

IS OSHA UNDERMINING STATE EFFORTS TO PROMOTE WORKPLACE SAFETY?

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION

AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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IS OSHA UNDERMINING STATE EFFORTS TO PROMOTE WORKPLACE SAFETY?

Thursday, June 16, 2011

**U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC**

The subcommittee met, pursuant to call, at 10:05 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Bucshon, Gowdy, Ross, Woolsey, and Payne.

Staff present: Katherine Bathgate, Press Assistant/New Media Coordinator; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Ryan Kearney, Legislative Assistant; Donald McIntosh, Professional Staff Member; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Professional Staff Member; Joseph Wheeler, Professional Staff Member; Kate Ahlgren, Investigative Counsel; Aaron Albright, Minority Communications Director for Labor; Kate Ahlgren, Minority Investigative Counsel; Tylease Alli, Minority Clerk; Daniel Brown, Minority Junior Legislative Assistant; Brian Levin, Minority New Media Press Assistant; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; and Julie Peller, Minority Deputy Staff Director.

Chairman WALBERG. Good morning. A quorum being present, the committee will come to order.

As I look around I see the leadership team here, all here. That means that didn't overindulge at the president's party last night.

We can't say that about the rest of the people necessarily. But I hope not. Though all the cotton candy I had, I shouldn't be here either, I guess.

I don't know how to control myself at a county fair. But it was a nice evening, and I am glad we can get back to work today though.

I would like to welcome our guests, and thank our witnesses for sharing their thoughts and expertise on workplace safety with this subcommittee.

This week's explosion at a chemical plant in southern Louisiana reminds us the cause of worker safety requires consistent vigilance. We are deeply grateful workers were not injured in the accident. And we hope its cause will quickly be determined so future incidents can be prevented.

The Louisiana accident also underscores the diverse safety needs of our workforce. Certain jobs pose unique hazards and require different safety standards, demonstrating once again the need for federal policies that provide certainty and flexibility to our workplaces.

The needs and priorities of businesses in my home state of Michigan may be very different than those in Washington, Tennessee, and Vermont or California. Job creators and workers in rural communities may face different challenges than the neighbors located in the nation's cities.

Rules and regulations handed down by Washington must reflect this important reality. And that is why state occupational safety and health programs are so important.

For more than 40 years, federal law has allowed states to assume responsibility for the health and safety of its workplaces. State plans are approved and monitored by the federal Occupational Safety and Health Administration.

Today, 27 states and territories administer workplace safety programs and the results of their efforts are remarkable. According to the Occupational Safety and Health State Plan Association, participating states conducted more than 61,000 inspections and identified an estimated 130,000 workplace safety violations.

When compared to the federal safety program, state plans generally lead to more workplace inspections and result in more innovative safety solutions.

State plans are not without faults or weaknesses, however. They strive to promote the best protections for their workers and abide by the federal requirements that they be at least as effective as federal safety standards.

Unfortunately as is far too often the case with federal law, this catchy phrase has led to great confusion and frustration.

As a report by the Department of Labor's inspector general illustrates, defining an effective plan has proven a difficult task for OSHA. In fact, the IG report found OSHA has not even evaluated its own enforcement program, which raises the question of how it could possibly measure the efficacy of state efforts.

In recent years, OSHA has stepped up to its scrutiny of state plans. And in many ways, this is welcomed.

We want to ensure every safety program is producing results and protecting workers. However, OSHA has not experienced the same level of scrutiny, which is why I will be asking the Government Accountability Office to conduct a comprehensive review of OSHA's enforcement program using the same standards of success OSHA used to evaluate state plans.

As OSHA's scrutiny of the program has increased, so has the administration's demands. The hallmark of the program's success is its ability to easily adapt to the ever-changing needs of local workplaces.

Dictating from Washington, D.C. what the workforce safety priorities should be for Sacramento, California, or Concord, New Hampshire will further drain scarce resources and undermine the success of these state efforts to protect workers.

As the IG report states, and I quote—“OSHA required states to make program changes, but did not explain how the changes would improve effectiveness.”

This makes little sense. Especially at a time when the federal government has failed to accurately determine the success of its own worker safety program.

In conclusion, let me say that budgeting is about setting priorities. And we all know these are tough fiscal times.

In recent years, Congress has short-changed the states, failing to meet its commitment to fully fund this program. The fault lies on both sides of the aisle. Working together, I am sure we can find waste and inefficiencies in the Department of Labor’s budget that will help get our nation’s fiscal house in order and strengthen our support for this program.

Rather than undermining the success of state workplace safety, our goal as policy-makers should be to improve these important initiatives and encourage more states to take on the responsibility.

If we do this, federal taxpayers will get a better return on their investment. But more importantly, workers will be better protected.

I look forward to working with my colleagues on ways to strengthen state workplace safety programs.

I would now like to recognize the ranking member, Ms. Woolsey, the senior democrat on the subcommittee, for her opening remarks.

[The statement of Mr. Walberg follows:]

**Prepared Statement of Hon. Tim Walberg, Chairman,
Subcommittee on Workforce Protections**

Good morning. I would like to welcome our guests, and thank our witnesses for sharing their thoughts and expertise on workplace safety with the subcommittee. This week’s explosion at a chemical plant in southern Louisiana reminds us the cause of worker safety requires constant vigilance. We are deeply grateful workers were not injured in the accident, and we hope its cause will be quickly determined so future incidents can be prevented.

The Louisiana accident also underscores the diverse safety needs of our workforce. Certain jobs pose unique hazards and require different safety standards, demonstrating once again the need for federal policies that provide certainty and flexibility to our workplaces. The needs and priorities of businesses in my home state of Michigan may be very different than those in Washington, Tennessee, and Vermont. Jobs creators and workers in rural communities may face different challenges than their neighbors located in the nation’s cities. Rules and regulations handed down by Washington must reflect this important reality.

That is why state occupational safety and health programs are so important. For more than 40 years, federal law has allowed states to assume responsibility for the health and safety of its workplaces. State plans are approved and monitored by the federal Occupational Safety and Health Administration.

Today, 27 states and territories administer workplace safety programs and the results of their efforts are remarkable. According to the Occupational Safety and Health State Plan Association, participating states conducted more than 61,000 inspections and identified an estimated 130,000 workplace safety violations. When compared to the federal safety program, state plans generally lead to more workplace inspections and result in more innovative safety solutions. State plans are not without faults or weaknesses; however, they strive to promote the best protections for their workers and abide by the federal requirement that they be “at least as effective” as federal safety standards.

Unfortunately, as is far too often the case with federal law, this catchy phrase has led to great confusion and frustration. As a report by the Department of Labor's Inspector General illustrates, defining an effective plan has proven a difficult task for OSHA. In fact, the IG report found OSHA has not even evaluated its own enforcement program, which raises the question of how it could possibly measure the efficacy of state efforts.

In recent years, OSHA has stepped up its scrutiny of state plans, and in many ways, this is welcomed. We want to ensure every safety program is producing results and protecting workers. However, OSHA has not experienced this same level of scrutiny, which is why I will be asking the Government Accountability Office to conduct a comprehensive review of OSHA's enforcement program using the same standards of success OSHA uses to evaluate state plans.

As OSHA's scrutiny of the program has increased, so has the administration's demands. The hallmark of the program's success is its ability to easily adapt to the ever changing needs of local workplaces. Dictating from Washington D.C. what the workforce safety priorities should be for Sacramento, California, or Concord, New Hampshire, will further drain scarce resources and undermine the success of these state efforts to protect workers. As the IG report states, "OSHA required states to make program changes, but did not explain how the changes would improve effectiveness." This makes little sense, especially at a time when the federal government has failed to accurately determine the success of its own worker safety program.

In conclusion, let me say that budgeting is about setting priorities and we all know these are tough fiscal times. In recent years Congress has short-changed the states, failing to meet its commitment to fully fund this program. The fault lies on both sides of the aisle. Working together, I am sure we can find waste and inefficiencies in the Department of Labor's budget that will help get our nation's fiscal house in order and strengthen our support of this program.

Rather than undermining the success of state workplace safety, our goal as policy-makers should be to improve these important initiatives and encourage more states to take on this responsibility. If we do, federal taxpayers will get a better return on their investment, but more importantly, workers will be better protected.

I look forward to working with my colleagues on ways to strengthen state workplace safety programs. I would now like to recognize Ms. Woolsey, the senior Democrat of the subcommittee, for her opening remarks.

Ms. WOOLSEY. Thank you, Mr. Chairman.

I truly appreciate the interest that this committee has in providing oversight of the agencies within our jurisdiction including OSHA.

However, I am disappointed that the majority failed to invite OSHA, or schedule this hearing with sufficient advance notice so that they could be available to present their views on state plans, and the inspector general's report.

Since this is the second hearing focused on OSHA, it would seem timely to invite Assistant Secretary Michaels to inform us on OSHA's initiatives, and also, Mr. Chairman, to allow him to respond to your concerns.

Many states have advised us that they work well with OSHA, as they provide valued guidance and budget support. OSHA's oversight also identifies states that fail to adequately protect their workers.

For instance, OSHA's reviews have found that South Carolina and Oregon have serious weaknesses. Their average penalties for serious violations are less than \$300. That is 70 percent below the national average of \$1,000, and does little to deter the kind of violations that could cause serious injury or death.

OSHA also found significant weaknesses in my state of California. They found that the state's workforce safety plan impaired enforcement. In response, the legislature in California enacted, and the governor signed, corrective legislation.

I would ask, by the way, unanimous consent to submit for the record, a letter that I received from Ellen Widess, the chief of Cal/OSHA, that is in strong support of the partnership between federal OSHA and the California State OSHA Plan.

I would be lax in not noting that this is the largest state OSHA program in the country.

And here is the letter.

[The information follows:]

STATE OF CALIFORNIA

EDMUND G. BROWN, JR., Governor

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June 14, 2011

The Honorable Lynn Woolsey
 Education and the Workforce Committee
 House of Representatives
 2181 Rayburn House Office Building
 Washington, DC 20515

Re: Subcommittee on Workforce Protection Hearing on June 16, 2011

Dear Congresswoman Woolsey:

We understand the Subcommittee on Workforce Protection will be conducting a hearing on June 16 entitled "Is OSHA Undermining State Efforts to Promote Workplace Safety?" We wanted to share our perspective and experience from California's OSHA program for this important discussion. We believe that the partnership of Fed/OSHA and Cal/OSHA's state plan is successful and deserves the support of Congress.

History of California's State Plan

California has had a state plan and relationship with Fed/OSHA since 1973. When President Nixon signed the Williams-Steiger Act (the OSHA Act of 1970), stakeholders in California advocated for state legislation to retain the responsibility for worker safety and health protection, rather than have Federal OSHA assert jurisdiction. The California Occupational Safety and Health Act of 1973 created a program under the Department of Industrial Relations. We have had a state plan, and a most productive relationship with Fed/OSHA since then, with only a one year lapse. In 1987, Governor Deukmejian eliminated the state plan, but this was reversed by a substantial vote of the people of California in 1988.

As with other state programs, California voters recognized that it was important for the state to operate its own program so that local issues could be addressed and managed in a manner that reflected the concerns and interests within California. Since the inception of the Cal/OSHA program, the intent has not been to simply mirror the Federal program. It has been the goal of various administrations to ensure that the California program satisfy the requisite elements of the federal program while tailoring our program to the unique needs and interests of California's labor and employer communities.

Congress clearly envisioned an important role for the states under the new national safety legislation, but it also sought a comprehensive, nation-wide system of safety and health requirements, with Federal OSHA standards and enforcement providing a uniform "floor." This ensures uniform

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protections for workers employed by multi-state employers. It also discourages "forum shopping" by employers seeing a competitive advantage at a cost of less protection for their workers. State plans are a vital part of the effective joint Federal/state job safety program that exists today. Importantly, the relationship has also allowed Cal/OSHA to play a leadership role in the nation, going beyond Fed/OSHA's standards and programs in certain areas and identifying others where we feel our program is different, though equally protective.

Benefits of Federal Support to State Plans

Aside from the critical financial support provided by Fed/OSHA to the State of California to help defray the costs of running the enforcement and consultation programs, Fed/OSHA provides programmatic oversight and evaluation that adds substantial value to Cal/OSHA's program. Most recently, the 2009 Enhanced Federal Annual Monitoring Evaluation (EFAME) Report contained a number of findings and recommendations concerning our operations that were valid, and are part of our Corrective Action Plan to address those issues. While we continue to discuss with our Regional Fed/OSHA office those aspects that we do not agree are deficient, having Fed/OSHA's external evaluation serves to point out areas where we can improve our efforts to protect workers' health and safety. As an example, Fed/OSHA's critique that we were not issuing enough serious violations was helpful in enacting new state legislation clarifying the definition of "serious" violations. This was a change supported by both the labor and the employer community in California.

Fed/OSHA provides state plans funding that allows us to support both enforcement programs and proactive consultation programs that help specific employers and industry groups understand health and safety requirements and develop sound programs to protect workers. In addition, Fed/OSHA provides us with resources and expertise we cannot afford in state. For example, Fed/OSHA's laboratories develop lab methods and provide reliable standards that we can use to address serious health and safety hazards in California. We also rely on Fed/OSHA's lab analysis in sensitive and difficult cases, such as the recent cooperative effort between Fed/OSHA, Cal/OSHA and Oregon OSHA to identify the presence of formaldehyde in Brazilian Blowout, a widely used hair product. State programs like California can avail themselves of the federal labs for sample analysis when there are insufficient state lab services. This benefits both workers and employers by ensuring there is accurate testing to determine if there are hazardous exposures.

Fed/OSHA has, over the years, provided state programs with expert witnesses for various issues such as medical monitoring, and hazard evaluation. They can coordinate and assist different state programs on inspections regarding common issues such as ergonomic hazards and exposures to chemicals. In addition, Fed/OSHA has maintained an Integrated Management Information System nationwide as a central database which has been vital to state programs. Fed/OSHA has also provided leadership in protecting workers during response to catastrophes in various states, including the World Trade Center recovery and the aftermath of Katrina. States alone could never provide the resources and expertise needed in these critical times.

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California's Flexibility under the State Plan

As mentioned above, Cal/OSHA's program contains many unique, innovative and more comprehensive programs that go beyond the Federal requirements. Fed/OSHA has approved these, and often held up California as an example for both the Federal program and other state plans.

- Cal/OSHA pioneered the partnership excellence process now called the Voluntary Protection Program by OSHA.
- Cal/OSHA adopted the first law in the nation guaranteeing workers the right to know about the hazards associated with chemicals in their workplace
- Cal/OSHA established the first Injury and Illness Prevention Program (IIPP) in the early 1990's, that provided a model for other states and the federal program.
- California has led the nation in adopting new occupational health and safety standards to protect workers from bloodborne pathogens, prevent heat illness for outdoor workers, protect workers in healthcare and allied industries from diseases transmitted through the air, and controlled exposure to diacetyl, a chemical used in the flavoring and food manufacturing industries.
- California has adopted more than 40 new or lower Permissible Exposure Limits (PEL's) over the past eight years for worker exposures to various toxic substances in the workplace, all representing greater protection than provided by Fed/OSHA.

It's important to note that these were adopted following extensive stakeholder advisory processes in California. Cal/OSHA has also been able to implement unique permit, registration, certification and notification requirements to protect workers in many hazardous situations such as trenching, tower crane and pressure vessel operations, tunneling and underground mining, asbestos abatement and carcinogen use. These programs have allowed California's industries to flourish and still ensure that workers are protected

The Role of Minimum Standards

Fed/OSHA provides nationwide consistency that protects workers and provides employers with more certainty about standards, inspections and outcomes across the country. Without the minimum federal standards as a base, many of the fundamental safety standards would vary from state to state, as would the actual enforcement and consultative processes, leaving multi-state employers in a state of uncertainty. We are pleased that Assistant Secretary David Michaels recognizes the need for state ingenuity and difference as long as state plans are at least as effective as the federal standards. Dr. Michaels has committed to work with state plans such as California's on National Emphasis Programs and other significant policy changes that affect the states. We welcome that partnership, and are confident that Fed/OSHA will include input from the state plans.

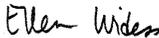
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We recognize that the Occupational Safety and Health State Plan Association (OSHSPA) has voiced strong concerns about Fed/OSHA's penalty procedures proposed last year, including the need for empirical evidence proving the deterrent power of penalties and the disproportionate economic impact of higher penalties on small employers. These issues are complicated and deserve full discussion with state plans. Cal/OSHA, like other state plans, also struggles to determine appropriate penalties that will deter irresponsible employers who put their workers at risk through serious and repeat violations. Such employers also hurt our economy by putting law-abiding employers with good safety and health programs at a competitive disadvantage. California recognized that its maximum penalties for serious violations were too low. We now have the authority to impose higher penalties for such violations when circumstances warrant.

Conclusion

There is always room for greater communication between Fed/OSHA and the state plans on these and other issues. We look forward to continuing the dialogue among Fed/OSHA and the state plans to achieve our shared goals of effective health and safety protection for all workers in the country.

Sincerely,



Ellen Widess
Chief, California Division of Occupational Safety and Health

EW/ew

cc: Dr. David Michaels, Assistant Secretary for Occupational Safety and Health, U.S. Dept. of Labor
Marty Morgenstern, Secretary, California Labor and Workforce Development Agency
Christine Baker, Acting Director, California Department of Industrial Relations

Chairman WALBERG. Without objection, it will be included. There is no objection.

Ms. WOOLSEY. Thank you.

In 2009, OSHA commenced a review of the Nevada State Plan, after 25 workplace related deaths occurred over an 18-month period.

It found that Nevada's inspectors were inadequately trained. And that the state had actively discouraged inspectors from issuing willful and repeat violations in fatality cases.

Since then, Mr. Chairman, OSHA has completed in-depth reviews of 25 state OSHA programs, which hasn't happened since

1991, following the deaths of 25 workers trapped in a fire at Imperial Food plants in North Carolina. As you commented, these are positive developments that the committee should be supporting.

The Inspector General recently issued recommendations that it said would improve OSHA's evaluations of state workplace safety programs to better determine their effectiveness.

On May 31st, OSHA provided a detailed written response to the IG report that outlines the steps OSHA is taking to develop effectiveness measures. OSHA stated that it will also continue to rely upon its existing activity measures to ensure that state plans are operating effectively and fulfilling federal grant requirements.

Unfortunately, the work OSHA is doing to improve its state review program is in jeopardy because the majority's budget cuts funding for OSHA by 23 percent. Grants for state plans will be cut by \$25 million from the request of \$105 million.

If this budget is approved for fiscal year 2012, OSHA will be really up a tree without a paddle. No it is—

Chairman WALBERG. Whatever you do in California.

Ms. WOOLSEY. Yes, I think I was putting two things together here.

But so, Ranking Miller and I recently asked GAO to assess the impacts of proposed budget cuts on the ability of state plans to carry out their mission, and whether some state plans may be forced to simply close down and turn their program back to federal OSHA.

I also look forward to hearing from our witnesses—this is a great group—whether these cuts will undermine states' efforts to promote worker safety.

So, Mr. Chairman, incredibly 4,551 workers were killed on the job last year alone. That is an average of 12 workers killed each day.

Worker safety and health should not be a partisan political issue. And I look forward to working with you to ensure that we, and this committee, can make a better future for our workers.

[The statement of Ms. Woolsey follows:]

**Prepared Statement of Hon. Lynn C. Woolsey, Ranking Minority Member,
Subcommittee on Workforce Protections**

Mr. Chairman, I appreciate the interest that this committee has in providing oversight of the agencies within its jurisdiction, including OSHA. However, I'm particularly disappointed that the majority failed to invite OSHA, or schedule this hearing with sufficient advance notice so that OSHA could be available to present its views on state plans and the Inspector General's report. While this is the second hearing focused on OSHA, it would seem timely to invite Assistant Secretary Michaels to inform us on OSHA's initiatives.

Many states have advised us that they work well with OSHA, as they provide valued guidance and budget support. OSHA's oversight also identifies states that fail to adequately protect their workers. For instance, OSHA's reviews have found that South Carolina and Oregon have serious weaknesses. Their average penalties for serious violations are less than \$300. That is 70 percent below the national average of \$1,000, and does little to deter the kind of violations that could cause serious injury or death.

OSHA also found significant weaknesses in California's state workforce safety plan that impaired enforcement; in response, the legislature enacted and the Governor signed corrective legislation. I would ask unanimous consent to submit for the record, a letter I received from Ellen Widess, the Chief of CalOSHA that is in strong support of a strong partnership between federal OSHA and the California State plan. I would note this is the largest state OSHA Program in the country.

In 2009, OSHA commenced a review of the Nevada State Plan after 25 workplace related deaths occurred over an 18-month period. It found that Nevada's inspectors were inadequately trained and that the state had actively discouraged inspectors from issuing willful and repeat violations in fatality cases.

Since then, OSHA has completed in-depth reviews of 25 state OSHA programs, which hasn't happened since 1991, following the deaths of 25 workers trapped in a fire at the Imperial Foods plant in North Carolina. These are positive developments that the committee should be supporting.

The Inspector General recently issued recommendations that it said would improve OSHA's evaluations of state workplace safety programs to better determine their effectiveness. On May 31, OSHA provided a detailed written response to the IG report that outlines the steps it is taking to develop "effectiveness" measures. OSHA stated that it will also continue to rely upon its existing "activity" measures to ensure that State Plans are operating effectively and fulfilling federal grant requirements.

Unfortunately, the work OSHA is doing to improve its state review program is in jeopardy because the majority's budget cuts funding for OSHA by 23 percent. Grants for state plans will be cut by \$25 million from the request of \$105 million, if this budget is approved for Fiscal Year 2012.

Ranking Member Miller and I recently asked GAO to assess the impacts of proposed budget cuts on the ability of state plans to carry out their mission, and whether some state plans may be forced to simply close down and turn their program back to Federal OSHA.

I also look forward to hearing from our witnesses whether these cuts will undermine states' efforts to promote worker safety.

Mr. Chairman, incredibly, 4,551 workers were killed on the job last year. That is an average of 12 workers killed each day. Worker safety and health should not be a partisan political issue. I think we can do better in future Subcommittee hearings to assure that they are informative and balanced. Thank you.

Chairman WALBERG. I thank the gentlelady.

And I would suggest that we should change that to up a tree without a noose. That is all I care about.

OSHA, in reference to OSHA being here or not, OSHA did respond to the IG report back on May 31st. It is a matter of our record.

They responded extensively to that. There was 7 days notice, which is within the committee rules for this hearing. And the minority is and was always able to call OSHA, and would certainly give that opportunity again.

Ms. WOOLSEY. So would the gentleman yield on that 7 day—

Chairman WALBERG. I would yield.

Ms. WOOLSEY. I know you did what the committee is expected to do under the rules.

But the department, the Labor Department, has their own rule that in order to prepare adequately and do a good job when they come before the Congress, they really ask for 14 days notice.

And we know that. We can do that.

Chairman WALBERG. We will do our best.

But I am delighted we have witnesses here today that I think are a great panel for us to hear from.

So pursuant to committee Rule 7C, all members will be permitted to submit written statements to be included in the permanent hearing record.

And without objection, the hearing record will remain open for 14 days to allow questions for the record, statements, and extraneous material referenced during the hearing to be submitted for the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses.

Elliot Lewis is the assistant inspector general for audits with the U.S. Department of Labor's Office of Inspector General.

Mr. Lewis has been with the Office of Inspector General since 1991 serving in a variety of positions within the Office of Financial Management Audits.

Before joining the federal government, Mr. Lewis was a partner at T.R. McConnell & Company, an accounting firm in Columbia, South Carolina.

Mr. Lewis holds an undergraduate degree in accounting from the University of South Carolina.

Thank you for being here.

Peter Gerstenberger is a senior—and I hope I didn't destroy that name—a senior advisor for safety, compliance and standards at the Tree Care Industry Association, located in Londonderry, New Hampshire.

At TCIA, Mr. Gerstenberger has produced safety training curriculum, training videos, and participated in national recognized standard setting initiatives nationwide.

Mr. Gerstenberger holds a Bachelor of Science in biology from Grinnell College, and a Master's of Science from Iowa State University.

Welcome.

Eric Frumin is director of health and safety with Change to Win. Mr. Frumin is a leading National Trade Union spokesperson on issues of job safety, health, and disability, including OSHA's standard setting and enforcement, and occupational disease, and injury surveillance.

Mr. Frumin has advised trade and unionists and governments in Asia, Africa, and Central and South America, and the U.N. Commission on Sustainable Development on health, safety, and environmental issues.

Thanks for being here.

And then, Kevin Beauregard is assistant deputy commissioner and assistant director, Occupational Safety and Health Division of the North Carolina Division of Occupational Safety and Health.

Mr. Beauregard has been with North Carolina's occupational Safety and Health OSH division for the last 20 years, where he has held a variety of positions including safety compliance officer.

Mr. Beauregard is a board certified safety professional, and certified public manager, and holds a Bachelor of Science in industrial technology from the University of Maryland.

Mr. Beauregard is testifying on behalf of the Occupational Safety and Health State Plan Association.

Before I recognize each of you to provide your testimony, let me briefly explain our lighting system which works with the stop lights in our republic.

When you begin with, the light in front of you will turn green. When 1 minute is left, the light will turn yellow. And when your time is expired, the light will turn red, at which point I would ask you to wrap up as quickly as possible. Well, more than quickly as possible.

