

11-1-2011

OSHA Enforcement of the "As Effective As" Standard for State Plans: Serving Process or People?

Courtney M. Malveaux

Commissioner, Virginia Department of Labor and Industry, Richmond, Virginia

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

 Part of the [Agency Commons](#), [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Courtney M. Malveaux, *OSHA Enforcement of the "As Effective As" Standard for State Plans: Serving Process or People?*, 46 U. Rich. L. Rev. 323 (2019).

Available at: <https://scholarship.richmond.edu/lawreview/vol46/iss1/12>

This Essay is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

OSHA ENFORCEMENT OF THE “AS EFFECTIVE AS” STANDARD FOR STATE PLANS: SERVING PROCESS OR PEOPLE?

*Courtney M. Malveaux **

I. INTRODUCTION

Since the passage of the Occupational Safety and Health Act of 1970 (“OSH Act”)¹ in 1971, the federal Occupational Safety and Health Administration (“OSHA”) has perplexed many states tasked with its enforcement. Congress passed the OSH Act to nationalize workplace safety and health standards.² It empowered OSHA to enforce these standards, either on its own or through an approved workplace safety and health plan operated by a state (“State Plan”).³ The OSH Act provides matching funds and oversight for states choosing to operate their own programs on the condition that participating states operate a regime that is “at least as effective as” that of federal OSHA.⁴

But contrary to the goals of the OSH Act, OSHA frustrates states’ efforts by imposing process-based requirements, regardless of results and despite congressional intent.⁵ Congress did not intend for OSHA to evaluate the “as effective as” standard

* Commissioner, Virginia Department of Labor and Industry, Richmond, Virginia; J.D., 2002, Marshall-Wythe School of Law, College of William & Mary; M.A., 1998, George Washington University; B.A., 1993, Pennsylvania State University. Amanda Blair, W. Glenn Cox, Kathleen Greene, Elizabeth Southall, and Jay Withrow provided research.

1. 29 U.S.C. §§ 651–678 (2006 & Supp. III 2010).

2. S. REP. NO. 91-1282, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177, 5177.

3. *See* 29 U.S.C. §§ 655(a), 657–659, 667.

4. 29 U.S.C. §§ 667, 672.

5. *See* OFFICE OF INSPECTOR GEN.—OFFICE OF AUDIT, U.S. DEP’T OF LABOR, REPORT NO. 02-11-201-10-105, OSHA HAS NOT DETERMINED IF STATE OSH PROGRAMS ARE AT LEAST AS EFFECTIVE IN IMPROVING WORKPLACE SAFETY AND HEALTH AS FEDERAL OSHA’S PROGRAMS, at 2–3 (2011) [hereinafter *OIG REPORT*].

through process-based criteria, as is demonstrated in the context of another regulatory law, the Clean Air Act.⁶

OSHA can restore the original purpose of the OSH Act by shifting toward a results-based analysis of state efforts to preserve employee safety and health. OSHA needs to rewrite its regulations, ease its focus on internal state processes, and take a fresh approach to its monitoring of State Plans to embrace the original meaning of the OSH Act. Despite these and other challenges, Virginia operates an extremely effective program that can be enhanced if OSHA turns its attention toward results.

II. BACKGROUND ON THE OCCUPATIONAL SAFETY AND HEALTH ACT

A. *The Purposes of the OSH Act: Achieving Safe and Healthy Working Conditions*

In 1971, growing concerns over workplace injuries, illnesses and fatalities, and the resulting impact of billions of dollars in lost productivity led Congress to pass the OSH Act.⁷ Congress sought to ensure "safe and healthful working conditions" for America's workforce and to "preserve our human resources."⁸ To accomplish this, Congress directed OSHA's Secretary of Labor to create and apply uniform national standards for occupational safety and health.⁹

Observing the varying quality of workplace safety and health plans already in place throughout the country, Congress declined to federalize the entire field of occupational safety.¹⁰ Instead, it authorized the Secretary of Labor to set mandatory occupational standards, provide for occupational health and safety research, and implement effective enforcement programs.¹¹ States had the option to continue to assume responsibility for occupational safety and health by adopting their own State Plans subject to OSHA's

6. Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401—7671q).

7. H.R. REP. NO. 91-1291, at 14 (1970).

8. 29 U.S.C. § 651(b).

9. S. REP. NO. 91-1282, at 1, *reprinted in* 1970 U.S.C.C.A.N. at 5177.

10. *See* AFL-CIO v. Marshall, 570 F.2d 1030, 1033 (D.C. Cir. 1978).

11. 29 U.S.C. § 651(b).

oversight.¹² However, Congress enabled and required the Secretary of Labor to approve State Plans to develop and enforce safety and health standards that are “at least as effective in providing safe and healthful employment and places of employment as the [federal] standards.”¹³

At the time of the OSH Act’s passage, Congress observed that relatively few states had modern occupational safety and health requirements and those states that had such requirements did not devote adequate resources to enforce them.¹⁴ In addition, the patchwork of state laws often led to inconsistent results.¹⁵ To ameliorate this problem, Congress assigned OSHA the role of setting “up to date” standards and protections for the entire nation.¹⁶ It reserved a role for states choosing to operate their own plans (“State Plan States”) through a grant program.¹⁷ OSHA would carry out its mandate by working with states in crafting their own occupational safety and health plans, administering the grants, and providing oversight.¹⁸ Congress envisioned that this system would foster federal-state cooperation and assist states in operating their own occupational safety and health programs.¹⁹

B. *Congress Intended OSHA to Base Its Standards on Measurable Outcomes*

Congress sought results-oriented safety and health standards that would be embraced by federal OSHA and the State Plan States alike. For this purpose, it permitted the Secretary of Labor to adopt “National Consensus Standard[s]” during a two-year window following the effective date of the OSH Act, unless the Secretary of Labor determined that a standard did not result in improved safety or health for employees.²⁰ Congress intended that the Secretary of Labor would look to scientifically measurable criteria, including medical judgment, in developing these stand-

12. *Id.* § 651(b)(11).

13. *Id.* § 667(c)(2).

14. S. REP. NO. 91-1282, at 4, *reprinted in* 1970 U.S.C.C.A.N. at 5180.

15. *See, e.g., id.* (discussing differing state laws pertaining to the production of the coal tar product betanaphthylamine).

16. *Id.* at 5, *reprinted in* 1970 U.S.C.C.A.N. at 5181.

17. *Id.* at 17, *reprinted in* 1970 U.S.C.C.A.N. at 5195.

18. *See* 29 U.S.C. § 651(b)(11).

19. *See* S. REP. NO. 91-1282, at 17, *reprinted in* 1970 U.S.C.C.A.N. at 5195.

20. *Id.* at 5, *reprinted in* 1970 U.S.C.C.A.N. at 5181–82.

ards.²¹ At the time of the OSH Act's inception, however, the lack of standardized incident reporting meant that OSHA could not measure states' effectiveness by comparing incident rates alone.²² The standards are revised continually because many of the original standards are out-of-date and must be constantly improved and replaced to embrace new knowledge and techniques.²³ Unfortunately, in the forty years since the OSH Act's inception, OSHA has not yet developed standards to meet its legislative mandate.

