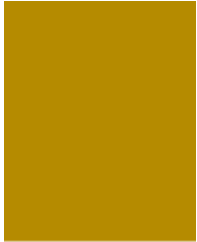


MICHAEL BEST

& FRIEDRICH LLP



OSHA Update and National Emphasis Programs

Pulp and Paper Safety Association 2010 Safety Conference

Sponsored by: Pulp and Paper Safety Association

June 7, 2010

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414.225.4991

"To those who have for too long abused workers, put them in harm's way, ... let me be clear, there is a new sheriff in town."

Hilda Solis
U.S. Labor Secretary



“Secretary Solis' phrase that ‘There's a new sheriff in town’..... is not an abstract wish; it's a description of how OSHA is now working.”

David Michaels
Assistant Secretary of Labor For
Occupational Safety and Health





New Assistant Secretary - David Michaels, Ph.D.

- Confirmed by unanimous consent - December 3, 2009
- Former Asst. Secretary of Energy for Environment, Safety and Health
- George Washington University Researcher
- CIH
- Priorities: Streamline rulemaking; set health exposure limits for hazardous chemicals; adopt mandatory s/h program standard



New Political Deputy Asst. Secretary – Jordan Barab

- Former Acting Assistant Secretary – April 13, 2009, to December 3, 2009
- Former Senior Policy Advisor on s/h – House Education and Labor Committee
- Former member, U.S. Chemical Safety and Hazard Investigation Board



New Career Deputy Asst. Secretary– Rich Fairfax

- Former Director of Directorate of Enforcement, Construction Directorate
- Long-term career OSHA executive
- Guru of enforcement
- Yin to Barab's yang



New Solicitor of Labor – Patricia Smith

- Very controversial appointment
- Confirmed by party-line vote on February 4, 2010: 60-37
- Former NYS Labor Commissioner
- Former Chief, NYS Attorney General's Labor Bureau



Occupational Safety and Health Review Commission

- First full complement since April 2007
- Backlog of cases
- Likely to get busier



OSHRC New/Old Chair - Thomasina Rogers

- Confirmed by unanimous consent May 13, 2009.
- Three-term member of Commission; Chair during Clinton Administration
- Former Chair, Administrative Conference of the United States
- Former Counsel, Equal Employment Opportunity Commission



OSHRC New Member – Cynthia Attwood

- Confirmed by unanimous consent February 11, 2010.
- Former Associate Solicitor for Occupational Safety and Health, Associate Solicitor for Mine Safety and Health
- Former Administrative Appeals Judge, U.S. Department of Labor Administrative Review Board



OSHRC Member – Horace (Topper) Thompson

- Chair during Bush II Administration
- Southern gentleman
- Consensus Builder

TOP 10

FY 2010 Most Frequently Cited Standards

1. Scaffolding, general requirements, construction (29 CFR 1926.421)
2. Fall protection, construction (29 CFR 1926.501)
3. Hazard Communication (29 CFR 1910.1200)
4. Respiratory protection (29 CFR 1910.134)
5. Ladders (29 CFR 1926.1053)
6. Lockout/Tagout (29 CFR 1910.147)

TOP 10

FY 2010 Most Frequently Cited Standards

7. Electrical, wiring methods, components and equipment (29 CFR 1910.305)
8. Powered Industrial Trucks (29 CFR 1910.178)
9. Process Safety Management (29 CFR 1910.119)
10. Electrical system design (29 CFR 1910.303)

TOP 10

Most Significant Fines issued in 2009

1. Largest fine ever: \$87.4 million - BP
 - Penalized for its failure to abate 270 previously cited hazards, along with 437 new willful violations
 - Prior record set in 2005 for \$21 million to BP
2. Prison time and fines – RPI Coating
 - Two executives facing 2.5 years in prison and \$1.25 million fine
 - OSHA says it will be working more closely with the Department of Justice in cases like these.

TOP 10

Most Significant Fines issued in 2009

3. Per-Employee Citations – G.S. Robbins & Co.

- OSHA cited on a per instance basis – 21 egregious willful citations for hazardous chemical handling.
- \$1.2 million fine

4. Employee Complaints – Milk Specialties

- Inspection resulted from employee complaint – not related to a death or multiple serious injuries.
- Willful citations for failure to comply with confined space and lockout/tagout regulations
- \$1.14 million fine

TOP 10

Most Significant Fines issued in 2009

5. Owner & supervisor jailed – ANC Roofing

- Two workers fell through unprotected skylights, 4 months apart.
- Owner sentenced to 9 months in jail and fined \$248,000.
- Supervisor sentenced to 30 days in jail.

6. Worker trampling incident - Walmart

- Employee trampled by shoppers on Black Friday, 2008.
- Employer should have been aware of the danger.

TOP 10

Most Significant Fines issued in 2009

7. Per instance fines – Smalis Painting Co.
 - OSHA monitored 6 employees for lead exposure.
 - Issued 202 willful violations – 1 violation for each exposed employee.
 - Employer facing potential fines of \$1.09 million.

8. Make changes and reduce fines – A-1 Excavating
 - Employer agrees to implement safety and health improvements beyond what's required by regulations.
 - Hire full time safety director and third-part consultant
 - Reduce salary of supervisors/managers who fail to comply with OSHA requirements
 - Create site specific health and safety plans for all major projects
 - Notify OSHA of all job sites before work begins for 3 years
 - In exchange OSHA cut proposed fines almost in half to \$470,000.