We have votes that are coming here, and so we want to get this hearing in, and have opportunity for question from the panel—or from the committee to the panel as well.

So I will try to work at being much more committed to keeping the time today for myself included.

After everyone has testified, members will each have 5 minutes to ask questions of the panel.

And so, let us begin first of all with Mr. Lewis.

STATEMENT OF ELLIOT P. LEWIS, ASSISTANT INSPECTOR GENERAL FOR AUDIT, U.S. DEPARTMENT OF LABOR'S OFFICE OF INSPECTOR GENERAL

Mr. LEWIS. Mr. Chairman, members of the subcommittee, thank you for the opportunity to discuss the OIG's audit of OSHA's oversight of state plan programs.

Protecting the health and safety of our nation's workers is one of the department's most important responsibilities. Under Section 18 of the Occupational Safety and Health Act, OSHA is responsible for ensuring that state plans are at least as effective as the federal program.

Currently, 27 states and territories have been approved by federal OSHA to operate their own workers safety and health programs. Once OSHA approves a plan, the state assumes full responsibility for operating its safety and health program. However, OSHA remains responsible for ensuring that the state complies with the act.

Mr. Chairman, our audit was conducted to determine whether OSHA ensured that state safety and health programs were at least as effective as the federal program. We concluded that increased accountability is needed at both the federal and state level, because neither OSHA nor the states have outcome-based performance metrics to measure the effectiveness of their programs.

As part of our audit, we surveyed all 27 state plans, as well as obtained information from OSHA national and regional officials.

The survey of state plans found that all of the states believe that operating their own safety and health program allows for more flexibility in response to specific needs of the workplaces in their state. And 78 percent believe that their programs are more comprehensive than federal OSHA.

Generally states believe their programs were effective based on their comprehensive knowledge of local employers. However as with OSHA, none of the states provided us with information to show that they have established the cause or relationship between their activities and reductions in injuries and illness.

In monitoring state plans, OSHA reviews output data such as inspection counts, penalty amounts, measures for timeliness and completion of inspections, violation classification, timely adoption of standards.

While these output measures may be appropriate, they do not necessarily measure the effect of these actions on actually achieving safety and health improvements. Effectiveness measures are needed to this end. In fact, 63 percent of states surveyed said that measures need to be more outcome rather than output-based.

States voiced other concerns with OSHA's oversight of state plans. Forty-eight percent said that monitoring needs improvement with respect to consistency and communication.

Most states believe that there is a moving target for what is expected of them, especially when there is a change of administration which results in a lack of clear expectations.

Finally though, although 75 percent believe that recommendations made by OSHA were feasible, states did not always believe that the changes would result in improvements.

Mr. Chairman, our audit found that OSHA has not defined effectiveness for health and safety programs whether they are operated by the states or at the federal level. This not only limits OSHA's ability to ensure its own program operates in an effective manner, but it also limits OSHA's ability to determine whether state plans are at least as effective as OSHA.

Our audit recommended that OSHA define, measure, and monitor effectiveness. We recognize that defining and measuring effectiveness is difficult to do.

However in order to meet the act's requirements, ensure that programs are having the greatest impact, and demonstrate the value of safety and health strategies, effectiveness must be defined and measured.

We are pleased to note that OSHA recognizes the need to improve effectiveness measures and is already taking action to this end. OSHA has formed a task force with state plan representatives, and is working to define effectiveness.

OSHA also stated that it is developing impact measures for both itself and the states. In addition, OSHA is conducting a multiyear study of 80,000 highest risk employers to determine how OSHA's interventions impact injury and illness outcome.

The OIG believes that OSHA should continue working with the federal state task force to determine how effectiveness can be measured.

In addition, OSHA may want to consider evaluating states with model plans to identify best practices that have resulted in successful program outcomes for possible implementation on a wider scale, and developing and pilot testing metrics in several states to see whether they actually measure safety and health program outcomes rather than outputs.

In conclusion, Mr. Chairman, we believe there is room for greater accountability at the federal and state level in demonstrating the impact of safety and health programs funded by the taxpayers.

Current program evaluation should be augmented with outcome-based performance measures. In our opinion, it is critical to measure the impact of specific program strategies on protecting the safety and health of our nation's workers regardless of whether a program is operated by the state or the federal government.

Thank you for the opportunity to testify on our work. I would be pleased to answer any questions that you or any members of the subcommittee may have.

[The statement of Mr. Lewis follows:]

Prepared Statement of Elliot P. Lewis, Assistant Inspector General for Audit, Office of Inspector General, U.S. Department of Labor

Good morning, Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to discuss our recent report on the Occupational Safety and Health Administration's (OSHA) monitoring of State Plan programs. As you know, the Office of Inspector General (OIG) is an independent entity within the Department of Labor

(DOL); therefore, the views expressed in my testimony are based on the findings and recommendations of my office's work and not intended to reflect the Department's position.

Background

Protecting the health and safety of our nation's workers is one of the most important responsibilities of the Department. The Occupational Safety and Health Act (OSH Act) of 1970 provides the mandate for OSHA to ensure the safe and healthy working conditions for working men and women by: setting and enforcing standards; providing training, outreach, and education; and encouraging continuous improvement in workplace safety and health. With few exceptions, the OSH Act covers most private sector employers and their employees in the 50 states and six territories, either directly through Federal OSHA or through an OSHA-approved state safety and health plan.

Currently, 27 states and territories have been approved by Federal OSHA to operate their own worker safety and health programs. The OSH Act also authorizes OSHA to provide funding through Federal grants for up to 50 percent of state operational costs. In FY 2010, states were granted \$104 million to develop and operate State Plans.

Under Section 18 (c)(2) of the OSH Act, Federal OSHA is responsible for ensuring that State Plans are at least as effective as Federal OSHA. Once OSHA approves a plan, the state assumes full responsibility for operating its occupational safety and health program. However, Federal OSHA remains responsible for ensuring that the state complies with the OSH Act and may revoke approval of the State Plan if it does not.

Mr. Chairman, our audit was conducted to determine whether OSHA ensured that safety and health programs operated under State Plans were at least as effective as the Federal OSHA program, as required by law. We concluded that increased accountability is needed at both the Federal and state level, because neither Federal OSHA nor the states have outcomes-based performance metrics to measure and demonstrate the causal effect of their programs on the safety and health of workers.

Audit Findings

As part of our audit, we surveyed all 27 State Plans. We found that states generally believed their programs were effective. This belief was often based on their comprehensive knowledge of local employers. Many states indicated that they have created unique safety and health initiatives that reduce the number of workplace fatalities, injuries, and illnesses. States measure their own performance by measuring changes in the number of worker injuries and illnesses. However, as with the Federal OSHA, none of the states provided us with information to show that they have established a causal relationship between their activities and reductions in injuries and illnesses. It is important to consider that these rates can be impacted by external factors. These include economic conditions in the states, such as levels of employment and changes in the mix of industries.

All of the states believe that operating their own safety and health programs allows for more flexibility in response to specific needs of the workplace in their state. We found that 78 percent (21 of 27) of states also believe that their programs are more comprehensive than Federal OSHA. For example, 19 states believe that their health and safety standards exceed OSHA's regarding permissible exposure limits for hazardous substances. Further, all 27 states indicated that their State Plans had responded more quickly to local needs citing more aggressive whistleblower deadlines, more timely review of contested cases, and faster adoption of standards.

Our survey found 75 percent of the states (20 of 27) believed that recommendations made by OSHA Federal monitors were usually feasible or very feasible. However, the states did not always agree that program changes required by OSHA would improve the effectiveness of their programs. One example they cited was OSHA's change to its penalty structure, which would significantly increase penalty amounts. OSHA required states to adopt either the Federal penalty structure or a similar one. States were reluctant to adopt this Federal policy, indicating that OSHA has not explained how higher penalties would result in more effective enforcement.

In addition, 48 percent (13 of 27) of states believe that OSHA's monitoring of their state programs needs improvement, but only 3 (or 11 percent) believed that a total revamp of OSHA's monitoring is needed. Fourteen states responded that OSHA's "one-size-fits-all" approach is not effective, noting deviations from the Federal program do not equate to a state being less effective. Eleven states noted that OSHA needs to be more consistent in monitoring and reporting results. Finally, 6 states

mentioned that improved communications are needed between the states and Federal OSHA.

Many states believed that there is a large variance between what OSHA requests from them at one point in time to another, especially when there are changes in Administration. The survey indicated that 70 percent (19 of 27) of states expressed concerns that this “moving target” approach regarding desired program performance resulted in a lack of clear expectations.

Mr. Chairman, we recognize that there will be differences between state-run safety and health programs and Federal OSHA. We do not disagree that there can be more than one approach to safety; however, all programs must ultimately meet the mandate of the OSH Act. Effectiveness measures are needed to make this determination. In fact, in response to our survey, 63 percent (17 of 27) of states said that effectiveness measures need to be re-evaluated and made outcome, rather than output-based. A particularly good observation we received was that a national dialogue should be initiated to explore how best to measure improvements in worker safety and health programs, as opposed to measuring outputs such as citations and penalties issued.

In addition, many states expressed concerns that their programs would be impacted by budget cuts. One state noted that its current fiscal crisis resulted in furloughs, which impacts their ability to meet program goals. Another noted that because of state budget reductions, it was unable to accept additional grant funds being offered by Federal OSHA to state programs due to the lack of matching funds from the state. Many also believed that there is a scarcity of qualified staff and a high turnover rate due to a lack of resources to fund competitive salaries. This is compounded by state hiring freezes that result in vacant positions and a significant decrease in the number of inspections, surveys, and other activities. These concerns by the states are all the more reason to know whether we are getting the most benefit from the resources invested.

Mr. Chairman, our audit found OSHA has not defined effectiveness for health and safety programs, whether operated by the states or Federal OSHA. This not only limits OSHA’s ability to ensure its own program operates in an effective manner but also to determine whether State Plans are, or are not, at least as effective as Federal OSHA. OSHA reviews individual State Plans by evaluating data such as inspection counts, penalty amounts, injury and fatality rate trends, measures for timeliness and completion of inspections, violation classification, and timely adoption of standards. While these measures may be appropriate, they do not necessarily measure the effect of these actions on achieving safety and health improvements.

OSHA has taken steps recently toward improving oversight, but the approach continues to focus on State Plan program outputs. As mentioned in our audit, OSHA’s Enhanced Federal Annual Monitoring and Evaluation (EFAME) process requires more on-site monitoring of compliance with Federal OSHA program structure and procedures. However, EFAME does not measure program effectiveness from an outcomes perspective.

Audit Recommendations

Our audit contained four recommendations to OSHA. Specifically, we recommended that OSHA:

- Define effectiveness in terms of the impact of state programs on workplace safety and health.

- Design measures to quantify the impact of State Plans on workplace safety and health.

- Measure Federal OSHA program performance to establish a baseline to evaluate State Plan effectiveness.

- Revise the monitoring processes to include comparison of the impact of state and Federal programs.

OSHA Response

In response to our audit, OSHA stated that it:

- Intends to continue to use appropriate activity measures to evaluate the effectiveness of state programs and ensure that they are meeting the requirements for State Plan approval and funding.

- Formed a task force with State Plan representatives and is working to define effectiveness and expand its scope to review appropriate impact measures.

- Is developing additional impact measures for both Federal OSHA and the states.

- Envisions a review of trends and compliance, violations, or discrimination rates as measures of impact within in its FY 2011-2016 Strategic Plan.

Mr. Chairman, we recognize that defining and measuring effectiveness of safety and health programs is difficult to do. However, in order to meet the OSH Act re-

quirements that state programs be at least as effective as the Federal program, effectiveness must be defined and measured.

OSHA noted in its response to our audit report that it is committed to defining and measuring effectiveness. Possible ways OSHA could do this include:

Continuing to work through the Federal/State task force to determine how effectiveness can be measured.

Evaluating states with model plans to identify best practices that have resulted in successful program outcomes for possible implementation on a wider scale.

Developing metrics and pilot testing them in several states to see whether they are actually measuring safety and health program outcomes rather than outputs.

Conclusion

In conclusion, Mr. Chairman, we believe that there is room for greater accountability at the Federal and state levels in demonstrating the impact of safety and health programs funded by the taxpayers. We believe that current program evaluation should be augmented with outcome-based performance measures. In our opinion, it is critical to measure the impact of specific program strategies on protecting the safety and health of our nation's workers—regardless of whether a program is operated by the state or the Federal government.

Thank you for the opportunity to testify on our work. I would be pleased to answer any questions that you or any Members of the subcommittee may have.

Chairman WALBERG. Thank you, Mr. Lewis.
We now recognize Mr. Gerstenberger.
Welcome.

STATEMENT OF PETER GERSTENBERGER, SENIOR ADVISOR TO THE PRESIDENT FOR SAFETY, STANDARDS AND COMPLIANCE, TREE CARE INDUSTRY ASSOCIATION

Mr. GERSTENBERGER. Chairman Walberg, Ranking Member Woolsey, and members of the subcommittee, on behalf of the Tree Care Industry Association and our 2,000 member companies across the United States, we thank you for the opportunity to share our experiences with state plans and with federal OSHA.

My name is Peter Gerstenberger. As the Chairman mentioned, I am on the staff of TCIA. Incidentally, prior to 2003, TCIA was known as the National Arborist Association or NAA.

I work with company owners and their employees on safety and compliance matters. I am the organization's liaison with federal OSHA and with select state plans. I have had the privilege of serving this organization for 25 years.

Our members are companies engaged in commercial and residential tree trimming and removal, utility vegetation management, landscape maintenance, and related activities.

Tree care is a high hazard industry. We estimate that our industry's fatality rate places us among the top 10, and likely among the top five most hazardous occupations in the country.

Worker safety has been one of the central tenets of TCIA since its inception over 70 years ago. We were the original Secretariat of the ANSI Z133 Committee, and remain very active in the standard-making process.

We direct the only credentialing program for safety professionals within our industry, and produce a wealth of bilingual safety training programs.

Throughout my tenure, I have participated actively as a member of ANSI Z133, a standard developed through a consensus process by an accredited standards committee representing employers and

employees, organized labor, equipment manufacturers, academia, and other stakeholders.

And the Z133 standard captures the collective wisdom and experience of the entire profession, translating that body of knowledge into standards of safe practice.

The Z133 Committee was first formed in 1969, predating OSHA.

Our efforts have not been limited to our membership and the ANSI Committee. We have been fortunate to collaborate with federal OSHA as well as several state plan OSHAs. And each time, the result was some tangible safety benefit to the industry.

Recently, our work with state plan OSHAs has been particularly fruitful. We have worked directly with California, Virginia, Maryland and Michigan to adopt more effective guidance for tree care operations.

In the interest of time, I am going to highlight our recent experience with Virginia OSHA, comparing and contrasting them to our experience with federal OSHA.

Since 2000, Virginia experienced 47 tree care related fatalities which comprised 9 percent of all occupational fatalities within the state. Considering the relatively small size of the tree care industry in that state, this is a disproportionately high number of fatal accidents.

In 2001, TCIA approached the Virginia Department of Labor industry about the possibility of adopting a comprehensive regulation addressing tree trimming.

We requested a regulation based on ANSI Z133 2000. Discussions with Virginia resulted in a commitment from the industry to make changes to the ANSI standard which culminated in the adoption of ANSI Z133 2006.

On that point, let me digress from the Virginia OSHA story to point out that at the same general timeframe, TCIA was also having conversations with federal OSHA about wording in the Z133 standard for different reasons, but with the same end result.

Z133 was strengthened from a regulatory perspective.

Virginia OSHA initiated a rulemaking in 2007 with the assistance of a work group comprised of private and public sector representatives. The final regulation, just adopted recently, is based very closely on Z133.

We submit that the situation in Virginia is a microcosm of the situation nationally as far as their industry is concerned.

What we appreciate about the Virginia situation is that they saw high hazard industry where help was needed, and they took decisive and relatively swift action.

Our efforts to engage federal OSHA have in some instances produced positive outcomes. For 12 years, our association's leadership worked directing with federal OSHA toward the promulgation of 29 CFR 1910.269, the Electric Power Generation, Transmission and Distribution Standard. Certain parts of the vertical standard regulate line clearance tree trimmers.

The result of that collaboration in our estimation was an effective workable standard.

Unfortunately, not all interactions with federal OSHA have resulted in positive outcomes. In that same general timeframe, OSHA

was separately working on a vertical standard for the logging industry.

And it wasn't until after that rule was promulgated that it was determined through letters of interpretation that the industry, our industry, should be regulated by that same rule.

The end result was that absent our ability to have any input into that standard, that the resulting standard resulted in a very poor fit in terms of regulating our industry, and ensued from that was basically a 12-year running battle, verbal and legal, with OSHA over the applicability of that standard to our industry.

Now we can't define what effective should mean for the committee, but we can certainly point to the aforementioned as an example of ineffective.

Over the years OSHA has repeatedly petitioned and asked federal OSHA for a specific standard for our industry. At one point in time in 2008, we actually made it as far as being in—noted as in the advance notice for proposed rulemaking for a separate standard.

But then suddenly and inexplicably, we were dropped from the regulatory agenda.

We rank state plans' effectiveness as measured by the receptiveness to either promulgate or revised regulations to improve safety in our industry as very good, and by contrast, federal OSHA, not quite as effective in that area.

We have been, and we remain, more than willing to participate in further dialogue with OSHA and other stakeholders concerning this important measure.

We thank you for the opportunity to be heard and happy to address any questions.

[The statement of Mr. Gerstenberger follows:]

Prepared Statement of Peter Gerstenberger, Senior Advisor for Safety Compliance and Standards, the Tree Care Industry Association

Testimony of Peter Gerstenberger Senior Advisor for Safety Compliance and Standards for the Tree Care Industry Association before the House Education and the Workforce Committee Subcommittee on Workforce Protections June 16, 2011

Chairman Walberg, Ranking Member Woolsey and Members of the Subcommittee, on behalf of the Tree Care Industry Association (TCIA) and our approximately 2,000 member companies across the U.S., we thank you for the opportunity to testify today about our experiences with state plans and federal OSHA.

My name is Peter Gerstenberger and I am the Senior Advisor for Safety, Compliance and Standards for the Tree Care Industry Association. I am responsible for the development of TCIA's safety and compliance training programs and the association's primary contact with company owners and their employees on safety/compliance matters. I also act as TCIA's liaison with OSHA and similar state entities and regularly work with these agencies in an effort to improve safety throughout our industry. I have had the privilege of serving TCIA in one capacity or another for more than 25 years. Throughout my tenure, I have participated actively as a member of the ANSI Z133 Committee, which develops the only consensus safety standard for tree care operations.¹ The Z133 committee was first formed in 1969, pre-dating OSHA.

TCIA's 2000 active members are companies engaged in arboriculture (tree care), tree trimming and removal, utility vegetation management, landscape maintenance and related activities. Tree care is a high-hazard industry. Using estimates of our industry's size from reliable sources as well as our own market research, we cal-

¹The American National Standard's Institute (ANSI) Z133. 1-2006, Safety Requirements for Arboricultural Operations. Z133 was first published in 1972. It was revised in 1979, 1982, 1988, 1994, 2000 and 2006. A revised standard is expected for 2011.

culate that our industry's fatality rate places us among the top 10, and likely among the top five most hazardous occupations in the country.²

As a result, worker safety has been one of the central tenets of TCIA since its inception more than 70 years ago. We were the original Secretariat of the ANSI Z133 in 1969 and remain very active in that standard-making process. We also have consistently focused on assisting our members improve safety through education and training. As part of this effort, we direct the only credentialing program for safety professionals within our industry, produce a wealth of bilingual safety training programs, and offer employers a model illness and injury prevention program.

Our efforts have not been limited to our membership and the ANSI committee, however. We also regularly engage regulators to effect safer working conditions for our members' employees as well as the multitude of small employers outside our membership. In this regard, we have been fortunate to collaborate with federal OSHA as well as several State Plan OSHAs in the past, and the result has been a tangible safety benefit to the industry in each instance.

In recent years, our collaborations with state plans have been particularly fruitful. We have worked directly with State Plan OSHAs in California, Virginia, Maryland and Michigan to adopt more effective rules and guidance for tree care operations.

Since 1993, Virginia experienced 59 non-logging, tree care-related fatalities, which comprised seven percent of all occupational fatalities within the state, with 47 of those, or nine percent of all occupational fatalities, occurring since 2000. For an industry of the relatively small size of the tree care industry, this is a very high number of fatal accidents.

TCIA (then National Arborist Association) approached the Virginia Department of Labor & Industry (DOLI) about the possibility of adopting a comprehensive regulation addressing tree trimming in 2001. We requested a regulation based on ANSI Z133.1-2000. Developed through a consensus process by an accredited standards committee representing employers and employees, organized labor, equipment manufacturers, academia, and other stakeholders, the Z133 Standard captures the collective wisdom and experience of the entire profession, translating that body of knowledge into standards of safe practice.

Discussions with the DOLI resulted in a commitment from the industry to make changes to the ANSI standard, which culminated in the adoption of the revised ANSI Z133.1-2006.³

Virginia OSHA (VOSH) initiated this rulemaking in 2007 with the assistance of a regulatory work group composed of private and public sector representatives. TCIA organized a small coalition of affected members to sit down with VOSH, other agencies and other affected parties to craft the standard language that very recently took effect in the Commonwealth.

The purpose of the new regulation is to provide comprehensive protection to private and public sector employees and employers exposed to tree trimming hazards. The final regulation is based closely on ANSI Z133, with certain provisions such as the one for first aid/CPR training that are more stringent than either Z133 or OSHA general industry standards.

VOSH estimates that on average over the last 10 years there were four fatal tree trimming accidents per year that could be prevented going forward if there is full compliance to the final regulation.

California has had tree care-specific rules on its general industry safety orders (GISO) as well as its high voltage safety orders for quite some time. We are not aware of the full history of their promulgation other than the fact that they were based upon the extant consensus standards at the time.

²A recent report published by the Centers for Disease Control & Prevention (CDC) indicates that there are 190 fatal occupational fatalities among a group of workers that the Bureau of Labor Statistics (BLS) terms "grounds maintenance workers." See *Fatal Injuries Among Grounds Maintenance Workers—United States, 2003—2008*. Morbidity and Mortality Weekly Report, May 6, 2011. Vol. 60, No. 17. Within this statistic, it is eminently clear that tree care activities and tree care workers were responsible for the majority of those fatal accidents. As benchmarks, consider the all-industry fatality rate put forth by BLS of 4.0 (per 100,000) and the GMW rate of 13.3. To calculate a comparable statistic for tree care, we need the number that has eluded everyone, namely the total number employed in tree care in the U.S. Industry sources suggest that this number is somewhere between 150,000 and 300,000. Using the 63-fatalities-per-year-among-tree-trimmers figure from the CDC report and not counting the workers from allied trades who died doing tree work, we estimate a fatality rate of between 21 and 42 per 100,000. For comparison's sake, according to the BLS CFOI, the 2009 fatality rate for construction laborers was 18.8 with 229 total fatalities, and for farming, fishing and forestry occupations it was 25.8 with 239 fatalities.

³TCIA also had substantive conversations with federal OSHA concerning Z133. Please see page 7 of this document.

We began our collaboration with California OSHA (Cal/OSHA) in 2004. At that time there was a recognized and growing hazard associated with climbing into and removing trees killed or weakened by forest fires and pine beetle infestations in the State. Cal/OSHA reached out to the industry experts and even attended our conferences and trade shows to learn more. We participated in the development of an emergency regulation to allow tree workers to be hoisted by crane into the tree canopy when other methods were less safe or infeasible. Cal/OSHA immediately saw the logic of adopting this as permanent regulation, consistent with what had been recognized as an accepted safe work practice in Z133 since 1979. In 2005, that goal was realized.

Currently, an advisory committee of our members, Cal/OSHA staff, and representatives from unions, utilities, municipalities, companies and other stakeholders are assisting Cal/OSHA with the revision of several outdated sections of its GISO pertaining to tree care operations. Once again, Z133 language is serving as the template. With these standards, Cal/OSHA's compliance field force will be better educated to look for the hazards likely to cause serious harm, and the smallest practitioner in the remotest corner of the State will have ready access to updated minimum standards for safety.

In 2008, TCIA entered a formal alliance with the Michigan Occupational Safety and Health Administration (MIOSHA) and five other Green Industry organizations in Michigan to help protect the safety and health of Michigan's green industry workers. The MIOSHA program is part of the Michigan Department of Labor & Economic Growth (DLEG).

MIOSHA launched a Tree Trimming Industry initiative in October 2006, due to a series of fatalities involving tree trimmers in Michigan. MIOSHA sent letters and a fact sheet to 1,000 employers in the tree trimming and removal industry to raise awareness of the industry hazards and to offer training materials. MIOSHA also increased compliance efforts in the industry to encourage employers to protect their workers.

This ground-breaking alliance was an outgrowth of that initiative. By forming this collaborative relationship, all partners pledged to work together to foster the highest standards, good work ethics and safe work practices for all professional sectors of the green industry.

The goals of this alliance included, but were not limited to: Reducing accidents; providing training and education specific to the green industry and encouraging member participation; developing fact sheets, PowerPoint presentations, best practices case studies, and a website resource list to help employers and employees increase their knowledge of safety and health issues and to forge innovative solutions; and coordinating participation in forums, round table discussions, conferences, and reciprocal website links to assist employers with compliance and the development of safety and health systems.

