



U.S. Department of Labor

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Severe Violator Enforcement Program

White Paper

January 2013

1 Executive Summary

Passage of the Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration (OSHA) to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. In the four decades since the OSH Act was enacted, the nation has made dramatic progress in reducing work-related deaths and injuries. Since 1970, workplace fatalities have been reduced by more than 65 percent. Reported occupational injury and illness rates have decreased by over 67 percent since 1973. In 1971, an estimated 38 workers died on the job every day. Today, the Bureau of Labor Statistics (BLS) puts that number at 13 per day, with a workforce that is almost twice as large. But far too many preventable injuries and fatalities continue to occur. Despite much progress, there is still much to do, and OSHA must make the most effective use of limited resources to carry out its mission.

While the vast majority of employers want to protect their employees, others continue to expose workers to very serious dangers even after receiving citations for hazards causing serious injuries, illnesses, and deaths. On June 18, 2010, OSHA instituted the Severe Violator Enforcement Program (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 OSH Act. The program replaced the Enhanced Enforcement Program (EEP), an earlier program that the Office of the Inspector General (OIG) found to be an inefficient and ineffective means of identifying and addressing the most severe violators. On August 16, 2012, OSHA issued a [memorandum](#) detailing criteria for being removed from SVEP.

Following a preliminary evaluation of the new program's initial 18 months in operation, OSHA has found that SVEP is already meeting certain key goals, including a significant increase in follow-up inspections and enhanced settlements. The program has succeeded in guiding OSHA enforcement toward recalcitrant employers by targeting high-emphasis hazards, facilitating inspections across multiple worksites of employers found to be recalcitrant, and by providing Regional and State Plan offices with a nationwide referral procedure. This evaluation has also identified several important challenges, such as a high number of transitory construction companies which are difficult for OSHA to follow-up with.

Cumulative Summary

As of the end of FY 2011, there were a total of 191 inspections designated as SVEP cases. This report reviews this set of developing cases at two points in time – their individual status as of September 30, 2011 and as of February 29, 2012 – in order to apply statistical analysis to the SVEP's implementation. SVEP cases were broken down by their SVEP-triggering criteria, by industry type (construction and non-construction), company size, and case status. OSHA surveyed the field regarding follow-up and related inspections, 11(b) actions, and various aspects of settlement activity. From information collected in the SVEP Log and the OSHA surveys, OSHA found that:

- The mandatory follow-up inspections are regularly conducted.

- Enhanced Settlement Provisions are being established with employers requiring measures above and beyond basic hazard abatement to ensure compliance at the cited facility and at other related facilities. Of the 180 inspections that were still SVEP cases as of February 2012, 67 settlements included enhanced settlement provisions. The most commonly-used provisions require employers to provide safety training, inform OSHA of current and future worksites, use OSHA's consultation services, and regularly conduct safety and health audits.
- Follow-up and related inspections of construction companies have been difficult. Because of the short-term nature of the jobs and the small size of the companies, they often cannot be located for follow-ups.
- To date, few SVEP cases have triggered related inspections of the same employers across multiple sites.
- To date, few SVEP cases have required court orders to force compliance under section 11(b) of the OSH Act.
- Clarification and standardization of policies between OSHA and the Department of Labor's Solicitors Office (SOL) are needed to facilitate joint work (such as 11(b) orders, citation deletion and reclassification, and the inclusion of enhanced settlement provisions).

2 Introduction

The Severe Violator Enforcement Program (SVEP), which became effective on June 18, 2010, is intended to 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 relating to significant hazards.

The SVEP replaced the Enhanced Enforcement Program (EEP), a program also intended to target problematic employers. The EEP's criteria, broader than the SVEP criteria, also relied on the employer's compliance history. 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, did not conduct proper follow-up on a majority of EEP-qualifying cases, made little effort to determine if non-compliance existed company-wide where there were multiple locations, and generally did not utilize the enhanced enforcement tools the EEP provided to ensure future compliance.

Rather than amend the EEP, OSHA replaced the program with the more narrowly focused SVEP. At the root of the OIG's criticism was OSHA's failure to conduct follow-up inspections because of EEP's expansive criteria. These criteria created so many EEP cases that OSHA could not maintain the program's increased enforcement efforts. As such, OSHA tightened the criteria in the SVEP to better focus its enforcement resources on those employers who have demonstrated particular recalcitrance or indifference to their OSH Act obligations.

Section XX of the SVEP Directive, CPL 02-00-149, requires OSHA's Directorate of Enforcement Programs (DEP) to submit to the Assistant Secretary an End of Fiscal Year Report of each Region's SVEP activity. In addition to the activity report, DEP worked with OSHA's Regional Offices to evaluate SVEP's implementation, current status, and obstacles in order to measure its effectiveness and efficiency.

This report reviews the data collected on those inspections designated as SVEP cases as of September 30, 2011, the end of FY 2011.

3 Cumulative Summary as of September 30, 2011

Between when the program became effective on June 18, 2010 and the end of FY 2011, there were a total of 191 inspections designated as SVEP cases. In the first, partial fiscal year (June 18, 2010 – September 30, 2010), there were 41 cases. In FY 2011, the first full year of the SVEP, there were 150 SVEP cases.

a. Eligibility Criteria

Every case that meets the SVEP criteria is considered a severe violator enforcement case. A case meets the SVEP criteria if it meets one of the following criteria:

