well as possible, the type and condition of equipment in use, the materials (e.g., chemicals) being used, the process/operation involved, and the kinds of work being done near the hazardous area. Have there been any recent chemical spills, releases, or accidents?

_____

_____

_____

5. With what frequency are employees doing the task that leads to the exposure? Continuously? Every day? Every week? Rarely? For how long at one time? How long has the condition existed (so far as can be determined)? Has it been brought to the employer's attention? Have any attempts been made to correct the condition, and, if so, who took these actions? What were the results?

_____

_____

_____

6. How many shifts are there? What time do they start? On which shift does the hazardous condition exist?

_____

_____

_____

7. What personal protective equipment (e.g., hearing protection, gloves or respirators) is required by the employer relevant to the alleged exposure? Is it used by employees? Include all PPE and describe it as specifically as possible. Include the manufacturer's name and any identifying numbers.

_____

_____

_____

8. How many people work in the establishment? How many are exposed to the hazardous conditions? How near do they get to the hazard?

_____

_____

_____

9. Is there an employee representative or a union in the establishment? Include the name, address, and telephone number of the union and/or the employee representative(s).

_____

_____

_____

For Health Hazards

10. Has the employer administered any tests to determine employee exposure levels to the hazardous conditions or substance? Describe these tests. Can the employees get the results (as required by the standard)? What were the results?

_____

_____

_____

11. 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?

_____

_____

_____

12. What administrative or work practice controls has the employer put in place?

13. Do any employees have any symptoms that may have been caused by exposure to hazardous substances? Have any employees ever been treated by a physician for a work-related disease or condition? What was it?

14. Have there been any “near-miss” incidents?

15. Are respirators worn to protect against health hazards? If so, what kind? What exposures are they protecting against?

16. If the complaint is related to noise, what, if any, hearing protection is provided to and worn by the employees?

17. Do employees receive audiograms on a regular basis?

For Safety Hazards:

18. Under what adverse or hazardous conditions are employees required to work? This should include conditions contributing to stress and "other" probability factors.

_____

_____

_____

19. Have any employees been injured as a result of this hazardous condition? Have there been any "near-miss" incidents?

_____

_____

_____

Chapter 10

INDUSTRY SECTORS

I. Agriculture.

A. Introduction.

Special situations arising in the agriculture industry, which is regulated under 29 CFR Part 1928 and the General Duty Clause, are discussed in this section. Part 1928 covers "agricultural operations," which include, but are not limited to, egg farms, poultry farms, livestock grain and feed lot operations, dairy farms, horse farms, hog farms, fish farms, and fur-bearing animal farms. OSHA has very few standards that are applicable to this industry. Part 1928 sets forth a few standards in full and lists particular Part 1910 standards which apply to agricultural operations. Part 1910 standards not listed do not apply. The General Duty Clause may be used to address hazards not covered by these standards.

B. Definitions.

1. Agricultural Operations.

This term is not defined in 29 CFR Part 1928. Generally, agricultural operations would include any activities involved in the growing and harvesting of crops, plants, vines, fruit trees, nut trees, ornamental plants, egg production, the raising of livestock (including poultry and fish), as well as livestock products. The Occupational Safety and Health Review Commission has ruled that activities integrally related to these core "agricultural operations" are also included within that term. *Darragh Company*, 9 BNA OSHC 1205, (Nos. 77-2555, 77-3074, and 77-3075, 1980) (delivery of feed to chicken farmer by integrator of poultry products is agricultural operation); *Marion Stevens dba Chapman & Stephens Company*, 5 BNA OSHC 1395 (No.13535, 1977) (removal of pipe to maintain irrigation system in citrus grove is agricultural operation). Post-harvest activities not on a farm, such as receiving, cleaning, sorting, sizing, weighing, inspecting, stacking, packaging and shipping produce, are not "agricultural operations." *J. C. Watson Company*, 22 BNA OSHC 1235 (Nos. 05-0175 and 05-0176, 2008).

2. **Agricultural Employee**.

OSHA regulation 29 CFR §1975.4(b)(2) states that members of the immediate family of the farm employer **are not** regarded as employees. Although AKOSH has not formally adopted this standard, AKOSH will utilize this regulatory standard as guidance.

3. **Farming Operation**.

This term is used in OSHA's Appropriations Act, and has been defined in CPL 02-00-051 (AKOSH PD 98-11), *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998, to mean any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations.

These are employers engaged in businesses that have a two digit Standard Industrial Classification (SIC) of 01 and three digit North American Industry Classification System (NAICS) of 111 (Agricultural Production - Crops); SIC 02 and NAICS 112 (Agricultural Production - Livestock and Animal Specialties); four digit SIC 0711 and six digit NAICS 115112 (Soil Preparation Services); SIC 0721 and NAICS 115112 (Crop Planting, Cultivating, and Protecting); SIC 0722 and NAICS 115113 (Crop Harvesting, Primarily by Machine); SIC 0761 and NAICS 115115 (Farm Labor Contractors and Crew Leaders); and SIC 0762 and NAICS 115116 (Farm Management Services).

4. **Post-Harvesting Processing**.

This is a term that is used in CPL 02-00-051 (AKOSH PD 98-11), *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998, in discussing enforcement guidance for small farming operations. Generally, post-harvest processing can be thought of as changing the character of the product (canning, making cider or sauces, etc.) or a higher degree of packaging versus field sorting in a shed for size.

C. Appropriations Act Exemptions for Farming Operations.

1. **Exempt Farming Operations**.

OSHA is limited by provisions in its Appropriations Act as to which employers it may inspect. Some of the Appropriations Act exemptions and limitations apply to small farming operations. Specifically, OSHA shall not inspect farming operations that have 10 or fewer employees **and** have had no temporary labor camp (TLC) activity within the prior 12 months.

2. **Non-Exempt Farming Operations**.

A farming operation with 10 or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months **is not** exempt from inspection.

3. **State Plans States**.

States with OSHA-approved State Plans may enforce on small farms and provide consultation or training, provided that 100% state funds are used and the state has an accounting system in place to assure that no federal or matching state funds are expended on these activities.

4. **Enforcement Guidance for Small Farming Operations**.

OSHA's Appropriations Act exempts qualifying small farming operations from enforcement or administration of **all** rules, regulations, standards or orders under the Occupational Safety and Health Act, including rules affecting consultation and technical assistance or education and training services..

Table 10-1, below, provides an at-a-glance reference to OSHA activities under its funding legislation.

Table 10-1: OSHA's Appropriation Act Exemptions for Farming Operations

OSHA Activity	**Farming operations with 10 or fewer employees (EEs) and no TLC activity within 12 months.**	**Farming operations with more than 10 EEs or a farming operation with an active TLC within 12 months.**
Programmed Safety Inspections	Not Permitted	Permitted
Programmed Health Inspections	Not Permitted	Permitted
Employee Complaint	Not Permitted	Permitted
Fatality and/or two or more Hospitalizations	Not Permitted	Permitted
Imminent Danger	Not Permitted	Permitted
11(c) (whistleblower investigation)	Not Permitted	Permitted
Consultation & Technical Assistance	Not Permitted	Permitted
Education & Training	Not Permitted	Permitted
Conduct Surveys & Studies	Not Permitted	Permitted

NOTE: See CPL 02-00-051 (AKOSH PD 98-11), *Enforcement Exemptions and Limitations under the Appropriations Act*, May 28, 1998, for additional information.

D. Standards Applicable to Agriculture.

OSHA has very few standards that apply to employers engaged in agricultural operations. Activities that take place after harvesting are considered general industry operations and are covered by OSHA's general industry standards.

1. Agricultural Standards (Part 1928).

a. Roll-over Protective Structures (ROPS) for Tractors (29 CFR §1928.51, 1928.52, and 1928.53).
b. Guarding of Moving Machinery Parts of Farm Field Equipment, Farmstead Equipment, and Cotton Gins (29 CFR §1928.57).
c. Field Sanitation (29 CFR §1928.110). See Paragraph I.F. of this chapter, *Wage & Hour/OSHA Shared Authority under Secretary's Order*, regarding Wage & Hour authority. OSHA has no authority to issue any citations under this standard.

