

## DEPARTMENT OF LABOR

## Occupational Safety and Health Administration

## 29 CFR Part 1952

[Docket No. T-027A]

RIN 1218-AC13

**Oregon State Plan; Eligibility for Final Approval Determination (Excluding Temporary Labor Camps); Proposal To Grant an Affirmative Final Approval Determination; Comment Period and Opportunity To Request Public Hearing**

**AGENCY:** Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

**ACTION:** Proposed final State plan approval; request for written comments; notice of opportunity to request informal public hearing.

**SUMMARY:** This document gives notice of the eligibility of the Oregon State occupational safety and health plan, as administered by the Oregon Department of Consumer and Business Services, for determination under section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the State plan should be granted. This eligibility for 18(e) determination applies to all issues covered under the plan, with the exception of temporary labor camps.

If an affirmative determination under section 18(e) is made, Federal standards and enforcement authority will no longer apply to issues covered by the Oregon plan, with the exception of temporary labor camps in agriculture, general industry, construction and logging. This notice announces that OSHA is soliciting written public comment regarding whether or not final State plan approval should be granted, and offers an opportunity to interested persons to request an informal public hearing on the question of final State plan approval.

**DATES:** Submit written comments and hearing requests by the following dates:

*Hard Copy:* Your comments and hearing requests must be submitted (postmarked or sent) by January 18, 2005.

*Facsimile and electronic transmission:* Your comments and hearing requests must be sent by January 18, 2005.

Please see the section entitled **PUBLIC PARTICIPATION** for additional information on submitting written comments and hearing requests.

**ADDRESSES:** *Regular mail, express delivery, hand-delivery, and messenger service:* Submit three copies of comments, attachments, and hearing requests to the OSHA Docket Office, Docket No. T-027A, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2350. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m. E.S.T.

Please note that security-related procedures may result in significant delays in receiving comments by regular mail. Telephone the OSHA Docket Office at (202) 693-2350 for information regarding security procedures concerning delivery of materials by express delivery, hand delivery, and messenger service.

*Facsimile:* Transmit hearing requests and comments (including attachments) consisting of 10 or fewer pages by facsimile to the OSHA Docket Office at (202) 693-1648.

*Electronic:* Submit comments and hearing requests electronically through the Internet at <http://dockets.osha.gov>.

You must include the docket number of this notice, Docket No. T-027A, in your hearing requests and comments.

For access to the docket to read or download comments or background materials, such as Oregon State Plan documents, go to OSHA's Docket Office Home Page at <http://dockets.osha.gov>. All comments, submissions and background materials are also available for inspection and copying in the OSHA Docket Office at the address above. Contact the OSHA Docket Office at (202) 693-2350 for information about materials not available on the OSHA Web site and for assistance in using this Web site to locate docket submissions. Because comments sent to the docket or to OSHA's Web site are available for public inspection, the Agency cautions interested parties against including in these comments personal information such as social security numbers or birth dates.

**FOR FURTHER INFORMATION CONTACT:** For general information and press inquiries, contact George Shaw, Office of Communications, Room N-3647, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693-1999. For technical inquiries, contact Barbara Bryant, Director, Office of State Programs, Directorate of Cooperative and State Programs, Room N-3700, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2244. Electronic copies of most information

and data concerning the Oregon State Plan that have been made part of the record in this proceeding have been posted on OSHA's Docket Office Home Page at <http://dockets.osha.gov>. You may also access many of Oregon's documents referenced in this **Federal Register** document by visiting the State's Web site at [www.cbs.state.or.us/external/osha](http://www.cbs.state.or.us/external/osha). Electronic copies of this **Federal Register** document, as well as all post-1993 OSHA **Federal Register** notices mentioned in this document, are available on OSHA's Web site at [www.osha.gov](http://www.osha.gov).

## SUPPLEMENTARY INFORMATION

## Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.* (the "Act") provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting and obtaining Federal approval of a State plan. Procedures for State Plan submission and approval are set forth in regulations at 29 CFR part 1902. If the Assistant Secretary, applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and 1902.4, finds that the plan provides or will provide for State standards and enforcement which are "at least as effective" as Federal standards and enforcement, "initial approval" is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial approval period as provided by section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3 and 1902.4, if it includes satisfactory assurances by the State that it will take the necessary "developmental steps" to meet the criteria within a three-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a "certification of completion of developmental steps" when all of a State's developmental commitments have been satisfactorily met (29 CFR 1902.34). Certification attests to the structural completeness of a State plan, but renders no judgment as to its performance in actual operation.

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of concurrent Federal enforcement activity, it becomes eligible to enter into an "operational status agreement" with OSHA (29 CFR 1954.3(f)). A State must have enacted its enabling legislation,

promulgated State standards, achieved an adequate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a developmental plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied and whether final approval should be granted.

An affirmative determination under section 18(e) of the Act (usually referred to as "final approval" of the State plan) results in the relinquishment of authority for Federal concurrent enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). With the exception of sections 5(a)(1) and 11(c), Federal standards and enforcement authority no longer apply in that State to issues granted final approval status under the plan. Procedures for section 18(e) determinations are found at 29 CFR part 1902, subpart D. In general, in order to be granted final approval, in addition to structural sufficiency, actual performance by the State must be "at least as effective" as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for that State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL-CIO v. Marshall*, C.A. No. 74-406), pursuant to a U.S. Court of Appeals decision that directed the Assistant Secretary to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program.

The last requirement for final approval consideration is that a State must participate in OSHA's Integrated Management Information System (IMIS). This is required so that OSHA can obtain the detailed program performance data on a State necessary to make an objective continuing evaluation

of whether the State performance meets the statutory and regulatory criteria for final approval.

### History of the Oregon Plan and of Its Compliance Staffing Benchmarks

#### *Oregon Plan*

On June 6, 1972, the Oregon occupational safety and health plan was submitted to the Assistant Secretary in accordance with section 18(b) of the Act and 29 CFR Part 1902, Subpart C, and on July 20, 1972 a notice was published in the **Federal Register** (37 FR 14445) concerning the submission of the plan, announcing that initial Federal approval of the plan was at issue and offering interested persons 30 days in which to submit data, views and arguments in writing concerning the plan.

