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EXAMINING AGENCY DISCRETION IN SETTING AND ENFORCING REGULATORY FINES AND PENALTIES

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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EXAMINING AGENCY DISCRETION IN SETTING AND ENFORCING REGULATORY FINES AND PENALTIES

THURSDAY, FEBRUARY 11, 2016

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:33 a.m., in room SD–342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Portman, Ernst, Heitkamp, and Peters.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Good morning, everyone. I am glad that everyone is here for this Subcommittee hearing.

The Subcommittee has held a series of hearings examining the regulatory process. We determined over the course of these hearings that a robust, efficient process will lead to better regulations and better regulatory outcomes. We have not had a lot of dissent on that. It is a matter of just working on the process.

Today's hearing focuses on the proper role of regulatory enforcement. It goes without saying that writing a law or developing a regulation is easier than actually enforcing it across the 50 States and our Territories in a fair, predictable, and consistent manner. But doing so is essential. Fair, predictable, consistent regulatory enforcement procedures must be understandable for all stakeholders.

I believe that most Federal agencies agree that transparency is important and that providing accessible compliance assistance services is essential to any comprehensive enforcement regime. Safety, fairness, fighting discrimination are all great goals of our regulators and of enforcement. I think that is a reasonable thing.

But, as we have learned from previous hearings, the sheer magnitude of the Code of Federal Regulations (CFR) means that understanding and complying with regulations is a gargantuan task for most individuals and businesses. The complexity of the regulatory system, coupled with the fear that failure to comply, even if complying is completely accidental, will result in a fine or penalty, that

means that a business will feel they are targeted for arbitrary violations that they do not fully understand.

As a result, regulated parties often feel confused. They deal with conflicting compliance information and it leaves them vulnerable to the whims of any regulator. In fact, one small business owner from one of the States mentioned back to us that when faced with the overwhelming number of regulatory requirements, "what chance does a business have?"

Indeed, many individuals and businesses believe that agency officials enforce regulations in an unfair, unpredictable, and arbitrary manner. Because businesses often feel they are targeted arbitrarily, they are understandably fearful at times of Federal regulators.

I hear stories from businesses that their only interaction with agency enforcement issues is to inspect and issue fines. As a result, my constituents tell me that their relationship with agencies have deteriorated and that instead of inspectors working with businesses to identify and solve compliance problems, government regulators show up, issue a fine and punishment.

When businesses choose to avoid interaction with Federal agencies and dread inspections, our shared regulatory goals are not achieved and we have a breakdown between the government that is designed to serve people and the people that they serve.

Agencies should play an active role in changing this culture. Agency officials, starting at the top, can set the tone by emphasizing compliance assistance, prevention through education, so that finable offenses, not to mention larger tragedies, do not occur in the first place. If businesses are no longer apprehensive in approaching an agency when they need clarification, they will likely find regulatory compliance easier and it will be more successful in compliance goals. In turn, all of us will enjoy safer workplaces and a cleaner environment.

I look forward today to discussing our shared goals and feasible solutions. It is my hope we can start setting a tone in all of our agencies that helps engage with people and helps the people that are designed to serve the Nation and the people that we serve to actually have a better relationship in the days ahead.

With that, I would recognize Ranking Member Senator Heitkamp for her opening remarks.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Chairman Lankford, for holding this hearing today and, giving us all an opportunity to explore this topic in our regulatory process.

I am interested in hearing from our witnesses today as we examine how regulatory enforcement is working on the ground to improve compliance as we identify ways in which Congress and the administration can work together to improve compliance with our regulations.

For our Nation to be successful and safe, for our citizens to be able to work hard and provide for their families, we need a regulatory process that works for American business and American families. That means we need to have enforcement mechanisms to ensure everyone is playing by the same set of rules.

To that end, fines, penalties, restitution orders, and other sanctions are critical tools that the government has at its disposal to achieve compliance and deter wrongdoers from violating Federal laws and regulations. Without such tools, agencies have very little leverage in which to ensure the safety and health of our citizens and our environment.

However, on the other side of the same coin, I believe that ensuring regulated agencies and entities have the necessary resources and information to successfully comply with regulations should also be our top priority. In fact, we have these mechanisms to ensure compliance and no one should feel like they are living in a "gotcha" world, where they are unaware of what the requirements are and only fearful that the sheriff will show up and slap a big fine on when they did not even know that they had an obligation to comply with a regulation.

So, therefore, I am also interested in learning how your agencies focus their energy and resources on compliance assistance programs and ensure that entities are aware of what those requirements are. Specifically, I would like to know how both of your agencies work with small business to ensure that regulatory requirements are clear, transparent, and accessible. I know that both of your agencies work very closely with the Small Business Administration (SBA) and their office to ensure that small business concerns are appropriately addressed and quickly addressed.

So, I look forward to hearing from both of you and hearing your insights as part of this all-important job that we have to do, which is to keep our citizens safe.

Senator LANKFORD. At this time, we will proceed with testimony from our witnesses.

Jordan Barab is the current Deputy Assistant Secretary of Labor at Occupational Safety and Health Administration (OSHA), a post he has held since April 2009. Prior to his current position, Mr. Barab served as Special Assistant to the Assistant Secretary of Labor for OSHA. Mr. Barab has also worked with the U.S. Chemical Safety and Hazard Investigation Board and for the House Education and Labor Committee. Thank you for being here, Mr. Barab.

Susan Shinkman is the Director of the Office of Civil Enforcement (OCE) at the Environmental Protection Agency (EPA), a post that she has held since August 2012. Prior to this post, she served as the Chief Counsel to the Pennsylvania Department of Environmental Protection. She also served as Chief Counsel to Pennsylvania's Inspector General (IG) and the Pennsylvania Department of Labor and Industry. Ms. Shinkman also served as Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of Pennsylvania.

I would like to thank you both for appearing here as witnesses. It is the tradition and custom of this Subcommittee to swear in all witnesses, so if you would please stand and raise your right hand.

Do you swear that the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BARAB. I do.

Ms. SHINKMAN. I do.

Senator LANKFORD. Thank you. You may be seated. Let the record reflect the witnesses have answered in the affirmative.

We will use a timing system. You will see a countdown clock in front of you. We are not strict on time except that we have 10:30 votes that are being called today, and so be very attentive to time to make sure that we get plenty of time for your testimony as well as the questions of those that are here at the dais today. Your written testimony will already be a part of the permanent record, so anything in your oral testimony that you would like to share beyond your written testimony is acceptable, whatever may be.

Mr. Barab, typically, we go ladies first, but today, we are making an exception to be able to have you go first, if you are OK with that, and have you be able to kick off today. So, we will receive your testimony now.

TESTIMONY OF JORDAN BARAB,[1] DEPUTY ASSISTANT SECRETARY, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR

Mr. BARAB. Thank you very much. Good morning, Chairman Lankford, Ranking Member Heitkamp, and distinguished Members of the Subcommittee. Thank you for inviting me here today.

As Deputy Assistant Secretary of Labor for the Occupational Safety and Health Administration, I am honored to testify about the important work we are doing. As you know, OSHA's mission is to ensure the safety and health of roughly 130 million workers. Over the last 45 years since OSHA was created, we have made dramatic progress in reducing work-related deaths and injuries, but there is still a great deal more to do.

I would like to begin today by briefly discussing OSHA's investigation and citation process. OSHA recognizes that most employers want to keep their employees safe, but there are still far too many employers who cut corners and fail to protect their employees. For these employers, avoiding OSHA penalties remains an effective incentive.

Under the OSH Act, the Department is authorized to conduct inspections and issue penalties for health and safety hazards. The OSH Act also sets forth the types and amounts of potential penalties. For instance, OSHA penalties for willful or repeat violations have a maximum of $70,000 for each violation. Penalties for serious violations have a maximum of $7,000 per violation. Until recently, these figures have remained static. However, the 2015 bipartisan budget bill passed by Congress raised penalties and provided an opportunity for penalties to be indexed to inflation for the first time.

The primary purpose of the penalties is deterrence. Any funds collected are deposited in the U.S. Treasury and are not used to support agency functions.

OSHA carefully considers the impact of our penalties on small businesses. We take into account several factors. OSHA generally reduces penalties for small employers as well as those acting in good faith and employers with no recent citations. In fact, the average OSHA penalty for a serious violation is roughly $2,000. Sadly,

[1] The prepared statement of Mr. Barab appears in the Appendix on page 28.

these penalties can often seem too low. This is particularly true for incidents involving worker fatalities, where the penalty is often only a few thousand dollars.

Workplace inspections and investigations are conducted by OSHA compliance officers. They are trained safety and health professionals who are given strict procedures that they must follow. OSHA conducts two general types of inspections, programmed and unprogrammed. Programmed inspections account for roughly 46 percent of inspections and specifically target the most dangerous workplaces and the most recalcitrant employers. Unprogrammed inspections account for 54 percent of inspections. They are initiated for several reasons, including worker complaints, referrals, employer reports, and followup inspections.

OSHA's primary goal is correcting hazards, not issuing citations or collecting penalties. As a result, when OSHA issues a citation, we always offer the employer an informal conference with the area director. The agency and the employer may work out a settlement agreement. Last year, 65 percent of inspections with a citation resulted in informal settlements.

Alternatively, employers can formally contest the alleged violations and/or penalties. Last year, this happened in 7.4 percent of cases. These contests were sent to the Occupational Safety and Health Review Commission for independent review.

At the same time, we recognize that most employers want to do the right thing and we are committed to ensuring that they have the tools and information they need. This is why we have made compliance assistance a priority. We work diligently to provide training, educational materials, and consultation services to employers and workers. New OSHA standards and enforcement initiatives are always accompanied by webpages, fact sheets, guidance documents, webinars, interactive training programs, and special products for small businesses.

The cornerstone of this effort is our onsite consultation program for small and medium-sized businesses. Last year, close to 30,000 employers took advantage of this free, high-quality service. A full 87 percent of these visits were to businesses with fewer than 100 employees.

OSHA also continues its strong support for recognizing employers who make safety and health a priority. Through the Safety and Health Achievement Recognition Program (SHARP) and the Voluntary Protection Program (VPP), we recognize employers who have developed outstanding injury and illness prevention programs. SHARP and VPP employers demonstrate that safety pays. They serve as models for other businesses to follow.

Another critical piece of our strategy effort is the Susan Harwood Training Grant Program. This program provides funding to nonprofit organizations for valuable training and technical assistance for vulnerable workers and workers in small businesses.

OSHA also provides additional cooperative programs designed to encourage, assist, and recognize efforts to eliminate hazards and enhance workplace safety and health practices. For example, OSHA has an alliance with the National Service Transmission, Exploration, and Production Safety (STEPS) Network, along with the National Institute for Occupational Safety and Health (NIOSH), to

help employers reduce injuries and fatalities in the oil and gas industry.

Thank you again for the opportunity to testify about the work we are doing every day to improve the safety and health of American workers and how we put great effort into making sure employers have all the necessary tools they need to meet their responsibilities.

I would be pleased to answer any questions you may have.

Senator LANKFORD. Thank you. Ms. Shinkman.

TESTIMONY OF SUSAN SHINKMAN,[1] DIRECTOR, OFFICE OF CIVIL ENFORCEMENT, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. SHINKMAN. Thank you, Mr. Chairman, Ranking Member Heitkamp, and Members of the Subcommittee. I am Susan Shinkman. I am the Director of the Office of Civil Enforcement, an office within EPA's Office of Enforcement and Compliance Assurance. We are responsible for developing and prosecuting civil, administrative, and judicial cases and providing legal support for cases and investigations initiated by EPA regional offices. Thank you for the opportunity to testify about how EPA meets the challenge of ensuring consistent implementation and enforcement of Federal environmental laws and regulations.

Our mission is to protect both human health and the environment by ensuring compliance with environmental laws. EPA regions support the national programs while working to ensure that EPA's work complements State, Tribal, and local environmental priorities.

To provide consistency across the regions and headquarters, the civil enforcement and compliance programs employ statute-specific policies to address compliance monitoring, enforcement responses to violations, and penalty assessments.

EPA recognizes the role of small businesses in the Nation's economy and has developed innovative compliance assistance tools to help the small business community understand and comply with environmental requirements. When a new rule implemented—impacting small entities EPA prepares Small Entity Compliance Guides, which explain the actions that a small entity must take to comply. When EPA conducts an inspection of a small business, we hand out information related to the rights of the small business. Under our small business compliance policy, EPA will eliminate or significantly reduce penalties for small businesses that discover violations and promptly disclose and correct them.

In recognition of these efforts, the Small Business Administration has given EPA's enforcement and compliance program as it affects small businesses an A rating for every year since 2005.

One of the ways that EPA's regional offices, together with their State, local, and Tribal partners, monitor compliance is through inspections of facilities. Inspectors record observations and identify areas of concern, and at the conclusion of the inspection, they will discuss their observations with the regulated entity. If followup is

[1] The prepared statement of Ms. Shinkman appears in the Appendix on page 39.

needed, EPA will work with the regulated entity to remedy the violations.

The vast majority of our enforcement cases are resolved through a settlement. Approximately 90 percent are handled administratively, while larger, more complex matters are usually handled as civil judicial cases in conjunction with the Department of Justice (DOJ).

In addition to injunctive relief to ensure compliance, EPA does seek penalties to achieve deterrence and remove any significant economic benefit resulting from noncompliance. This levels the playing field by preventing companies that break the law from having an unfair competitive advantage. EPA's penalty policies also provide for a reduction in penalty based on ability to pay.

EPA has made tremendous progress toward achieving cleaner air, water, and land over the last four decades. We will continue to work with States, Tribes, and local governments to make smart choices about priorities, to take advantage of innovations, and to ensure that the most important work is done first.

EPA's enforcement program is designed to produce consistent and fair results that achieve compliance, cure noncompliance, deter future violations, and benefit human health and the environment.

Thank you for the opportunity to testify and I would be happy to answer any questions.

Senator LANKFORD. Thank you. Thank you both.

The Chairman and Ranking Member are going to defer our questions toward the end and I would recognize Senator Peters for the first question.

OPENING STATEMENT OF SENATOR PETERS

Senator PETERS. Thank you, Mr. Chairman, and thank you for deferring. I do need to leave to speak on the floor, so I appreciate this opportunity. I will be on the floor talking about the situation we have in Flint, Michigan, and appreciate the opportunity to ask a question of Ms. Shinkman.

Ms. Shinkman, on December 8, 2009, the EPA sent a memorandum to its regional administrators titled, "Proposed Revisions to Enforcement Response Policy for the Public Water System Supervision Program." In this document, which is attributed to an Assistant Administrator in your office at the time, Cynthia Giles, the memo outlines a risk-based approach for enforcement of the Safe Drinking Water Act to target repeat violators by assigning points based on the number and severity of violations. Page six of this document outlines EPA's enforcement response policy model for repeat violators. This policy states, and I quote, "Responses to violations should escalate in formality as the violation continues or occurs."

Additionally, I understand that in those States with primacy over enforcement, EPA is authorized after 30 days under the Safe Drinking Water Act to take certain actions to return a system to compliance. These authorities allow the EPA to issue administrative orders, impose fines, and pursue other civil and even criminal actions. The same EPA policy document explains that most enforcement actions are administrative in nature, but, I quote, "judicial

cases are also an important enforcement tool and the use of judicial authority is encouraged."

So, understanding your agency's wide discretion in decisions of whether to levy fines against violators of our Nation's environmental laws, in the case of the Safe Drinking Water Act, we have a document here that encourages the EPA to seek judicial remedies when formal enforcement actions are necessary, whether in the form of injunctive relief, civil penalties, or criminal action.

With this in mind, I want to direct your attention, as I mentioned, to my home State, in the city of Flint, where we, as you know, have a very difficult situation, where there have been a series of bad decisions that now have subjected the entire city to toxic lead-tainted water. Nearly 2 years ago, an unelected emergency manager that was appointed by Governor Snyder changed Flint's water source to the Flint River in order to save some money, and we know the result of that State decision has been catastrophic.