III. OSHA UTILIZES PROCESS-BASED MEASURES IN ITS REGULATIONS AND OVERSIGHT, FRUSTRATING STATE EFFORTS AND CONTRADICTING LEGISLATIVE INTENT

A. *OSHA Uses Procedural Indices in Its Regulations to Measure State Plan Effectiveness*

At a minimum, State Plan States must follow the OSH Act and OSHA indices. The OSH Act provides a list of criteria that must be met by a state in the development of its State Plan.²⁴ In its regulations, OSHA added a set of indices of its own, to ensure that State Plans are at least "as effective as" the federal program.²⁵ To obtain the approval of the Secretary of Labor to develop and enforce their own safety and health standards, State Plan

21. *Id.* at 5–6, reprinted in 1970 U.S.C.C.A.N. at 5182. This intention is consistent with the Government Performance and Results Act, which requires the Office of Management and Budget to hold federal agencies accountable according to measurable outcomes, rather than procedures. See generally 5 U.S.C. § 306 (Supp. IV 2011) (outlining requirements for annual performance plans); 31 U.S.C. §§ 1115–16 (Supp. III 2010) (outlining requirements for agency strategic plans).

22. H.R. REP. NO. 91-1291, at 15. Specifically, Congress pointed out the problems caused by the lack of a standardized accident and disease reporting which could make "states with the least effective programs . . . appear to have a more favorable accident record." *Id.*; see also *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974) ("It is noteworthy that the [OSH] Act does not establish as a *sine qua non* any specific number of accidents or any injury rate.").

23. See S. REP. NO. 91-1282, at 6, reprinted in 1970 U.S.C.C.A.N. at 5182–83.

24. 29 C.F.R. § 1902.3 (2010).

25. *Id.* § 1902.3(d)(1) (providing that each "State [P]lan shall provide a program for the enforcement of the [s]tate standards which is, or will be, at least as effective as that provided in the Act, and provide assurances that the[s]tate's enforcement program will continue to be at least as effective as the [f]ederal program").

States must use standards²⁶ and programs²⁷ that are at least “as effective as” OSHA’s.²⁸

In providing indices to measure whether State Plan standards are “as effective as” federal standards, OSHA promulgated regulations that were broad enough to allow flexibility to deal with inevitable changes prompted by new industries and work hazards.²⁹ The indices contain a number of requirements, most of them relating to enforcement procedures, in which the Assistant Secretary of Labor must provide adequate methods to assure that such standards continue to be “as effective as” federal standards.³⁰ Most of the listed indices also pertain to process over results.³¹

26. S. REP. NO. 91-1282, at 17, *reprinted in* 1970 U.S.C.C.A.N. at 5194. The Act requires State Plans to “contain assurances that the state will develop and enforce standards at least as effective as those developed by the [S]ecretary [of Labor, and], that the state will have the same legal authority personnel and funds necessary to do the job.” *Id.*

27. *Id.* at 16, *reprinted in* 1970 U.S.C.C.A.N. at 5194–95. “[T]he plan must . . . establish and maintain an occupational safety and health program applicable to all employees of the state and its political subdivisions, and that such program will be as effective as that applicable to provide employers covered by the plan.” *Id.*

28. *Id.* at 17, *reprinted in* 1970 U.S.C.C.A.N. at 5195.

29. *See, e.g., id.*

30. 29 C.F.R. § 1902.4(a) (2010). The indices require the Secretary of Labor to determine whether State Plans develop standards addressing the hazards of employee exposure to toxic materials and harmful physical agents. *Id.* § 1902.4(b). They require procedures that provide input from interested stakeholders such as employees, employers, standards-producing organizations, and the public. *Id.* § 1902.4(b)(2)(iii). They require State Plan States to provide for variances as necessary and to be ready to set standards promptly when faced with unforeseen hazards. *Id.* § 1902.4(b)(2)(iv)–(v). They require State Plan States to provide for the posting of information on workplace hazards for employees, to provide for protection of employees from exposure to hazards through protective equipment, and to monitor and measure exposure to hazards. *Id.* § 1902.4(b)(2)(vi)–(vii).

31. *Id.* § 1902.4(c). The indices require State Plan States to inspect workplaces to assure safe and healthful working conditions for employees and to allow employees to bring violations to the attention of enforcing state agencies, under state protection against discharge or discrimination for doing so. *Id.* § 1902.4(c)(2)(i)–(v). They require State Plan States to see to it that employees are notified when the enforcing agency does not take compliance action in response to an employee complaint and that employees are informed of their protections and obligations under the Act, as well as their exposure to toxic materials and harmful physical agents. *Id.* § 1902.4(c)(iii)–(iv), (vi). State Plan States must also require “prompt restraint or elimination of any conditions or practices . . . which could reasonably be expected to cause death or serious physical harm” through abatement of such conditions or practices, and they must issue and post citations of violations or otherwise notify employees and employers of violations of standards. *Id.* § 1902.4(c)(2)(ii), (x). Employers are entitled to protections, such as safeguards for trade secrets, and are entitled to a right to review alleged violations, abatement periods, and proposed penalties through administrative or judicial review or other opportunities for full hearings on these issues. *Id.* § 1902.4(c)(2)(viii), (xi). The regulations require State Plan States to augment their enforcement efforts with voluntary compliance programs. *Id.* § 1902.4(c)(2)(xiii). Perhaps the most elusive and controversial requirement is that State Plan States must provide “effective sanctions against employers who violate [s]tate standards and orders.” *Id.* §

This contradicts the definition of the term “effective” as “[p]erforming within the range of normal and expected standards; [p]roductive; [or] achieving a result.”³²

B. OSHA Evaluates State Plans Through Inconsistent, Process-Based Measures, Rather than Measures of Effectiveness in Achieving Workplace Health and Safety

Rather than focusing on results, OSHA uses procedural measures to evaluate State Plans. In a recent audit of OSHA’s monitoring of the twenty-seven State Plan States, the Office of the Inspector General (“OIG”) concluded that OSHA has yet to devise a means to determine whether State Plans are “as effective as” OSHA.³³ It criticized OSHA’s failure to evaluate the impact of its own enforcement efforts, leaving states without quantifiable data to demonstrate their own effectiveness by comparison.³⁴

In setting its own baselines in federal enforcement states, OSHA correctly uses criteria which comport with the intended goals of the Act—Days Away, Restricted, or Transferred (“DART”) rates; and fatality rates.³⁵ DART data are important because they measure lost productivity in the workplace, a primary concern cited in the OSH Act.³⁶ The OIG also noted that OSHA uses outcome-based data when evaluating its overall effectiveness in both State Plan States and federal enforcement states: “injury and illness data; and fatality data.”³⁷

However, OSHA resists the use of this baseline data when assessing State Plan States. Instead, it favors activity-based measures over outcome-based measures mainly “because outcome

1902.4(c)(2)(xi).