The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) requested a public hearing, which was held September 27, 1972, in Portland, Oregon. Comments on the plan were received from the AFL-CIO, the National Electrical Contractors, and the Oregon Construction Industry Council, Inc. In response to concerns raised by the commentors, as well as issues noted by OSHA, the State made clarifications and revisions to its plan relating to its standards and enabling legislation. The standards issues concerned the effectiveness of some standards, product standards, variance procedures, hazard communication, protection from exposure to hazards (requirements for personal protective equipment), and access to employee exposure records. Legislative issues concerned criminal penalty v. civil damage lawsuits, protection for employees filing complaints, and sanctions for alleged "red tag" notice violations. Thereafter, on December 28, 1972, the Assistant Secretary published a **Federal Register** notice (37 FR 28628) granting initial approval of the Oregon plan as a developmental plan and adopting Subpart D of Part 1952 containing the decision and describing the plan.

The Oregon Occupational Safety and Health Division (OR-OSHA) in the Department of Consumer and Business Services is designated as the agency having responsibility for administering the plan throughout the State under the authority of the Oregon Safe Employment Act (Oregon Revised Statutes, Chapter 654). The plan covers all private sector employers with the exception of private sector establishments on Indian reservations and tribal trust lands, including tribal and Indian-owned enterprises; Federal agencies; the U.S. Postal Service and its

contractors; contractors on U.S. military reservations, except those working on U.S. Army Corps of Engineers dam construction projects; and private sector maritime employment on or adjacent to navigable waters, including shipyard operations and marine terminals. Such employers remain subject to Federal OSHA jurisdiction. The State's coverage also extends to all State and local government employers as required by section 18(c)(6) of the OSH Act. The plan provides for the adoption by Oregon of standards which are at least as effective as the Federal occupational safety and health standards. The plan requires employers to furnish employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm, and to comply with all occupational safety and health standards promulgated by the State agency. Employees are required to comply with all standards and regulations applicable to their conduct.

The plan contains provisions similar to Federal procedures governing: Inspection and citation procedures; emergency temporary standards; imminent danger proceedings; coverage under the State's equivalent of the general duty clause; variances; safeguards to protect trade secrets; protection of employees against discrimination for exercising their rights under the plan; and employer and employee rights to participate in inspection and review proceedings. Notices of contest of citations and penalties are heard by the Oregon Workers' Compensation Board, an independent administrative board. Decisions of the Workers' Compensation Board may be appealed to the Oregon appellate court. Complaints of discrimination are investigated by the Oregon Bureau of Labor and Industries, which also makes final determinations through settlement agreements and contested case hearings. Employees who allege discrimination have a private right of action in the circuit courts of Oregon, but may pursue both administrative and civil remedies only if they file a suit in court after BOLI has investigated and rejected their claim. The Assistant Secretary's initial approval of the Oregon developmental plan, a general description of the plan, a schedule of required developmental steps, and a provision for the exercise of discretionary concurrent Federal enforcement during the period of initial approval were codified in the Code of Federal Regulations (29 CFR Part 1952, Subpart D, 37 FR 28628, December 28, 1972).

In accordance with the State's developmental schedule, all major structural components of the plan were put in place and documentation submitted for OSHA approval on or before December 28, 1975. These "developmental steps" included enactment of the Oregon Safe Employment Act, promulgation of State occupational safety and health standards at least as effective as the Federal standards, development of administrative rules and procedures, hiring and training of inspectors, establishment of specific occupational safety and health goals, development and implementation of an affirmative action program, and development and implementation of administrative rules concerning a public sector consultation program. In completing these developmental steps, the State developed and submitted for Federal approval all components of its program including, among other things: The Oregon Safe Employment Act; the Oregon State Poster; an Affirmative Action Plan; personnel merit system rules; a Statement of Goals and Objectives; the Oregon State Compliance Manual; regulations for inspections, citations and penalties, variances, employee complaints, and posting of citations and notices; recordkeeping and reporting regulations; Oregon occupational safety and health standards; and public sector consultation program rules.

These submissions were carefully reviewed by OSHA; after opportunity for public comment and modification of State submissions, where appropriate, the major plan elements were approved by the Assistant Secretary as meeting the criteria of section 18 of the Act and 29 CFR 1902.3 and 1902.4. The Oregon Subpart of 29 CFR Part 1952 was amended to reflect each of these approval determinations (see 29 CFR 1952.102).

On September 15, 1982, in accordance with procedures at 29 CFR 1902.34 and 1902.35, the Assistant Secretary certified that Oregon had satisfactorily completed all developmental steps (47 FR 42105, September 24, 1982). In certifying the plan, the Assistant Secretary found the structural components of the plan—the statutes, standards, regulations, and written procedures for administering the Oregon program—to be at least as effective as corresponding Federal provisions. Certification does not, however, entail findings or conclusions by OSHA concerning the adequacy of the plan in actual performance. As has already been noted, OSHA regulations provide that certification initiates a period of

evaluation and monitoring of State activity to determine in accordance with section 18(e) of the Act whether the statutory or regulatory criteria for State plans are being applied in actual operations under the plan and whether final approval should be granted.

On January 23, 1975, OSHA and the State of Oregon entered into an Operational Status Agreement which suspended the exercise of Federal concurrent enforcement authority in Oregon in all except specifically identified areas. (See 40 FR 18427.)

The State has submitted plan supplements describing changes to its program since plan approval. OSHA's approval of major plan changes has been announced in **Federal Register** notices published periodically. Approval of a fully updated State plan document containing all current structural components (legislation, regulations, policies and procedures manuals) and an updated plan narrative is published elsewhere in today's **Federal Register**.

#### *Oregon Benchmarks*

Under the terms of a 1978 Court Order in *AFL-CIO v. Marshall*, compliance staffing levels (benchmarks) necessary for a "fully effective" enforcement program were required to be established for each State operating an approved State plan. In 1980, in response to the Court Order, OSHA established benchmarks for all approved State plans, including benchmarks of 47 safety and 60 health compliance officers for Oregon. The 1978 Court Order noted that new information might warrant an adjustment by OSHA of the fully effective benchmarks. In October, 1992, Oregon, in conjunction with OSHA, completed a reassessment of the levels resulting in a proposed revised health compliance staffing benchmark of 28 health compliance officers. The State determined that there was no compelling reason to revise the existing 1980 safety benchmark of 47 safety compliance officers. After opportunity for public comment and service on the AFL-CIO, the Assistant Secretary approved these revised staffing requirements on August 11, 1994 (59 FR 42493).