The water crisis in Flint is an immense failure of Michigan State Government, certainly. The Michigan Department of Environmental Quality (MDEQ) has admitted they failed to properly follow the Federal lead and copper rule and that they chose not to ensure optimal corrosion control treatment was in place going forward.

Your agency's own emergency order invoked under authorities of the Safe Drinking Water Act on January 21 of this year states in its findings of fact, and I quote, "The presence of lead in the city water supply is principally due to the lack of corrosion control treatment after the water source was switched and the city of Flint MDEQ and the State have failed to take adequate measures to protect public health." The emergency order also reserves EPA's right to commence civil action and assess civil penalties in order to ensure compliance with this order.

However, the same document explains that EPA Region 5 staff first expressed concern about the lack of corrosion control back in May. That means the emergency order was issued at a minimum of 7 months after the EPA's concerns were first communicated to the State.

So, if I am reading this law right, the EPA only has to wait 30 days before it can pursue enforcement actions on its own separate from the State, and at the very least, the EPA needs to have some authority to tell the public directly about this health crisis. That is why I have introduced legislation to require the EPA to notify the public after 15 days if a State has not done so. The House passed similar legislation just yesterday.

So, my question to you is fairly simple. If your agency's own policy document encourages judicial action when a situation is escalating, why did the EPA wait so long to take action in Flint?

Ms. SHINKMAN. Senator, I appreciate your question and certainly your concerns. This is a very tragic and catastrophic issue. The authority under the Safe Drinking Water Act is to give primacy to the States to try and do their enforcement and make sure that the Safe Drinking Water Act is properly administered. In this case, clearly, there was a falling down on the appropriate measures. The EPA Regional Office, Region 5, was monitoring what was going on with the State over a period of time. Obviously, a significant amount of time passed in which perhaps other action should have been taken.

My office became aware of it in the fall of last year. We worked with the region. We were monitoring what was going on. And, at the time we became aware of it, there were steps that were being taken. We monitored them as well as we could. When we realized that the situation required emergency action, we took the action on January 21 and issued that order.

The order is very specific. It is issued to the State, the MDEQ, and the city of Flint. It has very specific requirements over a short period of time. We are monitoring that order on a daily, almost hourly, basis to make sure that we try to bring the city back into compliance and improve the drinking water in the city of Flint.

We have taken that action. The most immediate need was to do emergency action. If that does not work, we will obviously be following through with other enforcement actions, potentially judicial.

Senator PETERS. Well, and I know my time has expired, but I realize that you have taken action and have been much more focused on the Flint situation now, which I appreciate. But, why did that not happen months ago? As you know, every month that goes by with tainted water and children, in particular, who are consuming water with lead that creates irreparable damage to their brains, why was this not treated as a crisis immediately?

Ms. SHINKMAN. I cannot answer for everyone who was involved in it. I can say from my office, as we became more aware of it, we moved and we took the most appropriate action we could in January. Other people's actions earlier, I cannot account for all of them. I recognize the fact that it is a very important issue. It is certainly being looked into by a lot of people.

Senator PETERS. So, what do we need to do going forward? How can we prevent this from ever happening again? What sort of actions do we need to take, or is there anything that we need to be doing working with you at the EPA?

Ms. SHINKMAN. From the EPA's standpoint, we are very aware of what happened. We are going to try and make sure it does not happen again. We are looking back at what happened here, and looking forward, we are scouring to make sure that something like that does not ever happen again. The authority is there. The emergency existed. We issued the emergency order. In a similar case, we would certainly issue a similar emergency order as soon as we could.

Senator PETERS. Well, and I understand that there was some confusion within the EPA as to whether or not they should go public or whether or not you should go public with some of the tests that were coming forward, that is why I have introduced legislation with Senator Stabenow to require immediate public disclosure if a State does not take action, if a State is not making these tests available to the public that show elevated levels of lead or other toxins. I believe the House bill has even a quicker timeline of 24 hours that you have to report. Our bill has 15 days.

But, we need to be very clear that if the EPA sees something, that you go public. There should be no ambiguity about that. It should be clear cut, straightforward, that the public has a right to know. Certainly, the State of Michigan bears primary responsibility for this crisis. There is no question about that. They need to step up. They broke it. They need to fix it. But, certainly, I am ex-

tremely disappointed with the EPA's response on this, as are so many people, and I think we can never tolerate the EPA not going public immediately when you have a building crisis of this magnitude.

So, I will continue to work with you and your office and I look forward to working closely so that we can do whatever it takes to make sure that this never, ever happens again.

Thank you.

Senator LANKFORD. Senator Portman.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. Thank you, Mr. Chairman, and let me just start by saying, with regard to Senator Peter's comments on water quality, we are working with the EPA on some issues in my State of Ohio. I do not know if you know Bob Kaplan, your Assistant Administrator, but I have spoken to him directly about some of these same issues. In our case, it is a small community called Sebring, Ohio, and the mayor, Mayor Pinkerton, and I have talked on occasion about, over the last 2 or 3 weeks, about EPA's role. We want to be sure EPA is providing the technical expertise and providing the kind of oversight that they are required to, but also providing transparency.

So, I would ask you today, Ms. Shinkman, because you are here and because this topic is timely, if you could please ensure that, in fact, we are not having another case where the EPA is not providing the right kind of information to the people who are depending on the water supply. We think things are under control in Sebring right now, but in my conversations with Mr. Kaplan, I made it clear that we expect EPA to do its job and to provide the transparency to the people of that community.

Ms. SHINKMAN. I appreciate that, Senator. I am aware of the situation. I believe EPA is directly involved at this point and will continue to monitor it.

Senator PORTMAN. And, I want to thank the Chairman and Ranking Member for holding this hearing. We once again are seeing this Subcommittee do good work, and this is a Subcommittee to look at regulations and, therefore, the regulatory process including regulatory fines and penalties. They roll up their sleeves and jump into this, the Chairman and Ranking Member, and I really appreciate that, because I think there is increasing power in the regulatory system that has not had the proper oversight and this is one area.

If you are a small business person, it is intimidating. You do not have the compliance people to figure out what all these potential regulatory issues are, much less what the fines and penalties might be, and if there is not a consistency in terms of the application and transparency in terms of what the rules are, it makes it very difficult, one, to comply, and two, again, just intimidation of not being able to figure out what the rules are.

Mr. Barab, I did not get to hear your whole testimony, but I got to read some of it just now, and I appreciate your being here today and talking about what OSHA is doing to try to make it easier for people to understand, particularly small businesses, what the rules

are. You have a thousand inspectors out there, is that right? I saw that in your testimony.

Mr. BARAB. Yes, a thousand in the Federal level and probably another 1,100——

Senator PORTMAN. At the State level?

Mr. BARAB [continuing]. Among the 28 State plans.

Senator PORTMAN. Yes. So, you have 2,100 people, at least, but a thousand at the Federal level. That is a lot of people, and if you have the kind of flexibility I saw in your testimony and you have different applications depending on the situation, how do you have consistency, and what are you doing to ensure that there is a consistent application across the agency, understanding that flexibility is something you also want, because in some instances, that flexibility can be very helpful to a small business, to work more as a partner with them to resolve issues rather than an enforcement measure to punish them for something that they did not have the expertise to handle. So, talk about that.

Mr. BARAB. Yes. Thanks for the question. It is a good question, because that is one of our major challenges always, ensuring consistency among our inspectors around the country.

We do train our inspectors very carefully when they first come on and continuously thereafter to ensure that they are complying with the procedures. We have what is known as our Field Operations Manual, which is a notebook about this size which contains all the procedures, all the enforcement procedures, the penalty procedures, the appeal procedures, everything that an inspector needs to make sure that they are doing their job, again, with that consistency, with the transparency that we value.

We monitor that. I mean, we have a whole staff in Washington making sure that our inspectors do follow those procedures. We work very closely with our solicitors, again, when we run into difficult problems, again, to ensure that kind of consistency.

Now, we also do, as you mentioned, have some flexibility there, and I think that is a good thing, because we are dealing with many employers who have a right to, and we listen to their defenses when that happens. We have a process where we have informal conferences after we issue the citations in order to discuss the problems that we found and to talk about possibly reducing fines or changing the citations. So, I think we do try to balance those procedures with some flexibility.

Senator PORTMAN. Thank you. I appreciate that. And, again, your testimony was helpful in that regard and this Subcommittee is going to be looking at ways to increase that transparency and to let people know what the issues are that they have to address, but also, how the fines and penalties work.

And, Ms. Shinkman, my time has now expired, but I assume that you are going to answer this further, how the EPA could increase the transparency in terms of letting people know what is going on. I am going to turn it back to the Chairman and Ranking Member, but I look forward to hearing what your response is to that.

Senator LANKFORD. Ms. Shinkman, if you want to go ahead and answer that, you are certainly welcome to.

Ms. SHINKMAN. Thank you. Yes, we are very concerned about those issues, as well—consistency, transparency, and flexibility in

all of our penalty policies and our regulatory actions. For transparency, we have all of our policies on the web. They are available for anyone and you can see them by statute or by program area. Any of our proposed settlement agreements are open for public comment.

For consistency, we have actually a specific policy for each statute that are applicable across all ten regions and headquarters so we all have the same standards to apply. We have training for our inspectors that is also done across the ten regions and with headquarters.

We are also very concerned about flexibility, because we face big industries and small businesses, and so we have built into all of our policies many standards that we can look to to make sure that we are applying them flexibly. For example, we look at the compliance history of the entity. We certainly look at the size of the entity. That is a big issue for us because of the disparities that we see. We look at the good faith efforts to comply as opposed to willfulness of noncompliance. We look at the duration of any violation. And we also look at the seriousness of it.

And, finally, in any penalty situation, we look at the ability of the violator to pay so that we can be addressing that realistically before we settle on any final penalty.

Senator PORTMAN. Thank you, Mr. Chairman.

Senator PORTMAN. Senator Ernst.

OPENING STATEMENT OF SENATOR ERNST

Senator ERNST. Thank you, Mr. Chairman, and thank you both for your testimony today.

Ms. Shinkman, we do not have to look any further than a lot of headlines out there today to see that the American public does not have a lot of faith nor trust in our government and government officials. That is quite evident with what we see going on in the primaries, the caucuses, and, of course, what we see with a number of agencies across the Federal Government. Could you please tell me the last time that Administrator McCarthy reviewed the procedures of the onsite inspectors.

Ms. SHINKMAN. I am sorry, I cannot answer that. I will be happy to get back to you and look into that.

Senator ERNST. If you would, please.

Ms. SHINKMAN. Sure.

Senator ERNST. And, do you know, has she ever participated in an inspection from start to finish to better understand what our small businesses must do to comply with their inspections?

Ms. SHINKMAN. I will certainly look into that.

Senator ERNST. OK. And, my point of this is that there are a lot of bureaucrats out there that will simply throw out rules and regulations without understanding the full impact from start to finish, both the labor intensity in any of these rules and regulations or the cost to the businesses. I think it is disregarded so many times.

So, I would like to see leaders leading from the front and understanding what they are instructing our civilian population, our companies, our small businesses, to comply with. It is easy to sit in an office and push out rules and regulations, but we need leaders that are willing to go on the ground and actually walk through

these situations with those business owners so they get it. Our American public feels that our bureaucrats do not get it. They have lost touch with what is going on out in the communities.

As you know, EPA's Waters Rule is very concerning to many in my State, as well as many others out there, and I want to take a minute to get some clarity on the interim Clean Water Act settlement penalty policy, and I am going to quote here. It says that, "it sets forth how the agency generally expects to exercise its enforcement discretion in deciding on an appropriate enforcement response and determining an appropriate settlement penalty."

And then I am going to walk you through the formula on how to calculate a penalty. Again, "The settlement penalty is calculated based on this formula. Penalty equals economic benefit plus gravity, plus or minus gravity adjustment factors, minus litigation considerations, minus ability to pay, minus supplemental environmental projects."

My concern that I hope that you can address is that it seems you all have a tremendous amount of discretion when it comes to enforcing a penalty, that is No. 1. And, to be honest, I have never seen a formula with so many variables here. And not only do we have so many variables, it is EPA that decides what the gravity is, what the economic benefit is, what that litigation consideration is, and you also decide what the business's ability to pay is.

This is very confusing, and how is this approach assisting business owners into compliance? It seems like we have the EPA against our businesses, and can you explain this policy.

Ms. SHINKMAN. Thank you, Senator. I will attempt?

Senator ERNST. Very frustrating.

Ms. SHINKMAN. Well, I appreciate that, and those of us who work with it every day perhaps get a little more familiar with it and perhaps lose sight of how it might look to someone for the first time or the second time. So, maybe we need to look at our language a little bit better. But, I can explain a couple of those elements to you——

Senator ERNST. Please.

Ms. SHINKMAN [continuing]. In a way that I hope will be helpful.

Starting from the back, the ability to pay, the only way EPA determines or makes any finding about ability to pay is based on what the violator submits. If we have a penalty amount that seems to be appropriate, and I will get to how that is derived in a minute, but if the entity says that they do not think they can pay, we ask them to explain that and give us some information about why, and we look into realistically whether that is true, based on tax returns or other economic financial statements that a business might provide.

So, the EPA does not pick out from the air what the ability to pay is. We work with the information that is provided by the entity, and we give that opportunity to provide statements about pay, and very often it leads to a reduction in the penalty. So, that is how that determination is made toward the end.

The economic benefit is a way of finding out whether a company that, if not in compliance, benefited by not having to, say, pay for controls that all of their competitors had to pay for. If there is some kind of equipment that costs maybe $10,000 a year to operate and

the entity that was in noncompliance did not install it but all of their competitors did, they received an economic benefit of $10,000 every year that they operated without that control. So, that would be an economic benefit that would be part of the penalty calculation.

Senator ERNST. But, all of this is decided by the EPA, correct?

Ms. SHINKMAN. In discussions with the company. We would not have the information without talking to the company. But, we would ask, if we saw that they did not have the control, we would talk perhaps to the competitors, perhaps we would know what that control cost, and if it was not there, it is an iterative process, coming up with a penalty. Those are two elements that are distinct that you mentioned. That is how the ability to pay works. That is how the economic benefit works.

And then the other considerations that some, I think, were listed as part of what we call the gravity component, that is where the willfulness as opposed to the unknowingness comes in, and the length of the violation—if it was a spill, whether it went on for a month or a day, what the harm was from it. Those are the kinds of considerations that come in, and sometimes in a matrix way that we work with the company on to try to determine what the appropriate penalty is.

And, we resolve most of our cases through settlements by having this discussion. And, rather than just having a free-wheeling, what do you think is appropriate, we set out these guidelines. The economic benefit is one and then the gravity component is built—consists of these other considerations, like damage, length of time, the prior history of the violator.

Senator ERNST. OK. And, I know I am going way over. I am going to make one final point, because we have cases like Senator Peters was just discussing with the Flint water situation, where the EPA did know something. We do not know the full extent of this, but the EPA knew. We have a mine spill that affected a river. Who decides if the EPA is at fault and how much they should be fined for incidents like this?

And, I know you cannot answer that. That is just one of those questions out there that, it seems like the EPA has got so much power and control over so many situations. You try and gain more control through expanded definition of Waters of the United States, but you cannot honestly manage what you already have under your belt.

So, I am going to stop right there, but I appreciate the extra time. Thank you very much.

Senator LANKFORD. Senator Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman.

As someone who once upon a time, when I was tax commissioner, had to write a penalty policy, I sympathize, because frequently, if you just leave it up to discretion without any kind of policy, what you get is the squeaky wheel gets the grease and everybody else who is in exactly the same situation is not treated fairly, if they say, well, I did it, so I am going to pay the penalty. We need to make sure that that does not happen, and so I would just suggest to you that people can be bitter if they find out, boy, I did not get

my penalty waived or reduced, but he did simply because he asked. And, so, I just set that out as one of the concerns.

But, my main reason for wanting to have this hearing and for how I look at this is penalties should be last resort. That should be the very end of enforcement. That should be the end of regulation. That should be reserved for those people who do not get it, who have done something that is, in my opinion, fairly blatant, knowing that they have not been in compliance with the regulation.

