

**Explanation of Rulemaking, Final Action
Penalties, Appeals and Other Topics in Division 1**

Oregon OSHA

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Table of Contents

Executive Summary	2
Section I: History of Current Rulemaking	4
Section II: Description of Rule as Adopted	8
Section III: Discussion of Penalties in General	11
Section IV: Issues Addressed by the Rule as Proposed and as Adopted	16
1. Adjustments Based on Employer Size	16
2. Adjustments Based on Employer’s Demonstrated Good Faith Efforts	18
3. Adjustments Based on Immediate Compliance	20
4. Adjustments Based on Employer History	23
5. Base Penalty Calculation	24
6. Application of Adjustments to Repeat and Willful Violations	25
7. Application of Adjustments for Fatality and Accident Investigations.....	25
8. Application of Adjustments for Failure-to-Abate Violations	26
9. Penalties for Multiple Repeat and Willful Violations.....	26
10. Administrator’s Discretion.....	26
11. Time Frame for Repeat Violations	26
12. Repeat Violations at Fixed Site and Mobile Workplaces	27
13. Definition of Repeat Violations	28
14. Penalty for Combined Violations.....	32
15. Guidance Related to Appeals and Informal Conferences	32
Section V: Discussion of Financial Impacts of the Rule as Adopted	33
Section VI: Evaluation of the Rule and Its Implementation	34

Executive Summary

During recent years, Oregon OSHA has several times considered revisions to its penalty structure – in internal discussions, in conversations with external stakeholders, and during discussions with the staff of the federal Occupational Safety and Health Administration (federal OSHA) who evaluate Oregon’s compliance with the terms of the Occupational Safety and Health Act of 1970.

Federal OSHA has several times recommended that Oregon OSHA penalties (historically among the lowest in the nation, at roughly one-third the national and federal averages) be increased substantially. This includes a formal recommendation in the Federal Annual Monitoring and Evaluation (FAME) report for Fiscal Year 2009, issued in its final form in September of 2010. In addition, federal OSHA itself set out to increase the average penalties issued under federal jurisdiction by three to four times, issuing revised penalty guidance to its staff in the fall of 2009. At the same time, it encouraged states to take similar measures.

As a result of all those discussions, Oregon OSHA held a series of public forums throughout the state during the late spring and summer of 2010 designed to obtain feedback on the effectiveness of Oregon OSHA penalties, particularly concerning the various adjustments to those penalties. Throughout those discussions, it was Oregon OSHA’s stated intent to take steps to improve the effectiveness of its use of existing penalty authority, not necessarily to increase the average penalty assessed.

Following those forums and subsequent discussions with the Oregon OSHA Partnership Committee (made up of representatives of both employer and employee groups), Oregon OSHA created a stakeholder advisory group specifically to assist it in developing a rule proposal regarding the effective use of penalties. That group met several times, beginning in June 2011. As a result of those discussions, Oregon OSHA proposed revisions to the penalty rule (as well as several other administrative and technical modifications to portions of Division 1, primarily in relation to appeals) on October 14, 2011. Public comment was received at hearings in Eugene and in Portland, as well as in writing through December 14, 2011. On December 1, 2011, in response to inquiries about the original statement of need and fiscal impact, Oregon OSHA filed an amended statement of need and fiscal impact. The proposed rule itself was unaffected by the amended statement.

Having considered the public comment and a careful review of the related documents and other factors, Oregon OSHA is adopting the rule, with several minor revisions, many of them non-substantive in nature. As was the case with the proposed rule, the rule as adopted is estimated to be almost revenue neutral (the rule as adopted is somewhat more likely to be revenue neutral than the rule as proposed). However, the rule will result in some significant modifications to particular penalties. The details will vary considerably between particular inspections because the nature of the penalty adjustments has been changed substantially. However, in general, those employers being cited for the most serious violations will pay higher penalties, while those being cited for lesser violations will pay lower penalties. At the same time, the smallest employers will pay somewhat lower penalties (except in relation to the most serious violations), while the largest employers will see their penalties increase.

Although these rule changes make no change in employer requirements, Oregon OSHA believes they will improve worker protection, and they will do so without increasing the cost of complying with the safety and health rules themselves. By paying greater attention to the varying impact of penalties on employers of different sizes, by acknowledging employer's good faith efforts to comply where they can be documented, by taking into account a more complete understanding of employer history, and by focusing on violations where worker death is a reasonably predictable result, these changes will better use Oregon OSHA's existing penalty authority to encourage compliance with Oregon OSHA rules and with safe workplace practices. This, in turn, will reduce the risk of workplace injury, illness, and death.

I. History of Current Rulemaking

On both the national and state levels, there have been suggestions in recent years that workplace health and safety penalties are not being used as effectively as they might to promote health and safety in the workplace. At the state level, Oregon OSHA's rules have been largely unchanged for two decades or more. Oregon OSHA representatives have several times discussed the penalty provisions with the Oregon OSHA Partnership Committee and other groups over the past six to seven years, but the genesis of the current rulemaking comes from discussions during late 2009 and early 2010. Oregon OSHA developed several "concept documents" for public discussions of the rule's effectiveness, and those documents provided the basis for a series of public forums held during the late spring and summer of 2010. These forums were held in La Grande, Eugene, Medford, Coos Bay, Bend, and Tualatin. In addition, a forum held in Salem was streamed via the Internet to allow remote viewing.

National debate (including federal comment regarding Oregon's penalties) has generally focused on the perceived need for larger penalties, but the over-arching purpose of the Oregon discussion has been to identify ways that penalties can be used more effectively to encourage employers to comply with Oregon OSHA rules both before and after an enforcement visit.

Like federal OSHA, Oregon OSHA is required to issue penalties for serious violations and has the authority to issue penalties of up to \$7,000 per violation for both serious and other-than-serious violations. In practice, penalties are largely limited to serious violations. In Oregon, the average first-time serious violation does not approach the \$7,000 maximum; instead it typically ranges between \$300 and \$350 (although violations with a clear risk of death generally result in a somewhat higher penalty).

Also like federal OSHA, Oregon OSHA has the authority to issue penalties for repeated or willful violations of up to \$70,000 per violation. In practice, willful violations are relatively infrequent, and generally carry substantial penalties (the minimum penalty for a willful violation is \$5,000). Repeat violations are somewhat more common, but penalties for such violations only rarely approach the statutory maximum.

Historically, federal OSHA's average penalty for a first-time serious violation has been approximately \$1,000, roughly three times that of Oregon, and the average for all federal and state violations nationally has also been roughly \$1,000. However, federal OSHA issued new policy guidance to its staff in the fall of 2009, with a stated expectation that the new guidance would increase federal average penalties between 3 and 4 times. Based on experience to date, the new federal guidance has indeed increased federal penalties, although somewhat less than had been anticipated, instead resulting in penalties between 2 and 2½ times higher than the previous federal OSHA average.

As it finalized its new penalty policy, federal OSHA strongly encouraged state programs to take similar steps, suggesting that a failure to do so would raise questions about whether the state program could maintain its status (required under both state and federal law) to be "at least as effective as" federal OSHA. Although some states (two) adopted the federal penalty policy, and some other states took steps to raise their penalties at least to some extent either immediately

before or shortly after the federal change took effect, the Occupational Safety and Health State Plan Association (OSHSPA) raised concerns with federal OSHA about the relationship between average serious penalties and enforcement effectiveness. Those concerns resulted in the creation of a joint state-federal working group charged with identifying measures to determine relative effectiveness of both federal and state regulatory programs. The work of that group has not yet been concluded, but it is clear that penalties and their relationship to effective deterrence will remain an area of particular federal oversight interest.

Oregon has historically been a “low penalty” state. As noted, the average penalty for a first-time serious violation has hovered between \$300 and \$350 for some time. Typically, that penalty has been the lowest average in the nation, although in several recent years South Carolina has averaged slightly lower penalties. The average size of penalties was discussed when Oregon’s state program received final approval from federal OSHA in 2005, although it did not prevent the program from obtaining that approval.¹ As a result of issues discovered several years ago in relation to the Nevada state plan, federal OSHA decided to increase its monitoring, leading to the September 2010 publication of Enhanced Federal Annual Monitoring of Effectiveness (EFAME) reports for each of the states, focusing on Federal Fiscal Year 2009.² Although Oregon’s EFAME report was generally positive and certainly included many fewer areas of concern than some other states, one of the two recommendations for corrective action concerned the average size of penalties. The report recommended that Oregon OSHA “[i]ncrease gravity-based penalty amounts significantly in order to encourage employer voluntary compliance and to serve as a strong deterrent” and “[m]ake policy adjustments to raise penalty averages for serious violations.”

Oregon OSHA, which had already begun the process of developing changes to its penalty rules to improve their effectiveness, responded to the report’s recommendation in a letter from the Oregon OSHA Administrator:³

We agree that we can use our penalty authority and its resulting deterrent effect more effectively than is the current case. As you know, we are in the midst of developing a rulemaking proposal that would change our penalty rules in an effort to increase their effectiveness, and we expect to have those rules in place before the middle of FFY 2011. Based on our present analysis, we expect those changes to have the overall effect of increasing our penalties between 40 and 50 percent on average, although a simple increase in the average penalties is not the intended purpose of the rulemaking.