#### **Determination of Eligibility**

This **Federal Register** document announces the eligibility of the Oregon plan for final approval determination under section 18(e) for all issues, with the exception of temporary labor camps in agriculture, general industry, construction and logging, which issue is being excluded from final approval at this time pending resolution of OSHA's concerns regarding the effectiveness of

the State's temporary labor camps standards. OSHA intends to work with the State to resolve all effectiveness issues with regard to its two temporary labor camp standards so that final approval may be extended to all covered issues within a reasonable timeframe. 29 CFR 1902.39(c) requires that notice of this determination of eligibility be published in order to seek public input prior to the Assistant Secretary's decision. The determination of eligibility is based upon OSHA's findings that:

(1) The Oregon plan has been monitored in actual operation for at least one year following certification. The results of OSHA's monitoring of the plan since the commencement of plan operations are contained in written evaluation reports which are made available to the State and to the public. The results of OSHA's most recent post-certification monitoring are set forth in a comprehensive evaluation report covering the period of October 1, 2002 through September 30, 2003, which has been made part of the record of the present proceedings and is available in Docket T-027A, together with all previous evaluation reports since 1983.

(2) The plan meets the State's revised benchmarks for enforcement staffing. On August 11, 1994, pursuant to the terms of the Court Order and the 1980 Report to the Court in *AFL-CIO v. Marshall*, OSHA approved revised fully effective benchmarks of 47 safety and 28 health compliance officers for Oregon based on an assessment of State-specific characteristics and historical experiences. Oregon has allocated safety positions in excess of these numbers, as evidenced by its FY 2005 *Application for Federal Assistance* in which the State has committed itself to funding the State share of salaries for 44 safety and 23 health compliance officers, with an additional 8 safety and 5 health compliance officers that are funded with 100% State monies. Total compliance officer staffing in both FY 2004 and FY 2005 is 52 safety and 28 health. Both the FY 2004 and FY 2005 grant applications have been made part of the record in the present proceeding.

Oregon provides State funds for its program well in excess of the required 50% match of Federal funding. The additional funds have allowed the State to expand staffing and activities in both its enforcement and voluntary compliance programs. Oregon also operates a 100% State-funded on-site consultation program for public and private employers that is separate from its Federally-funded consultation program under section 21(d). As this State-funded program differs in several

significant ways from the Federal requirements, its private sector component is not considered to be part of the State plan and is evaluated primarily to assure no negative impact on the required functions of the approved State plan.

(3) Oregon participates and has assured its continued participation in the computerized Integrated Management Information System (IMIS) developed and administered by OSHA.

*As required of all States with approved plans, Oregon has developed a five-year Strategic Plan* (currently covering the period FY 2001 to FY 2005) to guide its efforts to improve occupational safety and health in the State. The State's strategic goals (improve workplace safety and health, change workplace culture, and assure public confidence) are similar to those of Federal OSHA and are directed to the overall goal of reducing workplace injuries, illnesses and fatalities. Oregon's efforts are expected to contribute to the achievement of OSHA's national injury/illness/fatality reduction goals. Oregon's FY 2001–2005 Strategic Plan and its FY 2004 and FY 2005 Annual Performance Plans are available in Docket T–027A, as a part of Oregon's FY 2004 and 2005 grants.

#### *Issues for Determination in the 18(e) Proceedings*

The Oregon plan is now at issue before the Assistant Secretary for determination as to whether the criteria of section 18(c) of the Act are being applied in actual operation in a manner at least as effective as the Federal program. 29 CFR 1902.37(a) requires the Assistant Secretary, as part of the final approval process, to determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1902.3 and 1902.4. The Assistant Secretary must make this determination by considering the factors set forth in § 1902.37(b). OSHA believes that the results of its evaluation of the Oregon program as described in the most recent evaluation report, considered in light of these regulatory criteria and the criteria in section 18(c) of the Act, indicate that the regulatory indices and criteria are being met. The Assistant Secretary accordingly has made an initial determination that the Oregon plan is eligible for an affirmative section 18(e) determination for all issues covered by the plan with the exception of temporary labor camps as regulated by two state standards applicable to both agriculture and general industry (including construction and logging). This notice initiates proceedings by which OSHA expects to elicit public

comment on the issue of granting an affirmative section 18(e) determination to Oregon. In order to encourage the submission of informed and specific public comment, a summary of current evaluation findings with respect to these criteria is set forth below.

#### (a) Standards and Variances

Section 18(c)(2) of the Act requires State plans to provide for occupational safety and health standards which are at least as effective as Federal standards. A State is required to adopt, in a timely manner, all Federal standards and amendments or to develop and promulgate State standards and amendments at least as effective as the Federal standards. See §§ 1902.37(b)(3), 1902.3(c), 1902.4 (a) and (b). Although Oregon does not automatically adopt standards which are identical to the Federal standards, it usually adopts Federal standards by reference and sometimes adds a few State-initiated provisions under the State's regulatory numbering system. Oregon also adopts independent standards which do not have a direct Federal counterpart. Oregon OSHA adopts standards through a promulgation process that provides notification to the public of its intent to adopt a standard: It publishes the standard that it proposes in the Secretary of State's Bulletin, it asks for comments and it may hold hearings. After review of all comments and appropriate revision, the standard is formally adopted and its effective date established. When Oregon OSHA is considering substantive standard revisions, a committee of affected employers, employees, and other experts is convened to provide input and draft language before comments are requested from the public. Thus, OR-OSHA's standards development process is similar to Federal OSHA's and provides full opportunity for public input.

Some Oregon standards and related enforcement policies differ from the Federal, such as the State's enforcement policy requiring employers to pay for personal protective equipment, Oregon's additional rules for personal protective equipment and for explosives and blasting agents, and the State's different rules for air contaminants, bloodborne pathogens (needlestick devices), spray finishing, concrete and masonry construction, and fall protection in construction. Oregon has also adopted a number of standards which do not have Federal counterparts, including workplace safety committees, crane operator training, thiram, reinforced plastics manufacturing, ornamental tree and shrub services, and extensive forest

activities (logging) requirements. [18(e) Evaluation Report, pp. 20–21]

Where a State adopts Federal standards, the State's interpretation and application of such standards must be consistent with Federal interpretation and application. Where a State develops and promulgates its own standards, interpretation and application must ensure protection at least as effective as comparable Federal standards and enforcement procedures. While acknowledging the effectiveness of individual standards, this requirement stresses that State standards, in actual operation, must be at least as effective as the Federal standards. See §§ 1902.37(b)(4), 1902.3(c)(1), 1902.3(d)(1), 1903.4(a), and 1902.4(b)(2). As already noted, the Oregon plan provides for adoption of standards identical to or at least as effective as the Federal standards. Oregon also generally adopts Federal interpretations or more stringent requirements and thus assures at least as effective worker protection.

The State is required to take the necessary administrative, judicial or legislative action to correct any deficiency in its program caused by an administrative or judicial challenge to any State standard, whether the standard is identical to the Federal standards or developed by the State. See § 1902.37(b)(5). There have been administrative and judicial challenges to State standards in Oregon, but they have all been satisfactorily resolved. The State legislature has periodically enacted legislation requiring changes in the State's standards, such as for safety committees, hazard communication in agriculture, live-line bare-handed electrical work, sanitation in construction, and most recently for steel erection. For example, the steel erection legislation resulted in a required modification to Oregon's more stringent fall protection provisions in its steel erection standard to make them identical to the Federal.