I was intrigued by the stakeholder discussions, because I think compliance is why we have penalties, and you should all want, as agency heads, to walk in and never assess a penalty. It means that you are doing your work on the front end in terms of compliance.

And, so, I was interested in the work that OSHA does with stakeholders that you discussed in your testimony. Can you elaborate how you reach out to safety organizations and how you collaborate with manufacturers and stakeholder groups.

Mr. BARAB. Yes. We have a number of means of doing that. First of all, we have a fairly large part of our budget that goes to compliance assistance. I think it is this year about $68 million.

Senator HEITKAMP. What percentage is that?

Mr. BARAB. Well, it is a little over 10 percent, probably 12 percent——

Senator HEITKAMP. You may want to up that a little bit.

Mr. BARAB. Well, it has actually been cut back since—that is one of our budget items that has never really recovered from sequestration, which is rather upsetting, because what that money does largely is go to paying for what we call compliance assistance specialists, which we at one time had one in each one of our 85 area offices. Now, we are not able to quite afford that anymore. And, what these compliance assistance specialists do is they work with businesses to make sure that they are aware of their obligations under the law, that they are aware of best practices, that they are aware of basically how to keep their workplaces safe.

Senator HEITKAMP. North Dakota has a workforce safety program that is State run, and I think it might be one of the—it used to be everybody had State-run systems and now we have transitioned. Can you talk about how you work with the State-based systems? Could you not expand your outreach in terms of workforce safety by working with the insurance agencies?

Mr. BARAB. Yes, and we do try to work with everyone, not only with private sector stakeholders, but with the States. Now, North Dakota is not one of the States that has its own health and safety program, so we are directly responsible for enforcement of health and safety, workplace health and safety.

Senator HEITKAMP. And you have two inspectors in North Dakota.

Mr. BARAB. Yes. We are trying to up that.

Senator HEITKAMP. Yes.

Mr. BARAB. We know there is a major problem there. We are actually opening an office—and right now, we actually have an office that covers South Dakota and North Dakota. We are opening up a new office in South Dakota so that we can put more resources into North Dakota, because we realize, given the oil boom there,

there is a major demand, and, the incidents and injuries and illnesses and fatalities that have come along with that. So, we do try to work very carefully with the States where they have those resources, again, as well as with the private sector in all States.

Senator HEITKAMP. When I served on the board of directors of a large chemical—that is what is was—gasification plant, I mean, we had a safety report before we did anything else, and I think the industry is very interested in workforce safety. It is expensive not to be focused on workforce safety. And, a lot of the programs like the ones that are run by the State of North Dakota encourage compliance and, so, I am trying to basically say, let us not get out there with a "gotcha." Let us get out there and invest a lot of resources in meeting kind of compliance on the front end.

The other thing that will be a bonus as a result of that is you will begin to understand how some of your regulations are perceived and that they do not add value to safety and the workforce. Those are regulations that have been written in Washington, D.C., that, as Senator Ernst talked about, when they are applied, do not necessarily achieve a result that in any way adds value to workforce safety.

And, so, I just really think 10 percent of the compliance budget, or enforcement budget, going to educating and getting people into compliance is an inadequate balance.

I am kind of running out of time, but I would like to know what that split is at EPA.

Ms. SHINKMAN. I do not know offhand what it is. We could certainly get that information for you. We do have compliance programs, particularly for small businesses and for agriculture——

Senator HEITKAMP. Why do you think everybody is so afraid of EPA? No, I mean, I think, you sit here, and I think sometimes EPA feels under siege, but we hear it when we are there. We hear the concerns. We hear the fear. That is not exaggerated and it is not an over-focus of ours. So, what is it about your agency that strikes the fear in the heart of the people you regulate?

Ms. SHINKMAN. I do not think I can answer that directly. I appreciate——

Senator HEITKAMP. I am just making my point. You do not need to try and answer that question. But, I think it is a legitimate point and I think it should cause some soul searching within your agency on why that is and how you can do a better job working with those people.

You can only look at what happened in Flint and realize how critically important it is, what you do. I mean, and that you do what you do well. Flint is a reminder to all of us that we need these agencies. But the question becomes, how do we prevent this from happening, as Senator Peters talked about, but also, how do we develop a better relationship long-term.

Mr. BARAB. Senator, if I could correct one thing I said, I mentioned our $68 million for compliance assistance.

Senator HEITKAMP. Yes.

Mr. BARAB. That is our Federal compliance assistance budget for the services that I mentioned. We also have what I mentioned in my testimony——

Senator HEITKAMP. Right, the State——

Mr. BARAB [continuing]. Which is our consultation budget, which goes totally to small employers, and that is about $50—I think it was $57 million, so that is added to the $68 million that I mentioned before.

Senator HEITKAMP. I will followup with some questions.

Mr. BARAB. OK.

Senator HEITKAMP. And, I am interested in what your plans are for the Dakotas, so——

Mr. BARAB. Sure.

Senator LANKFORD. Let me just give you a couple quotes. As we asked the question, and we let people know that we had this hearing and were trying to gather information and background sources, and I have several stories and things that I can share on it, let me just pull a couple quotes here, just about the fines and the mindset of when inspectors come.

One person told us that they were told that when an inspector came, they said to them, "if it takes all day, we will stay until we find a violation".

One person said, "the EPA views businesses as an ATM to be fined, regardless of the determinations of an investigation".

Another one said, "the determination of whether there is a fine and the amount depended on the mood of the investigator".

Said this one, "there has been a culture change from one of compliance assistance to one of scaring people into compliance".

And then this one, "more stick than carrot". I thought it was interesting.

Now, I would tell you, just interacting with the two of you and hearing your mindset and your view on this, I think if most business folks were sitting across the table from you and talking back and forth, they could work a lot of things out. But, there is a real sense, and what Senator Heitkamp had mentioned before, I have heard from numerous employers saying, if I went back—and people that own small businesses—if I went back 10 years ago, when someone showed up for an inspection, they were extremely helpful to me and they were helping me find safety issues. Now, they show up and they are just a fine.

And something seems to have shifted, and now it has gone from "I am grateful to have the help to walk around the facility with fresh eyes," to, "oh no, they are coming. I am going to have to pay a fine for something, no matter what it is". So, I do not know if you could say what has occurred, but that real life sense is out there, and so this perception that for many is reality, of I do not want an inspector to come help me to find safety violations because I know I am going to have a fine. Even if it costs them all day to stay here, they are going to find something.

Some of this goes back to the training you all talked about before. I know EPA had the wonderful experience of several years ago having someone in Region 6 say, "the way we do this is like the Turks used to do it, to go into town and grab five guys and crucify them. Then there are no problems after that". Obviously, that is not the EPA's attitude as a whole. And, when you talk about trying to train people in regions and making sure it is consistent, that comes to mind immediately when you think there was a region that was most certainly not consistent with the EPA national value.

I am actually going to get to one—my question is, how do you balance out the issue of compliance and the real deterrence that a fine is and being helpful to someone in being able to walk through? We want any business to have a fresh set of eyes to look around for health and safety issues. We do not want them to be able to push us away. How are we currently trying to balance that out to reengage with business, to say, we want to be able to help in the process? And, I will have just both of you mention that.

Ms. SHINKMAN. Thank you. First, I would like to address the disconnect that you have described. Clearly, that is what it is, I hope. Certainly, from EPA's perspective, we really believe in our mission to reduce pollution and protect the health of the communities that we all serve. That really is the mission. That is how we feel about it. I understand that there is a perception out there as you have well described. And, so, we need to work at getting around that disconnect.

I believe there are a couple ways that we have tried. We do have compliance assistance available for small businesses. We have tried to improve on that and making it available.

We have also focused on some of our penalty and enforcement methods to look at ways to deal with small entities, with small violations. We have expanded our—we call them Expedited Settlement Agreements (ESA). These are ways that we can, when there is a small violation seen in the field, we can address it rather quickly. We use this for things like underground storage tanks where there might be a leak, some recordkeeping in some of our chemical violations, things that we see that are small, can be remedied quickly. We try to have what is really a non-negotiable agreement. It is small. These are the facts. We can all agree to them quickly. And we have tried to expand our use of those so that when there is a small violation that can be dealt with quickly, we can use that.

Senator LANKFORD. Can you walk me through the settlement process? And this will be one, Mr. Barab, I want to get a chance to visit with you, as well. You both mentioned the settlement. There is a very clear process, and as Senator Ernst had mentioned before, I get it as far as the benefit and the cost and the risk and all those things. I get the process and going into that.

Ms. SHINKMAN. Sure.

Senator LANKFORD. The challenge is, once you go through that, you set a fine and then there is a process to have a conversation on the settlement. Here is the fine. Now, let us talk about if we are going to settle on it. How does that part of the process work? What is the mechanics of that?

Ms. SHINKMAN. OK. Let me start maybe a little earlier. It really is an incremental process. An inspector goes out and sees that there is a problem.

Senator LANKFORD. Right.

Ms. SHINKMAN. Unless it is an emergency that needs to be addressed immediately, there is usually a discussion about it and then they come back to the office and discuss what, if anything, needs to be done about it from an enforcement perspective.

After that determination is—if there is a violation that actually merits taking enforcement action, then there is a discussion about

what level of enforcement to take. Is this something that can be dealt with administratively by going back and talking about it and seeing whether it is a small, quick resolution or whether it is something that is going to require changes at the facility that would require some investment and some monitoring. An awful lot of them do not, but if they do, there is a further discussion about that.

Senator LANKFORD. Can I ask you a quick question on that? When you find a violation, does that warrant a fine every time?

Ms. SHINKMAN. It depends——

Senator LANKFORD. As far as, do you feel an obligation coming at you either legislatively or from a guidance that if there is a violation, that is a fine?

Ms. SHINKMAN. We have enforcement discretion and we can——

Senator LANKFORD. OK. Mr. Barab, do you all have enforcement discretion, as well? Do you feel that——

Mr. BARAB. I would say, generally, we are required to issue a fine of some sort when we find a violation.

Senator LANKFORD. Every time.

Mr. BARAB. There is some discretion there, but, yes, that is the——

Senator LANKFORD. OK. I want to talk about that. I hate to interrupt you, but I wanted to get some clarity on that to make sure we are heading in the same direction. Go ahead and you can finish, Ms. Shinkman.

Ms. SHINKMAN. So, there is enforcement discretion. We decide whether it is something that within our policies merits further action. That further action may be an administrative order or an agreement that we talk about, we reach agreement that the first thing we want to do is abate whatever the problem is.

Senator LANKFORD. Right.

Ms. SHINKMAN. And, so, that is what is addressed first, whether it is going to require additional action, stopping something, starting something, try to resolve it that way. If we reach that resolution, in most cases, there will be at least some penalty because there was noncompliance, and then we go through the factors to decide how large the penalty is.

In a bigger case, what would happen, generally, is there would be further discussions and there may even be a referral to the Department of Justice, and then there are further discussions within EPA, with the Department of Justice, and with the entity that is out of compliance. So, it is an incremental process, an iterative.

I think a lot of the things that you are hearing about tend to be the small ones. But, the reality is, there is usually a process and there is a lot of dialogue back and forth before there is an ultimate resolution about what injunctive relief or change needs to be made in the processes to make sure that the company is in compliance going forward, what mitigation needs to be done for any damage that might have—like a spill or something like that that needs to be cleaned up, and then, what penalty do we need under the standards that we have.

Senator LANKFORD. We are still back to the settlement thing. The process, how to get there. Once the fine has been—the settlement that you are describing, is that typically a judicial settle-

ment? We are in a court and we are trying to work through that? Or——

Ms. SHINKMAN. It could be both.

Senator LANKFORD [continuing]. What is the other settlement?

Ms. SHINKMAN. The other is administrative, in which case we would have either an order that is appealable or a signed agreement, and that goes through our administrative process to the Environmental Appeals Board.

Senator LANKFORD. And that is a more fluid conversation that is happening——

Ms. SHINKMAN. Yes, it is.

Senator LANKFORD [continuing]. Across the table. We agree on the facts, now, what is a reasonable fine, and you are discussing that process.

Ms. SHINKMAN. We certainly try to reach agreement on all of those. Obviously, we do not always.

Senator LANKFORD. Mr. Barab, is the settlement process pretty similar for you all? Again, I understand once you get to the spot of a fine, an assignment, you had mentioned very well about the exact numbers and the changes that have happened in the Budget Act and such from there. But, I am talking about the settlement process at the end.

Mr. BARAB. Yes. Our process is slightly different than EPA's. Once we finish the inspection, the inspector then goes back to the office. The area director actually has authority over what the penalty will be, assuming any kind of violations have been found.

At that point, the employer has 15 days to contest the citation, if the employer wants to do that. During that 15-day period, there is a chance, and we strongly encourage employers to engage in what we call our informal settlement process. So, the employer comes into the office, the area office, and sits down with our area director and they try to work out some kind of settlement, if possible. And, again, looking at the violations there were, looking at the employer's defenses, looking at the abatement period. All of those things are discussed during that informal period. And, again, in about two-thirds of the cases that we have, we do reach some kind of settlement at that point with the employer.

Now, if no settlement is reached, then within that 15-day period, the employer can contest, legally contest, the citation. That then goes to the Occupational Safety and Health Review Commission. There are Administrative Law Judges (ALJ) that decide that, and that case then moves up that ladder.

Senator LANKFORD. OK. Let me ask the question about the flexibility that you have or do not have on fines. Is it a guidance or is it statutory that if you see a violation, there has to be a fine?

Mr. BARAB. That is statutory, and our maximum penalties are set also by law.

Senator LANKFORD. OK——

Mr. BARAB. But we are also——

Senator LANKFORD [continuing]. But as far as a minimum penalty, that is statutory that it requires——

Mr. BARAB. The only place there is a minimum penalty is with willful violations, and that is a $5,000 minimum, $70,000 maximum. As I mentioned, there are also—by statute, we also have to

consider, as EPA does, size, history, and good faith. So, there are almost always reductions there.

Senator LANKFORD. So, at the end of this, as you all both mentioned that the goal of the penalty is always deterrence, and I get that. But, the goal of the regulation and of the statute is usually health and safety and environmental protection and such, and the fine, the penalty here, becomes a vehicle to help accomplish some of that. But, I do not know of anyone that has written a statute to make sure that we fine some entity, as well. That is the worst case scenario for us.

I give you the easy example we have all experienced. My daughter when she was in high school was pulled over by a police officer because her dad, me, was not helping her watch for things like a headlight that was out. Now, she is also a teenager and she can watch for that herself, but as the dad and the 16-year-old gets pulled over with a headlight out, she was given a warning by the police officer and said, "hey, did you know?" She said, "I did not know, did not catch it." He gave her a warning.

We got back home and spent $125 rearranging the front of her car to do a new headlight. Joy, OK. She got a warning. We fixed it. The health and safety issue of getting both headlights working was accomplished.

What I am trying to figure out is, how much flexibility do your compliance folks have to be able to walk in and say, you know what? That trash can is in the wrong spot, and someone to say, I did not realize. When I walk through manufacturing locations, as you all do all the time, as well, on the wall somewhere, there is a library of four-inch plastic binders that are sitting up there with all the regs and all the requirements and most of the people that run the manufacturing locations live in dread that they have missed a page somewhere from those six four-inch binders that are up there on the wall somewhere trying to make sure that they miss it.

How much flexibility do you feel like you have to be able to help people, to say, you missed one, and it is not necessarily a fine, and it is not necessarily, a leak that is going to damage a lot of folks or was not necessarily health and safety, but they missed one.

Mr. BARAB. There are certainly small things that we correct as we walk around, or ask the employers to correct. There is no doubt about that. But, again, our concern is saving lives, and——

Senator LANKFORD. Sure.

Mr. BARAB [continuing]. Our serious violation, which is only the maximum of $7,000, there is a requirement the way a serious violation is defined in that it has to be likely to cause death or serious physical harm. So, those are, again, fairly serious, as the term is, when we find those, and——

Senator LANKFORD. I have no issue with that. I am talking about minor fines.

Mr. BARAB. Yes.