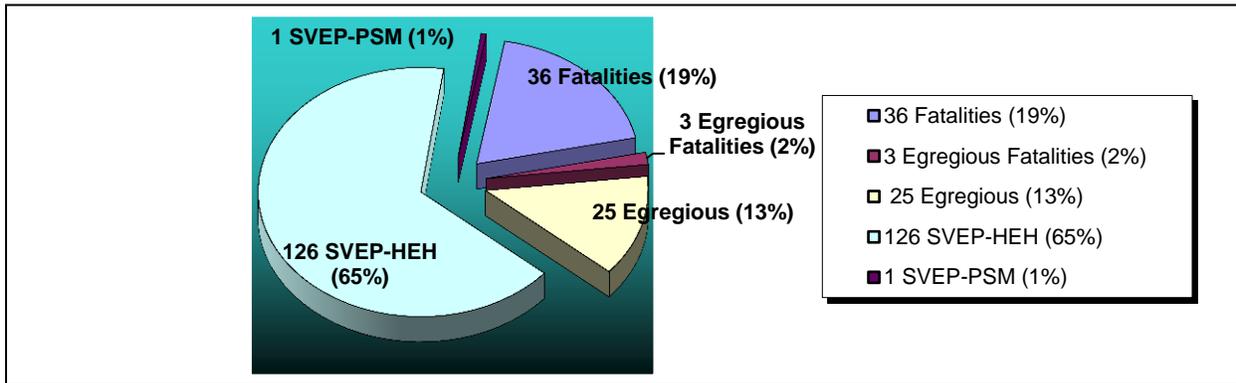
- Is a fatality or catastrophe inspection with one or more willful or repeated violations or failure-to-abate notices (SVEP-fatality);
- Is a non-fatality/catastrophe inspection with two or more willful or repeated violations or failure-to-abate notices that are high gravity violations related to High-Emphasis Hazards (SVEP-HEH);
- Is 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 (SVEP-PSM);
- Is an egregious (e.g., per-instance citations) case (SVEP-egregious).

As of the end of FY 2011, 36 inspections (19%) were designated as SVEP-fatality cases, and 25 inspections (13%) were designated as SVEP-egregious criteria. Three additional inspections (2%) fell into both of these categories, as they were egregious cases with fatalities. Only one case (1%) has been designated under the SVEP-PSM criteria. The remaining 126 inspections (65%), the largest proportion, were designated as SVEP cases under the SVEP-HEH criteria. Figure 1, below, shows the proportion of cases designated under each set of criteria. Table 1 breaks down the cases by both designating criteria and fiscal year.

Table 1: SVEP Cases Broken Down by Qualifying Criteria and Year

	6/18 – 9/ 30/ 2010	FY 2011	Total
Total SVEP Cases	41	150	191
SVEP-Fatality Cases	4	32	36 (19%), excl. egregious
Egregious Cases	7	18	25 (13%), excl. fatalities
Egregious Fatality	1	2	3 (2%)
SVEP-HEH	29	97	126 (65%)
SVEP-PSM	0	1	1 (1%)

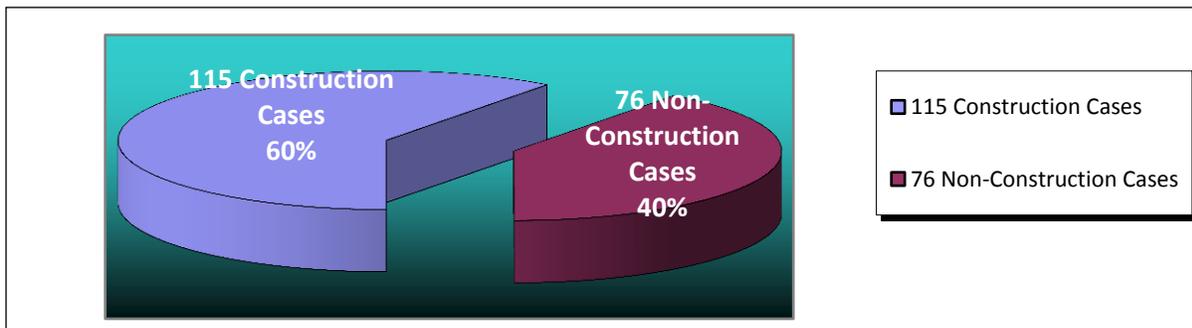
Figure 1: Proportion of SVEP Cases by Designating Criteria



b. Construction

The SVEP distinguishes between construction and non-construction cases because additional enforcement capabilities are granted to construction cases (see SVEP Directive section XV(B)(5)). A majority of SVEP cases are construction inspections. As of September 30, 2011, 115 (60%) of the 191 SVEP cases are in construction (see Figure 2). Of those 115 cases, 13 (11%) are fatality cases, including an egregious one. The 76 non-construction cases are a mixture of general industry, health, process-safety management (PSM), and maritime cases. Trends and issues related to applying the SVEP Directive to construction cases is discussed further below.

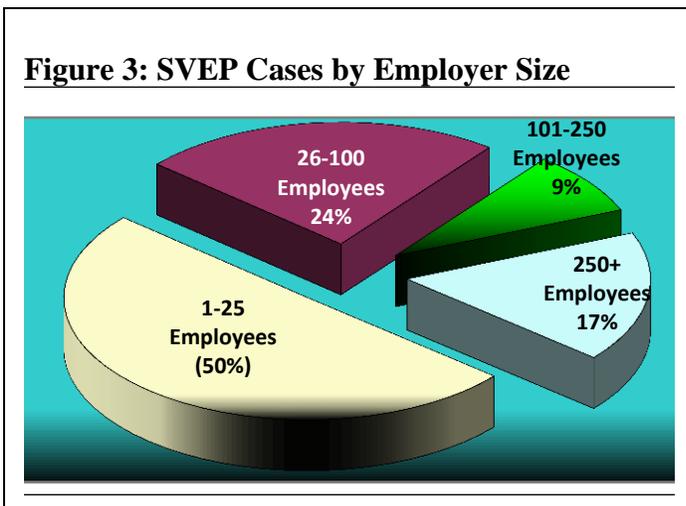
Figure 2: Construction v. Non-Construction SVEP Cases



c. Employer Size

A large factor affecting the SVEP is the proportion of various sized employers. For example, it is the large proportion of small construction companies that affects the success of the SVEP's follow-up requirement. Small construction companies have small mobile worksites and, as a consequence, are often difficult to find. Overall, a majority of SVEP cases are small businesses. Based on the number of controlled employees, 96 SVEP cases (50%) concern employers with between 1 and 25 employees. Employers in 46 SVEP cases (24%) have between 26 and 100 employees. Employers in 16 SVEP cases (9%) have between 101 and 250 employees. Thirty-three SVEP cases (17%) concern employers with more than 250 employees.

As mentioned above, whether an employer is in the construction industry or not also affects SVEP enforcement. One hundred fifteen cases concern employers in construction, as compared to 76 that do not. Of these 115 SVEP construction cases, 80 (70% of construction cases, 42% of total cases) involve employers that employ less than 25 employees.

