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OSHA Docket Office
Occupational Safety & Health Administration
United States Department of Labor
Room N-2625
200 Constitution Avenue N.W.
Washington, D.C. 20210

Via Electronic Submission: <http://www.regulations.gov>

**Re: Docket ID: OSHA-2015-0018
Request for Comment on the Occupational Safety and Health
Administration (OSHA) Draft Safety and Health Program Management
Guidelines**

The American Petroleum Institute (API) appreciates the opportunity to provide comments on the Occupational Safety and Health Administration's (OSHA) Safety and Health Program Management Guidelines (Management Guidelines).

API is a national trade association representing 660 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry.

The Management Guidelines update OSHA's original Safety and Health Program Management Guidelines published in 1989. API appreciates OSHA's efforts to update the original guidelines and provide a framework to effectively and proactively manage workplace safety and health. API agrees with the framework set forth in the Management Guidelines and the core program elements: (1) management leadership, (2) worker participation, (3) hazard identification and assessment, (4) hazard prevention and control, (5) education and training. While API is in general agreement with the Management Guidelines, API strongly urges OSHA to take the following comments into consideration.

I. Worker Participation – Incentive Programs (p. 8)

Under the second core program element, worker participation, OSHA states:

“Incentive programs for workers or managers that tie performance evaluations, compensation, or rewards to low injury and illness rates can discourage injury and illness reporting. Point systems that penalize workers for reporting injuries, illnesses, or other safety or

health concerns have the same effect, as can mandatory drug testing after reporting injuries. Effective safety and health programs recognize positive safety and health activities, such as reporting hazardous conditions or suggesting safer work procedures”

API is concerned with this language and believes that as written the language could create confusion regarding the appropriate use of OSHA’s recordable injury and illness rate within well-balanced incentive programs. The Management Guidelines should align with OSHA’s 2014 memo entitled “Revised VPP Policy Memorandum #5: Further Improvements to the Voluntary Protection Programs (VPP),” where OSHA acknowledges injury and illness rates as one factor in an incentive program structure. A copy of the memo can be found at: https://www.osha.gov/dcsp/vpp/policy_memo5.html.

API is also concerned with OSHA’s reference against mandatory drug testing as a means for identifying needed corrective action following an employee injury and safety incident. API members believe that employers are entitled to have at their disposal disciplinary processes in cases where an employee’s actions are not consistent with established procedures and practices designed to ensure their safety and the safety of coworkers. Post-incident drug testing procedures are a critical component of an effective and robust incident investigation. Understanding the full context and contributing factors is the foundation of ensuring that corrective actions are identified and implemented in a manner that better protects employees in the workplace as well as the public and environment.

Further, OSHA should be aware that safety regulators at the Department of Transportation (DOT) have existing regulations and guidance on the use of random and post-incident drug testing requirements (49 CFR § 40). The DOT recognizes the need for using post-incident drug and alcohol testing as an effective tool to prevent catastrophic accidents. Jurisdictional differences notwithstanding, we believe the Management Guidelines need to reflect this same DOT approach.

II. Consistency in OSHA Guidance and Final Rulemakings

On January 19, 2016 API submitted comments on OSHA’s Draft Guidance Document: *Protecting Whistleblowers: Recommended Practices for Employers for Preventing and Addressing Retaliation* (OSHA Docket No. OSHA-2015-0025) (Draft Guidance Document). A copy of API’s comments are attached as Attachment A and incorporated in these comments by reference. In the attached comments, API asserted that OSHA should ensure consistency between the proposed rule to Improve Tracking of Workplace Injuries and Illnesses (Docket No. OSHA-2013-0023, 78 Fed. Reg. 67254) (Proposed Rule) and OSHA’s Draft Guidance Document. OSHA should also ensure that the Management Guidelines are in alignment with both the Proposed Rule and the Draft Guidance Document.

III. Conclusion

In summary, API requests:

- (1) The Management Guidelines should align with OSHA's 2014 memo entitled "Revised VPP Policy Memorandum #5: Further Improvements to the Voluntary Protection Programs (VPP)."
- (2) The Management Guidelines should reflect the DOT approach on the use of post-incident drug-testing.
- (3) OSHA should ensure consistency in both OSHA guidance and final rulemakings.
- (4) Lastly, OSHA should fully consider API's prior comments on OSHA's Draft Guidance Document and the Proposed Rule on incentive programs and post-incident drug testing.