TOP 10

Most Significant Fines issued in 2009

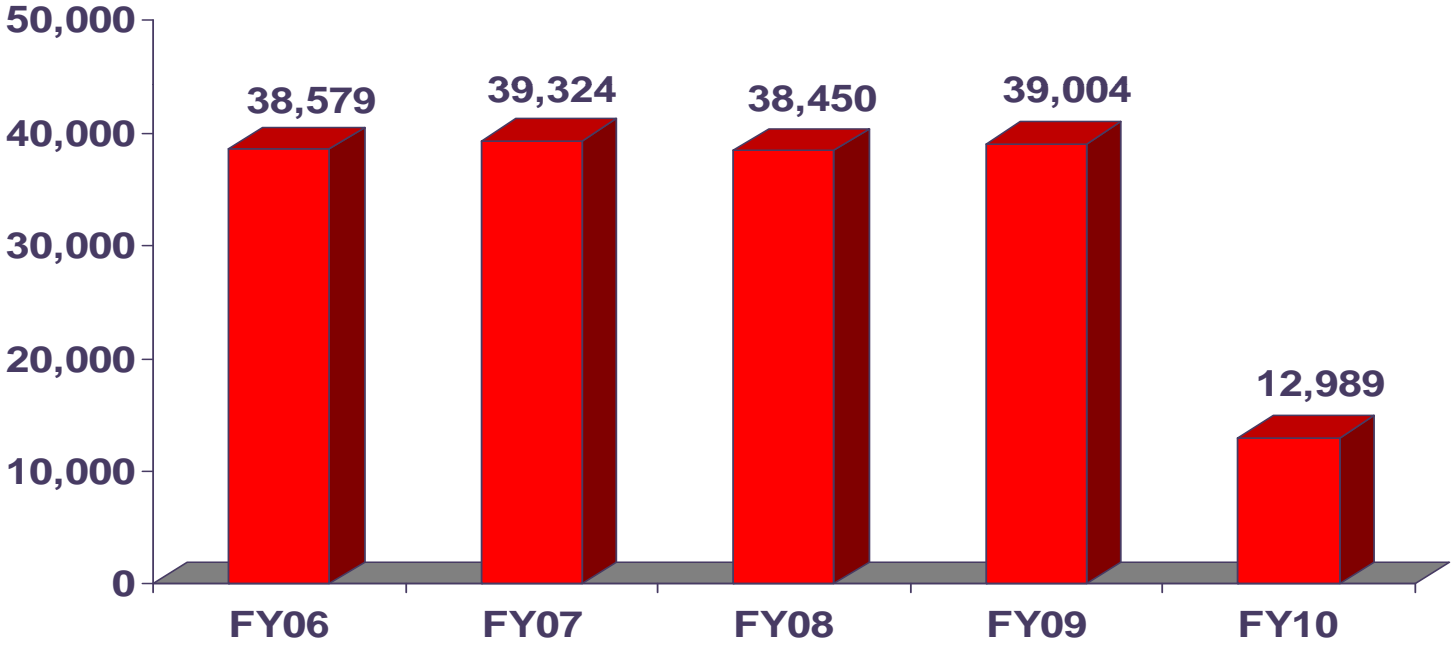
9. Fines and other conditions – Cintas

- Worker death resulted in \$3 million fine.
- Employer agreed to
 - hire additional safety staff;
 - Conduct more frequent safety inspections; and
 - Establish new system to review employee complaints.

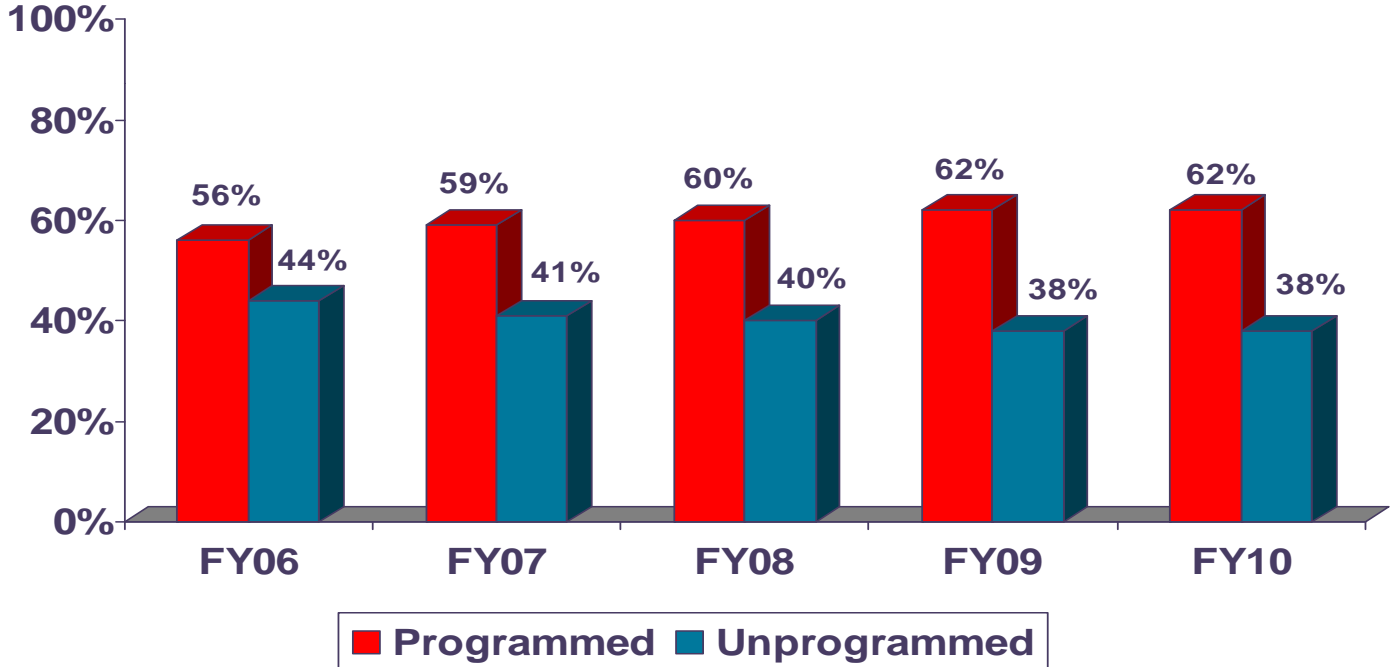
10. Fines and other conditions – Broadway Concrete

- Employer agreed to pay \$750,000 and
- Implement changes:
 - Reduce salaries of senior supervisors who fail to comply with job safety practices;
 - Hire full time safety director;
 - Develop corporate safety plan; and
 - Provide OSHA with information on major projects and access to all job sites for next four years.

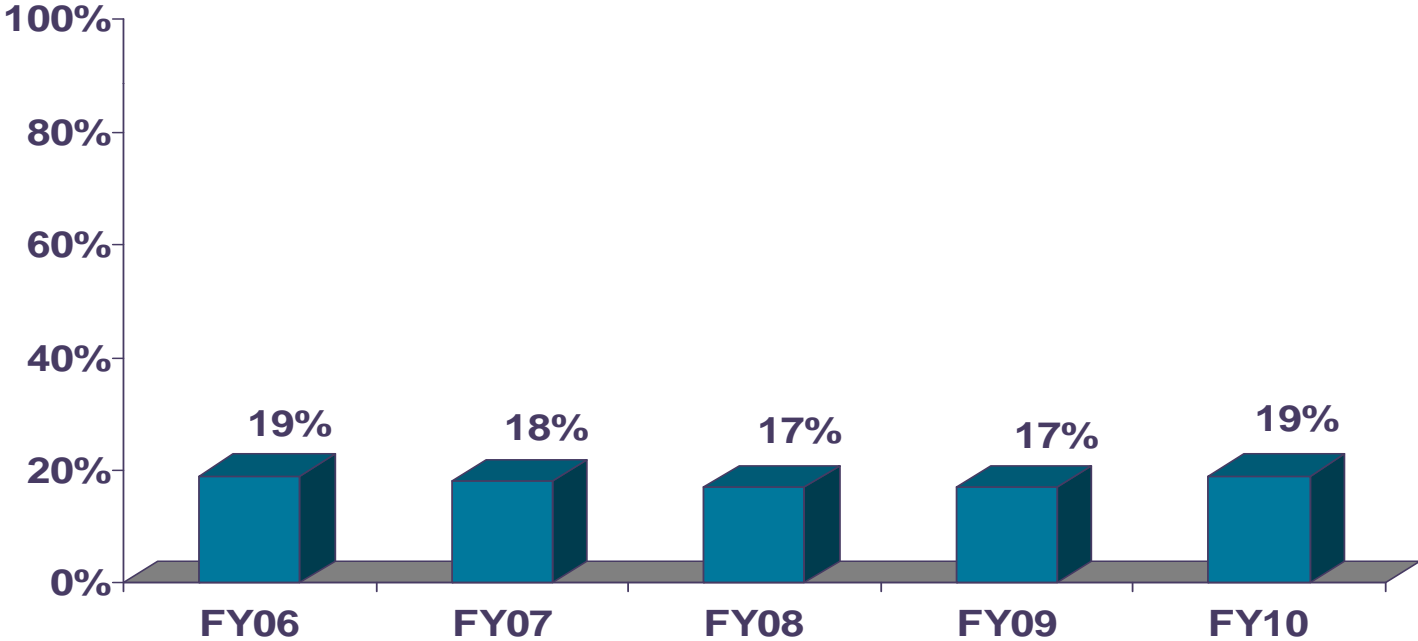
FY 2006 – 2010 (Oct. 1- Feb. 14) Inspects Conducted



