Occupational Safety & Health State Plan Association

August 6, 2010

David Michaels, PhD, MPH
Assistant Secretary for Occupational Safety and Health
United States Department of Labor
200 Constitution Ave, NW #2315, Suite 800
Washington, DC 20210- 0001

Re: Legal Basis of Requirement for Mandatory State Plan Adoption of OSHA's New Penalty Procedures

Dear Assistant Secretary Michaels:

At the June 22, 2010, Occupational Safety and Health State Plan Association (OSHSPA) Spring meeting, Deputy Assistant Secretary Jordan Barab informed State Plan States that federal OSHA would require mandatory adoption of recently proposed changes to its penalty calculation procedures. The reasons prompting these changes that were provided to OSHSPA by Mr. Barab and other OSHA officials over the last year include:

- Current penalty levels do not provide a sufficient deterrent to employers to encourage them to proactively identify and correct serious hazards that could severely injure or kill employees prior to an OSHA inspection.
- "Bad actor" employers whose employees are severely injured or killed on the job are not sufficiently penalized either before or after the fact of an accident or death.
- It does not make sense to the average observer that federal OSHA and State Plan penalty calculation procedures could result in significantly different penalties for the same violation.

The overwhelming majority of OSHSPA members have very serious concerns about this unilateral decision to impose an enforcement procedure absent any statutory change to the OSH Act by Congress. Federal OSHA's decision to revise its penalty calculation procedures may be one of the most significant and important policy changes that OSHA has undertaken in the last 20 years. Over the past two decades, State Plans and previous OSHA administrations have made concerted efforts to work more closely together in a true partnership relationship. In keeping with this history, both you and Deputy Assistant Secretary Barab have indicated on multiple occasions that State Plans States would be more involved in OSHA's decision making processes on major policies, but recent actions do not affirm this commitment. The recent decision to require State Plan adoption of all future National Emphasis Programs (NEP) without any prior consultation regarding the selection, relevance or impact on OSHSPA State Plan

members, and your insistence on attempting to make the new penalty calculation procedures mandatory, again without any input from OSHSPA, further belies this commitment.

Of perhaps as great a concern to State Plan States' is the fact that, when asked for an explanation of what factors would be taken into account and what criteria would be used by OSHA to evaluate each State Plan States penalty calculation procedures, federal officials responded that answers to those questions have yet to be developed.

OSHSPA members believe that before such a major policy change is initiated, a significant level of research, analysis, and consultation with appropriate stakeholders – including State Plans – should occur. This is particularly pertinent to the area of revised penalty calculation procedures considering that collectively State Plan States annually conduct more inspections and issue more violations than federal OSHA. Instead, State Plan States were not consulted on this proposed change, nor were State Plan States provided by OSHA with any empirical studies which support OSHA's rationale for adoption of these new penalty procedures (e.g., that a 300-400% increase in average penalty per serious violation would deter employers from violating OSHA regulations, over and above other considerations which could result in increased employer compliance, such as loss of government contracts from receipt of an OSHA citation, or increases in workers' compensation costs following an accident). Furthermore, as discussed below, OSHSPA members have not been provided any information by federal officials to indicate that research or analysis was conducted to assess the potential negative effects that a penalty increase could have on employers, employees and the effectiveness of both the federal and State Programs.

Specifically, State Plan States have the following substantive concerns about federal OSHA's proposed new penalty calculation procedures:

- OSHSPA is greatly concerned that implementation of the new penalty calculation procedures during a recession, with no phase-in strategy, could result in the same sort of backlash from employers that occurred in the mining industry when the Mine Safety and Health Administration (MSHA) raised their penalty levels in 2006. The mining community responded by significantly increasing their rate of contest of violations and penalties to the point where most parties would agree that MSHA's legal system has been overwhelmed and is in gridlock. Neither federal OSHA nor the State Plan States have the legal resources to handle a potential doubling, tripling or quadrupling of the current contest rate. If contested cases and the numbers of hearings increase substantially, Compliance Safety and Health Officers (CSHOs) will be required to appear in court on a more regular basis, which means they will be spending increasing amounts of their time in depositions and in court providing testimony instead of conducting inspections, and identifying and ensuring correction of serious hazards. In FY 2009, the Federal appeals rate was 6.8% and the collective State Plan States appeals rate was 14.3%. It seems reasonable to ask whether OSHA has conducted a comprehensive study on the potential impact of the new procedures on the productivity of CSHOs, appeals rates in federal/state jurisdictions and the rate of correction of violations in contested cases. **If such research and analysis has been conducted, OSHA should provide the results to OSHSPA for review and comment.**

