Testimony of

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Good Morning Madam Chair and Members of the Subcommittee.

My name is Randy Rabinowitz. I am a private attorney specializing in occupational safety and health law. I have spent the past 30 years on OSHA law issues, first as a law clerk and attorney at the Solicitor's Office, later in private practice, and as Labor Counsel to the Committee on Education and Labor between 1991 and 1995. I have been a consultant to OSHA, the State of Washington, and the Commission on Labor Cooperation. I have represented a variety of unions, including UAW, USW, UFCW, Unite, and others in litigation over OSHA and MSHA standards. For several years, I taught a law school seminar on OSHA law, have served as the union co-chair for the OSHA law subcommittee of the American Bar Association, and have authored several law review articles on OSHA law issues. For more than a decade, I have served as the Editor-In-Chief of a prominent treatise on OSHA law, published jointly by the ABA and the Bureau of National Affairs (BNA).

I am pleased to appear before you this morning. I have been asked to provide an overview of OSHA's current legal authority to conduct investigations generally and, more specifically, to conduct corporate-wide investigations. My testimony is intended to highlight areas of the Occupational Safety and Health Act of 1970 (OSH Act) which pose obstacles to broader reliance on corporate-wide investigations to identify patterns of misconduct for the purpose of reducing the safety and health hazards workers face on-the-job.

Many companies devote substantial resources to safety and health and, within those companies, managers and officers take their duty to protect employees seriously. Unfortunately, far too many companies, both big and small, do not. This is unacceptable, because workers should not have to die or become ill when they go to work.

In the more than two decades that I have been practicing OSHA law, every year it seems there is an expose describing the dangerous, often life-threatening conditions at some large company or within an industry.

- In the 1980's, the meatpacking industry crippled thousands of workers. IBP denied the problem. An investigation by Representative Tom Lantos revealed the company's deception about the true toll of worker injury and death.

- In the late 1980's, the Phillips Petroleum and other petrochemical companies ignored process safety hazards, creating highly dangerous conditions. The risk of catastrophic explosions highlighted the need for stricter standards. Congress compelled OSHA to act when it failed to do so.

- In the 1980 to 1990s, the auto, garment, meatpacking, trucking/distribution and healthcare industries all ignored the devastating toll from ergonomic injuries until OSHA developed corporate-wide programs to address these hazards.

- The construction industry has killed workers through failures in site management and most often missing fall protection. Today, the Avalon Bay development company and its contractors repeat this pattern.

- In the late 1990's and since, as the *New York Times* revealed in its expose, the McWane company achieved new lows in corporate malfeasance – with its "production-first and only" schemes that degenerated into death and injury for workers, and conspiracy, deception, and criminal convictions for managers.

Today these same patterns continue:

- At the Cintas Corp., the repeated violations of life-and-death OSHA standards across the company again show a pattern of production-first, safety later.

- A recent expose by the *Charlotte Observer* illustrates that the House of Raeford, Smithfield and DCS Sanitation have again created the same dangerous working conditions Cong. Lantos investigated two decades earlier. The House of Raeford's misrepresentation of its injury rates raises serious questions about OSHA's failure to enforce basic recordkeeping requirements.

- New industries often escape scrutiny until it's too late. Today, the waste hauling industry and its leader, WMI, has repeatedly violated OSHA rules, causing severe injuries and even death among its workforce.

And, after every expose, OSHA and others promise to "get tough." But, almost four decades after the Occupational Safety & Health Act went into effect, OSHA enforcement efforts grow weaker, not stronger.

Empirical research has shown strict enforcement by OSHA is effective in reducing illnesses and injuries.[1] It is the very foundation for the OSH Act. Nevertheless, during the Bush Administration OSHA has shifted its resources to voluntary programs, including an alphabet soup of partnerships, alliances and consultative programs. There is no empirical evidence that these programs reduce injuries or that they do so more effectively than old-fashioned enforcement.