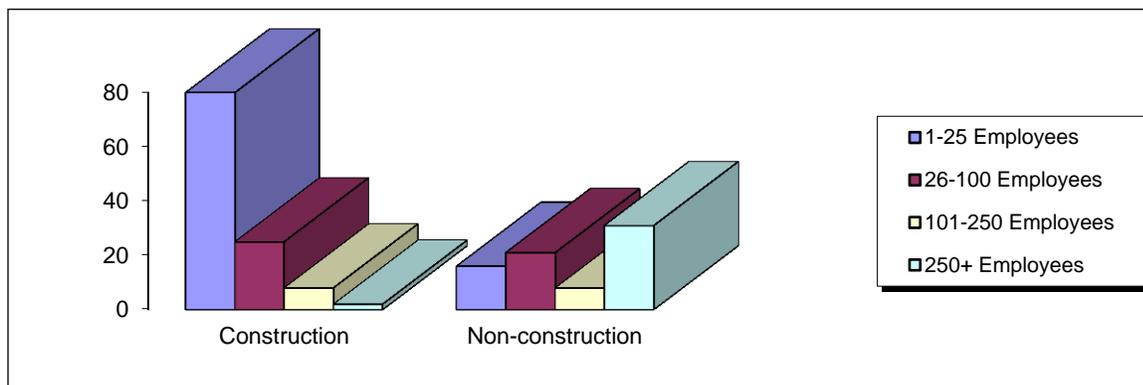


Construction employers in 25 SVEP cases (22% construction, 13% total) have between 26 and 100 employees. Construction employers in 8 SVEP cases (7% construction, 4% total) have between 101 and 250 employees. Two SVEP cases (2% construction, 1% total) concern employers with more than 250 employees.

Of the 76 non-construction cases, 16 SVEP cases (21% of non-construction (NC) cases, 8% of total cases) concern

employers with between 1 and 25 employees. Employers in 21 SVEP cases (28% NC, 11% total) have between 26 and 100 employees. Employers in 8 SVEP cases (11% NC, 4% total) have between 101 and 250 employees. Thirty one SVEP cases (41% NC, 16% total) concern employers with more than 250 employees. Figure 4 compares the number of construction and non-construction cases in each size category.

Figure 4: Size of SVEP Employer, Construction v. Non-Construction



d. Compliance and Awareness

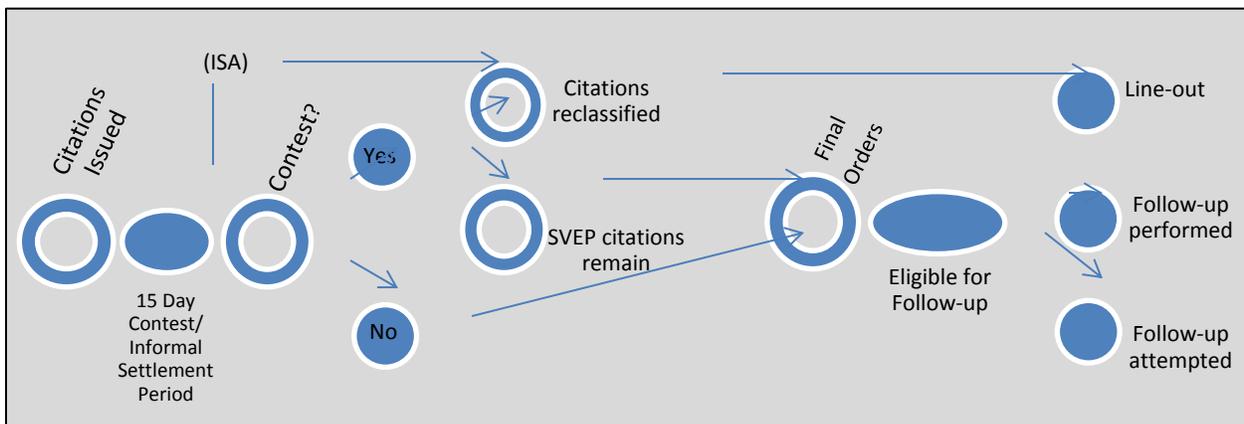
The SVEP has a number of methods by which to encourage severe violators to comply and abate hazards. Such methods include follow-up and related inspections, notifying company headquarters, and the inclusion of enhanced provisions within settlement agreements. The discussion below reviews these methods and their use. Because new cases are being added to the program every month and every SVEP case proceeds through the program at its own pace, the number of cases at any particular time or status point (*i.e.*, under contest or eligible for a follow-up inspection) is always shifting. In order to account for this distortion and to better judge the success of the SVEP's implementation, this section of the report reviews a set of SVEP cases and

examines their progression in two snapshots, taken five months apart. The first snapshot is the program as it was at the end of fiscal year 2011, when there were 191 SVEP cases, 18 follow-up inspections, and 21 related inspections on the SVEP Log. The second snapshot shows how those same 191 SVEP cases had developed as of February 29, 2012.

To better understand these snapshots, a brief overview of how an SVEP case proceeds through OSHA's enforcement process is beneficial (see Figure 5). An inspection becomes an SVEP case upon the issuance of qualifying citations. If the employer has more than one fixed site, the Area Director mails a copy of the citations to the employer's headquarters. After issuance, there is a 15-day contest period during which the employer decides whether to contest the citations. During that time, the employer and OSHA may meet and agree to an Informal Settlement Agreement (ISA). (OSHA may negotiate for enhanced provisions during both informal and formal settlement discussions.) The ISA may delete or reclassify the citations such that the case no longer qualifies for the SVEP. If this occurs, the case is lined off the Log. However, settlements can only result in lining off if there are factual changes based on the quality of 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 contest period. The case is then eligible for a follow-up inspection.

If, upon citation issuance, the citations are contested, the follow-up inspection is barred until the case is either adjudicated or settled (although related inspections – inspections of an employer's other worksites triggered by a reasonable belief of systemic noncompliance – may occur at any point (see Section 3(d)(ii) below)). 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 SVEP Log but OSHA's SVEP requirement to conduct a follow-up inspection is considered fulfilled.