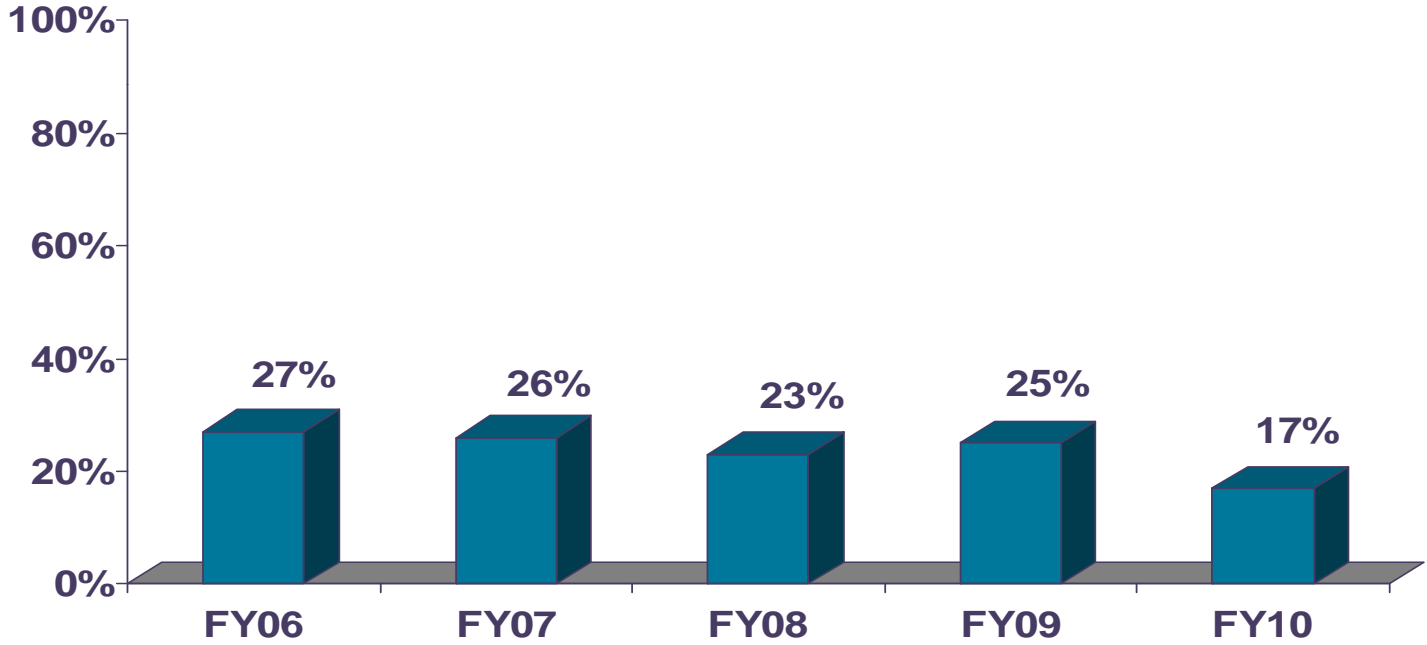
FY 2006 – 2010 % Inspects Programmed v. Unprogrammed



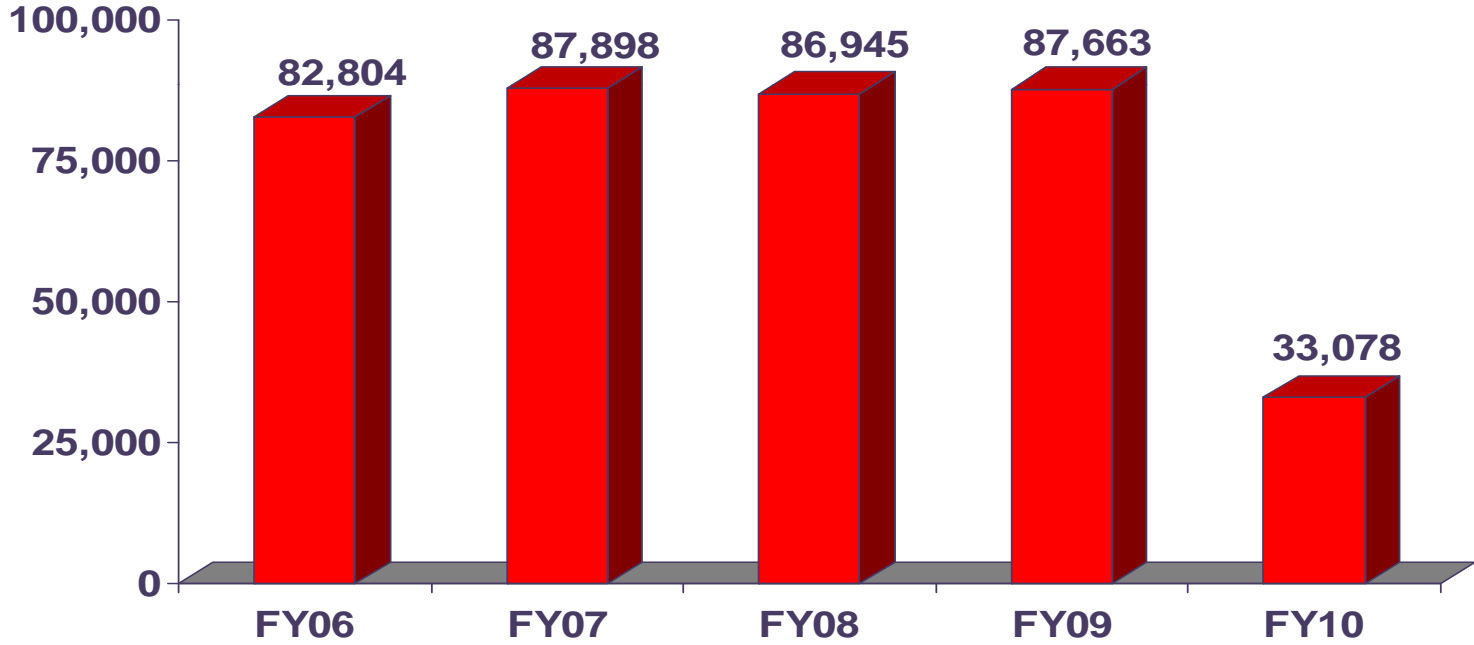
FY 2006 – 2010 Percent Complaint Inspections