Just over three years after the alliance was signed, all those goals and more have been realized.

As the economy continues to impact our industry, nowhere is the effect being felt more than in Michigan. In 2010, Michigan experienced seven occupational fatalities related to tree care. These fatalities included electrocutions, falls and struck-by's; and arguably all could have been prevented with more training. Therefore it was particularly gratifying for the Michigan Green Industry Association (MGIA, one of the Green Industry Alliance Partners) to be able to announce that it had been approved for a \$20,000 grant from MIOSHA. The grant helped relieve some of the financial burden of training for numerous small employers while providing high-quality, tree care-specific safety training to 200 tree workers.

In 2011 with MIOSHA's assistance, MGIA will again be able to help address unmet training needs with both electrical hazard awareness and CPR/first aid training programs.

Very recently, Maryland OSHA initiated a rulemaking with the ultimate goal of promulgating a comprehensive vertical standard for tree trimming similar to Virginia's. TCIA attended a hearing in November 2010 and participated in a work group in December 2010 with other stakeholders to refine the first draft of a proposed standard that MOSH had created internally.

We submit that the situation in States like Virginia, California, Michigan and Maryland is a microcosm of the situation nationally as far as our industry is concerned. As a result, we feel that similar collaboration with other state plans and federal OSHA can improve safety in our industry.

Our efforts to engage federal OSHA have in many instances resulted in positive outcomes. For example, during a 12-year period, our association's leadership worked directly with federal OSHA toward the promulgation of 29 CFR §1910.269, Electric Power Generation, Transmission and Distribution. Certain parts of this "vertical

standard” regulate the utility line clearance tree trimming industry, a specialized industry within our profession, employing tens of thousands in the U.S. The result, in our estimation, was an effective, workable standard that was and is responsive to the hazards of line clearance tree trimmers.

We have also sought and received assistance from federal OSHA to train thousands of workers. In 2004-05, TCIA received a \$197,000 Harwood grant to provide a series of full-day regional, bilingual electrical hazards awareness workshops targeting small-employer businesses. Our program included a train-the-trainer component to leverage the resources from the grant. The grant enabled us to provide this vital training to 2,327 tree care workers. Once again in 2007-08, TCIA received \$160,000 from OSHA to conduct electrical hazards awareness training through regional workshops. Another 1,513 tree care workers were trained.

From 2002 through 2007 as we fulfilled our Harwood grant obligations, we continued to collaborate with a variety of arborist organizations to deliver electrical hazards training. In total, we estimate that more than 10,000 arborists received electrical hazards training using TCIA training materials in a five-year time span.

In recent years, there has been an amazing transformation in the industry that we firmly believe is directly attributable to this training, and for which OSHA deserves some of the credit. In the 19 years prior to the electrical hazards workshops, the percentage of all fatal accidents attributable to electrical hazards, as measured by OSHA, was 39 percent. By 2006, that statistic had dropped to 18 percent, and a year later (the last year of our grant) it had dropped even further to 16 percent.

While our most recent applications for Harwood grants have not been selected, we hope to receive future grants so we might build upon our past success.

On February 11, 2003, TCIA entered an Alliance with federal OSHA. The Alliance was created to help solidify a relationship between both organizations which will result in enhanced dialog, information exchange, and the development of training materials. Both parties to the Alliance agreed that the ANSI Z133 Standard should be recognized as the leading authority for safe practices in the tree care industry, and that all training programs created should be consistent with this document. However, because the Z133 is a consensus standard, both parties agreed to review the Z133 document in order to ensure consistency with existing legal standards before developing such training programs based on its content. Therefore, in June of 2003, representatives of OSHA and the TCIA reviewed the content of the 2000 revision of Z133.

Our shared goal was to identify areas of the Z133 document that either appeared to be inconsistent with existing legal standards, or appeared to need clarification for better understanding. TCIA did not make any promises or commitments to OSHA that Z133 would be revised per the recommendations; nevertheless we did carry the recommendations to the Z133 committee and almost all were adopted in the next revision. Again this exercise was undertaken for the sole purpose of identifying the principles on which future training programs could be modeled. Our industry’s consensus safety standard became stronger as a result.

Unfortunately, not all interactions with federal OSHA have resulted in positive outcomes. In the same period that OSHA was working on 1910.269, it was also separately working on a standard for the logging industry, 1910.266, that became a final rule in 1994-95. It wasn’t until after the rule was promulgated that OSHA determined through letters of interpretation that the tree care industry should be regulated by it. By applying the standard to our industry after it was promulgated, we were denied any opportunity to have input into the standard. This has resulted in various inconsistencies and inefficiencies, including some of the final Logging Standards’ requirements directly contradicting what had just become law in 1910.269. What ensued was a running legal and verbal battle between OSHA and our industry over 10-plus years concerning the applicability of the Logging Standard that culminated in the current OSHA Directive, CPL 02-01-045, Citation Guidance Related to Tree Care and Tree Removal Operations.

We cannot define what “effective” should mean for this committee; however, we can certainly point to the aforementioned as an example of ineffective. While the current federal directive provides some guidance on safety measures for our industry, it nonetheless is the product of an attempt by OSHA to cobble together various standards from general industry, as well as other industries, and apply them to tree care. In this manner, it is incomplete and inferior to standards such as those in Virginia and California, which address the unique hazards facing our industry and provide proactive guidance to employer, employees and enforcement officers.

Over the years, TCIA has repeatedly engaged OSHA in an effort to address these deficiencies and obtain a specific standard for our industry, including a formal petition for rulemaking we filed in 2006. Support for an arboriculture standard also has come from various other stakeholders. Indeed, Members of Congress from both

Chambers and both parties have intervened several times on this issue in support of a separate "arborist standard" based upon ANSI Z133, beginning when Cass Ballenger, the former Chair of this Subcommittee, suggested OSHA move forward with a separate standard more than 10 years ago. Those calls have been repeated by several Members of this Subcommittee over the years, including several current members, who have urged OSHA to move forward with a negotiated rulemaking.

It appeared that we would get what we had been asking for when in September 2008 (Federal Register Vol. 73, No. 182, Thursday, September 18, 2008, Pages 54118-54123) OSHA issued an advance notice of proposed rulemaking (ANPR) for tree care operations. They seemed to agree with our justification for a standard when they said, "After analyzing the BLS and IMIS fatality and injury data, OSHA has decided to pursue rulemaking to address hazards in tree care operations. As the first step in the rulemaking process, OSHA is publishing this ANPR to gather data, information, and comment on hazards in tree care operations and effective measures to control hazards and prevent injuries and fatalities. In addition, OSHA is requesting comment on provisions a standard should include to effectively address those hazards. OSHA also will carefully consider the ANSI Z133.1 standard, as well as State occupational safety and health standards addressing tree care operations, in developing a standard."

It certainly appeared to us from the comments OSHA received on the ANPRM that there was broad base support for a standard from industry, individual arborists and other stakeholders.

Despite the vast majority of commenters supporting a standard and for reasons we do not understand, OSHA has apparently decided not to pursue a rulemaking at this time and did not include this rulemaking on its last two regulatory agendas. OSHA's justification for not moving forward on a vertical standard for our industry has been that existing standards already provide adequate protections to workers in tree care, and that the Agency had higher priorities. We do not agree.

Allow us to compare our industry's recent citation history with that of the logging industry. In fiscal 2009-10, 66 percent of the logging industry's citations were issued under its vertical standard and less than one percent were issued under OSHA's catch-all of the general duty clause.

By contrast in our industry, 10 percent of our citations were general duty clause. We heard it expressed by a high-ranking OSHA official once that general duty citations were considerably more difficult to research and write, and were more frequently contested by the employer. Your committee may wish to ask OSHA about the relative "efficiency" of general duty citations. Certainly efficiency is one measure of effectiveness.

We cannot comment upon the effectiveness of State Plan's enforcement activities relative to federal OSHA's. We simply have no knowledge in that area. However, effectiveness as measured by certain State Plan's responsiveness to our efforts to improve safety in our industry is very good.

We have been and we remain more than willing to participate in further dialogue and meetings with OSHA and other stakeholders concerning this important measure. Thank you for the opportunity to be heard in today's hearing, and I am happy to address any questions.

Chairman WALBERG. Thank you, Mr. Gerstenberger.

Now, we recognize Mr. Frumin?

Your microphone, please.

Mr. FRUMIN. Yes, okay.

Chairman WALBERG. Thank you.

**STATEMENT OF ERIC FRUMIN, HEALTH AND SAFETY
DIRECTOR, CHANGE TO WIN**

Mr. FRUMIN. Chairman Walberg, Ms. Woolsey, Mr. Kline, thank you for the opportunity to testify here today.

Every year thousands of workers die from injuries, tens of thousands die from job-related diseases, and hundreds of thousands are disabled.

Under that cloud, this committee has the obligation to assure that the agencies that Congress created are effectively doing their

part to help. And where necessary, force employers to protect their workers by complying with our nation's job safety laws.

First, I must urge this committee in the strongest possible terms to reject the outrageous attempt by the Appropriations Committee to slash OSHA's budget by 23 percent.

The states have told you that they are already severely underfunded. The fact is that the Congress essentially froze funding for the states throughout the Bush administration.

It was only in the last 2 years that both federal and state OSHA finally saw the significant increases in their enforcement resources. If the committee is indeed concerned about efforts to undermine state OSHA programs, your first stop is with Chairman Rogers and his colleagues.

Please stop this crippling attack on our nation's basic job safety and health enforcement effort.

I would like to offer four other essential points.

One, federal OSHA must continue to closely monitor state OSHA plans as required by law to ensure that they are minimally at least as effective as the federal program, and eventually fully effective.

Two, any evaluation of effectiveness must include penalty levels for serious violations.

Three, it would be a very serious mistake to rely primarily on injury and illness rates as performance measures for OSHA programs.

And four, the Labor Department's efforts, as Mr. Lewis alluded to, to develop useful performance measures, are innovative and should be strongly supported.

I am going to address these points in regard to what some of the other witnesses have said.

First, what is the right balance between federal and state efforts?

In 1970, the Congress required OSHA to approve state plans, when requested, but also to make a core continuing evaluation of how each state is carrying out such a plan, and to withdraw approval when the plan fails.

In other words, Congress adopted very clear limits on the states' role and discretion.

So when Mr. Beauregard or others complain about the, quote—"unequal"—unquote, partnership or make pointed references to protecting so-called states' rights, or imply that some other partnership is required, they are apparently not aware of the basic structure of the act.

Over the last 40 years, we have repeatedly seen states that failed to perform, employers which flouted the law, and workers who suffered and died. And when that happened, the buck stopped at the desk of the U.S. Secretary of Labor, not with the governor and the state legislature.

Let us face facts. The Congress acted in 1970 in major part because so many states have so badly failed to protect their own workers. And we have continued to see states fail since then.

Mr. Chairman, Mr. Kline, listen to the words of Senator Peter Dominick, a republican leader on the Senate Labor Committee, who opposed a new central role for federal government from the legislative history.

“For the first time in modern history, the federal government is taking over the role of monitor of health and safety functions in almost every business throughout the country. There is a provision,” he said, “which will permit the states to regain some administrative control, but we should not be under any illusion, the federal government is going to be setting the standards.”

Now we all know that OSHA has few tools to force states to correct even blatant failures, short of the chaos that comes from withdrawing the states’ plan authority. Only in severe cases, like the 1991 outrage in North Carolina, has OSHA been able to use concurrent jurisdiction with the states’ agreement.

But that was only triggered because of a catastrophe. The OSHA Act promised protection to workers before job hazards cut short their lives and limbs.

OSHA’s recent enhanced review has now shown serious weaknesses in worker protection in Indiana and Hawaii and elsewhere. So we now ask, how will OSHA prevent Indiana and Hawaii from becoming the next North Carolina or Nevada, before workers are slaughtered by the dozen?

Unfortunately, even some OSHA administrators did not follow this approach and allowed their own state monitoring efforts to deteriorate, as in Las Vegas. And we were relieved to see OSHA enhance its reviews. We hope they and the states can agree on an appropriate way to move forward and assure that these programs become fully effective.

Lastly, I would like to point out that deterrence is absolutely key to any serious enforcement effort. Many inspections are done, but they are far too few given the number of employers, and deterrence is critical.

Only the threat of serious inspection—serious sanctions will encourage the kind of voluntary compliance that states and federal OSHA expect. And that penalties like \$300 in the state of South Carolina simply are not acceptable and must be stopped.

Finally, we would like to point out that we cannot take seriously major complaints about OSHA’s mandates that states participate in the National Enforcement Program. Let us look at the issue of combustible dust.

The Chemical Safety Report Board reported—

Chairman WALBERG. Time has expired. I encourage you to wrap up quickly here.

Mr. FRUMIN. I am.

That in North Carolina, beginning with the 1980 incident, there were 12 serious incidents of combustible dust including the one in Kinston that killed six and injured 38.

But OSHA only asks states to do five NEP inspections. We don’t think that is too much.

We thank you for the opportunity to testify, and be happy to answer any questions.

[The statement of Mr. Frumin follows:]

**Prepared Statement of Eric Frumin, Health and Safety Director,
Change to Win**

Chairman Walberg, Ranking Member Woolsey, and members of the Subcommittee, thank you for the opportunity to testify today.

I am Eric Frumin. I serve as the Health and Safety Director for Change to Win, and have worked in this field for 37 years. Change to Win is a partnership of four unions and 5 million workers, in a wide variety of industries, building a new movement of working people equipped to meet the challenges of the global economy in the 21st century and restore the American Dream: a paycheck that can support a family, affordable health care, a secure retirement and dignity on the job. The four partner unions are: International Brotherhood of Teamsters, Service Employees International Union, United Farm Workers of America, and United Food and Commercial Workers International Union.

The effectiveness of the Federal and State agencies in setting and enforcing job safety and health standards is a critical question. Every year, thousands of workers die from injuries, tens of thousands die from job-related diseases, and hundreds of thousands are disabled. Under that cloud, this Committee has the obligation to assure that the agencies the Congress created are effectively doing their part to help—and where necessary, force—employers to take the basic steps to comply with our nation's job safety laws.

We would like to offer four essential points:

Federal OSHA must continue to closely monitor State OSHA plans, as required by law, and must also assure that they provide “satisfactorily effective enforcement” programs.

Any evaluation of effectiveness must include whether the penalty levels for serious violations provide adequate deterrence.

It would be a serious mistake to rely primarily on injury/illness rates as performance indicators for OSHA programs.

USDOL efforts to develop useful performance measures should be supported

Federal OSHA must continue to closely monitor State OSHA plans to assure, as required by law, and must also assure that they provide “satisfactorily effective enforcement” programs.

This Committee has held many hearings over the 40 years of OSHA's existence regarding the agency's competence and direction. In the last Congress, the Committee adopted many proposals to modernize the OSHA, and sharply improve OSHA's ability to deal with negligent employers.

One of those hearings focused specifically on the severe failures of a few state OSHA programs—notably including Nevada's abject failure to protect construction workers, which resulted in the needless deaths of 12 workers over an 18-month period in the Las Vegas building boom.

While both the Congress and successive Secretaries of Labor have encouraged states to adopt their own OSHA programs, and 22 states/territories have done so for the private sector economy, too little attention has been paid since the enactment of the OSHAct in 1970 to the adequacy of both those state programs and the federal actions to monitor those programs as required under Section 18(c) and 18(f), as well as by subsequent appeals court directives. And those repeated failures over the decades have resulted in abject failures by various state OSHA programs, with horrendous consequences for the citizens of those states.

The most recent example, which sparked the welcome but long-overdue Federal detailed review of state plans, was the chaos which descended upon the massive City Center construction project in Las Vegas in 2008-09. Construction is by definition a human creation. The ruthless pace of death and destruction there was no happenstance, no “accident.” It was the inevitable result of weak or non-existent safety management practices in a highly hazardous industry, creating serious problems which were neglected by a virtually toothless Nevada state OSHA program.

It was scandalous that the huge contractors should have created the hazardous conditions in the first place, and that they were essentially abetted by the Nevada's failure. But these abject failures were also a predictable outcome of the years of an arm's-length, “see no evil” federal approach to its monitoring responsibilities under Sect. 18(c) and 18(f). Indeed, one must ask what would have happened had not an intrepid set of reporters and editors from the Las Vegas Sun dug deeply into this morass and so vividly exposed the contractors' and the state's failures.

Fortunately, without even having a confirmed Assistant Secretary or Solicitor, Secretary Solis responded quickly to this dire situation. Federal OSHA closely scrutinized the Nevada program, and then, in an unprecedented but long-overdue action, announced the expansion of that scrutiny to all other state plans as well. That “enhanced” review has now been completed, and is the subject of this hearing.

It is not the first time that this Committee has had to devote attention to the consequences of the failure of a state OSHA enforcement program and failed federal oversight. In the late 1980's, the NC OSHA program was in a shambles, starved of funds by a callous state legislature and ignored by a Federal OSHA which valued

the appearance of state enforcement rather than its substance. When 25 workers died and 54 were injured behind locked fire doors at the Imperial Poultry plant in Hamlet, NC, On September 3, 1991, the reality of NC's disgraceful program was revealed. With the state's inspection rate at about half the required level, the plant had never been inspected in 11 years. Federal OSHA announced that, with NC OSHA's acquiescence, it was undertaking concurrent enforcement in NC, to assure that Tarheel workers would not remain unprotected from such vicious neglect.

As the funerals proceeded, then-Chairman Ford held an urgent hearing on the severe problems with the OSHA legislation, and continued his work on legislation to vastly improve the setting and enforcement of OSHA standards. That legislation was sadly never enacted, but it addressed many of the same problems that continue to undermine workplace safety in both the federal and State programs since then, including the severe weaknesses in many state programs.

Mr. Chairman, Ms. Woolsey, it is worse than regrettable that the persistent and severe gaps in the OSHAct still include obstacles the Act's guarantee of effective state plans.

We are not here to say that all state agencies are equally good or bad—or uniformly better or worse than the federal program. Some state programs have features that are far better than that which the Secretary of Labor, with her best efforts, has been able to undertake. For instance, farmworkers have been largely excluded from coverage and enforcement of basic job safety standards in Federal jurisdictions and most state plans. But California, Oregon and Washington have made major strides to protect them with both standards and enforcement. California, unique for its size and resources, has adopted job safety and health standards ahead of both the federal and other programs, just as California has stricter environmental rules. Other states have a variety of innovative laws, policies and programs which should serve as models for other states and federal OSHA.

And both federal OSHA and many state agencies have suffered from serious underfunding—as the states have consistently reminded the Congress. Those funding problems continue today, especially with the collapse of legislated budgets in so many states following the financial crisis and the severe recession it sparked.

And if the Budget Committee's allocations for FY 2012 are adopted, including a 23% cut in OSHA's annual budget, there will be a massive shortfall in funding and staffing for both federal and state OSHA programs. Indeed, if this Committee is seriously concerned about attempts to “undermine State efforts to promote workplace safety,” as the title of this hearing suggests, it would immediately call upon Chairman Rogers and your colleagues on the Appropriations Committee to significantly increase funding for state OSHA plans.

But even with those all-too-familiar strengths and external obstacles, we continue to see state agencies which are apparently incapable of rising to the level of effectiveness which was clearly envisioned by the Congress when it adopted Section 18:

(f) The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan.

For instance, as a result of the extraordinary review undertaken in 2010, OSHA revealed that the program in Hawaii was on the verge of collapse, much as OSHA had found in Nevada the prior year—and in NC twenty years before. Fed OSHA also found that various states were failing to assure compliance with the “benchmarks” for staffing required under federal law, even though those benchmarks would not themselves assure a fully effective state program given the continuing hazards and violations in these states.

Any evaluation of effectiveness must include whether the penalty levels for serious violations provide adequate deterrence.

The Fed OSHA review also identified state enforcement practices which on their face are patently questionable or worse. For instance, it is an article of faith in any statutory enforcement program including penalties that such penalties are essential to the deterrent function of the program. As we all know, there are far too few OSHA inspectors in either the Federal or State programs to assure regular inspections, even in highly hazardous industries. Deterrence is key.

Yet many states continue to impose penalties for serious violations—ones capable of causing “death or serious physical harm”—at levels far lower than those of either federal OSHA or other states. For instance, in 2009, Oregon's average “current” penalty (i.e., penalties remaining after settlements or appeals) was only \$330. Incredibly, South Carolina's average “current” penalty was only \$282. What model of deterrence does such weak performance convey to employers who are considering the risks of non-compliance?

There is precious little guidance in the OSHAct regarding the role of penalties within the deterrence model. Last year, this Committee decided that the days of ab-

surdly low penalties were over, and reported legislation to modernize OSHA's penalty provisions. As we all know, that legislation was opposed by the Chamber of Commerce and employers generally, such that it never even reached the full House for a vote. Today, the message to employers and workers continues to be very clear: the lives and safety of workers are worth less than that of wild horses in a federal park.

However, the vital role of deterrence is a well-founded concept in federal and state enforcement programs. US Circuit Courts have repeatedly upheld penalties on the basis that they must offer some deterrent function,¹ as described generally by EPA's enforcement policy (Policy On Civil Penalties, EPA General Enforcement Policy #GM-21," US Environmental Protection Agency, Effective Date: Feb 16 1984):

Deterrence

The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from non-compliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance.

NC OSHA itself stated in its response to the Federal review:

As federal OSHA and state procedures indicate, penalties are not designed as a punishment for violations but rather to serve as an effective deterrent and to provide an incentive toward correcting violations voluntarily prior to an enforcement inspection.

In short, we firmly believe that penalty levels must be high enough to offer serious deterrence, and that the levels of penalties must be addressed in any serious evaluation of the effectiveness of state OSHA programs. Unfortunately, some leaders among state plans appear to have forgotten this basic precept. Last year, the Occupational Safety and Health State Plan Association (OSHSPA), for instance, attempted to claim that current low penalties are adequate, and professed ignorance of any documented relationship between penalties and compliance (i.e. the deterrent value of penalties). OSHSPA even suggested that non-enforcement methods, such as compliance assistance, are more effective in stopping non-compliant employer behavior.²

It is hard to believe in the 21st Century that such a claim would be seriously considered, but some OSHSPA leaders continue to challenge the fundamental principle of deterrence.

We should expect that they will explain why they have refused to accept this fundamental principle. However, their suggestion that alternatives, such as the potential cancellation of government contracts and reduced workers compensation premiums to promote prompt compliance, is equally incredible. It is simply ludicrous to propose an alternative remedy that applies to only a small subset on employers, and is not authorized in OSHA or even proposed in legislation. Federal and state procurement procedures provide few if any actual penalties in the procurement decision-making for labor violations of any sort—never mind OSHA violations in particular. In addition, there are few such current mechanisms in state law, with only a handful of states even having such authority to implement such a practice—and at least, not in the timeframes envisioned under the OSHAct for compliance with life-saving safety and health standards. In the absence of such a concrete mechanism, one can't simply jettison adequate penalties/deterrence until appropriate standards are included in government contracts or procurement procedures and an appropriate mechanism for judging compliance is established.

¹ *Kasper Wire Works v. Sec. of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001) (OSH Act civil penalties designed to “inflict pocket book deterrence”); *Reich v. OSHRC*, 102 F.3d 1200, 1203 (5th Cir. 1997) (“OSHA must rely on the threat of money penalties to compel compliance by employers”).

² Letter from Kevin Beauregard, Chair, Occupational Safety and Health State Plan Association, to US Assistant Secretary of Labor David Michaels, August 16, 2010: “State Plan States’ experience has shown that an effective method to achieve greater compliance among small employers is by focusing on education and training while increasing the likelihood of an onsite inspection.”

Workers' compensation premiums are also only tenuously related to compliance with OSHA standards. For instance, the biggest factor in workers compensation costs is overexertion injuries³ and, as we all know, those are not addressed in OSHA standards. Workers compensation premiums are also typically calculated based on a rolling three-year average experience, so compliance in the short term in most industry sectors will have little or no short- or medium-term benefit for employers.

Both of these potential tools were available to state job safety enforcers in the 1960's. These tools were judged by Congress as insufficient to stop the deaths and injuries on the job. Hence, the Congress passed the OSHAct specifically to create a joint federal/state regime of standards and enforcement that could sidestep these obstacles and deliver a credible inspection/penalty enforcement and deterrence program capable of getting employers' attention. And section 18 of the Act likewise requires a minimum set of standards and enforcement policies—including penalties—such that state-by-state competition would never be allowed to undermine the basic protective purposes of the law. As the Senate Report stated: "In a state by state approach, the efforts of the more vigorous states are inevitably undermined by the shortsightedness of others," which underscores the "inadequacy of anything but a comprehensive, nationwide approach." S. Rept. No. 91-1282, at 4 (1970).

It is also clear that there is certainly no consensus supporting the view expressed by the OSHSPA leadership. As one prominent state OSHA program said last year:

* * * the average federal and state plan penalties for serious violations which carry the substantial probability of death or serious physical harm are embarrassingly low and widely recognized as having little deterrent impact.