Senator LANKFORD. One of my manufacturers was fined because he had a shelf in his workspace for one of his workers that was six inches too low. Now, I do not know all the story on that, but I stood on the floor with him and I said, "that shelf right there?" And he

said, "Yes, that shelf right there, we had to raise by six inches and we got a fine for it."

Mr. BARAB. Yes. I mean, we hear stories like that, and generally, when we look into them, usually, there is something else accompanying that with it that is of a more serious nature. But, when we have situations like that, we are always happy to look into them, but it sounds unlikely that there would be any kind of fines——

Senator HEITKAMP. But, I think what we are asking is, let us say you see an extension cord that is located in a location where somebody could trip. That is obviously a hazard. You note it. Are you telling me, because that is a violation, you have to assess a fine?

Mr. BARAB. We also have various means. We have other than serious fines, where they can be very low. We have a quick fix, where we can—if the employer fixes it right away, we can either minimize or, in some cases, eliminate the fine, so——

Senator HEITKAMP. Yes, right there. Stop.

Mr. BARAB [continuing]. OK.

Senator HEITKAMP. You said, "eliminate the fine." So, you do have discretion to not impose any fine——

Mr. BARAB. In exceptional cases——

Senator HEITKAMP [continuing]. Based on——

Mr. BARAB. In general, our law requires us to issue a fine when we find a violation, especially if it is a serious violation. But there are other than serious violations. Now, an extension cord, I mean, that is something that it can cause fires, electrocutions——

Senator HEITKAMP. No, I know.

Mr. BARAB. It is not necessarily—I mean, people throw some things out, but they actually, when you look at them, when we look at the past history——

Senator HEITKAMP. No, I thought it was a good example, because it can be, in the wrong place, incredibly dangerous. But, my point is, I would have to go back and take a look, because I am shocked that you could not waive a fine or a penalty in its entirety given kind of the relationship and compliance and what do they know and lack of knowledge and severity.

So, we will followup. I have to go vote.

Senator LANKFORD. Thank you. We will finish up in just a couple of minutes, because I am going to have to go follow and vote, as well.

This is one of the areas that we want to examine. It is the reason we have this type of hearing and debate. We will dig into it and find out from you all what you need, because I would hope that you are in the same position that we are working on health and safety and making sure we are protecting lives and this is not all about fines. As you mentioned before, the fines are not coming back to the entity themselves, anyway, so this is not a, quote-unquote, "money maker" for the agency. It is a deterrent, but we have to find a way to be able to balance this out.

One of the things that I had noticed was in 2011, the President issued a memorandum for the heads of the executive departments on regulatory compliance. OSHA and EPA were specifically noted in that for being good actors in it and highlighted some of the compliance and enforcement information and how you are making that

publicly available. So, that is a positive thing to say. Your agencies both are building in transparency on the basic issue of compliance and enforcement information.

Not every agency is dealing with this. I am not going to ask you to answer for everyone else. But, the Department of Transportation (DOT) updated their stuff in 2011, and then since 2012, there has been no change at all on their website on the information on compliance and enforcement information.

So, one of the things that we are asking of the administration is to help us, when the information gets out there and is helpful, to make sure all agencies are actually fulfilling that, are getting that information out, which both of your agencies are, but the Department of Transportation is not. So, that kind of consistency is extremely important.

We do need to work with your entities on things like minor violations. Was a poster missing? Was a piece of paperwork missing? Again, I had another agency and another entity that I dealt with as a manufacturer in my State that had not turned in paperwork a particular year saying they had nothing to turn in, and their wrong assumption was, I had nothing to report and so I did not have to turn in that report this year because there was nothing to report. They ended up having a huge fine come down on them for not turning in paperwork saying they had nothing to turn in.

Well, again, that just begs this question of how is that helping health and safety? That is a paperwork violation issue. There should be a, hey, you did not turn that in. You are right, we did not turn it in. But, instead, they had a fairly significant fine that came down on them for that. That is the kind of stuff that we need to figure out, to say, if you feel bound, or if agencies feel bound to be able to do a fine in that type of situation, then we have a problem.

One of our businesses said that they were hesitant to voluntarily invite OSHA into the workplace to do the onsite consultation programs because of their concern over that. Now, I heard from both of you, you want to work especially with small businesses to do the onsite consultation, to be able to help them through that. What is something that can be done to encourage more businesses to say, invite us to come in. We are not coming in to fine you. We are coming in to be able to help, to do almost a pre-inspection inspection.

Mr. BARAB. Yes. I often call our consultation program our best kept secret. It is a wonderful program. We try everything we can to really promote it, not only ourselves, but through associations. And, I want to emphasize, and we try to emphasize this with employers, we fund at least 90 percent of the consultation program. We do not run it, though. We give that money to the States and they run it. So, it is totally separate from OSHA, and that is what we try to emphasize to employers, that this is totally separate from OSHA. It is a free visit, basically, that small employers can receive and everybody should be taking advantage of it.

Senator LANKFORD. But, some are concerned that they should not because they are, for whatever reason—what I am telling you is, it is a good program——

Mr. BARAB. Yes.

Senator LANKFORD [continuing]. And it does focus on health and safety and on compliance on issues and thinking outside the box and some things. There has to be a way to be able to communicate this so that individuals know, hey, this is a neutral spot. Unless there is some major gross something that is here, this is a good spot.

Mr. BARAB. Well, we would love to work with you on ways to do that.

Senator LANKFORD. OK.

Mr. BARAB. There are a lot of myths out there that we would love to be able to combat and we would love to work with you to do that.

Senator LANKFORD. Well, this is something, I am saying, perception and reality. This is a business owner that said it to me directly. Yes, I know there is that type of a consultation. There is no way I would take that. Ms. Shinkman.

Ms. SHINKMAN. And, I would just briefly like to say, particularly for small businesses, we have an audit policy where, if they voluntarily disclose and fix what it is, there is minimal, if any, penalty at all. So, we encourage it. The sooner it is disclosed, the more voluntary audit of themselves to determine what the problems are——

Senator LANKFORD. Is that the eDisclosure program?

Ms. SHINKMAN. Yes, it is.

Senator LANKFORD. OK. Tell me a little bit about how that works, and what I would like to know is, how do you evaluate its effectiveness on how it is actually accomplishing the mission? How do you evaluate that?

Ms. SHINKMAN. Well, it is about 2 months old, so I am not too sure——

Senator LANKFORD. OK. It is a little early, then, yet.

Ms. SHINKMAN. I do not think we can give you any kind of an evaluation. But, it was formed so that we could quickly see these audit disclosures for a number of cases, particularly smaller ones like you have described, and for small businesses where they, through a web portal, give us notice of what they have disclosed—what they are disclosing——

Senator LANKFORD. So, give me an example of some of this, because this is their own safety systems, right, their own safety checks that they are doing. They find something, know it is a violation. Give me an example of something they would turn in and say, hey, we found something. We are going to report it.

Ms. SHINKMAN. We have determined that we do not have the number of containers that we are supposed to for a certain thing, or they have not been updated at a certain time. So, we are going to do that. We discovered it at X date. We did whatever it is to remedy it. It will be done by Y date. And, we are disclosing it to you now and we have a policy for making sure that it is not going to happen again. And, this is all disclosed electronically, and if all of the criteria are met, they will receive a notice that it has been disclosed and their issue would be closed out.

Senator LANKFORD. And, including the benefit? Penalty, as you mentioned before, part of the penalty is did they receive some sort of benefit by delaying that. Would that be waived, as well, or would that be something you guys would look at and go, hey, you did not

change this. You got an arbitrary benefit that other companies did not get.

Ms. SHINKMAN. I think that would not apply here, because part of the criteria is the early disclosure.

Senator LANKFORD. OK.

Ms. SHINKMAN. So, the criteria themselves eliminate those problems.

Senator LANKFORD. OK. That will be one that we want to watch, to be able to see how that works, because that gives a clear set of guidelines out there that people can find and note and to be able to help self-manage. I just want you to know from our Committee, we are going to watch and figure out how that is being evaluated to see if that is something that can be shared with other agencies and entities.

I would also share, as well, and this is just in our ongoing conversation about fees and fines and penalties, we are watching some entities like Fish and Wildlife Service. Fish and Wildlife Service has the opportunity for a penalty or to be able to make a contribution to a third-party organization that is a nonprofit. We are trying to figure out who sets that, who guides that, where does that money go. That is money that would have been to the General Treasury now that is to certain outside third-party entities for mitigation or whatever purposes, and, so, we are asking, I think, a fair question for the taxpayers' behalf.

If it is a fine that goes to the General Treasury or that you donate to a third-party organization, we want to know who picks that and where does that go and what is the long-term benefit of that.

EPA uses Supplemental Environmental Projects (SEPs), but my understanding is that is you can have a penalty or you can basically fix it and here is what we would encourage you to do in some ways. How are those SEPs decided?

Ms. SHINKMAN. Those SEPs are voluntary by the company if they—to set off part of the penalty by doing a project. Let me make it clear that they are never cash donations.

Senator LANKFORD. Right.

Ms. SHINKMAN. They are always voluntary projects to help the environment. There needs to be a nexus between what that project is and what the violation was. There will also always be some cash penalty. It is not 100 percent mitigation against the penalty and——

Senator LANKFORD. Is it typically 80 percent? Because the goal, again, is to deal with health and safety and environment at that point. So, you are saying it could be a control project or monitoring project or something else around them or around the city or around the community——

Ms. SHINKMAN. It could be——

Senator LANKFORD. What does it typically look like?

Ms. SHINKMAN. Typically, it looks like something like a decision to do monitoring for children for asthma or for lead in a certain school district for a certain period of time. The asthma might be the result of a clean air violation. The lead, for a different kind of—the lead monitoring, those sorts of things, purchase of emergency equipment if there has been a violation that is similar to that.

So, here is a policy. We have redone our entire policy so that it is much clearer. We did that last year, so the standards that are necessary to meet—we have strict standards and they are more clearly set out. A small business can get up to 100 percent set off of their penalty. Others, usually, it is around 80 percent. It really depends on the quality and the type of the project. But, it is never money that is just handed to somebody. It is never a project that EPA itself controls.

Senator LANKFORD. Right. EPA is different than other entities on that. There are other entities that are doing mitigation separately to an outside third party rather than a fee or fine, and that is one of the questions we will ask. Obviously, I am not going to ask you to answer for another entity on that.

We are quickly running out of time, and I know you are thoroughly enjoying this conversation, but we do have votes that are happening currently. I have to head over to that. I am not going to hold you over to be able to come back and forth.

I do want to maintain this conversation. What we would ask of you is I am sure that there are ideas that you or your entities would be interested to be able to share ways they can improve this process, whether that be process changes, issues in statute that had become a problem or that create a barrier between the people we serve and those of us who serve them, as you do, as well. That should be fixed and could be fixed. I want you to know, those are the type of things we are also looking for, as well. This is not a one-way conversation.

And for this Committee, we hope to be able to put products out in the days ahead to say, let us help fix some of the broken relationships that we have there and still be able to work on health and safety and environmental protection that need to be done. So, as you have thoughts on that, we are free to hear those and we are interested in those, as well.

I appreciate you being here and for the work that you put into this conversation and we will do some followup with some questions for the record in the days ahead on that.

I would like to make a statement to all that on February 24, this Subcommittee will also hold a hearing examining the burden of Federal statutes and regulations placed on State and local governments, what we have learned since the passage of the Unfunded Mandates Reform Act of 1995, and how the Unfunded Mandates Information and Transparency Act can improve upon those efforts.

This will conclude today's hearing. The hearing record will remain open for 15 days, until the close of business on February 26, for the submission of statements or questions for the record.

With that, thank you very much to our witnesses. This hearing is adjourned.

[Whereupon, at 10:48 a.m., the Subcommittee was adjourned.]

APPENDIX

OPENING STATEMENT FOR SEN. HEIDI HEITKAMP

Regulatory Affairs and Federal Management Subcommittee Hearing
February 11, 2016:

"Examining Agency Discretion in Setting and Enforcing Regulatory Fines and Penalties"

Thank you Chairman Lankford for holding this hearing today, and giving us the opportunity to explore an integral topic in our regulatory system. I am interested in hearing from our witnesses today as we examine how regulatory enforcement is working on the ground to improve compliance, as we identify ways in which Congress and the Administration can work together to improve our regulatory system.

For our nation to be successful and safe, for our citizens to be able to work hard and provide for their families, we need a regulatory process that works for American businesses and families. That means we need have enforcement mechanisms to ensure that everyone is playing by the same set of rules.

To that end, fines, penalties, restitution orders and other sanctions are critical tools that the government has at its disposal to achieve compliance and deter wrongdoers from violating federal laws and regulations. Without such tools, agencies have very little leverage in ensuring the safety and health of our citizens and environment.

However, on the other side of the same coin, I believe that ensuring regulated entities have the necessary resources, and information to successfully comply with regulations should also be of the highest priority. Our aim should be to ensure that we have safe, healthy, and prosperous society. Fines and penalties are a tool to achieve these desired goals.

Therefore, I am also interested in learning how your agencies focus their energy and resources on compliance assistance programs, and ensuring that entities are aware of changes in the regulated industry.

Specifically, I would like to know how both of your agencies work with small businesses to ensure that regulatory requirements are clear, transparent, and accessible. I know that both of your agencies work closely with the Small Business Administration and their Ombudsman's office to ensure that small business's concerns are appropriately addressed.

I look forward to hearing from our witnesses, as well as my colleagues, as we continue to move forward in improving on our regulatory system.

STATEMENT OF
JORDAN BARAB

DEPUTY ASSISTANT SECRETARY
OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION
U.S. DEPARTMENT OF LABOR

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON REGULATORY AFFAIRS AND
FEDERAL MANAGEMENT

U.S. SENATE

FEBRUARY 11, 2016

Introduction

Chairman Lankford, Ranking Member Heitkamp and distinguished Members of the Subcommittee, thank you for inviting me here today. As Deputy Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), I am honored to testify before you about how the Department works with regulated entities and other partners to assure the health, safety and dignity of America's workers.

Under the Occupational Safety and Health (OSH) Act of 1970, employers have the responsibility to provide a workplace free of recognized hazards and to comply with OSHA safety and health standards. This law created OSHA and provided the agency with a range of tools and strategies to ensure employers comply with these requirements and we work to apply them effectively and efficiently.

This year marks the 45th anniversary of the establishment of OSHA, and, by any measure, this agency has been one of the true successes of government efforts to protect workers and promote the public welfare. Only 45 years ago most American workers did not enjoy the basic human right to be safe in their workplace. Instead, employees were given a choice: they could continue working under dangerous conditions, risking their lives, or they could move on to another job. Passage of the OSH Act laid the foundation for the great progress we have made in worker safety and health since those days.

Working together, OSHA, our state partners, employers, unions, trade organizations and health and safety professionals have made great strides in reducing the incidence of workplace injuries, illnesses and fatalities. In 1970, an estimated 14,000 workers were killed on the job, an annual rate of 18 per 100,000 or about 38 workers every day. Today, with a workforce almost twice as large, that rate has fallen to 3.3 per 100,000, or about 13 workers killed every day according to the Bureau of Labor Statistics Census of Fatal Occupational Injuries. Injuries and illnesses also are down dramatically – from 10.9 per 100 workers in private industry per year in 1972 to 3.2 per 100 workers in 2014.

While these advances represent great progress, 13 deaths a day is still 13 too many. In addition to workplace fatalities, according to the Bureau of Labor Statistics (BLS), private and public sector employees experienced almost 4 million serious job related injuries and illnesses in 2014. Another estimated 50,000 Americans died from occupational diseases, resulting in a loss of 150 workers each day from hazardous working conditions. It is now widely recognized that these statistics, although alarmingly high, are an underestimate – that most occupational illnesses go uncounted and that the actual number of workers who are injured or sickened on the job annually is substantially higher.[1]

[1] *See, for example*: Wuellner, S. E. and Bonauto, D. K. (2014), "Exploring the relationship between employer recordkeeping and underreporting in the BLS Survey of Occupational Injuries and Illnesses." Am. J. Ind. Med., 57: 1133–1143. doi: 10.1002/ajim.22350. *See more at*: http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2014/08/29/new-study-points-to-significant-underreporting-of-injuries-to-bureau-of-labor-statistics.aspx#sthash.7xn3UQJk.dpuf

Workplace injuries and illnesses cause an enormous amount of physical, financial and emotional hardship for individual workers and their families. Combined with insufficient workers' compensation benefits, these injuries and illnesses cannot only cause physical pain and suffering but also loss of employment and wages, burdensome debt, inability to maintain a previous standard of living, loss of home ownership and even bankruptcy. At the same time, costs to employers of workplace injuries and illnesses are also substantial, including workers' compensation payments, decreased productivity, lower employee morale and the costs of replacing injured workers.