When granting permanent variances from standards, the State is required to ensure that the employer provides as safe and healthful working conditions as would have been provided if the standard were in effect. See §§ 1902.37(b)(6) and 1902.4(b)(2)(iv). Oregon granted three permanent variances during the 18(e) evaluation period. The granted variances were processed in accordance with State procedures. [18(e) Evaluation Report, p. 21] Where a temporary variance is granted, the State must ensure, among other things, that the employer complies with the standard as soon as possible and provides appropriate interim employee protection. See

§§ 1902.37(b)(7) and 1902.4(b)(2)(iv). The Oregon temporary variance procedures require that any employer granted a temporary variance must have an effective program for coming into compliance with the standard as soon as possible. During the section 18(e) evaluation period, no temporary variances were granted. [18(e) Evaluation Report, p. 21]

#### (b) Enforcement

Section 18(c)(2) of the Act requires State plans to maintain an enforcement program which is at least as effective as that conducted by Federal OSHA. Section 18(c)(3) requires the State plan to provide for right of entry and inspection of all work places at least as effective as that in section 8 of the Act.

*Inspection Targeting.* The State inspection program must provide for sufficient resources to be directed to designated target industries while providing adequate protection to all other workplaces covered under the plan. See §§ 1902.37(b)(8), 1902.3(d)(1), and 1902.4(c). Oregon relies on injury and illness claims data from the State workers' compensation system as the primary means to identify employers for high-hazard, programmed safety and health inspections. This site-specific targeting is augmented by workers' compensation claim severity classifications, an employer's history, and other factors to arrive at a ranking on an inspection list. Separate lists are made for general industry, construction, logging, and health.

Oregon's strategic plan for FY 2001–2005 focuses on reducing silica exposures, lead in construction exposures, and fall hazards. The State has targeted inspections in the following industries: agriculture, construction, lumber/wood, food/kindred products, and health care. OR-OSHA conducted 4,569 safety inspections during FY 2003. Of that total, 3,494 (76%) were programmed. In the same period, 789 health inspections were conducted, of which 350 (44%) were programmed, for a combined programmed inspections average of 72%. This is consistent with previous years' inspections and exceeds the Federal experience of 56% programmed inspections. Fourteen percent (14%) of State inspections are in response to complaints and 4% are in response to accidents. There are no backlogs of such inspections.

During the evaluation period, the percentage of OR-OSHA programmed safety inspections with serious, willful or repeat violations was 40% for Oregon compared to 60% for Federal OSHA and a national (State and Federal OSHA data combined) three-year average of 49%.

The percentage of OR-OSHA programmed health inspections with serious, willful or repeat violations was 25% for Oregon compared to 46% for Federal OSHA and a national three-year average of 40%. State officials assert that fewer serious violations per inspection are expected in Oregon because of a higher frequency of inspections, workplace safety committee (and employer safety and health program) requirements, and a large consultation program. (See discussion under Identifying and Citing Hazards.)

*Denials of Entry.* In cases of refusal of entry, the State must exercise its authority, through appropriate means, to enforce the right of entry and inspection. See §§ 1902.37(b)(9), 1902.3(e) and (f), and 1902.4(c)(2)(i) and (ix). Section 654.067 of the Oregon Safe Employment Act provides for an inspector's right of entry during regular hours to any place of employment. During the evaluation period, there were 14 denials of entry. Entry was achieved in all cases, the same as for Federal OSHA during the period. [18(e) Evaluation Report, p. 22]

*Inspection Procedures.* Inspections must be conducted in a competent manner following approved enforcement procedures, which include the requirement that inspectors acquire information adequate to support any citation issued. See §§ 1902.37(b)(10), 1902.3(d)(1), and 1902.4(c)(2). Procedures for the Oregon occupational safety and health compliance program are set out in the Oregon Field Inspection Reference Manual (FIRM), which is patterned after OSHA's FIRM and other compliance documents. The Oregon FIRM is supplemented by program directives. The State in actual operation has demonstrated its adherence to inspection procedures, including documentation, which are similar to Federal procedures. [18(e) Evaluation Report p. 22]

Oregon uses multi-employer workplace citation guidelines that are different from the Federal multi-employer policy. Oregon's guidelines allow employers on multi-employer sites to be cited if they create hazards, expose employees to hazards, or control the worksite, provided certain conditions are met, whereas the Federal policy is broader and also allows citations for employers responsible for correcting a hazard. Only Oregon employers that have knowledge of the hazardous conditions and exercise direct control over the work practices of employees exposed to such conditions may be cited. However, Oregon's guidelines encourage the use of Orders

to Correct for employers that are not cited.

*Identifying and Citing Hazards.* In FY 2003, Oregon compliance officers found 2.9 violations per inspection, which is the same as the Federal average of 2.95 violations per inspection, but lower than the three-year national (State and Federal data combined) average of 3.5. Oregon also cited an average of 1.1 serious, willful or repeat violations per inspection. The comparable Federal data was 2.2 and the national three-year average was 2.0. For other-than-serious violations, the respective averages were 1.81 for Oregon, .75 for Federal, and 1.5 for the three-year national average. In addition to issuing citations, the State issues "Orders to Correct" to require correction in certain circumstances. For example, orders may be used when a citation has not been issued within 180 days of the opening conference, when legal estoppel issues interfere with issuing a citation or when a small employer, who is required by rule to have a safety committee but does not, agrees to implement an "innovative" committee following the OR-OSHA guidelines for small employers. Citations for failure-to-abate and repeat violations can be issued on an Order to Correct. Almost all Orders to Correct have dealt with small employer implementation of safety committee requirements.

