March 17, 2023

Mr. James Wulff

Regional Administrator, OSHA

90 – 7th Street, Suite 18100

San Francisco, CA. 94103

### **RE: NVOSHA Response to Follow-up FAME Report**

Dear Mr. Wulff,

The Nevada Occupational Safety and Health Administration (NVOSHA) would like to thank you for the opportunity to provide a formal response to the 2022 Follow-up Federal Annual Monitoring and Evaluation (FAME) report. This response is intended to enhance the initial response provided on August 18, 2022, to the initial 2021 FAME report, and specifically address the status comments included in the follow-up FAME report. NVOSHA continues to work with regional and state OSHA representation to develop a proactive and mutually beneficial relationship between the two agencies. With the support of regional and state representation of OSHA the Nevada State Plan Program has worked on addressing the identified findings from the FY 2021 FAME evaluation. Please see NVOSHA’s formal response to the findings and observations below.

### **FINDINGS FY2022**

### **B.2.b: Fatalities**

**Finding FY 2202-01/2021-02:** The number of fatality investigations, 1 of 6 (16%), was not opened within one day and was below the FRL.

**Status:** NVOSHA conducted training and streamlined policies and procedures to ensure timely fatality investigations were initiated within one day (SAMM 10).  However, in FY 2022, only 15 of 18 (83.33%) fatality investigations were responded within the one-day timeline.  This finding is continued.

**State Response:** In review of the 3 identified investigations, the following comments are made in response:

Regarding inspection number 1618245: The initial report was provided that this was an employee experiencing a bee sting and having a fatal reaction to the bee sting afterwards. NVOSHA initiated a response when it was later discovered that the employer may have intentionally released bees as part of an alfalfa growing and harvesting process.

Regarding inspection number 1600965: The initial report was that an employee had a personal medical event leading to a heart attack. At the direction of the Administrator, a response was opened after further discussion to review possible heat stress elements in support of the newly adopted heat stress National Emphasis Program.

Regarding inspection number 1626033: This matter is still open, and this office encountered significant reporting issues with the incident. The initial e-complaint did not provide sufficient information to justify an immediate response, and it was not until this office received a fatality notification from an insurer that we determined this matter warranted an investigation. Additionally, the CSHO assigned to the incident failed to respond timely which has been addressed as a performance issue. This CSHO is no longer with NVOSHA.

As referenced in our previous response, we will continue to monitor our performance regarding SAMM 10. Historically, NVOSHA has promptly initiated all fatality investigations within one day as follows:

* 2015: 100%
* 2016: 100%
* 2017: 100%
* 2018: 100%
* 2019: 100%
* 2020: 100%

As of March 17, 2023, a SAMM report for the current fiscal year identifies that all five reported work-related fatalities were responded to within one workday.

### **B.2.c: Targeting and Programmed Inspection**

**Finding FY 2022-02/2021-03:** The total number of enforcement inspections, 810 (67.5%) was below the goal of 1,200 (SAMM 7).

**Status:** The FRL for SAMM 7 in Appendix D was +/-5% of the grant negotiated goal of 405 safety inspections and 530 health inspections. The range of acceptable data not requiring further review was 384.75 to 425.25 for safety inspections and 503.50 to 556.50 for health inspections. NVOSHA conducted a total of 836 private sector inspections (599 safety, 237 health).

NVOSHA’s effort continued to be significantly hampered by adverse conditions such as staff turnover rate of 36%, vacant or probationary status positions in training (41% of 44 CSHOs), 25 (56.8%) CSHOs possessed less than two years of enforcement experience. This finding is continued.

**State Response:** As of March 17, 2023, NVOSHA has worked tirelessly to address this goal. Accountability efforts to increase inspections has been addressed and implemented with managers, which was in turn addressed with supervisors and inspectors. Work performance standards have been revised to specifically include the acceptable range to meet this particular goal. In addition, NVOSHA continues to look for alternative methods of retaining staff to include flexible scheduling and utilizing creative recruiting methods such as the Department of Defense Skillbridge Program which has provided this agency at least 5 new interns – one of which successfully transitioned to FTE.

