



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 06 2016

OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS

The Honorable James Lankford
Chairman
Committee on Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management
United States Senate
Washington, D.C. 20610

Dear Mr. Chairman:

Enclosed please find the U.S. Environmental Protection Agency's responses to the Subcommittee's questions for the record following the February 11, 2016, hearing titled "Examining Agency Discretion in Setting and Enforcing Regulatory Fines and Penalties."

I hope this information is helpful to you and the members of the Subcommittee. If you have further questions, please contact me or your staff may contact Carolyn Levine in my office at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely,

A handwritten signature in black ink that reads "Nichole Distefano".

Nichole Distefano
Associate Administrator

Enclosure

**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
Committee on Homeland Security and Governmental Affairs
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);
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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.
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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 factors¹ 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 its 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.



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

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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 factors¹ 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.

**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 to employers 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.