2. General Industry Standards (Part 1910).

a. Temporary Labor Camps (§1910.142). See Chapter 12, Section II, *Temporary Labor Camps*.
b. Storage and Handling of Anhydrous Ammonia (29 CFR §1910.111(a) and (b)).
c. Logging Operations (29 CFR §1910.266).
d. Specifications for Accident Prevention Signs and Tags – Slow-Moving Vehicle Emblem (29 CFR §1910.145(d)(10)).
e. Hazard Communication (29 CFR §1910.1200).
f. Cadmium (29 CFR §1910.1027).
g. Retention of Department of Transportation Markings, Placards and Labels (29 CFR §1910.1201).
Except to the extent specified above, the standards contained in subparts B through T and subpart Z of Part 1910 of Title 29 do not apply to agricultural operations.

3. General Duty Clause.

As in any situation where no standard is applicable, AS 18.60.075(c)(4) may be used; all the elements for a general duty clause citation must be met. See Chapter 4, Section III, *General Duty Clause.*

E. Pesticides.

1. Coverage.

a. Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Environmental Protection Agency (EPA) has jurisdiction over employee protection relating to pesticides (which also includes herbicides, fungicides and rodenticides). The EPA Worker Protection Standard (WPS) protects employees on farms, forests, nurseries, and greenhouses from occupational exposure to agricultural pesticides. The WPS includes provisions for personal protective equipment, labeling, employee notification, safety training, safety posters, decontamination supplies, emergency assistance, and restricted field entry. See 40 CFR Part 170, Worker Protection Standard.
b. The regulation covers two types of employees:

    - **Pesticide Handlers**. Those who mix, load, or apply agricultural pesticides; clean or repair pesticide application equipment; or assist with the application of pesticides in any way.

    - **Agricultural Workers**. Those who perform tasks related to the cultivation and harvesting of plants on farms or in greenhouses, nurseries, or forests – such as carrying nursery stock, repotting plants, or watering – related to the production of agricultural plants on an agricultural establishment.
c. For all pesticide use, including uses not covered by 40 CFR Part 170, it is a violation of FIFRA to use a registered pesticide in a manner inconsistent with its labeling. Thus, AKOSH has no authority to issue any citations related to pesticide exposures. In the event that a CSHO should encounter any cases of pesticide exposure or the lack of an appropriate pesticide label on containers, a referral shall be made to the local EPA office or to state agencies administering pesticide laws.
d. EPA also has jurisdiction in non-agriculture situations where pesticides are being applied by pest control companies. This would include, but not be limited to, applications in and around factories, warehouses, office buildings, and personal residences. AKOSH may not cite its Hazard Communication standard in such situations.

2. OSHA's Hazard Communication Standard.

Although AKOSH will not cite employers covered under EPA's WPS with regard to hazard communication requirements for pesticides, agricultural employers otherwise covered by AKOSH are still responsible for having a hazard communication program for all hazardous chemicals that are not considered pesticides.

Chapter 11

IMMINENT DANGER, FATALITY, CATASTROPHE, AND EMERGENCY RESPONSE

I. Imminent Danger Situations.

A. General.

1. Definition of Imminent Danger.

(AS 18.60.095 defines imminent danger as "…a particular condition or practice in any place of employment that constitutes a danger that could reasonably be expected to immediately cause death or serious physical harm."

2. Conditions of Imminent Danger.

The following conditions must be present in order for a hazard to be considered an imminent danger:

a. Death or serious harm must be threatened; AND

b. It must be reasonably likely that a serious accident could occur immediately OR, if not immediately, then before abatement would otherwise be implemented.

NOTE: For a health hazard, exposure to the toxic substance or other hazard must cause harm to such a degree as to shorten life or be immediately dangerous to life and health (IDLH) or cause substantial reduction in physical or mental efficiency or health, even though the resulting harm may not manifest itself immediately.

B. Pre-Inspection Procedures.

1. Imminent Danger Report Received by the Field.

a. After the Chief of AKOSH Enforcement or designee receives a report of imminent danger, he or she will evaluate the inspection requirements and assign a CSHO to conduct the inspection.

b. Every effort will be made to conduct the imminent danger inspection on the same day that the report is received. In any case, the inspection will be conducted no later than the day after the report is received.

c. When an immediate inspection cannot be made, the Chief of AKOSH Enforcement or designee will contact the employer immediately, obtain as many pertinent details as possible about the situation, and attempt to have any

employee(s) affected by the imminent danger voluntarily removed, if necessary.

i. A record of what steps, if any, the employer intends to take in order to eliminate the danger will be included in the case file.

ii. This notification is considered an advance notice of inspection to be handled in accordance with the advance notice procedures described below.

2. Advance Notice.

a. 29 CFR §1903.6 authorizes advance notice of an inspection of potential imminent danger situations in order to encourage employers to eliminate dangerous conditions as quickly as possible.

b. Where an immediate inspection cannot be made after AKOSH is alerted to an imminent danger condition and advance notice will speed the elimination of the hazard, the Team Leader or CSHO, at the direction of the Chief of AKOSH Enforcement, will give notice of an impending inspection to the employer.

c. Where advance notice of an inspection is given to an employer, it shall also be given to the authorized employee representative, if present. If the inspection is in response to a formal AS 18.60.088 complaint, the complainant will be informed of the inspection unless this will cause a delay in speeding the elimination of the hazard.

C. **Imminent Danger Inspection Procedures.**

All alleged imminent danger situations brought to the attention of or discovered by CSHOs while conducting any inspection will be inspected immediately. Additional inspection activity will take place only after the imminent danger condition has been resolved.

1. Scope of Inspection.

CSHOs may consider expanding the scope of an imminent danger inspection based on additional hazards discovered or brought to their attention during the inspection.

2. Procedures for Inspection.

a. Every imminent danger inspection will be conducted as expeditiously as possible.

b. CSHOs will offer the employer and employee representatives the opportunity to participate in the worksite inspection, unless the immediacy of the hazard

makes it impractical to delay the inspection in order to afford time to reach the area of the alleged imminent danger.

c. As soon as reasonably practicable after discovery of existing conditions or practices constituting an imminent danger, the employer shall be informed of such hazards. The employer shall be asked to notify affected employees and to remove them from exposure to the imminent danger hazard. The employer should be encouraged to voluntarily take appropriate abatement measures to promptly eliminate the danger.

D. **Elimination of the Imminent Danger.**

1. Voluntary Elimination of the Imminent Danger.

a. **How to Voluntarily Eliminate a Hazard.**

- Voluntary elimination of the hazard has been accomplished when the employer:

  - Immediately removes affected employees from the danger area;
  - Immediately removes or abates the hazardous condition; and
  - Gives satisfactory assurance that the dangerous condition will remain abated before permitting employees to work in the area.

- Satisfactory assurance can be evidenced by:

  - After removing the affected 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

  - A good faith representation by the employer that permanent corrective action will be taken as soon as possible, **and** that affected employees will not be permitted to work in the area of the imminent danger until the condition is permanently corrected; or

  - A good faith representation by the employer that permanent corrective action will be instituted as soon as possible. Where personal protective equipment can eliminate the imminent danger, such equipment will be issued and its use strictly enforced until the condition is permanently corrected.

NOTE: Through onsite observations, CSHOs shall ensure that any/all representations from the employer that an imminent danger has been abated are accurate.

b. Where a Hazard is Voluntarily Eliminated.

If an employer voluntarily and completely eliminates the imminent danger without unreasonable delay:

- No imminent danger legal proceeding shall be instituted;
- The OSHA-8, Notice of an Alleged Imminent Danger, does not need to be completed;
- An appropriate citation(s) and notice(s) of penalty will be proposed for issuance with an appropriate notation on the OSHA-1B to document corrective actions; and
- CSHOs will inform the affected employees or their authorized representative(s) that the imminent danger hazard(s) has been eliminated and of any steps taken by the employer to eliminate the hazardous condition.