Figure 5: Stages of a SVEP Case

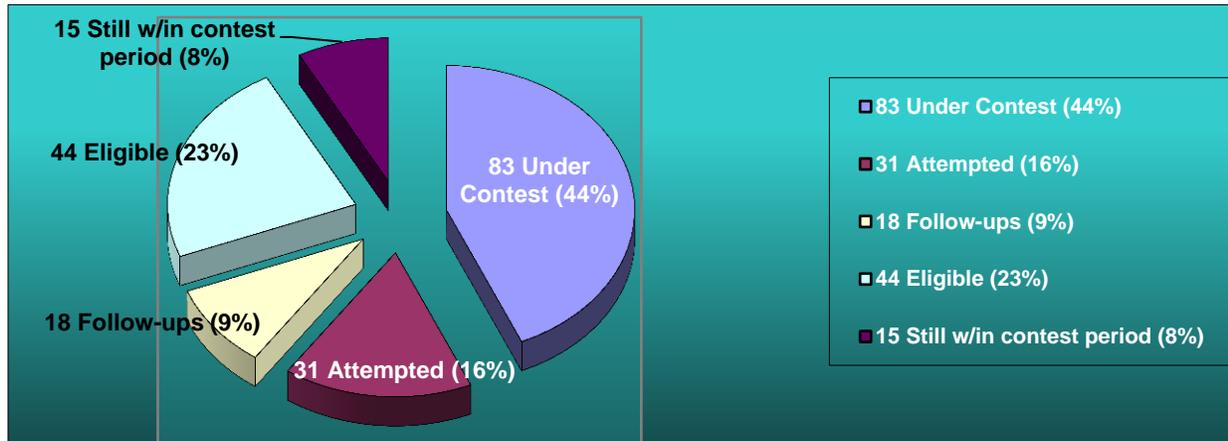


i. Follow-up Inspections

A follow-up inspection is required to be conducted in every SVEP case after citations become final orders. The follow-up inspection assesses not only whether the cited violations were abated, but also whether the employer continues to commit similar violations. Follow-up

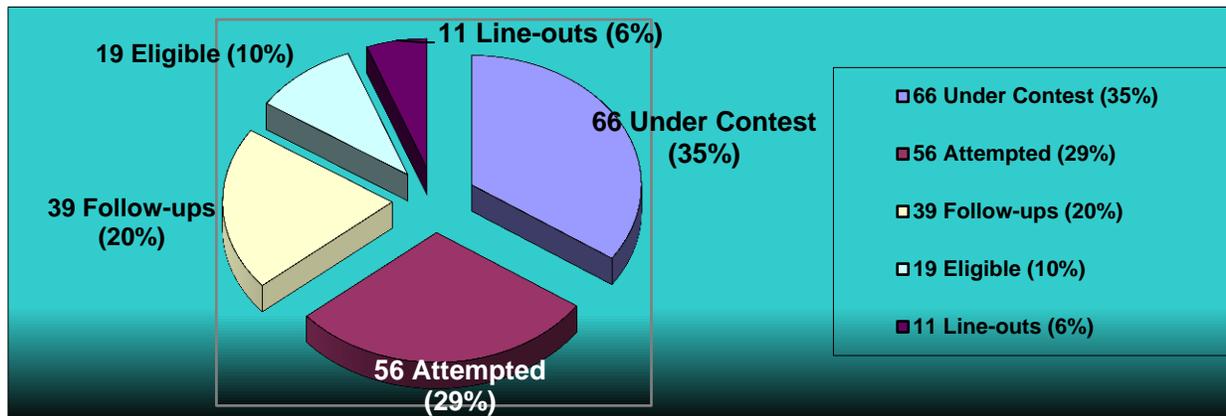
inspections began in FY 2011. By September 30, 2011, of the 191 ongoing SVEP cases, more than half (52%) were not yet eligible for follow-up. Of those 48% that had become eligible for follow-up, more than half had received either a follow-up or an attempted follow-up. By February 29, 2012, of those cases eligible for follow-up, nearly all had received either a follow-up or attempted follow-up.

Figure 6: Follow-up Status of SVEP Cases as of Sept. 30, 2011

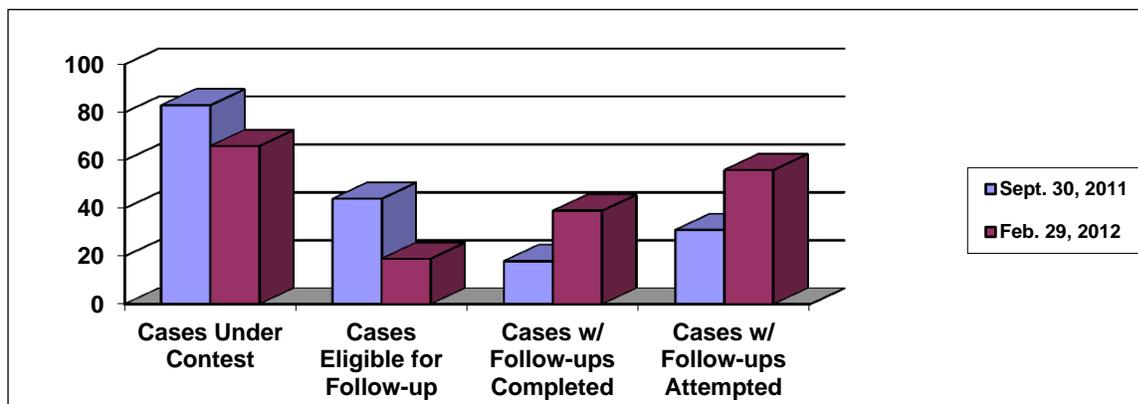


In FY 2011, 18 follow-up inspections were concluded and 31 more were attempted. Of the 18 follow-up inspections completed, eight occurred in the construction industry and 10 were non-construction. No follow-up inspection has itself become an SVEP case. Individual case factors affect whether and when OSHA may conduct a follow-up inspection. Figure 6 (above) breaks down the SVEP cases by their follow-up status as of September 30, 2011. At that time, 83 cases (44%) were under contest, 44 (23%) were eligible to have follow-up inspections conducted, and 15 (8%) were so new that they were still in the 15-day contest period.

By February 29, 2012, 11 cases had been lined out. Out of the 180 remaining SVEP cases, 39 (20%) had follow-up inspections, 56 (29%) were attempted, 66 (35%) were under contest, and 19 (10%) were eligible to have follow-up inspections conducted (see Figure 7). To highlight the ever-shifting nature of SVEP data, some of those cases that were eligible as of the end of February had settled and transitioned from contest status only earlier that month.

