FEDERAL REGISTER
VOL. 58, No. 157

Rules and Regulations

DEPARTMENT OF ENERGY (DOE)

10 CFR Part 820

Procedural Rules for DOE Nuclear Activities

Part II

58 FR 43680

DATE: Tuesday, August 17, 1993

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is issuing procedural rules to be used in applying its substantive regulations and orders relating to nuclear safety. These procedural rules are intended to be an essential part of the framework through which DOE deals with its contractors, subcontractors, and suppliers to ensure its nuclear facilities are operated in a manner that protects public and worker safety and the environment. In particular, this part sets forth the procedures to implement the provisions of the Price-Anderson Amendments Act of 1988 (PAAA) which subjects DOE contractors to potential civil and criminal penalties for violations of DOE rules, regulations and orders relating to nuclear safety (DOE Nuclear Safety Requirements). DOE is also publishing its enforcement policy to inform contractors and other persons of the bases and anticipated processes for various enforcement actions.

EFFECTIVE DATE: This rule will become effective on September 16, 1993.

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SUPPLEMENTARY INFORMATION:

I. Background

DOE has reassessed the continued safe operation of its nuclear facilities in light of a restructured need for weapons production and a general realization of the need for improvement in the physical and working conditions of its facilities. Consistent with this reassessment, DOE has identified and will implement many new nuclear safety requirements in rules and orders that

affect the operation and management of the nuclear facilities by DOE contractors. DOE contractors consist of entities from private industry and the not-for-profit sector, including educational institutions. In order to ensure that the new set of expectations and requirements could and would be met, DOE decided to provide monetary incentives in its Management and Operating (M&O) contracts for actions consistent with or exceeding requirements and to penalize actions and activities that were not in compliance with requirements.

PAAA is consistent with this "carrot and stick" approach to contractor performance. PAAA renewed DOE's authority to indemnify contractors for public liability arising from a nuclear incident. As a condition of renewed indemnification and to ensure that contractor performance was consistent with prescribed standards, Congress also mandated a new DOE program, separate and apart from contractual award fees, to subject contractors to civil and criminal penalties for violations of DOE nuclear safety requirements.

On September 21, 1989, DOE published a Notice of Inquiry (NOI) and Request for Public Comments on Implementation of the Price-Anderson Amendments Act of 1988 Civil and Criminal Penalty Authority (54 FR 38865). The NOI proposed a framework of DOE nuclear safety enforcement which was, in part, adapted from the U.S. Nuclear Regulatory Commission's (NRC) enforcement approach and policy with respect to commercial licensees. Comments on the NOI generally addressed issues in four broad categories: (1) The applicable DOE Nuclear Safety Requirements to be enforced; (2) the effect of PAAA penalty implementation on management and operating contractors; (3) the treatment of nonprofit educational institutions; and (4) the DOE General Statement of Enforcement Policy.

After consideration of the NOI comments, DOE developed an enforcement program and policy and published a Notice of Proposed Rulemaking (NOPR) to solicit comments on the proposed 10 CFR part 820 Procedural Rules for DOE Nuclear Activities and the General Statement of Enforcement Policy (56 FR 64290, December 9, 1991). The NOPR requested written comments by February 3, 1992, (subsequently extended to March 25, 1992) and invited oral comments at a public hearing on January 13, 1992. Comments were received from 17 public sources-mostly comments from DOE contractors or their attorneys. One law firm indicated it represented five contractors in its compilation of comments.

In addition, on May 15, 1992, DOE published a clarification to its NOPR on 10 CFR part 820 to further clarify the definition of DOE Nuclear Safety Requirement (57 FR 20796). This Notice of Clarification was issued because the comments to the NOPR indicated uncertainty concerning what provisions in the CFR would be the basis for assessing civil penalties under the authority of PAAA. The Notice of Clarification provided 30 days for public comment. In response to this notice, public comments from eight contractors or their attorneys were received. The basic thrust of the comments was that further clarity was needed as to what was encompassed within the scope of DOE requirements "directly related to nuclear safety."

Copies of all written comments and a copy of the transcript of the public hearing are available for examination in the DOE Freedom of Information Reading Room, Room 1E-190, Docket No. NS-RM-91-820, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-6020. Particularly informative are the DOE responses to the NOI as set forth in the NOPR that discuss a wide range of substantive and procedural issues which have been raised relating to

contemplated DOE enforcement authority.

The final DOE enforcement rule and policy statement adopted today has carefully considered the issues raised by the comments in response to the NOI, the NOPR, and the Notice of Clarification. Many of the comments were raised in response to the NOI and were considered in the NOPR. To the extent that DOE has not changed its position with respect to those issues, they will not be addressed here unless a further response is needed for clarity. As discussed below, many of the comments were premised on misinterpretations or a misapplication of the proposed rule. To the extent the misinterpretations were the result of a lack of clarity in the proposed rule, the discussion below should further clarify the intent, scope, and application of DOE enforcement authority. To the extent that the comments indicated uncertainty as to the implementation of part 820, the discussion below will provide more detail on how the enforcement rule will be implemented. It will also specifically delineate those rule or policy revisions that resulted from consideration of the comments, or resulted from further DOE refinement of the enforcement rule or policy.

II. DOE's Responses to Comments

The following discussion describes the issues raised in comments, provides DOE's position on the comments, and sets forth any resulting changes to the procedural rules or the enforcement policy. DOE has also made a number of editorial, stylistic, and format changes for clarity and consistency. As a logical grouping, the comments and issues raised are divided into two groups- (1) comments received on the procedural rules in 10 CFR part 820; and (2) comments received on the General Statement of Enforcement Policy (Appendix A to part 820).

A. Procedural Comments

1. Enforcement Concepts

a. Definition of "DOE Nuclear Safety Requirements." The most prevalent issue raised by comments was the scope of requirements to be the subject of PAAA enforcement. This was also one of the major issues raised in the NOI and in the Notice of Clarification, and was discussed at length in those notices. The thrust of the concerns raised by the commenters is that: (a) The requirements may not be promulgated in accordance with the provisions of the Administrative Procedures Act (APA) (5 U.S.C. 551 et seq.) and the DOE Organization Act (DOEOA) (42 U.S.C. 7191) relating to notice and comment; (b) the requirements may go beyond "nuclear" safety and delve into areas such as "worker" or "environmental" safety not enforceable pursuant to PAAA authority; and (c) the term "nuclear safety" is so undefined and ambiguous that contractors will be required to act at their peril without a clear understanding of what actions might subject them to possible PAAA sanctions.

After carefully considering these comments, DOE has decided to retain the broad definition of "DOE Nuclear Safety Requirement", as discussed in the NOPR and the Notice of Clarification. The concerns expressed in the comments did not appear to take into account sufficiently DOE's decision in the proposal to limit as a matter of policy the subset of nuclear safety requirements that can provide a basis for a PAAA civil penalty, as described below. n1 As set forth in 10 CFR 820.20(b) (formerly, 10 CFR 820.20(d)), DOE will assess civil penalties only on the basis of a violation of (1) any DOE Nuclear Safety

Requirement set forth in the Code of Federal Regulations (CFR); (2) a violation of a Compliance Order; or (3) any program or plan explicitly required by a provision of the CFR or by a Compliance Order.

n1 This limitation on the types of nuclear safety requirements that may be a basis for a PAAA civil penalty does not affect any contractual obligations of a contractor to comply with a nuclear safety requirement set forth in a DOE Order or Notice.

All DOE Nuclear Safety Requirements set forth in the CFR will be promulgated through appropriate APA notice and comment rulemaking procedures. Compliance Orders are not "rules" within the meaning of 5 U.S.C. 551, and thus are not subject to these rulemaking procedures. The programs and plans referenced in 10 CFR 820.20(b) must be explicitly required by a provision in the CFR or a Compliance Order.

Commenters have questioned whether future DOE rules pertaining to such matters as security, personnel, record retention, and procurement might subject a contractor to PAAA enforcement if one of the requirements in those rules is violated. DOE answered that question in its Notice of Clarification. That notice specifically indicated that the requirements of proposed 10 CFR parts 830 and 835 would be enforceable DOE Nuclear Safety Requirements. This also applies to the requirements of proposed 10 CFR part 834. Likewise, substantive requirements in 10 CFR part 820, such as 820.11 on information requirements, were identified as DOE Nuclear Safety Requirements. These requirements impose substantive duties on contractors at nuclear facilities because a failure to perform that duty could jeopardize public or worker safety or the environment.