API and its members appreciate the opportunity to provide these comments and we value our shared commitment to worker health and safety. We look forward to an opportunity to discuss these issues further with OSHA.

Sincerely,

A handwritten signature in blue ink, appearing to read "Heidi Keller".

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January 19, 2016

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Via Electronic Submission: <http://www.regulations.gov>

**Re: Docket ID: OSHA-2015-0025
Request for Comment on the Draft Guidance Document Protecting
Whistleblowers: Recommended Practices for Employers for Preventing and
Addressing Retaliation**

The American Petroleum Institute (API) appreciates the opportunity to provide comments on the Occupational Safety and Health Administration (OSHA) Draft Guidance Document (Draft Guidance Document) Protecting Whistleblowers: Recommended Practices for Employers for Preventing and Addressing Retaliation.

API is a national trade association representing 650 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry.

API members are committed to promoting a healthy and safe work environment. API members acknowledge that in order to maintain a workplace that is safe and one in which employees are comfortable voicing their concerns, companies must have effective and well-established anti-retaliation programs. In the Draft Guidance Document, OSHA identifies five key steps to creating an effective anti-retaliation program: (1) ensure leadership commitment, (2) foster an anti-retaliation culture, (3) implement a system for responding to reports of retaliation, (4) conduct anti-retaliation training, and (5) monitor progress and program improvement. API has the following comments on this important Draft Guidance Document.

I. Postpone Finalization of the Draft Guidance Document

API believes that there is significant overlap between the Draft Guidance Document and OSHA's supplemental notice (OSHA Docket No. OSHA-2013-0023, 79 Fed. Reg. 47605) (Supplemental Notice) to the proposed rule to Improve Tracking of Workplace Injuries and Illnesses (Docket No. OSHA-2013-0023, 78 Fed. Reg. 67254) (Proposed Rule). OSHA should

ensure that the Proposed Rule and the Draft Guidance Document are in alignment and allow stakeholders to comment on the Draft Guidance Document within the context of the finalized rule. OSHA should not finalize the Draft Guidance Document until the Proposed Rule is finalized. Once the Proposed Rule is finalized, OSHA should provide an opportunity for further public comment on the Draft Guidance Document.

II. Foster An Anti-Retaliation Culture

In step two of the Draft Guidance Document, OSHA proposes “[e]liminating all formal and informal workplace incentives that encourage or allow retaliation or discourage reporting.” This section references the March 12, 2012 memo (2012 Memo) entitled “Employer Safety Incentive and Disincentive Policies and Practices.” API member companies are concerned that the reference to the 2012 Memo will inadvertently create confusion as to the appropriate/inappropriate use of safety metrics, such as the OSHA recordable injury and illness rate.

In lieu of referencing the 2012 Memo, API proposes that the Draft Guidance Document instead reference the Agency’s more current 2014 memo (2014 Memo) entitled “Revised VPP Policy Memorandum #5: Further Improvements to the Voluntary Protection Programs (VPP).” The 2014 Memo was intended for both OSHA and public stakeholders. The 2014 Memo clearly takes precedence over Section #4 of the 2012 Memo by declaring upfront, “[t]his memorandum replaces VPP Policy Memorandum #5: Further Improvements to the Voluntary Protection Programs (VPP) dated June 29, 2011, and includes regional guidance on evaluating safety and health incentive programs (Appendix A).” Furthermore, the 2014 Memo provides a more balanced framework for evaluating employer incentive programs. A copy of the 2014 Memo can be found at: https://www.osha.gov/dcsp/vpp/policy_memo5.html.

OSHA has long used the recordable injury and illness frequency rate metrics as part of its Site Specific Targeting (SST) enforcement program. Similarly, OSHA considers injury and illness frequency rates as part of the evaluation for recognition in the agency’s prestigious Voluntary Protection Program.

Historically, the oil and gas industry has used OSHA recordable injury and illness frequency rates as part of their safety performance assessments. For example, many employers incorporate the OSHA injury and illness rate as part of a corporate-wide objective factor, among many other metrics and evaluation criteria, in judging the performance of its business units.