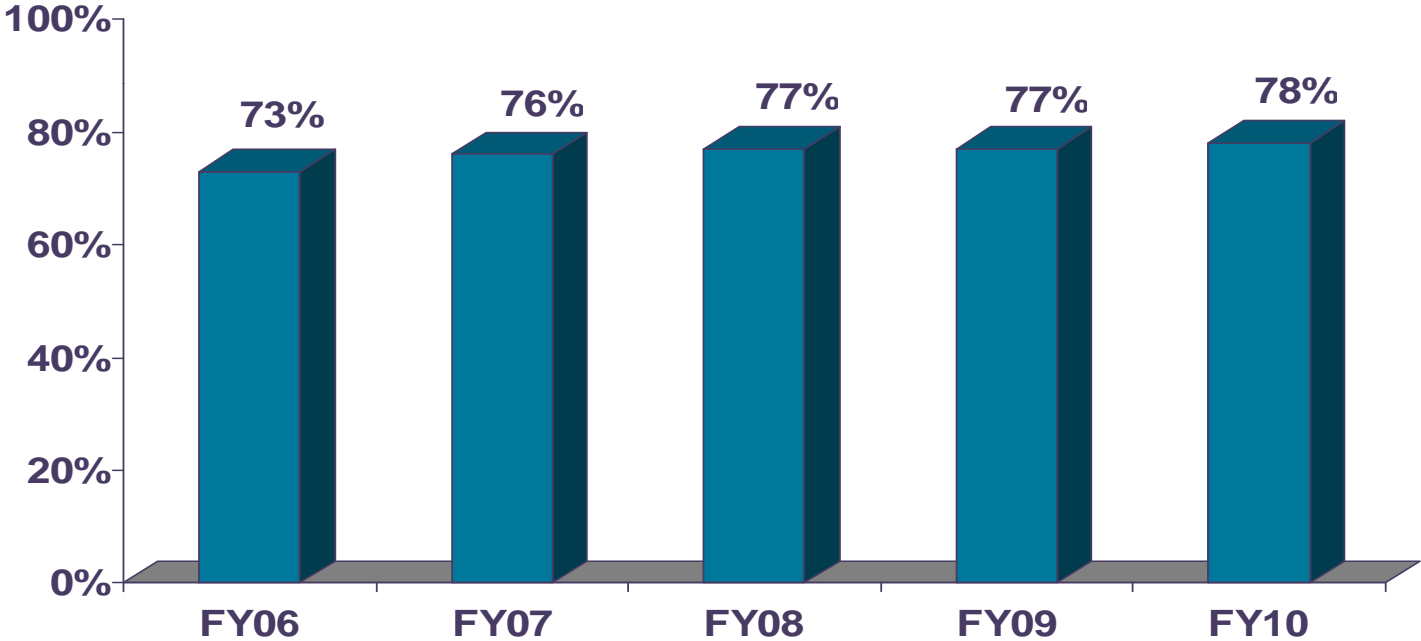
FY 2006 – 2010 % Inspections In-Compliance



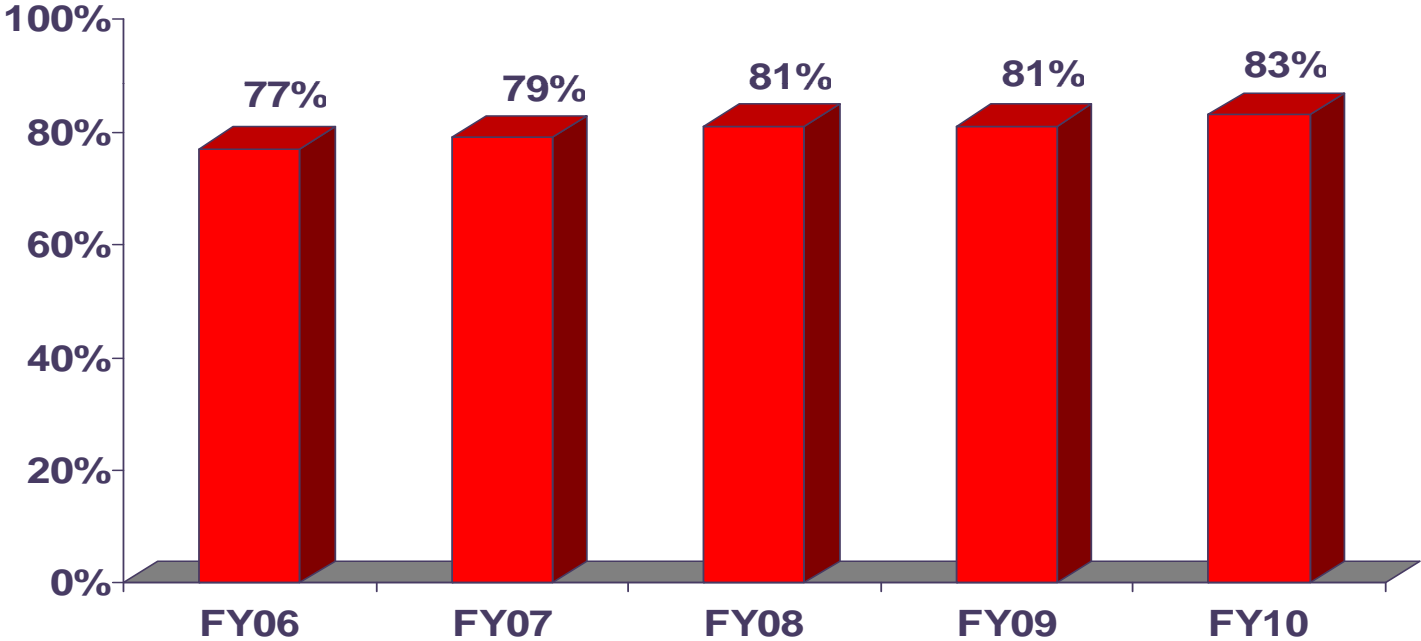
FY 2006 – 2010 Total Citations Issued



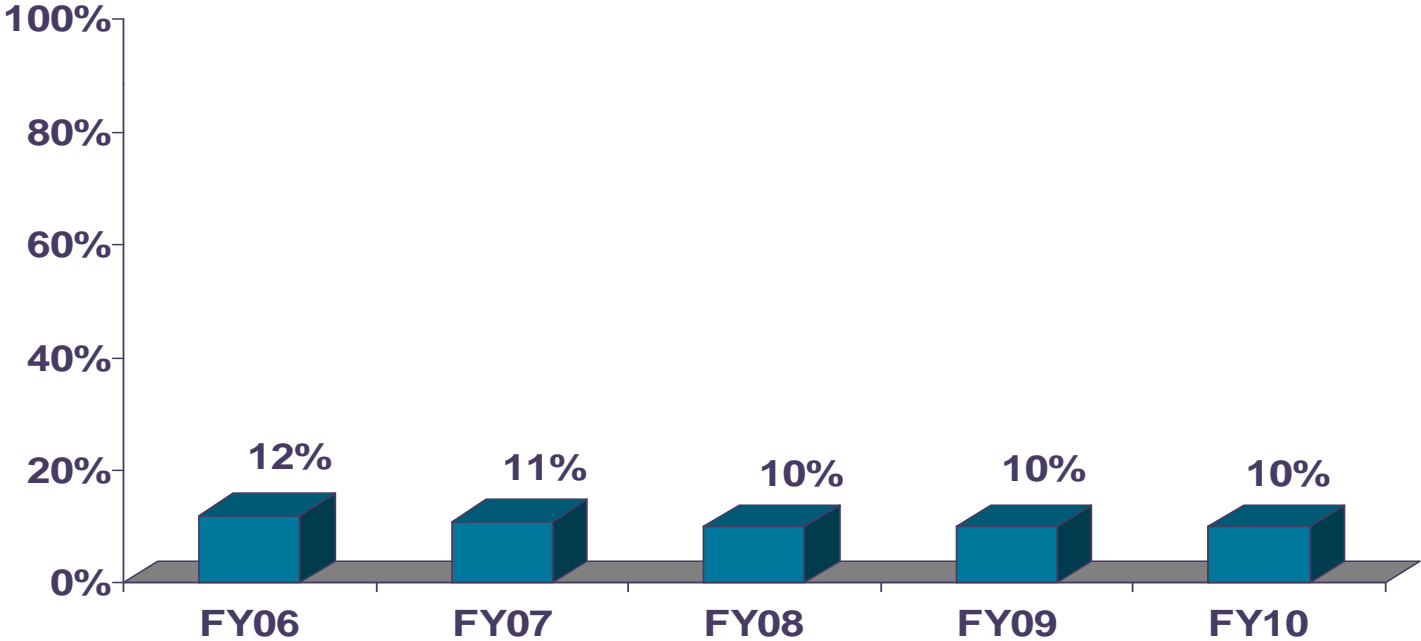
FY 2006 – 2010 % Total Citations Issued As Serious