### **B.2.d: Citations and Penalties**

**Finding FY 2022-03/2021-04:** The percentage of in-compliance inspections for both safety (46.84%) and health (61.54%) inspections exceeded the FRL of 37.98% and 48.77% respectively.

**Status:** The FRL for SAMM 9a and 9b in Appendix D was +/-20% of the three-year national average of 32.25% for safety inspections and 44.42% for health inspections. The range of acceptable data not requiring further review was 25.80% to 38.70% for safety inspections and from 35.54% to 53.30% for health inspections. NVOSHA’s in-compliance rate was 43.91% for safety inspections and 57.14% for health inspections, both were well above the top of the FRL range.

This can be attributed to the high enforcement personnel turnover rate of 36% in FY 2022 compared to 30% in FY 2021. There were 35 CSHOs at the beginning of the fiscal year and 13 CSHOs left the agency during the year, transferred to other positions within the agency or were promoted. NVOSHA made progress with 14 new hires and ended the year with 36 CSHOs, a net increase of one position. A training program was designed to develop CSHOs and increase their hazard recognition skills using a variety of methods combined with supervisory involvement. In addition, NVOSHA was in the process of analyzing statistical data to ensure resources were directed at high hazard industries. This finding is continued.

**State Response:** The previous targeting lists have been analyzed to identify violation rates within each of the targeted industries. Additionally, the targeting lists have been enhanced with additional industries with high DART rates in Nevada, and industries identified in updated Federal OSHA National Emphasis Programs. NVOSHA averaged 3 to 6 violations per inspection, which justifies the need for enforcement presence within these industries. Work performance standards for senior-level CSHOs include a goal of conducting 40-50% of their inspections at targeted locations, which should ultimately result with identifying more hazards, as well as removing more employees from hazards. Additionally, second year CSHOs are required to conduct comprehensive inspections in at least one of each targeted industries before their third year.

In addition, a review of issued citations and the need for additional training was conducted. During review of the OTS violations, two categories stood out: bloodborne and electrical. To aid in appropriate hazard recognition, training classes were located and scheduled. CSHOs are scheduled for an electrical course taught by a previous Federal OSHA OTI instructor. Both offices will complete this course by May 2023. To address the bloodborne pathogens, we have scheduled with OTI for an on-the-road course to host 2340 Biohazards. This will be performed during the next federal fiscal year.

As for an overall hazard recognition skill, CSHOs received several technical trainings. These include, but are not limited to, OTI courses, OSHA Authorized training facilities, and other third-party vendors. Topics included respiratory protection, expanded health standards, asbestos, and cranes in construction. CSHOs are also attending courses at OTI during this federal fiscal year for fall protection and principles of industrial ventilation.

With more technical training staff will be able to identify and appropriately classify hazards.

### **B.2.f: Worker and Union Involvement**

**Finding FY 2022-04/2021-05:** In 7 of 87 (8%) inspections, documentation of employee interviews was not included in the case file.

**Status:** A case file review is necessary to gather the facts needed to evaluate progress on this finding. This finding will be a focus of next year’s on-site case file review during the FY 2023 comprehensive FAME and remains open.

**Finding FY 2022-05/2021-06:** In six of eight (75%) case files with union involvement, the union participation or declination at the opening and closing conference was not documented. In 5 of 8 of these cases, union participation in the walk-around portion of the inspection was not documented in the casefile.

**Status:** NVOSHA implemented a checklist and use of a diary sheet to ensure that the involvement of or lack thereof union representation was afforded and documented as part of the case file review. A case file review is necessary to gather the facts needed to evaluate progress on this finding. This finding will be a focus of next year’s on-site case file review during the FY 2023 comprehensive FAME and remains open.

**State Response to FY2022-04 and FY2022-05:** NVOSHA believes this is exclusively a documentation issue and not an issue with ensuring union representatives are provided an opportunity to participate. NVOSHA is committed to providing union representatives an opportunity to participate in inspections.

As part of our corrective action, we’ve since conducted meetings with supervisory staff communicating the finding to them. A checklist has since been created that requires supervisory staff to, upon review of a casefile, ensure that either the involvement or declination of union involvement during the opening and closing conferences are being documented. The required OIS entry fields associated with union involvement have been reiterated through training by the OSU.