Like the Act itself, a recent enforcement effort by OSHA, its Enhanced Enforcement Policy or EEP Program, is another example of an enforcement program with great potential that has never achieved its promise. The EEP program was adopted in 2003, in response to the enforcement disgrace at McWane Corp. Unfortunately, the EEP program has failed to protect workers at indifferent, large employers from highly-dangerous hazards.

In my view, OSHA should try to leverage its resources to identify patterns of misconduct and demand abatement of the problems company-wide. These large companies have the organizational resources to make health and safety improvements. It is a shame when OSHA fails to insist on this company-wide protection for workers.

Overview of OSHA enforcement

OSHA faces obstacles if it wants to expand its corporate-wide enforcement efforts.

Some of these obstacles stem from the structure of the OSH Act and Congress may need to act to fix these. Other obstacles have been created by OSHA. OSHA chooses to enforce the Act facility by facility. Its programs and policies are designed to facilitate a plant by plant approach to enforcement. Those programs are administered by a Regional Administrator (RA). Within each region, the RA decides which cases to pursue. This piecemeal and disjointed approach often makes it difficult to achieve the communication and collaboration necessary to uncover patterns of misconduct across large corporations. Obviously, legislation is not necessary to fix these bureaucratic obstacles to greater corporate-wide enforcement.

To help understand OSHA's authority to conduct enforcement across an employer's several facilities and the obstacles to effective exercise of that authority, I believe a brief overview of the enforcement scheme under the OSHA Act would be helpful. OSHA's enforcement efforts rely principally on two types of inspections. OSHA relies first on injury and illness statistics recorded by employers and reported to OSHA to conduct "general schedule" inspections. These inspections are intended to target high-risk employers. The scope of a general schedule inspection is generally broader than the scope of a complaint inspection.

Second, when a current employee at a facility, or that employee's representative, files a written complaint about a hazardous condition, OSHA must initiate an inspection. [2] During such complaint inspections, OSHA usually inspects only those conditions described in the complaint. If an employee believes OSHA should broaden its inspection, the employee can request that OSHA do so while the inspection is ongoing.

When an inspection reveals that an employer has violated an OSHA standard, regulation, or the general duty clause, OSHA must issue citations.[3] These citations must be issued no later than six months from the date on which the inspection began. The sooner OSHA identifies a problem and issues citations, the sooner the employer must begin abatement.

A citation notifies an employer of the violations OSHA found, the penalties it proposes, and the date by which abatement must be accomplished. Each violation is classified by severity. A serious violation is one where there is a substantial probability the violation will cause death or serious injury. OSHA must assess a penalty of up to $7000 for each of these violations. A willful violation occurs when an employer intentionally disregards safety and health or is indifferent to the Act's requirements.[4] OSHA must assess a penalty of between $5,000 and $70,000 for each willful violation.[5] OSHA may also levy additional fines of up to $70,000 for each repeat violation, those which are substantially similar to violations in prior OSHRC orders.

OSHA may refer a case for criminal prosecution when willful violations of specific standards result in an employee death.[6] OSHA may not seek criminal penalties for general duty clause violations, even if an employee dies. OSHA cannot seek criminal penalties when an employer's OSH Act violations permanently disable workers. Only firms, not individuals, are subject to criminal prosecution for a misdemeanor.[7] States may prosecute employers who harm workers if their actions violate state criminal laws, such as those prohibiting manslaughter and reckless endangerment. [8]

OSHA, however, has substantial discretion about whether to cite an employer for hazards it observes, to withdraw citations, reach settlements, characterize violations, and reduce or eliminate penalties.[9] Courts are not permitted to review OSHA's decision on whether to enforce the law. OSHA routinely changes the classification of violations when settling citations even in major cases involving worker deaths – usually changing willful violations to "unclassified" violations so criminal prosecution is no longer possible and the $5000 minimum penalty does not apply. Penalties are often substantially reduced as well.