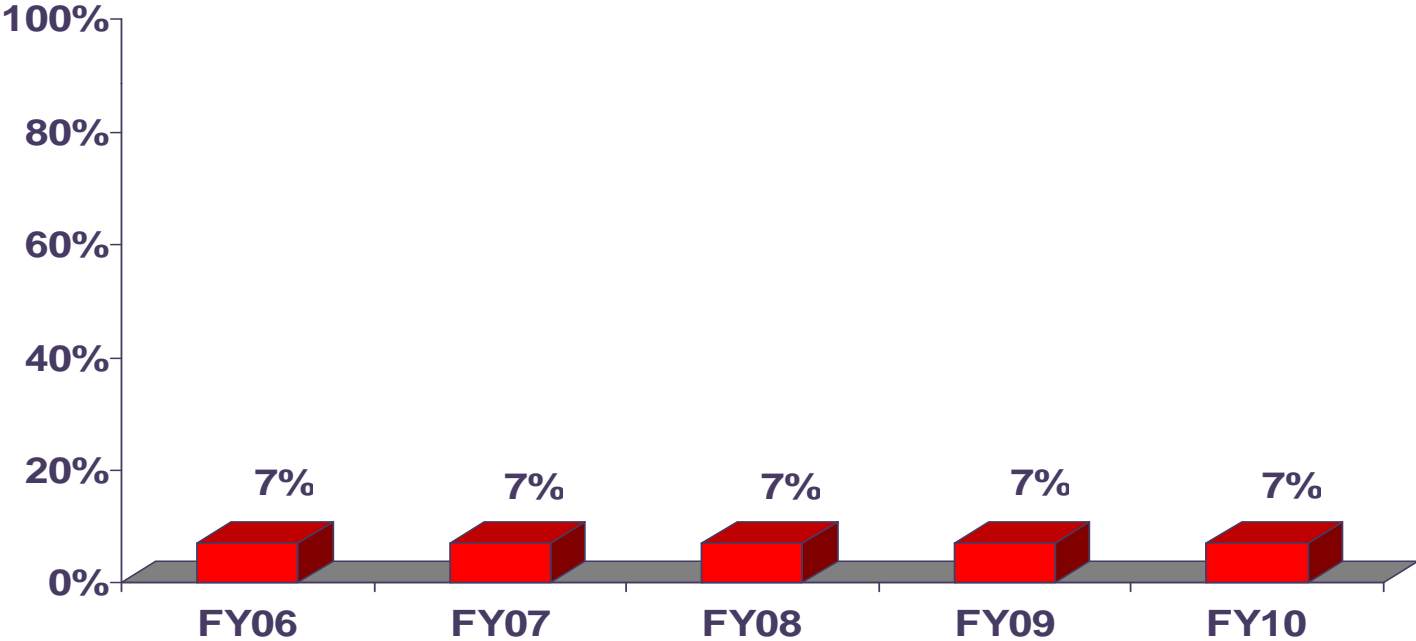
FY 2006 – 2010 % Total Citations Issued as S, W, R, & Unclass



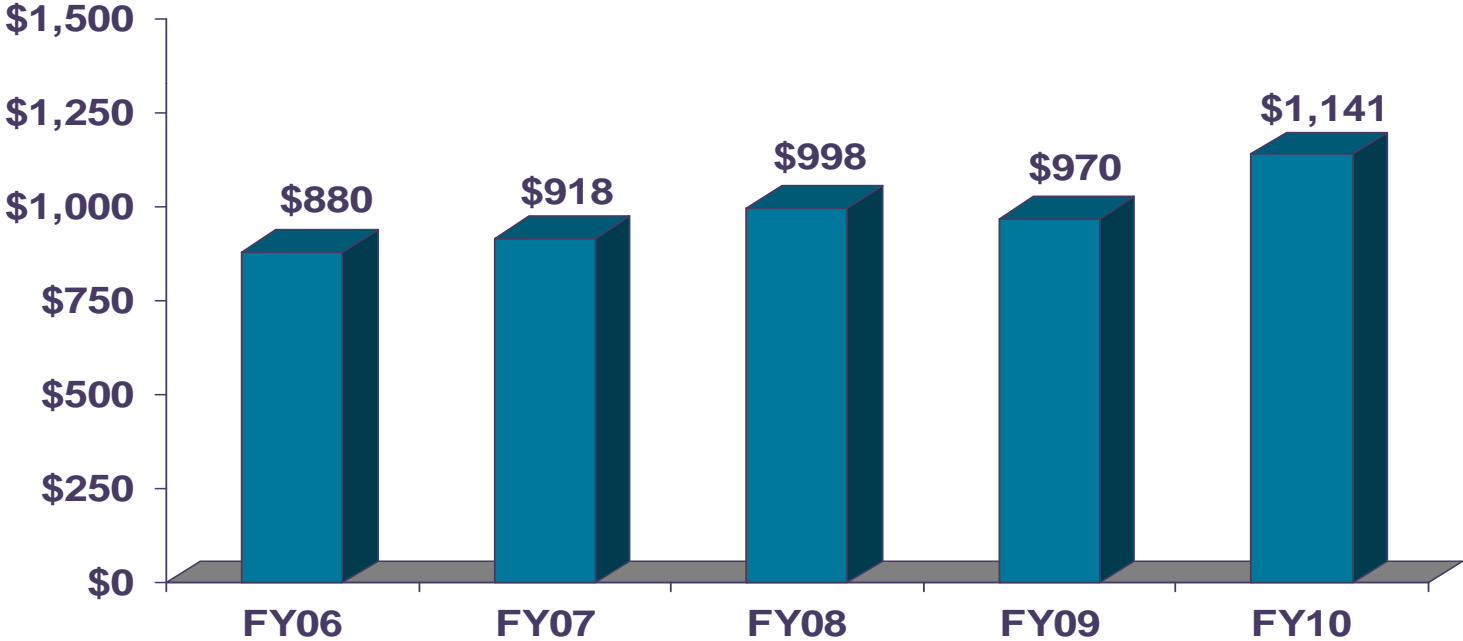
FY 2006 – 2010 % Inspections w/ Only OTS Citations



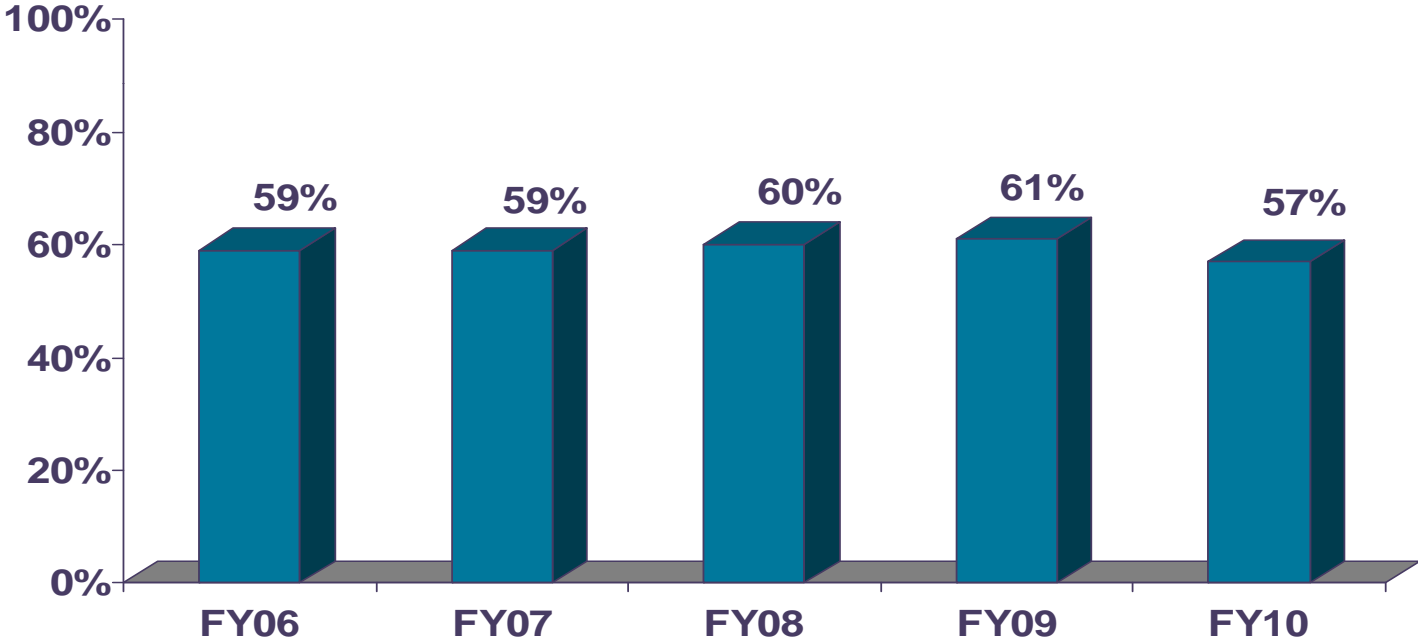
FY 2006 – 2010 % Inspections w/ Citations Contested