- Changing the maximum penalty reduction factor for employer size from 60% to 40%, as proposed, will place an undue and disproportionate financial burden on small employers at a time when our national unemployment rate hovers close to 10%. As you know, small employers in the United States are responsible for creating the majority of jobs in our national economy. While neither OSHA's current penalty policy nor the proposed new penalty policy is likely to present a significant deterrent to Fortune 500 companies, the current policy does provide a deterrent to small employers. Under the new policy, while raising penalty levels on small employers is not likely to significantly increase the deterrent effect on larger employers, such action could force some small employers to forgo hiring additional employees or could possibly result in layoffs to existing employees. OSHSPA believes there is a strong disconnect between OSHA's stated rationale for implementing new penalty procedures and the employers/employees likely to be impacted the most by this change. State Plan States' experience has shown that an effective method to achieve greater compliance among small employers is by focusing on education and training while increasing the likelihood of an onsite inspection. As has been shown in a number of different studies over the years, employers in many State Plan States have a much higher likelihood of being inspected than similarly situated employers in federal OSHA States. This strategy has proven effective, and is supported by the existence of fewer serious violations of occupational safety and health rules and regulations in those establishments inspected by State Plan States. OSHSPA recommends OSHA consider pursuing a strategy of making a more concerted effort to increase

federal enforcement staffing and CSHO inspection productivity, if the primary objective is to improve employer compliance.

- OSHSPA evaluated the new penalty calculation procedures as presented at our recent Springfield, Illinois, meeting, and we have determined the proposed new procedures are unlikely to have any additional deterrent effect for large companies even though large companies are almost exclusively the ones cited by federal OSHA officials as typifying "bad actor" employers. Again, OSHSPA believes there is a decided disconnect between the publicly stated rationale for implementing the new procedures and the actual results which can reasonably be expected when the new procedures are applied. Large companies today are usually much more concerned about having violations classified as "serious" than they are about penalty levels. Even if the current maximum initial penalty levels for the largest employers were to be significantly increased through a policy change and become closer to the statutory cap of $7000, the concerns of these large employers would likely remain primarily with classification of the violations. OSHSPA believes a better deterrence approach for large (or even small) companies deemed "bad actors" is through the use of egregious penalties, criminal prosecution and/or increasing the statutory maximums for both civil and criminal penalties. The first two options exist under current OSHA penalty procedures, and the third can only be achieved through legislative action.

- Although OSHA intends the new penalty calculation procedures to primarily deter "bad actor" employers and prevent serious accidents and occupational deaths, our members believe the new procedures will actually have their most significant impact on calculated penalty levels for low and moderate gravity serious violations, which OSHA itself defines as less likely to result in death or serious injury. Additionally, with the current maximum penalty set statutorily at $7000, there does not appear to be enough room on the "upside" of current penalty levels to significantly increase the average high gravity serious penalty for large employers. In fact, the proposed changes will most significantly impact small and medium sized employers and will result in little change to those penalties currently being assessed to large employers. Likewise, small employers will be more significantly impacted with the proposed increase in minimum penalties assessed for serious violations. We believe that OSHA's approach in developing the new penalty calculation procedures was misdirected from the beginning because it started with the premise that raising the **average** serious penalty significantly would provide a deterrent effect, instead of focusing on what changes to the penalty calculation procedures for serious violations would most likely result in the elimination or reduction of serious injuries, illnesses and fatalities. For instance, new procedures could have been developed that would result in the highest penalties being assessed for those serious violations that relate to the four main causes of fatal accidents in the construction industry; or the new procedures could have provided for the maximum penalty being assessed whenever a violation is found to have directly contributed to or caused a fatal accident or serious injury or illness. Instead, the new procedures place an increased emphasis on low and medium severity violations, which could be reasonably interpreted by employers and stakeholders as OSHA wanting to punish **all** employers instead of just the bad actors or the employers that most seriously endanger their employees. OSHSPA members believe that the majority of employers we contact on a daily basis care about their employees and about providing a safe and healthful workplace, but sometimes they need help to achieve compliance, either in terms of education, resources, or motivation in the form of an inspection. Absent any consideration and discussion about these concerns, OSHSPA questions the design of the new procedures in light of their stated rationale and purpose.