These harsh realities underscore the urgent need for employers to provide a safe workplace for their employees as the law requires. That is why OSHA continues to work with employers, workers, community organizations, unions and others, with the goal of enabling all workers to go home safely at the end of every work day.

Overview of OSHA

OSHA's mission is to assure safe and healthful working conditions for working men and women by setting and enforcing standards and providing training, guidance, outreach, education, and compliance assistance. With a budget of approximately $550 million, OSHA has a staff of 2,200, including over 1,000 inspectors. States with OSHA-approved state job safety and health plans have at least an additional 1,100 inspectors. Field activities are directed by ten regional administrators, who supervise approximately 85 local area offices throughout the United States. OSHA has approximately 350 staff in the National Office.

The OSH Act covers employers and their employees in the 50 states, the District of Columbia, Puerto Rico, and other U.S. territories. Coverage is provided either directly by the Federal OSHA or by an OSHA-approved state job safety and health plan. The OSH Act defines an employer as any "person engaged in a business affecting commerce who has employees, but does not directly cover public employees." State plan states cover public employees, and federal employees are covered by OSHA under Executive Order 12196, Occupational Safety and Health Programs for Federal Employees.

Thus, we are a small agency with a very large mission – the safety and health of roughly 130 million workers, employed in somewhere between 7 and 8 million workplaces all across the country. OSHA and its state partners are accomplishing the gains discussed above with relatively fewer personnel. In the late 1970s, there were about 36 federal and state compliance officers for every million covered workers. Currently, there are fewer than 20 inspectors for every million covered workers.

We carefully leverage our limited resources for maximum impact. OSHA recognizes that most employers want to keep their employees safe and protect them from workplace hazards. But there are still far too many employers that knowingly cut corners on safety and neglect well recognized OSHA standards and common sense safety measures. For these employers, avoiding OSHA penalties remains an effective incentive to comply with the law and protect their employees.

We also don't want to waste taxpayer dollars or employers' valuable time inspecting workplaces that are already doing the right thing. For that reason, OSHA's enforcement program strives to target the most dangerous workplaces, where workers are most likely to be hurt on the job. OSHA's

penalty system takes into account the size and behavior of employers, with higher fines for repeated and willful violations, and substantial discounts for small employers.

At the same time, OSHA provides extensive assistance to employers who want to protect their workers, through our website and publications, webinars, training programs and more, many geared toward small- and mid-sized employers. In addition, OSHA provides free and confidential on-site consultations for small- and medium-size employers that request assistance in protecting their workers and complying with OSHA standards. OSHA also provides additional cooperative programs designed to encourage, assist and recognize efforts to eliminate hazards and enhance workplace safety and health practices.

The OSH Act Provisions and Requirements

The OSH Act assigns OSHA two principal functions: setting standards and conducting inspections to ensure that employers are providing safe and healthful workplaces. OSHA standards may require that employers adopt certain practices, means, methods, or processes reasonably necessary and appropriate to protect workers on the job.

Compliance with standards may include implementing engineering controls to limit exposures to physical hazards and toxic substances, implementing administrative controls, as well as ensuring that employees have been provided with, have been effectively trained on, and use personal protective equipment when required for safety and health, where the former controls cannot be feasibly implemented. The OSHA standard setting process is lengthy and complex, with multiple opportunities for public input at various stages of the process.

Federal OSHA Standards are grouped into four major categories: general industry (29 CFR 1910); construction (29 CFR 1926); maritime - shipyards, marine terminals, and longshoring (29 CFR 1915-19); and agriculture (29 CFR 1928). While some standards are specific to just one category, others apply across industries. Among the standards and regulations with similar requirements for all sectors of industry are those that address access to medical and exposure records, personal protective equipment, and hazard communication.

OSHA's safety and health standards – including rules for asbestos, fall protection, cotton dust, trenching, machine guarding, benzene, lead and bloodborne pathogens – have prevented countless work-related injuries, illnesses and deaths. For example, OSHA's 1978 Cotton Dust standard helped drive down the rates of brown lung disease among textile workers from 12 percent to 1 percent. Since OSHA enacted the grain handling standard in the late 1980s, there has been a significant reduction in grain explosions resulting in far fewer worker injuries and deaths. Since OSHA revised the excavation and trenching standard in 1989, fatal trenching injuries have decreased significantly, even as construction activities have increased. OSHA's Bloodborne Pathogens Standard and the Needlestick Safety and Prevention Act have made occupationally acquired Hepatitis B infections a thing of the past for healthcare workers.

The OSH Act also encourages states to develop and operate their own job safety and health programs. OSHA approves and monitors these "state plans," which operate under the authority of state law. There are currently 28 OSHA State Plan States, of which 22 states and jurisdictions operate complete state plans (covering both the private sector and state and local government employees) and six (Connecticut, New Jersey, New York, Illinois, Maine, and the Virgin Islands)

that cover state and local government employees only. States with OSHA-approved job safety and health plans must have programs that are at least as effective as the federal program.

OSH Act Penalties

Under the OSH Act, OSHA is authorized to conduct workplace inspections and investigations to determine whether employers are complying with standards and regulations issued by the agency for safe and healthful workplaces. OSHA also enforces Section 5(a)(1) of the OSH Act, known as the "General Duty Clause," which requires that every working man and woman must be provided with a safe and healthful workplace. OSHA has very detailed inspection and citation processes that are outlined in OSHA's Field Operations Manual, publicly available on the OSHA website and discussed in greater detail later in my testimony.[2]

The OSH Act authorizes OSHA to issue penalties for hazards and violations that threaten the health and safety of workers and sets forth the types and amounts of potential penalties. OSHA penalties are not specific to the standard being violated; they are instead specific to the nature of the violation. The OSH Act specifies different types of citations including serious, other-than-serious, willful, or repeated.

1. Serious: According to the OSH Act, "A serious violation shall be deemed to exist if there is a substantial probability that death or serious physical harm could result".

2. Other-than-Serious: Other-than-serious violations are not statutorily defined, but OSHA characterizes violations as other-than-serious in situations where the injury or illness that would be most likely to result from a hazardous condition would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees. For example, failure to designate a "Caution" area specifically with yellow markings, as required by 29 CFR 1910.144(a)(3) would most likely be an Other Than Serious violation. A failure to give employees information on respirators to those employees voluntarily using dust masks would most likely be an Other Than Serious violation of 29 CFR 1910.134(c)(2)(i).

3. Willful: A willful violation exists where an employer has demonstrated either an intentional disregard for the requirements of the OSH Act or a plain indifference to employee safety and health.

4. Repeat: An employer may be cited for a repeat violation if that employer has been cited within the previous five years for the same or a substantially similar condition or hazard and the citation has become a final order of the Occupational Safety and Health Review Commission. Substantially similar conditions may include a violation of the same hazardous condition but in different circumstances, such as two different types of unguarded machines. Although the hazard is the same, the way the employee is exposed to the hazard can be different. For example, a violation can be substantially similar even though the initial violation and hazard involved a different type of machine (e.g. unguarded press brake versus an unguarded drill press).

[2] https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf

Under Section 17 of the OSH Act, OSHA penalties for "willful" or "repeat" violations have a maximum civil penalty of $70,000 but not less than $5,000 for each willful violation.[3] Penalties for "serious" violations have a maximum of $7,000 per violation.[4] Until recent Congressional action, these figures have remained static since 1990, and have not been properly indexed to inflation. However, the budget bill passed by Congress and signed by the President in November 2015 provides an opportunity for the penalties to be increased and appropriately indexed to inflation going forward.

The purpose of the penalties is deterrence. Funds collected by OSHA for employer fines are deposited with the U.S. Treasury as required under the OSH Act, which states that "[c]ivil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States."[5] OSHA does not have authority to use penalty funds for agency operations.

OSHA carefully considers the impact of our penalties on small businesses. The OSH Act requires OSHA to take into account several factors in setting penalties, including size of the employer, history and good faith. In setting a penalty, OSHA generally reduces penalties for small employers, as well as for employers who are shown to be acting in good faith or have a history of no OSHA citations over the previous 5 years. Good faith penalty reductions are not applied to "high gravity serious," "willful," "repeat" and "failure to abate" violations. For serious violations, OSHA may also reduce the proposed penalty based on the gravity of the alleged violation. The current average OSHA penalty for a serious violation is currently very low at around $2,000 for all employers.

Inspections and Citation Process

Workplace inspections and investigations are conducted by OSHA compliance safety and health officers (CSHOs or compliance officers) who are safety and health professionals trained in the disciplines of safety and industrial hygiene. OSHA CSHOs are given strict procedures that they must follow.

OSHA conducts two general types of inspections: programmed and unprogrammed. Programmed inspections accounted for 46% of FY 2015 OSHA inspections and target specific high-hazard industries or individual workplaces that have experienced high rates of injuries and illnesses. For instance, Special Emphasis Programs (SEPs) are the primary means by which OSHA attempts to focus on the most dangerous workplaces. SEPs provide for programmed inspections of establishments in industries with high injury or illness rates and are also based on potential exposure to health hazards. Before any enforcement activities begin under any emphasis program, OSHA conducts robust and comprehensive outreach activities, educating employers about the program and providing ways to get help to abate hazards.

In addition, unprogrammed inspections accounted for 54% of OSHA inspections and are initiated for several reasons, including:

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[3] 29 U.S.C. §666.
[4] Id.
[5] Id.

- Worker complaints of hazards or violations.
- Referrals of hazards from other federal, state or local agencies, individuals, organizations or the media. (For example, if OSHA is informed of a hazard, injury, or fatality through a news report, the Agency may open an investigation. Likewise, if another agency informs OSHA about a hazard, injury, or fatality that it has observed, OSHA may initiate an investigation.)
- Employer reports of fatalities, inpatient hospitalizations, amputations, or loss of an eye.
- Follow-up inspections to check for abatement of violations cited during previous inspections.

Preparation

Before conducting an inspection, OSHA compliance officers research the inspection history of a worksite and review the operations and processes in use and the standards most likely to apply. They also gather appropriate personal protective equipment and testing instruments to measure potential hazards.

Opening Conference

The on-site inspection begins with the presentation of the compliance officer's credentials, which include both a photograph and a serial number. The compliance officer will begin by explaining why OSHA selected the workplace for inspection and describe the scope of the inspection, how it will be conducted, employee representation, and employee interviews.

Physical Inspection

Following the opening conference, the employer selects a representative to accompany the compliance officer during the inspection. An authorized representative of the employees, if the employees select one, also has the right to go along. In all inspections, the compliance officer will select and privately interview a reasonable number of employees during the inspection. The compliance officer and the employer and employee representatives will then walk through the portions of the workplace covered by the inspection, inspecting for hazards that could lead to employee injury or illness. The compliance officer will also review worksite injury and illness records and ensure the posting of the official OSHA poster. Compliance officers attempt to minimize work interruptions during the inspection and will keep confidential any trade secrets they observe.

During the walkaround, compliance officers may point out some apparent violations that can be corrected immediately. While these hazards are still cited, prompt correction is a sign of good faith on the part of the employer, and may result in penalty reductions under OSHA's "Quick-Fix" incentive program. "Quick-Fix" is an abatement incentive program meant to encourage employers immediately to abate hazards found during an OSHA inspection, and thereby, quickly prevent potential employee injury, illness, and death. "Quick-Fix" does not apply to all violations. For example, "Quick-Fix" incentives only apply to violations classified as "other-than-serious," "low-gravity serious" or "moderate gravity serious", and not to "high gravity serious," "repeat," "willful," or "failure to abate" violations. Only corrective actions that are permanent and substantial, not temporary or cosmetic, are eligible for "Quick-Fix" penalty reductions.

Closing Conference

After the walkaround, the compliance officer holds a closing conference with the employer and the employee representatives to discuss the findings. The compliance officer discusses possible courses of action an employer may take following an inspection, which could include an informal conference with OSHA or contesting possible citations and proposed penalties. The compliance officer also discusses consultation services and employee rights.

Results

OSHA inspectors do not themselves issue citations or assess fines; they report conditions found during an inspection to their Area Director who may issue citations and propose fines. OSHA must issue any citation and proposed penalty within six months of the violation's occurrence. Citations describe OSHA requirements allegedly violated, list any proposed penalties and give a deadline for correcting the alleged hazards.

In FY 2015, OSHA issued 63,575 violations, of which 74% were cited as serious. Based on FY2015 inspection activity, more than 9,300 hazards associated with illnesses in construction and general industry were abated. Each of these means that one or more workers were removed from hazards that could have injured or possibly killed them.

Appeals

OSHA's primary goal is correcting hazards and maintaining compliance rather than issuing citations or collecting penalties. When OSHA issues a citation to an employer, it also always offers the employer an opportunity for an informal conference with the OSHA Area Director to discuss citations, penalties, abatement dates or any other information pertinent to the inspection. The agency and the employer may work out a settlement agreement to resolve the matter and to eliminate the hazard. In FY 2015, 65% of inspections with a citation resulted in informal or expedited settlements between the employer and OSHA and the average penalty reduction resulting from an informal settlement agreement was around 41.3%.

Alternatively, employers have 15 working days after receipt of citations and proposed penalties to formally contest the alleged violations and/or penalties by sending a written notice to the Area Director. In FY 2015, employers contested violations and/or penalties in 7.4% of cases. OSHA forwards the contest to the Occupational Safety and Health Review Commission (OSHRC) for independent review. Citations, penalties and abatement dates that are not challenged by the employer or settled become a final order of the OSHRC. Employers and other parties may appeal commission rulings to the appropriate U.S. Court of Appeals. Note that if a violation is contested, OSHA cannot order abatement and payment of penalties for those items contested until the OSHRC proceedings are concluded.

Whistleblower Protections

To help ensure that workers are free to participate in safety and health activities, Section 11(c) of the OSH Act prohibits any person from discharging or in any manner retaliating against any worker for exercising rights under the OSH Act. These rights include raising safety and health concerns with an employer, reporting a work-related injury or illness, filing a complaint with OSHA, seeking

an OSHA inspection, participating in an OSHA inspection and participating or testifying in any proceeding related to an OSHA inspection. Protection from retaliation means that an employer cannot retaliate by taking "adverse action" against workers, for example, by firing, blacklisting, demoting, threatening, or reducing pay for a whistleblower. Employees who believe they are facing retaliation for exercising their rights must file a retaliation complaint with OSHA within 30 calendar days from the date of the alleged retaliation.

Compliance Assistance

Another major component of OSHA's strategy to protect workers is compliance assistance. OSHA maintains a substantial and diverse compliance assistance program that provides extensive assistance to employers of all sizes, but particularly to small businesses. Our commitment to compliance assistance continues to be strong, despite fewer appropriated funds for these activities since sequestration.

There are several principles under which our compliance assistance program operates:

- We believe that no employer, large or small, should fail to provide a safe workplace simply because it can't get accurate and timely information about how to address workplace safety or health problems or how to implement OSHA standards.
- All workers, no matter what language they speak or who their employer is, should be knowledgeable about the hazards they face, the protections they need and their rights under the OSH Act.
- Employers that achieve excellence in their health and safety programs should receive recognition.

On-site Consultation Program

OSHA's primary compliance assistance program is its On-site Consultation Program. We understand that most small businesses want to protect their employees, but often cannot afford to hire a health and safety professional. This help for small businesses is critical both for the health of these businesses and for the safety and health of the millions of workers employed by small businesses.