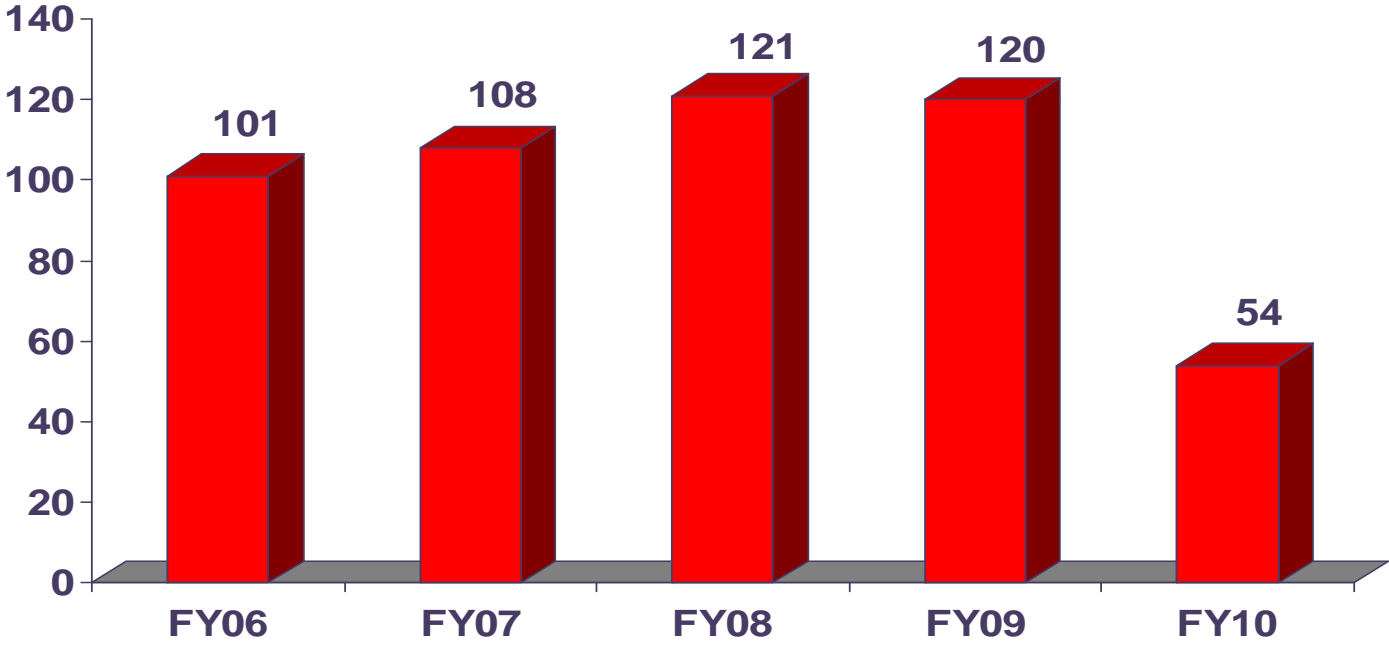
FY 2006 – 2010 Average Penalty Per Serious Violation



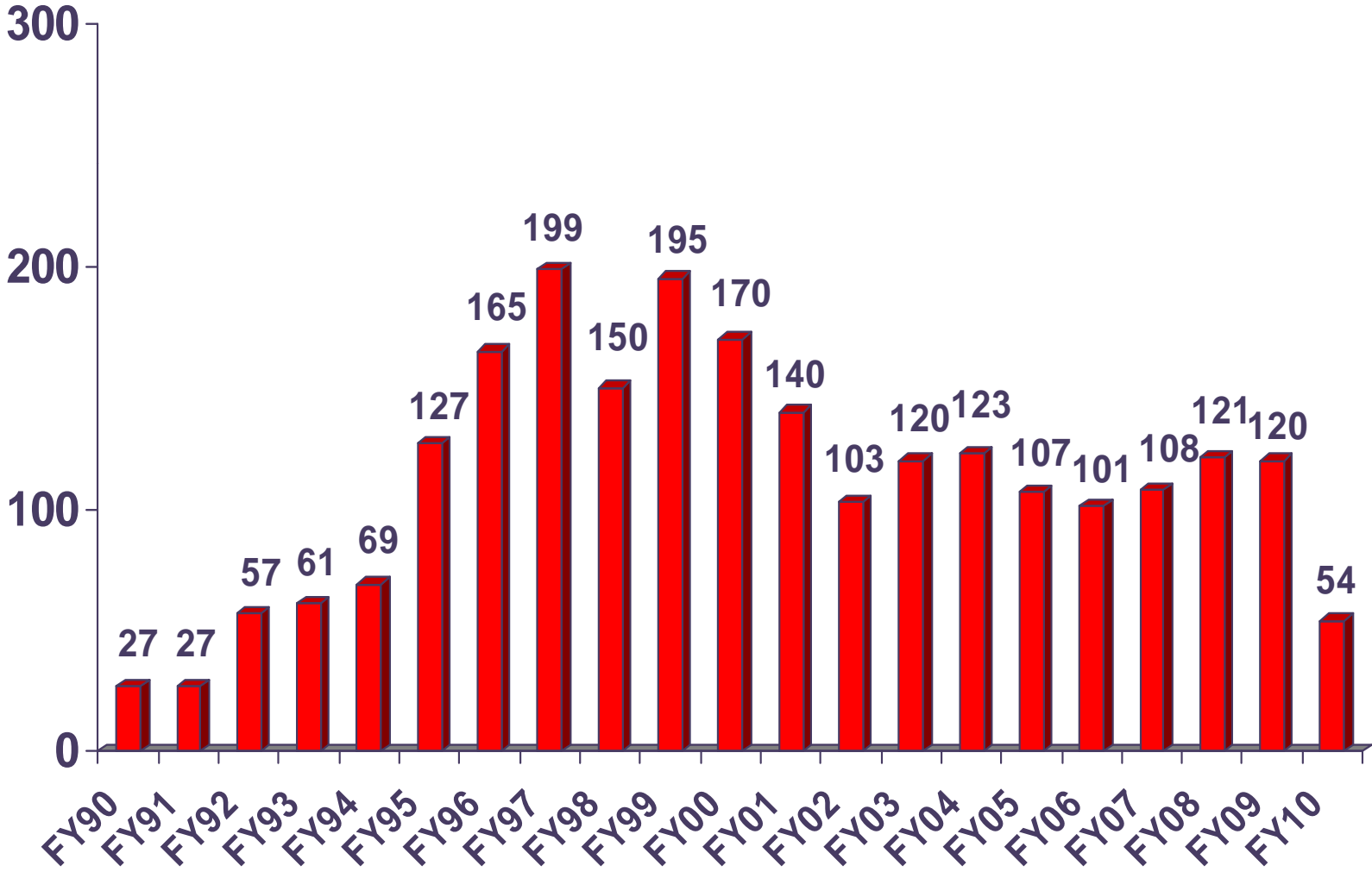
FY 2006 – 2010 % Construction Inspections