* * * there is a roughly five-fold variation from state to state in average penalties for all employer size groups. * * * This is a disturbing inconsistency that raises substantial concerns about equal expectations for employers and equal protection for employees. Even acknowledging that there may be some rational differences in enforcement strategy from state to state that would merit modest penalty variations these vast differences suggest that the opportunity given to states to establish their own penalty policies should be carefully limited. This unfortunate situation has resisted change for 40 years and it seems time that OSHA exerted somewhat firmer control.⁴

Faulty reliance on injury/illness rates as performance indicators for OSHA programs

Some, including the Labor Department's Inspector General, have taken issue with the use of penalty levels—or other "activity measures," like the percentage of Serious violations—as indicators of effective agency performance, preferring to rely heavily instead on the remarkably unreliable workplace injury/illness rates.

This is a marked departure from the view that the IG took in another audit it conducted in 2010. At that time, it concluded:

OSHA directives state that penalty reductions were designed primarily to provide an incentive toward correcting violations voluntarily. Furthermore, reductions were to be based on the general character of a business and its safety and health performance.

However, OSHA has not effectively evaluated the use of penalty reductions for size, history, good faith, and informal settlements, and the impact on comprehensive corrections of workplace hazards.⁵

In other words, the IG has confirmed the importance of penalties as deterrence, and the importance of insuring that OSHA takes care to reduce penalties only when justified by the facts and allowed by the statute. The IG's latest report fails to take into account this earlier finding, and the obvious relationship between statutory penalties and the effectiveness of either Federal or State OSHA enforcement programs.

That said, the IG's recent report on OSHA's evaluation of state plans also acknowledges the difficulty of doing such evaluations. In their interviews with federal OSHA staff, IG staff observed that the required empirical outcome data simply was not available:

³Liberty Mutual Research Institute for Safety, 2010 Liberty Mutual Workplace Safety Index: "Overexertion, which includes injuries related to lifting, pushing, pulling, holding, carrying, or throwing, maintained its first place rank, costing businesses \$13.40 billion in direct costs. Consistent with past years, this event category accounted for more than one-quarter of the overall national burden."

⁴Letter from Dr. Michael A. Silverstein, Ass't. Director, Washington State Department of Labor and Industries, to US Assistant Secretary of Labor David Michaels, August 18, 2010.

⁵US DOL Office of the Inspector General, "OSHA Needs to Evaluate Penalty Reductions," Report No. 02-10-20110-105, Sept. 20, 2010, p. 4.6 HIDDEN TRAGEDY: Underreporting of Workplace Injuries and Illnesses. A Majority Staff Report by the Committee on Education and Labor, U.S. House Of Representatives, June, 2008.

[Federal OSHA does] not currently hav[e] extensive, quantitative performance measures to evaluate the State Plans. The officials agreed that many measures were by necessity activity-based because outcome data were lacking. Officials stated that activity measures provided valuable information on State program operations and were helpful proxy measures of effectiveness. (p. 6)

Nor does the IG offer any recommendation for alternative measures other than what one state-plan administrator reportedly referred to as the “gold standard for success”: worksite injury/illness data. One assumes that if legitimate, practical alternative measures were easily available, the IG would have found them, but it apparently did not.

This Committee has recently looked carefully at the reliability of reported workplace injury/illness rates. It found what most workers understand very well: the underlying raw data for the nation’s job injury/illness data system are simply not reliable.⁶ OSHA has said so, and is continuing to find employers who willfully violate the rules on injury/illness records. BLS has said so, and is supporting research to measure the undercount. It is time to simply stop the fiction that declining injury/illness rates are a source of comfort for this Committee, the Secretary of Labor or her counterparts across the nation.

The same is true as well for fatality data. If state-based fatality rates were any guidance to the effectiveness of state OSHA plans, then the Wyoming plan, which had the highest fatality rates in the nation, should have been shut down years ago, and several other states considered for the same treatment.

The simple reality is that within important limits, injury/illness data are useful at the establishment level for employers, unions and workers as only one part of an overall evaluation of the overall effectiveness of workplace job safety and health programs. These data are also useful to OSHA in targeting enforcement resources to those sites which are willing to comply with the recording rules and report accurate numbers. But they are a far cry from an accurate measure of whether or not an entire compliance enforcement program is effectively addressing the range of issues it confronts when dealing with the full range of industries, employers and hazards in its jurisdiction.

The risks of overreliance on injury rates were starkly revealed at BP’s Texas City refinery, where a company large enough to know better used measures of slips, trips and falls to justify a disinvestment of hundreds of millions of dollars—a purposeful neglect which eventually cost the lives of 15 workers and the safety of hundreds. This is no way to run a railroad.

DOL efforts to develop useful performance measures should be supported

The final missing piece to the challenge of effective measurement of performance is the on-going research by both federal OSHA and Washington State on the actual effectiveness of enforcement. The recent study (attached) by the Washington State’s Safety and Health Assessment & Research and Prevention (SHARP) Program has clearly demonstrated that enforcement—including penalties—is an effective method for securing the changes in employer behavior by non-compliant employers, at least as reflected in the outcome of workers compensation claims:

Impact of DOSH enforcement with and without citation on non-MSD compensable claims rates

Inspections that result in citations for violations of safety rules would be expected to have greater impact due to the penalties which employers face. When we break out the impact of DOSH enforcement visits that result in citations from those that do not we find the following:

- Fixed-site industries: DOSH enforcement inspections that had no citation had only a 5.0% greater decrease in non-MSD compensable claims rates relative to employers with no DOSH activity. But DOSH enforcement inspections that had one or more citations had a 20.3% greater decrease in non-MSD compensable claims rates relative to employers with no DOSH activity.
- Non-Fixed-site industries: DOSH enforcement inspections without citation had a only a 3.1% greater decrease in non-MSD compensable claims rates relative to employers with no DOSH visits. But enforcement inspections with one or more citations had a 19.1% greater decrease in compensable claims rate relative to employers with no DOSH activity.⁷

It is unfortunate that there has been as little research on this question in the US as has been the case until now. Indeed, there have been multiple evaluations of fed-

⁷ Washington State’s Safety and Health Assessment for Research for Prevention (SHARP) Program, “The Impact of DOSH Enforcement and Consultation Visits on Workers’ Compensation Claims Rates and Costs, 1999-2008,” SHARP Technical Report Number: 70-5-2011, May 2011.

eral OSHA's enforcement and consultation, and voluntary compliance programs by the Government Accountability Office which repeatedly concluded that the agency had not taken seriously its obligation to evaluate its policies and actions. Outside of Washington State, the same has largely been true for state OSHA agencies as well.

Fortunately, the US Labor Department has, for the first time, taken very seriously the need to conduct such evaluations—as part of an overall evaluation effort within the federal government. The Department has its first Evaluation Officer in history, and the funding for such evaluations has tripled compared to recent prior years. Additional funding was secured through the Recovery Act funding. We understand that OSHA already has underway a critically-important empirical study of the effectiveness of its own enforcement activities within this context.

DOL's 201-2016 Strategic Plan explicitly addresses the need to empirically identify, select, implement and evaluate new performance metrics, particularly for its enforcement agencies. Indeed, the evaluation effort described in the Department's Strategic Plan is unprecedented in OSHA's history, and envisions implementation of new baseline metrics in 2012. As the Plan states:

For any given Federal program's reported performance, there are several factors (external independent variables) over which the agency has neither jurisdiction nor control that will affect the level of performance. Program evaluation aims to isolate the influence of the agency's performance from the influence of these external independent variables in order to reach a clearer understanding of the true impact of the agency. Even with the more sophisticated approaches to measuring worker protection outcomes, the ability to isolate the effects of an agency's activities or to measure the impact of an agency's activities (what would have happened, all else equal, in the absence of the agency) requires rigorous evaluation.

Future program evaluations at the Department will focus on impacts more than ever before. While DOL has worked to develop a robust set of outcome goals and measures for this strategic plan, the information provided by these measures alone is limited. To truly understand whether their strategies are working, these outcome measures need to be linked to impacts. For example, to understand the impact of inspections on future compliance of an employer, one cannot just look at the number of repeat violators and conclude that because it is fewer than the number of employers first found to be out of compliance that the difference is the impact of the inspection on future compliance. Some of those employers may have come into compliance on their own even if they had not been inspected.⁸

The principles and methods for these evaluations has been further explained in great detail in DOL's companion document "A New Approach to Measuring the Performance of U.S. Department of Labor Worker Protection Agencies", June 28, 2010. It includes a discussion of the specific evaluation models appropriate for worker protection agencies, including how to deal with the issue of recidivism.

It is unfortunate, to say the least, that the Inspector General did not take this substantial effort into account. In the face of literally decades of critiques concerning inadequate evaluation of its various programs, OSHA finally gets departmental support for a qualitative improvement in its evaluation effort—and the IG has written it off as irrelevant. When I asked the Inspector General whether or not it had reviewed either the Strategic Plan or the document on performance measures for enforcement agencies, the IG's only response was:

"No, we did not incorporate this into the audit. While we reviewed the measures, those measures had not yet been implemented and we did not evaluate the merits of the specific measures."⁹

We hope that in light of this important new effort, the IG will reconsider its conclusions and recommendations, and provide the concrete assistance that beleaguered enforcement agencies like OSHA urgently need from oversight bodies like the IG—or from this Committee, for that matter. Constructive suggestions based on proven best practices are critical to organizational improvement in many spheres of activity, and enforcing labor standards is no different.

Conclusion

Federal and state OSHA programs are critical components of our national system for preventing the unacceptable toll of worker death, injury and illness. While they can never replace the absolute necessity for good-faith investment by employers in effective management systems, they are the critical missing link when dealing with

⁸U.S. Department of Labor Strategic Plan Fiscal Years 2011-2016, DRAFT for Stakeholder Review, August, 2010, p. 94.

⁹Email from Jeffrey Lagda, Sr. Program Analyst, US DOL OIG, to Eric Frumin, April 29, 2011.

employers who fail to pay attention to their responsibilities. When employers abusively neglect their responsibilities, and when large companies engage in such neglectful conduct on a broad scale, the coordinated actions of federal and state enforcement agencies are absolutely critical to stopping such abuses. If the forty years have taught us anything, it is that only strict enforcement, backed up by adequate resources and the political will to use them, can make a dent in the daily toll of death, injury and disease from job safety violations and hazards.

Recommendations

We strongly urge the Committee to support OSHA's efforts under Section 18 of the OSHAct to closely monitor the performance of its state partners, and to assure that both it and its state partners maintain "satisfactorily effective enforcement" programs—as required by the US Court of Appeals in 1978.¹⁰

We also urge the Committee to assure that both federal and state OSHA programs receive the full level of resources required to protect American workers' health and safety on the job. The threats to OSHA's funding are acute, and you must not allow opponents of strong labor protections to use a severe economic recession as a pretext to reduce state resources for defending workers' lives and safety.

I'll be pleased to answer any questions.

Chairman WALBERG. Thank you, Mr. Frumin.
I recognize Mr. Beauregard?

STATEMENT OF KEVIN BEAUREGARD, NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION

Mr. BEAUREGARD. Mr. Chairman, members of the committee, thank you for the opportunity to testify today and discuss issues of importance to members of the Occupational Safety and Health State Plan Association.

Today, the 27 states and territories that operate a state plan program for workplace safety and health, work together through OSHSPA to address common issues and facilitate communicate between the states and OSHA.

Over the past few years, OSHSPA members have grown increasingly concerned in regards to several issues that are significantly impacting the administration of our state plan programs.

I will briefly highlight OSHSPA's issues and concerns associated with funding, state plan monitoring, the OIG report, National Emphasis Programs and penalties. Details of our concern are reflected in my written testimony.

I want to be clear that the views expressed by me today, in my role as OSHSPA chair, are supported by the overwhelming majority of the OSHSPA membership.

In regards to Mr. Frumin's testimony about state plans, OSHSPA, leadership, or North Carolina, I will be more than happy to answer any follow-up questions to set the record straight.

Currently, state plans provide coverage to approximately 40 percent of private sector workers nationwide, and more than 10 million public sector workers. Additionally in 2011, state plans accounted for approximately 60 percent of all enforcement activity nationwide.

However, state plans currently receive 18.6 percent of the total federal funding allocated for OSHA programs.

In the past decade, OSHA's total funding, excluding state plans and State Consultation Programs has increased approximately 47.5 percent. In comparison, state plan total federal funding over the same time period has increased approximately 17.8 percent.

The state plan increase includes a \$1.5 million increase for the creation of the Illinois State Program. The remaining state programs have collected 16.1 percent federal funding over the past decade, and approximately 13 percent of that was realized in 2010.

Due to the manner in which OSHA distributed the funding, some state plans received less than half of the allocated 13 percent increase. State plans currently overmatched the federal grants by more than \$71.5 million.

This translates to states overall providing approximately 63 percent of the funding versus 37 percent federal funding to ensure their programs are at least as effective as OSHA.

State plan programs welcome constructive review and analysis of our operations. Properly conducted audits and program monitoring can be helpful for all federal and state programs in identifying strengths and weaknesses.

The state plans do not and should not operate in a manner identical to OSHA. OSHA has often interpreted at least as effective to mean identical to OSHA which is becoming increasingly problematic.

OSHSPA members would welcome the opportunity to work with OSHA in developing effective measures, and an effective auditing system that will better ensure that state plans and federal OSHA are equally accountable to the American workers and general public regarding overall program effectiveness.

The recent OIG report concluded that, "OSHA has not designed a method to determine that state plans are at least as effective as federal OSHA in reducing injuries and illnesses."

The same report recommended that OSHA should define effectiveness, design measures to quantify impact, establish a baseline, and revise their state plan monitoring process.

The OIG report appears to validate many of the issues and concerns previously brought up by OSHSPA regarding OSHA's state plan monitoring process.

OSHSPA fully supports OSHA's efforts to develop and use NEPs to address workplace hazards that pose a real and significant threat to employee and employer safety and health. And we encourage that memberships voluntarily participate as appropriate.

However, OSHSPA has significant concerns about OSHA's decision to mandate that state plans adopt all of its NEPs. The OSH Act clearly indicates that state plans are charged by Congress to identify their needs and responsibilities in the area of occupational safety and health.

OSHSPA disagrees with OSHA's interpretation on the matter, and will continue to take actions necessary to protect state rights associated with the administration or state plan OSHA programs.

Last year, OSHA also informed state plans that it would be revising its penalty calculation procedures associated with citations, and that it intended to mandate that all state plans either adopt identical or very similar procedures that would result in substantial penalty increases.

State plans were not consulted on this proposed change, nor did OSHA provide state plans with any empirical data which supported its rationale for adoption of these new penalty procedures.

OSHSPA members expressed substantive concerns to OSHA about the potential negative programmatic and resource impacts that their new penalty calculation procedures would likely have on their programs.

In closing, OSHSPA is fully supportive of credible and meaningful partnership with federal OSHA and we encourage Congress to support such a partnership to make it a reality.

Our state plan programs are not merely an extension of federal OSHA. We represent distinct and separate government entities operating under duly elected governors or other officials. And in addition to the protocols provided by Congress and federal OSHA, also operate under state constitutions and legislative processes.

Like OSHA, each state plan program is staffed with dedicated occupational safety and health professionals with years of valuable service. State plan programs are not looking for preferential or special treatment, but feel strongly that OSHA should work harder at establishing a true partnership with state plan programs, and be more cognizant of the effects that its unilateral policy decisions have on state plan programs.

Thank you again for the opportunity to address state plan issues. And I welcome any questions.

[The statement of Mr. Beauregard follows:]

**Prepared Statement of Kevin Beauregard, Chair,
Occupational Safety and Health State Plan Association (OSHSPA)**

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE: Thank you for the opportunity to testify today and to discuss issues of importance to members of the Occupational Safety and Health State Plan Association (OSHSPA). Eleven members of this subcommittee represent States that have either comprehensive or public sector-only State Plan programs, so many of you are likely very familiar with many of the items that I will cover today. When OSHA was established, Congress specifically encouraged states to develop their own occupational safety and health programs and to provide enforcement and compliance assistance activities in their states. Section 18 of the Occupational Safety and Health Act (OSH Act) authorizes states to administer a state-operated program for occupational safety and health, provided the program is "at least as effective" as federal OSHA. Congress envisioned a comprehensive national program that would provide safety and health protection in all U.S. States and Territories. Prior to the creation of OSHA, many states had already been operating programs to protect their workers.

Today, the 27 States and Territories that operate a State Plan Program for workplace safety and health work together through OSHSPA to address common issues and facilitate communication between the States and federal OSHA. State programs have made major contributions in the area of occupational safety and health and have helped drive injuries, illnesses and fatalities to all-time low levels. It makes sense for State Plan Programs and OSHA to work together to develop strategies for making jobsites safer and to share methods that will work on both a national and state level.

OSHSPA does not view occupational safety and health as a partisan issue. The OSH Act was established "to assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the states in their efforts to assure safe and healthful working conditions; by providing research, information, education and training in the field of occupational safety and health; and for other purposes." In order to meet the original intent of the OSH Act, OSHSPA firmly believes that a "balanced approach" within OSHA and State Plan Programs is required. We believe the most effective approach includes strong, coordinated programs that address education and outreach, consultation and enforcement. The lack of commitment to any of these three elements will eventually lead to an ineffective OSHA program.

State Plan Programs and OSHA share common goals regarding occupational safety and health. Over the years we have formed many positive relationships and have achieved many successes through cooperation between OSHSPA members and OSHA staff as we worked side-by-side on numerous projects and in response to na-

tionwide catastrophic events. Those successes prove that OSHA has many positive attributes and talents to share with State Plans and, likewise, that State Plans have many positive attributes and talents to share with OSHA.

One of the many benefits of State Plan Programs is the flexibility afforded States to address hazards that are unique or more prevalent in particular states, or are not already being addressed by OSHA. In many instances, State Plans have passed more stringent standards or additional standards that do not exist on the federal level, while OSHA labors through the standard adoption process that frequently takes not only years but decades. State Plan Programs have also developed innovative inspection targeting systems directly linked to Workers' Compensation databases, and special emphasis inspection programs covering such hazards as residential construction, logging, food processing, construction work zone safety, waste water treatment plants, overhead high voltage lines, and workplace violence. Many States sponsor annual State Safety and Health Conferences which bring training, networking and outreach to thousands of employees and employers and spread the word about the positive benefits of providing safe and healthful workplaces. OSHSPA publishes an annual Grassroots Workplace Protection report which highlights many of these unique and innovative state initiatives. Over the past few years, OSHSPA members have grown increasingly concerned in regard to several issues, addressed below, that are significantly impacting the administration of our State Plan programs.

Funding of State Plans

There should be an expectation that employers and employees in all States be provided with comparable levels of occupational safety and health protections. While Congress envisioned that the partnership between federal OSHA and the State Plans would include federal funding of 50 percent of the costs, the federal percentage for State Programs has diminished significantly over the years. Currently, State Plans operate in 27 States and Territories providing coverage to approximately 40 percent of private sector workers nationwide and more than 10 million public sector workers. Additionally, in FY 2011 State Plans accounted for approximately 60 percent of all enforcement activity nationwide. However, in FY 2011, State Plans received only 18.6 percent of the total federal funds allocated for OSHA programs.

Federal funding of State Plans as a subset of total OSHA funding has grown increasingly disproportionate over the last ten years. The total federal funding for OSHA in FY 2001 was \$425.8 million (including \$88.4 million for State Plan Programs), and total OSHA funding for FY 2011 is \$557.4 million (including \$104.2 million for State Plan Programs). In the past decade, OSHA's federal funding, excluding State Plan and State Consultation programs, has increased approximately 47.5%. In comparison, State Plan total federal funding over the same time period has increased approximately 17.8%. The FY 2011 State Plan funding figure includes an additional \$1.5 million for the creation of the Illinois State Plan program in FY 2009. If this funding is not included with the other State Plan increases, the remaining State Plan Programs collectively have only received a 16.1% federal funding increase over the past decade, and approximately 13% of that increase was received in FY 2010. Additionally, the FY 2010 funding increase was not distributed in an equal percentage across-the-board manner to all State Plans, but rather via an antiquated federal OSHA funding formula. As a result, many State Plans received less than half of the allocated 13% increase. It is also important to note that the increase in FY 2010 federal funding for State Plans was provided after numerous years of State Plans receiving little or no annual federal funding increases. State Plans are very appreciative of receiving the FY 2010 increase as it has helped offset some of the increases in program costs caused by inflation; however, as the figures above reflect, the State Plan increase is only a fraction of the federal OSHA increase over the same time period. OSHSPA's position is that it is important to provide adequate funding for both OSHA and State Plans to better ensure positive progress continues to be made in the areas of occupational safety and health.

OSHSPA believes that it is also important to note that State Plan federal funding increases significantly trailed the rate of inflation during the 2000s. The State Plan line item of the OSHA Budget was not assessed a COLA increase when COLAs were distributed to OSHA and other federal agencies between 2001 and 2010. Anecdotal information indicates that State Plan grants have been treated in a fashion similar to "block grants" or ETA grants even though State Plans have on-going personnel costs and specific "benchmark" position requirements for safety inspectors and industrial hygienists to maintain final approval status. This oversight has resulted in shifting 100% of the associated costs for any necessary COLA adjustments to State funding.

OSHA added approximately 130 new inspectors in FY 2010 in addition to those positions that they added in FY 2009. Meanwhile, over the past few years many State Plans have been eliminating positions, holding positions vacant and furloughing employees due to state budget reductions and the lack of adequate federal funding. In addition, some states have been unable to send safety and health compliance officers to required training at the OSHA Training Institute (OTI) due to budget constraints. State funding reductions have impacted the ability of many State Plans to provide the required matching State funds, which results in equivalent federal funding reductions. In consideration of State and federal funding deficiencies, the requirement for 50% matching State funds should be waived whenever a State's funding decreases due to a balanced budget requirement. This would help to reduce the negative impact on occupational safety and health within State Plan jurisdictions facing reductions in both State and federal funding at the same time and/or in consecutive years.

While the FY 2010 budget provided a one-time increase of approximately \$11.9 million over previous years, State Plans still "overmatch" the federal grants by more than \$71.5 million. This translates to the States overall providing approximately 63% of funding versus 37% federal funding to ensure their programs are "at least as effective as" OSHA. Many State Plans provided a significant overmatch, yet received less than half of allocated FY 2010 State Plan federal funding increase. In addition, according to federal OSHA's State Plan "funding formula" for FY 2010, 10 of the 27 State Plans had base grant awards that were underfunded by the amount of \$5.7 million dollars. The existing OSHA "funding formula" distributes approximately one-half of newly appropriated funds to the underfunded State Plans and approximately one-half to all State Plans. This formula has been in place for years but has had limited success because of the lack of federal funding increases overall for State Plans over the last decade. In addition, changes in State demographics, populations and industries have rendered the existing funding formula inadequate.

Deficit Reduction Issues

Much attention is currently being placed on the upcoming FY 2012 federal budget to address a soaring national debt and increasing budget deficit. State Plans understand the need to control federal spending to a level that is sustainable. In the event that it is determined to be necessary to reduce OSHA's budget in FY 2012, State Plans respectfully request that Congress fully consider the disproportionate funding increases provided to State Plan OSHA programs over the past decade prior to making across-the-board line item decreases that will once again disproportionately affect State Plan occupational safety and health programs. Potential budget scenarios being discussed include rolling back agency federal funding to FY 2006 or FY 2008 levels. In FY 2009, the public sector-only Illinois State Plan was officially recognized by OSHA and funded by Congress in the amount of \$1.5 million, which accounted for approximately 30% of the entire increase in the State Plan line item between the years 2001 and 2009. An across-the-board rollback in the State Plan line item to the FY 2006 or FY 2008 level would result in either the elimination of the Illinois State Plan program, or more likely, that the other 26 State Plans would have their budgets reduced sufficiently to adequately fund the Illinois State Plan. Either scenario would result in a disproportionate reduction in federal funding to State Plans.

Additionally, if OSHA funding were to be reduced to FY 2006 or FY 2008 levels in an across-the-board manner, it would have the effect of rolling back State Plan funding to mid-1990's levels. This would sharply curtail intervention activities and would likely have a severe detrimental impact on occupational safety and health nationwide. Although State Plans are certainly willing to make adjustments as necessary, we do not feel that a disproportionate burden should be placed on State Plans that will also likely have a disproportionate impact on occupational safety and health in the 27 State Plan States.

There may be a time in the not so distant future when some States may opt out of having a State-administered program, simply due to the ever increasing burden of providing well beyond 50% of the program funding. If this comes to pass, the federal government will then need to allocate 100% of the funding to provide equivalent occupational safety and health protections in those states. To prevent this from occurring and based on the original intent of the OSH Act, the long term goal should be to fully fund at least 50% of the costs for all State Plan Programs.

Although the number of employers and employees covered by State Plan Programs continues to increase in most states, the net resources to address workplace hazards in the State Plan Programs have declined due to inflation, state budget reductions, and lack of adequate federal funding from Congress. The potential impacts, if this trend continues, are reductions in employer/employee training and outreach, technical assistance, consultation services, and enforcement. This will have

a major impact on our efforts to reduce injuries, illnesses and fatalities and will potentially lead to increases in all these areas after much progress has been made. A process must be established to accurately and fairly address the budgetary requirements of State Plan Programs. Insufficient federal funding poses the most serious threat to the overall effectiveness of both State Plans and federal OSHA. If the intent of Congress is to ensure OSHA program effectiveness, this issue must be adequately addressed. OSHSPA urges Congress to establish a process to accurately and fairly address the budgetary requirements of State Plan Programs.