32. BLACK’S LAW DICTIONARY 592 (9th ed. 2009).

33. OIG REPORT, *supra* note 5, at 2.

34. *See id.* The OIG noted that OSHA does use data, but it does not pertain to outcomes. *See id.* Rather, OSHA used “activity-based data including inspection counts, penalty amounts, injury and fatality rate trends, Integrated Management Information System [] [statistics] and recordkeeping, measures for timeliness and completion of inspections, violation classification, staffing benchmarks, and timely adoption of standards.” *Id.* It is noteworthy that OSHA requires states to follow its staffing benchmarks in order to be “as effective as” OSHA but has no such benchmarks for OSHA’s own enforcement. *See id.* at 7–8.

35. *Id.* at 7.

36. *See id.*

37. *See id.* at 2.

are lacking.”³⁸ OSHA points to the fact that DART data are not available in ten states, though it declines to mention that the ten states missing the data are federal OSHA states.³⁹ Second, it points to states that lack sample sizes large enough to draw statistical conclusions about workplace injuries and illnesses.⁴⁰ OSHA also objects to the use of fatalities as a measure of effectiveness because of their unpredictability, and because the rise or fall in this number could be attributed in part to rising or falling unemployment numbers.⁴¹ Nevertheless, OSHA declines to demonstrate that these inherent dangers do not exist in the data it uses to evaluate its own program.

Further, when it comes to assessing states, OSHA protests the use of outcome-based measures exclusively because it finds them “extremely problematic,” and because, in OSHA’s view, they confound the purposes of the OSH Act.⁴² Therefore, process is now a primary driver for OSHA. Rather than setting its own consistent, outcome-based criteria for effectiveness, which would address the core purpose of the OSH Act in reducing or eliminating injuries, illnesses, and fatalities, OSHA uses activity-based measures to evaluate State Plans and relies on State Plan States to define effectiveness in their own contexts.⁴³

38. *Id.*

39. Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Workplace Injuries and Illness—2009 (Oct. 21, 2010) (on file with author).

40. OIG REPORT, *supra* note 5, at 7.

41. *Id.* With respect to the former, OSHA’s concern may have been with employers self-reporting. Memorandum from David Michaels, Assistant Sec’y, Occupational Safety & Health Admin., to Elliot P. Lewis, Assistant Inspector Gen. for Audit, Office of Inspector Gen. 4 (Mar. 31, 2011) (on file with author).

42. *See id.* at 1–2.

43. OIG REPORT, *supra* note 5, at 2; Changes to State Plans: Revision of Process for Submission, Review and Approval of State Plan Changes, 67 Fed. Reg. 60,122, 60,123 (Sept. 25, 2002) (to be codified at 29 C.F.R. pts. 1902, 1952–55.) [hereinafter Changes to State Plans]. In response to the Government Performance and Results Act of 1993, OSHA was forced to begin looking at outcome-based measures for itself and for State Plans: “Over the years, OSHA’s monitoring has changed from a system of measuring the states against [f]ederal performance on various indicators to the current reviews that measure state performance against the state’s own goals.” OIG REPORT, *supra* note 5, at 8. However, the Obama administration still relies heavily on activity measures and, in the recent Enhanced Federal Annual Monitoring and Evaluation effort in 2011, reverted dramatically to focusing on activities rather than performance-based outcomes. *Is OSHA Undermining State Efforts to Promote Workplace Safety?: Hearing Before the H. Subcomm. on Workforce Prot.*, 112th Cong. 15 (2011) (prepared statement of Elliott P. Lewis, Assistant Inspector General for Audit, U.S. Department of Labor) [hereinafter *Is OSHA Undermining State Efforts Hearing*].

The result is as ironic as it is sad: “OSHA lacks the clear understanding of the impact of State [Plan] programs on safety and health.”⁴⁴ The experience has left most State Plan States in agreement that “OSHA’s effectiveness measures need to be re-evaluated and more outcome, rather than, output-oriented.”⁴⁵

Despite these alleged flaws, a comparative study of the aforementioned data between federal OSHA enforcement and State Plans should provide a comparison between the two enforcement regimes on a level playing field. It is through such a comparison that OSHA can work with State Plan States to determine if they are “as effective as” OSHA.

C. *OSHA Leaves State Plan States Guessing How to Implement the “As Effective As” Standard*

In establishing indices for evaluating State Plans, the Secretary of Labor uses case-by-case, process-based criteria to assess the effectiveness of State Plans, leaving State Plan States without suitable guidance about how to create a program that embodies the goals of the OSH Act.⁴⁶ Peter DeLuca, Administrator of the Oregon Occupational Safety and Health Division, submitted a comment to the proposed 2002 amendments citing the need to clarify the “as effective as” language.⁴⁷ He pointed out that the “lack of clarity around ‘at least as effective as’ only stifles and discourages creativity” in State Plan States and restricts State Plan States’ ability to find new ways to enhance workplace safety and health.⁴⁸

In response to DeLuca’s concerns, OSHA declined to clarify “as effective as,” stating that it would be impracticable and inadvisable to create a “one size fits all” definition for the varied State Plans.⁴⁹ Rather than developing a multivariate scheme or other tool to measure effectiveness across states, OSHA re-delegated

44. OIG REPORT, *supra* note 5, at 8.

45. *Id.* at 13 exh.1.

46. *See id.* at 4.

47. *See* Changes to State Plans, *supra* note 43, at 60, 122.

48. *Id.* at 60, 123.

49. *See id.*

State Plan oversight to the states themselves, based on each state's own criteria.⁵⁰

OSHA's decision to leave the "as effective as" language undefined frustrates a major purpose of the statute and places the burden of determining effectiveness on the Secretary of Labor.⁵¹ It cannot be denied that states have a variety of industrial mixes that alter the makeup of the challenges each faces, or that no two states face the same challenges. Some states may well have a significantly higher prevalence of high-hazard industries, while others may be blessed with relatively safe industry profiles. Despite these inevitable variances, however, to evaluate each state's processes individually, without measuring their outcomes, leaves state enforcers guessing how to meet OSHA's approval and tends to stifle and discourage State Plan States' creativity.

D. OSHA's Process-Based Measures Contradict Legislative Intent

While OSHA declined to adopt a "one size fits all" means to evaluate State Plan effectiveness,⁵² it embraced this approach with its National Emphasis Programs ("NEP"). Under NEPs, OSHA focuses inspection resources on particularly hazardous industries.⁵³ For the first forty years of the OSH Act, OSHA gave State Plan States the option to participate.⁵⁴ State Plan States did participate in NEPs quite frequently to address hazards such as combustible dust explosions.⁵⁵

50. *See id.* To wit, OSHA stated that it leaves to each state the initial determination as to whether a particular requirement is "at least as effective as" at the time it adopts and begins to enforce the new requirement, and if OSHA disagrees, it must institute an adjudicatory rejection proceeding in which the burden of proof rests with OSHA, not the [s]tate.

Id.