2. Refusal to Eliminate an Imminent Danger.

a. If the employer does not or cannot voluntarily eliminate the hazard or remove affected employees from the exposure and the danger is immediate, CSHOs will immediately consult with the Chief of AKOSH Enforcement or designee and obtain permission to post an OSHA-8, Notice of an Alleged Imminent Danger.

b. The Chief of AKOSH Enforcement or designees will then contact the Director and determine whether to consult with the AAG to obtain a Temporary Restraining Order (TRO).

c. The employer will be advised that AS 18.60.096 gives Alaska district courts the authority to restrain any condition or practice that poses an imminent danger to employees.

NOTE: The Agency has no authority to order the closing of a worksite or to order affected employees to leave the area of the imminent danger or the workplace.

d. CSHOs will notify affected employees and the employee representative that an OSHA-8 has been posted and will advise them of AS 18.60.089 discrimination protections. Employees will be advised that they have the right to refuse to perform work in the area where the imminent danger exists.

e. The Chief of AKOSH Enforcement or designee and the Director, in consultation with the AAG, will assess the situation and, if warranted, make arrangements for the expedited initiation of court action, or instruct the CSHO to remove the OSHA-8.

3. When Harm Will Occur Before Abatement is Required.

a. If CSHOs have clear evidence that harm will occur before abatement is required (i.e., before a final order of the Board in a contested case or before a TRO can be obtained), they will confer with the Chief of AKOSH Enforcement or designee to determine a course of action.

NOTE: In some cases, the evidence may not support the finding of an imminent danger at the time of the physical inspection, but rather after further evaluation of the case file or presence of additional evidence.

b. As appropriate, an imminent danger notice may be posted at the time citations are delivered or even after the notice of contest is filed.

II. Fatality and Catastrophe Investigations.

A. Definitions.

1. Fatality.

An employee death resulting from a work-related incident or exposure; in general, from an accident or an illness caused by or related to a workplace hazard.

2. Catastrophe.

The hospitalization of three or more employees resulting from a work-related incident or exposure; in general, from an accident or an illness caused by a workplace hazard.

3. Hospitalization.

Being admitted as an **inpatient** to a hospital or equivalent medical facility for examination, observation or treatment. This typically involves an overnight stay.

B. Initial Report.

1. The Fatality/Catastrophe Report Form (OSHA-36) is a pre-inspection form that must be completed for all fatalities or catastrophes unless knowledge of the event occurs during the course of an inspection at the establishment involved. The purpose of the OSHA-36 is to provide AKOSH with enough information to determine whether or not to investigate the event. It is also used as a research tool.

2. If, after the initial report, the Chief of AKOSH Enforcement becomes aware of information that affects the decision to investigate, the OSHA-36 should be updated. If the additional information does not affect the decision to investigate, or the investigation has been initiated or completed, the OSHA-36 need not be updated. After updating the OSHA-36, it should be resubmitted.

3. See additional details on completing the OSHA-36 in Paragraph III. of this chapter, *Recording and Tracking for Fatality/Catastrophe Inspections*.

C. Investigation Procedures.

1. Unless the Chief of AKOSH Enforcement determines that investigation would not result in an effective use of AKOSH resources, all fatalities and catastrophes will be thoroughly investigated in an attempt to determine the cause of the event.

    a. In rare cases where AKOSH learns of a fatality or catastrophe in an untimely manner, such that the accident scene and witnesses are no longer available, the Chief of AKOSH Enforcement may determine that a site inspection/investigation is not an effective use of resources.

    b. The Chief of AKOSH Enforcement may initiate an investigation at the home office of the employer in the event that the scene of the fatality or catastrophe is not appropriate for inspection.

    c. In cases where the Chief of AKOSH Enforcement determines that an investigation of a fatality or catastrophe is not warranted, the reasons shall be documented and maintained.

2. The investigation should be initiated as soon as possible after receiving an initial report of the incident, ideally within one working day, by an appropriately trained and experienced compliance officer assigned by the Chief of AKOSH Enforcement or designee. The Chief of AKOSH Enforcement or designee determines the scope of the fatality/catastrophe investigation. All investigations must be completed in an expeditious manner.

3. Inspections following fatalities or catastrophes should include videotaping as a method of documentation and gathering evidence when appropriate. The use of photography is also encouraged in documenting and evidence gathering.

4. As in all inspections, under no circumstances should AKOSH personnel conducting fatality/catastrophe investigations be unprotected against a hazard encountered during the course of an investigation. AKOSH personnel must use appropriate personal protective equipment and take all necessary precautions to avoid and/or prevent occupational exposure to potential hazards that may be encountered.

D. Interview Procedures.

1. **Identify and Interview Persons.**

   a. Identify and interview all persons with firsthand knowledge of the incident, including first responders, police officers, medical responders, and management, as early as possible in the investigation. The sooner a witness is interviewed, the more accurate and candid the witness statement will be.

   b. If an employee representative is actively involved in the inspection, he or she can serve as a valuable resource by assisting in identifying employees who might have information relevant to the investigation.

   c. Conduct employee interviews privately, outside the presence of the employer. Employees are not required to inform their employer that they provided a statement to AKOSH.

   d. When interviewing:

      - Properly document the contact information of all parties because follow-up interviews with a witness are sometimes necessary.

      - When appropriate, reduce interviews to writing and have the witness sign the document. Transcribe video- and audio-taped interviews and have the witness sign the transcription.

      - Read the statement to the witness and attempt to obtain agreement. Note any witnesses' refusal to sign or initial his/her statement.

      - Ask the interviewee to initial any changes or corrections made to his/her statement.

      - Advise interviewee of AKOSH whistleblower protections.

   e. See Chapter 3, *Inspection Procedures*, for additional information on conducting interviews.

E. Investigation Documentation.

Document all fatality and catastrophe investigations thoroughly.

1. Personal Data – Victim.

Potential items to be documented include: Name; Address; Email address; Telephone; Age; Sex; Nationality; Job Title; Date of Employment; Time in Position; Job being done at the time of the incident; Training for job being performed at time of the incident; Employee deceased/injured; Nature of injury – fracture, amputation, etc.; and Prognosis of injured employee.

2. Incident Data.

Potential items to be documented include: How and why did the incident occur; the physical layout of the worksite; sketches/drawings; measurements; video/audio/photos to identify sources, and whether the accident was work-related.

3. **Equipment or Process Involved**.

   Potential items to be documented include: Equipment type; Manufacturer; Model; Manufacturer's instructions; Kind of process; Condition; Misuse; Maintenance program; Equipment inspection (logs, reports); Warning devices (detectors); Tasks performed; How often equipment is used; Energy sources and disconnecting means identified; and Supervision or instruction provided to employees involved in the accident.

4. **Witness Statements**.

   Potential witnesses include: the Public; Fellow employees; Management; Emergency responders (e.g., police department, fire department); and Medical personnel (e.g., medical examiner).

5. **Safety and Health Program**.

   Potential questions include: Does the employer have a safety and/or health program? Does the program address the type of hazard that resulted in the fatality/catastrophe? How are the elements of the program specifically implemented at the worksite?

6. **Multi-Employer Worksite**

   Describe the contractual and in practice relationships of the employer with the other employers involved with the work being performed at the worksite.

7. **Records Request**.

   Potential records include: Disciplinary Records; Training Records; and Next of Kin information.

   NOTE: Next of kin information should be gathered as soon as possible to ensure that condolence letters can be sent in a timely manner.