OSHA's State Plan Auditing and Monitoring Process

All members of OSHSPA are subject to regular federal OSHA monitoring activities as a condition of maintaining a State Plan Program and all States acknowledge responsibility for maintaining programs "at least as effective as" OSHA. There are different sized State Plan Programs throughout the United States with varying capabilities. Likewise, there are different sized federal area offices with varying capabilities in States under federal OSHA jurisdiction.

In addition to regular monitoring activities on a local, regional and national level, there is also a rigorous State Plan approval process in place for any State or Territory that desires to have a State-run OSHA program. The approval process includes many minimum requirements and obligations that must be met to ensure that the eventual program is "at least as effective as" OSHA. Prior to achieving final State Plan approval, States must also meet mandatory benchmark staffing levels for safety and health enforcement officers. Although States are held to minimum staffing levels, there are no such staffing benchmarks applied to federal jurisdictions. Although the State Plans expect and accept that OSHA will conduct oversight and monitoring activities, the criteria and expectations applied need to be universal for both State and federal operations.

In October 2009, the U.S. House of Representatives Committee on Education and Labor held hearings associated with the Nevada State Plan OSHA Program. While the Nevada State OSHA Program was the primary subject of the hearing, testimony provided by a number of participants pertained to oversight of all State Plan OSHA Programs. Subsequently, OSHSPA provided written testimony at the aforementioned hearing expressing concerns pertaining to the existing State Plan oversight process administered by OSHA.

State Plan Programs are not opposed to OSHA monitoring their programs, and we welcome constructive review and analysis of our operations. Properly conducted, audits and program monitoring can be helpful for all federal and State programs in identifying both program strengths and weaknesses. OSHSPA believes that it is critical for any methodology utilized by OSHA to measure State Plan programs based on valid criteria that allows the States to operate in a way that is "at least as effective as" OSHA. The State Plans do not, and should not, operate in a manner identical to OSHA. Rather, they should continue to serve as laboratories of innovation for moving occupational safety and health issues forward and for fueling creative approaches to ensuring the occupational safety and health of workers.

There should be an expectation that all federal and State occupational safety and health programs are administered in an effective manner. Specifically in regard to "effectiveness," OSHSPA has indicated that, prior to conducting additional comprehensive State Plan monitoring activities, OSHA and the State Plans should work together to establish well-defined performance measures and goals for both State Programs and OSHA. OSHSPA has indicated that established benchmarks could include, but would not be limited to: minimum levels for staffing, federal/state funding, training, equipment, quality control, internal auditing and outcome measures for both State Plans and federal OSHA. Following the establishment of effectiveness criteria, it was recommended by OSHSPA that there be regular audits of both State Plan Programs and OSHA's national, regional and area offices against those established benchmarks. OSHSPA also believes that since OSHA will be conducting additional comprehensive monitoring activities of all State Plan Programs for "effectiveness" and quality control, it would be prudent for OSHA to conduct similar monitoring of its own offices to ensure that they are also operating in an "effective" manner.

There is no specific definition or adequate guidance for the "at least as effective as" language contained in the OSH Act and this has caused significant issues in regard to OSHA's auditing and monitoring of State Plans. As a result, OSHA has often interpreted "at least as effective as" to mean "identical to" OSHA. State Plans have raised the issue that an inadequate definition of "at least as effective as" and the failure to establish valid program criteria that focus on outcomes rather than processes makes it infeasible to systematically and accurately evaluate either State Plan or OSHA effectiveness. This issue was specifically brought up by State Plans

as early as 2002 when it was published in the Federal Register, Volume 67; Number 185, dated September 25, 2002. At that time, OSHA indicated that it agreed with “the principle that State Plan requirements are not required to be identical is an important statutory feature of the State Plan Programs. The language and structure of the part 1953 regulation acknowledge the important principle that State plan requirements need not be identical * * *.” However, OSHA’s changing position on the issue in subsequent years and its failure to resolve the matter has contributed significantly to monitoring and auditing deficiencies.

Since OSHA’s often interprets “at least as effective as” to mean “identical to” in regard to measures, it has become a constantly moving, often unobtainable, target which compares mandated activity trends and policies within federal OSHA to those occurring within each State Plan. A primary concern is that OSHA has displayed a tendency to focus its oversight on activities, indicators, and measures that have not necessarily been directly linked to positive outcomes associated with occupational safety and health. Examples of such measures and indicators include: percent serious rate of violations cited, contestment rates, penalties assessed, penalties retained, and classification. Additionally, some of these items, if individually interpreted, can lead to conclusions that are not factually based or supportable in regard to program effectiveness.

Despite the above mentioned concerns previously broached by OSHSPA, OSHA proceeded to conduct its FY 2009 and FY 2010 State Plan monitoring and auditing based on these inadequate indicators. Subsequently, OSHA issued State-specific 2009 Enhanced Federal Annual Monitoring and Evaluation (EFAME) Reports of all State Plan OSHA programs and will be following up with those recommendations for the FY 2010 FAME.

Following the release of the 2009 EFAME reports, OSHSPA issued a press release that reiterated our concerns with the current monitoring and auditing process. It continues to be OSHSPA’s position that our members would welcome the opportunity to work with OSHA in developing effective measures and an effective auditing system that will better ensure that State Plans and federal OSHA are equally accountable to the American workers and general public regarding overall program effectiveness. I am pleased to report that such a joint effort has been recently initiated.

Office of Inspector General Report

On March 31, 2011 the U.S. Department of Labor, Office of Inspector General—Office of Audit (OIG), issued Report #02-11-201-10-105 entitled “OSHA HAS NOT DETERMINED IF STATE OSH PROGRAMS ARE AT LEAST AS EFFECTIVE IN IMPROVING WORKPLACE SAFETY AND HEALTH AS FEDERAL OSH APROGRAMS.” This audit was performed partly in response to a special review that OSHA conducted of the Nevada State Plan OSHA program. OIG indicated the objective of their review was to answer the question: “Has OSHA ensured that State Plans operate OSH programs that are at least as effective as Federal OSHA?” The OIG report indicates that “OSHA has not designed a method to determine that State Plans are at least as effective as Federal OSHA in reducing injuries and illnesses.” Further, OIG made the following four recommendations to the Assistant Secretary for Occupational Safety and Health: 1) define effectiveness; 2) design measures to quantify impact; 3) establish a baseline using Federal OSH programs to evaluate State Plans; and 4) revise monitoring processes to include assessments about whether State Plans are at least as effective as Federal OSHA Programs.

The OIG report appears to validate the issues and concerns previously brought up by OSHSPA regarding OSHA’s State Plan monitoring process and it also supports the recommendations previously submitted by OSHSPA regarding how OSHA could address the issues and concerns.

Training of Enforcement Personnel

It is the stated goal of the current administration as well as previous ones that there be more consistency and transparency between federal OSHA and State Plans, particularly in the way mandated federal regulations are enforced. Many State Plans do not send inspectors to needed courses taught at the OSHA Training Institute (OTI) due to out-of-state travel costs and/or travel restrictions in times of budget tightening. OSHSPA requests consideration to create a separate State Plan training line item to allow 100% federal funding to be utilized for travel and training of State Plan personnel. In FY 2010, it was estimated that \$3.1 million would cover individual OTI and State Plan internal training courses for State Plan personnel.

National Emphasis Programs (NEPs)

OSHSPA fully supports OSHA’s efforts to develop and use NEPs to address workplace hazards that pose a real and significant threat to employee and employer safe-

ty and health. Many State Plans have benefitted over the years from OSHA's identification and development of NEPs to address existing or emerging hazards that threaten the lives of America's working men and women. OSHSPA is more than willing to work with OSHA on the identification and development of NEPs and to encourage our membership to voluntarily participate in these programs as appropriate.

The current administration has recently committed to including OSHSPA in the development process of NEPs; however, this does not adequately address concerns associated with its decision last year to mandate that State Plans adopt all of its NEPs. Specifically, OSHA has indicated that its interpretation of the OSH Act provides its agency with the legal authority to require State Plan participation in all NEPs (see attached letter from Assistant Secretary David Michaels dated October 12, 2010, and OSHSPA's May 13, 2011 response). OSHSPA disagrees with OSHA's interpretation on this matter and will continue to take actions necessary to protect States' rights associated with the administration of State Plan OSHA programs.

OSHA's recent implementation of the National Emphasis Program (NEP) on Recordkeeping in FY 2010 is an example of a resource impact for State Plans resulting from OSHA's insistence that State Plans participate in its emphasis program. Congress provided OSHA with approximately \$2 million dollars to address such Recordkeeping initiatives in 2009-2010 but provided no additional monies to State Plans. OSHSPA members voiced concerns, not only about OSHA mandating adoption of this NEP, but also to the targeting methods utilized for the NEP. After OSHA implemented this NEP, it was subsequently suspended many months later to address targeting deficiencies that were previously identified by OSHSPA members. Inspections under the Recordkeeping NEP can last hundreds or even thousands of hours, which takes away from other planned enforcement inspection activities. If Congress does not provide similar federal funding to State Plans, the initiative becomes an unfunded mandate for States, which are already significantly underfunded by Congress. Additionally, although an emphasis program may be deemed appropriate, it could divert attention from areas of greater need in an individual State Plan.

The OSH Act of 1970 provides in §2(b) (11):

“(b) The Congress declares it to be its purpose and policy * * * to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and preserve our human resources—

(11) by encouraging States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in **identifying their needs and responsibilities in the area of occupational safety and health**, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, **and to conduct experimental and demonstration projects in connection therewith** * * *” (*Emphasis added*).

As the OSH Act indicates, State Plans are charged by Congress to identify “their needs and responsibilities in the area of occupational safety and health.” OSHA's position that a State Plan must conduct inspections in a given industry constitutes federal micro-management of State resources and runs directly contrary to Congress's stated intent for the States to identify their own needs and responsibilities for assuring “safe and healthful working conditions” in their State.

OSHSPA finds OSHA's position that a State Plan should use its limited resources to address a hazard that may admittedly be a priority elsewhere in the nation, but is not one in each State Plan, to be unsupportable. Further, it is OSHSPA's position that OSHA does not have the legal authority nor is it correct from a policy making standpoint to require State Plans to adopt NEPs.

Penalties

On June 22, 2010, OSHA informed State Plans that it would be revising its penalty calculation procedures associated with citations and that it intended to mandate that all State Plans either adopt identical procedures or very similar procedures that would result in the same type of penalty increases. State Plan States were not consulted on this proposed change, nor did OSHA provide State Plans with any empirical data which supported its rationale for adoption of these new penalty procedures. The new penalty procedures were expected to increase assessed penalties an average of 350% over the existing averages. Some State Plans have lower penalty assessment averages than OSHA, and adopting the new OSHA procedures would have resulted in a much more drastic increase.

OSHSPA members were not provided any information by OSHA to indicate that research or analysis was conducted to assess the potential negative effects that a

penalty increase could have on employers, employees and the effectiveness of federal and State Programs. State Plan States expressed substantive concerns to OSHA about the potential negative programmatic resource impacts that the new penalty calculation procedures would likely have in areas such as increased informal conferences, increased settlement agreements, and a significant increase in the number of adjudicatory hearings. This is of particular significance to many States that are facing funding and personnel reductions. In addition to all other concerns expressed, State Plans indicated that a penalty increase during an economic downturn seemed ill-timed. Finally, State Plans have also expressed concerns about the manner and process that OSHA utilized in its revised procedures to determine the final assessed penalty.

The overwhelming majority of OSHSPA members have very serious concerns about OSHA's unilateral development of a new penalty policy and its attempt to mandate that all State Plans adopt it.

Safety and Health Protections for State and Local Government Employees

OSHSPA fully supports safety and health coverage for all State and local government employees and believes the best way to do this is with public sector State Plan coverage in all States. One impediment to such plans has been OSHA's stance that any State wishing to establish a new State Plan must work by itself through its own Congressional delegation to obtain federal matching funds. OSHSPA would encourage Congress to look for ways to encourage States to consider public sector-only State Plans, as recently occurred in Illinois.

Voluntary Protection Programs

OSHSPA supports continued federal funding for Voluntary Protection Programs. VPP clearly demonstrates to employers and employees the tremendous value provided by a comprehensive health and safety program.

Closing Remarks

Past and current OSHA administrations have routinely espoused the benefits of "partnership" between State Plan Programs and OSHA. OSHSPA is fully supportive of a credible and meaningful partnership with federal OSHA and we encourage Congress to support such a partnership to make it a reality. Our State Plan Programs are not merely an extension of federal OSHA; we represent distinct and separate government entities operating under duly elected governors or other officials and, in addition to the protocols provided by Congress and federal OSHA, also operate under State constitutions and legislative processes. State Plans are not just more "OSHA offices" and are not intended to be identical to federal OSHA, but rather were created to operate in such a manner as to provide worker protection at least as effectively as OSHA. Words such as "transparency," "partnership," "one-OSHA" and "one-voice" have been circulating for years as the desired relationship between State Plans and OSHA. Since we all share the common goal of improving nationwide occupational safety and health conditions, this would appear to make perfect sense. However, in reality there has often been an unequal "partnership" between OSHA and State Plans, especially when it comes to policy development, funding, and program implementation. All too often, the "one-voice" is interpreted to mean "federal OSHA's voice."

Like OSHA, each State Plan Program is staffed with dedicated occupational safety and health professionals with years of valuable experience. Although OSHSPA members' contributions could be a more integral part of the OSHA strategic planning process, our members are quite often excluded from providing critical input. Often State Plans are not brought into the discussion of important plans and policies that directly affect our programs until all the critical decisions have been made. The same can be said for OSHA's development of its regulatory agenda and legislative initiatives. State Plan Programs are not looking for preferential or special treatment, but feel strongly that OSHA should work harder at establishing a true "partnership" with State Plan Programs and be more cognizant of the effects that its unilateral policy decisions have on State Plan Programs.

Together, State Plan Programs and OSHA can successfully improve workplace conditions and continue to drive down workplace injury, illness and fatality rates. We should always be working toward program improvement with the single goal of having a positive impact on nationwide occupational safety and health. Establishing an "us versus them" relationship between OSHA and State Plan Programs will do little to enhance nationwide workplace safety and health.

OSHA, State Plan Programs and Congress need to join forces to best ensure that workplace injuries, illnesses and fatalities continue to decline nationwide. There should be a true partnership between OSHA and State Plan Programs to ensure all employers and employees are afforded equivalent workplace protections nationwide.

Efforts should be made to ensure State Plan partners are included in the OSHA strategic planning and policy development process. OSHA should also work to complete national regulations in a timely manner. OSHA and State Plan Programs should be held equally accountable regarding performance, and matching federal funding should be provided to State Plans as Congress originally intended. These measures together will do more to enhance nationwide occupational safety and health than any other measures being considered at this time. Thank you again for the opportunity to discuss State Plan issues. I look forward to your questions.

Chairman WALBERG. Thank you.

Claiming my time for questioning, Mr. Lewis, let me ask you if—I think a fairly straight forward question here.

If federal OSHA were placed under scrutiny similar to that of the state plans, would it be deemed an effective program?

Mr. LEWIS. I am not sure that I can't give a simple answer to that. And I am not sure that I could give an answer to that.

I mean, I think that was the gist of our audit that whether we looked at what the federal government is measuring and monitoring in their program, or what the states are. Neither really comes to a conclusion of what is effective.

I mean, they are both at the federal level and at the states, they are looking at, you know, how the injury and illness rates are changing or dropping. But what we don't see is how have you established the actions that you have taken, whether in the federal program or the state. What impact did those actions have on that rate dropping?

So, I can't—

Chairman WALBERG. So does that—

Mr. LEWIS. I can't tell you because OSHA, you know, couldn't tell you. They know for a fact, we took these actions. It has this impact.

Chairman WALBERG. Okay.

Mr. LEWIS. So the gold standard has not been met necessarily.

Chairman WALBERG. Correct. By the [inaudible] either.

Okay. Thank you.

Mr. Beauregard?

Your testimony suggests that the state plans understand federal OSHA's oversight role of the individual programs. However, you make clear that the state plans believe that the, "at least as effective as" does not mean identical to the federal OSHA.

In your opinion, what are the appropriate measures for determining state plans' effectiveness? And illustration would be helpful.

Mr. BEAUREGARD. I believe there is many different things that can be utilized to determine effectiveness.

But the bottom line when it comes to safety and health programs, whether it is an OSHA program or a state plan program, or a corporate program is—what are the outcome results?

Are you reducing injuries and illnesses and fatalities?

And in order to look at that, there are a number of things that you can look at. You can look at workers' compensation claims or payouts or increases. You can look at—in North Carolina, we have a Site-Specific Program that is adopted off of the OSHA program, the SST program.

In that program, we actually analyze the difference—the impact that we have based on the before an OSHA intervention and after

an OSHA intervention, and determine whether or not we have an impact.

In a 5-year study, we have had over 40 percent reduction in injuries and illnesses—as those establishments that we have had some type of intervention activity with. And so I think that is a clear sign that there is effectiveness in the outcome of that program.

There are certain mandated measures that I do think need to be looked at. I think you need to look at staffing. The state plans had benchmark requirements. The federal OSHA does not have benchmark requirements.

As a result, state plans are able to do many more inspection activities than our federal counterparts in certain areas. And I can't say that is the case in all states, but I can certainly say it is the case in North Carolina.

We do more enforcement activities in our state than OSHA does almost in their entire Region 4. And I do think that there is more than one way to have an impact on injury and illness rates, just as enforcement inspections and penalties have an impact, education and outreach training activities, consultations can also have an impact.

But in regards to the actual outcome measures, I think you need to look at injury and illness rates, you need to look at fatality rates.

It may surprise some if you go on federal OSHA site today and you look at fatalities nationwide, you look at state plan fatalities that occurred in state plans and fatalities that occurred in OSHA programs right now through April—mid-April, 66 percent of the fatalities have occurred under federal jurisdictions, 33 percent under state jurisdictions.

Catastrophes, 72.5 percent of the catastrophes that have occurred in this current year have occurred in federal jurisdictions.

If you look at just simply fatalities and catastrophes, one would probably lead to the conclusion that the effectiveness issue probably needs to be looked at in the OSHA program as well.

Chairman WALBERG. Thank you.

Mr. Gerstenberger, in your testimony you talk about—written testimony, talk about the cooperative effort between the Michigan Occupational Safety and Health Administration, MIOSHA, and Tree Care workers and Michigan Green Industry Association.

How has this cooperation helped protect those working in Michigan's tree industry, in specific ways?

Mr. GERSTENBERGER. Specifically, our work in Michigan was sub regulatory. We weren't working to revise any regulations in the state.

We worked through a variety of different outreach measures to reach the industry. Most recently, Michigan OSHA provided grants to a local organization known as the Michigan Green Industry Association.

And we cooperated through the Michigan Green Industry Association to train arborists under that grant to reach them with very important information affecting some of the most pronounced hazards that we face in our industry. Hazards associated with tree felling.

Going forward, I know Michigan Green Industry Association has already received another MIOSHA grant that will address a wide variety of hazards, again faced by—

Chairman WALBERG. So the flexibility can be helpful in—

Mr. GERSTENBERGER. Absolutely.

Chairman WALBERG [continuing]. And working with the industry.

Mr. GERSTENBERGER. Yes.

Chairman WALBERG. My time has expired. And I have got to bide by my own rules.

So, thank you. And maybe the question will come up later.

I turn to—I recognize the ranking member for questioning.

Ms. WOOLSEY. Thank you, Mr. Chairman.

Mr. Gerstenberger's testimony is absolute proof of why we need to have a representative from OSHA sitting at this table.

Wouldn't you have liked to ask somebody from OSHA what they are doing or why aren't they doing something about the tree care industry's concerns?

I would have.

So we need these people at the table for these hearings.

Mr. Frumin, is OSHA undermining state efforts to promote worker health and safety?

Mr. FRUMIN. Hardly. I think they are making a reasonable attempt now, a better attempt than in the past, to assure that states are complying with their own plans.

And more than that are properly training their staffs, properly identifying violations, and assessing penalties that amount to real deterrents. So, undermining it—hardly, no.

Ms. WOOLSEY. Well, are they providing the support that the states should be able to count on for setting up state programs and helping the states measure up to the floor?

I mean, this is what this is about. State programs have to meet this federal floor. And the states can do anything more that is appropriate, if they want to invest in it—

Mr. FRUMIN. I am not aware of any states who have complained that the Feds, the federal OSHA has failed to help them establish state plans. That has been a consistent feature for 40 years. The Feds have helped states do that.

Funding is always an issue. But, you know, that is a fact of life.

And beyond that, I think we can hear from a number of states who have been appreciative of the assistance that the federal OSHA has given them in a whole host of areas.

But it is more than that. It is also offering leadership. It is offering a national program when you have employers from coast-to-coast.

We need to look at these employers or industries that operate throughout the country. We need to look at them in a consistent way.

Some employers have some understanding of how to operate under a national program. That is why we have a federal law.

Ms. WOOLSEY. Right, and before the federal law, before OSHA was part of the federal law, how did the states measure up?

Were they doing a great job?

Mr. FRUMIN. No. We have a federal law because the states failed, and the Congress realized it in frustration in 1970.

It is not that there wasn't an argument about it. Some people said, well, we will let the states continue to do it. But it was obvious by that point, the states were failing left and right. The consequences were intolerable.

Ms. WOOLSEY. So, what do you think will happen to the safety programs, both federal and state, if we have a 23 percent cut in the OSHA budget?

Mr. FRUMIN. Well in layman's terms, we can kiss it goodbye. There is no way any state or federal administrator can keep a reasonable enforcement program going with those kinds of budget cuts.

It is really—it is beyond shortsighted. It is simply intolerable, and does not respect the needs of American workers and families and communities.

Mr. FRUMIN. And employers for that matter.

Ms. WOOLSEY. Right.

Mr. FRUMIN. Who rely on strict enforcement to keep their costs down.

Ms. WOOLSEY. Right.

Well, Mr. Beauregard, what do you think of the 23 percent proposed reduction for fiscal year 2012 in the OSHA budget?

Mr. BEAUREGARD. I think if there is any significant reduction on either the state OSHA budgets or the federal OSHA budget, it will certainly have an impact on any type of activities that either in state plans or the federal OSHA can conduct.

Quite frankly, none of us can sustain that type of a decrease. It would probably have a broader impact on the federal OSHA program because the states are supplying so much of the funding to the programs to begin with.

Ms. WOOLSEY. That is true, that is true. But also, states can do more, so they are paying for the additional above the floor.

Mr. BEAUREGARD. Well, one of the issues is—Mr. Frumin brought up the North Carolina issue. Back when that tragedy—and I agree, it was a terrible tragedy in regards to Imperial Foods' fire.

The state of North Carolina was criticized substantially by not having enough inspections or enough activities.

What happened after that was the state of North Carolina provided sufficient—more funding for the program.

What didn't happen is the federal government didn't provide any funding for the program.

And so as a result, since that time the state has put in \$9 million into the program, and federal funds haven't been there. And so we received about \$2.5 million of federal funds.

Had we received the entire amount, we certainly could have done a lot more within our state.

Ms. WOOLSEY. Certainly.

What do you think would happen to the state plans? Where would they go if they become underfunded and not able?

Would they just turn everything right back to the Feds?

Mr. BEAUREGARD. You know, it is certainly a possibility. Right now there are many different size programs. There are many dif-

ferent demographics within different states. And so the programs themselves are of many different sizes.

North Carolina runs one of the largest programs in the country. And currently we have twice the staff as they have in federal jurisdiction states such as Georgia.

And so, we would probably have a much smaller program if we had significant reductions, but we would probably still have a program. Whereas, you may have a smaller state that may not be able to do that.

Ms. WOOLSEY. Thank you, Mr. Chairman.

Chairman WALBERG. Gentlelady's time has expired.

I recognize Chairman Kline.

Mr. KLINE. Thank you, Mr. Chairman.

Thank you to our witnesses today.

Mr. Gerstenberger, just a comment about your industry. I must admit that I am terrified every time I see folks in your industry at work.

They did some work in our backyard. We have kind of a woodlot back there. Better them than me. Chain saws, 40-50 feet in the air, god bless you.

Mr. Beauregard, I want to pick up a little bit on this funding issue, a lot of discussion about the proposed cuts and appropriations.

But for the last 3 years, OSHA has received increases in its appropriation. And yet, you have indicated that maybe some of that money didn't come down to North Carolina, the states.

Can you address that allocation of funds?

Mr. BEAUREGARD. I sure can.

Historically over the last decade, the state plans have received very little federal funding increases. On an annual basis, OSHA's budget went off every year. But the state budget line item, because the states are one line item within the federal OSHA budget, the state line item didn't necessarily go up.

We didn't receive cost of living increases when federal OSHA received cost of living increases. That becomes problematic for the states because our positions are funded both with state and federal funds.

But when we don't receive the cost of living increase, it means that the states either need to go ahead and address that with more funding and overmatching funding, or not address the cost of living matter.

And so as a result, it has become very imbalanced. The exception to that was a few years back.

The OSHSPA saw the writing on the walls. And our members, you know, saw that they were going to be having difficulties with continual years and not receiving these increases. We began an educational campaign to let people know exactly what was happening.