Similarly, the Notice of Clarification indicated that certain provisions of the DOE Whistleblower Rule (10 CFR part 708, DOE Contractor Employee Protection Program) would constitute DOE Nuclear Safety Requirements if, for instance, a reprisal were found to be in response to the worker's raising or disclosing legitimate nuclear safety-related information or concerns. The intent is to impose an affirmative duty to protect worker safety at DOE nuclear facilities by subjecting chilling effect reprisals against contractor employees to PAAA enforcement. Clearly, other sanctions might be available to protect the whistleblower, such as through other DOE or Department of Labor remedial actions against the employer, or judicial actions brought under whistleblower statutes or common-law tort principles. But the safety of all workers at DOE facilities can only be protected by DOE contractors, which is the objective of an effective DOE enforcement program designed to ensure timely and complete disclosure of information that might be pertinent to safe nuclear operations.

Any deterrent to that flow of information can potentially constitute a violation of DOE Nuclear Safety Requirements as imposed through the DOE Whistleblower protection provisions. This is in accord with the NRC enforcement policy which also subjects licensees to possible enforcement action under the NRC Whistleblower regulation if they discriminate against employees raising safety issues or otherwise engaging in protected activities as established in the Energy Reorganization Act or the Atomic Energy Act. See 10 CFR 50.7.

DOE cannot specify or predetermine the universe of DOE regulations that will relate to nuclear safety because all of the nuclear activities and

programmatic areas that will be subject to rulemaking are unknown at this time. Future events, operational activities or new information pertaining to DOE nuclear facilities could dictate the need for additional or expanded regulations to control or improve nuclear activities. As previously discussed, these requirements will be promulgated consistent with appropriate rulemaking procedures and, therefore, will not be imposed in an arbitrary or unfair manner.

For the most part, the commenters have narrowly construed "nuclear safety" to require a direct nexus between the regulated activity and public health and safety such that a violation of the requirement would be the immediate cause of a health or safety impact. For example, one comment urged that DOE specify as DOE Nuclear Safety Requirements only those regulations that pertain to the "control or mitigation of radiation." As we have explained, the nexus does not need to be so direct or the definition so narrow. Indeed, the nexus might be as broad as a requirement to develop, maintain, and control information or a requirement to implement a quality assurance plan that relates to nuclear activities. A violation of an information or quality assurance requirement may not result in a direct or potential immediate threat to health or safety, but it could be an important link in a sequence of activities or events that could lead to a nuclear incident or a radiological exposure. Thus, these requirements are properly DOE Nuclear Safety Requirements.

b. Enforcement of compliance orders. DOE proposes to assess civil penalties for violations of Compliance Orders issued pursuant to 10 CFR 820.41. See 10 CFR 820.20. Comments questioned the validity of this enforcement option because they allege it was not authorized by the PAAA and it is not consistent with APA notice and comment provisions. With respect to statutory authority, DOE was given specific PAAA authorization to penalize violations of any "order related to nuclear safety ". 42 U.S.C. 2282a. With respect to consistency with APA provisions, Compliance Orders are "orders" rather than "rules" within the meaning of 5 U.S.C. and therefore are not subject to notice and comment rulemaking requirements under 5 U.S.C. 553. Accordingly, their issuance is fully consistent with all relevant provisions of the APA and DOEOA.

c. Enforcement of technical safety requirements. Operations at DOE nuclear reactors are governed by facility-specific Technical Specifications (Tech Specs) and operations at most non-reactor nuclear facilities are governed by facility-specific Operational Safety Requirements (OSRs). Proposed subpart G of part 820 would have subjected a contractor to PAAA enforcement for nuclear safety-related noncompliances with applicable Tech Specs or OSRs. Some commenters have suggested that this subpart G enforcement provision is inconsistent with PAAA authority (not a rule, regulation or order) and APA (not issued with notice and comment opportunity).

DOE recognizes that current Tech Specs/OSRs were not developed and implemented with civil penalty enforcement sanctions in mind and many are not consistent with current standards in scope, form, content, and quality. In addition, many of the current Tech Specs/OSRs contain conditions that may not be pertinent to safe operation or may be inconsistent with other conditions. Because of these and other considerations, DOE has decided as a matter of policy that DOE and contractor resources would be best utilized and nuclear safety would be better improved by revising current Tech Specs/OSRs to meet the requirements that will be imposed by proposed □ 830.320. Accordingly, it is deleting subpart G from part 820. At the same time, DOE is reemphasizing

the need for contractors to remedy the deficiencies in current Tech Specs/OSRs through revisions prior to the adoption of proposed 830.320 which will require the development and DOE approval of new facility-specific TSRs. When proposed 830.320 is fully implemented, DOE will vigorously pursue enforcement actions against any violations of its requirements concerning TSRs because these operational limits truly provide essential margins of safety at nuclear facilities. Since proposed 830.320 will constitute a DOE Nuclear Safety Requirement, contractors will be subject to PAAA enforcement for violations of TSRs required by proposed 830.320.

d. Enforcement of a program or plan required to Implement a CFR Regulation or a Compliance Order. Proposed 10 CFR 820.20(d)(3) indicated that violations of any program, plan, or other provision required to implement a DOE regulation or Compliance Order might be subject to PAAA civil penalties. Comments stated that such action is illegal under the APA and DOEOA. DOE does not agree with these comments since the requirement to develop and implement a program or plan will be in fulfillment of an explicit provision in a regulation or Compliance Order properly promulgated. These program or plan provisions will be binding on appropriate contractor activities and will be subject to compliance evaluations and corrective actions. Noncompliances or deficiencies with respect to a program or plan required by a DOE Nuclear Safety Requirement identified in 820.20(b) (i.e., a regulatory or Compliance Order requirement) will be a violation of the underlying requirement and provide a basis for a PAAA civil penalty.

The identification of regulatory and Compliance Order requirements in 820.20(b) provides a basis to assess civil penalties for violations of program or plan provisions required to implement these requirements. Thus, non-compliance with such a program or plan would be a violation of a nuclear safety requirement even if not specified in 820.20(b). However, to fairly apprise persons subject to civil penalties of the binding nature of program or plan provisions required to implement regulatory or Compliance Order requirements, DOE has retained the reference to programs and plans in 820.20(b).

Finally, proposed 820.20(d) has been redesignated so that it is now 820.20(b). This was a stylistic revision to indicate a preference for defining the "basis" for the assessment of civil penalties before defining the "exemptions" from the assessment of civil penalties instead of vice-versa.

e. Definition of contractor. The rule has been amended to add a definition of "contractor" so that it is clear that the term will encompass subcontractors and suppliers of indemnified contractors for purposes of PAAA enforcement. This definition is consistent with section 274A of the PAAA (42 U.S.C. 2282a) incorporated as section 234A of the AEA.

f. Definition of person. Several comments were directed to the comprehensive definition of any "person" subject to DOE Nuclear Safety Requirements and enforcement actions as a result of being involved in DOE nuclear activities. These comments questioned the legality of holding contractors responsible for violations committed by persons not in a contractual relationship with DOE, such as subcontractors or suppliers to contractors. Another comment noted that a parent corporation legally cannot be responsible for violations and penalties assessed against a subsidiary.

DOE considered and discussed some of these contractual and legal issues in

the NOPR. The NOPR indicated that the definition of "person" in 10 CFR 820.2 was the same definition as in the Atomic Energy Act of 1954 (AEA) (42 U.S.C. 2011 et seq.) which is a statutory authority for DOE activities. This all-encompassing definition ensures all entities that may be DOE contractors (e.g., corporations, partnerships, sole proprietorships, institutions, etc.) are subject to the provisions of part 820. Furthermore, the PAAA grant of DOE enforcement authority is independent of contractual relationships and the PAAA specifically authorized civil penalties to be assessed against suppliers and subcontractors of DOE contractors. See 42 U.S.C. 2282a. In addition, DOE indicated in the NOPR that affiliated entities, such as parent corporations, would be responsible for any penalty assessed against the contractor.

Although the DOE General Statement of Enforcement Policy in appendix A to part 820 states that contractors, subcontractors, and suppliers shall be subject to civil penalties as a result of violations of DOE Nuclear Safety Requirements, the procedural rules in part 820 have been revised to also reflect this PAAA authorization of civil penalty assessment authority. Section 820.20(b) (formerly, □ 820.20(d)) has been revised to make clear that, in accordance with section 234A of the AEA, civil penalties may be assessed against any "person" that is a contractor indemnified under the AEA (including its subcontractors and suppliers) not otherwise exempted from the assessment of civil penalties.