Figure 7: Follow-up Status of SVEP Cases as of Feb. 29, 2012

If the SVEP is being implemented properly, all cases will eventually have a follow-up conducted or attempted. Figure 8 demonstrates this progression to the extent it occurred over the five months between snapshots. Many cases that had been under contest or eligible for a follow-up in September had their follow-ups conducted or attempted by February. The number of cases under contest in September had therefore decreased by February, while the number of cases with completed and attempted follow-ups increased between September and February.

Figure 8: Demonstration of Case Status Progression over Time

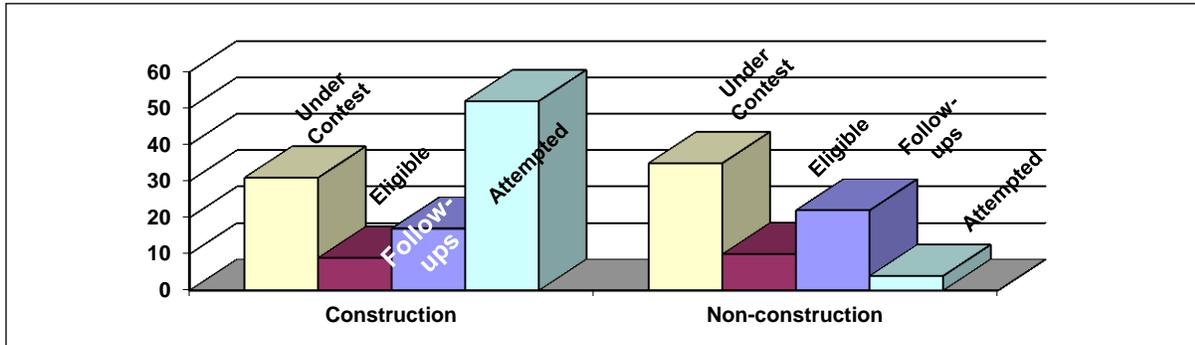
Construction and non-construction cases trigger different enforcement issues in the SVEP. Many small construction companies, for example, have mobile worksites and, therefore, OSHA is often unable to locate them for a follow-up. For this reason, SVEP data presented below is broken down between construction and non-construction employers. Table 2 (below) breaks down the status of construction and non-construction SVEP cases as of February 2012.

Table 2: No. of Construction and Non-Construction Cases by Follow-up Status (Feb. 2012)

	<u>Construction</u>	<u>Non-construction</u>	<u>Total</u>
Follow-ups	17	22	39
Attempted Follow-ups	52	4	56
Under Contest	31	35	66
Eligible	9	10	19

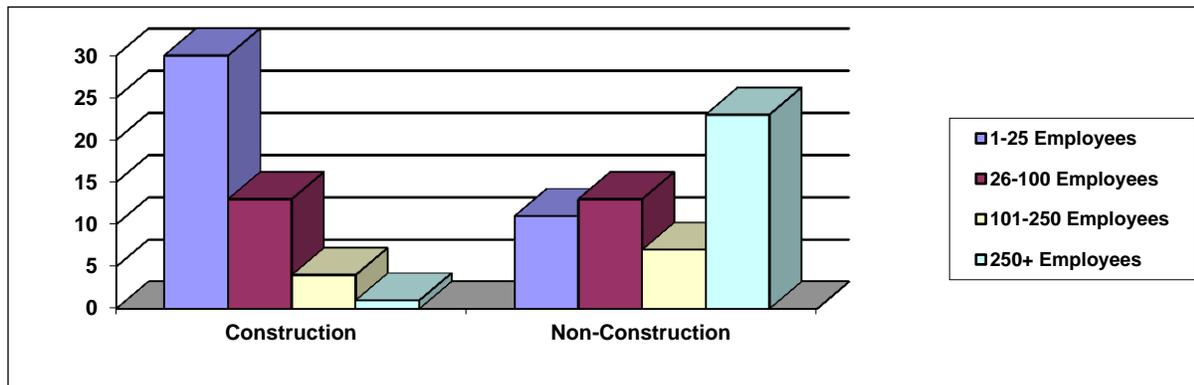
As demonstrated in Figure 9 below, completing follow-up inspections of construction companies has been difficult. The reasons for this trend are explained below.

Figure 9: No. of Construction and Non-Construction Cases by Follow-up Status (Under Contest, Eligible, Follow-up Completed, Follow-up Attempted) – February 2012



Under Contest/Unclassified: Follow-up inspections can only be conducted after final orders have been issued. Follow-up inspections cannot be conducted, therefore, when a case is under contest. As of September 30, 2011, 83 of the 191 SVEP cases were under contest. Another 19 cases had been under contest at some point, but had settled by the end of the fiscal year. Of those in contest, 34 were construction cases and 39 were non-construction cases. Fifteen cases (8%) were so new that the cases were still within the 15-day period given to employers to consider whether or not to contest the citations. By February 2012, the 15-day contest period had ended for those 15 cases and they had either gone into contest or become eligible for a follow-up. As of February 2012, the number of cases in contest had been reduced down to 66, with 31 cases being construction and 35 being non-construction. Of the 102 SVEP cases that have ever been under contest, 30 construction and 11 non-construction cases concern employers with between 1 and 25 employees (see Figure 10). Employers in 13 construction and 13 non-construction cases have between 26 and 100 employees. Employers in 4 construction and 7 non-construction cases have between 101 and 250 employees. Last, one construction and 23 non-construction cases concern employers with more than 250 employees.

The SVEP contest rate is 44%, which is significantly higher the national rate of 8% for both FY 2010 and FY 2011. The large disparity between the SVEP and national contest rates is predictable considering the characteristics of each group. Whereas the national rate is created out of a pool that includes every inspection in that year for which OSHA has issued any citation, including a single other-than-serious citation, the SVEP contest rate is created out of a pool in which *every* employer in *every* SVEP case is facing significant sanctions for willful and repeat violations.