As of March 17, 2023, a casefile review via NV OSHA’s State Internal Evaluation Plan (SIEP) to evaluate the progress of these findings is still pending. NV OSHA is looking to evaluate a minimum of 6 months' (through March 31, 2023) worth of data before conducting an internal evaluation, which is tentatively scheduled in June of 2023. The internal review will allow us to evaluate the progress regarding these findings based off the results associated with the corrective action that we’ve implemented.

### **B.7: Whistleblower Program**

**Finding FY 2022-06/2021-07:** In 35 of 50 (70%) administratively closed investigation files, there was no evidence of a supervisory review.

**Status:** A case file review is necessary to gather the facts needed to evaluate progress on this finding. This finding will be a focus of next year’s on-site case file review during the FY 2023 comprehensive FAME and remains open.

**State Response:** As of March 17, 2023, a review of this process has been performed. All files reviewed were determined to have a documented supervisory review included with the file. Additionally, when a case was closed,an email was sent to the Complainant, the email was then saved to the file. If the complaint is docketed and dismissed, the Complainant was sent a closure letter which was then included with the file.

### **OBSERVATIONS FY2022**

### **B.3.b: Formal Review of Citations**

**Observation FY 2022-OB-01/2021-OB-02:** The reclassification rate of private sector violations was higher at 45.10% (SIR 6B) than the national average of 12.17%.

**Status:** The reclassification rate after a contest had been filed for private sector inspections (SIR 6b) was 23.26% in FY 2022. Although this was a decrease from the 45.10% in FY 2021, it continued to be above the national average of 13.21%. The observation will be continued.

**State Response:** As of March 17, 2023, NVOSHA reviewed the SIR for the current fiscal year (October 1, 2022 to March 15, 2023). This measure is currently showing 19.7% for NVOSHA and 11.41% nationally which demonstrates that NVOSHA’s continued efforts to address this matter are resulting in a downward trend. NVOSHA will continue to monitor this measure.

**State Activity Mandated Measures (SAMM) Highlights - 2022**

**SAMM 5 – Average Number of Violations per Inspection with Violations by Violation Type**

**Discussion of State Plan Data and FRL:** The FRL for average number of violations per inspection with violations by violation type (SWRU) is +/- 20% the three-year national average of 1.77 which equals a range of 1.42 to 2.12. The FRL for average number of violations per inspection with violations by violation type (other) is +/- 20% the three-year national average of 0.90 which equals a range of 0.72 to 1.08. NVOSHA averaged 1.40 for SWRU and 1.29 for other than serious, both were outside the acceptable FRL range and warranted a closer look at the situation.

**Explanation:** The lower-than-average SWRU and higher-than-average other than serious violations per inspection was most likely due to two contributing factors. The first and probably most significant factor was the hiring and retention of staff. The second factor was staff inexperience and the need for training and development. OSHA will continue to monitor this at quarterly meetings.

**State Response:** A SAMM report was generated on March 15, 2023 pertaining to federal fiscal year 2022. Measure 5 (average SWRU violations per inspection) indicated that the three-year national average was 1.74 with a range of 1.39 to 2.09. NV OSHA’s three-year national average was 1.38.

A SAMM report was generated for the current fiscal year (October 1, 2022 to March 15, 2023), in which Measure 5 (SWRU) indicates that the three-year national average was 1.74 with a range of 1.39 to 2.09. NV OSHA’s three-year national average was 1.63.

Upon reviewing a Violation Detail Data report for fiscal year 2022 and filtering out Other-than-Serious (OTS) violations, which includes State-specific violations under Nevada Revised Statutes (NRS) Chapter 618 and Nevada Administrative Code (NAC) Chapter 618. There was a total of 536 OTS violations, which included 160 NAC/NRS violations (30%). When subtracting the State-specific violations from this equation then dividing that by the total number of non in compliance inspections (376/415), the average number of OTS violations per inspection was 0.91 (within the acceptable range). NVOSHA believes this state plan should not be penalized for enforcing Nevada-specific statutes and regulations adopted to address state-specific concerns. NVOSHA believes it is meeting the intent of this SAMM measure.