Furthermore, consistent with the NOPR, the definition of "person" in □ 820.2 has been revised to reflect that affiliated entities, such as a parent corporation, may be responsible for any penalty assessed against the contractor. DOE believes the primary focus of its enforcement process should be the actual entity that conducts or is primarily responsible for a DOE activity. Therefore, DOE endeavors to ensure these entities are financially responsible. In accordance with the authority granted the Secretary under AEA Sec. 170 d(2) (42 U.S.C. 2209), indemnification policies and agreements will be reviewed and revised, as appropriate, to provide and maintain financial protection of such a type and in such amounts as shall be determined to cover public liability arising out of or in connection with the contractual activity. Independent subsidiaries will be required to maintain adequate financial protection for their activities. Various means exist to provide the requisite financial protection including the posting of a surety bond or a guarantee by a parent.

One comment questioned the wisdom of letting any "person" request the initiation of an investigation (10 CFR 820.21(b)) since this would allow foreign governments or any political subdivision of such government to request an investigation of a DOE nuclear activity. DOE does not believe it is prudent to preclude any nuclear safety investigation that is based on a reasonably credible source merely because the source may have reasons other than public health and safety as the motive. Sufficient investigative and evidentiary safeguards exist to assure that confidential or classified information is not disclosed and the rights of all persons are protected. See 10 CFR 820.12. Thus, except as clarified above, the concerns of commenters on the definition of a person are found to be without merit.

g. Definition of nuclear incident. Several comments suggested that the term "nuclear incident" be defined in order to ensure consistency with the required response to incidents involving radioactive materials. See e.g., AEA Sec. 11 q. (42 U.S.C. 2014 q.). One comment questioned whether mixed waste incidents would be considered a nuclear incident for purposes of part 820. DOE has

concluded that it is not necessary to define "nuclear incident" in part 820 because enforcement is dependent on violations of defined DOE Nuclear Safety Requirements rather than the occurrence of a "nuclear incident". To the extent the term "nuclear incident" must be defined for purposes of part 820, it will have the same meaning as in the Act. See 10 CFR 820.2(b). In sum, a definition of "nuclear incident" is not required under part 820.

h. Definition of DOE official. One comment expressed confusion regarding who may be a DOE Official for purposes of actions required under part 820. DOE Officials could include the Director of Enforcement for PAAA investigation and enforcement decisions; the General Counsel for an interpretation of a requirement; the appropriate Secretarial Officer for an exemption; the Deputy Assistant Secretary for Naval Reactors for activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note; and the Presiding Officer for an enforcement adjudication decision.

i. Definition of director. The proposed definition of Director referred to the Director of the Office of Nuclear Safety. As a result of internal reorganization since the issuance of the proposal, this reference is no longer accurate. The definition has been revised to refer to the DOE Official to whom the Secretary has assigned the authority to issue Notices of Violation under subpart B of part 820.

2. DOE Enforcement Process

a. NRC as model. Comments to both the NOI and the NOPR questioned whether the NRC enforcement program should be used as the model for the DOE enforcement program because of the difference between NRC licensees and DOE contractors. It is argued that DOE contractors have no economic incentive to violate requirements whereas NRC licensees may have an incentive to violate requirements or license conditions in order to keep their facilities in operation and producing income. Extending the argument, commenters assert that DOE contractors will not violate requirements with the same degree of willfulness as would a violator with a financial incentive. In short, the thrust of the comments is that the DOE liability and penalty provisions and policy should be more lenient than NRC's.

DOE considered and responded to this issue in the NOPR. The NOPR indicated that Congress enacted the PAAA penalty provisions to provide additional safety incentives for DOE contractors. DOE generally adopted the NRC system so that it could consider the unique circumstances that might be present in the DOE contractor system and mitigate or escalate the base penalty as appropriate. The differences between NRC licensee and DOE contractor situations have been recognized. DOE believes that flexibility in the enforcement policy will allow it to consider all relevant factors that may have a bearing on the circumstances of a violation. Further, DOE questions the underlying premise to the claim that there is never a financial incentive to operate facilities at variance with applicable DOE Nuclear Safety Requirements. For example, award fee production objectives may provide sufficient incentive to operate in a noncompliance condition in order to meet production goals.

b. DOE enforcement program and policy. The proposed DOE enforcement program and policy were discussed at length in the NOPR in response to NOI comments. Several comments have been offered to improve the process. One comment suggested that DOE should provide alternate dispute resolution and encourage the use of settlement conferences to avoid protracted litigation on contested

violations or to settle uncontested issues. DOE agrees with this comment. That is why an informal enforcement conference may be provided prior to issuance of a Preliminary Notice of Violation (10 CFR 820.22), settlement conferences are encouraged at any time during the enforcement process (10 CFR 820.23(a)), and a mechanism exists for Consent Orders (10 CFR 820.23(b)). However, one comment stated that it was unlawful and inappropriate to "compel" attendance at an informal conference. DOE believes that not only is it lawful to compel attendance by subpoena of any person who may have violated a DOE Nuclear Safety Requirement, but it would be in that person's best interests to attend to present facts which might have a crucial bearing on the enforcement investigation or the consideration of an appropriate penalty.

More importantly, DOE may want to compel attendance at an informal conference of persons who may have significant information concerning the alleged violation and who may only produce that information under the power of a subpoena. In this regard, one comment requested that such information produced at an informal conference be considered confidential. DOE notes that these informal conferences are predecisional. They will not normally be open to the public and there will be no transcript. See 10 CFR 820.22. While minutes of the conference will be written and maintained by DOE, proper requests for confidentiality or privilege will be considered and granted if appropriate.

It has been suggested that DOE PAAA enforcement should only be used for extraordinary or egregious occurrences. While the comment did not expound on this suggestion, DOE believes it has its roots in the same concerns that led to a number of NOI comments. That is, DOE should recognize its supervisory responsibility at DOE facilities; DOE should recognize the contractor funding limitations for needed improvements at these facilities; DOE should recognize its role in creating the noncompliance situation; DOE should recognize that contractors might not be in sufficient control of a situation or have proper knowledge of applicable requirements; and DOE, as mandated by the PAAA, should take into account the "ability to pay" and the "effect on ability to continue to do business" in determining the amount of any civil penalty. As indicated in the NOPR, DOE has considered all of these concerns in its adoption of the General Statement of Enforcement Policy. The DOE enforcement policy has sufficient flexibility to permit DOE to be firm but fair in the exercise of its authority so that all relevant mitigation factors are considered. DOE's consideration of these matters in the enforcement deliberative process is a compelling reason why the contractor should attend the informal conference.

A number of comments were submitted with respect to PAAA enforcement remedies. Several comments urged sanctions other than civil or criminal penalties for lesser violations-e.g., warning letters, contract penalties. The DOE enforcement process does, however, provide alternative resolution mechanisms. DOE can terminate investigations, enter into Consent Orders which might prescribe other appropriate remedies and corrective actions, and issue Compliance Orders to mandate appropriate remedies for existing or potential violations. In addition, the DOE enforcement policy permits DOE to refrain from issuing a Notice of Violation or a civil penalty in the exercise of its discretion. See part 820 appendix VIII.D. In appropriate minor and isolated occurrences, DOE will use its discretion to refrain from issuing Notices of Violation and treat the violation as a "noncompliance" which will be identified, evaluated, and tracked to determine generic or specific compliance problems. These alternatives provide a positive response to commenters on this issue since it is clear that to provide only contract remedies for violations

would be inconsistent with the PAAA authority granted by Congress.

An available remedy in the DOE enforcement process is the "modification, suspension, or recision of a contract". See 10 CFR 820.2. One comment stated that this remedy was not authorized by PAAA. While it is correct that PAAA subjected contractors to civil penalties for violations of DOE Nuclear Safety Requirements, the Secretary has independent power under the AEA and the DOE Act to authorize contract sanctions such as modification or termination. Thus, these sanctions may be incorporated in an enforcement action if properly authorized by the Secretary.

Other comments were directed at ways to improve the DOE enforcement program which were outside the rule or the policy, such as (1) ensure proper training of investigators, (2) establish a program to disseminate information of violations to all contractors, and (3) provide internal procedures to ensure enforcement consistency. DOE appreciates these comments and will encourage suggestions for improvements at all times. The above comments will be duly considered in the establishment of the DOE enforcement program. The processes and procedures of the DOE enforcement program will be set forth in the DOE Enforcement Manual. This Manual will be available to the public and DOE encourages suggestions to improve these processes for enforcement.

c. Information requirements. Section 820.11 imposes requirements on persons required to provide information to or maintain information for DOE-i.e., the information must be complete and accurate in all material respects; and the information pertaining to a violation of a DOE Nuclear Safety Requirement, a Nuclear Statute, or the AEA must not be concealed or destroyed. Several comments were raised regarding the parameters of these requirements.