OSHA's On-site Consultation Program is designed to provide professional, high-quality, individualized assistance to small businesses at no cost. This service, budgeted at $57.8 million, provides free and confidential workplace safety and health evaluations and advice to small and medium-sized businesses with 250 or fewer employees, and run by the states, separate and independent from federal or state OSHA's enforcement programs.

In FY 2015, OSHA's On-site Consultation Program conducted more than 27,800 free visits to small and medium-sized business worksites, helping to remove more than 3.5 million workers from hazards nationwide. A full 87% of those visits were to businesses with fewer than 100 employees.

This program doesn't just help protect workers; it also helps businesses save money. After numerous years of reporting relatively low injury cases, Chemung Advocacy, Resources and Care (ARC), of Elmira, New York, which was established by parents interested in providing support services for their developmentally disabled children, experienced a spike in recordable injuries and

requested a free consultation visit from OSHA's On-site Consultation Program, administered by the New York State Department of Labor.

Chemung ARC corrected all of the hazards identified by the consultant. By the following year, the company's Days Away from Work, Restricted Work or Job Transfer (DART) rate had dropped to 58% of the average rate reported by the BLS for the vocational rehabilitation services industry. In addition, the organization's Total Recordable Case rates dropped from 4.0 to 1.0 (compared to the industry incidence rate of 5.7 in 2014) over a two-year period. The reduction in recordable injuries had a direct impact on the company's workers' compensation costs – its premiums dropped 12.5% in the year following the free onsite consultation visit.
OSHA also continues its strong support for recognizing those employers who "get" safety. For small employers, the OSHA On-site Consultation Program's Safety and Health Achievement Recognition Program or SHARP program, recognizes small businesses that have achieved excellence. In addition, OSHA's Voluntary Protection Program (VPP) recognizes employers and workers in industry and federal agencies who have implemented effective safety and health management systems and who maintain injury and illness rates below the national average for their industries. In order to participate in these programs, employers commit to implement model safety and health program management systems that go far beyond OSHA's requirements. These employers demonstrate that "safety pays" and serve as a model to all businesses.

Outreach and Training

For the vast majority of employers who want to do the right thing, we want to put the right tools in their hands to maintain a safe and healthful workplace. That is why we invest in our compliance assistance materials. New OSHA standards and enforcement initiatives are always accompanied by web pages, fact sheets, guidance documents, on-line webinars, interactive training programs and special products for small businesses. In addition, our compliance assistance specialists, found in most of our 85 Area Offices across the nation, supplement this with a robust outreach and education program for employers and workers.

A major initiative of this administration has been increased outreach to hard-to-reach vulnerable workers, including those who have limited English proficiency. These employees are often employed in the most hazardous jobs, particularly in construction, and may not have the same employer from one week to the next. We have particularly focused on Latino workers and others for whom English is not a first language. Latino workers suffer higher work related fatality and injury rates on the job than other workers, often because they are in the most dangerous jobs and do not receive proper training.

Another critical piece of our strategic effort to prevent workplace fatalities, injuries and illnesses is training about job hazards and protections. OSHA's Susan Harwood Training grant program provides funding for valuable training and technical assistance to non-profit organizations – employer associations, universities, community colleges, unions, and community and faith based organizations. This program focuses on providing training to workers in high risk industries and is also increasing its focus on organizations involved in training vulnerable, limited English speaking and other hard-to-reach workers to assure that those workers receive the training they need to be safe and healthy in the workplace.

Alliances and Strategic Partnerships

Where an extra effort is needed in an industry, or there are insufficient standards, OSHA often partners with employers, workers, professional or trade associations, labor organizations, and other interested stakeholders through alliances and strategic partnerships to encourage, assist, and recognize efforts to eliminate serious hazards and enhance workplace safety and health practices in specific industries.

For example, OSHA has worked through an alliance with the National Service, Transmission, Exploration & Production Safety (STEPS) Network and the National Institute for Occupational Safety and Health (NIOSH) to help employers reduce injuries and fatalities in the oil and gas industry. And, we've worked with the American Staffing Association to insist that both host employers and staffing agencies understand their responsibilities to protect temporary workers on the job, and provide them the same protections as all other workers.

We have also joined with stakeholders in the construction industry in an unprecedented nationwide outreach effort to prevent fatal falls in construction. And, in the growing telecommunications industry, we have worked with the Federal Communications Commission, the National Association of Tower Erectors, and leaders in the telecommunications industry to initiate a working group aimed at developing and implementing recommended safety practices for preventing tower worker deaths.

Conclusion

We continue to work hard each and every day to ensure employers are protecting their workers from the myriad of safety and health hazards in workplaces across this country. And, we put great effort into making sure employers have all the necessary tools required to meet their responsibilities. We believe that with our current resources, the balanced approach of targeted enforcement and extensive compliance assistance is the most effective and efficient way for us to achieve our mission.

I want to thank you again for inviting me to this hearing to detail the work that we do. I look forward to your questions.

Testimony of Susan Shinkman, Director, Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Before the
Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management

Thursday, February 11, 2016

Mr. Chairman, Ranking Member Heitkamp, distinguished Members of the Subcommittee, I am Susan Shinkman, Director of EPA's Office of Civil Enforcement. The Office of Civil Enforcement, or (OCE), is an office within the Office of Enforcement and Compliance Assurance, responsible for developing and prosecuting civil administrative and judicial cases and providing legal support for cases and investigations initiated by EPA regional offices.

Thank you for the opportunity to testify about how the EPA meets the challenge of ensuring consistent implementation and enforcement of federal environmental laws and regulations. I will be focusing my remarks on how the EPA uses various tools to provide for consistency and transparency in the agency's enforcement and compliance program, and for flexibility to ensure fairness – particularly for small business – and a level playing field for the regulated community as a whole.

EPA's Mission

EPA's mission is to protect both human health and the natural environment across the varied national landscape by ensuring compliance with environmental laws of the United States. The EPA must accomplish these protections by implementing 28 different environmental programs contained in 11 different environmental statutes, each with its own mechanism for

achieving its goals. Because most of these laws also provide for states and tribes to implement these statutory programs, the EPA often has the dual role of maintaining a significant federal enforcement program while promoting effective state and tribal enforcement.

Consistency in Enforcement

Most EPA programs are implemented by the ten regional offices, with Headquarters maintaining responsibility for national program oversight and direction. The regional offices support the national programs while tailoring their expertise and work to address regional issues. They also work with their state, local and tribal counterparts to ensure that EPA's work, as appropriate, complements state and tribal environmental priorities.

The Enforcement and Compliance Assurance program employs statute-specific policies and guidance to address compliance monitoring, enforcement responses to violations, and penalty assessment, all of which were created to provide consistency across the regions and Headquarters. Cross-statutory policies include guidance on the use of expedited settlements with lower penalties for prompt compliance, guidance on evaluating a violator's ability to pay civil penalties, policies providing for substantial penalty reductions for large and small businesses and communities that self-disclose and promptly correct violations, the Supplemental Environmental Projects Policy, and model administrative orders and judicial consent decrees.

The Need for Flexibility

The EPA recognizes that unique or differing circumstances may be faced by different members of the regulated community. For example, the fact that enforcement actions in different locations for the same type of violation may result in different penalties does not necessarily indicate an inconsistency or disparity. Instead, the flexibilities inherent in the enforcement

program may allow for a lower penalty to reflect mitigation or a supplemental environmentally beneficial project that a settling party agreed to undertake, or that one party was a small business whose financial resources were taken into account as provided in our policies for determining penalties. A higher penalty could reflect exacerbating circumstances, such as the duration of the violation or the severity of any environmental damage that resulted from the violation.

While penalties are an important tool to encourage compliance and ensure that a violator does not obtain an unfair competitive economic advantage over its competitor who complied with the law – the ultimate goal of the program is to obtain compliance with the environmental laws of the United States. In addition, the EPA uses a range of strategies, including compliance assistance techniques, like web-based information, regulatory fact sheets and implementation manuals, webinars and workshops. We actively engage in compliance monitoring activities, such as collecting and reviewing compliance information reported by facilities, conducting inspections and performing compliance evaluations. The EPA offers compliance incentives, such as favorable settlements through EPA's new e-Disclosure Audit Policy or its Small Business Compliance Policy. And, where necessary, we take enforcement actions.

Compliance Incentives and Support for Small Businesses

The EPA recognizes the role and position of small businesses in the nation's economy, and the kinds of challenges they face. To that end, the Agency has developed innovative compliance assistance tools to help the regulated community understand and comply with environmental requirements – particularly small businesses. First, the EPA prepares Small Entity Compliance Guides when a rule may have a significant economic impact on small entities, pursuant to the Small Business Regulatory Enforcement Fairness Act (SBREFA). These Compliance Guides explain in plain English the actions that a small entity must take to comply

with the rule. Second, the EPA works with outside organizations to operate 15 web-based Compliance Assistance Centers that have received over 2.5 million visitors in FY 2015. The EPA also maintains a number of topic specific hotlines for responding to requests for information.

EPA's enforcement policies and practices are also designed to accommodate small businesses. For example, whenever the EPA conducts an inspection of a small business, we provide a handout with information related to the rights of a small business under SBREFA, and other information and opportunities for assistance. In addition, each of the statute-specific penalty policies can be scaled according to the size of the business, ensuring that the penalties sought for a violator are proportional. Moreover, under our Small Business Compliance Policy, the EPA will eliminate or significantly reduce penalties for small businesses that voluntarily discover violations of environmental law and promptly disclose and correct them. In recognition of these efforts, the Small Business Administration has given EPA's Enforcement and Compliance Program as it affects small businesses an "A" rating every year since 2005.

Overview of the Enforcement Process

EPA's regional offices, together with their state, local and tribal partners, monitor compliance through inspections of facilities and other activities to gather compliance-related information. During an inspection, inspectors record observations of fact and identify any areas of concern. At the conclusion of the inspection, the inspector will discuss those observations with the regulated entity and answer questions. After an inspection is completed, the results of the inspection will be reviewed by the inspector's supervisor. If follow-up is determined to be appropriate under the statute-specific enforcement response policy, the EPA will work with the regulated entity to remedy the violation and resolve the enforcement action. The vast majority of

all cases brought by the EPA are resolved on consent, through a mutually agreeable settlement. Most cases, approximately 90 percent, are handled administratively, while larger, more complex matters are usually handled as civil judicial cases, in conjunction with the U.S. Department of Justice. Civil judicial cases are often brought jointly by both the EPA and states. EPA's objective in all cases is to secure compliance with the law in order to protect the environment and to safeguard communities from exposure to unhealthy pollutants and to ensure a result that is fair – to the defendant, to the defendant's competitors, and to the public affected by the violations.

In light of constrained budgetary resources, the EPA is continuing to seek new and innovative ways to increase compliance and reduce pollution in our enforcement and compliance cases. As an example, Next Generation Compliance includes innovative approaches to settlements, permits and rulemaking with compliance drivers built in, such as fenceline monitoring of air emissions, e-reporting, and public posting of environmental monitoring data to increase transparency. These tools promote efficiency and cost savings to industry, small businesses, and the government. Real time data enables increased protection of public health and the environment.

Penalties

Deterrence is an important goal of penalty assessment. Penalties seek to achieve deterrence by removing any significant economic benefit resulting from noncompliance – this levels the playing field by preventing companies that break the law from having an unfair competitive advantage over companies that are in compliance with the law. In addition, a penalty includes an amount beyond recovery of the economic benefit to reflect the seriousness of the violation. The portion of the penalty that recovers the economic benefit of noncompliance is referred to as the "economic benefit component;" that portion of the penalty which reflects the

seriousness of the violation is referred to as the "gravity component." The EPA is guided in assessing penalties under the environmental statutes by EPA's enforcement response and penalty policies which seek to ensure that the EPA assesses fair and equitable civil penalties and provide consistency across the regions and Headquarters. EPA's existing penalty policies for air, water and hazardous waste have always provided for a reduction in penalties based on "ability to pay."

Conclusion

The EPA has made tremendous progress toward achieving cleaner air, water and land over the last four decades. We will continue to work with states, tribes and local governments to make smart choices about priorities, to take advantage of innovations, and make sure that the most important work is done first. That goal cannot be achieved without a flexible enforcement and compliance program that acknowledges and allows for the diversity in our nation's environmental, economic and demographic conditions. EPA's enforcement program is designed to produce consistent and fair results that achieve compliance, cure noncompliance, deter future violations, and benefit human health and the environment.

Thank you for the opportunity to testify. I would be happy to answer any questions.

Post-Hearing Questions for the Record
Submitted to Mr. Jordan Barab
Deputy Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
From Senator James Lankford

"Examining Agency Discretion in Setting and Enforcing Regulatory Fines and Penalties"
February 11, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

On Small Businesses

1. Many small businesses feel overwhelmed by the number of regulations they must be aware of and follow. How do you ensure that businesses are aware of all the regulations they are required to follow, and are you concerned that the sheer number of regulations may be a problem, particularly for Small Businesses?

   Response: OSHA is committed to ensuring that small businesses are aware of their obligations and have the resources and assistance they need to comply. A major component of OSHA's strategy to protect workers is compliance assistance. OSHA maintains a substantial and diverse compliance assistance program that provides extensive assistance toemployers of all sizes, but particularly to small businesses.

   OSHA's primary compliance assistance program is its On-site Consultation Program, which is designed to provide professional, high-quality, individualized assistance to small businesses at no cost. This service provides free and confidential workplace safety and health evaluations and advice focused on small and medium-sized businesses with 250 or fewer employees. The program is 90% funded by OSHA and run by the states independently from federal or state OSHA enforcement programs.

   In FY 2015, OSHA's On-site Consultation Program conducted more than 27,800 free visits to small and medium-sized business worksites, helping to protect more than 3.5 million workers from hazards nationwide. A full 87% of those visits were to businesses with fewer than 100 employees, of which 27% consisted of businesses with fewer than 10 employees.

   In addition, OSHA compliance assistance specialists, located in most of its 85 Area Offices, provide outreach and education programs for employers and workers. Any new OSHA standards and enforcement initiatives are always accompanied by informative web pages, fact sheets, guidance documents, on-line webinars, interactive training programs and special products for small businesses.

On Areas of Emphasis

2. OSHA has National Emphasis Programs (NEPs) and Special Emphasis Programs (SEPs) that they use to target their inspections. What is the process for how does OSHA determines its national and special emphasis programs and what does that mean for how OSHA's regions and officers target their inspections?

   Response: OSHA uses its emphasis programs to focus its resources on industries that have the most serious safety and health problems. OSHA develops emphasis programs based on data from national and regional trends, as well as local knowledge. The hazards may be specific to an industry or type of work. OSHA usually references Bureau of Labor Statistics data in our NEPs or SEPs in support of targeting a specific industry or type of hazardous operations.

   Before an emphasis program begins, OSHA engages in extensive outreach to the affected industries and businesses. OSHA provides specific guidance for each emphasis program that clarifies the scope, focus, and inspection process. General guidance on inspections can be found in OSHA's Field Operations Manual.

3. Local Emphasis Programs (LEPs) are OSHA's enforcement strategies designed and implemented at the regional office and/or area office levels. These programs are intended to address hazards or industries that pose a particular risk to workers in the office's jurisdiction. Please describe the oversight of these targeted enforcement programs at the national level and additionally describe the oversight of the data used to justify the use of OSHA's limited resources to target industries on a local level. Is there any transparency in the data used by OSHA in these programs?

   Response: OSHA strives to provide flexibility to local offices to address hazards specific to their area while ensuring consistency and adherence to national policy. Each emphasis program is reviewed by the National Office, and Congress receives a copy ten days prior to their implementation. The initiating office also performs an annual review of the emphasis program and provides the inspection results to the National Office.

   In order to promote transparency, the data used to develop an emphasis program is publicly available and all emphasis programs are posted on the OSHA website. Each LEP clearly defines specific hazards or industries that pose a particular risk to workers as well as the underlying data used to support those conclusions.

4. How could more rigor be incorporated into the process to ensure that the best science is being used to determine which workplaces most require an OSHA inspection to ensure efficient use of resources?