51. *See* 29 U.S.C. § 675(c)(2) (2006).

52. Changes to State Plans, *supra* note 43, at 60, 123.

53. *See, e.g.*, Letter from Kevin Beauregard, Chair, Occupational Safety & Health State Plan. Ass'n, to David Michaels, Assistant Sec'y for Occupational Safety & Health, U.S. Dep't of Labor 1 (May 13, 2001) (on file with author) [hereinafter OSHSPA May 13th Memo].

54. *See* OIG REPORT, *supra* note 5, at 1.

55. *Federal Program Change Summary Report: Combustible Dust National Emphasis Program*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Oct. 15, 2008), http://www.osha.gov/dcsp/osp/standards_fpc/fpc_cpl_03_00_008.html (indicating that fifteen State Plan States intended to adopt the combustible dust NEP and that, as of October 15, 2008, eleven of those states had formally adopted the NEP).

In 2010, the Obama administration decided to mandate State Plan adoption of all future NEPs.⁵⁶ Now State Plans must conduct up to five inspections in each targeted industry each year.⁵⁷ OSHA mandates five inspections in each state, regardless of the size of the state, the number (or even the existence) of employers in such industries in each state, and the number (or absence) of fatalities, injuries, or missed workdays in such industries.⁵⁸ However, OSHA does not provide states with additional funding to carry out these mandates.⁵⁹

The Occupational Safety and Health State Plan Association (“OSHSPA”), an organization representing the twenty-seven State Plan States, took issue with “OSHA’s position that a State

56. See *Is OSHA Undermining State Efforts Hearing*, *supra* note 43, at 38 (written statement of Kevin Beauregard, Chair, Occupational Safety & Health State Plan Association); accord *Nev.’s Workplace Safety & Health Enforcement Program: OSHA’s Findings & Recommendations: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 22 (2010) (prepared statement of Jordan Barab, Assistant Secretary for Occupational Safety & Health, U.S. Department of Labor) (announcing the Obama administration’s plan to make all future OSHA NEPs mandatory for state programs). OSHSPA challenged the mandate on the grounds that there was no legal basis for requiring State Plans to adopt all future NEPs. See Memorandum from Kevin Beauregard, Chair, Occupational Safety & Health State Plan Ass’n, to David Michaels, Assistant Sec’y, Occupational Safety & Health Admin., U.S. Dep’t of Labor 1 (July 6, 2010) (on file with author) [hereinafter OSHSPA July 6th Memo]. Assistant Secretary Michaels responded by citing the OSH Act’s requirement that State Plans be “at least as effective” as those of federal OSHA. Memorandum from David Michaels, Assistant Sec’y, Occupational Safety & Health Admin., U.S. Dep’t of Labor, to Kevin Beauregard, Chair, Occupational Safety & Health State Plan Ass’n 1 (Oct. 12, 2010) (citing 29 C.F.R. § 1902.3(d)(1) (2010)) (on file with author). He stated that

[t]o carry out this requirement, OSHA regulations provide that whenever “a significant change in the [f]ederal program would have an adverse effect on the ‘at least as effective as’ status of the State [P]lan if a parallel [s]tate change were not made,” a [s]tate change “*shall be required*.” A change in OSHA “policy or procedure of national importance” is an example of such a [f]ederal program change requiring [s]tate action.

Id. (citing 29 C.F.R. § 1953.4(b)(1)–(2) (2010)). Because OSHA’s adoption of an NEP is “a change in policy or procedure of national importance,” when so notified, State Plans are required to respond.” *Id.* at 2 (citing 29 C.F.R. § 1953.4(b)(2) (2010)).

57. See, e.g., OSHSPA May 13th Memo, *supra* note 53, at 2.

58. See *id.* at 2–3 (showing that under the mandate, State Plans will be required to use their limited resources to address hazards that may not be problems in a particular state); OSHSPA July 6th Memo, *supra* note 56, at 1 (“A [s]tate strategic plan often includes statewide emphasis programs specific to prevalent industries . . . within an individual state that are accounting for the highest rates of . . . serious accidents. Requiring State Plans to adopt NEPs developed solely by OSHA could divert limited state resources from these critical areas . . .”).

59. See OSHSPA May 13th, Memo, *supra* note 53, at 3. Because Virginia provides half of the funding for VOSH, NEPs implementation serves not only as an unfunded mandate but also as a federal mandate on how state funds are to be utilized. *Id.*

Plan should use its limited resources to address a hazard that may be a problem elsewhere in the nation, but is not [a problem] in a particular [s]tate.”⁶⁰ Further, it objected to “federal micro-management of [s]tate resources” via the five-inspection requirement because it “runs directly contrary to Congress’s stated intent for the [s]tates to identify their own needs and responsibilities for assuring ‘safe and healthful working conditions’ in their [s]tate.”⁶¹ OSHSPA pointed out that these provisions hold even if a state can achieve safety and health outcomes through cooperative programs, rather than through enforcement.⁶² The state would have to comply “even if the [s]tate could demonstrate that previous enforcement and consultation inspections in the particular industry or emphasis area in their [s]tate resulted in high non-compliance rates and/or a low percent-serious rate.”⁶³ OSHSPA found these positions to be “unsupportable.”⁶⁴ Further, it found them “contrary to Congress’s stated intent that State Plans ‘conduct experimental and demonstration projects’ to address workplace hazards.”⁶⁵

Another example of the negative impact OSHA can have on State Plans occurred with its implementation of an NEP on recordkeeping, which was based on OSHA’s perception that employers were intentionally underreporting injuries and illnesses.⁶⁶ Initially, when OSHA issued this NEP on February 19, 2010, it developed the initiative “without any State Plan participation early enough in the development process to identify any negative

60. See *id.*; see also OCCUPATIONAL SAFETY & HEALTH ADMIN., FED. ANNUAL MONITORING & EVALUATION (FAME) REPORT ON VA. OCCUPATIONAL SAFETY & HEALTH PROGRAM: OCT. 1, 2008 TO SEPT. 30, 2009, at 7 (2010) [hereinafter APRIL 30TH FAME REPORT]).

61. See OSHSPA May 13th Memo, *supra* note 53, at 2.

62. See *id.* OSHA offers programs to assist employers in complying with its health and safety regulations. OSHA’s On-Site Consultation Program, for example, provides free workplace safety evaluations to small businesses. *On-Site Consultation*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <http://www.oshgov/dcsp/smallbusiness/consult.html> (last visited Oct. 12, 2011). The program is independent from OSHA’s enforcement program and work site visits do not result in penalties or citations. *Id.*

63. OSHSPA May 13th Memo, *supra* note 53, at 3.

64. *Id.*

65. *Id.* (citation omitted).