Figure 10: Construction and Non-Construction Under-Contest Cases by Size

Follow-ups Attempted: In 56 cases, OSHA inspectors attempted to conduct follow-up inspections but were unable to for various reasons (52 of these cases were in construction). In these 56 cases, the Area Office determined that no further efforts would be made to complete the follow-up inspections. In making the determination to not conduct a follow-up inspection of an SVEP case, the Area Office must have a compelling reason. The reasons allowed are:

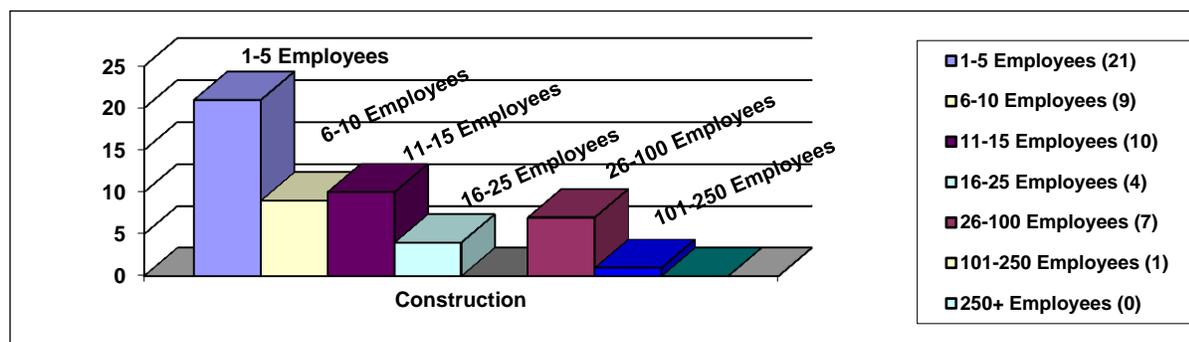
- The employer has gone out of business;
- The worksite has closed; or
- The cited operation at the worksite has ended or been discontinued.

Upon attempting the follow-up inspection and determining that it cannot be completed, the Region informs DEP and the follow-up requirement is considered fulfilled.

In six construction and two non-construction cases, the employers had gone out of business. In 22 cases, all construction, the worksite or workplace had closed. In 24 construction and two non-construction cases, the cited operation had been discontinued at the worksite. In consideration of the short-term nature of construction projects, the SVEP Directive allows OSHA to conduct follow-up inspections of construction severe violators at their other worksites. Even with this alternative, however, OSHA has had difficulty accomplishing follow-up inspections of construction companies.

DEP found that the primary reason for the difficulty with the construction companies is that the companies are very difficult to find due to their small size and mobility. As shown in Figure 11 below, 44 of the 52 construction cases with unsuccessful follow-up inspections control only one to 25 employees. Twenty-one of the 44 cases have five or fewer controlled employees. Whether the company has simply finished its project and moved on or the business has left its office address and disconnected its phone number, the small size hinders OSHA's ability to find these employers through other means, such as Dun and Bradstreet reports.

Other reasons for the high number of unsuccessful construction follow-up inspections is that many companies go for long periods between projects or the work may not have the same hazards for which they were cited in the SVEP case. In addition, the companies often do not inform OSHA when they find work. This is the case even though many of the construction companies have agreed in their settlements to inform OSHA of their next project.

Figure 11: Construction Cases with Follow-ups Unable to be Completed by Size

Eligible for Follow-up: As of the end of FY 2011, 44 cases were classified as eligible to have a follow-up conducted. Follow-up inspections are expected to be conducted relatively soon after the final order date, although not immediately. For the inspections to be effective, time must be given to allow companies to abate the hazards and create a better safety culture, or, alternatively, to fall back on bad habits. For this reason, Area Offices did not begin conducting follow-up inspections until FY 2011. Eighteen follow-up inspections were concluded by the end of FY 2011 and nine more had been conducted but not concluded. These cases remain classified as eligible for a follow-up inspection until the follow-ups are concluded and reported to the National Office. Nine other cases had follow-up inspections scheduled to be conducted in FY 2012. Twenty-two of the 44 eligible cases were construction cases in which the employers' cited projects had concluded and either OSHA could not find the company elsewhere or the employer had no other projects scheduled.

By the end of February 2012, the Area Offices had completed more follow-ups, including the nine that were in-process in September. Indeed, as of February, only nine construction and ten non-construction cases were eligible. As expected, the steep reduction in eligible cases between September and February was primarily driven by Area Offices determining that it was time to reclassify a number of construction cases as Attempted/Unable to be conducted after having attempted to conduct those inspections for many months. Of the remaining eligible cases, two had follow-ups conducted but not concluded, three have follow-ups scheduled, seven are awaiting resources (one is a PSM case and six are recently settled), one is postponed while a state consultation is in progress, four are construction companies with no current work, one has ended the cited process, and one has been delayed on SOL's advice pending settlement of a related case.

Silica: Section XII(H) of the Directive, which details those standards regarding silica exposure hazards that will trigger the SVEP, connects the Silica National Emphasis Program follow-up inspection requirement to the SVEP's requirement. To date, there is only one silica case in the SVEP. No follow-up inspection has yet been conducted under this dual requirement because the case is under contest.

Follow-up Conclusion: Over the last year, Area Offices have established administrative processes to ensure that follow-up inspections are conducted. Now that these processes are in place for the most part, SVEP follow-up inspections have become routine. The number of follow-up inspections conducted in the four months since the end of FY 2011, for example, is

almost equal to the number conducted the entire year before. The field offices are tracking SVEP cases and conducting follow-up inspections at the appropriate time.

ii. Related Inspections

Section XV(B) of the SVEP Directive states that OSHA will inspect related workplaces and worksites of the same employer when the Regional Administrator (RA), in consultation with RSOL, 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. Related inspections began in FY 2011, during which 21 related inspections were conducted, of which two became SVEP cases.

Related inspections are those that were officially conducted as SVEP-triggered related inspections. This number does not include either inspection when health and safety inspections are run nearly simultaneously at a worksite, or subsequent inspections of an employer's workplaces that are independently initiated by a complaint or accident. The additional SVEP cases of eleven employers, therefore, have not been included in the related-inspection count because the second or third inspections are unrelated to their original SVEP cases.