¹ “Oregon State Plan: Final Approval Determination,” Federal Register Number 70:24947-24955, May 12, 2005. “Oregon’s procedures for calculating penalties are different than OSHA’s. The state uses lower base penalty amounts to calculate the probability/severity-based (gravity-based) penalty, applies different calculations to combined or grouped violations, and applies different calculations for penalty adjustment factors. Although these differences result in lower average penalties in Oregon (\$365 for serious violations in FY 2003), no deficiencies in program operations attributable to these differences were noted.”

² “Oregon OSHA Enhanced Federal Annual Monitoring Evaluation,” for Fiscal Year 2009, published September 28, 2010. The report is available at <http://www.osha.gov/dcsp/osp/efame/oregon.html>.

³ The language quoted is from a letter sent on September 20, 2010, from Oregon OSHA Administrator Michael Wood to Dean Ikeda, Acting Regional Administrator for federal OSHA’s Region X, headquartered in Seattle, Washington. A copy of the entire letter is included at the link already provided.

The purpose of this review is to enhance the effectiveness of our penalties. We are not convinced that the average penalty for a first-time serious violation is the only – or even the primary – measure of the effectiveness of the deterrent effect created by our enforcement activities.

As an example, any meaningful analysis of enforcement deterrence must take into account not only the size of the potential penalty but also the likelihood that a violation will in fact be identified. Given Oregon OSHA's highest enforcement presence in the country year after year, the effect of our inspections is likely to be more significant than if we were issuing similar penalties but maintaining only the average federal enforcement presence.

As a further example, because of the abatement [of serious violations under appeal] requirement I already mentioned, our initial penalties are not subject to reduction simply to ensure abatement of serious violations, as is the case in federal jurisdiction and in every state plan in the country.⁴

I will mention only one other factor as part of this admittedly abbreviated discussion of what can be a very complex issue. In evaluating the effectiveness of penalties, those of us in occupational health and safety often make the point that serious violations are those that can cause serious injury, illness or death. It is worth noting that not all serious violations, however, create a meaningful risk of death. In Oregon's case, we endeavor to identify those 'death' violations and subject them to a separate penalty calculation. In the coming year, we plan to make more effective use of that provision in our existing rules. While that will have an incidental impact on the overall average penalty (perhaps as much as 25 percent), it will have a much more significant impact on the effectiveness of our penalties in focusing employer attention on those violations we most want to prevent.

Federal OSHA issued a follow-up FAME report in 2011 that focused on federal fiscal year 2010 and provided an updated timeline of Oregon OSHA's rulemaking.⁵ And the draft FAME report for federal fiscal year 2011, which has been shared with Oregon OSHA by the staff of federal OSHA's Region X, again emphasizes federal concerns regarding the relatively small penalties issued by Oregon and the perceived need to significantly increase those penalties.⁶

In the meantime, Oregon OSHA had continued development of a rule proposal, although at a somewhat slower pace than originally expected. Following a discussion with the Oregon OSHA Partnership Committee in late 2010, Oregon OSHA decided to rework the proposal somewhat to reduce the overall fiscal impact (as noted previously, increasing the average penalty was never the purpose of the proposed rulemaking, although earlier fiscal analyses did suggest that there would be a clear, if incidental, increase in the average). Oregon OSHA also established an ad-hoc stakeholder advisory group specific to the penalty rule (including primarily representatives of employers and employer groups, as well as a small number of worker representatives). The stakeholder advisory group met four times between June and September of 2011. The group

⁴ This statement was true at the time the letter was written. However, Washington State subsequently joined Oregon in requiring that serious violations be corrected even while an appeal is pending. However, the observation remains true of federal OSHA and of every other jurisdiction in the country with the exception of Washington State.

⁵ That report (and related documents) can be found at <http://www.osha.gov/dcsp/osp/efame/2010/oregon.html>.

⁶ Because the FFY 2011 report is a draft and not yet finalized, it is not yet available on the internet.

addressed 16 distinct issues related to penalties, leading Oregon OSHA to develop the rule as proposed October 14, 2011.

Oregon OSHA accepted written comments through December 14, 2011. In addition, Oregon OSHA held two public hearings, one in Eugene on December 2, 2011, and one in Portland on December 7, 2011. It received a number of comments in both written and oral form. After considering those comments and reviewing other available information, Oregon OSHA adopted the final rule on May 11, 2012, with an effective date of July 1, 2012.

II. Description of the Rule as Adopted

The rule as adopted includes most of the provisions of the proposed rule, although some of them were not adopted and many were modified somewhat in response to issues raised during the public comment period. The key issues addressed in the rulemaking include the following:

1. Adjustment for Employer Size

The final rule includes the adjustment to the base penalty for employer size as proposed:

Employees	Percentage Reduction
1-25	60%
26-90	40%
91-130	30%
131-175	20%
176-250	10%
251 or more	none

2. Adjustment Based on Employer Good Faith

The final rule includes adjustments for employer good faith as proposed (leaving the options of a decrease of 20 percent of the base penalty, an increase of 20 percent, or no adjustment), but the description of the criteria for the good faith assessment has been modified for clarity in response to public comments.

3. Adjustment Based on Immediate Correction of Violations

The final rule restores the adjustment for immediate correction of violations found in the current rule but omitted from the rule as proposed. However, the final rule reduces the adjustment to 10 percent of the base penalty and includes guidance limiting such adjustments to situations where substantial, rather than temporary or superficial, steps are taken.

4. Adjustment Based on Employer History

The final rule includes a reduced adjustment for employer history as proposed (leaving the options of a decrease of 10 percent of the base penalty, an increase of 10 percent, or no adjustment), but the description of the criteria has been modified for clarity (clearly including both injury/illness history and overall history of compliance with Oregon OSHA rules). In addition, the time frame for such data has been specified as three years (with the exception of information needed to consider three-year data in the light of longer-term trends).

5. Base Penalty Calculation

The final rule includes the increase in base penalties for death-rated violations as proposed, increasing the base penalties for low, medium and high-probability death-rated violations to \$2,100, \$3,500 and \$7,000, respectively.

6. Application of Adjustments to Repeat and Willful Violations

The final rule includes the proposed provision allowing size adjustments, but no other adjustments, to repeat and willful violations (in contrast to the previous rule, which allowed no adjustments of any kind for repeat and willful violations).

7. Application of Adjustments During Fatality and Accident Investigations

The final rule includes the proposed provision allowing size adjustments, but no other adjustments, to violations that contributed to a fatality or an injury (in contrast to the previous rule, which allowed no adjustments of any kind for such violations).

8. Application of Adjustments for Failure to Abate Violations

The previous rule indicated that no adjustments were made for failure to abate violations. However, this language was confusing, because it was based on the lack of any *additional* adjustments. Agency practice has long been to calculate penalties for most failure to abate violations using the penalty previously cited as the daily penalty. That original penalty, of course, may have included applicable adjustments. The rule as adopted simply omits any reference to adjustments for failure to abate, eliminating the source of the confusion. This does not represent a substantive change and will have no impact on existing Oregon OSHA practice in calculating the penalty for such violations.

9. Penalties for Multiple Repeat and Willful Violations

The final rule includes the proposed language indicating that a fourth repeat would normally be multiplied by 15 and a fifth repeat by 20, while a willful violation would normally be multiplied by 25, all instead of relying exclusively on administrator's discretion in setting such penalties as did the previous rule.

10. Administrator's Discretion

The final rule includes the proposed language allowing the administrator to use his or her discretion to set a penalty for any violation, rather than excluding first, second and third repeat violations from that authority, as did the previous rule.

11. Time Frame for Repeat Violations

The final rule retains the existing three-year time frame for repeat violations, rather than adopting the five-year time frame found in the proposal and current federal OSHA guidance.

12. Repeat Violations at Fixed-Site and Mobile Workplaces

The final rule includes a slight modification to the proposed language, allowing the administrator (or a designee) to determine that a repeat violation at certain mobile workplaces should be handled as a fixed-site violation because the span of control and nature of activity for a portion of the state is more readily comparable to fixed location activity.

13. Definition of Repeat Violations

The final rule includes a modified version of the proposal to change the definition of repeat violations so that it is not determined solely by whether the same rule is being cited. Instead, the rule considers a violation a repeat if it involves a substantially similar violation (the rule as proposed referred to a substantially similar hazardous condition).

14. Penalty for Combined Violations

The final rule adopts the proposed language changing penalty calculations for combined violations (violations involving multiple instances of the same violation), making it consistent with other penalty calculations, rather than relying upon the previous approach of calculating a separate penalty for each instance and then totaling the penalties.

15. Guidance Related to Appeals and Informal Conferences

The final rule adopts a revised version of the proposal to clarify language about the relationship between appeal notices and requests for informal conferences. In contrast to the rule as proposed, the final rule achieves greater clarity by discussing notices of appeal and requests for informal conferences as two completely distinct issues (although the same employer request frequently addresses them both).

The rule as adopted also includes a number of other technical and non-substantive changes (such as replacing references to “the division” with the clearer reference to “Oregon OSHA”).

III. Discussion of Penalties in General

Throughout the process, Oregon OSHA encountered a range of attitudes toward its existing penalty approach (and, indeed, to the use of penalties in general). That same range of attitudes is reflected by certain public comments made in relation to the proposed rule.