66. OCCUPATIONAL SAFETY & HEALTH ADMIN. DIRECTIVE NO. 10-07 (CPL 02), INJURY AND ILLNESS RECORDKEEPING NAT’L EMPHASIS PROGRAM, Exec. Summary, Abstract-3 (Sept. 28, 2010). OSHA focused on “establishments operating in historically high rate industries and reporting injury and illness rates slightly lower than the cut-off rates used by OSHA to compile its primary inspection targeting list under the Site-Specific Targeting [] program.” *Id.*

resource impacts on State Plan programs in time to address them up front.”⁶⁷ The results of the NEP, in the absence of state involvement, were underwhelming. The initial NEP did not show the number of underreported violations cited and “not-in-compliance” inspections.⁶⁸ In a follow-up NEP, OSHA had to revise the inspection targeting criteria in order to include more establishments in violation of the recordkeeping regulations to support its hypothesis.⁶⁹

OSHA further exacerbates state concerns with the criteria used in its Federal Annual Monitoring and Evaluation (“FAME”) reports. The FAME reports are OSHA’s formal mechanism to evaluate the effectiveness of each State Plan and to provide State Plan States with OSHA’s criteria for the continued delegation of OSHA’s enforcement duties.⁷⁰ In these reports, OSHA evaluates data such as the number of hazards located and the percentages of identified hazards that inspectors deem “serious,” “other-than-serious,” “willful,” or “repeat.”⁷¹ Counterintuitively, OSHA concludes that inspections uncovering compliant employers do not signify safe workplaces, but inadequate inspection targeting systems.⁷² On the other hand, in federal enforcement states, OSHA

67. OSHSPA May 13th Memo, *supra* note 53, at 3; see also OCCUPATIONAL SAFETY & HEALTH ADMIN. DIRECTIVE NO. 10-02 (CPL 02), INJURY & ILLNESS RECORDKEEPING NAT’L EMPHASIS PROGRAM, Exec. Summary, Abstract-3 (Feb. 19, 2010). OSHA received an appropriation of approximately \$2 million for this initiative but allocated none of the additional funding to assist the twenty-seven State Plan States that invested hundreds to thousands of hours in compliance efforts, a result that “could constitute an unfunded mandate to State Plans.” OSHSPA May 13th Memo, *supra* note 53, at 3.

68. See Sara Ditta, *OSHA Fails to Find ‘Bad Actors’ in Recordkeeping NEP, Suspends Program*, INSIDEOSHAONLINE.COM (Aug. 4, 2010), <http://insideoshaonline.com/OSHA-Online-Daily-NEWS/OSHA-Daily/osha-fails-to-find-bad-actors-in-recordkeeping-nep-suspends-program/menu-id-622.html>.

69. See *Is OSHA Undermining State Efforts Hearing*, *supra* note 43, at 38 (written statement of Kevin Beauregard, Chair, Occupational Safety & Health State Plan Association).

70. Memorandum from Lee Anne Jillings, Acting Dir. for Directorate of Coop. & State Programs, Occupational Safety & Health Admin., to Reg’l Adm’rs, Occupational Safety & Health Admin. (Jan. 10, 2011) (on file with author) [hereinafter Jillings Memo].

71. APRIL 30TH FAME REPORT, *supra* note 60, at 21–22. In these reports, OSHA evaluates State Plans according to in-compliance rates, not-in-compliance rates, percentages of serious violation rates; percentage of programmed inspections with serious, willful, or repeat violations; and numbers of violations found per inspection. OSHSPA May 13th Memo, *supra* note 53, at 3.

72. See OSHSPA May 13th Memo, *supra* note 53, at 3. (“OSHSPA can provide countless examples of State Plan annual evaluation reports where OSHA monitoring personnel have used such indicators as high in-compliance rates and low percent serious violation rates in planned inspections to conclude that a state’s targeting system was inadequate or not ‘as effective as’ OSHA’s targeting system.”).

views a similar decline in a more positive light. In its own strategic plan for 2011–2016, OSHA projects that its performance indicator for “[p]ercent of serious, willful, repeat violations in . . . [l]arge construction projects [and] [h]igh-hazard manufacturing industry” is “targeted to trend downward” in 2016.⁷³ Apparently, a quantum indicating ineffectiveness in State Plans is a goal when it is applied to OSHA.

As its next step, OSHA is considering additional constraints on State Plans by requiring them to follow its Severe Violators Enforcement Program (“SVEP”). OSHA launched this proposal in June 2010 to increase enforcement efforts in cases involving “significant hazards and violations by concentrating on employers who have demonstrated indifference to their occupational safety and health obligations through willful, repeated, or failure-to-abate violations.”⁷⁴ The SVEP proposal applies to situations involving fatalities, catastrophes, “[h]igh-[e]mphasis [h]azards,” and other severe occupational hazards, hazardous chemicals, and egregious violations.⁷⁵

SVEP includes more mandatory inspections and follow-up inspections of identified companies, inspections at multiple locations of companies that have them, more intense examination of employers’ history, and penalty increases.⁷⁶ Preliminary data suggest that this initiative may increase the rate of contested citations.⁷⁷

73. HILDA L. SOLIS, U.S. DEP’T OF LABOR, STRATEGIC PLAN: FISCAL YEARS 2011–2016 at 44 (2010).

74. OCCUPATIONAL SAFETY & HEALTH ADMIN. DIRECTIVE NO. CPL 02-00-149, SEVERE VIOLATOR ENFORCEMENT PROGRAM (June 18, 2010), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=4503.

75. *Id.*

76. See *Putting Safety First: Strengthening Enforcement and Creating a Culture of Compliance at Mines and Other Dangerous Workplaces*, Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions, 111th Cong. 132–33 (2010) (statement of David Michaels, Assistant Secretary, Occupational Safety and Health Admin.); Press Release, U.S. Dep’t of Labor, U.S. Dep’t of Labor’s OSHA Takes Action to Protect America’s Workers with Severe Violator Program and Increased Penalties (Apr. 22, 2010), available at http://osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17544 (signaling an intent to increase penalties for serious violations from \$1000 to up to \$4000).

77. Marcus Baram, *Swatting at Flies: Another Huge Company Fights a Small Fine over Safety Violations*, HUFFPOST BUS. (May 20, 2011, 5:05 PM), http://www.huffingtonpost.com/2011/05/20/big-company-fights-small-fine_n_864756.html (“More companies seem to be disputing [OSHA] penalties . . . Since 2008, the number of new cases heard by the [U.S. Occupational Safety and Health Review Commission (“OSHRC”)] has nearly doubled

OSHA has not yet determined whether State Plans will have to increase penalties by the same or similar amounts. But it already measures State Plan effectiveness in part through penalty levels and identifies violations without demonstrating how those measures translate into effectiveness.⁷⁸ Such indices include the average number of violations per inspection.⁷⁹ While an effective State Plan may demonstrate a higher number of identified violations, an effective regime may also deter such violations in the first place, thus yielding lower numbers.⁸⁰ Such a measure can vary from one industry to the next. OSHA also computes the average initial penalty per serious violation among private sector employers, but it does not provide empirical data to demonstrate that lower penalties would fail to deter violations.⁸¹ On the other hand, in OSHA-run states, preliminary data indicates that recently enhanced penalties may be increasing legal contests. Under the OSH Act, legal challenges stay required abatement until they are resolved.⁸² Third, OSHA computes average penalties for serious safety and health violations by private sector employers.⁸³ Again, OSHA has not demonstrated the effect of higher or lower penalty levels on employee safety or health.