Although Oregon OSHA finds as many violations per inspection as does Federal OSHA, its percentage of programmed inspections with serious, willful or repeat violations is lower than both the Federal and national averages (see Inspection Targeting). State officials assert that Oregon's lower percent of serious, willful or repeat violations is attributable to the fact that Oregon has a much higher frequency of inspections compared to Federal and national averages. With 157,117 private sector establishments (per Oregon FY 2004 annual performance plan, p. 4), Oregon's 5,082 private sector inspections in FY 2003 represent one inspection for every 29 establishments, compared to one inspection for every 82 private sector establishments at the national (State and Federal OSHA data combined) level. [18(e) Evaluation Report, pp. 21–22]

Oregon has also required employer safety and health programs through workplace safety committees since 1982. Besides conducting workplace inspections, investigating accidents and recommending to the employer how to eliminate hazards, these safety committees assist the employer in evaluating the employer's safety and health program and make written

recommendations to improve the program. In addition, Oregon has a large, independent consultation program whose private sector component operates outside of the approved State plan and a large employer recognition and exemption program which meets Federal requirements, as well as other cooperative compliance assistance activities. These programs emphasize assisting employers in improving their safety and health programs. (84% of Oregon consultations in FY 2003 involved working with safety committees.) These factors may have the effect of reducing the numbers of serious hazards present in the workplace and therefore the number of serious violations per inspection. Oregon's accepted workers' compensation disabling claims rate and Bureau of Labor Statistics lost workday injury/illness rate have also been steadily declining over the past decade, demonstrating fewer injuries. (See Injury/Illness Rates section.) [18(e) Evaluation Report, pp. 10–12, and Appendix A, SOAR Report, pp. A–1 and A–3]

Though Oregon has a lower percentage of violations that are willful (.02% vs. .49% Federal), Oregon's statutory provisions for criminal willful penalties at ORS 654.991(a) contain two additions not found in the Federal OSHA Act which should enhance Oregon's ability to successfully pursue criminal willful violations. A willful violation in Oregon that materially contributes to the death of an employee may also be subject to criminal prosecution, as well as a willful violation that causes a death. The Oregon Act also includes a definition of "willful".

**Advance Notice.** State plans must include a prohibition on advance notice of inspections, and exceptions must be no broader than those allowed by Federal OSHA procedure. See § 1902.3(f). Oregon has adopted approved procedures for advance notice similar to the Federal procedures. During the evaluation period, Oregon did not grant any advance notice of inspections.

**Employee Participation.** State plans must provide for inspections in response to employee complaints, and must provide an opportunity for employee participation in State inspections. See § 1902.4(c)(i) through (iii). The State has procedures similar to those of Federal OSHA which require that either an employee representative be provided an opportunity to accompany the compliance officer on the walk-around or that a reasonable number of employees be interviewed. In

addition, inspection reports are provided to employee representatives and complainants. In each of the 18 accompanied visit inspections with OSHA monitors during the evaluation period, employees or their representatives actively participated. No problems have been noted concerning employee participation. [18(e) Evaluation Report, p. 22]

**Response to Complaints.** Oregon's procedures for processing and responding to complaints are essentially identical to OSHA's. Imminent danger complaints are to be responded to by inspection within 24 hours and serious complaints within 5 working days. Other-than-serious complaints may be responded to by inspection (within 30 working days), letter, fax or telephone. During the evaluation period the State was timely in initiating responses to employee imminent danger complaints 98% of the time, serious complaints 95% of the time, and other-than-serious complaints 99% of the time. In addition, OR-OSHA provided complainants with timely response letters 94% of the time and sent timely letters 100% of the time to family members when fatalities were involved. During FY 2003 Oregon responded to 59 imminent danger complaints (8%), 379 serious complaints (52%) and 291 other-than-serious complaints (40%); these figures are virtually unchanged from FY 2002. [18(e) Evaluation Report, pp. 22–23 and Appendix A, SOAR Report, p. 12]

**Non-discrimination.** State plans must also provide protection for employees against discrimination similar to that found in section 11(c) of the Federal Act. See § 1902.4(c)(2)(v). Section 654.062(5) of the Oregon Safe Employment Act provides for discrimination protection equivalent to that provided by Federal OSHA. Under Oregon law, the Bureau of Labor and Industries (BOLI) has jurisdiction for discrimination cases. Oregon OSHA contracts with BOLI for discrimination complaint processing. A total of 54 complaints alleging discrimination were investigated during the evaluation period, four of which were found to be meritorious. Oregon met the 90-day time limit for completing discrimination investigations 67% of the time. The State's goal is to complete investigations within 90 days in 85% of cases. Oregon OSHA is actively working with BOLI to improve case determination timeliness, to ensure that a review of the "prima facie" elements is conducted in every instance when determining the merits of 11(c) complaints, and to provide file documentation of the reasons why no investigation is conducted. The administrator of the Civil Rights

Division of BOLI has expressed BOLI's commitment to addressing OSHA's concerns, and OR-OSHA will be reviewing discrimination case files for appropriate case file documentation, including prima facie analysis, during quarterly audits. BOLI takes appropriate action through administrative and court litigation on merit cases where the employer does not voluntarily comply with the State's proposed remedy. OR-OSHA pays BOLI for each occupational safety and health-related discrimination investigation it conducts. At the time the evaluation report was prepared, BOLI had 12 investigators. [18(e) Evaluation Report, pp. 26–28]

Although the State's non-discrimination program is working to resolve several issues, employees in Oregon continue to have the right to dually file a discrimination complaint with Federal OSHA to preserve their right to further Federal investigation and prosecution should it be necessary. As Federal authority under section 11(c) is not affected by an 18(e) determination, this protection would be unaffected by this proposed action. Oregon complainants also have a private right of action and may file a civil suit in State or Federal court if they are not satisfied with BOLI's decision or if their case is dismissed. For a discussion of Oregon's discrimination rules, see "Oregon State Plan; Approval of Plan Supplements; Revised State Plan" published elsewhere in today's **Federal Register**.

**Citations and Proposed Penalties.** The State is required to issue, in a timely manner, citations, proposed penalties, and notices of failure to abate. See §§ 1902.37(b)(11), 1902.3(d), and 1902.4(c)(2) (x) and (xi). The time from an inspection opening conference to citation issuance for safety inspections in Oregon was 38 days during FY 2003. This is better than the national average of 47 days but longer than the Federal average of 29 days. For health inspections, however, OR-OSHA averaged 74 days while the national average was 63 days and the Federal average was 40 days. As a result of State attention to this issue, by the end of the second quarter of FY 2004 lapse times were 34 days (safety) and 69 days (health). [18(e) Evaluation Report, p. 24]

The State must propose penalties in a manner that is at least as effective as the penalties under the Federal program, which includes first instance violation penalties and consideration of factors comparable to those required in the Federal program in calculating penalties. See §§ 1902.37(b)(12), 1902.3(d), and 1902.4(c) (x) and (xi). Oregon's authority includes the use of

first instance sanctions with maximum statutory penalty amounts identical to the Federal with the exception of an optional \$1,000 maximum penalty for posting violations vs. the Federal mandatory \$7,000. This difference is not considered significant, however, as Oregon has also established a minimum posting penalty of \$100–\$200 and in practice, although OSHA may cite for failure to post a citation or annual summary, it does not usually issue citations for failure to post the OSHA poster (OSHA Directive CPL 02–00–111 (CPL 2.111), “Citation Policy for Paperwork and Written Program Requirement Violations”, November 27, 1995). Unlike OSHA, Oregon also has statutory civil penalties of \$100 to \$2,500 for false statements (in addition to criminal penalties), red tag penalties of \$100 to \$5,000, and field sanitation penalties of \$250 to \$2,500. By regulation, Oregon also has raised the statutory minimum penalty amounts for various violations.