Comments suggested that DOE should adopt a due diligence standard regarding the completeness and accuracy of information that might be reviewed or inspected by DOE. The thrust of this comment is that, despite the best efforts of a contractor to develop and maintain complete and accurate information in, for instance, design basis documentation, that information may not be adequately controlled due to the passage of time and changes to structures, systems, and components.

The short answer to this comment is that information required by DOE to be developed and maintained because of its safety significance will be required to be controlled despite revisions to the activities over time which are the subject of the information. Requirements on design basis, safety analyses, and other safety significant information will be established by DOE and will address the type, quantity, and time requirements of information that must be controlled. Any violation of these information requirements will subject the violator to PAAA civil penalties. Circumstances concerning the type, quantity, timing, control procedures, etc., relating to the information will be factors to be considered in the assessment and adjustment of a civil penalty.

For example, if initially inaccurate or incomplete information is corrected before detection of or reliance on that information by DOE and a full factual accounting is made, enforcement action will not normally be taken. DOE's emphasis will be on the prompt identification and correction of inaccurate/incomplete information by contractors. Similarly, if initially accurate information is later rendered inaccurate/incomplete by subsequent events, such as newly discovered information or technology advances, an enforcement action normally will not be taken if the outdated information is

identified and corrected in a timely manner by the contractor. On the other hand, if DOE discovers or relies on the outdated information before it is corrected, an enforcement action normally will be taken. In short, a contractor has an affirmative duty to update and maintain all information that is pertinent to nuclear safety.

The circumstances surrounding a failure to correct will be considered in the determination of the appropriate enforcement action or penalty. Circumstances which may be considered include: Significance of misinformation, opportunity and means to detect, timeliness of detection and correction, controls on development and maintenance of information, and other incidents of misinformation. In sum, violations for failure to develop, maintain, or provide required information will be considered on a case-by-case basis taking into account the facts and circumstances of the violation. DOE will reasonably enforce these violations to ensure that contractors have implemented effective processes to adequately develop, maintain, and control information that is significant to the safe conduct of their nuclear activities.

d. Special report orders. Any DOE Official, as defined above, may issue a Special Report Order (SRO). The SRO would require any person involved in a nuclear activity or otherwise subject to the jurisdiction of DOE to file a special report providing information relating to a DOE Nuclear Safety Requirement, the AEA, or a Nuclear Statute. See 10 CFR 820.8(b). One comment questioned DOE's authority to issue SROs which are required to be enforced pursuant to a United States District Court order per 820.8(g).

The authority for DOE to issue SROs is found in the General Authority provisions of the AEA. In Sec. 161(c), DOE is authorized to "make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes, the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify or appear and produce documents, or both, at any designated place." 42 U.S.C. 2201(c). The authority in Sec. 161 has been generally granted to DOE pursuant to Sec. 104(h) of the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.), and Sec. 301 of the DOEOA. See also Senate Report No. 93-980, 93d Cong., 2d Sess., 82-85 (1974). Sec. 642 of the DOEOA also authorizes the Secretary, in the absence of an express prohibition, to delegate functions to DOE officers and employees and to authorize "such successive redelegations of such functions within the Department as he may deem to be necessary or appropriate."

3. Regulatory Exemptions/Interpretations

a. Exemptions from DOE nuclear safety requirements. Processes for exemption relief from DOE Nuclear Safety Requirements are set forth in subpart E to part 820. It provides criteria and procedures for exemptions which are to be considered and granted if appropriate by the Secretarial Officer who is primarily responsible for the activity from which relief is requested. If relief is requested by a nuclear entity from provisions of proposed 10 CFR parts 834 or 835, the exemption must be considered and granted if appropriate by the Assistant Secretary for Environment, Safety and Health.

A few of the criteria have been clarified in the final subpart E. These

clarifications provide more detail on the special circumstances that may be considered by the Secretarial Officer when making exemption determinations. For example, 820.62(d) has been revised to provide temporary relief from the application of specified DOE Nuclear Safety Requirements when it can be demonstrated that special circumstances exist (e.g., a piece of redundant equipment breaks down and operational status is needed to comply with technical specifications) and the contractor is taking good faith actions to achieve compliance (e.g., the part has been ordered expeditiously). However, temporary relief can only be granted by the Secretarial Officer when all the criteria of 820.62 have been demonstrated-i.e., (a) authorized by law, (b) no undue risk to human health or safety, (c) consistent with safe operation of the facility, and (d) special circumstances exist.

Several comments faulted the exemption criteria, maintaining it does not provide relief in circumstances where scheduling, DOE funding, or other DOE activities contributed to the noncompliance condition. The exemption relief is either granted or denied based on considerations of: (1) Whether the relief would be authorized by law; (2) whether the relief would present an undue risk to human health or safety; (3) whether the relief would result in a condition that is consistent with the safe operation of a nuclear facility; and (4) whether other specified special circumstances exist to grant the relief. While time, money, and DOE contributions may be factors in the exemption considerations, the overall exemption must be consistent with and based on the factors in 820.62. The Secretarial Officer must also utilize any procedures deemed necessary and appropriate to administratively process and consider the exemption.

By issuing DOE Nuclear Safety Requirements through the rulemaking process, DOE is sending a strong message that it believes these requirements are important to nuclear safety and that exemptions should only be granted if they do not unduly jeopardize health and safety. Factors of time and money are secondary considerations after it has been determined that the relief is authorized by law and the exemption would not compromise health or safety.

However, DOE recognizes that, in some cases, it may be necessary to phase-in full compliance with certain requirements. For that reason, several requirements in proposed 10 CFR parts 830 and 835 provide expressly for implementation plans to be submitted by contractors and approved by DOE. Where there is no express provision for an implementation plan, it may be necessary to seek an exemption for phasing-in compliance. Subpart E has been revised to provide in 820.65 that DOE has the discretion to make an expedited exemption determination for implementation plans reasonably demonstrating that full compliance will be achieved within two years. The exemption process is expedited by eliminating the requirement to determine that special circumstances exist. Any implementation plan indicating that full compliance with specified requirements will not be achieved within two years must seek an exemption to those requirements pursuant to the regular exemption process (that is, special circumstances must be demonstrated).

One comment stated that a denial of an exemption request should be based on valid scientific evidence and not be based merely on the discretion of the Secretarial Officer. DOE concludes that the requirement that the exemption decision: (1) Be in writing, (2) set forth the reasons for the decision, and (3) be filed with the Office of the Docketing Clerk will provide sufficient safeguards against arbitrary decisionmaking.

It was also suggested that subpart E provide an appeal procedure from adverse exemption decisions by the Secretarial Officers. The rule has been revised to provide an appeal to the Secretary from exemption decisions by a Secretarial Officer. See 10 CFR 820.66. Accordingly, the final rule provides that within fifteen (15) days of the filing of an exemption decision by a Secretarial Officer, the person requesting the exemption may file a Request to Review with the Secretary, or the Secretary may decide, sua sponte, to review. If no Request to Review is filed or the Secretary does not decide to review sua sponte within 15 days, the exemption decision becomes a Final Order. If action is taken to review, the Secretary shall have thirty (30) days (unless extended in writing) to review the exemption decision and any requested relief. If the Secretary takes no action, then the decision becomes a Final Order at the end of the 30 day period. If the Secretary takes action, then the Secretary's decision will constitute a Final Order when it is filed.

b. Interpretations of DOE nuclear safety requirements. Pursuant to subpart D part 820, the General Counsel is responsible for formulating and issuing any interpretation concerning the AEA, a Nuclear Statute, or DOE Nuclear Safety Requirements and all interpretations must be filed with the Office of the Docketing Clerk. Most comments on this procedural mechanism concerned the adequacy of this interpretation process in terms of consistency, technical adequacy, finality, and continuing validity.

DOE believes that consistency of interpretations is ensured by having the General Counsel develop and issue the interpretation. A federal agency's legal office is normally the organization responsible for issuing opinions on or interpretations of legal requirements applicable to or promulgated by that agency. This helps assure consistency and legal accuracy. Filing the interpretations in an appropriate docket file in the Office of the Docketing Clerk also assures consistency by having a central, accessible, and lasting repository for the interpretations. This file will be open to contractors and the public except for classified or privileged opinions.

The General Counsel will not formulate or issue interpretations on technical matters without appropriate technical input from DOE Field or Headquarters personnel. Section 820.52 permits the General Counsel to utilize any procedure which is appropriate to comply with these responsibilities. A requirement mandating that the General Counsel utilize appropriate technical resources, as one comment urged, is not considered necessary as DOE concurrences on technical matters are a normal internal function for adequacy, accuracy, and consistency. These normal internal reviews are DOE administrative functions that do not need to be prescribed by regulatory requirements.