Ironically, such a mandate could render State Plans less effective in reducing injuries or illnesses. If, in fact, legal challenges increase as they currently appear to be, they would stay required

from [thirteen] to [twenty-four] in 2010.”); *see also* U.S. OCCUPATIONAL SAFETY & HEALTH REVIEW COMM’N, FY 2010 PERFORMANCE & ACCOUNTABILITY REPORT 6–7 (2010) [hereinafter OSHRC REPORT]. The workload of OSHRC administrative law judges has dramatically increased as a result of contested OSHA penalties. *See, e.g.*, OSHRC REPORT, *supra* at 6 (noting that in FY 2010, the workload of administrative law judges has increased substantially over prior FYs and included a 60% increase in the number of cases disposed of with hearings).

78. *See* OIG REPORT, *supra* note 5, at 5–6.

79. *See, e.g., id.* at 15 exh.2.

80. *See* APRIL 30TH FAME REPORT, *supra* note 60, at 26. However, OSHA appears to assume the former over the latter. To wit,

Virginia conducted 2,474 programmed inspections during FY 2009 with an average of 2.9 violations per inspection compared to [f]ederal OSHA’s 3.1 violations per inspection. Virginia’s serious/willful/repeat rate was 65% compared to [f]ederal OSHA’s rate of 81%. While there appears to be a significant difference between Virginia’s rate and [f]ederal OSHA, the total [S]tate [P]lan rate is 44% so Virginia appears to be performing an adequate job in the classification of its violations.

Id.

81. *See* OIG REPORT, *supra* note 5, at 16.

82. *See* 29 U.S.C. § 659(C) (2010).

83. OIG REPORT, *supra* note 5, at 16.

abatement of workplace hazards while legal contests are pending.⁸⁴ Increased legal challenges would also force cash-strapped states to divert funds from inspection positions and other health and safety-related positions to hire more attorneys to handle the caseload.⁸⁵ Virginia Occupational Safety and Health (“VOSH”) staff members have observed that SVEP has led to increased hostility among employers who are resisting heavy-handed enforcement during inspections, particularly small employers who are less able to afford higher penalties.⁸⁶ In addition, OSHA may cause problems for small employers in economically depressed areas, when more cooperative measures or reduced penalties may encourage quick abatement.

IV. DESPITE OSHA’S PROCESS-BASED REQUIREMENTS, VIRGINIA ACHIEVES MEASURABLE OUTCOMES IN OCCUPATIONAL SAFETY AND HEALTH

When OSHA does evaluate State Plans, it offers recommendations that overwhelmingly relate to process, such as OSHA-approved file documentation, rather than results.⁸⁷ Often, OSHA’s “major” findings of fault in a State Plan are erroneous or insignificant.⁸⁸ Rather than enhancing workplace safety and health in

84. See VA. DEP’T OF LABOR AND INDUS., OCCUPATIONAL SAFETY & HEALTH FIELD OPERATIONS MANUAL ch. 11, at 24 (2001) [hereinafter VOSH FOM] (noting that the period for abatement of contested violations does not begin to run until the day following a court order).

85. Apparently, increased penalties are causing an unexpected flood of legal challenges today in a similar context, federal enforcement of mining violations. *Reducing the Growing Backlog of Contested Mine Safety Cases*, COMM. ON EDUC. & THE WORKFORCE (Feb. 23, 2010), <http://democrats.edworkforce.house.gov/hearing/reducing-growing-backlog-contested-mine-safety-cases.shtml> (“As the result of stepped-up enforcement and tougher penalties after a spate of mine tragedies in 2005 and 2006, mine owners tripled the number of violations they appeal and are now litigating 67[%] of all penalties.”).

86. VOSH is Virginia’s OSHA-approved occupational safety and health State Plan.

87. See generally APRIL 30TH FAME REPORT, *supra* note 60, at 24–33. For example, despite OSHA’s finding that VOSH was responding to and investigating complaints in a timely manner, OSHA issued VOSH a recommendation stating: “Written documentation should be contained in case files to justify why a non-formal complaint resulted in an inspection.” *Id.* at 24. Additionally, OSHA commended VOSH for its prompt and thorough investigation of job-related fatalities but found that documentation of such incidents needed improvement. *Id.* at 24–25. OSHA issued VOSH a recommendation to that effect: “Ensure that interviews with employer representatives and employees [regarding job-related fatalities] are documented in case files.” *Id.* at 26.

88. See, e.g., Letter from Courtney Malveaux, Comm’r, Va. Dep’t of Labor & Indus., to John M. Hermanson, Reg’l Admin., U.S. Dep’t of Labor-Occupational Safety & Health Admin. (Oct. 14, 2010), available at http://www.osha.gov/dcspp/osp/efame/va_formal_respon

Virginia, this system requires VOSH to expend considerable time and resources on procedural issues, to its detriment. In fact, many State Plan States spend hundreds or thousands of staff hours on complying with OSHA's recordkeeping NEP, diverting critical resources from enforcement efforts.⁸⁹ Currently, significant VOSH staff time that could be spent finding creative ways to enhance occupational safety and health is devoted to FAME reports, OSHA audits, authoring letters to industry participants in industries targeted by OSHA, and other tasks required by OSHA.

Despite these distractions, VOSH has demonstrated marked success in worker safety and health that certainly has contributed to a steady decrease each year in fatal accidents investigated by VOSH between 2005 and 2009, culminating in a 48% decrease over a five-year period.⁹⁰ VOSH continues to maintain injury and illness rates that fall consistently well below the national average.⁹¹

VOSH points to a number of factors for its successes. It may have averted potential fatalities, injuries, and illnesses through its unique and well-tailored regulations.⁹² Over the years, VOSH has enacted additional unique regulations in the areas of confined space hazards in the construction and telecommunications industries;⁹³ overhead high voltage line safety;⁹⁴ fall protection in steel erection;⁹⁵ reverse signal operation in construction and general

se.pdf [hereinafter Malveaux letter]. For example, OSHA issued the following recommendation: "Bulk samples should be taken by industrial hygienists whenever suspected combustible dust is encountered in a work place." APRIL 30TH FAME REPORT, *supra* note 60, at 28. In its corrective action plan response to the Enhanced Federal Annual Monitoring Report, VOSH stated: "This error was found in 1 of 102 case files. VOSH does not consider a less than [1%] error rate to rise to the level of a serious problem. This issue will be addressed at the annual VOSH training conference for [Compliance Safety and Health Officers] in 2011." Malveaux Letter, *supra* at 7.