F. Potential Criminal Penalties in Fatality and Catastrophe Cases.

1. **Criminal Penalties**.

   a. AS 18.60.095(e) provides criminal penalties for an employer who is convicted of having willfully violated an AKOSH standard, rule or order when the

violation results in the death of an employee. When there are violations of an AKOSH standard, rule or order, or a violation of the general duty clause, criminal provisions relating to false statements and obstruction of justice may also be relevant.

b. The circumstances surrounding all occupationally-related fatalities will be evaluated to determine whether the fatality was caused by a willful violation of a standard, thus creating the basis for a possible criminal referral. The evidence obtained during a fatality investigation is of paramount importance and must be carefully gathered and considered.

c. Early in the investigation, the Chief of AKOSH Enforcement or designee, in consultation with the investigator, should make an initial determination as to whether there is potential for a criminal violation. The decision will be based on consideration of the following:

- A fatality has occurred.
- There is evidence that an AKOSH standard has been violated and that the violation contributed to the death.
- There is reason to believe that the employer was aware of the requirements of the standard and knew it was in violation of the standard, or that the employer was plainly indifferent to employee safety.
- If the Director agrees with the Chief of AKOSH Enforcement or designee's assessment of the case, the Director will notify the AAG and may assign a team or trained criminal investigator to assist in or perform portions of an investigation.
- When there is a potential criminal referral in a case, it is essential that the Director and/or Chief of AKOSH Enforcement involve the AAG's Office in the early stages of the investigation during the evidence gathering process.

G. Families of Victims.

1. Contacting Family Members.

Family members of employees involved in fatal or catastrophic occupational accidents or illnesses shall be contacted early in the investigation and given the opportunity to discuss the circumstances of the accident or illness. AKOSH staff contacting family members must exercise tact and good judgment in their discussions.

2. Information Letter.

The standard information letter will normally be sent to the individual(s) listed as the emergency contact on the victim's employment records (if available) and/or the otherwise determined next of kin within 5 working days of determining the victim's identity and verifying the proper address where communications should be sent.

In cases where a letter is not sent, a description of the efforts to communicate with the next of kin shall be documented in the case file.

NOTE: In some circumstances, it may not be appropriate to follow these exact procedures; i.e., in the case of a small business, the owner or supervisor may be a relative of the victim. Modify the form letter to take any special circumstances into account or do not send the letter, as appropriate.

3. Letter to Victim's Emergency Contact.

The AKOSH Chief of Enforcement will send a letter to the victim's emergency contact or otherwise verifiable next of kin to provide notice of AKOSH inspection of the accident. Upon completion of the inspection, the AKOSH Chief of Enforcement will send a letter to the victim's emergency contact or otherwise verifiable next of kin with the general results of the inspection.

4. Interviewing the Family.

a. When taking a statement from families of the victim(s), explain that the interview will be handled following the same procedures as those in effect for witness interviews. Sensitivity and professionalism are required during these interviews. Carefully evaluate the information received and attempt to corroborate it during the investigation.

b. Maintain follow-up contact with key family members or other contact persons so that these parties can be kept up-to-date on the status of the investigation. Provide family members or their legal representatives with a copy of all citations, subsequent settlement agreements or Review Commission decisions as these are issued, or as soon thereafter as possible. However, such information will only be provided to family members after it has been provided to the employer.

c. The releasable portions of the case file will not be made available to family members until after the contest period has passed and no contest has been filed. If a contest is filed, the case file will not be made available until after the litigation is completed. Additionally, if a criminal referral is under consideration or has been made, the case file may not be released to the family. Notify the family of these policies and inform them that this is necessary so that any potential litigation is not compromised.

H. Public Information Policy.

AKOSH's public information policy regarding response to fatalities and catastrophes is to explain AKOSH presence to the news media. It is not to issue periodic updates on the progress of the investigation. The Director and his or her designee will normally handle response to media inquiries.

III. Recording and Tracking for Fatality/Catastrophe Investigations.

1. Fatality/Catastrophe Report Form (OSHA-36).

The OSHA-36 is a pre-inspection form that must be completed for all fatalities and catastrophes unless knowledge of the event occurs during the course of an inspection at the establishment involved. Processing of the OSHA-36 shall be as follows:

a. The Chief of AKOSH Enforcement will complete and enter into IMIS an OSHA-36 for all fatalities and catastrophes as soon as possible after learning of the event. A copy of the OSHA 36 shall be e-mailed by the Chief of AKOSH Enforcement to the Director as soon as possible. As much information as is known at the time of the initial report should be provided; however, all items on the OSHA-36 need not be completed at the time of this initial report. Wherever possible, the age of the victim(s) should be provided, because this information is used for research by OSHA and other agencies.

b. If additional information relating to the event becomes available that affects the decision to investigate, the OSHA-36 is to be updated and resubmitted via e-mail to the Director's Office.

c. In addition, the Chief of AKOSH will contact the Director to ensure prompt notification of the Commissioner's Office of major events, such as those likely to generate significant public or legislative interest.

2. Investigation Summary Report (OSHA-170).

a. The OSHA-170 is used to summarize the results of investigations of all events that involve fatalities, catastrophes, amputations, hospitalizations of two or more days, have generated significant publicity, and/or have resulted in significant property damage. An OSHA-170 must be opened, logged into IMIS, and saved as final as soon as the agency becomes aware of a workplace fatality and determines that it is within its jurisdiction, even if most of the data fields are left blank. The information on this form enables the Agency to track fatalities and summarizes circumstances surrounding the event.

NOTE: The two-day hospitalization criterion is a cutoff to preclude completing an OSHA-170 for events that may not be serious. There is no

relationship between this criterion and the definition of hospitalization in Section II. A. of this chapter, Definitions.

b. For fatality/catastrophe investigations, the OSHA-170 will be:

- Opened in IMIS at the beginning of the investigation and saved as *final*, even if most of the data fields are left blank, so that AKOSH can track fatality/catastrophe investigations in a close to "real time" fashion.

- Modified as needed during the investigation to account for updated information.

- Updated with all data fields completely and accurately completed at the conclusion of the investigation, including a thorough narrative description of the incident.

c. The OSHA-170 narrative should not be a copy of the summary provided on the OSHA-36 pre-inspection form. The narrative must comprehensively describe the characteristics of the worksite; the employer and its relationship with other employers, if relevant; the employee task/activity being performed; the related equipment used; and other pertinent information in enough detail to provide a third party reader of the narrative with a mental picture of the fatal incident and the factual circumstances surrounding the event.

d. Only one OSHA-170 should be submitted for an event, regardless of how many inspections take place. If a subsequent event occurs during the course of an inspection, a new OSHA-170 for that event should be submitted.

EXAMPLE 11-1: A fatality occurs in employer's facility in August. Both a safety and health inspection are initiated. One OSHA-170 should be filed to summarize the results of the inspections that resulted from the August fatality. However, in September, while the employer's facility is still undergoing the inspections, a second fatality occurs. In this case, a *second* OSHA-170 should be submitted for the second fatality and an additional inspection should be opened.

3. Immigrant Language Questionnaire (IMMLANG).

a) The IMMLANG Questionnaire is designed to allow the Agency to track fatalities among Hispanic and immigrant employees and to assess the impact of potential language barriers and training deficiencies on fatal accidents. Information for this questionnaire should be collected as early in the investigation as possible, as the availability of immigrants for questioning later in the process is often uncertain.

b) The IMMLANG Questionnaire shall be completed before the conclusion of a fatality investigation according to the procedures outlined in the December 16, 2003, memorandum from Deputy Assistant Secretary R. Davis Layne to the Regional

Administrators, It should be completed only if "IMMLANG-Y" is indicated on the OSHA-1 (N-10 Optional Information Code). The Questionnaire is not to be completed if "IMMLANG-N" is indicated on the OSHA-1.

c) The IMMLANG Questionnaire shall be submitted via the intranet. A copy of the completed questionnaire should be printed and placed in the case file.