Several comments focused on Oregon's success in reducing workplace injuries, illnesses and fatalities. For example, one organization noted its support for changes if they "help promote health and safety in the workplace," but noted that "Oregon's statistical history shows that the efforts of OR-OSHA and private employers has been successful in reducing occupational injuries and fatalities," prompting the commenter to "question the need to significantly modify the current manner in which OR-OSHA is enforcing the code."⁷

Another commenter noted that "a softer enforcement approach which relies more heavily upon consultation and education as has been administered in Oregon since the mid-1990's, is more effective and largely why Oregon's safety performance is one of the best if not the best of state plans." The same writer indicated that "Oregon OSHA has effectively contributed to improving accident prevention among Oregon employers, and continues to be more effective than agencies in other states," and advised "[y]our successes using methods that rely more heavily upon cooperative relationships, education, consultation, and voluntary protection, would be sacrificed with more liberally applied hard accountability systems that rely upon sanctions." The commenter particularly discouraged Oregon OSHA from adopting "sanctions based upon groups of employers regardless of their individual performance."⁸

Yet another wrote that "Oregon was a pioneer in a positive approach to deal with safety enforcement," and that "Oregon's reputation for an outstanding occupational safety and health program is nationally recognized."⁹

However, other commenters were less positive about Oregon OSHA's enforcement activities. Two commenters wrote that "[t]he current structure and application often result in low or no fines on most of the complaints that agricultural workers bring forward at much risk to themselves and their families" and that "[t]o the workers OR-OSHA's handling of the complaint is not enforcement at all but consultation with their employer." The same commenters included criticism directed at the proposed rule: "After a year of engagement at community forums, submission of comments and attendance at advisory group meetings, it appears that, once again, the proposed rules for the most part have bypassed the interests of Oregon's agricultural workers."¹⁰ The same commenters attached an earlier letter that discussed at length the need for higher penalties to ensure appropriate enforcement incentives suggesting that "[f]ederal OSHA has already determined that Oregon OSHA's penalty structure is not at least as effective as federal OSHA's, primarily because the amount of Oregon OSHA's penalties are so low."¹¹ The

⁷ December 2, 2011 letter from Randall S. Hledik of Wildish Construction Co.

⁸ December 14, 2011 letter from Dave Black of Vigilant.

⁹ December 7, 2011 letter from Bruce R. Poinsette.

¹⁰ December 14, 2011 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of Oregon Law Center.

¹¹ September 3, 2010 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of Oregon Law Center, attached to the December 14, 2011 letter from the same authors.

same documents also encouraged Oregon OSHA to look at increasing the penalties for other-than-serious violations as well as for serious violations, and to consider establishing penalties that would be adjusted based on inflation.

Another commenter suggested that Oregon OSHA's perspective is too enforcement-focused, neglecting the opportunities for effective partnership: "Oregon OSHA should be more cognizant of this issue [the unique nature of the construction industry] and work more with our industry than against us. We are not the enemy. We are the answer to providing a safe workplace in the construction industry."¹² Another commenter from within the same industry indicated overall support of the proposed rule changes, suggesting "that these changes will effectively encourage employers to adhere to safety and health rules," which in turn will increase "the safety of workers."¹³

Several commenters raised the issue of Oregon OSHA's considerably higher enforcement presence, when compared to other worker health and safety jurisdictions. One commenter, in comparing federal OSHA and Oregon OSHA enforcement practices, noted that "there is evidence to support that OR-OSHA maintains a much higher workplace penetration than most other states, and substantially higher than OSHA's."¹⁴ Several commenters wrote separately that they were "cognizant of the fact that, historically, penalties in Oregon have been lower than those in other jurisdictions as part of a 'trade-off' for the per capita number of inspectors and inspections being the highest in the country."¹⁵

One commenter specifically indicated "a measure of support" for provisions that might not otherwise be acceptable because of the need to address federal concerns: "OR-OSHA is compelled to respond to OSHA's recommendations for increases in gravity based penalties for serious violations." The same commenter noted that the proposed Oregon OSHA changes "reflect comparatively moderate increases which are a fraction of the currently enforceable Federal requirements."¹⁶

In contrast, another commenter raised the general concern about the need to preserve Oregon's ability to retain and attract employers to the state by ensuring that employers in Oregon are "not disproportionately impacted by regulatory activity when compared to similar impacts in other states."¹⁷ Another commenter noted that Oregon's success in addressing safety and health issues has itself provided a competitive advantage: "Due to Oregon's commitment to safety, employers in this state have seen steady decreases in workers' compensation costs, which plays a role in retaining existing employers and attracting new employers and jobs to the state." The same

¹² December 14, 2011 letter from Timothy Gauthier of the Oregon-Columbia Chapter of the National Electrical Contractors Association.

¹³ December 14, 2011 letter from Cindy Regier of the Pacific Northwest Chapter of the Associated Builders & Contractors.

¹⁴ December 7, 2011 letter from Eliot Lapidus of the Oregon-Columbia Chapter of the Associated General Contractors.

¹⁵ December 12, 2011 letter from Andrew Graham of the Oregon Self-Insurers' Association, December 13, 2011 letter from Scott Neufeld of the Special Districts Association of Oregon, and December 14, 2011 letter from Todd Scharff of Safeway.

¹⁶ December 7, 2011 letter from Eliot Lapidus of the Oregon-Columbia Chapter of the Associated General Contractors.

¹⁷ December 12, 2011 letter from Andrew Graham of the Oregon Self-Insurers' Association, December 13, 2011.

commenter suggested that “[in] light of the already steady improvements in safety it is important to weigh possible negative impacts from regulations in deciding whether or not to implement them.”¹⁸

Oregon OSHA has carefully evaluated these comments, both in relation to specific provisions and in considering the overall approach taken by the penalty rule revisions. That evaluation has resulted in the following general conclusions, which have guided decisions in relation to the specific elements of the proposed rule:

- With regard to the recurrent suggestion that the Oregon program is already comparatively successful, Oregon OSHA agrees. However, Oregon OSHA does not believe that general overall success should be used as a reason to avoid continuous evaluation and efforts to improve the program, no matter how good it is. Oregon OSHA does not see the changes adopted in this rule as a dramatic change in enforcement approach, nor do they represent in any way a shift of the balance between enforcement and collaborative activities, the latter of which will remain a major portion of Oregon OSHA’s overall efforts. But Oregon OSHA does believe that these modifications to the rule will enhance the effectiveness of the penalties that are issued as a result of the enforcement visits that already occur.
- With regard to the effect of penalties, Oregon OSHA agrees with those who recognize the deterrent value of enforcement, including penalties. At the same time, Oregon OSHA believes that modest penalties are sufficient to achieve that deterrent effect in most situations. There is little if any research distinguishing the value of one penalty from another. Nothing in either the proposed rule or the rule as adopted precludes or restricts the use of existing enforcement tools to deal with repeated, willful or egregious behavior when it occurs.
- With regard to the relationship between penalties and enforcement presence, Oregon OSHA agrees with those who note that the size of the potential sanction cannot be evaluated in a meaningful fashion outside the context of the likelihood that an inspection will be conducted and any violations identified. As noted by some of the commenters, Oregon OSHA has long maintained the highest enforcement presence of any safety and health program in the nation, and Oregon OSHA believes that any discussion of the effectiveness of penalties must acknowledge that closely related fact. As noted in an earlier section of this document, that recognition has been part of Oregon OSHA’s response to recent federal OSHA concerns about penalty size, and it also was a factor in federal OSHA’s evaluation of the penalty issue as part of its final approval of the Oregon program in 2005. At the same time, Oregon OSHA is aware that there is no clear standard for an “optimum” enforcement presence, nor is the research on the subject sufficiently clear to establish a clear ratio between the effect of enforcement presence and penalty size.
- With regard to the suggestion that federal OSHA has found Oregon’s program to be deficient from an effectiveness standpoint, Oregon OSHA considers that to be an

¹⁸ December 14, 2011 letter from Todd Scharff of Safeway.

inaccurate statement. Federal OSHA has indeed raised concerns about the Oregon program. But it is not the case that there has been a determination that Oregon's penalties make the program less effective than federal OSHA. Although the concern and a related recommendation were part of the last comprehensive evaluation of the program by federal OSHA, that evaluation did not find the program failed to meet the requirement to be at least as effective as federal OSHA (in contrast, that same evaluation remained very positive about the program overall).¹⁹ The most recent formal finding on the issue remains the final approval determination made by federal OSHA in 2005.²⁰ Oregon OSHA anticipates further discussions around these issues with federal OSHA, particularly in light of the ongoing efforts by the Occupational Safety and Health State Plan Association (OSHSPA) to work with federal OSHA to develop a more meaningful set of indicators to use in determining program effectiveness.

- With regard to the suggestion that Oregon OSHA's enforcement is lacking specifically in relation to agriculture, Oregon OSHA agrees that its enforcement activities can be more effective in agriculture and in other industries. However, Oregon OSHA also notes that its own efforts in agriculture far exceed those of federal OSHA – to an even greater degree than reflected by the state's overall enforcement presence.
- With regard to the suggestion that the penalty rules should not create a competitive disadvantage for Oregon employers in comparison to other states, Oregon OSHA agrees. However, Oregon OSHA sees little basis for the concern in the rule as proposed, and even less in the rule as adopted. As noted previously, average Oregon OSHA penalties will continue to be below the average of almost every other state, and substantially below the average of some states. In relation to the definition of repeat violations, Oregon OSHA's revised rule more closely mirrors that of other states. And in relation to the proposed five-year period for repeat violations, which would have matched federal OSHA states but not most other state plan states, Oregon OSHA has not adopted that provision but has instead retained the three-year period reflected by the current rule.
- With regard to the concern that the rules represent a shift away from employer-specific experience to treating employers based on the nature of the group involved, Oregon OSHA does not see such a shift in either the proposed rule or the final rule. The creation of a "good faith" assessment and the enhanced history assessment both reflect an interest in considering the particular employer and the particular situation. And the creation of a greater variation based on size is not based on assumptions or beliefs about the relative hazards represented by employers of different sizes; rather, it is based on a recognition that the same size penalty is not needed to motivate a small employer to the same degree as a larger employer.