In 2010, we got a significant increase. And we were very appreciative of that. Overall, it was about 13 percent.

However, that wasn't distributed equally among all the state plans. Federal OSHA has a funding formula which is quite out of date. And we brought that to their attention.

And it hasn't been adjusted for demographics, or anything like that within the various states. And as a result, in that year that we received 13 percent, a state like North Carolina actually received 6 percent. So even though we are already overmatching over \$6 million, we received a 6 percent increase in a year where everybody else within the OSHA program received a greater increase.

In many states, I think, there was 15 states received less than a 13 percent increase. There were some states that received greater than a 13 percent increase.

But that amount of funding that was distributed helped those states that were having issues. But it certainly was not enough for those states that had been severely underfunded.

Mr. KLINE. So your testimony here today representing your organization is that the money was distributed, was allocated, perhaps unfairly, and not very efficiently or effectively.

Is that correct?

Mr. BEAUREGARD. OSHA has a funding formula that they developed a long time ago. And the purpose was to create parity among the states.

The problem with it is the funding hasn't been there. And so there is even more disparity now than there was back when the formula was distributed.

And they did distribute it in a manner they saw fit. But it wasn't necessarily help to many of the states.

Mr. KLINE. Okay, sounds a little confusing.

Mr. BEAUREGARD. It is.

Mr. KLINE. Let me move to—shocking that there could be something coming from a federal bureaucracy that would be confusing.

Sorry, a little—okay. Sorry, just slipped out.

Let me stay with you if I could here, Mr. Beauregard, that prior to this administration, the policy for the adoption of the National Emphasis Programs, by state plans, was that adoption was strongly encouraged but it wasn't mandatory.

The state plans are now required to adopt these NEPs which I understand the state plans don't favor that requirement.

Can you explain what the concern is over this mandate?

Mr. BEAUREGARD. That is correct. The majority of the state plans do not favor mandatory adoption. There are some state plans that don't appear to have an issue with it.

The issue there is that we do think that OSHA over the years has developed some NEPs that were very valuable for both OSHA and some state plan states.

The problem is that each state has different makeups and demographics, different industries. And what may be good for one area of the country may not be an emphasis for another area of the country.

And by mandating the NEPs, first of all, OSHA is saying that even though you are overfunding your state, you are not receiving your 50 percent. We are going to tell you what to do with your own money that you are doing.

But secondly, they may be reprioritizing where you need to focus your resources. And we may have more pressing needs in our state. But now that we have a mandatory NEP, we have to drop what we are doing there.

And Mr. Frumin indicated that five inspections is not significant. Well, I tell you right now, there are over 11 NEPs, and they keep coming out. They don't seem to go away.

And so when you keep reallocating five inspections here, five inspections there, it does have an affect, particularly on the smaller programs that don't have the staffing.

And so they are left with a decision that they address the things that they really think are problematic in their state, or they address things that OSHA has identified may be problematic in their state.

Mr. KLINE. Thank the gentleman, my time has expired.

Chairman WALBERG. Thank you.

Recognize the gentleman from South Carolina, Mr. Gowdy?

Mr. GOWDY. Thank you, Mr. Chairman for calling this hearing and also for your leadership on this issue, as well as that of the chairman of the full committee, Mr. Kline.

Mr. Beauregard, I was noting that in the—I believe it is the grassroots publication, a partnership between Boeing and a company in my district, BE&K-Turner joint venture.

And I want to thank you to the extent that you are also mentioned in this publication for highlighting that partnership. And hopefully if the state of South Carolina can keep dodging complaints and lawsuits by the NLRB, we can continue to create jobs through Boeing and other companies in South Carolina.

Mr. Lewis, I think you also have a South Carolina connection. Is that right?

Mr. LEWIS. I do.

Mr. GOWDY. Welcome.

Mr. LEWIS. Thank you.

Mr. GOWDY. Can you—I heard South Carolina is maybe mentioned a couple of times by Mr. Frumin and by my colleague from California. Can you tell us what states are doing well and why?

And to the extent South Carolina may need to improve, how we can.

Mr. LEWIS. Well, looking at the data that is being tracked for the state plan states, I don't remember the rankings of every state, but as I recall, pretty much across the board over the past number of years, there have been reductions both in injuries and fatalities.

What I couldn't address would be why that is happening per se. And I think that was the concern in our audit.

Are we sure we know even though fatalities have dropped, and injuries have dropped, what exactly was the cause of that, and, you know, to what extent was it the investment in our programs?

And if we are doing something in the program that is not having the greatest impact, then let us shift those resources to something that is having a greater impact.

Mr. GOWDY. So your research indicated that the number of accidents and injuries has dropped in South Carolina?

Mr. LEWIS. Yes, I believe across all the states that we have looked at, the data had—the indicators had dropped for all states.

Mr. GOWDY. So despite some dissatisfaction with the size of the fines in South Carolina, we are doing a better job which would tend to rebut any notion that there is a connection between the size of

the fine and people's willingness to do a better job providing for their workers' safety.

Can you tell me what specific measures of success exist by which states can compare themselves to federal OSHA?

Mr. LEWIS. Well, I think the ultimate measure would be to look at—I mean, this is a program about health and safety in the workplace—would be to look at the conditions of health and safety in the workplace.

What injuries do we have, illnesses, fatalities?

So certainly seeing those drop, that is a measure of the goal we are trying to achieve. But again, the question is the success of the program, what was it we did in the program that achieved that success?

Or did that success could come about for other reasons, you know, do the demographics in the state could have changed. The economy could have changed. The mix of industries, other things could have an impact on why those rates go down or go up.

They are not attributable just to the programs we are running. And that is what we want OSHA to establish as best they can.

You know, what is having an impact and what is not?

Mr. GOWDY. Mr. Beauregard, training and outreach are two of the most important components to proactive safety. Can you describe how the state plans engage in training and outreach?

Mr. BEAUREGARD. Each state does some things differently regarding the training and outreach. So what I prefer to do is just explain how we do it in our state.

And then if there are follow-up questions, answer those.

We take training and outreach very seriously. We have a comprehensive training and outreach program.

As a matter of fact, every single document that we have, and we produce, is available through a downloadable mechanism on our website. So you can actually download everything we have onto your PC or laptop or individual DVD.

We have put together 60 PowerPoint presentations primarily for middle and small size employers that may not have the safety and health program. We put on webinars. We do outreach training activities. We do partnerships and alliances where we do training out in the field.

We very strongly believe that training is a critical component of ensuring that you are reducing injuries, illnesses, and fatalities.

The grassroots publication that you have, I think, outlines a lot of different training activities that are going on in other states. We do think that you need to have a strong training component which is where you should start when you identify a problem area.

Then you should intervene with some consultation activity. And then you should follow it up with some enforcement activity.

Mr. GOWDY. Thank you.

Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

And now we recognize—

We will let him catch up here.

I will recognize the gentleman from Indiana, Dr. Bucshon?

Mr. BUCSHON. Mr. Chairman, I yield back my time to you.

Chairman WALBERG. Well, I am glad I recognized you. Thank you, sir.

Anything back from a doctor is great, as long as it is a good report, right?

Let me turn to Mr. Gerstenberger and continue some question that I wanted to follow up on.

Your testimony discusses the use of safety and health plans. Can you describe how these work to improve safety?

And secondly along with that, do you have any concerns about OSHA's effort known as the I2P2 to regulate in this area?

Mr. GERSTENBERGER. Certainly, a very good question.

As an association, we embrace the concept of I2P2 if you will, or safety and health plans. Indeed, we produced a model safety and health plan for our members to use as a best practice.

I think it can be problematic when looking at a regulation focusing on I2P2 in that it can become a little too restrictive or prescriptive as to how the program should be carried out.

To be effective, a rule would have to be very flexible and dynamic to be able to be adapted to the variety of industries that it would regulate or the variety of businesses that it would regulate.

Our program, as a best practice provided to our industry, obviously gives the employer the latitude to adjust to their particular situation.

I think what would be most effective at the federal level if federal OSHA were to push out the various guidance it has around I2P2 or safety and health programs through compliance and outreach efforts in a manner to vet the outreach that it has before it considers promulgation of a rule.

Very briefly as a model for such rule-making, the California program is not bad. It doesn't provide any particular problems for the industry.

The problem in promulgating too inflexible of a rule or too prescriptive a rule is that it changes that small employer's focus away from safety for its workers toward citation avoidance, and just chasing things that could be regulatory out of compliance, as opposed to focusing on safety.

So we would like to see a flexible and dynamic rule, obviously with a lot of guidance and outreach around it, such as the cases in California right now.

Chairman WALBERG. Thank you.

Again, Mr. Gerstenberger, the Tree Industry Association has recognized that English—and of course in working with the employees we cross the language barrier in your industry.

You have recognized that English is not the first language of a number of workers.

Can you describe your industry's bilingual education and outreach in this area?

Mr. GERSTENBERGER. Certainly, because we can have all the rules in the world, but if they are not understood, certainly.

First and foremost, let me characterize the Hispanic component of our workforce.

Across the country, across the board, the component of our workforce that is Hispanic is approximately 25 percent. And that varies

considerably depending on what region of the country you are in. For instance in California, in many areas, it is almost 100 percent.

Secondarily, it is very important to understand not only that the—do you have a component of your workforce that is Hispanic, but you need to know the ethnic origins of that Hispanic workforce, and for instance in our situation, the vast majority of that Hispanic workforce is from Mexico, Central America.

The reason it is important to know that is to be able to address the idioms of the dialect, the very words and their meaning in translating your programs into Spanish.

Beyond that, our method of addressing worker safety and health issues for the Hispanic workers is quite simple. We translate all our safety programs into Spanish using the appropriate dialect and idioms for the target audience.

Among our employers—we distribute these programs through employers, and allow them to use them.

It has proven to be quite successful. We have identified any of a number of bilingual trainers in our industry. And we utilize them at our trade shows and so forth, again to address the Hispanic workforce in our industry.

So it is quite simple and straightforward.

Chairman WALBERG. Well, I applaud you for that effort.

Mr. GERSTENBERGER. Thank you.

Chairman WALBERG. Because as I joked earlier, up a tree without a noose is good. And certainly the language, making sure that all is understood.

I yield back my time, and recognize the gentleman from New Jersey, Mr. Payne?

Welcome.

Mr. PAYNE. Thank you, thank you very much. And thank you for calling this very important hearing.

As OSHA's been an issue that has been discussed for decades and decades, we certainly have been moving towards trying to protect our workers with having health and safety regulations.

I have a question, Mr. Frumin. The question of regulations, the question of sort of the carrot and the stick, you know, trying to get—and assist companies into having just better standards of safety is certainly approach of course.

We found in a number of instances that many times there is non-compliance, and so we have to sort of have the stick approach.

But I wonder in your opinion, how important are penalties in the overall enforcement scheme?

Do penalties deter noncompliance, do you believe?

Mr. FRUMIN. Sorry, thank you, Mr. Payne.

Well, penalties are critical. That is not only a very important feature of this law. It was written into the laws. They are mandatory.

First instance penalties, the Congress wasn't kidding when they made that decision. I am sure it was how they debated it at the time, Mr. Chairman. It is a very, very important feature of the law.

But it is true of civil enforcements generally. Where would EPA be without its penalties? Where would FDA? Where would the Highway Patrol be?

I mean let us not kid ourselves. Penalties are critical. This is a country or society that runs in part on money. And employers know how to count it.

Unfortunately, you know, there are differences of views on that. And some people don't understand their responsibility to maintain penalties that are effective deterrents.

And frankly, the penalties that are in the law now, we have learned, are too little. We continue to see employers large and small who are simply undeterred at all by the current penalty and enforcement structure.

And it is necessary to raise those penalties both administratively as the administration is finally doing, but also legislatively as this committee has considered for the last 2 years.

Mr. PAYNE. Continuing on that trend, are there are studies which show that OSHA inspections and penalties will lead to a decrease in the rate of workers' compensation claims?

Mr. FRUMIN. Sure. We had a recent one. It is part of my testimony from the Department of Labor and Industry in Washington that shows a very substantial decrease in workers' compensation claims comparing OSHA visits with inspections, with citations versus those without.

And these are very important findings, systematically done. I was glad to hear Mr. Beauregard describe their analysis. We have had too few of those analyses. We need to do a lot more of them.

And I wish Mr. Lewis had been able to describe in greater detail the new analysis that the Labor Department itself is doing. This is unprecedented.

We have never seen a department of—U.S. Department of Labor take so seriously the urgency of evaluating the actual impact of its enforcement efforts involving tens of thousands of workplaces over a period of time.

I think it is disingenuous to say that there is no view about how to establish evaluation criteria that is in effect at the Labor Department. They are in the midst of a full-scale redesign of it. It is a public document.

And I think they need to be given credit for that and be supported, so that in a couple of years when those results are in, we will finally see the kind of understanding that we need in order to move forward.

Mr. PAYNE. Also as you mention, Mr. Beauregard, in his testimony objects to comparison, we show that states tend to cite half as many serious violations as compared with federal OSHA.

Isn't a low rate of serious violations an indicator that states may be targeting the wrong facilities?

Is it possible that this indicates states are writing down penalties to the point that they lack the wanted deterrent factor value?

Mr. FRUMIN. Well, I can't speak for the states' motivation in arriving at such a small proportion of serious violations, but we did see in the federal review in a number of states where the state inspectors were simply not adequately classifying serious violations, and the mandatory penalties that come with them.

There is a sharp disparity between states overall and some individual states and some individual states, and of course, federal practice as well, regarding the proportion of serious violations.

Those are the violations that come with mandated penalties and it is critical that that be a key performance evaluation criteria going forward. What everyone thinks of looking at injury-illness data.

If we are not looking at the basics of—and compliance, you know, we are missing the point.

Mr. PAYNE. Thank you. My time has expired.

I would hope that perhaps in the future we could have the head of OSHA at the hearing—might help to hear what the helm of the group thinks.

All right, I yield back.

Chairman WALBERG. I thank the gentleman.

And will reiterate that we are certainly open to that. And hope that they could help us with if indeed the concern is that they need 14 days as opposed to others that can appear in 7 days notice, that we can work that out.

But we do have the information from them. It is part of record in relationship to the report. And we will certainly have them in front of us in the future.

I want to thank the witnesses for being here today. I think you have imparted a great amount of information on the whole cross spectrum of the issue to us.

Appreciate your time and your attention to the time as well.

And I express appreciation to my subcommittee members for their attention to the details here as well, and the questions that you supplied this morning.

So now I would recognize the ranking member for any closing remarks that she might have.

Ms. WOOLSEY. Thank you, Mr. Chairman.

Two thoughts before I make my closing remarks.

One, we have to recognize that regarding Mr. Beauregard's testimony, and he was absolutely right. The contribution from the federal government to the states' programs has not kept up with the rate of inflation, in the last—over 10 years, and that really cuts into what is going on.

Under President Obama, it increased about 15 percent. And in the president's budget, he requests more.

So, there is a recognition that we need to do more to assist the states.

The other thought I had was the Inspector General's report actually supports what OSHA is doing now. It just came before—actually your report says, OSHA should be establishing measures and the impact from the state and with their own department.

And that is what they are doing. So, I think that is good news for us. In your report, we asked for it and it came out now.

But it will fulfill itself. And thank you for that.

So, we have learned that effective state plans are essential in protecting workers' health and safety. But we also know that the dramatic Republican budget cuts that are being considered for the Department of Labor/ Health and Human Services' appropriations bill will absolutely undermine workers' safety and health in the 27 state plans, as well as the department in general, including my home state of California.

And many members of this committee, their states will be affected.

Mr. Beauregard's testimony states, and I quote—"Insufficient funding poses the most serious threat to the overall effectiveness of both state plans and federal OSHA."

And we agree with you.

The chief of California State OSHA Plan, Ellen Widess, sent a letter that I entered into the record regarding their relationship with federal OSHA.

And her letter makes two key points.

"Federal OSHA's standards and enforcement provide a uniform floor for all OSHA programs." I mean, this is from a state director.

"This ensures uniform protections for workers employed by multistate employers. It also discourages forum shopping by employers seeking a competitive advantage at a cost of less protection for their workers."

Secondly, she says, OSHA enhanced oversight found California law impeded the state from issuing enough serious violations. This resulted in state legislation clarifying the definition of serious violations, which was supported by both the labor and the employer community in California."

The state of Washington OSHA Plan has sent the subcommittee a letter answering the questions posed by this hearing. Their letter says, "OSHA does not undermine states' efforts to promote worker health and safety."

Washington OSHA also contends that OSHA's National Emphasis Programs, which requires states to join federal OSHA in targeting inspection at high hazard industries such as oil refineries or metal foundries, is a legitimate exercise of federal authority.

Mr. Chairman, OSHA was not included in this hearing; we have said it several times. And I thank you for saying you will make that effort next time.

We have the summary of the Labor Department's evaluation initiative covering enforcement and compliance assistance, as well as OSHA's May 31st, 2011 response to the inspector general report.

And I would like to ask unanimous consent to add these three items into the record.

[The information follows:]

Performance Measurement and Management at DOL and Within OSHA

- In 2010, the Department published its 5 year strategic plan. The plan emphasizes outcomes that DOL Agencies are trying to achieve.
- For worker protection agencies such as OSHA, this meant thinking beyond simply process and outputs, to how the Department will be able to measure whether it is making a difference in how employers behave and comply with the laws that the worker protection agencies enforce.
- The outcome measures for most worker protection agencies is a rate of compliance or a rate of violations in a particular industry or overall. In many cases, agencies have diverted resources from targeted investigations to investigations of randomly selected sites within a particular universe. Sampling and random inspections allow these agencies to draw conclusions about the larger universe they seek information on.
- Several agencies have also introduced measures of recidivism.
- OSHA has for many years tracked injury/illness and fatality data since improving the health and safety of workers is the ultimate long term goal of OSHA regulations. This is good outcome data because it looks at what is happening to workers. With the strategic plan they also introduced three new more intermediate outcome measures:

- Percent of serious, willful and repeat violations in high hazard general industry;
- Percent of serious, willful and repeat violations in large construction industry;
- Recidivism rate for serious, willful and repeat violations in high hazard general industry.

The first two examine how employers are behaving and the last measure gauges how effective our inspections are at keeping employers in compliance.

- In addition, the Department's Chief Evaluation Office is funding 4 evaluations that look at the impact of certain interventions and strategies on employer behavior as related to compliance with the law.

- OSHA evaluation on the SST program intended to determine if there is a different effect on employer compliance when they receive a high hazard warning letter, versus when they receive both the letter and an inspection.

- OSHA evaluation on the effect of compliance assistance and consultation visits on rates of injury and illness.

- Wage and Hour evaluation on the effect of various types of remedies on employer behavior—lessons from this evaluation will be useful for all worker protection agencies.

- Wage and Hour evaluation of the effect of enterprise-wide enforcement versus traditional establishment enforcement on compliance.

Prepared by the U.S. Department of Labor.



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

June 15, 2011

Honorable Tim Walberg
Chair, Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Honorable Lynn Woolsey
Senior Democratic Member
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Representatives Walberg and Woolsey:

The state of Washington is one of 27 states and territories that have been approved by the Occupational Safety and Health Administration (OSHA) to implement their own workplace safety and health plans as long as they are at least as effective as the federal program. We understand that the relationship between OSHA and the state plans is the subject for your June 16th Subcommittee hearing on the question "Is OSHA Undermining State Efforts to Promote Workplace Safety?" We are submitting the following comments for the record.

The state of Washington and OSHA have enjoyed a mutually supportive working relationship for many years. To answer your Subcommittee's question, in our judgment OSHA has not undermined our efforts to promote workplace safety. In fact, as a result of our interaction with our federal partner, including formal monitoring of our performance, the workplace illness and injury rate in our state has consistently improved for many years. We have recently been able to supplement this very basic measure of effectiveness with a more specific assessment of the impact of our enforcement inspections and consultation services on worker compensation claims rates. We have been able to demonstrate that over a ten year period worker compensation claims declined significantly more in workplaces where we have conducted inspections or consultations than in comparable workplaces without our intervention. In particular, worker compensation claims for the types of injuries and illnesses most closely related to our rules declined 16% more in workplaces where we issued citations for violations of our rules than in workplaces where our inspections did not result in citations. We believe that our positive working relationship with

Representatives Walberg and Woolsey
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OSHA has assisted us in achieving these positive results. We have enclosed a summary document describing these findings in more detail.¹

The findings noted above illustrate the complex relationship between measures of activity, such as inspection and citation statistics, and measures of outcome, such as injury and illness trends. We believe that OSHA's determination of whether state plans are at least as effective as federal efforts should include a combination of activity and outcome measures. We have reviewed the report on OSHA's evaluation of state plans issued March 31, 2011 by the U.S. Department of Labor Office of Inspector General. The report concluded that OSHA's evaluation of state plan effectiveness has been overly reliant on activity measures that do not fully characterize performance. The report recommended that OSHA take better steps to define effectiveness, design measures to quantify impact, establish baselines for evaluations and revise its monitoring processes accordingly. OSHA agreed with the intent of these recommendations and made a commitment to developing additional impact measures that would supplement the existing system. We are encouraged by this and look forward to working closely with OSHA and the other state plans in this effort.

The OSHA Act of 1970 established a national system for workplace safety and health that blended federal and state responsibilities. We believe this was intended to ensure equal protection nationwide with allowance for flexibility and creativity at the local level. It is not surprising that from time to time there have been tensions between state and federal programs in the effort to strike the right balance. Recently this tension has surfaced in discussions about whether OSHA's National Emphasis Programs (NEP) should be mandatory for all the state programs. We believe that it is a legitimate exercise of federal authority and responsibility to identify workplace hazards that require national attention. We understand that in our state we have an obligation to contribute to the national priorities while at the same time paying attention to other state specific issues. This simply means that by participating in the federal-state partnership we do not function with complete autonomy. However, it is also important that OSHA recognize that the states have limited resources and need to be able to address state issues along with national priorities. We are comfortable with OSHA expecting full state participation in NEPs as long as there are provisions for some statewide variation in the way the initiatives are implemented and as long as a state can opt out if the hazard or industry covered by the NEP does not exist in any significant way in the state. We believe that productive discussions about this have been taking place between OSHA and the Occupational Safety and Health State Plan Association (OSHSPA).

¹ Foley M, Fan ZJ, Rauser E, Silverstein B. The impact of DOSH enforcement and consultation visits on workers' compensation claims rates and costs, 1999-2008. SHARP Technical Report # 70-5-2011, May 2011. Washington State Department of Labor and Industries. www.lni.wa.gov/safety/research.

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We appreciate the opportunity to contribute to the discussion concerning these important issues.

Sincerely,



Michael A. Silverstein, M.D.
Assistant Director
Division of Occupational Safety and Health
Washington State
Department of Labor and Industries

Enclosure

cc: David Michaels, Assistant Secretary of Labor, OSHA
Kevin Beauregard, OSHSPA Chair
Mark W. Rupp, Director, Washington DC Office
Office of Governor Chris Gregoire, Washington State
Judy Schurke, Director
for Washington State Department of Labor and Industries

Chairman WALBERG. Without objection.
Ms. WOOLSEY. Thank you. And I yield back, Mr. Chairman.
Chairman WALBERG. I thank the gentlelady.
And again, thank you for being part of this hearing today.
A lot has been said, a lot more will be said on this issue.
I think I would start by making it very clear that I and many
others have a concern that we do have financial problems. We are
a nation that is broke—beyond broke.

We have gone two terms without a budget, addressing some of these issues, and, I think—and clarifying it.

We, at this time in the House, are attempting to change that by having a budget. And that budget is dealing with the realities of a fact that we are broke.

And this is not an issue of one side of the aisle or another. It has gone on for too long, that we have not established priorities to meet the pressing, important, and necessary needs of government.

And so that affects all of our budget areas. And certainly affects the Department of Labor as well.

I think the efforts right now are to make sure we really push ourselves to decide what is important and what is necessary. And that will be a difficult process. And mistakes will be made.

But in the course of hearings like this and others, we will have the opportunity to hopefully ferret out those things that are absolutely necessary. And we would do ourselves great harm in not attending to those details.

Offering flexibility, offering alternatives, pushing the envelope, suggesting new ways of handling it, those are, I hope, part of not only this subcommittee's process, but the Congress as a whole. Priorities are important.

And we have not been attentive to establishing the key priorities. Instead we have accepted everything as a priority, so to speak.

Efficiency has to be the requirement. But safety cannot be the—or loss of safety, be the outcome unnecessarily.

The concept of fine versus fix has to be dealt with. I think where we can find, where we have examples of promoting as mentioned already without huge fines, with the focus being given on fixing it. And finding those ways, and accessing those ways from other experiences to promote those things.

We are seeing that state OSHA in many cases has come of age. And the credibility with flexibility can be very helpful there.

I think it is a true statement that some work, many situations of work, but some work is necessarily dangerous. It is necessarily dangerous. Whether it was when I worked at steel mills, and there was necessary danger in carrying out my job.

However on the other side of the ledger, no work should be unnecessarily dangerous. And I guess that is the creative tension we have here, of trying to make sure that while we have dangerous situations of work and that danger is necessary, because the job has to be done, and it can't be done without some element of danger. Let us make sure that we have in place the ability to say that it is not unnecessarily dangerous.