4. Related Event Code (REC).

The OSHA-1B provides specific supplemental information documenting hazards and violations. If any item cited is directly related to the occurrence of the fatality or catastrophe, the related event code "**A**" shall be entered in block 13. If multiple related event codes apply, the only code that has priority over relation to a fatality/catastrophe ("**A**") is relation to an imminent danger ("**I**").

IV. Pre-Citation Review.

1. Because cases involving a fatality may result in civil or criminal enforcement actions, the Chief is responsible for reviewing all fatality and catastrophe investigation case files to ensure that the case has been properly developed and documented in accordance with the procedures outlined here.

2. The Chief of AKOSH Enforcement is responsible for ensuring that an OSHA-170 is reported to IMIS for each incident (see Paragraph II.I.2. of this chapter, *Investigation Summary Report (OSHA-170)*).

3. Review all proposed violation-by-violation penalties in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, dated October 21, 1990.

4. The Chief of AKOSH Enforcement should establish a procedure to ensure that each fatality or catastrophe is thoroughly investigated and processed in accordance with established policy.

V. Post-Citation Procedures/Abatement Verification.

The regulation governing abatement verification is found at 29 CFR §1903.19 as adopted under 8 AAC 61.142, and AKOSH's enforcement policies and procedures for this regulation are outlined in Chapter 7, *Post-Citation Procedures and Abatement Verification*.

1. Due to the transient nature of many of the worksites where fatalities occur and because the worksite may be destroyed by the catastrophic event, it is frequently impossible to conduct follow-up inspections. In such cases, the Chief of AKOSH Enforcement should obtain abatement verification from the employer, along with an assurance that appropriate safety and health programs have been implemented to prevent the hazard(s) from recurring.

2. While site closure due to the completion of the cited project is an acceptable method of abatement, it can only be accepted as abatement without certification where a CSHO directly verifies that closure; otherwise, certification by the employer is required. Follow-up inspections need not be conducted if the CSHO has verified abatement during the inspection or if the employer has provided other proof of abatement.

3. Where the worksite continues to exist, AKOSH will normally conduct a follow-up inspection if serious citations have been issued.

4. Include abatement language and safety and health system implementation language in any subsequent settlement agreement.

5. If there is a violation that requires abatement verification, field 22 on the OSHA1-B must be completed with the date of abatement verified.

6. If the case is an Severe Violator Enforcement Program (SVEP) case, follow-up inspections will be conducted in accordance with paragraph XV. (See AKOSH PD 10-13, Effective 9/15/2010). Follow-up inspections will normally be conducted even if abatement of cited violations have been verified through abatement verification.

VI. Audit Procedures.

The following procedures will be implemented to evaluate compliance with, and the effectiveness of, fatality/catastrophe investigation procedures:

1. Regional Offices will incorporate the review and analysis of fatality/catastrophe files into their audit functions of AKOSH and include their findings in the regular audit reports to the National Office. The review and analysis will utilize random case files to address the following:

   a. *Inspection Findings*. Ensure that hazards have been appropriately addressed and violations have been properly classified. Also ensure that criminal referrals are made when appropriate.
   b. *Documentation*. Ensure that the OSHA-170 narrative and data fields and the OSHA-1B narrative have been completed accurately and detailed enough to allow for analysis at the national level of the circumstances of fatal incidents. Ensure that the IMMLANG Questionnaire is completed, if relevant.

   c. *Settlement Terms*. Ensure that settlement terms are appropriate, including violation reclassification, penalty reductions, and additional abatement language.

   d. *Abatement Verification*. Ensure that abatement verification has been obtained.

e. Review IMIS reports to identify any trends or cases that may indicate that a further review of those cases may be necessary.

VII. Relationship of Fatality and Catastrophe Investigations to Other Programs and Activities.

1. Homeland Security.

OSHA's *National Emergency Management Plan (NEMP)*, as contained in HSO 01-00-001, dated December 18, 2003, clarifies the procedures and policies for OSHA's National Office, Regional Offices, and AKOSH during responses to incidents of national significance. Generally, AKOSH will provide technical assistance and consultation in coordinating the protection of response worker and recovery worker safety and health. When the President makes an emergency declaration under the Stafford Act, the National Response Framework (NRF) is activated. The NEMP can then be activated by the Assistant Secretary, the Deputy Assistant Secretary, or by request from a Regional Administrator. Whether AKOSH will conduct a formal fatality or catastrophe investigation in such a situation will be determined on a case-by-case basis.

2. Severe Violator Enforcement Program.

a. Inspections that result in citations being issued for at least one of the following are considered Severe Violator Enforcement Program (SVEP) cases:

i. A fatality/catastrophe inspection in which AKOSH finds one or more willful or repeated violations or failure-to-abate notices based on a serious violation related to a death of an employee or one or more hospitalizations.

ii. An inspection in which AKOSH finds two or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards due to the potential release of a highly hazardous chemical, as defined in the PSM standard; or

iii. An inspection in which AKOSH finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards due to the potential release of a highly hazardous chemical, as defined in the PSM standard; or

iv. All egregious (e.g. per instance citations) enforcement actions.

b. In such cases, the instructions outlined in AKOSH PD 10-13, *Severe Violator Enforcement Program (SVEP)*, dated September 15, 2010, shall be followed to ensure that the proper measures are taken regarding classification, coding and treatment of the case.

3. Significant Enforcement Cases.

a. Significant enforcement cases are defined as inspection cases with initial proposed penalties over $100,000. An inspection resulting from an employee fatality or a workplace catastrophe may well be a significant enforcement case and, therefore, particularly thorough documentation is necessary to sustain legal sufficiency.

b. In cases involving a fatality or catastrophe, the procedures outlined in the memorandum dated March 24, 2004, to Regional Administrators from Deputy Assistant Secretary R. Davis Layne regarding Procedures for Significant Enforcement Cases should be used as a guide.

4. Special Emphasis Programs.
If a fatality or catastrophe investigation arises with respect to an establishment that is also in the current inspection cycle to receive a programmed inspection under any High Hazard Targeting program, the investigation and the inspection may be conducted either concurrently or separately.

5. Cooperative Programs.

If a fatality or catastrophe occurs at a Voluntary Protection Program (VPP), AKOSH Strategic Partnership Program (ASPP) site, or AKOSH's Safety and Health Achievement Recognition Program (SHARP), the VPP Manager, ASPP Coordinator, or Consultation Project Manager, as well as the LS&S Director, should be notified. When enforcement activity has concluded, the VPP Manager, OSPP Coordinator, LS&S Director or Consultation Project Manager should be informed so that the site can be reviewed for program issues.

VIII. Special Issues Related to Workplace Fatalities.

1. Death by Natural Causes.

Workplace fatalities caused by natural causes, including heart attacks, must be reported by the employer. The Chief of AKOSH Enforcement will then decide whether to investigate the incident. If the cause of death appears to be natural causes, Form 36 data entry should be delayed until the cause of death is known.

2. Workplace Violence.

As with heart attacks, fatalities caused by incidents of workplace violence must be reported to AKOSH by the employer. The Chief of AKOSH Enforcement or designee will determine whether or not the incident will be investigated.

3. Motor Vehicle Accidents.

a. AKOSH does not require reporting motor vehicle accidents that occur on public roads or highways, unless the accident occurs in a construction work zone.

b. Although employers who are required to keep records must record vehicle accidents in their OSHA-300 Log of Work-Related Injuries and Illnesses, AKOSH does not investigate such accidents. See 29 CFR §1904.39(b)(3).

IX. Rescue Operations and Emergency Response.

A. AKOSH's Authority to Direct Rescue Operations.

1. Direction of Rescue Operations.

AKOSH has no authority to direct rescue operations. These are the responsibility of the employer and/or local political subdivisions or state agencies.

2. Monitoring and Inspecting Working Conditions of Rescue Operations.

AKOSH may monitor and inspect working conditions of covered employees engaged in rescue operations to ensure compliance with standards that protect rescuers, and to provide technical assistance where appropriate.