Incentive programs with injury and illness rate metrics should be considered in this context. Well-balanced programs which utilize other policies and codes-of-ethics that require all employees to conduct themselves in an ethical and honest manner, including accurate reporting and recordkeeping of injuries and illnesses, are rarely retaliatory by design. When retaliation or discrimination is asserted or suspected, then the program may be examined to determine if the injury and illness rate, as a corporate metric in the incentive program, facilitates retaliation or under-reporting.

III. Implement a System for Responding to Reports of Retaliation

In step three of the Draft Guidance Document, OSHA explains that disciplinary actions administered after an employee reports a concern/issue/injury should be reviewed to ensure that they are not retaliatory. OSHA outlines several questions that the employer should ask to ensure that any disciplinary response is appropriate.

However, this is inconsistent with OSHA's assertions in the Supplemental Notice. In the Supplemental Notice, OSHA proposed to "prohibit employers from taking adverse action against employees for reporting injuries and illnesses" and alluded to the types of actions that might be prohibited. This inconsistency highlights the rationale for API's suggestion that OSHA postpone the finalization of the Draft Guidance Document to ensure alignment with the Proposed Rule.

API concurs with the Draft Guidance Document's inference that progressive disciplinary actions are appropriate when they are not retaliatory. API agrees with OSHA that employers should never discipline an employee solely for reporting a concern or issue in good faith. However, in limited instances, where an employee violates a consistently enforced work rule or intentionally misreports facts, it may be appropriate for an employer to discipline that employee. Employers are entitled to have at their disposal disciplinary processes for cases where an employee's actions are not consistent with established procedures and practices designed to ensure their safety and the safety of coworkers. An employer's post-incident investigation and corrective action, including the administration of appropriate discipline, can be key elements in an effective safety program when they are not used to discourage employees from reporting injuries and illnesses.

API urges OSHA take into full consideration API's previous comments on the Supplemental Notice. A copy of API's comments on the Supplemental Notice are attached as Attachment A and incorporated in these comments by reference.

IV. Conclusion

In summary, API believes that OSHA should ensure that the Draft Guidance Document and the Proposed Rule are consistent. API requests that OSHA provide further opportunity for public comment on the Draft Guidance Document once the Proposed Rule is finalized. Additionally, API requests that step two of the Draft Guidance Document reference the OSHA 2014 Memo.

API and its members appreciate the opportunity to provide these comments and we value our shared commitment to worker health and safety. We look forward to an opportunity to discuss these issues further with OSHA.

Sincerely,



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October 14, 2014

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Via Electronic Submission: <http://www.regulations.gov>

**Re: Docket No. OSHA-2013-0023
Proposed Rule entitled "Improve Tracking of Workplace Injuries and Illnesses"
(78 Fed. Reg. 67254-67283, November 8, 2013); Supplemental notice of
Proposed Rulemaking (79 Fed. Reg. 47605-47610)**

The American Petroleum Institute (API) appreciates the opportunity to provide comments on the Occupational Safety and Health Administration (OSHA) supplemental notice of proposed rulemaking to improve tracking of workplace injuries and illnesses.

API is a national trade association that represents over 600 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

According to the supplemental notice, OSHA is now considering amending the proposed rule to include provisions that would: 1) require that employers inform their employees of their right to report injuries and illnesses; 2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome; and 3) prohibit employers from taking adverse action against employees for reporting injuries and illnesses. As a basis for this rule, OSHA claims "it would provide OSHA with additional enforcement tools to promote the accuracy and integrity of the injury and illness records employers are required to keep under Part 1904 . . . Under the additions to the proposed rule under consideration, OSHA

would be able to cite an employer for taking adverse action against an employee for reporting an injury and illness, even if the employee did not file a complaint.”

As the supplemental notice readily acknowledges, what OSHA is proposing is already required either directly or implicitly by existing standards and the whistleblower provisions under section 11(c) of the OSH Act. Specifically, employers are already required to establish policies and procedures for employees to report injuries and illnesses under section 1904.35. Implicit in this requirement is that such procedures must be reasonable and not unduly burdensome. As OSHA acknowledged in the supplemental notice, “OSHA believes that onerous and unreasonable reporting requirements are already in effect prohibited by section 1904.35.”