89. OSHSPA May 13th Memo, *supra* note 53, at 3.

90. Malveaux Letter, *supra* note 88, at 2. According to its internal records, VOSH received reports of sixty-four fatalities in 2005, fifty-five fatalities in 2006, forty-five fatalities in 2007, thirty-nine fatalities in 2008, thirty-three fatalities in 2009, and twenty-four fatalities in 2010. *Id.*; VA. DEPT OF LABOR & INDUS., VOSH FATALITIES—2010 (2010) (on file with author). As of September 7, VOSH has received reports of twenty-four fatalities in 2011. VA. DEPT OF LABOR & INDUS., VOSH FATALITIES—2011 (2011) (on file with author).

91. APRIL 30TH FAME REPORT, *supra* note 60, at 8; Malveaux Letter, *supra* note 88, at 2.

92. See Malveaux Letter, *supra* note 88, at 2.

93. 16 VA. ADMIN. CODE § 25-70-10 (1996).

94. *Id.* § 25-145-10 (Cum. Supp. 2011).

95. *Id.* § 25-145-20 (Cum. Supp. 2011).

industry;⁹⁶ and compliance with manufacturers' instructions for vehicles, machinery, tools, and equipment.⁹⁷ VOSH also made Virginia an exemplar of vigilance, as one of the top states in the rate of occupational safety and health inspections performed per number of employers and a top state in overall on-time complaint responses.⁹⁸ Additionally, VOSH built a comparatively robust Voluntary Protection Program ("VPP") and a Safety and Health Achievement and Recognition Program ("SHARP"), which recruited forty-three member employers and thirty-eight member employers respectively to serve as leaders in workplace health and safety.⁹⁹ Finally, VOSH has held safety and health conferences over the past sixteen years to give participants in high-hazard industries, consultants, employers, contractors, and other stakeholders an opportunity to share best practices and mutual expectations.¹⁰⁰

An increased ability to focus on outcomes over process may free VOSH to expend staff time and resources in creative ways to enhance occupational safety and health. For example, VOSH is looking at broadcasting public service announcements on television, radio, and in new media to educate employees and employers on recurring hazards. Well-timed and aggressive public education campaigns addressing hazards such as high overhead voltage lines, trenches and excavation, and heat and fall protection could prevent fatalities. VOSH is also looking at replacing the general inspection list it receives from OSHA with data on identified workplace injuries from the Virginia Workers' Compensation Commission. Currently, the OSHA general inspection list points VOSH inspectors to closed businesses or worksites that no longer exist. These inspectors could be spending their time (and state-paid gasoline and vehicle wear and tear) traveling to worksites that exist, and where employees are actually getting hurt. In addition, more VOSH staff could devote their time to

96. *Id.* § 25-97-30 (Cum. Supp. 2011).

97. *Id.* § 25-60-120 (Cum. Supp. 2011); *see also* Malveaux Letter, *supra* note 89, at 2.

98. Malveaux Letter, *supra* note 88, at 2; *see also* APRIL 30TH FAME REPORT, *supra* note 60, at 23-24 (indicating that during the period from October 1, 2008 to September 30, 2009, Virginia had a response rate of 99.73%).

99. Malveaux Letter, *supra* note 88, at 2; *see also* April 30th FAME REPORT, *supra* note 60, at 44. Virginia is unique in that it is the only state that has certified correctional facilities in VPP. *Id.* at 8.

100. *See* VA. DEPT OF LABOR & INDUS., 16th ANNUAL VIRGINIA OCCUPATIONAL SAFETY AND HEALTH CONFERENCE (2011).

consultations that help employers proactively address workplace hazards. They could also assist more in certifications for employers striving to become exemplars in workplace safety and health in Virginia's VPP or SHARP programs. Finally, VOSH staff could spend more time hosting public outreach events to educate employees and employers in targeted industries and geographic areas on the most common hazards VOSH encounters.

Currently, however, VOSH staff devote significant time and resources to meetings and reports dealing with the procedural issues raised by OSHA's audits, as well as complying with NEPs of debatable value in Virginia's industry mix. The creative minds on VOSH's staff could be turned loose on initiatives, such as those mentioned above, in order to find new ways to cooperate with employers and prevent workplace incidents. OSHA may be pleasantly surprised at the ways VOSH could produce even better outcomes, if given more flexibility to explore ways to save lives and simultaneously conserve resources.

V. OSHA CAN USE THE CLEAN AIR ACT AND STATE PLAN INITIATIVE TO MOVE TOWARD OUTCOME-BASED MEASURES

A. *OSHA Can Look to the Clean Air Act as an Example in Utilizing Outcome-Based Measures*

The term "as effective as" is used in other federal regulatory contexts, but not generally in the context of shared state-federal regulatory regimes.¹⁰¹ But the term is used in such a context in the National Ambient Air Quality Standards ("NAAQS") of the federal Clean Air Act.¹⁰² These standards set maximum concentration levels for specific pollutants.¹⁰³ They are harm-based standards that do not measure the amount of pollutants that emerge from a source, like a specific smoke stack, but rather the level of pollutants in an entire region's air quality that affects health outcomes.¹⁰⁴

101. See, e.g., 42 U.S.C. § 12182 (2006) (equal opportunity regulation); 46 U.S.C. § 3703a (2006) (shipping vessel construction); 46 U.S.C. § 55105 (2010) (shipping hazardous waste); 9 C.F.R. § 113.450 (2011) (Department of Agriculture); 12 C.F.R. § 215.8 (2011) (Federal Reserve); 46 C.F.R. § 163.002-9 (2010) (Coast Guard).

102. 40 C.F.R. § 51.908 (2010).

103. See id. § 50.2(b).

104. See id. § 50.1(e) (defining "ambient air" as "that portion of the atmosphere, exter-

The Clean Air Act provides states with grants and authority to enforce the NAAQS under a State Implementation Plan ("SIP").¹⁰⁵ Participating states measure and enforce requisite levels of pollutants in order to safeguard public safety.¹⁰⁶ Rather than focusing on process, SIP leverages federal resources, so states can use technology-based standards that focus on measurable outcomes for health and air quality for entire communities.

Under the Clean Air Act, participating states must demonstrate that their measures, rules, and regulations are "at least as effective" as the national standards they implement.¹⁰⁷ In demonstrating that its program is at least as effective as federal efforts, a participating state must measure emissions.¹⁰⁸

This is not to say that the SIP program does not encounter problems similar to those highlighted by the Department of Labor. In fact, each enforcing state has different challenges. Therefore, expert vigilance is necessary to supplement the outcome-based criteria.¹⁰⁹ Despite these challenges, the program requires enforcing states to operate a program "at least as effective" as that of the federal regulatory agency.¹¹⁰ It holds each state accountable to outcomes that measure the impact of industry on public safety.¹¹¹ This result is consistent with the definition of "ef-

nal to buildings, to which the general public has access"); *see also* ENVTL. LAW INST., OPPORTUNITIES FOR ADVANCING ENVIRONMENTAL JUSTICE: AN ANALYSIS OF U.S. EPA STATUTORY AUTHORITIES 9 (2001) (discussing the provisions under NAAQS as "harm-based" standards).

105. 42 U.S.C. § 7410 (2006).

106. *See* 40 C.F.R. § 7410; 40 C.F.R. § 51.112(a) (2010).