OR–OSHA’s procedures for penalty calculation contain a number of differences from OSHA’s, including lower base penalty amounts used in calculation of a probability/severity-based (gravity-based) penalty, and differences in calculations for combined or grouped violations and in penalty adjustment factors. For example, while Federal OSHA allows a penalty reduction of up to 60% for employer size, Oregon allows a penalty reduction of only 10% for small employers. Oregon also allows penalty reductions for a low lost workday injury rate which Federal OSHA does not. In addition, Oregon’s procedures generally allow a lower minimum penalty for failure-to-abate violations (\$50 per day for other-than-serious and \$250 per day for serious, with higher minimum in unusual circumstances, vs. Federal policy of \$1,000 per day minimum for either serious or other-than-serious unabated violations). Oregon does not allow penalty adjustments for repeat or willful violations, while OSHA allows an adjustment for employer size. Although these differences in penalty calculation result in lower average penalties in Oregon, no deficiencies in program operations attributable to these differences were noted during this evaluation period. Oregon’s penalties for serious violations averaged \$365 in FY 2003. The national average penalty for serious violations was \$1,331 and the Federal average was \$821. Oregon believes that its practice of conducting much more frequent inspections (see Inspection Targeting) and the fact that its final assessed penalties are reduced

less after appeal than are Federal OSHA’s result in equivalent worker protection as demonstrated by declining injury/illness rates. [18(e) Evaluation Report, pp. 24–25]

**Abatement.** The State must ensure abatement of hazards cited including issuance of notices of failure to abate and appropriate penalties. See §§ 1902.37(b)(13), 1902.3(d), and 1902.4(c)(vii) and (xi). A joint OSHA/OR–OSHA special study of case files with serious violations found that satisfactory abatement verification documentation existed in 90% (80 of 88) of the case files. [18(e) Evaluation Report, p. 24] Ninety-six percent (96%) of safety violations had abatement periods of less than 30 days and 97% of health violations had abatement periods of less than 60 days. This surpasses Federal performance of 80% and 90%, respectively. [18(e) Evaluation Report, Appendix B, FY 2003 Interim State Indicator Report, #C.4] Oregon also requires abatement verification when it issues an Order to Correct, and a Failure to Abate citation, with penalties, can be issued for non-abatement. (See discussion of Orders to Correct under Identifying and Citing Hazards.)

Whenever appropriate, the State must seek administrative and judicial review of adverse adjudications. Additionally, the State must take necessary and appropriate action to correct any deficiencies in its program which may be caused by an adverse administrative or judicial determination. See §§ 1902.37(b)(14) and 1902.3 (d) and (g). There was no Oregon OSHA appellate level contested case activity during this reporting period. OR–OSHA has had a number of appellate challenges in prior years, and has been successful in upholding basic employee rights (e.g., complainant confidentiality and participation in inspections) as well as program authorities (e.g., inspection targeting and expansion of inspection scope). OR–OSHA had fewer violations vacated (9% vs. 22%), fewer serious violations reclassified (3% vs. 13%) and less reduction in penalties amounts (45% vs. 49%) after appeal than Federal OSHA during this same period. [18(e) Evaluation Report, p. 25]

#### (c) Staffing and Resources

The State is required to have a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan. See section 18(c)(4) of the Act; 29 CFR 1902.37(b)(1), 1902.3(d) and 1902.3(h). A State must also direct adequate resources to administration and enforcement of the plan. See section 18(c)(5) of the Act and § 1902.3(i). The

number of safety compliance positions authorized by the State exceeds the enforcement staffing benchmark for safety (52 authorized with a safety benchmark of 47). For health compliance positions, the number authorized equals the health benchmark (28 authorized with a health benchmark of 28). At the close of the evaluation period, 97% of the authorized enforcement positions were filled—98% of safety compliance positions and 96% of health compliance positions. These allocations are consistent with prior years’ approved 23(g) grant agreements. In addition to the central office in Salem, the State maintains field offices in Portland, Salem, Medford, Eugene, Pendleton and Bend. [18(e) Evaluation Report, p. 28]

Oregon has consistently provided State matching funds well in excess of Federal funding. In the Fiscal Year 2005 initial grant award, the State has provided 72.6% of the total budget for its occupational safety and health program. Total funding for the State program in Fiscal Year 2005 is \$18,604,237. (\$5,105,000 Federal, \$13,499,237 State).

Oregon staff are trained by internally developed and conducted training sessions as well as by courses offered through the OSHA Training Institute. Development plans are created annually for each staff member to meet individual needs. In addition, the State develops a biennial training plan which provides the State with a process through which major rule changes and shifts in technology can be addressed division-wide.

#### (d) Other Requirements

**Public Employees.** States which have approved plans must provide a safety and health program for State and local employees which must be as effective as the State’s plan for the private sector. See § 1902.3(j). The Oregon plan provides a program in the public sector which is identical to that in the private sector, including proposed penalties for first instance violations. The same policies and procedures apply to both sectors in terms of inspections, complaints, citations, penalties, and employer/employee rights. During this evaluation period, the State conducted 265 (4.94%) of its total inspections in the public sector. The results of these inspections were comparable to those in the private sector. [18(e) Evaluation Report, p. 25]

**Injury/Illness Rates.** As a factor in its section 18(e) determination, OSHA must consider whether the Bureau of Labor Statistics’ annual occupational safety and health survey and other available



Federal and State measurements of program impact on worker safety and health indicate that trends in worker safety and health injury and illness rates under the State program compare favorably with those under the Federal program. See § 1902.37(b)(15). Bureau of Labor Statistics injury-illness data for 2002 are not directly comparable to 2001 or prior years due to OSHA's change in its recordkeeping requirements effective January 1, 2002.