When an employer receives a citation, it has fifteen working days in which to challenge the violations, the characterization, or the penalty. An uncontested citation becomes a final OSHRC order, enforceable in federal court.[10] Most contested citations are resolved informally, without resort to litigation. When employer challenges to citations are not resolved informally, they are adjudicated before the independent Occupational Safety & Health Review Commission. While an OSHRC challenge is pending, the employer is not required to abate the violation. This delay in abatement during litigation often extends for several years. In cases of imminent danger, OSHA can, but rarely does, ask a federal court to shut down a dangerous operation.

OSHA shares enforcement duties with states under the OSH Act. Section 18 of the Act authorizes states to administer their own OSHA program, if that program meets minimum federal requirements and receives OSHA approval. Twenty-two states enforce occupational safety and health requirements in the private sector apart from federal OSHA. Where OSHA has not given the state final approval of its plan, and it has not done so in six states with jurisdiction over safety and health in the private sector (California, Washington, Vermont, New Mexico, Michigan and Puerto Rico), OSHA could exercise concurrent enforcement jurisdiction, but it has a policy of not doing so. Enforcement procedures – as well as classification and penalties – can differ widely among the states.

Company-Wide Enforcement

OSHA adopted its Enhanced Enforcement Policy (EEP) in response to the *New York Times/ Frontline* expose on corporate-wide indifference to health and safety at McWane, and OSHA's inability to identify the horrifying pattern of misconduct at the company. Under the policy, when OSHA identifies high gravity serious violations at a facility, it considers whether to initiate additional enforcement action at that facility or at others. The idea – at least on paper – is to give OSHA a tool to find patterns of violations.

Within this framework, EEP provides guidance to staff on how to conduct broader investigations when a compliance officer identifies a serious violation at a facility and a possibility exists that similarly hazardous conditions exist elsewhere in the company. But it is too limited. And, OSHA relies on the policy too infrequently for it to accomplish its goals. OSHA can fix some of the obstacles to stronger corporate-wide enforcement. Others require Congressional action. Some of the issues which Congress should address are described below.

OSHA's current EEP program leaves the Agency with too much discretion to do nothing. On paper, the policy represents a reasonable effort by OSHA; the problem with the EEP policy

is that it can be changed or ignored. Sometimes OSHA staff follow it. Sometimes they do not. OSHA is free to act arbitrarily. It is not required to explain why it relies on the EEP in some cases and not in others. Within some OSHA regions, the EEP policy is relied on often. Within others, rarely.

OSHA's own statistics reveal that while OSHA has designated approximately 2,000 EEP cases since the inception of the program in 2003, it has not primarily been used to target employers with patterns of misconduct across multiple sites. Forty-six percent of the employers included in the EEP inspections are small employers with less than 25 employees, and only twenty-three percent of covered employers who had over 250 employees. Further, as of March 2007, OSHA reported that EEP had led to inspections of other locations of employers involved in EEP cases under one hundred times. OSHA's unfettered discretion to do nothing leaves employees without adequate protection. Further, because OSHA relies on the EEP inconsistently, the program fails to deter on-going patterns of violations across larger companies.

The strongest action under the EEP Program is the issuance of a national "EEP Alert" memorandum, instructing Federal OSHA Regional and Area Offices to conduct inspections at a specified group of a company's locations, designated by the National office. According to OSHA, however, it has only issued 8 such alerts since the inception of the program in 2003 – or less than two per year.

Congress should contain OSHA's discretion so that in appropriate cases it can be required to conduct corporate-wide investigations. Current law already mandates OSHA inspections when employees voice specific complaints. The EEP program contains no comparable requirement.