Finally, one comment urged a process to review and validate past interpretations. The validation of past interpretations will be a continual process through the issuance of interpretations, the development and implementation of new or revised regulations, and the request for new interpretations based on changed conditions. These processes are sufficient to assure the continued validity of past interpretations.

4. Enforcement Adjudication

a. Notices of violation. A PAAA enforcement adjudication begins when DOE issues a Preliminary Notice of Violation and a reply is filed pursuant to the provisions of 10 CFR 820.24. After reviewing the reply, DOE may issue a Final

Notice of Violation which, if contested, initiates an enforcement hearing process. See 10 CFR 820.25, 820.26. It is noted that in the proposed rule, this hearing process was termed a "PAAA adjudication." In the final rule, this hearing process is called an "enforcement adjudication" since the term is more generally understood in legal nomenclature.

One comment suggested that the procedures for the issuance of preliminary and final notices of violation be combined and that a single Notice of Violation be issued. However, three things are accomplished by the issuance of a Preliminary Notice of Violation (PNOV). First, the respondent may terminate the enforcement action by agreeing to comply with the proposed remedy and waiving any right to contest the notice or the remedy prior to issuance of a Final Notice of Violation. Second, DOE may terminate the enforcement action upon consideration of the reply to the PNOV. Third, the PNOV provides a vehicle for settlement conferences to be held at any time which may facilitate resolution of some or all of the matters in controversy. These could be substantial accomplishments served by the PNOV.

Another comment noted that the provisions for the issuance of Notices of Violation did not set forth requirements as to what should be specified in the notices-i.e., what nuclear safety or statutory requirements were violated and the facts surrounding the violation. DOE agrees that the alleged violator should be provided sufficient facts in the notice in order to effectively reply or consider the other available options. That is why the definition of "Preliminary Notice of Violation" and "Final Notice of Violation" in □ 820.2(a) specified the facts that were required in the notices. Both □□ 820.24 and 820.25 have been clarified to ensure that proper information similar to □ 820.2(a) is specified in the notices of violation.

One comment stated that Notices of Violation should disclose the federal court action that is required by 42 U.S.C. 2282a(c)(3) for DOE to obtain an order of judgment for an unpaid assessment. DOE does not believe it is appropriate or required to inform the respondent that if it elects to waive further legal proceedings and the civil penalty is assessed but not paid, further federal court judicial review is required when DOE seeks judicial authority to enforce the assessment.

Judicial review of final administrative decisions is always available by law (5 U.S.C. 702) and usually is provided in individual statutes. PAAA provides this right, and DOE recognizes this right of judicial review in 10 CFR 820.25(b)(2). If the Final Notice of Violation contains a civil penalty, it will request that the respondent elect: (1) To waive further proceedings; (2) to request an on-the-record adjudication; or (3) to notify DOE of the intent to seek judicial review. Accordingly, the elections available to the respondent in the Final Notice of Violation are fully consistent with APA and PAAA provisions.

As originally proposed, replies to notices of violation were required to be filed within 15 days. One comment complained that this was insufficient time to file a reply, particularly if the enforcement matter is technical and complex. DOE agrees that 15 days is insufficient to respond to notices of violation because the reply must respond to the factual and legal issues raised in the notice. Accordingly, the time limit for reply in 10 CFR 820.24(b) and 820.25(b) has been changed to 30 days. Since the respondent should have been apprised of the facts surrounding the notice by reason of the investigation and the informal conference, 30 days should be sufficient in

almost all cases. If more time is needed because of the complexity or new issues, the respondent could request an extension from the Director upon good cause shown.

An election to initiate an on-the-record adjudication is only available if the Final Notice of Violation contains a civil penalty. One comment indicated that an enforcement adjudication should also be available if the notice did not contain a civil penalty because the adverse implications of even a minor violation might impact contract award fees. As a legal matter, however, the PAAA authorized on-the-record adjudication only when civil penalties were assessed. See AEA Sec. 234A. As a practical matter, it is unlikely that a minor violation without a civil penalty assessed could affect contract award fees to such an extent that a contractor would be willing to engage in protracted litigation in a attempt to vindicate its position. In order to conserve scarce DOE and judicial resources, Congress did not authorize adjudication under these circumstances. Thus, an on-the-record enforcement adjudication is only available as a remedy option if civil penalties are assessed.

In the same vein, one comment suggested that nonprofit and educational contractors exempt from civil penalties in accordance with 10 CFR 820.20(b), should also have the right to an enforcement adjudication because they might be subject to criminal penalties. Notwithstanding the fact that exempt contractors do not have a right to an enforcement adjudication, they will have a right to trial and the other rights accorded defendants in the criminal justice system if and when they become subject to criminal sanctions. Their right to appropriately answer and defend the charges against them is thus fully protected.

Another comment stated that the right to an enforcement adjudication should be expanded to include those persons who are not respondents to a Notice of Violation but might be required to take or refrain from required actions pursuant to a Consent Order or any other settlement of an enforcement matter. This might include suppliers or subcontractors who might be affected by the actions required to resolve a violation of a contractor. While DOE recognizes that these persons might be affected by actions required to resolve contractor violations, their remedy lies not in the DOE enforcement process but in contract terms and conditions that address disputes or changed conditions. If a supplier or subcontractor commits a violation of a DOE Nuclear Safety Requirement and becomes subject to a PAAA civil penalty, as discussed above, then it will have the right to an enforcement adjudication. Similarly, if a person could be liable for payment of part or all of the penalty assessed against the respondent, then it could petition the Presiding Officer to intervene as a party in the enforcement adjudication. See 10 CFR 820.37(a).

b. Prehearing procedures. If a respondent files a request for an on-the-record adjudication, an enforcement adjudication is initiated and an administrative law judge is appointed to preside. Section 820.27 requires the respondent must also file a written answer to the Final Notice of Violation. As originally proposed, the answer was due at the same time the request was filed-that is, within 15 days of the Final Notice of Violation. Several comments indicated that this was insufficient time to file an answer. DOE agrees that further time should be allowed. Since 820.25(b) has been revised to provide 30 days for an election to be filed requesting an enforcement adjudication, this will effectively revise 820.27(a) to provide 30 days for an answer to be filed responding to the Final Notice of Violation.

Once an answer has been filed, the Presiding Officer will establish a schedule and direct the parties to appear at a prehearing conference. Discovery beyond the exchange of witness lists and documents, including oral depositions, may be permitted by the Presiding Officer based on a consideration of the factors set forth in 10 CFR 820.28(f). One comment interpreted this provision as precluding discovery against DOE. This interpretation is incorrect. A full range of discovery will be available against DOE upon a proper showing to the Presiding Officer.

c. Ex parte discussions/separation of functions. Once a respondent has requested an enforcement adjudication, ex parte and separation of function requirements preclude discussions about the merits of the case between the Presiding Officer (the DOE Official responsible for adjudication decisionmaking) and any party to the proceeding, including any DOE staff member who performs an investigative or prosecutorial function in that specific proceeding or any factually related proceeding. See 10 CFR 820.35 and 820.3. One comment suggested that the distinction between the time an on-the-record enforcement adjudication is "requested" in 820.3(a) and the time an adjudication is "commenced" in 820.3(b) should be clarified. DOE agrees that this distinction could be confusing and thus has revised 820.3(b) to reflect the ex parte prohibition against the Director once an adjudication has been "requested".

d. Evidentiary matters during investigation or hearing. Part 820.8 allows a DOE Official to obtain information or evidence for the full and complete investigation of any matter related to a DOE nuclear activity and, in particular, to determine compliance with applicable DOE Nuclear Safety Requirements. This section has been clarified to indicate that the taking of information or evidence by DOE Officials is not limited to only those matters that will result in enforcement actions. For example, DOE Officials have the authority to subpoena documents to obtain information to support exemption or interpretation decisions requested pursuant to the provisions of subparts D or E.

Section 820.8(j) is discretionary in terms of whether subpoenaed statements or testimony during an investigation will be recorded. One comment suggested that all testimony compelled by subpoena during an enforcement investigation should be recorded and that the witness should be provided with the transcript. The purpose of discretionary recording is that during an investigation it might be more effective to gather factual information by an informal interrogation. Certain witnesses feel more inclined to give complete and accurate information if their statements are not under oath and/or recorded. Other witnesses may have no personal knowledge of factual matters but may identify others who do have knowledge. Such interviews are brief and need not be recorded to preserve the information. It is therefore unduly costly and cumbersome to hamper the investigative process in the manner proposed. It is thus appropriate to give the DOE Official discretion in the DOE fact-finding mission. If witness' statements are to be used at an enforcement adjudication, they must be in writing and verified by the witness. When placed into evidence, these statements would be subject to cross-examination and thus all defendants' rights will be adequately protected.