Although Oregon's injury/illness rates are somewhat higher than the national rates, they have declined steadily during the past decade, at a rate greater than the national experience. Oregon's lost workday case incidence rate declined from 5.6 in 1988 to 3.2 in 2001, while the national rate declined from 4.0 in 1989 to 2.8 in 2001. Oregon's lost workday case rate has declined by 43% while the national rate has declined by 30%. Oregon's lost workday case rate for the private sector remained at 3.2 for 2001 and 2002, slightly higher than the national rate of 2.8 for both years. Oregon's total case rate was also slightly higher than the national rate in both 2001 (6.2 vs. 5.7 national) and 2002 (6.0 vs. 5.3 national). In construction, Oregon's lost workday case rate dropped from 4.3 in 1999 and 2000 to 3.8 in 2001, remaining below the national rate for all three years, but was slightly higher than the national rate in 2002 (4.0 Oregon vs. 3.8 national).

In manufacturing, Oregon's lost workday case rate was 4.3 in 2001, slightly higher than the 4.1 national rate, while in 2002 Oregon's rate of 4.1 was identical to the national. Oregon's lost workday case rate for public sector employment was 2.9 in 2001 and 3.1 in 2002, still comparing favorably to its 3.2 private sector rate. [18(e) Evaluation Report, p. 29 and Appendix A, SOAR Report, p. A-1.]

Oregon's number of accepted disabling workers' compensation claims has also declined steadily over the past decade, from 31,530 in 1994 to 23,482 in 2002 [18(e) Evaluation Report, Appendix A, SOAR Report, p. A-3], and the accepted disabling claims rate declined from 1.7 in 1998 to 1.5 in 2002.

**Required Reports.** State plans must assure that employers in the State submit reports to the Secretary in the same manner as if the plan were not in effect. See section 18(c)(7) of the Act; 29 CFR 1902.3(k). The plan must also provide assurance that the designated agency will make such reports to the Secretary in such form and containing such information as he or she may from time to time require. Section 18(c)(8) of the Act; 29 CFR 1902.4(1). Oregon's recordkeeping requirements are

identical to those of Federal OSHA with regard to the recording and reporting of injuries, illnesses and fatalities including all recent Federal revisions, but differ in other areas. In response to comments from OSHA, in March 2002, the State modified its rules to reflect certain Federal rulemaking changes which were necessary to be at least as effective as OSHA's, and in April 2004 added certain clarifying interpretive notes regarding bloodborne accidents and various definitions. OR-OSHA has regulations comparable to OSHA's for reporting workplace fatalities and catastrophes. The State participates in the BLS Annual Survey of Occupational Illness and Injuries and the Census of Fatal Occupational Injuries. Oregon OSHA has elected not to participate in the OSHA Data Initiative, but has access to workers' compensation claims rates for employer-specific injury/illness information. As noted previously, the State has assured its continuing participation with OSHA in the Integrated Management Information System (IMIS) as a means of providing reports on its activities to OSHA, and submits other information and reports as required. [18(e) Evaluation Report, p. 29]

**Voluntary Compliance.** Section 1902.4(c)(2)(xiii) requires States to undertake programs to encourage voluntary compliance by employers by such means as conducting training and consultation with employers and employees. Oregon operates an on-site consultation program funded under section 21(d) of the Occupational Safety and Health Act which is separate from its OSHA-approved State plan. This program provides consultation services to private sector employers focusing on small, high hazard employers. Two safety and two health positions are allocated for Oregon under this contract. During the evaluation period, Oregon's 21(d) consultants conducted 130 visits of which 93 were health consultations and 37 were safety consultations. These consultants played an important role in the implementation of a required employer recognition and exemption program by participating with State-funded consultants in 28 Safety and Health Achievement Recognition Program (SHARP) evaluation teams during the evaluation period.

Oregon provides additional consultative services to public and private employers with 19 safety and 13 health consultants that are 100% State-funded. (About 13% of OR-OSHA's annual consultations are conducted in the public sector.) This large State-funded consultation program does not make referrals to enforcement and does

not require the posting of hazards and therefore the private sector aspect of this program is not considered part of the approved State plan. It is evaluated to assure that it does not have a negative impact on the mandated State program activities. The State believes that this program has added to the overall effectiveness of Oregon OSHA and, to date, no negative impact on the Oregon State plan has been identified. [18(e) Evaluation Report, p. 30]

Oregon OSHA offers on its website an extensive inventory of training opportunities: on-line registration for a large variety of workshop classes, on-line training modules for Hispanic workers and for loggers, classes jointly developed with labor and the construction industry, and on-line interactive courses. On-line compliance assistance resources include a Spanish-English Dictionary of Occupational Safety and Health Terms, technical publications in Spanish, training materials, and an ergonomics web page. OR-OSHA also offers special assistance for small business, including "brown bag" safety and health program workshops and on-line resources. During FY 2003 14,927 participants, including 6,286 from five targeted industries, attended OR-OSHA training sessions and conferences. [18(e) Evaluation Report, Appendix A, SOAR Report, p. 7]

Oregon's employer recognition programs include Voluntary Protection Programs, with 7 certified sites; and its Safety and Health Achievement Recognition Program (SHARP), with 82 sites, and 84 additional employers working towards SHARP. OR-OSHA also has 20 partnerships, alliances and other cooperative agreements.

In 1999, the Oregon legislature enacted legislation which affords employers the right to withhold the results of voluntary safety and health self-audits conducted by private sector consultants hired by employers from outside their organizations. Although Federal OSHA by policy (65 FR 46498) does not routinely seek disclosure of such self-audits, it does retain the authority to gain access to voluntary self-audits where necessary to fulfill its enforcement responsibility. However, the Oregon legislation allows access by OR-OSHA to self-audits that are in any way related to the investigation of an occupational accident or injury; audits that are done in fulfillment of any requirement of an OR-OSHA standard; and discussions between employees, which would include records of the meetings, inspections, evaluations and recommendations of the workplace safety committees required in Oregon.



In a letter dated August 26, 2004, Peter De Luca, Administrator of the Oregon OSHA program, has explained the narrow scope of this legislation, the fact that it has never been invoked, and that there has been no negative impact on the State's ability to identify and cite violations. Further, Oregon has pledged to seek legislative reconsideration of the law should it ever negatively impact the State plan and its required performance. For further discussion of this legislation, see "Oregon State Plan; Approval of Plan Supplements; Revised State Plan" published elsewhere in today's **Federal Register**. While OSHA and the U.S. Department of Labor continue to believe that a self-audit privilege is inappropriate and unnecessary, such a policy in Oregon, as limited, does not present a sufficient basis for finding the State plan deficient or for withholding final approval status.