¹⁹ *Enhanced Federal Annual Monitoring and Evaluation Report for Federal Fiscal Year 2009*, found at http://www.osha.gov/dcsp/osp/efame/or_efame_with_appendices.pdf

²⁰ "Oregon State Plan: Final Approval Determination," Federal Register Number 70:24947-24955, May 12, 2005.

Overall, Oregon OSHA remains committed to using its penalties as effectively as possible to encourage the reduction and elimination of hazards that can cause worker injury, illness and death. The changes adopted in this rulemaking are the result of Oregon OSHA's considered evaluation of the issues concerned, and its belief (based on the totality of available information) that the changes will indeed increase penalty effectiveness, in spite of the fact that they are unlikely to result in any meaningful increase in the overall average penalty for a first-time serious violation.

IV. Issues Addressed by the Rule as Proposed and as Adopted

Throughout the rule development process, Oregon OSHA identified a range of issues related to penalties and how they are calculated. Most (but not all) of those issues resulted in proposed changes to the rule, and most (but not all) of the proposed changes are reflected in the rule as adopted.

1. Adjustments based on employer size

This is one of the primary issues identified by Oregon OSHA and discussed at the 2010 public forums. The concept document prepared for those forums on the topic included the following statement of background:

As part of Oregon OSHA's review of the effectiveness of its penalty rules in encouraging employers to comply with Oregon OSHA rules and generally to promote health and safety in the workplace, one of the changes under consideration is to increase the difference between the penalties assessed to small and large employers. Under the current rule, Oregon OSHA reduces the base penalty by 10 percent for employers who had 50 or fewer employees throughout the previous 12 months. Most other jurisdictions use a sliding scale that results in reductions in the base penalty of 60 percent or more for the smallest employers.

One result of this practice is that the relative impact of penalties on small employers is much higher in Oregon than in other states. Federal OSHA's average penalties for first-time serious violations have historically been nearly three times that of Oregon. For employers with more than 500 employees, however, federal OSHA's average approaches four times that of Oregon, while employers with 10 or fewer employees pay just two-and-one-half times as much in federal states as in Oregon.

Even in states with average penalties closer to Oregon's, larger employers pay much more than they do in Oregon. Overall, Oregon's average penalty is almost three-quarters that of Washington, and almost two-thirds that of North Carolina. Oregon's average penalty for truly small employers is more than 85 percent of the Washington average and ranges between 80 and 90 percent of the North Carolina average. An employer with more than 500 employees, on the other hand, would pay much less in Oregon – about 40 percent of the Washington penalty and about 35 percent of the North Carolina penalty.²¹

The concept then suggested replacing the existing 10 percent reduction for employers with 50 or fewer employees with a series of reductions of up to 80 percent (continuing to use peak employment within Oregon during the previous 12 months). However, this concept was soon adjusted to reflect a maximum reduction of 60 percent, after it was recognized that even some very serious violations would result in the minimum penalty with such a large size adjustment.

²¹ From "Oregon OSHA Penalties Supplement 1: Employer Size," June 7, 2010 (the same language appears in the revised version, issued November 1, 2010)

The resulting adjustments, which became the basis for both the formal rule proposal and the rule as adopted, is reflected in following table:

Employees	Percentage Reduction
1-25	60%
26-90	40%
91-130	30%
131-175	20%
176-250	10%
251 or more	none

Oregon OSHA’s rationale for the change throughout its discussions was that varying penalties by size better reflects that the purpose of penalties is to motivate employers, and the same penalty is unlikely to motivate a multinational corporation to the same degree as a small local business.

Although all jurisdictions whose penalty practices were reviewed by Oregon OSHA provide larger adjustments for the smallest employers than did the previous Oregon OSHA rule, there is variation in the cut-off points and in the adjustments themselves. As part of its 2010 effort to increase penalties, for example, federal OSHA reduced the reduction for the smallest group of employers to 40 percent.²² However, it recently reversed course on that issue, directing its staff earlier this year to begin granting the 60 percent reduction for the smallest employers once again.

Public comment on the issue ranged from strong support for²³ to outright opposition to²⁴ the proposed change. Other comments indicated that they were not opposed to the change²⁵ or that they were able to support it with modifications or if other conditions were met.²⁶ Oregon OSHA has carefully evaluated those comments received and the rationale provided for each of them:

- With regard to the suggestion that penalties should be consistent regardless of employer size, Oregon OSHA disagrees. Although employer size is admittedly a “blunt instrument” as a reflection of capacity to pay, it is a reasonable and readily available proxy. Oregon OSHA remains convinced that the purpose of penalties is not to punish, but to encourage compliance, both before and after an inspection (and even in the absence of an inspection). And Oregon OSHA remains convinced that acknowledging the variation in

²² Described in the “Penalty Information Bulletin” available at <http://www.osha.gov/dep/administrative-penalty.html>.

²³ See, for example, the December 14, 2011 letter from Cindy Regier on behalf of the Pacific Northwest Chapter of Associated Builders and Contractors, which singled the size adjustment out as one of three items deserving particular support.

²⁴ See, for example, the December 2, 2011 letter and oral testimony from Randall Hledik on behalf of Wildish Construction Company, and the December 14, 2011 letter from Timothy Gauthier on behalf of the Oregon-Columbia Chapter of the National Electrical Contractors Association.

²⁵ See, for example, the December 13, 2011 letter from Scott Neufeld of the Special Districts Association of Oregon.

²⁶ See, for example, the December 14, 2010 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of the Oregon Law Center, who indicate that greater variation based on size would be acceptable if small employer penalties are increased overall and if the size adjustment for the smallest employers is 35 percent, and the December 9, 2011 letter from J.L. Wilson of Associated Oregon Industries, which suggests changing the reduction for the smallest employers to 50 percent (apparently in large part to maintain the “revenue neutral” status of the overall proposal in light of AOI’s suggestion that a 10 percent reduction for immediate abatement be retained).

the impact of the penalty on small and large employers is consistent with that understanding.

- With regard to the suggestion that penalties should be increased overall before any size adjustment is provided, Oregon OSHA disagrees. The question of the appropriate penalty is a distinct issue from the question of how different employers are motivated by comparable penalties. Oregon OSHA does not consider it necessary or appropriate to link the two.
- With regard to the suggestion that the size reduction should be decreased in order to maintain the revenue-neutral status of the rule in light of other suggested changes, Oregon OSHA believes that the two issues can and should be considered separately. The overall revenue impact (negative or positive) of the rule proposal has never been a significant factor in Oregon OSHA's evaluation of the various provisions of the rule.

In the final rule, and after considering the record in its entirety, Oregon OSHA has therefore chosen to adopt the size adjustments as proposed.

2. Adjustments Based on Employer's Demonstrated Good Faith Efforts

The second of the primary issues identified by Oregon OSHA in advance of the 2010 public forums concerns the consideration of employer good faith efforts.

Under the previous rule, Oregon OSHA did not adjust penalties based on an employer's good faith (other than the specific adjustment for immediate abatement, which some worker safety and health jurisdictions consider to be an element of good faith).

Most other jurisdictions adjust for the employer's good faith, with the amounts ranging up to a maximum of 40 percent, depending upon the jurisdiction. Many jurisdictions restrict or disallow such adjustments in relation to fatality investigations, high-gravity serious violations, or repeat violations. All jurisdictions whose policies have been reviewed by Oregon OSHA effectively disallow such adjustments in relation to willful violations.

In discussing this issue in the materials prepared for the 2010 forums, Oregon OSHA described the merits of the concept as follows:

The primary argument in favor of providing a "good faith" assessment is that it would allow enforcement officers to better reflect the employer's overall commitment to safety and health and the employer's sincere efforts to comply with specific requirements (even if unsuccessful) *prior to the inspection*. It also would allow Oregon OSHA to consider actions begun but not completed during the inspection (such as ordering materials or arranging for the design of a new ventilation system).²⁷

The concept paper acknowledged that the approach presented both strengths and weaknesses:

The strength of this approach is that it would provide more flexibility to provide penalties appropriate to a particular situation, thereby better motivating employers to address safety and health issues before any inspection occurs. The primary drawback of the approach, however, is closely related – in providing greater flexibility, introducing an element of good faith also provides an area of greater uncertainty and variability. Unlike the current

²⁷ From "Oregon OSHA Penalties Supplement 2: Employer Good Faith," June 7, 2010.

penalty adjustments (size, immediate abatement, injury rate), a good faith assessment would introduce an element requiring a judgment be made (although such a judgment would be based on a set of identified criteria). The closest analogy in the current Oregon OSHA penalty rules would be found in the probability assessment that is made as part of determining the base penalty.