In this regard, 10 CFR 820.8 has been clarified to indicate the distinction between statements of a potential witness and testimony of an actual witness. Factual statements made during investigations do not need to be recorded. But

if those statements are to be used as evidence during an enforcement adjudication, they need to be in writing and verified, submitted as prefiled testimony, affirmed under oath, and subjected to cross-examination, all in accordance with the provisions of 820.29(c).

Pursuant to 10 CFR 820.8(k), witnesses giving statements during investigations or testimony during hearings can be sequestered during examination. One comment raised a due process argument that all parties should have the right of cross-examination of the sequestered witness. However, the purpose of sequestration is to exclude other witnesses and their attorneys from the examination to preclude possible collaboration on the factual issues or otherwise impair the integrity of the inquiry. During an investigation there is no right of cross-examination of potential witnesses giving statements. During an enforcement adjudication hearing, there would normally be only two parties-DOE and the contractor. No party would be excluded from cross-examination of witnesses' testimony under these circumstances.

In addition, since witnesses' testimony is prefiled, all witnesses know in advance the basic positions to be taken by other witnesses. Accordingly, the value of sequestration during presentation of a case-in-chief is minimal and should only be granted by the Presiding Officer when a clear need arises and a convincing case is made by one of the parties that sequestration is needed to develop a full and complete record. For example, DOE may request sequestration of defense witnesses if additional facts are disclosed after the testimony has been filed that relate to the alleged violation and DOE wants to question each witness about those newly-discovered facts. In this situation, sequestration would allow DOE to question each witness about those facts without fear that other testimony might taint or detract from the objectivity of that witnesses' testimony. Similarly, intervening facts may have a crucial bearing on a contractor's case and it might request sequestration of prosecution witnesses to preclude collaboration on or prejudice of those factual matters.

As indicated in 10 CFR 820.29(a), hearings will be conducted in accordance with the Federal Rules of Evidence. Consistent with normal practice in administrative hearings, the Presiding Officer will have broad discretion to admit relevant and material evidence. Comments requested clarification or amplification regarding the rules of evidence and the examination of witnesses. One comment questioned whether the prohibition of "direct oral testimony" except as permitted by the Presiding Officer (see 10 CFR 820.29(c)) should apply to oral rebuttal testimony. The evidentiary procedures established by part 820 recognize that in complex and technical adjudications all parties should be fairly apprised of the evidence supporting and rebutting their respective positions on the issues. There should be no evidentiary "surprises" and prefiled direct testimony and verified witness statements should facilitate the fair and expeditious resolution of the issues. However, the general prohibition against oral direct testimony does not apply to rebuttal testimony which the Presiding Officer may allow as a result of the cross-examination of a witness. Oral rebuttal testimony would be allowed in circumstances where cross-examination of a witness reveals a statement of fact or opinion that was not disclosed in a prior statement and fairness requires a chance to present rebutting testimony through a "live" witness.

Section 820.29(d) states that each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence. One comment suggested that DOE should have the burden of proving violations by "clear and convincing" evidence. However, that standard of proof is not

appropriate for administrative determinations. It is well settled that generally an agency must prove its case by a preponderance of the evidence and need not meet the additional burden of the standard of clear and convincing evidence. Steadman v. SEC, 450 U.S. 91 (1981).

B. Enforcement Policy Comments

1. Purpose of Enforcement Policy

Many comments were received regarding the overall fairness of the DOE enforcement policy and the need to ensure a consistent and equitable enforcement process. These comments were centered on a concern that DOE's enforcement authority might be more focused on implementation of punitive sanctions rather than the reasonable exercise of discretion and restraint based on the unique factual circumstances of the violation.

It is clear that DOE does not intend to exercise its enforcement discretion in a heavy handed and unreasonable manner. The General Statement of Enforcement Policy (Appendix A to this part) specifically states that the purpose of the DOE enforcement program is to promote and protect health and safety at DOE facilities by providing positive incentives for a DOE contractor to promptly identify, assess, report, and correct nuclear safety deficiencies. DOE is confident that, in most circumstances, these positive incentives will help ensure compliance, deter possible future violations, and encourage the continuous overall improvement of operations at DOE nuclear facilities. DOE wants to emphatically restate and reinforce that enforcement objective with this publication of the final enforcement policy.

The DOE goal in the compliance arena is to enhance and protect the radiological health and safety of the public and workers at DOE facilities by fostering a culture among both the DOE line organizations and the contractors that actively seeks not only to attain compliance with DOE nuclear safety requirements but to sustain it. The DOE enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for the open and prompt identification and reporting of noncompliances, and the initiation of comprehensive corrective actions to resolve both the noncompliance conditions and the program or process deficiencies that led to the noncompliance.

In the development of the DOE enforcement policy, DOE recognized that the reasonable exercise of its enforcement authority would reduce the likelihood of serious incidents. This can be accomplished by providing greater emphasis on a culture of safety in existing DOE operations, and strong incentives for contractors to identify and correct noncompliances. DOE wants to facilitate, encourage, and support contractor initiatives for the prompt identification and correction of problems. The effectiveness of these contractor initiatives and activities will be given significant weight in exercising enforcement discretion.

The PAAA provides DOE with the discretionary authority to compromise, modify, or remit civil penalties with or without conditions. In implementing the PAAA, DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate discretion in taking any enforcement action and proposing any penalty. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of safety requirements to nuclear facilities and by promoting and coordinating the proper contractor and

DOE safety compliance attitude toward those requirements. DOE is confident that the reasonable exercise of enforcement authority, coupled with the appropriate application of safety requirements to nuclear facilities, will help assure a proper and continuing level of safety vigilance and result in a sound enforcement program.

These concepts of a sound and viable enforcement program have been restated in the Introduction and Purpose sections of the final statement of enforcement policy. Those sections have been revised to reflect DOE's renewed emphasis on safety and an enforcement program that has been developed and will be implemented with objectives to achieve safety inquisitiveness and a way of operations that stresses voluntary compliance with applicable safety requirements. Voluntary compliance through effective contractor initiatives and activities is a cornerstone of the DOE enforcement program.

As indicated, DOE will consider contractor voluntary compliance initiatives and activities, including whether any DOE actions had implications on the effectiveness of those activities, in the exercise of enforcement authority. Contrary to concerns stated in several comments, the discretionary aspects of DOE enforcement authority is properly set forth in the policy statement rather than being incorporated into a substantive or procedural rule. The ability to compromise, modify, or remit civil penalties reflects DOE's intent to exercise discretionary enforcement functions based on the consideration of the voluntary compliance initiatives and activities noted above and stated in the enforcement policy. In order to meet its statutory mandate, flexibility in the enforcement of safety requirements must be maintained. However, the public has the right to be informed of and guided by the types of considerations DOE will utilize when making its enforcement determinations and the policy statement usefully serves this role. DOE will consider future revisions to the policy based on the success of the compliance assurance programs implemented by DOE contractors.

2. Application of DOE Nuclear Safety Requirements to Nuclear Facilities

DOE recognizes that the scope of and potential hazard from DOE nuclear activities may vary significantly among categories of facilities. This wide variance in activities at nuclear facilities has caused uncertainty regarding whether those activities will be subject to all or only part of (or exempt from) the DOE Nuclear Safety Requirements when they are implemented in the CFR. DOE believes that while regulatory requirements are generally applicably they should be enforced at each category of facility in a manner that is commensurate with the health and safety potential hazard from the nuclear activities conducted therein. For example, Table 1A in appendix A to part 820 reflects this graded approach to facility classification and allows DOE to apply civil penalties commensurate with the potential hazard from nuclear activities.

Furthermore, DOE is compiling a facility list that will identify all DOE nuclear facilities and group them in categories depending on nuclear activities conducted at those facilities. DOE also intends to develop a matrix that will generally describe the level of compliance with various types of requirements which will be expected at each category of facilities. During the development of the matrix, DOE may consider whether some categories of facilities should be granted a full or partial exclusion from certain specified requirements. Any such categorical exclusion would, at a minimum, be based on the criteria set forth in □ 820.62.

This classification process will ensure that PAAA civil penalties will appropriately reflect the severity of the hazards to the public or workers that might result from activities at each facility which are not in conformance with its requirements. The facility list and matrix will be developed as reference tools and are intended to assist contractors in their compliance efforts. Their duty to comply, therefore, is not suspended until the issuance of a final list and matrix. Compliance efforts must begin with the effective date of each DOE Nuclear Safety Requirement and/or as established in DOE-approved implementation plans.