B. Voluntary Rescue Operations Performed by Employees.

AKOSH recognizes that an employee may choose to place himself/herself at risk to save the life of another person. The following provides guidance on AKOSH citation policy toward employers whose employees perform, or attempt to perform, rescues of individuals in life-threatening danger.

1. Imminent Danger.

Section 29 CFR §1903.14(f) provides that no citation may be issued to an employer because of a rescue activity undertaken by an employee of that employer with respect to an individual in imminent danger [i.e., the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated] unless:

a. Such employee is designated or assigned by the employer to have responsibility to perform or assist in rescue operations,

AND

the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

b. Such employee is directed by the employer to perform rescue activities in the course of carrying out the employee's job duties,

AND

the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

c. Such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as operations where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water;

AND

such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual;

AND

the employer has failed to instruct employees not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, not to attempt rescue, and of the hazards of attempting rescue without adequate training or equipment.

2. Citation for Voluntary Actions.

If an employer has trained his or her employees in accordance with 29 CFR §1903.14, no citation will be issued for an employee’s voluntary rescue actions, regardless of whether they are successful.

C. Emergency Response.

1. Role in Emergency Operations.

While it is AKOSH's policy to respond as quickly as possible to significant events that may affect the health or safety of employees, the agency does not have authority to direct emergency operations.

2. **Response to Catastrophic Events (Note: these are *not* OSH Act requirements)**.

   AKOSH responds to catastrophic events promptly and acts as an active and forceful protector of employee safety and health during the response, cleanup, removal, storage, and investigation phases of these incidents, while maintaining a visible but limited role during the initial response phase.

3. **AKOSH's Role**.

   a. For inspections of an ongoing emergency response or post-emergency response operation where there has been a catastrophic event, or where OSHA and AKOSH are acting under the National Emergency Management Plan (NEMP), the Commissioner will determine the overall role that AKOSH will play.

   b. During an event that is covered by the NEMP, OSHA has a responsibility and authority to both enforce its regulations and provide technical advice and assistance to the Federal on-scene coordinator. If such an event occurs in a State Plan State, OSHA will coordinate with the State Plan agency to ensure their involvement in the response.

   c. For details on AKOSH's response to occupationally-related incidents involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or potential employee injury that generates widespread media interest. See CPL 02-00-094 (AKOSH PD 91-11), *OSHA's Response to Significant Events of Potentially Catastrophic Consequences*, dated July 22, 1991.

4. **Incidents of National Significance**.

   For detailed procedures on how to proceed during incidents of national significance when OSHA has been designated as the primary Federal agency for the coordination of technical assistance and consultation for emergency response and recovery worker health and safety, and the Assistant Secretary has activated the National Emergency Response Plan, see HSO 01-00-001 *National Emergency Management Plan*, dated December 18, 2003, and the National Response Framework (Worker Safety and Health Support Annex).

   Note: These documents apply when activated.

CHAPTER 12

SPECIALIZED INSPECTION PROCEDURES

I. Multi-Employer Workplace/Worksite [Reserved].

See CPL 02-00-124 (AKOSH PD 00-06), *Multi-Employer Citation Policy*, dated December 10, 1999.

II. Temporary Labor Camps.

A. Introduction.

AKOSH standards for temporary labor camps are found in 8 AAC 61.1040 and must be applied prior to any application of standards under 29 CFR 1910.142, as adopted under the Alaska Administrative Code.

B. Primary Concerns.

When conducting a housing inspection, CSHOs shall be primarily concerned with those facilities or conditions that most directly relate to employee safety and health. Accordingly, all housing inspections shall address at least the following:

1. Site.

a. Review the location of the site for adequate drainage in relation to periodic flooding, swamps, pools, sinkholes, and other surfaces where water may collect and remain for extended periods.

b. Determine whether the site is adequate in size to prevent overcrowding and whether it is located near (within 500 feet of) livestock.

c. Evaluate the site for cleanliness and sanitation; i.e., free from rubbish, debris, wastepaper, garbage, and other refuse.

2. Shelter.

a. Determine whether the shelter provides protection against the elements; has the proper floor elevation and floor space; whether rooms are used for combined purposes of sleeping, cooking and eating; and whether all rooms have proper ventilation and screening.

b. Determine which rooms are used for sleeping purposes, the number of occupants, size of the rooms, and whether beds, cots, or bunks and lockers are provided.

c. Determine what kind of cooking arrangements or facilities are provided, and whether all heating, cooking and water heating equipment are installed in accordance with state and local codes.

3. Water Supply.

Determine whether the water supply for drinking, cooking, bathing and laundry is adequate and convenient, and has been approved by the appropriate local health authority.

4. Toilet Facilities.

Determine the type, number, location, lighting, and sanitary conditions of toilet facilities.

5. Sewage Disposal.

Determine, in camps where public sewers are available, whether all sewer lines and floor drains are connected.

6. Laundry, Handwashing and Bathing Facilities.

a. Determine the number, kind, locations and conditions of these facilities, and whether there is an adequate supply of hot and cold running water.

b. Determine also whether such facilities have appropriate floors, walls, partitions and drains.

7. Lighting.

a. Determine whether electric service is available, and if so, if appropriate light levels, number of ceiling-type light fixtures, and separate floor- or wall-type convenience outlets are provided.

b. Determine also whether the light fixtures, floor and wall outlets are properly grounded and covered.

8. Refuse Disposal and Insect and Rodent Control.

Determine the type, number, locations and conditions of refuse disposal containers, and whether there are any infestations of animal or insect vectors or pests.

III. First-Aid Facilities.

Determine whether adequate first-aid facilities are available and maintained for emergency treatment.

A. Dimensions.

The relevant dimensions and ratios specified in 8 AAC 1040 are mandatory; however, CSHOs may exercise discretion to not cite minor variations from specific dimensions and ratios when such violations do not have an immediate or direct effect on safety and health. In those cases in which the standard itself does not make reference to specific dimensions or ratios but instead uses adequacy as the test for the cited conditions and facilities, the Chief of AKOSH Enforcement shall make the determination as to whether a violation exists on a case-by-case basis considering all relevant factors.

B. **Documentation for Housing Inspections.**

The following facts shall be carefully documented:

1. The age of the dwelling unit, including any additions. For recently built housing, date the construction was started.
2. Number of dwelling units, number of occupants in each unit.
3. Approximate size of area in which the housing is located and the distance between dwelling units and water supply, toilets, livestock and service building.

C. **Condition of Employment.**

The Act covers only housing that is a term and condition of employment. Factors in determining whether housing is a term and condition of employment include situations where:

1. Employers require employees to live in the housing.
2. The housing is in an isolated location or the lack of economically comparable alternative housing makes it a practical necessity to live there.
3. Additional factors to consider in determining whether the housing is a term and condition of employment include, but are not limited to:
   a. Cost of the housing to the employee – is it provided free or at a low rent?
   b. Ownership or control of the housing – is the housing owned or controlled or provided by the employer?

c. Distance to the worksite from the camp, distance to the worksite from other non-camp residences – is alternative housing reasonably accessible (distance, travel, cost, etc.) to the worksite?
d. Benefit to the employer -- does the employer make the camp available in order to ensure that the business is provided with an adequate supply of labor?
e. Relationship of the camp occupants to the employer – are those living in the camp required to work for the employer upon demand?

Chapter 13

LEGAL ISSUES

I. Administrative Subpoenas.

A. When to Issue.

An Administrative Subpoena may be issued whenever there is a need for records, documents, testimony or other supporting evidence necessary for completing an inspection or an investigation of any matter falling within AKOSH's authority.

1. The Division Director has authority to issue subpoenas, and may delegate to Chief of AKOSH Enforcement the authority to issue routine administrative subpoenas.

2. The issuance of an administrative subpoena requires the Chief of AKOSH Enforcement or Division Director's signature.

   AKOSH has authority to subpoena documents and witnesses under AS 18.60.083(b). CSHO's are to consult with the Chief of AKOSH Enforcement prior to issuing a subpoena.