OSHA has a crippling lack of the information that could help it target companies with widespread problems. OSHA currently lacks corporate-wide information on injuries and illnesses. Without such information, it cannot identify patterns of misconduct. Section 8 of the Act grants OSHA broad authority to adopt regulations requiring employers to keep records of workplace injuries and illnesses and report injury incidence to OSHA. OSHA's existing regulations require that these records be kept for each facility. Some, but not all, employers must report their injury incidence to OSHA. In my opinion, section 8 of the Act clearly permits OSHA to adopt broader corporate-wide recordkeeping requirements. There is no legal reason OSHA could not impose upon large companies a new requirement to report injuries and illnesses across facilities. There is a practical limit to whether OSHA can accomplish this goal within the foreseeable future. When OSHA last set out to revise its recordkeeping rules, the process took nearly 7 years. Any proposal to expand recordkeeping requirements for large companies would likely generate controversy and OSHA's track record of timely completing controversial regulations is dismal. So a Congressional mandate that OSHA adopt corporate-wide recordkeeping requirements with 6-12 months would be a necessary first step so the agency can obtain the basic information necessary about health and safety hazards across facilities within the same company.

OSHA also needs information on whether conditions posing hazards at one facility exist

at other facilities within the company. Current law allows OSHA to request such information, but leaves it with few effective ways to compel such information. Once OSHA identifies a serious safety and health hazard at a facility of a company with many facilities, it needs information about whether similar conditions or processes exist at other facilities before it decides whether to conduct a corporate-wide investigation.

Under current law, OSHA can ask for this information during an inspection. It is clearly relevant to OSHA's decision as to whether a violation is willful. For example, if a company has ten facilities with conveyors and employees have gotten injured in the conveyor at several facilities, that information could serve as potent evidence that the company either knew of the conveyor's danger or was indifferent to the danger. Either way, such a violation could be characterized as willful. So if OSHA wanted the information, and its request that it be turned over was denied, the Agency could issue a subpoena for the documents and seek to judicially enforce the subpoena if necessary.

OSHA faces a practical problem, however, in doing so. The OSH Act requires that it issue citations within six months of beginning its inspection. If a company resists OSHA's efforts to obtain company-wide information about hazards, the process of judicially enforcing a subpoena – a process which may require an adversary hearing in federal court – could easily drag on for over six months. And, why would a company voluntarily supply information to OSHA about company-wide health and safety hazards, when doing so will likely increase the fine they face and refusing to do so will run out the statute of limitations? So, in practice, OSHA is likely to negotiate for far fewer documents than it needs to identify company-wide problems. To correct this imbalance, Congress should require that employers provide OSHA with documents about hazardous processes or conditions across company facilities whenever a serious violation has been identified.

Critics of expanded OSHA enforcement may suggest that imposing such a mandate would encourage fishing expeditions by OSHA. I believe such an argument lacks merit. The Supreme Court has ruled that OSHA investigations must be consistent with the Fourth Amendment to the US Constitution. An employer's ability to challenge an OSHA subpoena for documents as unreasonable under the Fourth amendment guards against overly broad document requests by OSHA.

Large companies should have an obligation, once a serious hazard has been identified at one facility, to conduct internal investigations to determine whether the same hazard exists at other facilities. Current law imposes no such duty. In fact, it creates incentives to delay abatement at all facilities. This is true because an employer is not required to abate an OSHA violation until after all appeals to OSHRC have been exhausted. The OSHRC appeals process often takes years, and in one recent GM case, OSHRC just upheld citations issued more than 15 years ago after a General Motors employee died on the job. During the interim, GM was under no duty to abate the conditions which killed this worker and GM had no duty to determine whether similar conditions existed at other sites. Further, OSHA interprets the OSH Act to bar it from inspecting an individual establishment for the same violation while its challenge to existing citations is pending. This is a huge loophole in the OSH Act and severely limits OSHA's ability

effectively to conduct corporate-wide enforcement. It also means that when OSHA finds hazardous conditions, it often feels that it must negotiate away fines and willful designations just to obtain quicker abatement of hazards. Congress should correct this problem. Companies which delay fixing hazards or turn a blind eye to how prevalent the problem is within their facilities should pay a heavy penalty for doing so. Existing law provides just the opposite – a safe harbor.