In determining whether to provide a good faith adjustment, Oregon OSHA will need to determine whether the likely increase in the penalty's ability to promote desired employer behavior will be sufficient to outweigh the likely increase in the variability of penalties between enforcement officers.²⁸

As part of the 2010 forums, Oregon OSHA presented the table below for discussion purposes:

Good Faith Assessment	Base Penalty Adjustment
Excellent	35% reduction
Good	20% reduction
Average	no adjustment
Poor	20% increase

Following the 2011 stakeholder meetings, however, and based on the feedback received in those meetings, Oregon OSHA eliminated the "excellent" category from the rule as proposed, which therefore offered a 20 percent reduction for demonstrated good faith, a 20 percent increase for demonstrated poor faith (if such poor faith does not rise to the level of a willful violation or otherwise justify the use of the administrator's discretionary penalty authority), and no adjustment for average or normal efforts to comply.

Some comments regarding the proposed rule supported the addition of good faith adjustments,²⁹ while a number of commenters supported the concept generally but criticized the language of the rule as proposed. In most cases, this criticism focused on the need for more specific criteria and the concern about variability between individual enforcement officers.³⁰ At least one commenter suggested that a good faith adjustment, if adopted at all, should be smaller.³¹ Several other comments did not address the issue of good faith adjustments. Collectively, there was little concern expressed about the concept of adjusting penalties (at least downward) based on an assessment of employer good faith – but there were a number of concerns expressed about the practicality of making such assessments in a consistent and fair manner.

²⁸ *Ibid.*

²⁹ See, for example, the December 14, 2011 letter from Cindy Regier of the Pacific Northwest Chapter of Associated Builders and Contractors, which included "rewarding 'good faith' efforts" as one of three issues deserving particular support, and the December 9, 2011 letter from Elliot Lapidus of the Oregon Columbia Chapter of Associated General Contractors.

³⁰ See, for example, the December 9, 2011 letter from J.L. Wilson of Associated Oregon Industries, which suggested that the assessment "should be less subjective than it appears to be under the proposed rule," the December 14, 2011 letter from Dave Black of Vigilant, which suggested that the guidance "should be much more highly structured, and much less arbitrary and open to incidental interpretation," and the December 2, 2011 testimony by Kirk Lloyd on behalf of Farm Safe indicating that he would "be really comfortable" if the current Oregon OSHA administrator "could personally be responsible for determining what good faith is," but would not be comfortable having those determinations "delegated out to compliance officers."

³¹ December 14, 2011 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of Oregon Law Center.

Oregon OSHA has carefully evaluated these comments. They confirm Oregon OSHA's earlier recognition of the challenge created by using a good faith assessment, but they also generally confirm that such an assessment would provide value by encouraging employers to make sincere efforts to comply prior to any inspection. For that reason, Oregon OSHA is including a good faith adjustment in the final rule, although with minor modifications.

While Oregon OSHA understands the concerns regarding consistency, the division believes that the individual who can best assess the good faith efforts of an employer is the enforcement officer who has conducted the inspection. The rule therefore makes clear that good faith will be based on the enforcement officer's assessment, although within general agency parameters and relying upon criteria identified in the rule.

Oregon OSHA has rewritten and restructured the relevant portions of the rule to provide greater clarity (although not to the level of detail and specificity suggested by some who commented). In addition, during the period between the rule's adoption and its effective date, Oregon OSHA will provide training on the rule to all enforcement staff, with a particular focus on how to appropriately assess an employer's good faith. Oregon OSHA will conduct additional training and focused audits of enforcement files during the first year of the rule's existence to identify areas of particular inconsistency and any need for further training. And, finally, Oregon OSHA intends to empanel the previous ad-hoc advisory group during the summer of 2013 to assist it in evaluating the rule and determining whether any adjustments to the rule itself or to the supporting documents and training should be made.

3. Adjustments Based on Immediate Compliance

The third of the issues identified by Oregon OSHA in advance of the 2010 public forums concerned a provision of the existing rule: the 30 percent reduction in base penalties if the employer corrected the violation before the inspection was completed.

In its discussion of the issue as part of those forums, Oregon OSHA provided the following background about the use of similar adjustments by other jurisdictions:

Many other jurisdictions provide an adjustment for immediate correction of violations, while other jurisdictions consider it as part of good faith (although at least one jurisdiction indicates that immediate correction of violations will not be considered in determining penalties). In those jurisdictions that provide a penalty reduction for immediate abatement, however, it is a 10 percent reduction, smaller than the reduction provided by Oregon OSHA. In addition, such jurisdictions often further restrict reductions to ensure that compliance is meaningful (and not simply turning on a ventilation system or having employees hook up to fall protection anchors that they should already have been using).³²

The concept document also included the following discussion of the relative merits of the immediate abatement adjustment:

The primary argument in favor of providing a reduction for immediate correction is that it provides an incentive for employers to reduce employee exposure. One argument against providing such a reduction is that correction of violations is already an employer obligation and enforcement officers should ensure that it occurs without the need to resort

³² From "Oregon OSHA Penalties Supplement 3: Immediate Abatement," June 7, 2010.

to a penalty reduction. Another argument is that providing such a large reduction for immediate correction does not promote employer compliance before the inspection – and that the ability to perform some activities (reinstall guards, put fall protection into use, etc.) – may actually represent a lack of good faith effort prior to the inspection and therefore should not result in a reduction in the penalty.

One strength of the existing approach is that it is much easier to determine whether an employer has complied during the inspection than it is to assess efforts at compliance, either before or after the inspection. In other words, the current reduction has the virtue of simplicity and the resulting consistency. On the other hand, the current approach runs the risk of rewarding undesirable behavior and, even in the best circumstances, appears to provide a large reduction for simply fulfilling the employer’s obligations at the time of the inspection.³³

As it considered options before developing a proposal, Oregon OSHA focused on two alternate approaches. One would be to consider immediate correction as part of the good faith assessment. Another would be to reduce the credit for immediate abatement from 30 percent to 10 percent (and take steps to ensure that it was not given in situations where it would be rewarding undesirable behavior).

The rule as proposed essentially took the prior approach, limiting any consideration of immediate abatement to being considered as evidence of good faith where appropriate, and eliminating any separate reduction for immediate correction of violations. The rule as adopted takes the latter approach.

Most of those who commented on the rule as a whole did not address the question of immediate abatement. Some commenters opposed the change,³⁴ while others suggested that at least some reduction for immediate correction should be retained.³⁵ Some suggested that the change should apply only “to serious hazards that were known or should have been known to the contractor.”³⁶ Others supported the change as proposed.³⁷

Oregon OSHA has carefully considered these comments and the various discussions of the issues included within them:

- With regard to the suggestion that penalty reductions be retained for those violations that are not serious violations about which the employer knew or should have known, Oregon OSHA notes that very few penalties are assessed for other-than-serious violations, and those very few penalties are frequently assessed at the minimum. Serious violations can be cited and sustained only if Oregon OSHA concludes (and can demonstrate) that the employer knew or should have known about the hazard. For this reason, Oregon OSHA

³³ *Ibid.*

³⁴ December 14, 2011 letter from Timothy Gauthier of the Oregon-Columbia Chapter of the National Electrical Contractors Association.

³⁵ See, for example, the December 12, 2011 letter from Debra Dunn of the Oregon Trucking Association, (which suggests that such violations are lesser violations with less impact on employee safety) and the December 9, 2011 letter from J.L. Wilson of Associated Oregon Industries (which specifically suggests that a 10 percent reduction be retained).

³⁶ See, for example, the December 2, 2011 letter and oral comments from Randall Hledik of Wildish Construction and the December 7, 2011 letter from Elliot Lapidus of the Oregon Columbia Chapter of the Associated General Contractors.

³⁷ See, for example, the December 14, 2011 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of Oregon Law Center.

sees no reason to maintain a penalty reduction for a category of penalties that does not, as a practical matter, exist – those violations where the employer did not know and could not reasonably be expected to know about the hazard.

- With regard to the suggestion that those violations where immediate abatement is achieved tend to be less serious violations, Oregon OSHA’s analysis suggests that such reductions have frequently been given for very serious violations (one recurring example is for fall protection in construction, a significant source of both injury and death within the industry).
- With regard to the general suggestion that providing a reduction creates a beneficial impact on employer compliance, Oregon OSHA continues to believe that most employers comply readily with cited violations whether or not an additional financial incentive is provided.

After considering the discussion and the alternatives available, Oregon OSHA has decided to maintain a smaller reduction, available only when it represents a genuine effort to comply and to ensure future compliance. The rule as adopted includes a 10 percent reduction for immediate abatement that represents a “substantial” effort and that is not “temporary or superficial.” This is intended to acknowledge those situations where an employer makes an immediate and genuine effort and it will exclude those actions that suggest a lack of interest in compliance prior to the inspection. The following examples will help provide an understanding of the difference between a “substantial” effort and an action that may be expected to be “temporary or superficial.”

Example 1: If an employer invests in hard hats where they were not previously provided, that would generally represent a substantial effort that clearly changes the underlying situation. If, on the other hand, the employer simply instructs employees who were not being required to wear the hardhats available to put them on after the compliance officer raises the issue, that would appear to be “temporary or superficial” and in no way changes the underlying situation.

Example 2: If an employer develops installs anchors and purchases fall arrest equipment during the inspection, that would generally represent a substantial effort that changes the underlying situation. If, on the other hand, the employer simply directs the crew to attach their lanyards or to put on the previously provided fall protection equipment that was left in the truck, that would appear to be temporary or superficial.

Example 3: If an employer drafts a respiratory protection program and identifies appropriate respirators to protect against air contaminants in the workplace, that would appear to represent substantial action. If, on the other hand, the employer simply directs an employee who is not wearing his or her respirator to put it on, that would appear to be temporary or superficial.