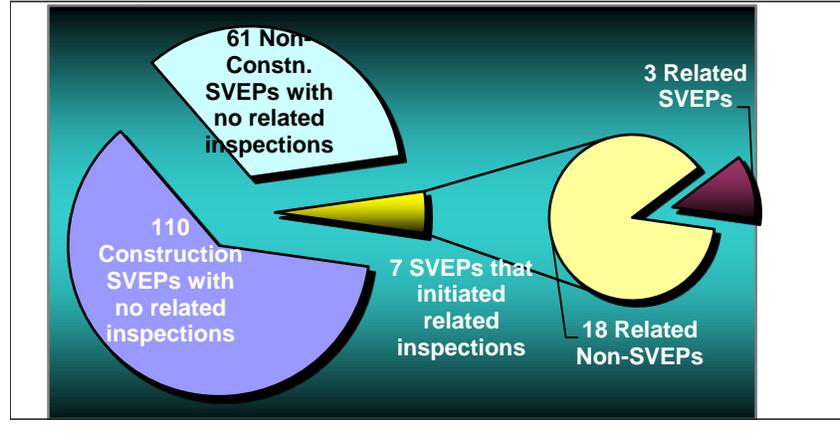
By the end of FY 2011, seven SVEP cases had initiated the 21 related inspections, with each of the seven triggering anywhere from one to seven related inspections (see Table 3 below). Six of the initiating SVEP cases were non-construction, which led to 19 of the related inspections also being non-construction. While citations were issued in many of the related inspections, only two related inspections became SVEP cases themselves. Both of these related/SVEP cases are non-construction cases.

Table 3: Related Inspection Data by Snapshot

	Sept. 30, 2011	February 29, 2012
Total No. of Related-Initiating SVEP Cases	7	7
Construction	1	1
Non-construction	6	6
Total Related Inspections	21	18
Construction	2	2
Non-construction	19 (incl. 2 SVEPs)	16 (incl. 3 SVEPs)
Related cases that became SVEPs	2	3
SVEP Cases w/ no Related Inspection	182	171

The number of related inspections shifted over the next few months due to lineouts and other case developments. As of February, seven SVEP cases had initiated 18 related inspections (see Figure 12). Three related inspections were designated as SVEPs. The third of these related/SVEP cases, having been conducted after the end of FY 2011, is an SVEP case outside of the 191 in the snapshot. While the number of related construction inspections remained the same (one initiating case, two related inspections), the number of related non-construction inspections dropped from 19 to 16. The number of triggering non-construction SVEP cases, however,

Figure 12: No. of related inspections triggered by SVEPs (Feb 2012):



remained the same. The settling of the Lucas Oil Production Studios case was the primary cause for the drop in the number of related inspections. Lucas Oil was lined out while only one new related inspection was conducted between September and February. Before the lineout, Federal OSHA had conducted four related inspections (State Program States conducted at least

two more) at the company’s various other sites. When Lucas Oil was lined out, therefore, all of the company’s related inspections were also removed from the SVEP Log. The remaining 171 SVEP cases, meanwhile, did not trigger any related inspections (see Figure 13).

Related inspections are triggered by the reasonable belief that an employer’s compliance problems were systemic across multiple worksites. For non-construction employers, this trigger generally results in related inspections being conducted on the larger employers. Of the six total non-construction employers with related inspections as of February, three employers have more than 250 employees (see Table 4). There is only one employer with one to 25 employees, one with between 26 and 100 employees, and one with 101 to 250 employees. In construction, the one employer with related inspections has 37 employees.

Table 4: No. of SVEP Employers with Related Inspections

	1 – 25 Employees	26 – 100 Employees	101 – 250 Employees	250+ Employees
Construction	0	1	0	0
Non-construction	1	1	1	3

In construction cases, the same factors that prevent or delay OSHA from conducting follow-up inspections also prevent or delay related inspections: employers are generally small businesses that shift from jobsite to jobsite, may go for long periods before their next project, and therefore are difficult to find. Because projects often end or jobsites close before follow-up inspections can be conducted, and because related inspections conducted at other sites can fulfill the SVEP follow-up requirement in construction cases, most of the related construction inspections have been categorized as follow-ups and excluded from the related-inspection data. After such an effort just to fulfill the follow-up requirement, the Area Offices rarely go further to attempt additional related inspections of a construction employer. Of the 110 construction SVEP cases that had not had any related inspections as of February 2012, no further action is being taken on the 17 construction cases with successful follow-up inspections or the 52 construction cases with failed attempts. Worksites have closed in 33 additional construction cases and the Area Offices are still attempting to find those employers. Further, in at least 15 construction cases, including some of the ones tallied above, the employers are obstructing OSHA enforcement. In some of

these cases, the employers are ignoring their citations (e.g., mailing back citations unopened and not appearing at the informal conferences). In the other cases, ones that have proceeded to settlement, the employers are not informing OSHA of their other worksites, contrary to the requirement in their settlements.

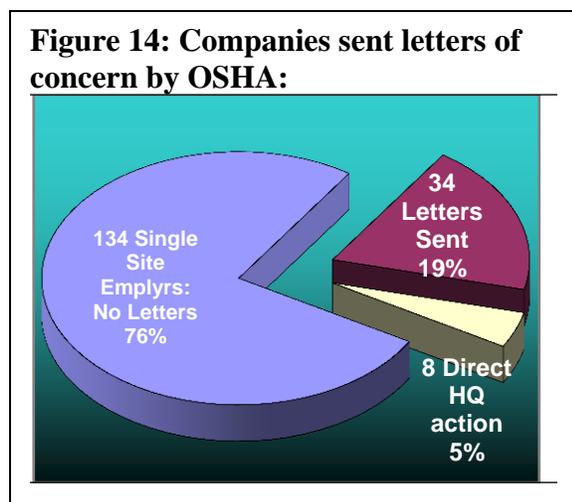
For non-construction cases, OSHA has not conducted related inspections in 61 instances. Nineteen non-construction employers have only one worksite. Four are out of business. Three have only one site with the cited process. Two already had their second site recently inspected and two have related inspections scheduled. One company is in the state consultation program. As the above list shows, the need to determine whether compliance problems are systemic is often bypassed by other factors which halt any potential related inspections. In only seven cases did the RA reach the point of determining whether the compliance issues were systemic and finding that they were not.