3. Severity of Violations

One aspect of DOE's discretionary enforcement authority is the designation of a severity level for violations of nuclear safety requirements. In accordance with the enforcement policy (Section VI), this designation is based on the relative safety significance of the violation. The most significant violations (Severity Level I) are defined as those which involve actual or high potential for adverse impact on the safety of the public or workers at DOE facilities. At the other end of the scale, Severity Level III violations are less serious but are more than a minor concern: i.e., if left uncorrected they could lead to a more serious concern.

In addition, DOE has the discretion to treat isolated minor violations as "noncompliances". Noncompliances will not be the subject of formal enforcement action through the issuance of a Notice of Violation. They, however, will be reported to and tracked by the Director to assure proper corrective actions are taken and to determine whether they are recurring on a generic, facility-specific, or contractor-specific basis. If noncompliances are recurring on a generic basis across the DOE complex, they may be indicative of a need to reconsider the regulatory treatment of the area in which the noncompliances are recurring. If noncompliances are recurring because of contractor or facility compliance problems, DOE may choose in its discretion to consider the noncompliances in the aggregate as a more serious concern warranting issuance of a Notice of Violation and a possible civil penalty.

This severity level or noncompliance designation framework for contractor violations is obviously discretionary. Comments on this issue were directed at the discretionary nature of DOE's actions. Most wanted more definition or detail on some of the factors that will determine the severity level such as the following: The potential adverse impact of the violation, whether there are related minor violations, the nature of recurring violations, contractor culpability related to the violation, senior management involvement, the duration of the violation, the past performance of contractor in compliance initiatives, prior notice of the violation, and whether multiple examples of a particular violation were identified.

The relative weight given to all of these factors in arriving at the appropriate severity level or designation of noncompliance will be dependent on the unique factual circumstances of each case. In furtherance of its goal of voluntary compliance, DOE must retain an appropriate level of enforcement discretion that is not amenable to exact definition. Nor is it possible to define agency action in response to hypothetical events. DOE will appropriately follow the general guidance that is set forth in this enforcement policy. But it will also shape the enforcement sanction based on a number of factors that are both within and outside the control of the

contractor, and are wholly dependent on the particular facts of the case. These fact-dependent considerations should not, and need not be prescriptive in order to shape an appropriate enforcement action and sanction.

By the same token, consideration of these factors will prevent unbridled enforcement discretion. These factors are not vague or unknown concepts to contractors. DOE contractors are generally familiar with the set of expectations that are attached to these factors in the context of an enforcement action. Further, DOE will continue to engage in a dialogue with individual contractors to enhance the clarity of compliance requirements and expectations. If DOE consideration of these factors should result in a DOE enforcement action, the Notice of Violation will contain detailed information regarding the violation, and the facts considered relevant by DOE to support the recommended action. See 10 CFR 820.24.

The degree and amount of evidence necessary to support a designation of severity level is a function of the significance and complexity of the violation. Consideration and documentation of the designation of severity level will address the following basic evidentiary questions relating to the existence and circumstances of the violation as appropriate:

What requirement was violated?

How was the requirement violated?

What was the safety significance of the violation?

When was the requirement violated and what was the duration of the violation?

By whom was the requirement violated?

What were the technical, programmatic, or managerial causes of the violation?

Were there multiple examples of a particular violation?

Should the contractor have been aware or did it have prior notice of the violation?

Was management involved directly or indirectly in the violation?

Once the circumstances surrounding the existence of a violation are understood and documented, the significance and the commensurate severity level will be determined based on the evidence of the case and the guidance in the enforcement policy.

Several comments claimed that the enforcement policy did not give adequate guidance concerning the application of "recurring" and "multiple" violations as used in Section VI to determine the severity level. Recurring or repetitive violations are those violations that reasonably could have been prevented by a contractor's corrective action for a previous similar violation or noncompliance condition which has or should have been previously documented. They are of concern because DOE expects a contractor's corrective actions to be effective in eliminating repeated violations. Effective corrective action is a primary objective of a contractor's compliance assurance initiatives.

Therefore, the failure to correct past noncompliances/violations is cause for special attention and consideration of escalated enforcement action by designation of a higher severity level.

Multiple violations are those that have the same underlying cause or programmatic deficiency, or are those which contributed to or were the unavoidable consequence of the underlying problem. For example, multiple related violations that result from inadequate training, procedures, safety evaluations, management or quality controls might be aggregated as violations of a programmatic deficiency. Depending on the number and nature of the multiple violations, DOE has the discretion to consider an escalation of the severity level. A group of similar noncompliances can also be aggregated and designated a violation at the appropriate severity level.

Aggregation of violations for designation of a severity level should not be confused with the use of multiple examples of a violation of a specific requirement. These are used to define the scope or extent of a problem, but are cited as one violation in the Notice of Violation. Multiple examples are usually preceded by the words "contrary to" in the notice to indicate their use as examples of the violation.

4. Determination of Civil Penalty

After a severity level is determined as discussed above, the amount of any civil penalty is determined. A determination of the monetary amount of the civil penalty is a two-part process. First, DOE will determine the base civil penalty to be imposed by reference to: (1) The facility category as determined by table 1A of appendix A to this part, and (2) the percentage of the table 1A amount determined by the severity level of the violation as depicted in table 1B of appendix A. Next, the base penalty will be escalated or mitigated by the adjustment factors or totally excused by the exercise of discretion as permitted by Section VIII of appendix A. This process for determining the civil penalty recognizes the potential health or safety implication by the type of DOE facility (e.g., a violation of a nuclear safety requirement at an operating Category A DOE reactor could potentially have a greater impact on human health and safety than a similar violation at a warehouse storing low level nuclear waste material) and the commensurate due diligence expected from contractors to comply with DOE Nuclear Safety Requirements applicable to their nuclear facilities, the effectiveness of voluntary compliance activities of the contractor, and DOE's role, if any, in the violation and further amplified in the DOE Enforcement Manual.

These factors are all described in the General Statement of Enforcement Policy. They differ from the factors to be considered in the designation of severity level because they are largely unrelated to the factual circumstances surrounding the existence of the violation itself. The civil penalty adjustment factors pertain to the effectiveness of contractor activities to identify and resolve both the noncompliance condition and the program or process deficiency that led to the noncompliance.

Comments to the civil penalty determination process were varied and many. Many comments raised a concern about how a contribution of DOE to the noncompliance condition that resulted in a violation may be considered. Several comments suggested that inadequate DOE direction should be given greater weight in the mitigation of the penalty. DOE recognizes that historically DOE direction from Field Offices, Headquarters, or in contract

terms relating to direction or authorization may, at times, not have had sufficient clarity or may have been at variance with the nuclear safety requirements or implementing guidance. DOE will work to eliminate these problems in the future. Acknowledging this potential, however, the enforcement policy clearly gives DOE discretion to consider all the facts and circumstances regarding DOE's involvement in the alleged violation.

Contractors will be given every opportunity in the investigation process, in the enforcement conference, and in response to the Preliminary Notice of Violation to present facts relating to this issue as well as all other issues. Depending on the facts, mitigation based on this factor might include termination of the enforcement action, or remission or reduction of the penalty.

DOE emphasizes that if a contractor becomes aware of conflicting or confusing DOE programmatic or contractual direction, it is obligated to promptly identify and report the problem and seek exemption or interpretive relief if necessary. As noted in the enforcement procedural rules and as discussed above, however, exemptions from or interpretations of DOE Nuclear Safety Requirements must be determined by DOE in accordance with proper procedures and must be in writing before they can be offered as probative evidence in support of relief from an enforcement action.

Lack of funding by DOE in order to attain compliance is a repeated contractor comment to the proposed DOE enforcement policy. This issue was specifically considered in the development of the enforcement policy. For the reasons discussed in section VIII therein, lack of funding by itself will not be considered as a mitigating factor in enforcement actions. A further comment on this issue stated that DOE contractors lack economic incentive to violate nuclear safety requirements. Presumably, this comment was raised on the theory that if an unsafe condition is found, DOE will provide the funds to correct it or the contractor will terminate operations. By comparison, NRC utility licensees have an economic incentive to continue to produce electricity even if, for instance, the terms of the applicable technical specifications contained in license conditions are violated. This argument would conclude that because there is no economic incentive to continue operations in an unsafe condition, DOE contractors would not act with the requisite intent to violate nuclear safety requirements.

It is true that in many circumstances DOE may contribute funding to correct an unsafe or noncompliance condition. Therefore, when such conditions are identified, they should be promptly reported and assessed. Thus, where it is appropriate, additional funding can be provided and corrective actions can be instituted by the contractor. However, it should be made clear that the failure of DOE to contribute funding does not, without more, exculpate the contractor. DOE will exercise appropriate enforcement discretion when considering all of the facts and circumstances consistent with the guidance in the enforcement policy. If the contractor acted promptly and effectively upon discovery of the violation/noncompliance condition, DOE has the discretion to refrain from issuing a Notice of Violation or may partially or totally mitigate the civil penalty.