Example 4: If an employer removes an employee from immediate exposure, that would generally be temporary or superficial. If, on the other hand, an employer permanently disables a tool that is improperly guarded (for example, a circular saw with the blade guard removed), that would appear to represent a substantial action.

Example 5: If an employer has the millwright craft a guard or install guardrails, that would generally represent a substantial action. If, on the other hand, the employer simply has available guards re-installed on the machines from which they were removed, that would generally be temporary or superficial.

Although choosing to leave a modified reduction for immediate abatement in the rule, Oregon OSHA remains uncertain as to the value of such an incentive and plans to specifically evaluate its continued use as part of its evaluation of the rule during the summer of 2013.

4. Adjustments Based on Employer History

The final major issue identified by Oregon OSHA in advance of the 2010 public forums concerned the history adjustment of the previous rule. In its concept paper on the subject, Oregon OSHA provided the following background:

Under the current rule, Oregon OSHA reduces the base penalty by 35 percent for employers whose injury and illness rate is below the average for their industry. Like other Oregon OSHA adjustments, no adjustment is applied to repeat, willful or failure-to-correct violations or to any violation that contributed to the injury, illness or death of an employee.

Most other jurisdictions do not take into account injury and illness history, instead adjusting penalties based on the employer's enforcement history (which, for many employers, means no history is available). One jurisdiction takes into account both the history of injuries and illness and the history of cited violations. Typically, other jurisdictions limit such reductions to 10 percent. One jurisdiction also allows a 10 percent increase in the base penalty for history that is worse than expected.³⁸

The same paper included the following comment regarding of the merits and drawbacks of such an approach:

The primary argument in favor of providing an adjustment for injury and illness history is that it takes into account a past record of success. The primary argument against such a practice is that the vast majority employers are too small for a one- or two-year assessment of the injury and illness rates to be meaningful as an indication of actual risk (or actual compliance). In addition, the current Oregon OSHA rule gives a substantial break for an employer whose rate is only slightly better than average.³⁹

Finally, the paper described a potential proposal to retain a history adjustment, but to broaden the data upon which it can be based and to reduce its overall effect:

One approach under active consideration would be to provide an assessment of history that takes into account both inspection history and the history of injuries and illnesses over a period of several years – such an assessment might be applied both to reduce penalties when the employer's history is better than average and to increase penalties when it is worse than average. In any case, Oregon OSHA is seriously considering reducing the penalty discount (and any penalty increase, if that approach is used) from 35 percent to 10 percent.

Such an approach would continue to credit employers who maintain a positive history over time, but would eliminate the distortion created by relatively large penalty

³⁸ From "Oregon OSHA Penalties Supplement 4: Employer History," June 7, 2010.

³⁹ *Ibid.*

adjustments on the basis of relatively small statistical variations in injury and illness rates.⁴⁰

In the rule as proposed, Oregon OSHA proposed to assess employer history using a broader range of data sources, including both enforcement and injury and illness history, over a period of up to five years. In addition, Oregon OSHA proposed that history adjustments could either decrease or increase the base penalty by 10 percent (or make no adjustment at all).

Several commenters indicated that the reduction of the positive adjustment from 35 percent to 10 percent was acceptable but that the possibility of a 10 percent increase in the base penalty should be removed.⁴¹ Others indicated that a larger reduction, such as 25 percent, should be retained.⁴² Still others opposed the change altogether,⁴³ while others opposed any adjustment in penalties as the result of either enforcement or injury/illness history.⁴⁴

With regard to the time frame, a number of commenters suggested that five years was too long a period and suggested three years as alternative.⁴⁵ One commenter explicitly agreed that the proposed five-year period was superior to the single year in the previous rule.⁴⁶

After Oregon OSHA carefully considered the comments received, the final rule maintains the proposed options for adjustment (10 percent decrease in the base penalty, 10 percent increase, or no adjustment). The rule provides for a review of available enforcement and injury data reflecting up to three years of history, although understanding current trends may need to take into account a longer period. This decision reflects Oregon OSHA's concern that the current adjustment provides too great a differentiation between employers based on too little information, but it also reflects Oregon OSHA's considered belief that taking into account employer history provides employers with an incentive to operate generally effective programs on an ongoing basis and appropriately rewards those employers who generally do the right thing. Retaining the option of slightly increased penalties for poor history will allow increases when circumstances clearly warrant it but also will remind employers that the typical employer will receive no adjustment, with only truly positive history resulting in a reduction.

5. Base Penalty Calculation

During the 2010 forums, Oregon OSHA suggested a modification to the base penalty amounts that would take into account the existing difference between the highest base penalty (\$5,000) and the statutory maximum for a non-repeat, non-willful violation of \$7,000.

As a result, Oregon OSHA originally suggested increasing all base penalties by between 40 and 50 percent. In part, the base penalty increase was intended to allow greater stratification of the final penalty by size.

⁴⁰ *Ibid.*

⁴¹ See, for example, the December 9, 2011 letter from J.L. Wilson of Associated Oregon Industries.

⁴² See, for example, the December 2, 2011 letter from Randall Hledik of Wildish Construction Co. and the December 7, 2011 letter from Eliot Lapidus of the Oregon-Columbia Chapter of the Associated General Contractors.

⁴³ See, for example, the December 14, 2011 letter from Timothy Gauthier of the Oregon-Columbia Chapter of the National Electrical Contractors Association.

⁴⁴ See, for example, the December 14, 2011 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of Oregon Law Center.

⁴⁵ See, for example, the December 14, 2011 letter from Rod Huffman of Associated Oregon Loggers.

⁴⁶ December 14, 2011 letter from Dave Black of Vigilant.

The adjustment in the base penalty under consideration was the primary reason that early estimates of the overall impact on the concept suggested it would increase the average penalty for a first-time serious violation by between 25 and 40 percent.

Following the forums, and following discussions with the Oregon OSHA Partnership Committee, Oregon OSHA modified its working proposal to increase base penalties only for those violations that reflect a meaningful risk of worker death. That working proposal, which increased the base penalty for a low probability death-rated violation from \$1,500 to \$2,100, for a medium probability death-rated violation from \$2,500 to \$3,500, and for a high probability death-rated violation from \$5,000 to \$7,000, became the basis for the rule as proposed. This adjustment better reflects Oregon OSHA's interest in focusing the rule on those violations most likely to result in the death of a worker.

Comments regarding the proposal to increase penalties ranged from support⁴⁷ to opposition.⁴⁸ Some comments suggested that the proposal be clarified as it relates to the difference "between 'imminent danger observations' and 'actual occurrence' or 'near miss incidents.'"⁴⁹ Still other comments explicitly stated that they did not oppose the change, particularly as part of a proposal that was revenue-neutral, or nearly so,⁵⁰ while others did not address it.

In evaluating the comments regarding this issue and the reasoning behind them, Oregon OSHA has decided to adopt the revisions as proposed as part of the final rule. As noted, the rule taken as whole does not represent a meaningful increase, if any, in the average penalty assessed (the rule as adopted even less so than the proposed rule). By adopting this change, Oregon OSHA enables the greater variation by employer size previously discussed and better focuses the rule on those violations where there is a meaningful risk of worker death.

6. Application of Adjustments to Repeat and Willful Violations

In the previous rule, no adjustments were made to repeat or willful violations. However, in reflecting on the rationale behind the greater variation between employers based on their relative size, Oregon OSHA (in consultation with the ad-hoc stakeholder advisory group) proposed that size adjustments be allowed before repeat and willful multipliers are applied. The proposed rule continued the past practice of disallowing adjustments for any other reason.

Based on the lack of substantive objection regarding this issue, the final rule adopts the language as proposed.

7. Application of Adjustments for Fatality and Accident Investigations

Similarly, Oregon OSHA's previous rule allowed no adjustments for violations that contributed to a fatality or other injury. The proposed rule allowed such adjustments based only on employer size.

Based on the lack of substantive objection regarding this issue, the final rule adopts the language as proposed.

⁴⁷ See, for example, the December 14, 2011 letter from Dave Black of Vigilant.

⁴⁸ See, for example, the December 14, 2011 letter from Timothy Gauthier of the Oregon-Columbia Chapter of the National Electrical Contractors Association.

⁴⁹ See, for example, the December 2, 2011 letter from Randall Hledik of Wildish Construction Co.

⁵⁰ See, for example, the December 9, 2011 letter from J.L. Wilson of Associated Oregon Industries.

8. Application of Adjustments for Failure to Abate Violations

The previous rule indicated that no adjustments could be made for failure to abate violations. However, this language was confusing, because it was based on the lack of any *additional* adjustments. Agency practice has long been to calculate penalties for most failure to abate violations using the penalty previously cited as the daily penalty. That original penalty, of course, may have included applicable adjustments. The rule as adopted simply omits any reference to adjustments for failure to abate, eliminating the source of the confusion. This technical correction does not represent a substantive change and will have no impact on existing Oregon OSHA practice in calculating the penalty for such violations.

9. Penalties for Multiple Repeat and Willful Violations

As the rule was being developed, and particularly in conversations with the ad-hoc stakeholder advisory group, Oregon OSHA decided to propose a decreased reliance upon the administrator's discretion in setting penalties for repeat and willful violations. In addition to the existing multipliers of 2 for initial repeats, 5 for second, and 10 for third, the rule as proposed established a multiplier of 15 for fourth, 20 for fifth, and 25 for willful violations.

