

OSHA expands the Severe Violator Enforcement Program to include oil and gas operations

On February 11, the Occupational Safety and Health Administration (OSHA) issued a memorandum to all OSHA regional directors and state plan designees authorizing the addition of upstream oil and gas hazards to the list of high-emphasis hazards in the Severe Violator Enforcement Program (SVEP). This policy change is significant because it permits OSHA to concentrate resources and enforcement efforts on oil and gas employers any time an incident meets the SVEP criteria.



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OSHA warranted the expansion of the SVEP to include oil and gas operations by stating in its memorandum that upstream operations have experienced a fatality rate that has ranged from five to eight times greater than the national average for all U.S. industries over the last 20 years. Under the SVEP, employers who are designated for inclusion are subject to more extensive sanctions, including corporate-wide and mandatory follow-up inspections, enhanced abatement and settlement terms, and publication of every SVEP citation. This policy is effective for any citations issued on or after February 11.

The Severe Violator Enforcement Program

On June 18, 2010, OSHA instituted the SVEP to more effectively focus enforcement efforts on recalcitrant employers who demonstrate indifference to the health and safety of their employees through willful, repeated or failure-to-abate violations of the Occupational Safety and Health Act of 1970. The SVEP replaced the Enhanced Enforcement Program (EEP), an earlier program that was also intended to target problematic employers. In 2009, the Office of Inspector General (OIG) audited the EEP and issued a report criticizing the program's efficiency and effectiveness. The OIG found that OSHA missed a number of EEP-qualifying cases, failed to conduct proper follow-up inspections on a majority of EEP-qualifying cases, made little effort to determine if non-compliance existed

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company-wide where there were multiple locations and generally did not utilize the enhanced enforcement tools the EEP provided to ensure future compliance. In response to the OIG audit, OSHA replaced the EEP with the more narrowly focused SVEP.

The underlying problem of the EEP was that OSHA failed to conduct follow-up inspections because the program's criteria were too expansive. The criteria created so many EEP cases that OSHA could not maintain the program's increased enforcement efforts. To address this problem, OSHA narrowed the criteria in the SVEP to better focus its enforcement resources. A case satisfies the SVEP criteria if it meets one of the following criteria:

- A fatality or catastrophe inspection with one or more willful or repeated violations or failure-to-abate notices;
- A non-fatality/catastrophe inspection with two or more willful or repeated violations or failure-to-abate notices that are high gravity violations related to high-emphasis hazards;
- A non-fatality/catastrophe inspection with three or more willful or repeated violations or failure-to-abate notices that are high gravity violations related to the potential release of a highly hazardous chemical; or
- An egregious (e.g., per-instance citations) case.

OSHA's recent memorandum authorized the addition of oil and gas hazards to the list of high-emphasis hazards. High-emphasis hazards are high gravity, serious violations of specific standards covered under falls or the National Emphasis Programs.¹ Low and moderate gravity violations will not be considered for a SVEP case. According to the memorandum, "a non-fatality inspection of an employer with the NAICS code 211111, 213111 and 213112 (Oil and Gas Production Services, Drilling and Well Servicing/'Upstream Oil and Gas Industry') in which OSHA finds two or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to upstream oil and gas activities will be considered a severe violator enforcement case." Because the criteria include "repeated violations," it is important for an employer to abate a high gravity serious violation and not repeat the violation to avoid being named into the SVEP.

Procedures of a severe violator enforcement case

The procedures of a severe violator enforcement case provide

an employer the opportunity to challenge or accept SVEP citations or enter into a settlement agreement with OSHA. An SVEP case commences upon the issuance of qualifying citations. After issuance of the citations, the employer has 15 days to challenge the citations. During that time, the employer and OSHA may enter into an informal settlement agreement (ISA). The ISA may delete or reclassify the citations so that the case no longer qualifies for the SVEP. If this occurs, the case is lined off the SVEP log. However, a case will be lined off the log only if there are factual changes based on the quality of the evidence brought forth during settlement discussions. If the citations remain after the ISA, or if the employer accepts the citations upon initial notification, final orders are issued at the end of the 15-day period. The case is then eligible for a follow-up inspection.