B. Warrant Applications.

1. Upon refusal of entry, of if there is reason to believe an employer will refuse entry, the Chief of AKOSH Enforcement shall proceed according to guidelines and procedures established in the region for warrant applications authorized in AS 18.60.083(b). The Chief of AKOSH Enforcement may initiate the compulsory process with approval of the Department of Law.

2. Warrant applications for establishments where consent has been denied for a limited scope inspection (i.e., complaint, referral, accident investigation) shall normally be limited to the specific working conditions or practices forming the basis of the inspection. However, a broad scope warrant may be sought if there is evidence of potentially pervasive violative conditions or if the establishment is on a current list of establishments targeted for a comprehensive inspection.

C. General Information Necessary to Obtain a Warrant.

If the warrant is to be obtained by the Department of Law, the Chief shall inform the Department of Law in writing within **48 hours** after the determination is made and provide all information necessary to obtain a warrant, including:

1. AKOSH Office, telephone number, and name of Chief or designee involved;
2. Name of CSHO attempting inspection and inspection number, if assigned. Identify whether the inspection to be conducted will include safety items, health items or both;

3. Legal name(s) of establishment and address, including City, State and County. Include site location if different from mailing address;
4. Estimated number of employees at inspection site;
5. Standard Industrial Classification (SIC) or North American Industry Classification System (NAICS) Code and high hazard ranking for that specific industry within the State, as obtained from statistics provided by the National Office;
6. Summary of all facts leading to the refusal of entry or limitation of inspection, including:
   a. Date and time of entry/attempted entry;
   b. Date and time of denial;
   c. Stage of denial (entry, opening conference, walkaround, etc.);

7. A narrative of all actions taken by the CSHO leading up to, during, and after refusal, including:
   a. Full name and title of the person(s) to whom CSHO presented credentials;
   b. Full name and title of person(s) who refused entry;
   c. Reasons stated for the denial by person(s) refusing entry;
   d. Response, if any, by CSHO to the denial name and address (if known) of any witnesses to denial of entry.

8. Any information related to past inspections, including copies of previous citations.

9. Any previous requests for warrants. Attach details, if applicable.

10. All completed information related to the current inspection report, including documentation of any observations of violations in plain view discovered prior to denial.

11. If a construction site involving work under contract from any agency of the Federal Government, the name of the agency, the date of the contract, and the type of work involved.

12. Other pertinent information, such as: description of the workplace; the work processes; machinery, tools and materials used; known hazards and injuries associated with the specific manufacturing process or industry.

13. Investigative procedures that may be required during the proposed inspection, e.g., interviewing of employees/witnesses, personal sampling, photographs, audio/videotapes, examination of records, access to medical records, etc.

D. **Specific Warrant Information Based on Inspection Type.**

Document all specific reasons for the selection of the establishment to be inspected, including proposed scope of the inspection:

1. Imminent Danger.

a. Description of alleged imminent danger situation;
b. Date information received and source of information;
c. Original allegation and copy of typed report, including basis for reasonable expectation of death or serious physical harm and immediacy of danger; and
d. Whether all current imminent danger investigative procedures have been followed.

2. Fatality/Catastrophe.

The OSHA-36 Form should be completed with as much detail as possible.

3. Complaint or Referral.

a. Original complaint or referral and copy of typed complaint or referral;
b. Reasons OSHA believes that a violation threatening physical harm or imminent danger exists, including possible standards that could be violated if the complaint or referral is credible and representative of workplace conditions;
c. Whether all current complaint or referral processing procedures have been followed; and
d. Any additional information pertaining to the evaluation of the complaint or referral.

4. Programmed.

a. Targeted safety – general industry, maritime, construction;
b. Targeted health; and/or
c. Special emphasis program--Special Programs, Local Emphasis Program, Migrant Housing Inspection, etc.

5. Follow-up.

a. Date of initial inspection;
b. Details and reasons follow-up was conducted;
c. Copies of previous citations which served as the basis for initiating the follow-up;
d. Copies of settlement agreements and final orders, if applicable; and/or
e. Previous history of failure to correct, if any.

6. Monitoring.

a. Date of original inspection;
b. Details and reasons monitoring inspection is to be conducted;
c. Copies of previous citations and/or settlement agreements that serve as the basis for the monitoring inspection; and/or
d. Petition for Modification of Abatement Date (PMA) request, if applicable.

E. **Warrant Procedures.**

Where a warrant has been obtained, CSHOs are authorized to conduct the inspection in accordance with the terms of the warrant. All questions from employers concerning the reasonableness of a compulsory process inspection shall be referred to the Chief of AKOSH Enforcement.

1. **Action Taken Upon Receipt of Warrant (Compulsory Process)**.

   a. The inspection will normally begin within 24 hours of receipt of a warrant or from the date authorized by the warrant for initiating the inspection.

   b. Upon completion of the inspection, if the warrant includes a return of service space for entering inspection dates, CSHOs shall complete the return of service on the original warrant, sign and forward it to the Chief of AKOSH Enforcement or designee for appropriate action.

F. **Second Warrant.**

Under certain circumstances, a second warrant may be sought to expand an inspection based on a records review or "plain view" observations of other potential violations discovered during a limited scope walkaround.

G. **Refused Entry or Interference.**

1. When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant, CSHOs shall specifically inquire whether the employer is refusing to comply with the warrant.

2. If the employer refuses to comply or if consent is not clearly given, CSHOs shall not attempt to conduct the inspection at that time, and shall leave the premises and contact the Chief of AKOSH Enforcement or designee regarding further action.

   a. CSHOs shall fully document all facts relevant to the refusal (including noting all witnesses to the denial of entry or interference).
   b. Chief shall then contact the Department of Law and the Division Director, who shall jointly decide the action to be taken.

H. **Notice of Contest**.

OSH Review Board is an independent board created to decide contests of citations or penalties resulting from AKOSH inspections. The Review Board, therefore, functions as an administrative court, with established procedures for conducting hearings, receiving evidence and rendering decisions by its Administrative Law Judges (ALJs). The Board operates under the following regulations: 8 AAC 61.160 – 8 AAC 61.220.

I. **Time Limit for Filing a Notice of Contest**.

1. The Act and AS 18.63.093(b) provides employers fifteen working days following its receipt of a notice of a citation to notify AKOSH of the employer's desire to contest a citation and/or proposed assessment of penalty.

2. Where a notice of contest was not mailed, i.e., postmarked, within the 15 working day period allowed for contest, the Chief of AKOSH Enforcement shall follow the instructions for Late Notices of Contest. A copy of any untimely notice of contest shall be retained in the case file.

J. **Contest of Abatement Period Only**.

If the notice of contest is submitted to the Chief of AKOSH Enforcement after the 15 working day period, but contests only the reasonableness of the abatement period, it shall be treated as a Petition for Modification of Abatement and handled in accordance with PMA procedures.

K. **Communication Where the Intent to Contest is Unclear**.

1. If a written communication is received from an employer containing an objection, criticism or other adverse comment as to a citation or proposed penalty, but which does not clearly appear to contest the citations, the Chief shall contact the employer to clarify the intent of the communication.

   a. After receipt of the communication, any clarification should be obtained within the 15 working day contest period, so that if a determination is made that it is a notice of contest, the file may be timely forwarded to the Review Board.
   b. In cases where the Chief of AKOSH Enforcement receives a written communication from an employer requesting **an informal conference that also states an intent to contest**, the employer must be informed that there can be no informal conference unless the notice of contest is withdrawn. If the employer still wants to pursue an informal conference, it must first present or send a letter expressing that intent and rescinding the contest. All documents pertaining to such communications shall be retained in the case file.

2. If the Chief of AKOSH Enforcement determines that the employer intends the document to be a notice of contest, it shall be transmitted to the OSH Review Board. If contact with the employer reveals a desire for an informal conference, the employer shall be informed that the conference does not stay the running of the 15 working day contest period.