   Response: When developing an emphasis program, the Agency relies on multiple data sources to identify industries, processes and occupations that experience high rates and

numbers of injuries, illnesses and fatalities, may be subject to catastrophic events, or where workers are regularly exposed to serious hazards. These data sources include the Bureau of Labor Statistics' (BLS) Survey of Occupational Injuries and Illnesses and Census of Fatal Occupational Injuries, the National Institute of Occupational Safety and Health (NIOSH) studies and findings, and OSHA's own information gathered from previous inspections. Combined, these three data sources are the most comprehensive data available on identifying occupational safety and health hazards. In addition to these data sources, OSHA also uses data available from organizations such as the National Safety Council, Environmental Protection Agency, State Workers Compensation Agencies, amongst others.

Each emphasis program directive outlines the data sources and methodology used to identify the hazard(s) to be addressed by the initiative. These directives further outline the methodology that will be used to select establishments for inspection, a selection process that uses neutral and objective selection criteria to comply with the Supreme Court's decision in *Marshall v. Barlow's, Inc.* 436 U.S. 307 (1978). Random selection of establishments that meet the inclusion criteria for the emphasis program is the most common method of selection used by OSHA, although local knowledge of relevant establishments can also be used in the selection process.

On Valuing Inspections

5. I understand that before last September, OSHA was using the number of inspections as the primary metric of enforcement activity performance for its front-line inspectors. It makes common sense that if all inspections are considered equal, inspectors would be more likely to conduct the easy and fast inspections. Can you elaborate on how your new enforcement weighting system attempts to ensure that the appropriate inspections are being conducted when inspectors visit sites?

   Response: For many years OSHA used the total number of inspections conducted as one of the key metrics to evaluate the effectiveness of the Agency in eliminating safety and health hazards to the American worker. This system did not account for the wide variety of inspections performed by the agency nor for the particular time and resources needed for the different types of enforcement activity. While this metric served a useful purpose, it penalized those field managers that took on more complex inspections that required a greater amount of Area Office effort. Resource-intensive inspections include but are not limited to those involving ergonomic hazards, chemical exposures, workplace violence, and chemical processing. For example, a process safety management (PSM) inspection of chemical processing facility, which might take months, accounted for the same weight under the previous system as a short duration inspection of a small construction site. OSHA's inspection metric that gave equal weight to all inspections did not take into consideration the additional resources needed to conduct these more time-consuming, complex investigations. This was especially true in areas in which serious hazards were found for which there were no specific applicable OSHA standards, and the Agency issued citations under the OSH

Act's General Duty Clause. The new system deemphasizes focus on mere inspection numbers as a primary metric and instead emphasizes focus on complex resource-intensive enforcement activities.

These enforcement activities were identified, defined, and assigned a weighted value. Activities that are identified as being more resource intensive are assigned a corresponding weighted value known as an Enforcement Unit (EU). The enforcement weighting system was designed to be flexible for adjustments and refinements over time that could result in the modification, addition, or removal of enforcement weighted activities. The current enforcement weighted activity categories are as follows:

- Federal Agency Inspections – 2 EUs
- Process Safety Management Inspections – 7 EUs
- Combustible Dust Inspections – 2 EUs
- Ergonomic Hazard Inspections – 5 EUs
- Heat Hazard Inspections – 4 EUs
- Non-PEL Exposure Hazard Inspections – 3 EUs
- Workplace Violence Hazard Inspections – 3 EUs
- Fatality / Catastrophe Inspections – 3 EUs
- Personal Sampling Inspections – 2 EUs
- Significant Cases – 8 EUs
- Non-formal Complaint Investigations – 1/9 EUs
- Rapid Response Investigations – 1/9 EUs
- All Other Inspections – 1 EU

On Ensuring Consistency of Inspectors

6. Beyond training, how do you ensure compliance with OSHA's Field Operations Manual by your front line inspectors? In your testimony, you mentioned monitoring conducted by headquarters- please elaborate on these practices.

   Response: In addition to training, OSHA's national office, in consultation with the DOL Office of the Solicitor, issues directives, instructions, and memos to define and update sections of the Field Operations Manual (FOM). Periodic conference calls and steering committee meetings that involve both national office and field enforcement personnel promotes clarification of policies and enforcement consistency. Additionally, enforcement staff in both the national office and the field routinely consult with the Office of the Solicitor on legal and interpretative issues relating to cases.

On Resources for Compliance Assistance and Enforcement

7. In your testimony, you mentioned declining resources allocated to compliance assistance specialists. In fiscal year 2016, OSHA was funded for 1510 federal enforcement FTEs and 247 FTEs. We noted that OSHA requested a modest increase for federal compliance assistance programs for fiscal year 2017. How has OSHA made decisions about FTEs and funding requested and allotted for compliance assistance specialists versus Compliance Safety and Health Officers (CSHOs)?

   Response: OSHA achieves its mission of ensuring the safety and health of America's workers through a balanced approach. In the FY 2017 President's Budget, OSHA is requesting $1,500,000 to restore 10 Compliance Assistance Specialist positions cut as a result of final appropriations action, for a total of 257 FTE in the Federal Compliance Assistance Budget Activity. This increase would once again allow OSHA to have at least one Compliance Assistance Specialist in each of its field offices. OSHA is also requesting $9,400,000 to support 60 FTE in federal enforcement for a total of 1,570 FTE. Of the $9,400,000 requested, $2,700,000 and 20 FTE will support the Executive Order 13650, "Improving Chemical Facility Safety and Security," to ensure the safety of the nation's chemical facilities and refineries. $6,700,000 and 40 FTE will be used to manage the increase in investigations resulting from a new rule that requires the reporting of all hospitalizations and amputations.

8. How do you ensure that your allocation of resources between compliance assistance and inspections is resulting in optimal compliance and safety in workplaces?

   Response: OSHA achieves its mission of ensuring the safety and health of America's workers through a balanced approach. We recognize that most employers want to keep their employees safe and protect them from workplace hazards. For those employers, OSHA operates a robust and multifaceted compliance assistance program that is mostly focused on providing assistance to small employers and vulnerable workers. OSHA provides extensive assistance to employers and vulnerable workers through its website and publications, webinars, training programs and more, many geared toward small and mid-sized employers. In addition, OSHA provides free on-site consultations for small and medium-sized employers that want assistance in protecting their workers and complying with OSHA standards.

   Unfortunately, however, there are still far too many employers that cut corners on safety and neglect well-recognized OSHA standards and basic safety measures. Thirteen workers are killed in the workplace every day, and 3.7 million private and public sector workers are seriously injured every year. Most of these deaths and injuries can be prevented by complying with OSHA standards, and, for those employers who neglect their responsibilities to make their workplaces safe, enforcement remains an effective deterrent. OSHA's enforcement program specifically targets the most dangerous workplaces, where workers are most likely to be hurt on the job, and our penalty system takes into account the size and behavior of employers, with higher fines for repeated and willful violations.

Post-Hearing Questions for the Record
Submitted to Mr. Jordan Barab
Deputy Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
From Senator Heidi Heitkamp

"Examining Agency Discretion in Setting and Enforcing Regulatory Fines and Penalties"
February 11, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. In many instances, both of your agencies delegate a lot of authority to states to enforce national regulatory objectives. However, you remain accountable of proper implementation of the national programs, and are in charge of overseeing state-run programs.

    a. How do your federal agencies work with state regulators to ensure that regulatory enforcement is fair and equitable across the board, and that overall federal objectives are being achieved?

Response: OSHA monitors State Plans to ensure that State Plans are "at least as effective" as the federal OSHA program. That is the standard set forth in the Occupational Safety and Health Act of 1970, 29 USC 651, 667.

OSHA has a number of practices and processes in place to evaluate the effectiveness of State Plan policies, procedures and standards, including the following: the occupational safety and health standards review process for Federal Program Changes as described in 29 CFR 1953.4(b); the investigation of Complaints About State Plan Administration (CASPA); quarterly monitoring visits; and Federal Annual Monitoring Evaluations (FAME), which include reviews of State Plan case files. OSHA's monitoring addresses the effectiveness of the State Plan program as a whole, including the effectiveness of its enforcement elements, as well as its efforts to set standards, provide outreach, hire and maintain qualified staff, among other things.

On September 22, 2015, OSHA published a revised and significantly expanded State Plan Policies and Procedures Manual. Most significantly, the revised Manual formalizes a biennial FAME process for State Plans, which includes alternating comprehensive and follow-up FAMEs every other year. This FAME strategy allows the State Plans an opportunity to focus on correcting deficiencies identified in the most recent comprehensive FAME.

The new Manual also includes the revised State Plan measures (SAMMs) used throughout the evaluation process and lays out consistent and clear overall policy framework for establishing, administering, monitoring, evaluating, and funding State Plans. The new procedures introduced throughout the Manual place primary emphasis on achieving

significant program results through a common approach of strategic planning and making regular progress towards strategic and annual performance goals. This approach allows State Plans to customize their programs to meet state-specific needs and priorities. The revised Manual also adds a much needed and requested layer of transparency for State Plans themselves and the public regarding OSHA's oversight of State Plans.

The SAMMs focus primarily on the effectiveness of enforcement elements. While there are several SAMMs that are unique to OSHA's role as a monitor for the State Plans, the majority of the measures are in-line with the measures OSHA's federal program is accountable for through OSHA's Operating Plan. This promotes consistency between OSHA and the State Plans, and between the State Plans. The SAMMs were last examined for effectiveness and revised for the FY 2013 monitoring cycle.

2. Mr. Barab, during the hearing, you stated that OSHA dedicated $68 million for compliance assistance programs, much of which goes to hiring Compliance Assistance Specialist, and an additional $57 million for small business compliance assistance programs. You stated that before sequestration, OSHA had 1 specialist in each of the 85 area offices, but now that number has decreased.

    a. As a follow up to that statement, could you provide the current number of Compliance Assistance Specialist employed by OSHA?

Response: OSHA currently has 48 Compliance Assistance Specialists on board.

    b. Also, how has the decrease in funding, and number of Compliance Assistance Specialist effected OSHA's ability to assist business comply with OSHA regulations? Has there been a noticeable increase in violation, resulting from businesses inability obtain proper compliance assistance?

Response: The decrease in the number of Compliance Assistance Specialists (CASs) has reduced the ability of by OSHA's field (Regional and Area) offices to conduct outreach and cooperative program activities.

CASs are tasked with helping vulnerable workers, businesses (including small businesses and businesses in high-hazard industries) and worker organizations understand the hazards they face, their rights and responsibilities under the law, and to comply with OSHA regulations. CASs conduct outreach activities such as by providing training, speaking at meetings and local conferences, hosting local roundtables and forums, sending out newsletters and informational pieces, and distributing OSHA resources. Through these outreach activities, CASs meet with and provide information to employers and employer organizations to assist them in complying with existing and new OSHA regulations. They also engage with employers and employees through outreach initiatives, such as OSHA's temporary worker initiative and fall prevention and heat illness prevention campaigns.

In addition, OSHA has a variety of cooperative programs that CASs implement on the local level. For example, CASs may implement Alliances with local trade or professional associations. Under these Alliances, OSHA and the associations agree to work together to address key hazards in a particular industry and help employers in that industry comply with OSHA standards. CASs may also implement Strategic Partnerships under which association or individual employers agree to work with OSHA to take specific measures to improve safety and health, including during large construction projects. CASs are also responsible for helping to implement OSHA's Voluntary Protection Programs (VPP), under which OSHA recognizes employers that have implemented effective safety and health management systems. CASs often participate in the extensive on-site reviews of sites applying for VPP recognition.

As the following table shows, the decreasing number of CASs has led to a drop in the number and reach of OSHA's outreach and cooperative program activities.

Outreach Activities by OSHA's Regional and Area Offices

	CAS Count	# outreach activities	# Alliances (field)	# Partnerships (field)	# VPP sites (federal)	# people reached/trained
FY 2013	74	6,239	255	62	1,600	6.1 million
FY 2014	63	5,092	230	67	1,540	2.2 million
FY 2015	56	5,272	198	57	1,452	2.4 million

3. In your testimony, we asked whether OSHA inspectors had the authority to waive fines for minor infractions that do not pose a threat to worker's health and safety. In your response, you stated that OSHA agencies are required to issue fine in most cases. Could you explain whether OSHA are obligated to impose fines regardless of the severity of the violation, and provide a reference to the statutory mandate that requires OSHA to issue a fines for minor violations? Death or serious bodily harm

Response: Under the OSH Act of 1970, Section 9, the Secretary is required to issue a citation where a violation of a health and safety standard exists. Section 17 of the Act mandates that employers shall receive a penalty of not more than $70,000 for a willful or repeat violation, and not more than $7,000 for a serious violation. Section 17 also states that employers *may* receive a penalty of up to $7,000 for violations that are deemed to be other-than-serious. The OSH Act also permits the Secretary to issue a de minimis notice instead of a citation for violations that have "no direct or immediate relationship to safety or health." OSHA uses these notices appropriately. For example, 29 CFR 1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard, and no citation would be issued for a failure to conduct weekly inspections for a seldom used press.

Although there is a statutory limit to a penalty issued, the OSHA Field Operation manual outlines when a reduction in penalty is appropriate. OSHA takes into account the severity

and probability of potential injury due to exposure to a hazard, as well as the size (number of employees), history, and good faith of the employer when assessing the penalty. OSHA's Field Operations Manual also allows for a further 15% reduction for "Quick Fixes" when employers immediately correct hazards that are considered other-than-serious, or lower to medium gravity serious violations.

U.S. Environmental Protection Agency
Responses to Questions for the Record
Following the Hearing: "Examining Agency Discretion in Setting and Enforcing Regulatory Fines and Penalties"
Before the
Subcommittee on Regulatory Affairs and Federal Management
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United States Senate
February 11, 2016

From Senator James Lankford

On Settlement Agreements

Under the Clean Water Act, in order to provide an extra incentive for regulated entities to negotiate quickly, the EPA may reduce the gravity amount of a proposed penalty by 10 percent if EPA expects the alleged violator to settle quickly. The emphasis on settling penalties quickly, and giving a discount for doing so, could easily put regulated parties in a difficult situation if they feel there was not adequate evidence to support the alleged violation. Either they settle a violation they believe they did not commit, or risk paying a larger fine if they do not win on appeal – which would also require hiring legal representation. Is justice achieved when regulated parties are put in such a difficult situation?

Response: The Clean Water Act (CWA) penalty policy's 10% reduction for violators who settle quickly and cooperatively is intended to benefit regulated parties and should not put them in a difficult situation. It is simply one of the downward penalty adjustments that can be applied. Congress specified in CWA section 309(g) the factors that the EPA and courts must consider in assessing civil penalties, including, for example, the violator's ability to pay and good faith efforts to comply. In all cases, the "other matters as justice may require" penalty factor serves to ensure that application of the penalty factors is flexible and does not create a manifest injustice.

In your testimony, you mentioned that any of EPA's proposed settlement agreements are open to public comment.

1. **Does this apply to all settlements, including minor or informal settlements?**

Response: This applies to all civil judicial settlements to enjoin discharge of pollutants pursuant to the Department of Justice (DOJ) (*see,* 28 CFR 50.7; https://www.justice.gov/usam/usam-5-12000-environmental-enforcement-section#5-12.620), and to all Clean Water Act and Safe Drinking Water Act (SDWA) underground injection control (UIC) administrative settlements (*see,* 40 CFR 22.45).

2. The comment period is thirty days for many of these settlements - how has EPA determined that this is an appropriate length of time?

Response: As provided by 28 CFR 50.7(b), civil judicial settlements are publicly noticed for "at least" 30 days, although in some instances a longer period of time may be provided (*e.g.*, a 60-day public notice period was provided for a recent settlement with BP for the *Deepwater Horizon* oil spill; 80 Fed. Reg. 60180 (October 5, 2015). For administrative settlements for which public notice is required, the length of time provided for comment is generally guided by the requirement in the applicable statute. For example, CWA section 309(g)(4) and RCRA 7003(d) require that we provide a "reasonable opportunity to comment." Thus, the EPA typically provides a 30-day public notice for settlements to balance the EPA's need to act promptly in fulfilling its environmental protection mission with its obligation to provide a reasonable opportunity to comment. Such time periods are also consistent with typical time frames in the rulemaking and judicial review context and also with DOJ policy regarding consent to proposed civil judicial settlements only after at least a 30-day public comment period is effectuated (*see*, 28 CFR 50.7).