Additionally, employers are already prevented from disciplining employees or taking adverse action against employees who report injuries or illnesses. Again, OSHA stated, “Much of the primary conduct that would be prohibited by the new provision is likely already prescribed by 11(c).” However, the ability of OSHA to cite an employer without an employee complaint is a significant departure from the language under section 11(c) and it would circumvent the current requirement that OSHA bring cases on behalf of employees in U.S. district court rather than issue citations. With this as the stated opinion, why add additional regulatory burden when the employee protections against an unduly burdensome process already exist.

API believes the reasoning behind the supplemental notice, that electronic reporting and retaliation are somehow linked, is purely speculation without data to back it up. As noted by OSHA, “stakeholders were concerned that the new requirements to publicize recordkeeping data **might** provide employers new motivation for disciplining employees for reporting.” That is not a sufficient evaluation of an abstract notion to warrant a new regulatory rulemaking.

API generally agrees that it is inappropriate for employers to discipline employees solely for reporting an injury or illness. In limited instances, where an employee reports an injury late or intentionally misreports facts regarding an injury or illness, it may be appropriate for an employer to discipline an employee. However, OSHA’s current statute and regulations adequately provide protections for employees reporting injuries and illnesses.

API members believe employers are entitled to have at their disposal disciplinary processes in cases where an employee’s actions are not consistent with established procedures and practices designed to ensure their safety and the safety of coworkers. OSHA’s discussion in this section uses several examples identified as being potentially unreasonable. These include post-injury drug testing, post-injury training and counseling, and post-injury discipline where an individual violates a safety rule “but the real reason for the action is the employee’s injury or illness report.” It is important to understand that these post-injury actions by employers can be key elements in an effective safety program when they are not used to discourage employees from reporting injuries and illnesses.

Conducting post-incident drug testing protects all employees in the workplace, as well as the public and the environment, from the potential actions of one individual. API’s member

companies operate within strict anti-drug and alcohol environments. Applied consistently and fairly to all workers, the program demonstrates a clear concern for the safety of everyone. The Department of Transportation (DOT), an agency that also regulates high hazard activities, requires drug testing following any accident that results in an injury; thus, suggesting it believes it to be valuable and necessary tool. The prompt use of post-incident drug and alcohol testing for cases where prohibited substance use cannot be ruled out as a contributory cause helps provide a safe workplace for all employees. The inability to use this effective tool for post-incident investigations could lead to catastrophic outcomes in high hazard industries.

Similarly, additional training or counseling after an incident ensures an employee understands what caused the incident and protects the individual and others in the workplace from repeat or more serious incidents. It is an expectation from organizations that are recognized leaders in injury and illness prevention that incidents provide an opportunity to learn and improve performance. To prohibit the use of this tool simply because an incident resulted in an injury or illness reported by the injured employee can restrict an employer from meeting its regulatory obligation to provide a safe and healthful workplace.

Disciplinary actions must be carefully considered and available for use by employers where a clear violation of a known and well-stated rule is involved whether the individual is injured or not. Following a thorough investigation, any findings of wrongdoing or a violation of an established safety rule must be acted upon. Failure to enforce safety rules is clearly detrimental to an employer's enterprise and is subject to citation of employers by OSHA.

In summary, API is skeptical regarding the validity of OSHA's premise in the supplemental notice that the proposal could motivate employers to underreport their employees' injuries and illnesses and retaliate against employees that report injuries and illnesses. The additional proposed provisions are not necessary and would be counterproductive. There is no evidence to demonstrate a link between the proposed electronic reporting and retaliatory measures. In fact, the results of OSHA's own National Emphasis Program on Injury and Illness Recordkeeping do not provide any data to support OSHA's allegation. As stated in our comments on March 7, 2014, API members still maintain that the proposed rulemaking does not further OSHA's goals to improve workplace safety and health and should be withdrawn.

API and its members appreciate the opportunity to provide these comments and we value our shared commitment to worker health and safety. We look forward to an opportunity to discuss these issues further with OSHA.

Sincerely,

A handwritten signature in cursive script that reads "Cindy Schild".

Cindy L. Schild