Most of the comments received did not address this proposed change. Those that did supported the change, noting that "eliminating reliance on 'administrator's discretion' has the advantage of more uniform and predictable penalties."⁵¹

The final rule includes the language as proposed.

10. Administrator's Discretion

As noted, the previous rule required the administrator to use his or her discretion to set penalties for violations involving a fourth or greater repeat, as well as for willful violations. It also allowed the administrator to use his or her discretion to establish a penalty up to the statutory maximum based on the facts of the case for any serious or other-than-serious violation. It did not, however, explicitly provide such flexibility in relation to first, second and third repeat violations. The cap for willful violation penalties is \$70,000.

In order to eliminate the inconsistency and provide the means to deal with extraordinary situations when they might occur, Oregon OSHA proposed language allowing the administrator to exercise his or her discretion, based on the facts of the case, to establish a penalty up to the statutory maximum for any violation.

Based on the lack of substantive objection regarding this issue, the final rule adopts the language as proposed.

11. Time Frame for Repeat Violations

Under the previous rule, repeat violations were cited when the prior violation occurred within the previous three years. In keeping with recently adopted changes in the federal OSHA penalty policy, Oregon OSHA proposed increasing the "look back" period to five years. During the stakeholder committee meetings, Oregon OSHA expressly stated that the provision was being proposed in order to keep the option of adopting it open and to allow a decision to be made on the best approach once the formal record was assembled.

⁵¹ September 3, 2010 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of Oregon Law Center, incorporated as part of the

Most commenters on the rule opposed the change, some noting that Oregon OSHA's greater enforcement presence makes a repeat violation more likely in three years than would be the case in a federal state.⁵² Three commenters opposed the change for that reason but also in part because of its perceived inconsistency with federal OSHA, making the identical comment that "[a] five year period is inconsistent with the standard three year time limit generally used in other states, including those covered by federal OSHA."⁵³ Another suggested that there is not "any more value to motivate employers by extending the time within which penalties would be increased due to repeated violations."⁵⁴

Two commenters, writing together, supported the change, noting correctly that "[f]ederal OSHA has expanded that time to five years" and suggesting that "Oregon OSHA should do the same."⁵⁵

In evaluating the comments, Oregon OSHA discards the argument that the three-year limit should be retained to be consistent with other states and federal OSHA, because federal OSHA has in fact increased the time frame to five years. Comments to the contrary apparently are based on a review of federal OSHA's Field Operations Manual, which has not yet been updated to reflect the policy guidance provided by memo to federal OSHA staff in the fall of 2010. But it is indeed current federal OSHA practice to identify penalties using a five-year period, and that practice was reaffirmed in the revised guidance issued by memo earlier this year. Both the previous memo and the revised memo were published by federal OSHA and accompanied by press advisories regarding the subject.

However, Oregon OSHA is persuaded by the argument made by a number of commenters that a three-year period is justified based on Oregon's much greater enforcement presence. In addition, Oregon OSHA notes that most other state jurisdictions have retained the three-year period, at least for the present time. Therefore the final rule does not include the proposed language and instead retains the previous language limiting repeat violations to a three-year period. For technical reasons, the final rule includes the three-year language in the citation guidance, rather than in the definition section, but this does not change the effect of the provision on Oregon OSHA enforcement activities.

12. Repeat Violations at Fixed Site and Mobile Workplaces

Both the previous and the newly adopted rules handle repeat violations differently if they occur at fixed site workplaces than if they are committed by employers with mobile work activities. In certain rare situations, however, mobile operations with highly regionalized activities within the state may be better handling by treating each region as a "fixed site" and handling the mobile activities within that region as though they occurred at the same facility, while handling mobile activities between regions as though they occurred at different facilities.

In order to allow Oregon OSHA to address these issues without compromising the overall distinction between fixed and mobile site activities, the proposed rule enabled the administrator

⁵² See, for example, the December 12, 2011 letter from Julie Davie of the Oregon Department of Transportation.

⁵³ December 12, 2011 letter from Andrew Graham of the Oregon Self-Insurers Association, the December 13, 2011 letter from Scott Neufeld of the Special Districts Association of Oregon, and the December 14, 2011 letter from Todd Scharff of Safeway.

⁵⁴ December 14, 2011 letter from Dave Black of Vigilant.

⁵⁵ September 3, 2010 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of Oregon Law Center, attached to the December 14, 2011 letter by the same authors.

to handle certain mobile activities as fixed site activities, based on the unique circumstances of the operation.

Relatively few comments were received on this subject.

One set of comments focused on a related issue, suggesting that the “fixed place of employment exemption for ‘other than serious violations’” be eliminated because the “same owners, entity or individuals control the fixed place of employment.” The same commenters suggested that the proposed language “would lead to less rigorous enforcement and not more effective provisions.”⁵⁶

Another commenter emphasized support of the provision, noting that the organization had raised the concern “in a letter to OR-OSHA dated October 31, 2008 when other changes were proposed to Division 1 relating to penalties.”⁵⁷

Oregon OSHA believes that the proposed language gives it appropriate flexibility to address such situations when the current rule would create an acknowledged inequity. The comments suggesting that it would lead to “less rigorous enforcement” are correct in those limited cases. However, Oregon OSHA proposed the language precisely because the current rule forces stricter enforcement than appears appropriate. It is true that the inequity could be eliminated by treating all violations by a single multi-site employer as repeat violations (in the way that mobile activities are handled now). However, Oregon believes the current approach is workable – and in any event the modified approach recommended by the particular commenters was not, as they noted, part of the proposal.

For these reasons, Oregon OSHA has adopted the language as proposed, with only slight revisions to make clear that the administrator can delegate the authority for such approval to one or more designees.

13. Definition of Repeat Violations

The statute (ORS 654.086(1)(c)) refers to higher penalties (up to \$70,000) for “[a]ny employer who willfully or repeatedly violates” Oregon OSHA requirements. The previous rule defined repeat violations by limiting it to the rule, statute or other requirement previously cited. This effectively prohibited a repeat violation where a different rule was cited, no matter how similar the circumstances. But it also required a repeat violation where the same rule was cited, no matter how different the circumstances.

In reviewing the issue, Oregon OSHA identified a number of situations where it seemed inappropriate to treat a violation as not being a repeat: for example, in situations where the same corrective measures were required to protect from the same hazard but, because of a somewhat different context, a different rule division was being cited. Perhaps the plainest example of such an issue comes in relation to scaffolding, where the exact same scaffold being used in the exact same way might not generate a repeat if the previous work involved construction (installing a light fixture, perhaps) while the current work involved non-construction maintenance (replacing a light bulb in the same light fixture, perhaps).

⁵⁶ December 14, 2011 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of Oregon Law Center.

⁵⁷ December 12, 2011 letter from Julie Davie of the Oregon Department of Transportation.

Similarly, employees working without respirators in hazardous atmospheres would have been treated as repeat violations in most cases, but not if the respirator (even the exact same respirator) happened to be required by one of the substance-specific air contaminant standards.

At the same time, Oregon OSHA was aware of issues with the various general standards found in Oregon OSHA rules where employers were cited for a lack of training or for a lack of supervision and then cited for another training or supervision violation involving completely different activities. In such cases, the previous rule required that the violations be cited as a repeat violation.

In order to address both issues, the proposal suggested changing the definition of repeat violation to include violations “involving substantially similar hazardous conditions.”

This provision received considerable comment in the record, with most of those who made comments on the proposal as a whole addressing the issue.

Several commenters indicated their support for the change. For example, one comment singled this issue out as one of three deserving particular support,⁵⁸ while others stated simply that the organizations support the proposal to change the definition of repeat violation.⁵⁹ Another indicated that “[w]e agree with your proposed language that repeated violations need to reflect substantially similar hazardous conditions,”⁶⁰ while yet another noted that the proposal “corrects a problem of being cited as a repeat under a more general rule for two completely different hazards.”⁶¹

Another commenter indicated opposition because, although reducing the likelihood of employers “receiving a repeat citation because only when the general rule is cited rather than the specific rule to the hazard” would be “a good thing,” the organization’s “collective group of safety managers are under the impression the change would actually make it easier to cite repeats.” The same set of comments specifically referenced the distinction between fall protection in construction and in maintenance activity, implying that an inability to cite repeats in such situations was a positive aspect of the previous rule.⁶²

One comment in support of the language “in that it allows for consideration of earlier violations that may not be identical to the particular violation” suggested “that any violation of the same statute, regulation, rule, standard or order, or a substantially similar violation” be treated as a repeat (effectively treating as repeat violations *both* all those violations that would be identified under the existing rule and all those violations that would be identified under the proposed rule).⁶³

⁵⁸ December 14, 2011 letter from Cindy Regier of the Pacific Northwest Chapter of Associated Builders & Contractors.

⁵⁹ December 9, 2009 letter from J.L. Wilson of Associated Oregon Industries and December 7, 2011 letter from Eliot Lapidus of the Oregon-Columbia Chapter of the Associated General Contractors..

⁶⁰ December 14, 2011 letter from Dave Black of Vigilant.

⁶¹ December 12, 2011 letter from Julie Davie of the Oregon Department of Transportation.

⁶² December 14, 2011 letter from Timothy Gauthier of the Oregon-Columbia Chapter of the National Electrical Contractors Association.

⁶³ December 14, 2011 letter from Shelley Latin of Legal Aid Services of Oregon and Nargess Shadbeh of Oregon Law Center.