And that we can afford those things in a way that we can continue to encourage jobs and the growth in the economy that expands the opportunity. But we can also encourage the safety factor as well.

So having said that, that will be our agenda. We will continue to work for that.

We hope that all that desire to be at this table will come to the table and make all good effort to be here.

And again, I say thank you for participating today.

No further business coming before this committee, the committee stands adjourned.

[Additional submission of Chairman Walberg follows:]

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



MAY 31 2011

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: 
DAVID MICHAELS, PhD, MPH

SUBJECT: Response to OIG's Final Audit Report
Number: 02-11-201-10-105
"OSHA Had Not Determined if State OSH Programs Were at
Least as Effective in Improving Workplace Safety and Health As
Federal OSHA's Programs."

This memorandum is in response to your March 31, 2011, transmittal of the Office of Inspector General (OIG) Audit Report Number: 02-11-201-10-105, "OSHA Had Not Determined if State OSH Programs Were at Least as Effective in Improving Workplace Safety and Health As Federal OSHA's Programs." We appreciate the OIG's responsiveness to many of OSHA's concerns. As we noted in response to the draft report, while we agree with the intent of the recommendations, OSHA is also concerned that attempting to define the effectiveness of State plans by relying exclusively on a system of impact or outcome measures is not only extremely problematic, but would not fulfill the more specific and extensive requirements of the Occupational Safety and Health Act of 1970 (the Act). We strongly believe that OSHA must review activities as well as outcomes to ensure that OSHA-approved State plans are operating effectively and fulfilling Federal grant requirements.

RESPONSE TO RECOMMENDATIONS

Recommendation 1: Define effectiveness in terms of the impact of State OSH programs on workplace safety and health.

OSHA Response: OSHA agrees in part. As noted in our response to the draft report, OSHA agrees that measuring the impact of State programs on workplace safety and health would be useful in determining the effectiveness of State programs. Determining appropriate measures to determine the program's effect on workplace safety and health is, however, extremely problematic, and even if it is possible to develop accurate impact measures, we do not believe that impact measures are sufficient to evaluate the effectiveness of State programs. OSHA has a responsibility to evaluate the complete State program, and we intend to continue to use appropriate activity measures to evaluate the effectiveness of State programs and ensure that they are meeting the requirements for State plan approval and funding. We appreciate that the audit report noted the OIG's agreement that impact measures should be used in conjunction with

activity-based measures to ensure compliance with the Act's requirements, although the audit recommendations were not modified to reflect this agreement.

OSHA does recognize the need to provide more precise parameters to define State plan effectiveness, and we have been working with our State plan partners to define effectiveness and develop appropriate measures. We have convened a Federal/State Task Group that was initially tasked with defining the parameters for an "at least as effective" State plan penalty policy, but has expanded its scope to look at all aspects of equivalent effectiveness. The Task Group, composed of the Board of Directors of the Occupational Safety and Health State plan Association (OSHSPA), the organization of States with OSHA-approved plans, and a group of senior OSHA officials, met in April 2011 to discuss the definition of effectiveness and how it should be measured. These meetings will continue, and the group's conclusions will provide input to a comprehensive revision of OSHA's State plan monitoring procedures. We anticipate one of the results of these discussions would be a new set of statistical activity measures, as well as outcome measures, to the extent they are available, to be used in evaluating State plan performance.

Recommendation 2: Design measures to quantify the impact of State OSH on workplace safety and health.

OSHA Response: OSHA agrees in part. OSHA and DOL are continuing to develop additional impact measures for both Federal OSHA and the States. The Department is engaged in studies on the effect of penalty size, warning letters and compliance assistance. This is a difficult and lengthy task, and OSHA would welcome OIG specific suggestions for such measures or information on studies that may have produced such measures.

As discussed above, OSHA is working to develop new measures, including impact measures, for defining and evaluating State plan effectiveness. Any measures developed will be incorporated into revised monitoring procedures that will be issued through a change to the State Plan Policies and Procedures Manual, as discussed in the response to Recommendation 4, below.

Recommendation 3: Measure Federal OSH program to establish a baseline to evaluate State OSH effectiveness.

OSHA Response: OSHA agrees in part. On the Federal level, the Department of Labor FY 2011-2016 Strategic Plan envisions a review of trends in compliance, violation, or discrimination rates as measures of impact.¹ OSHA looks at injury, illness, and fatality rates in select industry sectors as one indicator of OSHA's impact, while acknowledging there are inherent problems with these data. Among them are the reliance on employer self-reporting for injury and illness data, the data's heavy dependence on the level of economic activity and the changing composition of the economy. In some State plan States, the Bureau of Labor Statistics has noted that the sample size is not large enough to present a complete picture of injuries and illnesses. Nevertheless, OSHA will continue to seek methods of addressing this issue and include State plans in the process as appropriate.

¹ Trends, p. 16, Department of Labor FY 2011-2016 Strategic Plan

The DOL strategic planning process emphasizes the development of outcome measures and the need to link them to impact. DOL is working with its enforcement agencies in the development of these measures, in addition to the continued development of appropriate activity measures, particularly for the worker protection agencies. There are several ongoing DOL studies to this end. In addition, as mentioned above, the Department of Labor is engaged in studies on the effect of penalty size, warning letters and compliance assistance.

Recommendation 4: Assure effectiveness by revising the monitoring processes to include comparison of the impact of State OSH and Federal OSHA.

OSHA Response: OSHA agrees in part. As noted above, we will continue to use activity measures as well as all available impact measures to assess State plan performance. Any useful impact measures developed by OSHA or the Department to assess the effectiveness of the workforce protection agencies will be incorporated into a new OSHA State plan monitoring system which Federal OSHA is currently developing in consultation with the States. As noted above, discussions with State plan representatives on defining effectiveness have already begun. As finalizing and developing the data output reports for this system will take some time, we plan in the interim to continue the expanded monitoring efforts begun with the FY 2009 Enhanced Federal Annual Monitoring and Evaluation reports. Annual monitoring guidance will continue to require the analysis of available statistical measures that directly compare State to Federal performance in addition to the current activity measures, and to mandate on-site monitoring activities including review of State enforcement case files. Guidance for preparation of the FY 2011 State plan evaluation reports will be issued before the end of the fiscal year. Formal issuance of revised monitoring procedures as part of the State Plan Policies and Procedures Manual will be dependent on the progress of the on-going discussions and the availability of resources.

We have already implemented a system to give the State plans an expanded opportunity, beyond discussions at regular OSHSPA meetings, to provide input into the development of OSHA policy. Directives and other policy documents that constitute changes to the Federal program which will impact State programs, including National Emphasis Programs and other enforcement policies, are being shared in draft on a limited access website for State review and comment. Conference calls between the States and the OSHA staff involved in developing the policies are then conducted, as appropriate, to discuss the policy. We believe that this mechanism will provide more explanation and justification to the States on the rationale for changing policies and programs that affect them. We will try to include more background information on the reasoning behind new policies and procedures in future directives.

[Additional submissions of Ms. Woolsey follow:]

FEDERAL TO STATE 100% MATCH AWARDS—FY 2009–2011

State	FY 2009 Fed Award	FY 2009 State Match	FY 2009 State 100%	FY 2010 Fed Award	FY 2010 State Match	FY 2010 State 100%	FY 2011* Fed Award	FY 2011* State Match	FY 2011* State 100%
ALASKA	\$1,393,500	\$2,090,512	\$697,012	\$1,429,400	\$2,229,072	\$799,672	\$1,429,400	\$2,088,496	\$659,096
ARIZONA	\$1,813,000	\$1,814,251	\$1,251	\$1,813,000	\$2,214,670	\$401,670	\$1,813,000	\$2,129,093	\$316,093
CALIFORNIA	\$23,013,900	\$41,588,600	\$18,574,700	\$39,501,000	\$39,501,000	\$12,082,200	\$27,418,800	\$46,513,000	\$19,094,200
CONNECTICUT	\$614,000	\$1,763,383	\$1,149,383	\$650,400	\$1,636,449	\$986,049	\$650,400	\$1,531,469	\$881,069
HAWAII	\$1,686,400	\$1,686,400	\$0	\$1,538,000	\$1,538,000	\$0	\$1,445,400	\$1,445,400	\$0
ILLINOIS	\$1,500,000	\$1,500,000	\$0	\$1,500,000	\$2,188,000	\$0	\$1,584,500	\$2,188,000	\$0
INDIANA	\$2,188,000	\$2,188,000	\$0	\$2,188,000	\$2,188,000	\$0	\$2,188,000	\$2,188,000	\$0
IOWA	\$1,608,900	\$2,890,350	\$1,281,450	\$2,066,500	\$2,321,574	\$261,074	\$2,066,500	\$2,256,279	\$189,779
KENTUCKY	\$3,308,600	\$5,810,600	\$2,502,000	\$3,505,100	\$6,128,300	\$2,623,200	\$3,505,100	\$5,968,400	\$2,463,300
MARYLAND	\$3,916,600	\$4,611,106	\$694,506	\$4,130,800	\$4,560,756	\$429,956	\$4,130,800	\$4,774,956	\$644,156
MICHIGAN	\$9,893,100	\$11,138,500	\$1,245,400	\$10,291,600	\$11,387,000	\$1,095,400	\$10,291,600	\$12,528,700	\$2,237,100
MINNESOTA	\$3,900,300	\$4,805,084	\$904,784	\$4,123,300	\$4,923,054	\$799,754	\$4,123,300	\$4,936,981	\$813,681
MISSOURI	\$1,132,400	\$5,597,207	\$4,464,807	\$1,505,900	\$5,067,950	\$3,562,050	\$1,505,900	\$4,955,903	\$3,450,003
NEVADA	\$1,895,800	\$3,272,479	\$1,376,679	\$1,984,700	\$2,382,452	\$397,752	\$1,984,700	\$2,758,208	\$773,508
NEW JERSEY	\$828,000	\$1,085,530	\$257,530	\$1,027,300	\$1,027,300	\$0	\$1,027,300	\$1,027,300	\$0
NEW MEXICO	\$3,163,000	\$4,257,000	\$1,094,000	\$3,827,300	\$5,078,000	\$1,250,700	\$3,827,300	\$5,078,000	\$1,250,700
NEW YORK	\$5,180,700	\$11,952,262	\$6,771,562	\$5,501,500	\$12,354,071	\$6,852,571	\$5,501,500	\$12,354,071	\$6,852,571
NORTH CAROLINA	\$5,105,700	\$16,015,071	\$10,909,371	\$5,292,800	\$15,780,509	\$10,487,709	\$5,292,800	\$17,477,690	\$12,184,890
OREGON	\$2,438,800	\$7,854,000	\$5,415,200	\$2,588,900	\$5,641,069	\$3,052,169	\$2,588,900	\$5,180,743	\$2,591,843
Puerto Rico	\$1,734,200	\$1,734,200	\$0	\$1,734,200	\$1,734,200	\$0	\$1,734,200	\$1,734,200	\$0
SOUTH CAROLINA	\$3,278,900	\$4,999,981	\$1,721,081	\$3,977,100	\$4,206,521	\$229,421	\$3,977,100	\$4,206,523	\$229,423
TENNESSEE	\$1,300,200	\$1,485,606	\$185,406	\$1,464,200	\$1,464,200	\$0	\$1,579,200	\$1,579,200	\$0
UTAH	\$725,800	\$725,800	\$0	\$725,800	\$725,800	\$0	\$725,800	\$725,800	\$0
VERMONT	\$201,000	\$464,662	\$463,662	\$202,100	\$465,238	\$463,138	\$202,100	\$468,288	\$466,188
VIRGIN ISLANDS	\$3,319,800	\$3,319,800	\$0	\$3,319,800	\$3,319,800	\$0	\$3,319,800	\$3,319,800	\$0
VIRGINIA	\$6,901,600	\$38,735,838	\$31,834,238	\$7,249,900	\$32,780,939	\$25,531,039	\$7,249,900	\$35,113,670	\$27,863,770
WASHINGTON	\$520,000	\$784,598	\$264,598	\$548,700	\$812,843	\$264,143	\$548,700	\$884,808	\$336,108
WYOMING	\$92,562,200	\$184,170,820	\$91,808,620	\$101,605,100	\$172,974,767	\$71,569,667	\$101,712,000	\$184,809,478	\$83,297,478
Total Awards	\$30,800	\$30,800	\$0	\$2,787,900	\$2,787,900	\$0	\$2,787,900	\$2,787,900	\$0
Funds for One-Time Only Distribution Reduction	\$92,593,000	\$92,593,000	\$92,593,000	\$104,393,000	\$104,393,000	\$104,393,000	\$104,393,000	\$104,393,000	\$104,393,000

NOTES:
 * Initial Awards Source: OSHA
 1. The Federal Award column consists of the base award and mandatory for that fiscal year. This column does not include any one-time only funds, deobligated funds or lapsed funds transactions.
 2. The State Award column consists of a dollar for dollar match of the final base award and 100% State funds for federal or state safety and health enforcement. These figures do not include one-time only awards.
 3. Effective July 1, 2005, the required match for Virgin Islands is waived up to \$200,000 in accordance with section 301(d) of Public Law 95-134, The Omnibus Insular Areas Act of 1977 (48 USC 1465(d)).

Post Hearing Comments of David Michaels, Ph.D., MPH, Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor

Thank you for this opportunity to submit a statement to the record for the June 16 hearing, "Is OSHA Undermining State Efforts to Promote Workplace Safety?"

We were pleased to learn that all of the witnesses who testified agreed that OSHA was clearly not "undermining" state efforts to promote workplace safety. The two main witnesses on State Plans, Mr. Kevin Beauregard and Mr. Eric Frumin, both agreed that the factor that would contribute most to undermining the effectiveness of State Plans would be drastic cuts to the federal contribution to the State Plans' budgets.

Section 18 of the Occupational Safety and Health Act of 1970 allows states to develop and enforce occupational safety and health standards in the context of an OSHA-approved State Plan. Twenty-seven (27) states and territories have sought and obtained approval for their State Plans—21 states and Puerto Rico have complete programs covering both the private sector and state and local governments; four states and the Virgin Islands have programs limited in coverage to public sector employees. Currently, State Plans deliver the OSHA program to 40% of the nation's private sector workplaces, with federal OSHA responsible for the other 60%.

Section 18(c) of the Act requires OSHA to ensure that all aspects of the states' programs, but particularly their standards and enforcement programs, including the conduct of inspections, are at least as effective as OSHA's program, and that the State Plans have sufficient funding and qualified enforcement personnel to operate. Section 18(f) requires states to submit reports to federal OSHA, and federal OSHA is required to use those reports, as well as inspections of the State Plans, to determine whether states are effectively carrying out their plans.

This oversight is essential to ensuring a consistent level of protection of the health and safety of workers throughout the United States, as Congress intended. States still have the flexibility to go beyond the floor that federal OSHA sets, as CalOSHA Chief Ellen Widess noted in a recent letter to Representative Lynn Woolsey.

As OSHA's 2009 Special Report on Nevada and subsequent FY 2009 Enhanced Federal Annual Monitoring and Evaluation (EFAME) reports on the other State Plans showed, federal OSHA needed to improve its procedures for conducting the oversight required by the Act. OSHA has recently made great progress in improving oversight of and communications with State Plans, including improved state plan participation in developing National Emphasis Programs and the extensive overhaul of how OSHA monitors state plans, communicates those findings, and follows up on implementation of corrective action plans. The heads of Washington and California OSHA programs have both confirmed the benefits of federal assistance and oversight in letters to Ranking Member Woolsey.

We believe that this Federal/State Plan arrangement has been successful, with many states developing standards and enforcement methods that go beyond OSHA's standards and policies.

The Inspector General Report

The Inspector General's report, "OSHA Has Not Determined if State OSH Programs Are at Least as Effective in Improving Workplace Safety and Health As Federal OSHA's Programs" criticized OSHA for using activity measures instead of outcome or impact measures to determine the effectiveness of State Plans. While OSHA agreed in general with the need for better measures, we noted that attempting to determine the effectiveness of State Plans by relying exclusively on a system of impact or outcome measures is not only extremely problematic, but would not fulfill the more specific and extensive requirements of the Occupational Safety and Health Act of 1970.

Ideally, OSHA would use outcome measures in conjunction with other measures to evaluate effectiveness. Developing such outcome measures has been recognized by the Inspector General and other experts in this area as highly difficult. While it is clear that the development and enforcement of standards, as well as compliance assistance, has contributed significantly to the drop in injuries, illnesses and fatalities over the last 40 years, it is difficult to determine the extent to which inspections, penalties or compliance assistance contributed to this reduction. Other factors such as changes in industry mix, the composition of the working population, and difficulty in accurately measuring certain outcomes all make the development of useful outcome measures extremely difficult.

Despite these difficulties, OSHA is currently engaged in an unprecedented effort to evaluate the impact of its activities and develop outcome measures that could help measure the effectiveness of OSHA's enforcement program and other related

efforts. For example, several studies are underway to look at the impact of penalties on compliance, letters related to OSHA's Site Specific Targeting Program, consultation activities and the benefits of enterprise-wide settlements. The results of these and other studies (which should be available in several years) will provide important guidance for the Department of Labor's enforcement agencies and State Plan partners.

In addition, as OSHA awaits the results of those longer-term studies, OSHA is implementing several outcome measures in a more expeditious manner. For example, in the most recent strategic plan, OSHA has introduced three new more intermediate outcome measures:

- Percent of serious, willful and repeat violations in high hazard general industry;
- Percent of serious, willful and repeat violations in large construction industry;
- Recidivism rate for serious, willful and repeat violations in high hazard general industry.

Finally, OSHA and the State Plans have launched a joint effort to determine what activity and outcome measures will best enable federal OSHA to determine the effective operation of State Plan programs. This effort, in addition to improved communication concerning National Emphasis Programs and other federal OSHA activities, is expected to significantly improve federal OSHA oversight over state plan activities and effectiveness as we move forward together to accomplish our joint mission of ensuring the safety and health of American workers.

OSHA reviews an enormous amount of data on State Plans and our own program to gauge effectiveness. Because states participate in OSHA's data system, the same data is available on the State Plans as on the federal OSHA program, thus allowing direct and consistent comparisons. On the federal level, OSHA evaluates its enforcement program using a variety of statistics, including compliance rates, programmed inspections and fatalities resulting from certain factors. State Plans are evaluated on activity-based data, including inspection counts, violations characteristics, penalty amounts, injury and fatality rate trends, Integrated Management Information System (IMIS) and recordkeeping, measures for timeliness and completion of inspections, violation classification, staffing benchmarks, and timely adoption of standards. Monitoring these measures, combined with increased on-site evaluation of State Plan activities, evaluation of case files, faster follow-up of Complaints Against State Programs, and improved tracking of inspector training helps OSHA determine overall effectiveness. As noted above, as outcome measures are developed, OSHA's oversight of State Plan activities will improve.

Thank you for this opportunity to submit these comments.

**The Impact of DOSH Enforcement and Consultation
Visits on Workers' Compensation Claims Rates and
Costs, 1999-2008**

SHARP Technical Report Number: 70-5-2011

May 2011



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Key Words: DOSH, Washington State, compensable claims rates,
workers' compensation



Executive Summary

Since 2002 the Safety & Health Assessment & Research for Prevention (SHARP) program of the Washington State Department of Labor and Industries (L&I) has conducted annual analyses of the association between enforcement and consultation activities of the Washington State Division of Occupational Safety & Health (DOSH) and compensable claims rates. These reports showed that DOSH enforcement inspections at 'fixed-site' industry workplaces were associated with a decline in claims rates relative to those businesses that had no DOSH visits. But due to the greater volatility of claims rates at non-fixed-site businesses we had been unable to find statistically significant changes amongst businesses in this sector. The small numbers of consultation visits satisfying our selection criteria also made it difficult to see a consistent impact for these activities across annual study years.

In this analysis we pooled all ten previous annual studies together in order to gain greater statistical precision in our estimate of the effect of DOSH activity. All ten calendar annual studies were converted into one large study in which calendar years are converted into "DOSH activity year" followed by the "measurement year". The impact of DOSH activities on the change in compensable claims rates from the activity year to the measurement year was analyzed for all accounts and results were reported separately for fixed and the non-fixed-site industries. Since the focus of DOSH activity during a visit is likely to be on those hazards subject to specific regulation, we also performed separate analyses for non-musculoskeletal and musculoskeletal (MSD) claims rates. Additional analyses estimate the separate impact of DOSH enforcement activities with citation or without citation, and estimate the impact of DOSH activities on claim costs.

The following inclusion criteria were used to select the group of accounts for this study:

1. Only companies reporting hours each quarter during four consecutive years; two years before the DOSH activity year, as well as the two years including the activity year and the measurement year.
2. Only State Fund companies.
3. Only companies with a single business location.
4. Only companies with at least 10 FTEs per year.
5. Only companies with no DOSH activity during the two years prior to the year of the DOSH activity.

These restrictions allow for a rigorous, controlled evaluation of the effect of about 15% of all DOSH visits. Because average company size and the company's prior history of compensable claims rates can have an influence on claims rates, the changes in compensable claims rates and costs were examined in multivariate analyses controlling for these factors.

Main results of Pooled Analysis

Impact of DOSH activities on overall compensable claims rates:

- **Fixed-site industries:**

DOSH **enforcement** inspections were associated with a **4.3% larger decrease** in compensable claims rates relative to employers with no DOSH activity. DOSH **consultation** visits were not associated with a statistically significant decrease in compensable claims rates relative to employers with no DOSH activity.

- **Non-fixed-site industries:**

DOSH **enforcement** inspections were associated with a **3.1% larger decrease** in compensable claims rates relative to employers with no DOSH activity. DOSH **consultation** visits were associated with an **8.5% larger decrease** in compensable claims rates relative to employers with no DOSH activity.

These results suggest that while enforcement activity has significant impact in all industries, it is slightly greater in fixed-site workplaces. The impact of consultation is greater in non-fixed site workplaces such as in the construction industry.

Impact of DOSH activities on Non-MSD compensable claims rates:

The outcome measure used to track the impact of DOSH activity is compensable claims rates. But a large proportion of these injuries are non-traumatic musculoskeletal (MSD) disorders. Since these arise from hazards for which there is no specific DOSH regulation, the focus of DOSH inspections is on hazards related to non-MSD injuries such as unguarded machinery, lockout/tagout practices and fall hazards. If we restrict the outcome measure just to non-MSD claims rate changes we find the following:

o **Fixed-site industries:**

DOSH **enforcement** inspections were associated with a **7.4% larger decrease** in non-MSD compensable claims rates relative to employers with no DOSH activity. DOSH **consultation** visits were associated with a **24.8% larger decrease** in non-MSD compensable claims rates relative to employers with no DOSH activity.

o **Non-fixed-site industries:**

DOSH **enforcement** inspections were not associated with a statistically significant decrease in non-MSD compensable claims rates relative to employers with no DOSH activity. DOSH **consultation** visits were associated with an **11% larger decrease** in non-MSD compensable claims rates relative to employers with no DOSH activity.

The impact of DOSH on non-MSD compensable claims is much greater than that for compensable claims overall, particularly in fixed-site industries. Consultation activities also show a greater impact on non-MSD compensable claims. In fact, when we look at the impact of DOSH activity on compensable MSD claims, we do not find any consistent pattern of association.

Impact of DOSH enforcement with and without citation on non-MSD compensable claims rates:

Inspections that result in citations for violations of safety rules would be expected to have greater impact due to the penalties which employers face. When we break out the impact of DOSH enforcement visits that result in citations from those that do not we find the following:

- o **Fixed-site industries:** DOSH enforcement inspections that had **no citation** had only a 5.0% greater decrease in non-MSD compensable claims rates relative to employers with no DOSH activity. But DOSH enforcement inspections that had **one or more citations** had a **20.3% greater decrease** in non-MSD compensable claims rates relative to employers with no DOSH activity.

- **Non-Fixed-site industries:** DOSH enforcement inspections without citation had a only a 3.1% greater decrease in non-MSD compensable claims rates relative to employers with no DOSH visits. But enforcement inspections **with one or more citations** had a **19.1% greater decrease** in compensable claims rate relative to employers with no DOSH activity.

The impact of DOSH on non-MSD compensable claims rates when inspections result in citations is greater still than that for non-MSD compensable claims.

Conclusion

The results of the pooled analysis show that DOSH enforcement and consultation activities make a significant contribution to reducing claims rates and costs in the period following the visit. They also suggest that while enforcement has a similar impact in both fixed and non-fixed-site industries, consultation has a particularly strong effect in the non-fixed establishments. When we exclude musculoskeletal injuries and focus on those arising from hazards for which there are specific regulations, we find that the DOSH effect strengthens substantially for fixed-site industries. Citations for non-compliance have a powerful impact on non-MSD claims rates in the following year: claims rates fall by more than triple the amount at businesses having a DOSH enforcement visit with no citation. These results suggest that inspections that focus on violations of specific DOSH regulations, and which may result in penalties, have the greatest impact on workplace hazards and have the greatest potential to achieve injury prevention.

[Additional submissions of Mr. Beauregard follow:]

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

OCT 12 2010

Mr. Kevin Beauregard, Chair
Board of Directors
Occupational Safety and Health State Plan Association
North Carolina Department of Labor
Division of Occupational Safety and Health
1101 Mail Service Center
Raleigh, North Carolina 27699-1101

Dear Mr. Beauregard:

I am writing to respond to your letters of July 6, 2010 and August 6, 2010 regarding State plan adoption of National Emphasis Programs and OSHA's new penalty procedures. Your letters inquire about the legal basis and authority for requiring State action.