3. Other than posting settlements on your websites, how else do you alert the public that proposed settlements have been posted for public comment?

Response: For each civil judicial case settlement, a notice is also published in the Federal Register. The notice includes a brief description of the settlement, the procedure for submitting public comments, and the date the comment period closes. In addition, the EPA and/or DOJ usually issue press releases announcing civil judicial case settlements. These press releases provide links to both DOJ's and EPA's website of the recently lodged consent decrees on which the Department is currently accepting public comment (*see*, https://www.justice.gov/enrd/consent-decrees; https://www.epa.gov/enforcement/cases-and-settlements). If the consent decree was negotiated prior to filing a lawsuit, a copy of the complaint – filed contemporaneously with the consent decree – is also often provided. CWA/SDWA UIC administrative settlements are posted to the EPA docket system (*see*, http://www.epa.gov/dockets).

4. How do you ensure that comments are responded to? Is this public?

Response: Prior to seeking the court's approval of a consent decree settling an EPA enforcement action, comments relating to the proposed civil judicial settlement, together with a written response, are filed with the court. The EPA and DOJ explain to the court whether or not the comments disclose facts or considerations indicating that the proposed judgment is inappropriate, improper or inadequate. After it is determined that they do not, the agencies request the court to approve the settlement as a final judgment.

In addition, public comments on CWA and SDWA UIC administrative settlements are posted to the EPA docket system and are also publicly available (*see*, http://www.epa.gov/dockets). All comments received are considered by the EPA to be additional information that may be material or relevant to its administrative enforcement case. In the event that an alleged

violator seeks judicial review of an administrative order, any such comments would be part of the administrative record on review.

5. **On the website that lists settlements, it seems that public comment is available for consent decrees, but not immediately apparent for Administrative Orders. Please confirm that public comment is not sought on these Administrative Orders and explain why EPA has instituted this policy.**

Response: The EPA provides for public comment on CWA and SDWA UIC administrative settlements as required by the applicable statute and regulations. Further, we have made public comment available in cases of particularly high interest or widespread interest (*e.g.*, many people impacted), such as the Animal Feeding Operations case (*see*, https://www.federalregister.gov/articles/2005/07/12/05-13672/animal-feeding-operations-consent-agreement-and-final-order), and/or extended the comment period beyond 30 days in appropriate cases (*id.*).

Additionally, it should be noted, that when assessing administrative penalties, the EPA is required by the statute under which an enforcement action is brought, to provide an opportunity for a public hearing on the record. Where alleged violators exercise this right, 40 CFR Part 22 provides the rules for such hearings. 40 CFR 22.11 allows any person to seek permission to: (1) intervene as a party where their interests cannot be adequately represented by existing parties; or (2) file non-party briefs. If either option is allowed by the Administrative Law Judge, it would allow such members of the public to be heard prior to resolution of that matter.

On Budget Requests

How much does EPA request for compliance assistance activities each year as part of its budget request?

Response: Although, compliance assistance is a vital part of the EPA's integrated strategy to improve compliance with environmental laws, the agency does not separately identify specific funding for compliance assistance in its request.

On National Enforcement Initiatives

Every three years, EPA sets national enforcement initiatives to focus civil and criminal compliance and enforcement resources and expertise on serious pollution problems affecting communities. What is the process for how EPA determines its national enforcement initiatives and what does that mean for how EPA's regions and officers target their inspections?

Response: National Enforcement Initiatives help the agency focus time and resources on national pollution problems that impact local communities. The EPA selects National Enforcement Initiatives every three years to focus resources on national environmental problems where there is significant non-compliance with laws, and where federal

enforcement efforts can make a difference. The initiatives cover three fiscal years, and focus on employing Next Generation Compliance strategies to address today's pollution challenges through a modern approach to increase compliance, utilizing new tools while strengthening vigorous enforcement of environmental laws.

The initiatives are chosen so that the EPA can better protect communities, especially those overburdened by pollution. The selection process is informed by extensive analysis and public input. For all of EPA's initiatives, we work closely with our regional offices to ensure that the initiatives accomplish what they are intended to do. As part of that effort, we coordinate with the regional offices to assist in the development of their inspection strategies.

I understand that you are currently in the process of reevaluating and updating the National Enforcement Initiatives - and that last time the initiatives were reevaluated, they went unchanged. How could the reevaluation process be made more rigorous to ensure that National Enforcement Initiatives have had demonstrable benefits and that the prioritized initiatives are based on sound science?

Response: On February 18, 2016, the EPA announced its National Enforcement Initiatives for fiscal years 2017-2019, which focus on national pollution challenges where EPA's enforcement efforts will protect public health. For the next cycle starting on October 1, 2016, the EPA will retain four of its current National Enforcement Initiatives, add two new initiatives, and expand one to include a new area of focus. The fiscal year 2017-2019 National Enforcement Initiatives are:

1. Keeping Industrial Pollutants Out of the Nation's Waters (new initiative);
2. Reducing Risks of Accidental Releases at Industrial and Chemical Facilities (new initiative);
3. Cutting Hazardous Air Pollutants (expanded initiative);
4. Reducing Air Pollution from the Largest Sources;
5. Ensuring Energy Extraction Activities Comply with Environmental Laws;
6. Keeping Raw Sewage and Contaminated Stormwater Out of the Nation's Waters;
7. Preventing Animal Waste from Contaminating Surface and Ground Water.

The EPA's current National Enforcement Initiative that focuses on reducing pollution from mineral processing operations will return to the base enforcement program level for hazardous waste beginning in fiscal year 2017. Recent settlements that address some high risk mineral processing facilities have helped set the stage to resolve future cases at other high risk facilities in this sector.

The EPA took public comment on the proposed National Enforcement Initiatives for fiscal years 2017-2019, and solicited input from a wide range of stakeholders, including state and local governments, industry and non-governmental groups, and considered their feedback and comments when finalizing the initiatives.

The EPA has achieved significant progress under its National Enforcement Initiatives:

• More than 98 percent of cities with large combined sewer systems and more than 90 percent of cities with large sanitary sewer systems are under enforceable agreements or have permits that put them on a schedule to address untreated sewage discharges into America's waterways.
• 59 percent of individual power generating units at coal-fired power plants have installed the required pollution controls or are under a court order to do so.
• Since 2011, EPA has secured enforceable agreements to address violations at 539 facilities emitting toxic air pollution.
• Since 2011, EPA has concluded 217 enforcement actions at concentrated animal feeding operations for violations of the Clean Water Act, and 196 enforcement actions at natural gas extraction and production sites.

Additional information about EPA National Enforcement Initiatives is available on our website: http://www.epa.gov/enforcement/national-enforcement-initiatives.

On Input into Rules Being Promulgated

The SBA Office of Advocacy reported that in 2015 they wrote two letters to EPA questioning EPA's certification that the proposed regulations—one of which was Waters of the United States —had "no significant economic effect on a substantial number of small entities." SBA was concerned because EPA's certification meant that they did not conduct critical analysis and outreach with small businesses.

a. **Was your office consulted as EPA determined that it did not need to convene a small business panel?**

Response: In general, the EPA office leading a rulemaking determines if a small business panel needs to be convened.

b. **How does EPA ensure that enforcement considerations are made part of the regulation drafting process?**

Response: The EPA follows the Action Development Process (ADP) Guidance for developing regulatory actions. The EPA's ADP Guidance specifies that OECA participates on regulatory workgroups to help the agency issue effective rules that deliver the intended human health and environmental benefits. An effective rule promotes compliance, facilitates implementation at all levels of government, generates the data needed to measure environmental results, and, when necessary, is enforceable by the EPA, states and tribes.

On Small Businesses

Many small businesses feel overwhelmed by the number of regulations they must be aware of and follow. How do you ensure that businesses are aware of all the regulations they are required to follow, and are you concerned that the sheer number of regulations may be a problem, particularly for Small Businesses?

Response: The EPA assists the regulated community in understanding and complying with environmental regulations in numerous ways and through various mechanisms, including but not limited to: hotlines, clearinghouses, web sites, assistance centers, webinars, fact sheets, guidance documents, newsletters, applicability determinations, and EPA's Frequent Questions database.

The EPA funds web-based Compliance Assistance Centers to help businesses, colleges and universities, local governments and federal facilities understand and comply with environmental requirements and save money through pollution prevention techniques. Additionally, the EPA funds a state grant for the National State Small Business Environmental Assistance Program (SBEAP). Each state is required, through the 1990 Clean Air Act Amendments, to have a SBEAP to provide technical compliance assistance to small businesses at the state level.

To specifically meet the needs of small businesses, the EPA established the function of a Small Business Ombudsman (SBO) within EPA's Office of Small Business Programs, the EPA's focal point for small business related activities and programs. In many cases, the EPA strives to reduce small business impacts by exempting small businesses from regulatory requirements and/or reducing reporting burdens. EPA publishes a Regulatory Agenda twice a year (http://www.reginfo.gov/public/do/eAgendaMain) that lists all of the regulatory actions the agency is currently working on as well as the longer term actions the agency may issue. When the agency anticipates a rulemaking may significantly impact small businesses, it will convene a Small Business Advocacy Review Panel and consult directly with small businesses to develop recommendations for minimizing that impact.

Small businesses can also stay abreast of new regulatory actions the EPA is working on or reviewing by using the EPA's online Regulatory Development and Retrospective Review Tracker (Reg DaRRT) at http://yosemite.epa.gov/opei/RuleGate.nsf/. Small businesses may follow regulations that could impact them during their development and may participate through the public notice and comment period at the time a rule is proposed. The agency's work on individual rulemakings may also involve targeted outreach to small business or associations that represent small businesses during rule development. When the EPA anticipates a rulemaking may significantly impact small businesses, it will convene a Small Business Advocacy Review Panel and consult directly with small businesses to develop recommendations for minimizing that impact.

From Senator Heidi Heitkamp

1. **In many instances, both of your agencies delegate a lot of authority to states to enforce national regulatory objectives. However, you remain accountable for proper implementation of the national programs, and are in charge of overseeing state-run programs.**

    a. **How do your federal agencies work with state regulators to ensure that regulatory enforcement is fair and equitable across the board, and that overall federal objectives are being achieved?**

Response: The EPA ensures fair and equitable regulatory enforcement that meets federal objectives through the implementation of national policies and guidance, collaboration and coordination with state regulators to meet joint objectives, and oversight of state programs. For example, Enforcement Response Policies (ERPs) establish nationally consistent expectations for responding to violations under national environmental statutes; statute-specific Compliance Monitoring Strategies (CMS) provide guidance to both states and the EPA on how to ensure inspections are occurring appropriately and fairly.

The EPA also sets program oversight goals and performance commitments with each state under Performance Partnership Agreements (PPA). EPA Regional Offices meet with states on a regular basis throughout the year to assess their progress in meeting their goals in the CMS and under the PPAs. In addition, the EPA conducts regular oversight of state program performance to ensure overall federal objectives are being achieved by state delegated programs. During quarterly and annual meetings with states, EPA regions review state inspection activities and enforcement responses.

Furthermore, the EPA conducts a review of state Clean Air Act, Clean Water Act and Resource Conservation and Recovery Act programs under a State Review Framework (SRF). The SRF ensures that EPA oversight of state performance is consistent and equitable, yet provides sufficient flexibility to allow differences in state conditions and priorities. Review results and an array of state compliance and enforcement program data are publically available on EPA's web site.

2. **Ms. Shinkman given your role as the agency primarily responsible for enforcing regulations that cover the broad range of environmental issues, developing a "one size fits all plan" for all regulatory enforcement would be impossible. However, for our system to be fair and transparent, it is important that regulatory penalties fit the violation.**

    a. **What factors do you take into consideration, during your rulemaking process that helps you to calibrate appropriate penalties for such a wide array of regulations?**

Response: In our enforcement actions, EPA's penalties are based on congressionally-mandated factors[1] under the environmental laws we implement that are incorporated into Enforcement Response Policies (ERPs) and penalty policies. These policies, which are not adopted through a rulemaking process, but which are publicly available (*see*, http://www.epa.gov/enforcement/policy-guidance-publications#models) determine whether a violation is significant enough to warrant formal enforcement (*i.e.,* issuing a formal administrative complaint or order or asking DOJ to file a civil judicial complaint) or whether it is more appropriate to pursue informal enforcement responses such as issuance of warning letters or notices of violation. They also specify penalty ranges designed to ensure that the EPA acts in a consistent manner for similar violations and similar violators and outline appropriate timeframes for taking enforcement action.

In general, and consistent with the Congressionally mandated factors, EPA's penalty policies require consideration of the gravity or seriousness of a violation (including any actual or potential harm) and the economic benefit gained by the violator as a result of its delayed or avoided costs of compliance. While the "gravity" component of the penalty is designed to deter future violations, the economic benefit component of the penalty seeks to level the playing field so that regulated entities that comply with the law are not placed at a competitive disadvantage.

EPA's penalty policies also provide factors to be considered in increasing or decreasing the proposed penalty or settlement amount. For example, the EPA may increase the civil penalty where there is evidence that the non-compliance was willful or if the violator has a history of violations, and the EPA may reduce the civil penalty where the violator has evidenced good faith efforts, lacks an ability to pay the proposed penalty, agrees to perform a beneficial environmental project, and where there are other case-specific factors such as litigation risk.

3. **Ms. Shinkman, could you speak to how the EPA uses public disclosure, specifically Consumer Confidence Reports, to improve compliance of regulated entity?**

Response: Consumer Confidence Reports are the centerpiece of public right-to-know in the Safe Drinking Water Act (SDWA). These reports provide valuable information to customers of community water systems and allow them to make health-based decisions regarding their drinking water consumption. These reports must be directly delivered to customers no later than July 1st each year.

Consumer Confidence Reports can promote dialogue between consumers and their drinking water utilities, and can encourage consumers to become more involved in decisions which may affect their health. These reports include information regarding source water assessments, health effects data, and additional information about the public water system.

[1] To illustrate, the "congressionally-mandated factors" for the Clean Water Act are "...the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

Consumer Confidence Reports are an effective tool for delivering timely public notification of community water system SDWA violations, including information regarding the nature of the violation and how the system will return to compliance. The timeframe to report and act on these violations is scaled to the severity of the violation (*i.e.*, more critical violations require more prompt notification and action).

In addition, the EPA uses the Enforcement Compliance History Online (ECHO) (https://echo.epa.gov/) and it's SDWA Dashboard (https://echo.epa.gov/trends/comparative-maps-dashboards/drinking-water-dashboard) to publicly share information on drinking water quality. These websites are readily available to the public and are updated quarterly with information from the agencies directly implementing the SDWA. ECHO gives the public access to detailed violations and enforcement history for individual systems. The SDWA Dashboard allows the public to view compliance and enforcement trends on the national, state, tribal, and U.S. territory levels.

4. **Ms. Shinkman, you mentioned that the EPA applies training programs for you inspectors among the 10 regions across the nation. Could you list and describe those training programs, and provide an overview of what objectives those training programs are intended to accomplish.**

Response: EPA Order 3500.1 establishes mandatory agency-wide training requirements that EPA, state and tribal federally credentialed employees must meet prior to obtaining and keeping agency credentials which authorize them to conduct civil compliance inspections/field investigations under federal environmental statutes. The order requires that inspectors complete an: Occupational Health and Safety Curriculum; Basic Inspector Curriculum; Media Program-Specific Curriculum (including on-the-job training); and annual refresher courses.

To facilitate inspector training, the EPA has launched the National Enforcement Training Institute (NETI) eLearning Center, providing 24 hour access to on-line inspector training. EPA's inspector training curricula prepares individuals across the nation to conduct specific types of inspections/investigations and to obtain information and evidence in a consistent and technically sound manner.