If the employer contests the citations within the 15-day period, the follow-up inspection is barred until the case is either adjudicated or settled. It is important to note that OSHA may inspect other worksites triggered by a reasonable belief of systemic noncompliance. If the contest concludes with deleted or reclassified citations such that the case no longer qualifies for the SVEP, the case is lined off the log. If the citations remain, the case is eligible for a follow-up inspection. Once a follow-up inspection is either conducted or attempted, the case remains on the log but OSHA's SVEP requirement to conduct a follow-up inspection is considered fulfilled.

Extensive sanctions available to OSHA under SVEP

Under the SVEP, more extensive sanctions are available to OSHA to ensure employers abate cited violations and to prevent employers from committing similar violations in the future. The heart of these sanctions is OSHA's right to perform inspections. A follow-up inspection is required in every SVEP case after citations become final orders, even if abatement verification of the cited violations has been received. By conducting the follow-up inspection, OSHA can assess not only whether the cited violations were abated, but also whether the employer continues to commit similar violations. Additionally, OSHA will inspect related workplaces and worksites of the same employer when the regional administrator determines that there are reasonable grounds to believe that the compliance problems identified in the initial inspection are indicative of a broader pattern of non-compliance.

In addition to the follow-up and related workplace inspections, OSHA shall consider, including in settlement agreements, additional requirements above and beyond basic hazard abatement as part of its extensive sanctions. OSHA may propose any of the following settlement provisions:

- Employers shall hire a qualified safety and health consultant to develop and implement an effective and comprehensive safety and health program or, where appropriate, a program to ensure full compliance with the subpart under which the employer was cited under the SVEP.
 - Apply the agreement company-wide.
 - Require interim abatement controls if OSHA is convinced that final abatement cannot be accomplished in a short period of time.
 - Require the employer to provide a list of current and

future jobsites for a specified time period.

- Require the employer to submit, for a specified time period, its injury and illness log on a quarterly basis and to consent to OSHA conducting inspections based on that information.
- Require the employer, for a specified time period, to notify the area office of any serious injury or illness requiring medical attention and to consent to an inspection,
- Obtain employer's consent to entry of a court enforcement order under Section 11(b) of the Occupational Safety and Health Act.

Removal criteria for the Severe Violator Enforcement Program

Once an employer is part of the SVEP, it is extremely difficult to be removed from the program. OSHA will consider removing an employer from the SVEP after three years from the final disposition of the SVEP case. After three years, the regional administrator will perform additional follow-up inspections to determine whether the employer has: (i) abated all the SVEP violations; (ii) paid all penalties; (iii) abided by and completed all settlement provisions; and (iv) avoided receiving any additional serious citations related to the SVEP hazards. If the employer has satisfied each of these obligations, the regional administrator has discretion to remove the employer from the SVEP. If the regional administrator determines that the employer failed to carry out any of its obligations, it will place the employer back into the SVEP for an additional three years.

In light of the extensive sanctions and the difficulty of being removed from the program, it is important for an employer to avoid being named into the SVEP. Based on the criteria, the time to act is actually before the SVEP citation; an employer should consider contesting every citation that might subject them to a subsequent SVEP case. An employer should also take advantage of the informal conference and settlement procedures to delete or reduce the severity of citations, and contest citations that cannot be favorably resolved through settlement.

If you have any additional questions regarding the Severe Violator Enforcement Program, please contact the author at 412- 253-8825 or mlambach@babstcalland.com.

¹ High-emphasis hazards include falls under certain general industry, construction industry, shipyard, marine terminal and longshoring standards and amputation, combustible dust, crystalline silica, lead, excavation/trenching, shipbreaking and upstream oil and gas hazards.