II. Late Notice of Contest.

A. Failure to Notify AKOSH of Intent to Contest.

If the employer fails to notify AKOSH of its intent to contest a citation or penalty within fifteen working days following the receipt of a citation, the citation and proposed penalties become final orders of the Review Commission.

B. Notice Received after the Contest Period.

1. In every case where AKOSH receives notice of an employer's intent to contest a citation and/or proposed assessment of penalty beyond the 15 working day period, Chief of AKOSH Enforcement shall inform employers in writing that AKOSH will not accept the untimely notice of contest, but that the it may transmit the late filed notice of contest to the Board.

2. The letter from the Chief will also indicate the following:

a. Inspection number;
b. Citation number(s);
c. Corresponding proposed penalties;
d. Date on which AKOSH believes the employer received the notice of a violation (and proposed penalty, if applicable);
e. Date on which AKOSH received the employer's notice of contest, as well as any additional information the Chief believes to be pertinent.

NOTE: The postmarked envelope containing the late filed notice of contest date is to be retained. A copy of the letter and envelope shall be sent to Department of Law.

C. Retention of Documents.

1. AKOSH Chief shall maintain all documents reflecting the date on which the employer received the notice of a violation (and proposed penalty, if applicable), and the employer's notice of contest was received, as well as any additional information pertinent to demonstrating failure to file a timely notice of contest.
2. Written or oral statements from the employer or its representative explaining the employer's reason for missing the filing deadline shall also be maintained (notes shall be taken to memorialize oral communications).

III. Contested Case Processing Procedures.

The notice of contest and related documents must be sent to the OSH Review Board within 15 working days of receipt of the employer's notification. The Department of Law shall be consulted in any questionable cases.

A. Transmittal of Notice of Contest to Commission.

1. Documents to OSH Review Board.

2. Notices of Contest.

The original notice of contest shall be transmitted to the Board and a copy retained in the case file. The envelope containing the notice of contest shall be retained in the case file with the postmark intact.

3. **Contested Citations and Notice of Proposed Penalty or Notice of Failure to Abate.**
   A signed copy of each of these documents shall be sent to the Board and a copy retained in the case file.

4. **Notice of Contest documents shall be immediately mailed to:**

   OSH Review Board
   PO Box 111149
   Juneau, AK 99811-1149

B. Transmittal of File to the AAG.

Under the Board's Rules of Procedure under 8 AAC 61.175, AKOSH is required to file a complaint with the Commission within 30 days after the receipt of a notice of contest.

Immediately after receiving a notice of contest, the Chief of AKOSH Enforcement shall send to the AAG by U.S. mail (or other mutually agreeable manner) the notice of contest, which the Chief of AKOSH Enforcement or designee will later transmit to the Board, along with the complete investigative file (including photos and video).

IV. Communications while Proceedings are Pending before the Board.

A. Consultation with Department of Law.

1. After a notice of contest is filed and the case is within the jurisdiction of the Board, there shall be no subsequent investigations of, or conferences with, the employer or employee representatives that have sought party status relating to any issues underlying the contested citations, without prior clearance from the Department of Law.

2. Once a notice of contest has been filed, all inquiries relating to the Citation and Notification of Penalty shall be referred promptly to the Department of Law. This includes inquiries from the employer, affected employees, employee representatives, prospective witnesses, insurance carriers, other Government agencies, attorneys, and any other party.

B. Communications with Board Members while Proceedings are Pending before the Board.

CSHOs, Chief of AKOSH Enforcement, Director, or other field personnel shall not have any direct or indirect communication relevant to the merits of any open case

with Administrative Law Judges, members of the Board, or any of the parties or interveners. All inquiries and communications shall be handled through the Department of Law.

V. Board Procedures.

A. AS 18.60.093 provides enforcement and formal contest notification processes with the OSH Review Board.
B. AS 18.60.097 provides for judicial review.
C. Rules of Procedure. Refer to 8 AAC 61.170 – 8 AAC 61.220

VI. Discovery Methods.

Once a legal proceeding has been initiated, each party has the opportunity to "discover" evidence in the possession of an opposing party. Traditionally, discovery methods include:

- ► Request for Admissions,
- ► Interrogatories,
- ► Requests for Production of Documents, and
- ► Depositions.

An attorney from the Department of Law will represent the agency in responding to discovery requests. It is essential that all AKOSH personnel coordinate and cooperate with the assigned attorney to ensure that such responses are accurate, complete, and filed in a timely manner.

A. Interrogatories.

CSHOs shall draft and sign answers to interrogatories, with Department of Law assistance. It is the responsibility of the CSHO to answer each interrogatory separately and fully. The Department of Law attorney shall sign any objections to the interrogatories. CSHOs should be aware that they may be deposed and/or examined at hearing on the interrogatory answers provided.

B. Production of Documents.

1. If a request for production of documents is served on Department of Law and that request is forwarded to the AKOSH Office CSHOs, or staff member, they should immediately make all documents relevant to that discovery demand available to the Department of Law attorney.

2. While portions of those materials may be later withheld based on governmental privileges or doctrine (e.g., statements that would reveal the identity of an informer), CSHOs must not withhold any information from the Department of Law attorney.

3. It is Department of Law's responsibility to review all material and to assert any applicable privileges that may justify withholding documents/materials that would otherwise be discoverable.

C. Depositions.

Depositions permit an opposing party to take a potential witness' pre-hearing statement under oath in order to better understand the witness's potential testimony if the matter later proceeds to a hearing. CSHOs or other AKOSH personnel may be required to offer testimony during a deposition. In such cases, an Department of Law attorney will be present with the witness unless Chief determines not necessary.

VII. Testifying in Hearings.

While instructions provided by Department of Law attorneys take precedence, particularly during trial preparation, the following considerations will generally enhance the hearing testimony of CSHOs:

A. Review Documents and Evidence.

In consultation with Department of Law, CSHOs should review documents and evidence relevant to the inspection or investigation before the proceeding so that when testifying, they are very familiar with the evidence and need not regularly refer to the file or other documents.

B. Attire.

Wear appropriate clothing that reflects the agency's respect for the court or other tribunal before which you are testifying. This also applies when appearing before a magistrate to seek an administrative warrant.

C. Responses to Questions.

Answer all questions directly and honestly. If you do not understand a question, indicate that and ask that the question be repeated or clarified.

D. Judge's Instruction(s).

Listen carefully to any instruction provided by the judge and, unless instructed to the contrary by Department of Law counsel, follow the judge's instruction.

VIII. Citation Final Order Dates.

A. Citation/Notice of Penalty Not Contested.

The Citation/Notice of Penalty and abatement date becomes a final order of the Commission **on the date the 15 working day contest period expires**. For purposes

of computing the 15 working day period, the day the employer receives the citation is not counted.

Example 15-1: An employer receives the Citation/Notice of Penalty on Monday, August 4th. The day the employer receives the Citation/Notice of Penalty is not counted. Therefore, the final order date would be Monday, August 25th.

B. Citation/Notice of Penalty Resolved by Informal Settlement Agreement (ISA).

Because there is no contest of the citation, an ISA becomes final, with penalties due and payable, **on the date of the last signature of the parties**. See also Chapter 8, Paragraph I.B.2. (An ISA is effective upon signature by both the Area Director and the employer representative as long as the contest period has not expired).

NOTE: A later due date for payment of penalties may be set by the terms of the ISA.

C. Citation/Notice of Penalty Resolved by Formal Settlement Agreement (FSA).

The Citation/Notice of Penalty **becomes final 30 days after docketing of the OSH Review Board's Order approving the parties' stipulation and settlement agreement**, assuming there is no direction for review. The Board's Notice of Docketing specifies the date upon which the decision becomes a final order. If the FSA is approved by an order of the full Board, **it will become final after 60 days**.

D. **Board Decision Review by the Alaska Superior Court**.

The Alaska Court of Appeals' decision becomes final when the court issues its mandate.