Statutory Framework

The OSH Act and implementing regulations make it clear that OSHA has authority to require State plans to respond to major new Federal enforcement policies by adopting appropriate parallel changes. The Act and regulations require that State safety and health standards, and State enforcement of those standards, be "at least as effective as" those of Federal OSHA. Section 18(c)(2); 29 CFR §1902.3(d)(1). To carry out this requirement, OSHA regulations provide that whenever "a significant change in the Federal program would have an adverse effect on the 'at least as effective as' status of the State plan if a parallel State change were not made," a State change "**shall be required.**" 29 CFR §1953.4(b)(1)(emphasis added). A change in OSHA "policy or procedure of national importance" is an example of such a Federal program change requiring State action. 29 CFR §1953.4(b)(2). OSHA must notify the States of such changes, and each State must respond within the time OSHA sets. A State plan must adopt the Federal change, adopt an "at least as effective" equivalent, or demonstrate that no State change is necessary because the State program is already the same as or equally effective as the Federal change. 29 CFR §1953.4(b)(3) through §1953.4(b)(6).

The statutory mandate for "at least as effective" State enforcement programs follows from congressional concerns articulated in the Act's legislative history. Congress clearly envisioned an important role for States under the new national safety legislation, but it also sought a comprehensive, nationwide system of safety requirements, with Federal OSHA standards and enforcement providing a uniform floor. National job safety legislation was enacted because few States in 1970 had credible enforcement programs, and the few that existed varied widely in their effectiveness. Competitive pressures made it difficult for an individual State to maintain a vigorous program unless all did so. Congress had before it an administration proposal that noted "*...the scope and effectiveness of State laws and State administration varies widely and discrepancies in the performances of State programs appear to be increasing. Moreover, some*

States are fearful that stricter standards will place them at a disadvantage with other States.” Occupational Safety and Health: The President’s Message to Congress, 5 Weekly Compilation of Presidential Documents No. 32, 1082 at 1083 (Aug. 6, 1969). Congress concurred in that assessment. According to the Senate Committee Report, “*(i)n a state by state approach, the efforts of the more vigorous states are inevitably undermined by the shortsightedness of others,*” which underscores the “*inadequacy of anything but a comprehensive, nationwide approach.*” S. Rept. No. 91-1282, at 4 (1970).

National Emphasis Programs

When a pattern of serious injuries or incidents emerges that demonstrates a widespread hazard demanding attention by the nation’s employers, a credible and concerted nationwide enforcement response is the most effective means of raising industry awareness and achieving widespread compliance. The OSH Act, which gives OSHA responsibility to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions,” authorizes OSHA to take the lead in organizing an effective response to such hazards. The support and assistance of the State plans that OSHA funds and monitors under Section 18 is an essential part of such a response.

OSHA’s adoption of a National Emphasis Program (NEP) is a “change of policy or procedure of national importance,” 29 CFR §1953.4(b)(2); accordingly, when so notified, State plans are required to respond. A State may adopt the Federal program, or it may adopt an equivalent State program, if it can document how the State program is “at least as effective,” 29 CFR §1954.3(b)(4). In the latter case, it is essential that the States address all key components of the NEP in an “at least as effective” manner.

On the other hand, we also recognize that if we are requiring the States to participate in National Emphasis Programs, States should have the opportunity to participate in the development of those programs. OSHA would like to work with you to establish a permanent structure for consulting and obtaining State input on proposed National Emphasis Programs and other significant policy changes that affect the States, and hope we can discuss this at our next meeting.

Revisions to OSHA’s Penalty Policy

OSHA considers adequate penalty levels and the deterrent effect they provide to be essential parts of OSHA enforcement, and believes that effective enforcement is the foundation of OSHA’s efforts to provide safe and healthful employment for this nation’s employees. Workers across the country need to know that the effectiveness of penalties issued to employers who endanger workers’ lives and health will not depend on what side of a State border they happen to work.

Average Federal OSHA penalties for serious violations (currently around \$1,000) are far too low to exert a credible deterrent effect. OSHA has therefore undertaken to address this problem by initiating new penalty procedures, effective October 1, for employers who fall under Federal jurisdiction that will raise proposed penalties. We also believe that it is our legal responsibility,

in ensuring that State enforcement programs are at least as effective as the Federal program, to ensure that penalty levels in the State plans are also at levels that provide a credible deterrent to employers who may be balancing the cost of workplace improvements with the likelihood of receiving a significant penalty.

Congress established civil monetary penalties in the OSH Act to provide a meaningful deterrent for employers who might think it less costly to tolerate, rather than abate, workplace hazards. See *Kasper Wire Works v. Sec. of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001) (OSH Act civil penalties designed to “inflict pocket book deterrence”); *Reich v. OSHRC*, 102 F.3d 1200, 1203 (5th Cir. 1997) (“OSHA must rely on the threat of money penalties to compel compliance by employers”). Civil penalties must provide assurance that employers – whatever their size – who want to do the right thing will not suffer a competitive disadvantage by complying with OSHA requirements. Because penalties are central to the statutory enforcement scheme, there is no question that OSHA’s new penalty procedure is a “change of policy or procedure of national importance” requiring State action.

Upon further consideration, we agree that a State plan’s penalty policies need not be “identical” to the Federal penalty policies in order to be “at least as effective,” but on the whole State and Federal OSHA should provide comparable penalties in comparable circumstances. Your letter argues that some States inspect employers much more frequently than Federal OSHA does, and we do not mean to say that this factor cannot be considered in evaluating the adequacy of a State’s penalty system. But this does not negate the need to raise penalties – significantly in some cases. Greater likelihood that an inspection will occur does not present a credible deterrent if serious violations are accompanied by negligible penalties. A State that proposes to maintain a penalty procedure that differs from OSHA’s will need to document how its procedure provides an enforcement deterrent at least as effective as OSHA’s.

Currently, far too many States have average serious penalty levels that simply do not provide a credible deterrent. Average penalties as low as \$300 for a serious violation are simply not a meaningful deterrent in 2010. As mentioned above, the OSH Act was enacted, in significant part, because then-existing State enforcement programs varied so widely from State to State. Wide discrepancies in penalty amounts from State to State erode the deterrent effect of OSHA penalties nationwide.

It is clear from our recent discussions that we need to find a better balance between Federal OSHA’s responsibility to provide leadership and ensure that State enforcement programs are at least as effective as the Federal program, and the need to maintain a productive partnership with the State plans, recognizing that different States may have different means of reaching common goals. There is also a need for strong, clear, and transparent criteria to ensure that State penalty policies and enforcement programs are indeed at least as effective as Federal OSHA’s.

To address this, I propose that we develop a process where Federal OSHA and State plan representatives can reach some common ground on the principles of a State plan penalty policy that make sense, including principles that recognize the importance of maintaining the effective deterrent value of penalties, that recognize some room for local variation, and that contain clear

and transparent criteria that will ensure that State penalty policies and enforcement programs are at least as effective as Federal OSHA's.

We will discuss the details of this new process at the next OSHSPA meeting in Las Vegas.

Sincerely,



David Michaels, PhD, MPH

cc: OSHSPA Board

FY 2010 INSPECTION ACTIVITY

	State plans	Federal OSHA
Total Inspections	57,124	40,993
Safety	45,023	34,337
Health	12,101	6,656
Employees Covered by Inspection	2,361,456	1,423,528
Programmed	35,085	24,759
Unprogrammed	22,039	16,220
Accident	2,967	830

FY 2010 INSPECTION ACTIVITY—Continued

	State plans	Federal OSHA
Complaint	8,986	8,027
Follow-up	2,641	1,096
Other unprogrammed	7,445	6,267
Construction	22,993	24,430
Maritime	34	302
Manufacturing	9,462	7,917
Other Industry	24,635	8,344
Total Violations	120,417	96,742
Serious	52,593	74,885
Other-than-serious	65,031	17,244
Willful	278	1,519
Repeat	2,054	2,758
Failure-to-abate	460	334
Average Current Penalty per Serious Violation	\$871	\$1,053
Total Current Penalties	\$72,233,480	\$183,594,060

Source: U.S. Department of Labor, OSHA, FY 2010.

Occupational Safety & Health State Plan Association

Press Release, September 28, 2010

The Occupational Safety and Health State Plan Association (OSHSPA), made up of 27 States and Territories that administer their own OSHA programs and work as partners with OSHA to ensure safe and healthful workplaces across the nation, fully supports regular auditing and monitoring of State-administered occupational safety and health programs. It is the organization's belief that appropriate auditing and monitoring can be a valuable tool to enhance program effectiveness and to support continuous program improvement. OSHSPA also believes that it is critical for the methodology that is used by OSHA to measure programs be consistent across the nation and to continue to allow the States to operate in a way that is at least as effective as OSHA. The State Plans do not, and should not, operate in a manner identical to OSHA. Rather, they serve as laboratories for moving occupational safety and health issues forward and fuel creative approaches to ensure the occupational safety and health of workers.

OSHA has recently engaged in a process where enhanced federal monitoring of programs was conducted and has issued State-specific 2009 Enhanced Federal Annual Monitoring and Evaluation (EFAME) Reports of State Plan OSHA programs. The reports contain a number of recommendations that may be useful to State Plan OSHA programs. However, OSHSPA believes that the scope, methodology, and evaluation criteria used by each of the ten federal OSHA regional offices were inconsistent and in some cases the report findings are misleading. Despite a last minute attempt to standardize the format of the reports, documentation and content still vary considerably. For several states, the executive summaries do not appear to clearly represent the audit findings contained in the associated report, nor do they clearly indicate positive aspects of the State Plan programs. Finally, although required by the guidelines established by the OSHA national office, some reports do not include a determination on whether a State continues to meet its State Plan requirements.

A well-designed audit containing pertinent and valid criteria, administered consistently by a well-trained staff, and focused on outcomes rather than process, is critical if the end results are to be consistent and meaningful. Appropriate fact-based criteria must be established to measure quality and performance against valid established benchmarks. OSHSPA is concerned that some of the audits seem to place too much emphasis on OSHA's determination regarding whether or not specific state policies and procedures are identical to federal OSHA's. This "identical procedure" approach is in conflict with the provisions of the OSH Act that specifically allow for State Plan administration of an OSHA program utilizing alternative policies and procedures, as long as the State's standards and overall enforcement of those standards are at least as effective as federal OSHA's.

Each State Plan program will respond to OSHA individually regarding its specific audit. Overall effectiveness of State and federal OSHA programs is paramount in ensuring that all workers nationwide have a safe and healthful workplace. OSHSPA

members would welcome the opportunity to work with OSHA in developing effective measures and an effective auditing system that will better ensure that State Plans and federal OSHA are equally accountable to the American workers and general public, in regards to overall program effectiveness.

OCCUPATIONAL SAFETY & HEALTH STATE PLAN ASSOCIATION,
Washington, DC, May 13, 2011.

DAVID MICHAELS, PHD, MPH,
Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor,
200 Constitution Ave, NW #2315, Suite 800, Washington, DC 20210-0001.

SUBJECT: *Legal Basis of Requirement for Mandatory State Plan Adoption of National Emphasis Programs*

DEAR ASSISTANT SECRETARY MICHAELS: Thank you for your detailed letter of October 12, 2010, responding to the Occupational Safety and Health State Plan Association's (OSHSPA) letter on the above subject of July 6, 2010.

First, I wanted to express the appreciation of the OSHSPA Board of Directors and OSHSPA's membership as a whole for the discussions initiated on the broad issue of "as effective as" criteria for State Plans at the OSHSPA Board/Federal Steering Committee meeting in Chicago last month. The recent Office of Inspector General (OIG) report, entitled "OSHA Has Not Determined if State OSH Programs Are At Least As Effective in Improving Workplace Safety and Health as Federal OSHA's Programs", serves as a very timely and appropriate starting point for discussions of this issue, which lies at the core of State Plan monitoring and evaluation.

National Emphasis Programs (NEP)

OSHSPA fully supports OSHA's efforts to develop and use NEPs to address workplace hazards that pose a real and significant threat to employee and employer safety and health in federal and state jurisdictions. Many State Plans have benefitted over the years from OSHA's identification and development of NEPs to address existing or emerging hazards that threaten the lives of America's working men and women. As stated in previous communications with your office, OSHSPA is more than willing to work with OSHA on the identification and development of NEPs and to encourage our membership to participate.

However, for the reasons stated below, OSHSPA does not believe that OSHA has the legal authority nor is correct from a policymaking standpoint to require State Plans to adopt NEPs to maintain their "as effective as" status.

The OSH Act is clear that State Plans must:

- adopt standards that are at least as effective as those of OSHA; and
- must meet other basic requirements such as adequate personnel, adequate funding, right of entry, and coverage of public sector employees.

As you noted in your letter, OSHA regulations for State Plans further provide that whenever a "significant change in the federal program would have an adverse effect on the 'at least as effective as' status of the State if a parallel State change were not made," a State Plan change "shall be required."

You have interpreted the above provision as requiring mandatory State adoption of NEPs "when a pattern of serious injuries or incidents emerges that demonstrates a widespread hazard demanding attention by the nation's employers." You further mandate that "A State may adopt the Federal program, or it may adopt an equivalent State program, if it can document how the State program is 'at least as effective,' 29 CFR §1954.3(b)(4). In the latter case, it is essential that the States address all key components of the NEP in an "at least as effective" manner" (e.g., conduct a specified number of enforcement inspections within a set time frame).

OSHSPA's first comment on OSHA's position with regard to NEPs is that it seriously questions how any State's program could be "adversely effected" if it chooses not to adopt an NEP which only requires a State plan or a federal Area Office to conduct five or fewer inspections in a given industry per year—a frequent occurrence in NEPs. In a State Plan that conducts 3,000 inspections per year, your argument suggests that if the State fails to conduct 5 inspections, or 16/100ths percent of the total, the State Plan will somehow not be "as effective as" the federal program. In practical terms, OSHSPA finds OSHA's position unsupportable. In legal terms, OSHSPA finds OSHA's position contrary to the OSH Act.

The OSH Act of 1970 provides in §2(b)(11):

“(b) The Congress declares it to be its purpose and policy * * * to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and preserve our human resources—

(11) by encouraging States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in *identifying their needs and responsibilities in the area of occupational safety and health*, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, **and to conduct experimental and demonstration projects in connection therewith.** * * *” (*Emphasis added*).

As the OSH Act indicates, State Plans are charged by Congress to identify “their needs and responsibilities in the area of occupational safety and health.” OSHA’s position that a State Plan must conduct five inspections in a given industry per year constitutes federal micro-management of State resources and runs directly contrary to Congress’s stated intent for the States to identify their own needs and responsibilities for assuring “safe and healthful working conditions” in their State.

OSHSPA’s second comment with regard to OSHA’s position that “States address all key components of the NEP in an “at least as effective” manner” is that OSHA’s position is not supported by its own stated basis for the development of NEPs. For instance, if OSHA uses national data on injuries and incidents to support the development of the NEP, as your letter suggests, but a State has a level of injuries and illnesses in the industry that demonstrates there is no widespread hazard in the State, your position would still suggest that the State would have to conduct the NEP inspections anyway or risk being found to be not “as effective as” the federal program. OSHSPA finds OSHA’s position that a State Plan should use its limited resources to address a hazard that may be a problem elsewhere in the nation, but is not one in a particular State, to be unsupportable.

OSHA would also presumably take the position that if a State Plan chose to approach the particular hazard addressed by the NEP through Cooperative Programs first, the State Plan would still have to conduct enforcement inspections, even if the cooperative approach proved successful in the State. OSHSPA finds OSHA’s position in this scenario to be unsupportable as well, and contrary to Congress’s stated intent that State Plans “conduct experimental and demonstration projects” to address workplace hazards that impact the safe and healthful working conditions of employees and employers.

OSHSPA’s third comment is that OSHA’s current position on NEPs runs contrary to and is inconsistent with its own position on determinations of “as effective as” with regard to State Plans. As part of quarterly and annual monitoring of State Plans, OSHA regularly evaluates the “effectiveness” of State Plan inspection targeting systems by reviewing: in-compliance rates, not-in-compliance rates, percent serious rates, percent of programmed inspections with serious/willful/repeat violations and violations per inspection. State Plans that have inspections statistics that significantly differ from federal OSHA in any of these areas are currently subject to receiving recommendations and corrective action plans. This has been highlighted in the two most recent Federal Annual Monitoring and Evaluation (FAME) reports issued by OSHA. OSHSPA can provide countless examples of State Plan annual evaluation reports where OSHA monitoring personnel have used such indicators as high in-compliance rates and low percent serious violation rates in planned inspections to conclude that a State’s targeting system was inadequate or not “as effective as” OSHA’s targeting system.

NEP inspections are one part of a State Program’s planned inspection targeting scheduling system and by making all NEPs mandatory, OSHA would be requiring every State Plan to focus enforcement activities in the areas covered by the NEPs. Based on your letter, OSHA would presumably take the position that a State Plan would still have to conduct planned enforcement inspections under the NEP, even if the State could demonstrate that previous enforcement and consultation inspections in the particular industry or emphasis area in their State resulted in high in-compliance rates and/or a low percent serious rate. Additionally, OSHA’s current position on NEPs would not take into consideration state injury and illness rates pertaining to a particular industry or operation even if they were below the national average. OSHSPA finds OSHA’s position that a State Plan should use its limited resources to address a hazard that may admittedly be a problem elsewhere in the nation, but is not one in each State Plan, to be unsupportable.

OSHSPA’s final comment is that OSHA’s current position on NEPs could constitute an unfunded mandate to State Plans. OSHA’s recent implementation of the NEP on Recordkeeping was the latest example of a resource impact for State Plans resulting from participation in an OSHA enforcement initiative that OSHA had determined was of such widespread significance and importance that all federal and State Plan Programs should be strongly encouraged to participate. That particular NEP was developed by OSHA without any State Plan participation early enough in

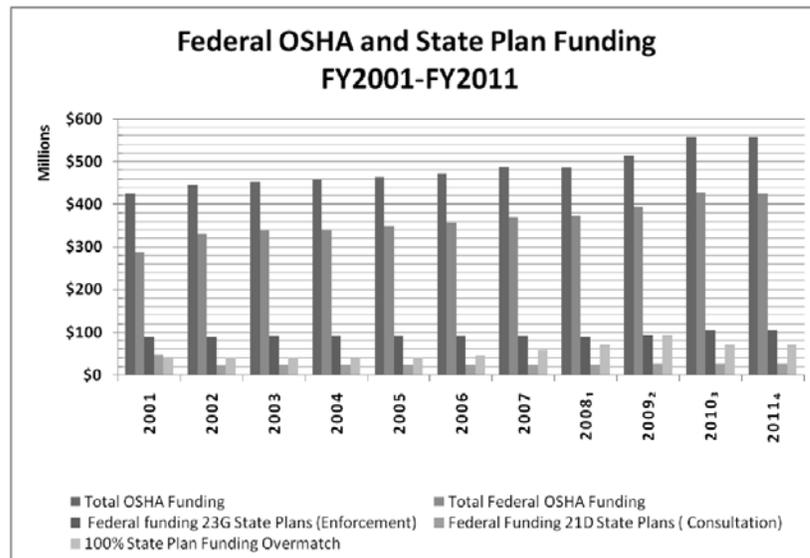
the development process to identify any negative resource impacts on State Plan programs in time to address them up front. Additionally, OSHA received an appropriation of approximately one million dollars in FY2009 and FY2010 from Congress to implement its Recordkeeping initiative, but provided no such funding to the 27 State Plans. As you know, inspections under the Recordkeeping NEP can last hundreds or even thousands of hours, which takes away from other planned enforcement inspection activities. When such funding is not provided to State Plans, the initiative becomes an unfunded mandate for States, which are already significantly underfunded as it is.

Based on the above, it is OSHSPA's position that OSHA does not have the legal authority nor is correct from a policymaking standpoint to require State Plans to adopt NEPs.

On behalf of OSHSPA, I respectfully request that OSHA withdraw its requirement for mandatory State Plan adoptions of NEPs.

Sincerely,

KEVIN BEAUREGARD, *Chair,*
Occupational Safety and Health State Plan Association.



¹ .018% rescission

² State Plan Funding restored to 2007 levels plus an additional \$1,500,000 for Creation of Illinois State Plan Public Sector Program

³ first significant increase of Federal funding for State Plan programs in a decade

⁴ .022% rescission

[Questions submitted for the record and their responses follow:]



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July 25, 2011

The Honorable David Michaels
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Assistant Secretary Michaels:

Enclosed are questions submitted by Chairman Walberg following the Subcommittee on Workforce Protections hearing on June 16. Please provide written responses no later than August 8, 2011 for inclusion in the official hearing record. Responses should be sent to Loren Sweatt of the Committee staff who may be contacted at (202) 225-4527.

Thank you again for your contribution to the work of the Committee.

Sincerely,

Tim Walberg
Chairman
Subcommittee on Workforce Protections

Submitted by Chairman Walberg

- 1.) OSHA's written statement suggests that one area OSHA is emphasizing with respect to its oversight of state plans is "improved state plan participation in developing National Emphasis Programs." What legal authority does OSHA have to require state plans to participate in NEPs? How has OSHA communicated that authority to the state plans? Please detail all outreach efforts OSHA engaged in, including those conducted prior to the Subcommittee's hearing on June 16, 2011, that were intended to include state plans in the development of NEPs?
- 2.) OSHA's written statement suggests that it will use willful and repeat violations and recidivism rates for these types of violations as part of the "outcome measures." What does OSHA believe these violation rates will measure? Will OSHA examine these rates when violations are issued or when they are deemed final? Will this be an outcome measure that OSHA will use to examine its own citation rates?
- 3.) OSHA's written statement says "OSHA has recently made great progress in improving oversight of communications with State Plans." By way of example, you cite the cooperation of the heads of Washington and California OSHA twice suggesting that OSHA is on the right track. Please explain why OSHA chose the individual from Washington State to represent the Occupational Safety and Health State Plan Association (OSHSPA) to be the representative to National Advisory Committee on Occupational Safety & Health (NACOSH), and did not choose the individual nominated by OSHPA. Moreover, please explain how OSHA's rejection of the OSHPA nominee could possibly engender cooperation with the state plan representatives the agency has touted in its statement.

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



AUG 23 2011

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Walberg:

Thank you for the opportunity to submit written testimony for inclusion in the official hearing record following the Subcommittee's hearing on June 16, as well as the additional opportunity to clarify the Occupational Safety and Health Administration's (OSHA's) position on aspects of our State Programs.

Enclosed are OSHA's responses to your questions of July 25, 2011.

Sincerely,

A handwritten signature in black ink, appearing to read "David Michaels", is written over the typed name.

David Michaels, PhD, MPH

Enclosure

Chairman Walberg Question 1:

OSHA's written statement suggests that one area OSHA is emphasizing with respect to its oversight of state plans is "improved state plan participation in developing National Emphasis Programs." What legal authority does OSHA have to require state plans to participate in NEPs? How has OSHA communicated that authority to the state plans? Please detail all outreach efforts OSHA engaged in, including those conducted prior to the Subcommittee's hearing on June 16, 2011, that were intended to include state plans in the development of NEPs?

OSHA Response:

The Occupational Safety and Health Act (the OSH Act) gives the Occupational Safety and Health Administration (OSHA) responsibility to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." OSHA must take the lead in organizing an effective response when a pattern of serious injuries or incidents emerges that demonstrates a widespread hazard demanding attention by the nation's employers. The support and assistance of the State plans that OSHA approves and monitors under Section 18 is an essential part of such a response.

The OSH Act and its implementing regulations require that state safety and health standards, and State enforcement of those standards, be "at least as effective as" those of federal OSHA. 29 U.S.C. §657(c)(2); 29 CFR §1902.3(d)(1). To carry out this requirement, OSHA regulations provide that whenever "a significant change in the Federal program would have an adverse effect on the 'at least as effective as' status of the State plan if a parallel state change were not made," a State change "shall be required." 29 CFR §1953.4(b)(1). When a pattern of serious injuries or incidents emerges that is national in scope, a credible and concerted nationwide enforcement response, such as that outlined in an OSHA NEP, is the most effective means of raising industry awareness and achieving widespread compliance. States with approved plans, which cover approximately 40% of covered workers, are an essential part of such a response.

Several choices are open to States when OSHA adopts an NEP. As stated in an October 12, 2010 letter to Chairman Kevin Beauregard of OSHSPA, a State may adopt the federal program, or may adopt an equivalent state program, if it can document how the state program is "at least as effective," 29 CFR §1954.3(b)(4). In some instances, States will be able to respond to a new Federal NEP by demonstrating how an existing or recent State program already targets the hazard in question in an "at least as effective" manner.

OSHA recognizes that if the States are required to participate in National Emphasis Programs, States should have the opportunity to participate in the development of those programs. OSHA has already begun working with States, and has implemented a more formal system to give them an expanded opportunity, beyond discussions at regular OSHSPA meetings, to provide input into the development of specific NEPs and other major OSHA policy documents. Beginning in November, 2010, directives and other policy documents that constitute changes to the Federal program which will impact State programs, including

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[Whereupon, at 11:27 a.m., the subcommittee was adjourned.]