Another commenter indicated that the “existing language provides clear guidance to employers” and recommended against adoption of the new language in part because “[s]ubstantially similar hazardous conditions is not further defined or clarified in the proposed rules.”⁶⁴

Three separate commenters included a largely identical discussion of the issues, acknowledging Oregon OSHA’s “stated purpose for the proposed change” as both to “purportedly relieve employers of ‘repeat liability when citations for violations of the same code exist, but where the underlying violative condition is substantially different. . . .’” and to “allow the Agency to cite ‘repeat’ violations across Divisions in the code” perceived inconsistency of “hazardous condition” with the practice in other states. The comments further acknowledge Oregon OSHA’s stated intention “to interpret ‘substantially similar hazardous condition’ narrowly,” but indicates that the term is “unnecessarily vague” and therefore likely to result in litigation to clarify the term.⁶⁵

The same commenters indicated that the term might “expand liability for ‘repeat’ violations far beyond that which is present in other states,” noting that in federal states violations are cited as repeat only when the previous citation includes “a substantially similar violation.” They suggested that such an “[e]xpansion of ‘repeat’ liability far beyond that which exists in other jurisdictions would unfairly place Oregon employers at a competitive disadvantage.”⁶⁶

The three commenters then suggested that Oregon OSHA specifically define the term “hazardous condition,” with two of them suggesting the phrase be defined to mean “The underlying facts giving rise to a citation for a safety and health violation”⁶⁷ while the third suggested empaneling “a stakeholder committee, balanced between management and labor” be used to draft the definition.⁶⁸

Oregon OSHA agrees with the suggestion that greater clarity should be provided. In addition, Oregon OSHA agrees with the implicit suggestion that, in this area, consistency between state and federal practice has particular value. In addition, Oregon OSHA sees value in avoiding the history of litigation regarding the definition of repeat violations that followed the adoption of the federal law. Oregon OSHA notes that the phrase referenced in the testimony, “substantially similar violation,” itself comes from the key case on the topic, the federal OSHA Review Commission’s decision *Potlatch Corp.*, which was issued in 1979.⁶⁹

For these reasons, and although Oregon OSHA does not see the terms as being as distinct as suggested in certain comments, the final rule discards the phrase “substantially similar hazardous condition” in favor of the phrase “substantially similar violation,” taken from federal case law.⁷⁰

⁶⁴ December 12, 2011 letter from Debra Dunn of the Oregon Trucking Association.

⁶⁵ December 12, 2011 letter from Andrew Graham of the Oregon Self-Insurers’ Association, December 13, 2011 letter from Scott Neufeld of the Special Districts Association of Oregon, and December 14, 2011 letter from Todd Scharff of Safeway.

⁶⁶ *Ibid.*

⁶⁷ December 12, 2011 letter from Andrew Graham of the Oregon Self-Insurers’ Association and December 13, 2011 letter from Scott Neufeld of the Special Districts Association of Oregon

⁶⁸ December 14, 2011 letter from Todd Scharff of Safeway.

⁶⁹ *Potlatch Corp.*, 7 O.S.H.C 1061 (1979).

⁷⁰ In adopting the *Potlatch* “substantially similar violation” standard for repeat violations, Oregon OSHA is not adopting that portion of the decision concerned with the need for the prior violation to be a final order, which is based on specific provisions of the federal law not found in the Oregon Safe Employment Act. In keeping with those

Oregon OSHA has done this with the express intent of following federal precedents regarding this issue and thereby ensuring that employers in Oregon and most of the rest of the country will face the same standard for determining substantial similarity as it relates to repeat violations.

Similarly, in providing more detailed criteria, Oregon OSHA has adopted the *Potlatch* position that a citation of the same standard provides *prima facie* evidence that violations are substantially similar, although (in contrast to the previous rule) that presumption can “be rebutted by evidence of the disparate conditions and hazards associated with these violations of the same standard.”⁷¹

As noted, federal case law itself considers both “hazards” and “conditions” in its analysis of whether something is a “substantially similar violation.” Indeed, many discussions of the subject use the phrase “substantially similar hazardous condition” as essentially synonymous with the phrase actually adopted. For example, in describing the *Potlatch* decision and its successors, one journal summarizes the issue as it relates to both conditions and hazards:

OSHRC held that the Secretary carries the burden of showing that the repeated violation concerns the same or substantially same condition cited in a prior final order. When a citation is made under the same standard, however, a rebuttable presumption is created that the condition is substantially the same as that cited previously. More recently, the Commission has indicated that the two citations need not have occurred under substantially similar conditions as long as they involved substantially similar hazards. Thus the similarity of the abatement methods is not the criterion; rather, the test is whether the two violations resulted in substantially similar hazards.⁷²

Federal OSHA’s guidance to its compliance staff reflects a similar approach, indicating that “[a]n employer may be cited for a repeated violation if that employer has been cited previously for the same or substantially similar condition or hazard....”⁷³ The federal booklet “Employer Rights and Responsibilities Following an OSHA Inspection” states that “[a]n employer may be cited for a repeated violation if that employer has been cited previously, within the last five years, for the same or a substantially similar condition or hazard....”⁷⁴ The same language, with the exception of the five-year reference, also appears in earlier editions of the publication.⁷⁵

Notwithstanding this history, Oregon OSHA agrees that using the phrase taken from the federal case law itself is preferable and avoids any mistaken belief that Oregon OSHA intended a different legal standard in adopting the rule. Therefore, as noted, the rule as adopted uses the phrase “substantially similar violation.”⁷⁶

unique provisions of Oregon law and past practice, Oregon OSHA’s rule continues to indicate that a repeat violation can be issued based on a citation previously received by the employer without regard to whether that citation has become a final order. The language of OAR 437-001-0160 provides clear guidance regarding such issues.

⁷¹ *Potlatch Corp.*, 7 O.S.H.C. 1061(1979).

⁷² *Practical Guide to the Occupational Safety and Health Act*, Law Journal Press, by ALM Media Properties, LLC. Chapter 5 “Degrees of Violations, Penalties and Abatement,” p. 9.

⁷³ Federal OSHA Field Operations Manual, VII.A.1. The same document in VII.B and VII.C discusses the handling of identical standards and different standards in a manner consistent with the rule as adopted.

⁷⁴ “Employer Rights and Responsibilities,” p. 5 (publication OSHA 3000-09R 2011, published in 2011 and found at <http://www.osha.gov/Publications/osh3000.pdf>).

⁷⁵ For example, the quoted language appears on page 5 of the 2005 edition and on page 3 of the 1999 edition.

⁷⁶ Oregon OSHA considers the term “violation” to refer not only to those violations addressed by citation but also to those violations that could not be cited but were addressed by an order to correct. It is Oregon OSHA’s intention that an order to correct, although not a citation, can continue to provide the basis for a repeat as it has in the past.

14. Penalty for Combined Violations

The previous rule provided that the penalty for combined violations (violations involving multiple instances of the same violation) would be calculated by determining a separate penalty for each instance and then totaling the separate penalties. The rule as proposed would have changed the calculation to be consistent with other penalty calculations.

Based on the lack of substantive objection, the final rule adopts the change as proposed.

15. Guidance Related to Appeals and Informal Conferences

In addition to the provisions related to penalties, the rule as proposed attempted to clarify the relationship between appeal notices and requests for informal conferences. This language was the subject of comment by relatively few groups, but those who did comment on the provision provided detailed criticisms of the proposed language. Three commenters addressed the issue at length in very similar language under the heading “OR-OSHA’s proposed modification to the rule regarding requests for hearings and informal conferences is confusing.”⁷⁷ Among other things, they noted that “as currently worded the proposed rule creates confusion more than clarity by commingling the portions applicable to hearing requests with those applicable to informal conferences.”⁷⁸ In contrast to the rule as proposed, the final rule achieves greater clarity by discussing notices of appeal and requests for informal conferences as two completely distinct issues (although the same employer request frequently addresses them both).

Oregon OSHA agrees that the language as proposed was confusing and the rule as adopted addresses the issue more clearly, including taking the suggestion that the discussion of hearing request and that of requests for informal conferences should be separated.

⁷⁷ December 12, 2011 letter from Andrew Graham of the Oregon Self-Insurers’ Association, December 13, 2011 letter from Scott Neufeld of the Special Districts Association of Oregon, and December 14, 2011 letter from Todd Scharff of Safeway

⁷⁸ *Ibid.*

V. Discussion of Financial Impacts of Rule as Adopted

The financial analysis filed in relation to the proposed rule remains an essentially accurate description of the costs of the rule as adopted. Oregon OSHA notes, however, that two changes would be likely to decrease the estimated costs slightly: the decision not to adopt the language increasing the repeat time frame from three years to five years, and the decision to retain a limited 10 percent reduction for immediate correction of violations, which was not part of the rule as proposed.

Overall, it remains Oregon OSHA's conclusion that the rule will result in little, if any, change in the average penalties assessed for violations cited under the Oregon Safe Employment Act.

VI. Evaluation of the Rule and Its Implementation

Oregon OSHA intends to evaluate the rule to determine whether the provisions appear to be operating as intended after one year, allowing any necessary adjustments in policy, compliance officer training, or the rule itself. In order to conduct this evaluation, Oregon OSHA will empanel the stakeholder advisory group that helped to draft the rule proposal during the summer of 2013 to assist with the evaluation of the rule based on information available at that time.