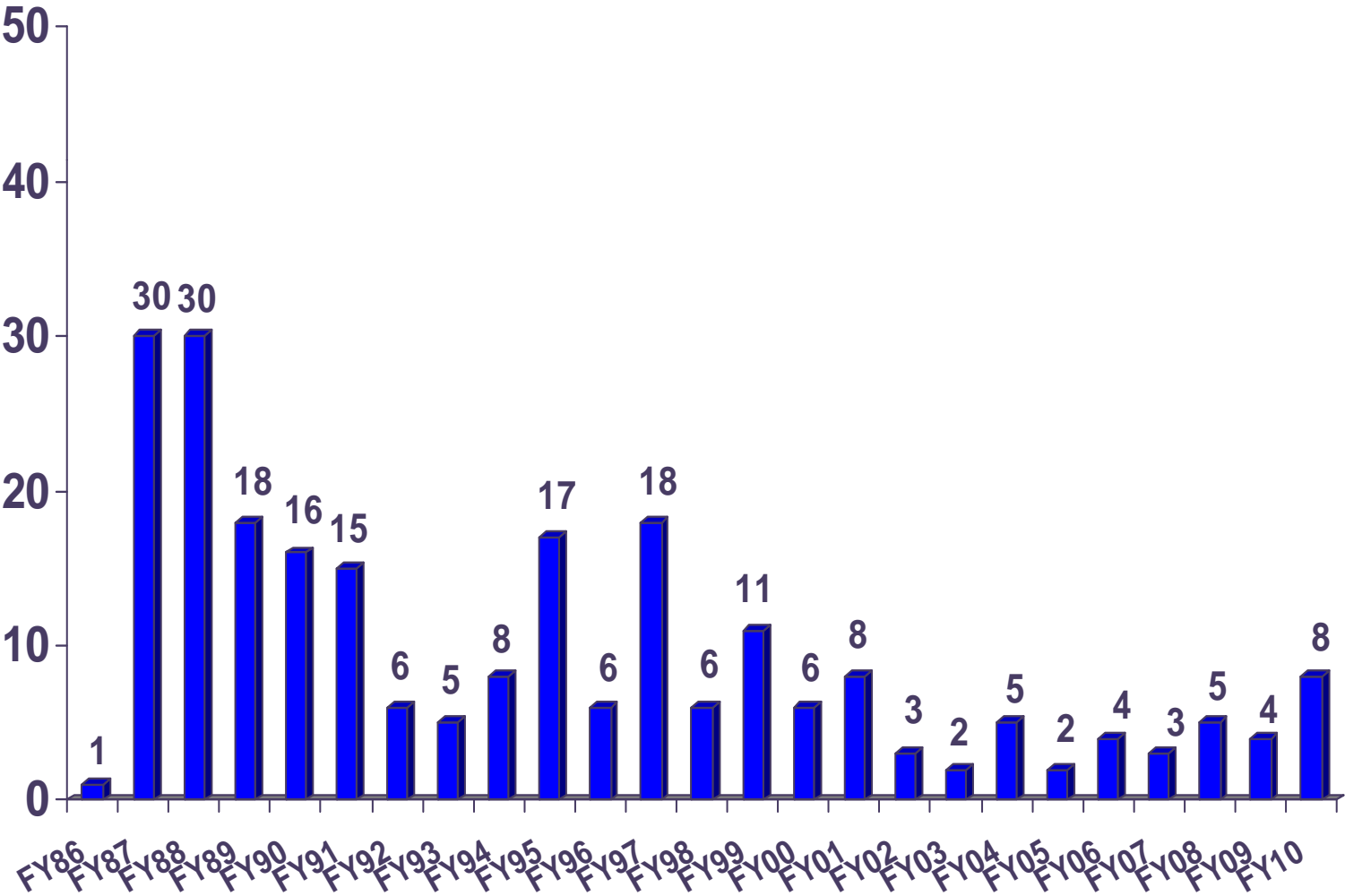
FY 2006 – 2010 Significant Cases



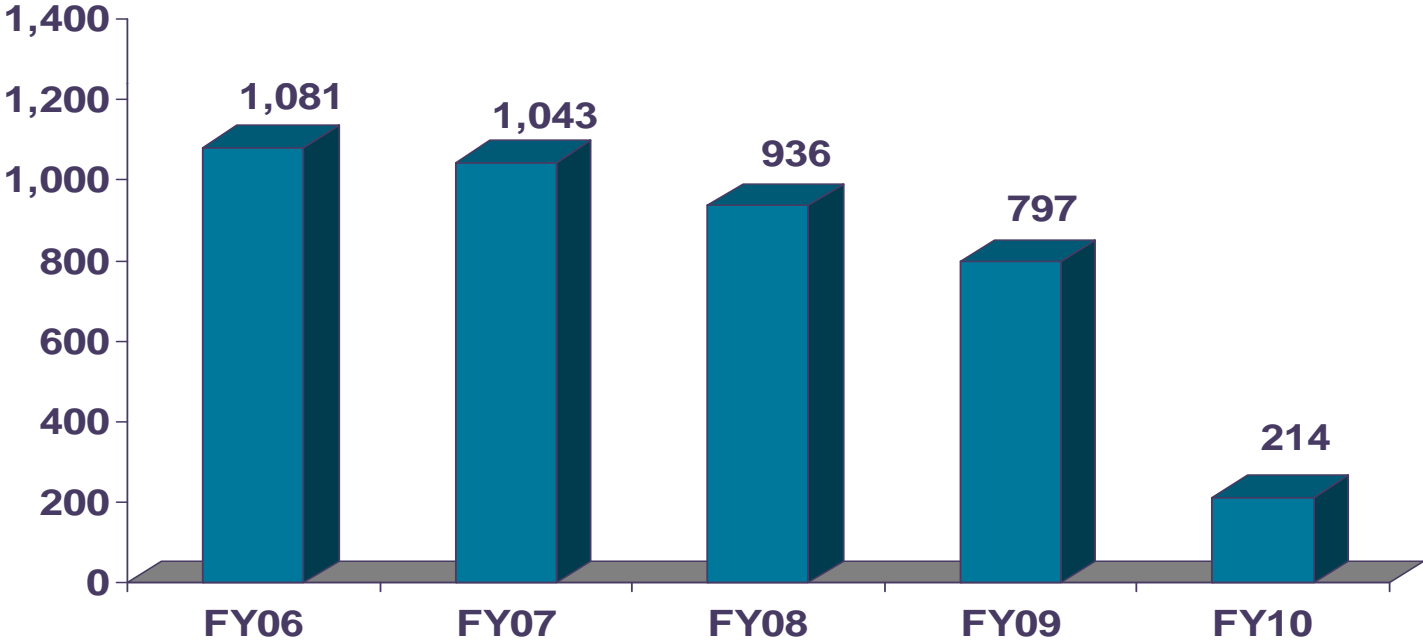
Significant Cases



Egregious Cases



FY 2006 – 2010 Fatality Investigations



OSHA's NEPs For 2010

- Recordkeeping
- Combustible Dust
- Chemical Manufacturers - PSM
- Petroleum Refineries - PSM
- Hexavalent Chromium
- Construction
- Silica
- Food Flavoring - Diacetyl

Recordkeeping

- New national emphasis program
- Response to organized labor complaint of underreporting
- OSHA has not found cases of underreporting, but is “taking seriously” stakeholder allegations.