107. *See id.* § 51.908(c) (2010).

108. *Id.* § 51.112(a)–(b).

109. *Id.* § 51 app. W.

It would be advantageous to categorize the various regulatory programs and to apply a designated model to each proposed source needing analysis under a given program. However, the diversity of the nation's topography and climate, and variations in source configurations and operating characteristics dictate against a strict modeling "cookbook." There is no one model capable of properly addressing all conceivable situations even within a broad category such as point sources. Meteorological phenomena associated with threats to air quality standards are rarely amenable to a single mathematical treatment; thus, case-by-case analysis and judgment are frequently required The judgment of experienced meteorologists and analysts is essential.

Id.

110. *See id.* § 51.908.

111. *See id.* § 51.112.

fective” as “[p]erforming within the range of normal and expected standards [p]roductive; [or] achieving a result.”¹¹²

B. OSHA Can Use an Enhanced Abatement Verification Process, Such as Virginia’s, to Evaluate and Enhance State Plan Effectiveness

One way OSHA could evaluate and enhance effectiveness would be to require abatement verification in a manner similar to the VOSH program. OSHA requires State Plans to verify that hazards have been eliminated or “abated” through “abatement certification, documents, plans and progress reports.”¹¹³ The OSHA Field Operations Manual requires abatement certification to include the receipt of certain abatement documents from an employer with information indicating that the subject hazards have been eliminated such as “photographic or video evidence.”¹¹⁴

OSHA generally requires abatement documentation only for “high gravity serious violations.”¹¹⁵ Likewise, it generally does not require abatement documentation for “[m]oderate or low gravity serious violations.”¹¹⁶ The OSHA area director has some discretion in these determinations, particularly if he or she chooses to require abatement documentation for moderate or low gravity serious violations in which the establishment had previously been cited “for a willful violation or a failure-to-abate notice . . . in the previous three years; or [] [i]f the employer has [a] history of a violation [causing] a fatality or . . . serious [bodily] harm to an employee in the [previous] three years.”¹¹⁷ OSHA’s abatement verification does not require a health or safety inspector to verify abatement through a follow-up visit or through direct visual evidence by photograph or otherwise.¹¹⁸

112. BLACK’S LAW DICTIONARY, *supra* note 32, at 592.

113. OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA’S FIELD OPERATIONS MANUAL (FOM) ch. 7, at 7 (2011) [hereinafter OSHA FOM].

114. *Id.*

115. *See id.* ch. 7, at 14.

116. *Id.*

117. *Id.*

118. *See id.* ch. 7, at 11. (“Where necessary, OSHA supplements these [verification] procedures with follow-up inspections and on-site monitoring inspections.”).

VOSH, on the other hand, provides that “all willful and repeat citations require abatement verification (certification and documentation), such as written, videographic or photographic evidence of abatement.”¹¹⁹ Therefore, VOSH expands the universe of OSHA violations requiring verification to include “willful” and “repeat” violations, regardless of whether they are deemed “high gravity serious.”¹²⁰

C. OSHA Can Alleviate State Confusion and Align with Legislative Intent by Using More Outcome-Based Measures to Define “As Effective As”

OSHA acknowledges that it needs to reform how it measures State Plan effectiveness and, in fact, has opened conversations with OSHSPA to do so.¹²¹ Fortunately, OSHA does not entirely lack indicia to determine State Plan effectiveness. Some of them do measure the efficiency of safety and health inspections. For example, OSHA measures the average number of days a State Plan takes to initiate an inspection and an investigation upon receipt of a complaint, which encourages diligence in state investigators.¹²² OSHA also measures the number of inspections completed per hundred hours worked by each safety and health inspector.¹²³ It also computes the percentage of complaint investigations completed within one day of receipt of a complaint and within five days of receipt of a complaint,¹²⁴ as well as the average numbers of days from the opening conference of an investigation to citation issuance.¹²⁵ OSHA also looks at the average time lapse

119. VOSH FOM, *supra* note 85, ch. 13, at 6.

120. Compare OSHA FOM, *supra* note 115, ch. 7, at 14 (“Moderate or low gravity serious violations should not normally require abatement documentation . . .”), with VOSH FOM, *supra* note 85, ch. 13, at 6 (“VOSH policy is that all serious violations, including moderate and low gravity violations, will require abatement documentation.”).

121. See Memorandum from Jordan Barab, Acting Assistant Sec’y, Occupational Safety & Health Admin., to Reg’l Adm’rs, Occupational Safety & Health Admin. (Nov. 24, 2009) (on file with author); see also Jillings Memo, *supra* note 70.

122. See, e.g., APRIL 30TH FAME REPORT, *supra* note 60, at app. D.

123. *Id.* at app. E.

124. U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., IMIS REPORT: VIRGINIA 1 (Oct. 3, 2010).

125. APRIL 30TH FAME REPORT, *supra* note 60, at app. D.

from receipt of a contest to a first-level decision by the State Plan,¹²⁶ a good measure of the efficiency of the judicial process.

There are many ways OSHA can overcome the challenges it faces in quantifying effectiveness. One possible solution is to curb the problem of small sample sizes of reported incidents by calculating numbers in each state over a period of several years. For example, OSHA could look at a small state's fatality rates instead of raw fatality numbers, or look at three- to five-year rolling averages to increase sample sizes. Such an analysis may not produce statistically significant conclusions about a state's enforcement efforts in a particular year, but this approach could yield valuable insight as to trends over a longer period of time. OSHA could also tackle the problem of the effect of economic factors, such as the likelihood of economic slowdown leading to fewer workplace incidents on fatality numbers by correcting for a quantifiable economic measure like economic growth rates or employment numbers. OSHA encounters varying industry mixes in the several states, and it could deal with this patchwork by using pro rata measures, weighted by industry type, calculated through data collected in local emphasis program initiatives. That way, if, for example, one state has a high percentage of employees in high-hazard construction industries, OSHA could project a higher number of expected workplace incidents when comparing it to a state with a predominately low-hazard industry mix. Additionally, OSHA could compensate for the lack of Bureau of Labor Statistics data on workplace injuries and illnesses in ten states by substituting this data with other reliable measures, such as workers' compensation claims. Furthermore, OSHA can adapt to the lack of information regarding the effect of enforcement efforts on workplace safety and health by requiring state and federal inspectors to verify abatement of all serious violations, rather than just those of the highest severity. This verification would have to be based on direct evidence, not on the word of the employer. Finally, OSHA could test a sampling of employers with past reported incidents to determine whether the number of reported incidents reduced over time after the State Plan implemented inspection or enforcement efforts by the State Plan.

126. *Id.*

VI. CONCLUSION

In using procedural criteria to evaluate whether State Plans are “as effective as” OSHA, OSHA has frustrated partnering State Plan States and contradicted legislative intent. By shifting the focus to outcomes in terms of safety and health in the workplace and by measuring its own effectiveness in comparison, OSHA can gain new footing with Virginia and other State Plan States to the benefit of men and women in America’s workforce.