#### Effect of Section 18(e) Determination

If the Assistant Secretary, after review of the written comments received and the results of any informal hearing if requested and held, determines that the statutory and regulatory criteria for State plans are being applied in actual operations, final approval will be granted and Federal standards and enforcement authority will cease to be in effect with respect to all issues covered by the Oregon plan (with the exception of temporary labor camps in both agriculture and general industry, including construction and logging), as provided by section 18(e) of the Act and 29 CFR 1902.42(c). Oregon has excluded private sector establishments on Indian reservations and tribal trust lands, including tribal and Indian-owned enterprises; the U.S. Postal Service and its contractors; contractors on U.S. military reservations, except those working on U.S. Army Corps of Engineers dam construction projects; and private sector maritime employment on or adjacent to navigable waters, including shipyard operations and marine terminals. In addition, the plan does not have jurisdiction over Federal agencies. Thus, Federal coverage of these areas would be unaffected by an affirmative section 18(e) determination.

In the event an affirmative section 18(e) determination is made by the Assistant Secretary following the proceedings described in the present notice, a notice will be published in the **Federal Register** in accordance with 29 CFR 1902.43; the notice will specify the issues as to which Federal standards and enforcement authority is withdrawn and provide notice that Federal authority with respect to enforcement

under section 5(a)(1) of the Act and discrimination complaints under section 11(c) of the Act remains in effect. The notice would state that if continuing evaluations show that the State has failed to maintain a compliance staff which meets the revised fully effective benchmarks, or has failed to maintain a program which is at least as effective as the Federal, or that the State has failed to submit program change supplements as required by 29 CFR Part 1953, the Assistant Secretary may revoke or suspend final approval and reinstate Federal enforcement authority or, if the circumstances warrant, initiate action to withdraw approval of the State plan. At the same time, Subpart D of 29 CFR Part 1952, which codifies OSHA decisions regarding approval of the Oregon plan, would be amended to reflect the section 18(e) determination if an affirmative determination is made.

#### Documents of Record

All information and data presently available to OSHA relating to the Oregon section 18(e) proceeding have been made a part of the record in this proceeding and placed in the OSHA Docket Office. Most of these documents have been posted electronically on OSHA's Docket Office Home Page at <http://dockets.osha.gov>. The contents of the record are also available for inspection and copying at the following locations: OSHA Docket Office, Room N-2625, Docket No. T-027A, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, (202) 693-2350; Office of the Regional Administrator, U.S. Department of Labor—OSHA, 1111 Third Avenue, Suite 715, Seattle, Washington 98101-3212, (206) 553-5930, fax (206) 553-6499; and Department of Consumer and Business Services, Oregon Occupational Safety and Health Division, 350 Winter Street NE., Room 430, Salem, OR 97310, (503) 378-3272, fax (503) 947-7461. To date, the record on final approval determination includes copies of all **Federal Register** documents regarding the plan (other than standards approvals), including notices of plan submission, initial Federal approval, certification of completion of developmental steps, codification of the State's operational status agreement, and other plan supplements. The record also includes: the State plan document (submitted September 2003 and updated through August 2004), which includes a plan narrative, State legislation, regulations and procedures, and an organizational chart for State staffing; the State's FY 2004 and FY 2005 Federal grants; and the October 1, 2002 through

September 30, 2003 18(e) Evaluation Report and all previous, post-certification evaluation reports (since 1983).

#### Public Participation

##### *Request for Public Comment and Opportunity To Request Hearing*

The Assistant Secretary is directed under § 1902.41 to make a decision whether an affirmative section 18(e) determination is warranted. As part of the Assistant Secretary's decision-making process, consideration must be given to the application and implementation by Oregon of the requirements of section 18(c) of the Act and all specified criteria and indices of effectiveness as presented in 29 CFR 1902.3 and 1902.4. These criteria and indices must be considered in light of the factors in 29 CFR 1902.37(b)(1) through (15). However, this action will be taken only after all the information contained in the record, including OSHA's evaluation of the actual operations of the State plan, and information presented in written submissions and during an informal public hearing, if held, is reviewed and analyzed. OSHA is soliciting public participation in this process so as to assure that all relevant information, views, data and arguments related to the indices, criteria and factors presented in 29 CFR Part 1902, as they apply to Oregon's State plan, are available to the Assistant Secretary during this administrative proceeding.

Interested persons are invited to submit written data, views, and comments with respect to this proposed section 18(e) determination. These comments must be received on or before January 18, 2005, and submitted in duplicate to the Docket Officer, Docket No. T-027A, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue NW., Washington, DC 20210. Written submissions must clearly identify the issues which are addressed and the positions taken with respect to each issue. Comments limited to 10 pages or fewer may also be transmitted by FAX to: (202) 693-1648, provided that the original and one copy of the comment are sent to the Docket Office immediately thereafter. Electronic comments may be submitted through the Internet at <http://dockets.osha.gov>. The State of Oregon will be afforded the opportunity to respond to each submission.

Pursuant to 29 CFR 1902.39(f), interested persons may request an informal hearing concerning the proposed section 18(e) determination. Such requests also must be received on

or before January 18, 2005, and should be submitted in duplicate to the Docket Officer, Docket No. T-027A, at the address noted above. Such requests must present particularized written objections to the proposed section 18(e) determination. The Assistant Secretary will decide within 30 days of the last day for filing written views or comments and requests for a hearing whether the objections raised are substantial and, if so, will publish notice of the time and place of the scheduled hearing.

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish his decisions in the **Federal Register**. All written and oral submissions, as well as other information gathered by OSHA, will be considered in any action taken. The record of this proceeding, including written comments and requests for hearing and all materials submitted in response to this notice and at any subsequent hearing, will be available for inspection and copying in the Docket Office, Room N-2625, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

### Federalism

Executive Order 13132, "Federalism," emphasizes consultation between Federal agencies and the States and establishes specific review procedures the Federal government must follow as it carries out policies which affect State or local governments. OSHA has included in the Background section of today's request for public comments a detailed explanation of the relationship between Federal OSHA and the State plan States under the Occupational Safety and Health Act. Although it appears that the specific consultation procedures provided in section 6 of Executive Order 13132 are not mandatory for final approval decisions under the OSH Act, which neither impose a burden upon the State nor involve preemption of any State law, OSHA has nonetheless consulted extensively with Oregon throughout the period of 18(e) evaluation. OSHA has reviewed the Oregon final approval decision proposed today, and believes it is consistent with the principles and criteria set forth in the Executive Order.

### Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) that this determination will not have a significant economic impact on a substantial number of small entities. Final approval would not place small employers in Oregon under any new or different requirements, nor would any additional burden be placed upon the State government beyond the responsibilities already assumed as part of the approved plan.

### List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and health, Occupational Safety and Health Administration.

(Sec. 18 of the Occupational Safety and Health Act of 1970, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 5-2002 (67 FR 65008, October 22, 2002).

Signed at Washington, DC, this 10th day of December, 2004.

**John L. Henshaw,**

*Assistant Secretary.*

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