Recordkeeping (cont'd)

- Focus on “high-hazard” industries.
- OSHA will conduct recordkeeping audits and inspections of 1000 nursing homes/personal care facilities before October 2010.
- BUT NEP not limited to acute health care.

Combustible Dust

- Focus on industries with perceived combustible dust issues – including “paper products”.
- Definition of “combustible dust”: “A combustible particulate solid that presents a fire or deflagration hazard when suspended in air or some other oxidizing medium over a range of concentrations, regardless of particle size or shape”

Combustible Dust (cont'd)

- NEP “will focus on general industry facilities where employees may be exposed to potential combustible dust hazards”.
- Sample collection – still an Achilles heel
- Citation still under Housekeeping Standard (1910.22), General Duty Clause, unless particular industry standard (e.g., grain handling)

Chemical Manufacturing - PSM

- One-year pilot program launched July 27, 2009
- Programmed inspections of facilities in Regions I, VII and X – based on previous fatalities, complaints, prior incidents/citations
- Focus on chemical manufacturer compliance with Process Safety Management Standard (1910.119)

Petroleum Refinery PSM

- Prompted by BP explosion and recent \$84.7M in proposed penalties for failure to comply with settlement agreement.
- Expands pilot program.
- Focus on compliance with PSM Standard (1910.119), but not only PSM Standard

Hexavalent Chromium

- Effective February 23, 2010
- Focus on “stronger enforcement” of Hex Chrom Standard (1910.1026)
- Follow up to 2008 compliance directive to field
- Inspections of industries with likely exposures from welding on stainless steel, electroplating, painting, etc.

Construction

- Provides for increased inspection of sites at which work funded by Stimulus Act (ARRA) monies being done.

Silica

- Expands 1996 Special Emphasis Program, which focused on construction
- Includes all industries where silica exposure may occur.
- Citation under 1910.1000(e), 1926.55(b), or 1926.57(a) and (b), "as appropriate"

Food Flavoring - Diacetyl

- Designed “to identify and reduce or eliminate hazards associated with exposures to flavoring chemicals in facilities that manufacture food flavorings containing diacetyl”.
- Does not “apply to facilities that use flavoring chemicals in the manufacturing of food products”.

Food Flavoring – Diacetyl (cont'd)

- Expands earlier NEP focusing only on microwave popcorn manufacturing facilities.
- Covers 83 facilities in federal enforcement states (shhhh, the list is secret).
- All must be inspected eventually.

New/Revised NEPs/Directives in the Works

- Isocyanates (instead of asthma) NEP - new
- Amputations NEP – revision
- High-Hazard Facilities - new
- Tuberculosis directive - revision
- Bloodborne Pathogens directive – revision
- PSM directive - revision

Revised OSHA Internal Penalty Guidelines

- New Interpretation, April 2010
- Increase average penalty for serious citation from \$1000 to \$3500 (driven by gravity prong).
- Repeat citations up to 5 (v. 3) years after citation.
- Employer-size discounts reduced – max of 40% (v. 50%); none for employer of more than 250 employees (v. 500 employees).
- No good faith discount if high gravity.
- 15% (v. 30%) discount for “quick fix”.
- History of violations now only an aggravator; no discount for good history.

Protecting America's Workers (PAWs) Act



- Significantly increase penalties.
- Expand criminal enforcement and extend it to “responsible” company representative (undefined).
- Expand coverage to public employers.
- Increase protection of whistleblowers.

Other Proposed Legislation

- Nurse and Health Care Worker Protection Act – require installation of Heuer Lifts in all health care facilities.
- Whistleblower Protection Enhancement Act – strengthen whistleblower protection under multiple federal statutes.



Rulemaking Underway

- Hazard Communication Standard – revision to include global harmonization.
- Combustible Dust – ANPRM published October 2009
- Occupational Injury and Illness Recording and Reporting – revision to reinstate column on 300 Log for MSDs
- Crane and Derrick Standard – new rule; target of July 2010
- Confined Spaces Standard for Construction – new; no action until Crane and Derrick Standard published
- Diacetyl Rule – new rule scheduled for October 2010
- Chemical Plants – Process Safety Management

Guidance And Training

- Small Businesses
- Scaffolding
- First Responders
- Silica
- Respiratory Protection
- Lasers
- Penalties

Guidance And Training (cont.)

- Safe egress from trenches
- Employer pay for equipment
- Respirator medical records
- Highway construction workers



Enforcement Activities

- SVEP (“Severe Violator Enforcement Program”)
- The following circumstances will be reviewed for possible handling as SVEP cases:
 - A fatality or catastrophe situation;
 - Industrial operations or processes that expose employees to the most severe occupational hazards and those identified as “high-emphasis hazards”;
 - Exposure of employees to hazards related to the potential release of a highly hazardous chemical; or
 - An egregious enforcement action.

SVEP (cont'd)

- “High-emphasis hazards” means *only* high gravity serious violations of specific standards covered under falls or following NEPs:
 - amputations,
 - combustible dust,
 - crystalline silica,
 - lead,
 - excavation/ trenching, and
 - shipbreaking,
- Regardless of the type of inspection being conducted.

SVEP (cont'd)

- SVEP also includes following “action elements” for employers who meet SVEP criteria.
 - Enhanced follow-up inspections;
 - Nationwide referrals, to include State Plan States;
 - Increased company awareness, to include News Releases;
 - Enhanced settlement provisions; and
 - Increased use of Federal court enforcement action (contempt of court) under Sec. 11(b) of the OSH Act.

Corporate-Wide Settlement Agreements

- Corporate Wide Settlement Agreements
 - Tied into the SVEP
 - In cases of systemic patterns of violations
 - Directive is out for review and concurrence.

Criminal Liability

- ✓ OSHA referring all potential criminal case to DOJ for review
- ✓ Prosecutor Must Prove:
 - ✓ The employer willfully violated a specific OSHA standard, rule, order or regulation; and
 - ✓ The employer's violation cause the death of an employee.

Cases

- W.G. Yates & Sons Construction Co v. OSHRC (5th Cir. 2006) – Supervisory employee' s misconduct not imputable to employer unless misconduct was foreseeable by employer.

Cases (cont'd)

- United States v. L.E. Myers Co. (7th Cir. 2009)
 - (1) Supervisory knowledge imputable to employer only if knowing employee had duty to report or ameliorate hazard; (2) deliberate ignorance provable only with showing that employer took deliberate steps to ensure it did not gain knowledge of nature of problem.

Cases (cont'd)

- Secretary of Labor v. Summit Contractors Inc. (OSHRC July 27, 2009) (on remand from 8th Cir.) - General (i.e., controlling) employer may be liable for exposure of other employers' employees depending upon degree of supervisor capacity practiced by first employer and nature/extent of safety measures it employs.

Cases (cont'd)

- Nat'l Assoc. of Home Builders v. OSHA (D.C. Cir. 2010) – OSHA has prosecutorial discretion to cite on per-employee basis for violations related to PPE provision, safety training (affirming OSHA's new rule re per-employee citation).