**SAMM 8 – Average Current Serious Penalty in Private Sector – total (1 to Greater than 250 Workers)**

**Discussion of State Plan data and FRL:** The FRL for SAMM 8 in Appendix D was +/-25% of the three-year national average of $3,259.35. The range of acceptable data not requiring further review was $2,444.51 to $4,074.19. NVOSHA’s average current serious penalty in the private sector with 1-250+ workers were $4,221.12, which was $962.77 above the upper end of the FRL range.

**Explanation:** NVOSHA’s implementation of Nevada Senate Bill 40, legislation paralleling the federal annual adjustment to penalties, resulted in an increase in average penalties during FY 2022. Individually, SAMM measures for the different size categories of employers were within the applicable FRL ranges. NVOSHA’s performance in this measure is noteworthy and OSHA will continue to monitor this metric during quarterly meetings.

**State Response:** NVOSHA does not necessarily consider penalty rates above the upper end of the FRL range as noteworthy and deems this fact as indicative of NVOSHA striving to achieve the appropriate deterrent effect for private sector employers with 1 to 250+ workers where this state plan has identified higher levels of violations per inspection.

**SAMM 11 – Average Lapse Time**

**Discussion of State Plan data and FRL:** The FRL for citation lapse time for safety and health inspections (SAMM 11) was +/- 20% of the three-year national average. For safety inspections, the three-year national average was 54.58 days, with an FRL range of 43.66 to 65.50 days. NVOSHA had a safety lapse time of 82.38, which was 16.88 days above the upper end of the FRL range. For health inspections, the three-year national average was 69.03 days, with an FRL range of 55.22 to 82.84 days. NVOSHA had a health inspection lapse time of 88.82 days, which was 5.98 days above the FRL range.

**Explanation:** The primary factors attributing to the increase in average lapse time for citation issuance included conditions such as staff turnover rate of 36%, vacant positions or positions in probationary status (41% the 44 CSHO positions), and 25 (56.8%) CSHOs possess less than two years of enforcement experience. OSHA will continue to monitor this metric during FY 2023.

**State Response:** NVOSHA has implemented accountability efforts which have been addressed with managers, which was in turn addressed with supervisors and inspectors. Work performance standards have been revised to ensure that case files are submitted to supervisors for review 30 to 35 calendar days on average from the date of the opening conference. If approval to extend an inspection due to complexity is not obtained by the manager, then the matter is considered a performance issue for the supervisor and inspector thereby warranting accountability measures to be utilized.

**SAMM 13 – Percent of Initial Inspections with Worker Walk-around Representation or Worker Interview**

**Discussion of State Plan data and FRL:** The FRL for SAMM 13 in Appendix D is fixed at 100% for all state plans. In FY 2022, NVOSHA completed 99.88% of initial inspections with worker walk-around representation or worker interviews.

**Explanation:** NVOSHA was slightly below the FRL for SAMM 13, however they exceeded the national average of 96.98%. OSHA will continue to monitor this metric during FY 2023.

**State Response:** A SAMM report was generated for the current fiscal year (October 1, 2022 to March 15, 2023), in which Measure 13 indicates that the percent of initial inspections with employee walk around representation or employee interview was 100%.

### **CONCLUSION**

The Nevada Occupational Safety and Health Administration (NVOSHA) would like to again thank our Federal OSHA partners for the opportunity to provide a formal response to the 2022 Follow-up Federal Annual Monitoring and Evaluation (FAME) report. As demonstrated by the above responses and NVOSHA’s corrective action plan, we fully commit to improving the Nevada State Plan program with the support of regional representation from OSHA.

Additionally, NVOSHA reaffirms its intent to work with regional and state OSHA representation to develop a proactive and mutually beneficial relationship between the two agencies with the end goal of protecting workers in the State of Nevada more efficiently and effectively. Additionally, NVOSHA management has committed to discussing FAME findings with line staff to include quarterly progress towards meeting established goals.

If you should have any questions, feel free to contact me at 702-486-9020.

Sincerely,

William Gardner

Chief Administrative Officer

Nevada Occupational Safety and Health Administration

cc: Victoria Carreón, Administrator