Litigation and settlement strategies also affect whether or not related inspections are conducted. For at least 38 construction and non-construction SVEP cases that are in contest, RSOL has determined that related inspections would harm OSHA's litigation and settlement strategies. In some of these cases, OSHA is pursuing corporate-wide settlement agreements, thereby still fulfilling the goal of improving an employer's safety culture company-wide.

iii. Company Awareness

The SVEP encourages increased company awareness of OSHA's enforcement actions. Section XV(C)(1) requires the Area Director to mail copies of the citations and Notifications of Penalty to the employer's national headquarters if the employer has more than one fixed establishment. In addition, in cases where OSHA determines that an establishment's safety and health problems should be addressed at the corporate level, OSHA may send a letter of concern along with a copy of the citations directly to the company president and may meet with company officials, concerned employees, and unions (Section XV(C)(3)).

OSHA sent letters to 34 company headquarters between June 2010 and FY 2011 (see Figure 14). These letters were unnecessary in 134 other cases where the employers only had single locations or were single fixed establishments (construction), or where the national headquarters were the



inspections sites. In eight other SVEP cases, letters were unnecessary since top officials from headquarters and corporate counsel were directly involved in the inspections and settlement discussions. Letters were not sent in the remaining four cases for a variety of reasons, such as the company going out of business or administrative oversight.

iv. Enhanced Settlement Agreements

Section XV(D) requires the Area Office to consider including in settlement agreements additional requirements above and beyond basic hazard abatement in order to ensure future

compliance both at the cited facility and at other related facilities. Of the 180 inspections that were still SVEP cases as of February 2012, 67 settlements included enhanced settlement provisions,¹ 28 settlements did not include such provisions, and 56 cases were still in contest.

Of the 67 cases that did include enhanced settlement provisions, 42 were construction cases and 25 were non-construction. These enhanced settlement agreements (ENHSAs) were concluded through both the formal and informal settlement process. No settlements were drafted in 15 cases where employers accepted final orders and in 14 cases which defaulted to final orders when the employers ignored the citations.

Section XV(D) specifically requires the Area Office to consider the following provisions:

- Require the employer to 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 settlement agreement corporate-wide;
- Require interim abatement controls if OSHA is convinced that final abatement cannot be accomplished in a short period of time;
- In construction (and, where appropriate, in non-construction industries), 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; and
- Obtain employer's consent to entry of a court enforcement order under Section 11(b) of the Act.
- Require the employer to take advantage of OSHA's consultation services.

Other enhanced provisions may also be considered as the case demands. Within the 67 ENHSAs, the following provisions were the most common:

- 38 ENHSAs require general employee training and/or occupation-specific safety training.
- 33 ENHSAs (all construction) require the employer to notify OSHA of current and future jobsites for a period of time;
- 33 ENHSAs require regular safety and health audits and inspections to be conducted by the employer or a third party;
- 25 ENHSAs require the employer to hire a health and safety consultant;
- 22 ENHSAs require the employer to accept final orders under either Section 11(b) or Lumex language;
- 16 ENHSAs require the employer to develop and implement a safety and health program;

¹ This number includes settlements in cases that are still classified as under contest either because the settlements have been signed but not processed or there are additional citations still being contested.

- 9 ENHSAs require the employer to consent to future OSHA inspections;
- 7 ENHSAs require the employer to review injury and illness reports, submit them to OSHA, and notify OSHA of any serious work-related injuries or illnesses.

v. **11(b) Orders and Administrative Subpoenas**

Section XVI of the SVEP Directive strongly encourages SVEP cases to be considered for Section 11(b) orders when it appears that such orders may be needed to ensure compliance. In considering the use of 11(b) orders, OSHA must balance the employer's apparent indifference to safety (as demonstrated by the SVEP-triggering citations), OSHA's expectation of post-citation abatement and compliance based upon the local offices' history with the employer, and the burden on resources to file numerous settlement agreements with the court. In many cases, after weighing such factors, these orders have been deemed unnecessary. In 144 cases, Section 11(b) language was not used in either citations or settlements. In 40 cases, Section 11(b) language was used in either the citations, or the settlement agreements, or both. The remaining cases are in ongoing settlement discussions and may or may not use 11(b) language. As of February 2012, only one SVEP case required referral to SOL for Section 11(b) action.

Some SVEP cases also require Administrative Subpoenas. Administrative Subpoenas may be issued whenever there is a need for records, documents, testimony, or other supporting evidence necessary for completing an inspection or an investigation of any matter falling within OSHA's authority. As of February 2012, Administrative Subpoenas have been issued in 34 SVEP cases.

vi. **Lineouts**

Lining out and removal are the two ways an employer may come off the SVEP Log. A lineout occurs when an ISA, a Formal Settlement Agreement (FSA), or a court adjudication deletes or reclassifies the citations such that the case no longer qualifies for the SVEP and is therefore lined off the Log. Settlements may only delete or reclassify the citations such that the case no longer qualifies for the SVEP if there are factual changes based on the quality of evidence brought forth during settlement discussions. Lining-out is not the same as removal. Removal occurs when an SVEP case is removed for meeting certain criteria of good behavior (detailed in the memorandum entitled *Removal Criteria for the Severe Violator Enforcement Program*, dated August 16, 2012). Lining-out, on the other hand, indicates citations that, while qualifying temporarily for the SVEP at issuance, do not have the strength of evidence or justification to be upheld upon pushback or contest by the employer. Unlike removal, where the employer is firmly a severe violator, a lineout indicates that the employer should not have qualified in the first place.

As of the end of FY 2011, there were 10 lineouts. Between the end of FY 2011 and February 2012, 11 more cases were lined out. In the *Removal Criteria* Memorandum, OSHA included a reminder to the field that reclassifying citations such that the case no longer qualifies for the SVEP may only be done if there are factual changes based on the quality of evidence brought forth during settlement discussions.

vii. Posting the SVEP Log on the Public Website

Due to a number of FOIA requests by reporters, OSHA is now posting the SVEP Log to the public website. The link to the document can be found on the Enforcement page (<http://www.osha.gov/dep/index.html>) in the Hot Topics section. OSHA updates the log at the beginning of every quarter.

4 Conclusion

OSHA's analysis of the SVEP shows that the program is off to a strong start. In effect for over 18 months, the program is meeting key goals. The field has begun conducting follow-up inspections and no follow-up inspection to date has itself been designated as a SVEP case. Further, SVEP has resulted in the expansion of enhanced settlement agreements. Employers have been paying attention to the SVEP since its initiation and the posting of the log to OSHA's public site has clearly raised awareness. The SVEP's effectiveness will only improve as the program matures.