- OSHA's decision to "serially" apply penalty reduction factors represents ill-conceived policy that presents the appearance of sleight of hand. By way of illustration, under current procedures a 60% penalty reduction (e.g. 10% for history, 10% for good faith and 40% for size), would result in a gravity based penalty of $7000 being reduced to $2800. Under the new procedures, even though OSHA would describe the same reductions as totaling 60%, when applied serially would result in a penalty of $3402, which is a true reduction of only 51.4%. The new procedure is unnecessarily complicated for field personnel and reducing penalties "serially" is misleading and deceptive to the public we serve. In addition, because employers who receive a reduction due to size are the primary beneficiaries of the current approach, this change will – like others in the policy – have its largest impact on the smallest employers. Again, OSHSPA questions the design of the new penalty procedures in light of the stated rationale.

In closing, all State Plan members of OSHSPA have chosen to administer their own occupational safety and health programs, as set forth in the OSH Act, to best ensure workplace safety and health in their respective States. For the past decade, States have taken on a disproportionate cost of administering these programs as part of their commitment to better ensure their citizens are afforded occupational safety and health protections. This letter is intended to serve as an indication of the importance States place on the penalty issue and overall federal strategy of unilaterally developing procedures which affect State Plan States without any effort to involve the States in the policy development and decision making process. State Plan States are justifiably disturbed by OSHA's recent attempts to impose a "one size fits all" approach to State Plan administration. We are seriously concerned about OSHA's failure to seek input from State Plans; our concern is exacerbated by the lack of follow-through on repeated promises we have heard from OSHA to include State Plans in significant policy discussions. In addition, we are concerned with OSHA's failure, thus far, to identify or share empirical research supporting significant policy decisions; the lack of information on whether OSHA has considered the possible negative impact of the procedures on employees, employers and the federal and State Programs; and the failure of OSHA to develop criteria for assessing the effectiveness of different State penalty calculation procedures.

On behalf of OSHSPA, we request that you provide OSHSPA members with the legal basis and authority for OSHA's decision to make adoption of OSHA's new penalty calculation procedures mandatory for State Plan States. Additionally, we request OSHA reverse its decision to provide formal notification to State Plan States of a mandatory requirement for State Plan States to adopt OSHA's revised penalty procedures. Finally, we request OSHA adequately address the concerns we have raised. Should you have any questions regarding issues outlined in this letter, please feel free to contact the Chair of OSHSPA.

Sincerely,

The OSHSPA Board:

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July 6, 2010

David Michaels, PhD, MPH
Assistant Secretary for Occupational Safety and Health
United States Department of Labor
200 Constitution Ave, NW #2315, Suite 800
Washington, DC 20210- 0001

Re: Legal Basis of Requirement for Mandatory State Plan Adoption of NEPs

Dear Assistant Secretary Michaels:

At the June 22, 2010, Occupational Safety and Health State Plan Association (OSHSPA) Spring meeting Deputy Assistant Secretary Jordan Barab informed State Plans that OSHA would be requiring mandatory adoption of all future National Emphasis Programs (NEPs) developed by OSHA. The reasoning provided to OSHSPA by Mr. Barab was that OSHA could not truly have a national emphasis program without requiring participation from all states.

OSHSPA members have serious concerns about this directive. NEPs developed by OSHA in the past have generally addressed legitimate safety and health issues of national importance. However, failure to include affected State Plans in NEP development and requiring subsequent adoption of the NEPs in all State Plans potentially places employees within some State Plans at greater risk for injury, illness or death. As you know, State Plans already provide well over 50% of the funding for our programs and are facing unprecedented demands on State resources through budget cuts, furloughs, reductions in force and other austere measures. State Plans have to be very careful in how they allocate inspection resources to address the hazards that impact their own State's employees and employers. To that end, each State has developed specific strategic plans for maximizing their resources in efforts to reduce statewide fatality, injury and illness levels. A State strategic plan often includes statewide emphasis programs specific to prevalent industries or activities within an individual state that are accounting for the highest rates of fatal and non-fatal serious accidents. Requiring State Plans to adopt NEPs developed solely by OSHA could divert limited State resources from these critical areas to other areas associated with a NEP which may or may not constitute a significant problem in an individual state. This is particularly worrisome to State Plans that have small programs and very limited resources.

On behalf of OSHSPA, I am requesting that you provide our members with clarification of the legal basis and authority for OSHA's recent decision to require State Plans to mandatorily adopt OSHA- developed NEPs and/or their equivalent policies. Should you have any questions please feel free to contact me @ 919-807-2863.

Sincerely,

Kevin Beauregard, CSP, CPM
Chair, Occupational Safety and Health State Plan Association

cc: Steven Witt, Director, Cooperative and State Plan Programs