OSHA's penalty structure provides little added incentive for large companies with multiple facilities proactively to find violations throughout the company and fix them before OSHA inspections. OSHA penalties for each serious violation are a maximum of $7000 and for each willful violation $70,000. These penalties may be significant for small companies, but are unlikely to pose a deterrent for larger companies. Besides, OSHA routinely negotiates penalty amounts and often accepts a fraction of the penalty it initially proposes. OSHRC penalties are almost always lower. Large companies, usually represented by experienced OSHA counsel, take advantage of these penalty reductions frequently. OSHA resources are spread so thin that OSHA can inspect every workplace under its jurisdiction only once every 133 years. Thus, a company cited at one location has little fear that OSHA will follow-up at a different location, or that such a follow up inspection will impose significant costs, particularly when the two facilities are in different OSHA regions.

Further, criminal penalties under the OSH Act are laughably weak and, therefore, provide little reason for companies to proactively identify problems across facilities. OSHA may prosecute a company for criminal violations only when there is a death and it was caused by a willful violation of a standard. Even then, the crime is a misdemeanor and two courts have ruled that OSHA may not prosecute individuals for the violation, so there is no threat under Federal law that a manager will go to jail for OSHA violations. Criminal fines for the company are just another cost of doing business. Criminal penalties for violating environmental laws are substantially more rigorous.

Finally, I can foresee one additional obstacle to broader corporate-wide enforcement. OSHA currently enforces the OSH Act in approximately one-half of the states. States enforce state OSHA law in the others. So, when a company has facilities in several states, each facility may be subject to different OSHA laws and enforcement by different agencies. If OSHA gets information about hazards in a state plan state, it can notify the state of the hazard, but it cannot inspect. Likewise, states which learn of hazards have no duty to notify OSHA or sister states of the problem. One state may cite a company for lockout violations and when another state or the federal government find similar violations at other facilities, they may not be able to impose the higher, repeat violation penalties provided for in the OSH Act. Congress should create an effective method of coordination among the different state plans and between federal OSHA and the states so that the patchwork of enforcing agencies does not prevent the discovery of patterns of misconduct.

[1] Baggs, Silverstein, and Foley, "Workplace Safety and Health Regulation: Impact of Enforcement and Consultation on Workers' Compensation Claims Rates in Washington State" 43 Am. J. Ind. Med. 483 (2003).

[2] OSHA must initiate inspections in response to formal complaints. 29 U.S.C. §656(f)(1). OSHA does not routinely initiate inspections in response to phone and other informal complaints or in response to complaints from non-employees. *But see* L.R. Wilson & Sons, Inc., 17 O.S.H. Cas. (BNA) 2059 (O.S.H.D. 1997), *aff'd in part & rev'd in part, remanded,* 134 F.3d 1235 (4th Cir. 1998) (initiating inspection in response to the Assistant Secretary's observations).

[3] Section 9(a) provides that "if, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order prescribed pursuant to this act, he *shall* with reasonable promptness issue a citation to the employer."

[4] United States v. Dye Construction Co., 510 F.2d 78, 81-2 (10th Cir. 1975) (holding "evil motive" not an essential element of willfulness).

[5] 29 U.S.C. §666(a).

[6] 29 U.S.C. §666(e).

[7] United States. v. Doig, 950 F.2d 411, 412 (7th Cir. 1991) (holding that Congress did not intend to subject employees to charges of aiding and abetting employers in criminal violations under § 666(e)).

[8] Illinois v. Chicago Magnet Wire, 534 N.E. 2d 962, 966-70 (Ill. 1989).

[9] Sydney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713, 731 (1997).

[10] 29 U.S.C. §659(a).