Several comments raised concerns regarding the relationship between PAAA civil penalties and the award-fee process under the terms of M&O contracts. These comments, in essence, suggested that civil penalties were in conflict with various terms imposed by the contract or requirements imposed by DOE

Acquisition Regulations. Similar comments regarding the financial arrangements between DOE and its contractors were raised in response to the NOI and addressed by DOE in the NOPR. The short answer to all these comments and concerns is that Congress enacted civil penalty provisions in the PAAA to provide additional incentives, apart from contractual award-fee incentives, to comply with nuclear safety requirements. Thus, PAAA civil penalties and contractual award-fees are independent.

As noted in the NOPR, the independence of PAAA civil penalties and contractual award-fees could result in a contractor being paid a low award-fee for generally poor safety performance and incurring a civil penalty when specific violations are enforced. It was also noted in the NOPR that DOE recently amended its Acquisition Regulations to change the structure and amounts of fees to be paid its profit-making and fee bearing M&O contractors. These contractors will now be entitled to earn enhanced award fees if their nuclear safety compliance assurance initiatives and activities are effective. In short, Congress and DOE have instituted a financial and enforcement process to provide ample incentive to comply with DOE Nuclear Safety Requirements with requisite rewards and sanctions based on an indemnified contractor's (including subcontractors and suppliers) safety performance.

5. Subcontractors and Suppliers

DOE's enforcement policy is also applicable to subcontractors of and suppliers to indemnified DOE contractors. See Appendix A, Section IX; see also Definitions of Contractor and Person, Section I.A.6, supra. One comment stated that a civil penalty should not be imposed on a contractor based on vicarious liability. That is, where a violation is committed by a subcontractor or supplier, the partial liability with a resulting civil penalty should not be attributed to a contractor in the absence of a specific finding of fault on the part of the contractor. However, this argument ignores the reality of the liability and responsibility of the general contractor for the defects, shoddy workmanship, negligence, violations, etc. of a subcontractor of or supplier to the contractor. Similar to the construction industry, a general contractor can be liable for contract damages or code violations resulting from the work or products of its subcontractors or suppliers. A contractor's remedy in these situations is either appropriate indemnification clauses in its contracts, or legal suits that seek reimbursement for damages or penalties paid by the contractor. Notwithstanding a contractor's remedies, it does have a continuing obligation and responsibility to assure that a subcontractor's or supplier's performance is in compliance with applicable specifications and requirements. Therefore, DOE finds this concern to be without merit.

Another comment argued that appropriate mitigation factors should be applied to the proposed civil penalty of a contractor that had to use the services or products of a subcontractor or supplier solely because of federal government procurement law or practices. One theory underpinning this argument is that in many situations a M&O contractor is required to use a low bidder or a minority contractor and is therefore subject to services or products that may not be the best quality. Procurement law is well settled on the issue that no bid need be accepted where the bidder cannot reasonably demonstrate that it can comply with established or stated codes, standards, or requirements pertaining to performance. A nuclear safety violation will not be excused on the theory it resulted from federal procurement practices. It is the responsibility of the contractor to reject bids that cannot meet the quality or other specifications stated in the request-for-proposal (RFP) and to

inspect services and products to assure compliance with those specifications if the RFP is accepted.

6. Inaccurate and Incomplete Information

DOE, pursuant to rule (10 CFR 820.11) and policy (Section X. of appendix A to part 820), has the discretion to enforce violations of DOE Nuclear Safety Requirements that require contractors to provide accurate and complete information to DOE. These informational requirements pertain to both written and oral statements. Section X of the enforcement policy indicates how DOE will exercise discretion in its consideration of enforcement action for both written and oral statements. One comment was concerned that oral statements made to DOE are not inherently as reliable as written statements and, therefore, they should not be considered for enforcement action. This comment infers that oral statements might not be made with the requisite knowledge, authority, or formality to render them enforceable.

However, this comment goes to the heart of an enforcement problem that is addressed in Section X. DOE recognizes that in the past oral information in some situations may have been provided to DOE without the proper reflection or management review. At the same time, DOE must be able to rely on all information concerning significant nuclear safety matters. Accordingly, the enforcement policy gives DOE the discretion to consider all the facts and circumstances surrounding oral statements. Enforcement considerations will include those factors listed in Section X. As indicated therein, factors such as the significance of the information, the degree of intent or negligence involved in the communication, and the opportunity and the time available to correct the information before it was relied on by DOE, will be primary considerations. It bears repeating that, as a general matter, if an inaccurate statement (oral or written) is promptly identified and corrected before it is relied on by DOE, or before DOE raised a question about the information, no enforcement action will be taken. Similarly, if a previously accurate statement is later rendered inaccurate because of subsequent events (e.g., newly discovered information or advance in technology), enforcement action will not normally be taken if the outdated information is timely identified and corrected by the contractor.

III. Procedural Requirements

A. Review Under Executive Order 12291

Executive Order 12291, entitled "Federal Regulations," requires that a regulatory impact analysis be prepared prior to the promulgation of a "major rule." The DOE has concluded that this action is not a "major rule" for purposes of the Executive Order because its promulgation will not result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete in domestic or export markets.

Pursuant to section 3(c) of E.O. 12291, this final rule was submitted to the Director of the Office of Management and Budget. The Director has concluded his review under that Executive Order.

B. Review Under the Regulatory Flexibility Act

This final rule was reviewed under the Regulatory Flexibility Act of 1980, Public Law 96-354 (5 U.S.C. 601-612) which requires preparation of a regulatory flexibility analysis for any rule that is likely to have significant economic impact on a substantial number of small entities. DOE certifies that this regulation will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

C. Review Under the Paperwork Reduction Act

The information and reporting requirements herein are not substantially different from existing reporting requirements contained in DOE contracts with DOE prime contractors covered by these rules. DOE will submit any new information collection requests concerning these rules to the Office of Management and Budget for approval in accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. 3501.1 et seq., and the procedures implementing that Act, 5 CFR part 1320.

D. Review Under the National Environmental Policy Act

DOE has reviewed the promulgation of this final rule with respect to its responsibilities under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) and the Council on Environmental Quality regulations for implementing NEPA (40 CFR parts 1500-1508). The rule specifies procedures and standards for DOE enforcement actions under the PAAA. As noted in the CEQ regulations, major Federal actions "do not include bringing judicial or administrative civil or criminal enforcement actions" (40 CFR part 1508.18(a)). Therefore, DOE has concluded that the promulgation of this rule does not represent a major Federal action with significant effects on the human environment within the meaning of NEPA and that no further review under NEPA is required.

E. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency subject to Executive Order 12291 to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in paragraphs 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation: Specifies clearly any preemptive effect; describes any administrative proceedings; and defines key terms. DOE certifies that the final rule meets the requirements of paragraphs 2(a) and (b) of Executive Order 12778.

F. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987) requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the national government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a

federalism assessment to be used in all decisions involved in promulgation and implementing a policy action.

Today's final rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

List of Subjects in 10 CFR Part 820

Government contracts, DOE contracts, nuclear safety, civil penalty, criminal penalty.

Issued in Washington, DC on August 3, 1993.

Peter N. Brush,

Acting Assistant Secretary, Environment, Safety and Health, Department of Energy.

For the reasons set out in this preamble, chapter III of title 10 of the Code of Federal Regulations is amended by adding a new part 820 as set forth below.

PART 820-PROCEDURAL RULES FOR DOE NUCLEAR ACTIVITIES

Subpart A-General

Sec.

Subpart B-Enforcement Process

Authority: 42 U.S.C. 2201, 2282(a), 7191.

Subpart A-General

 820.1 -- Purpose and scope.

(a) Scope. This part sets forth the procedures to govern the conduct of persons involved in DOE nuclear activities and, in particular, to achieve compliance with the DOE Nuclear Safety Requirements by all persons subject to those requirements.

(b) Questions not addressed by these rules. Questions that are not addressed in this Part shall be resolved at the discretion of the DOE Official.

(c) Exclusion. Activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion are excluded from the requirements of subparts D and E of this part regarding interpretations and exemptions related to this part. The Deputy Assistance Secretary for Naval Reactors or his designee will be responsible for formulating, issuing, and maintaining appropriate records of interpretations and exemptions for these

facilities and activities.

 820. -- Definitions.

(a) The following definitions apply to this part:

Act or AEA means the Atomic Energy Act of 1954, as amended.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

Consent Agreement means any written document, signed by the Director and a person, containing stipulations or conclusions of fact or law and a remedy acceptable to both the Director and the person.

Contractor means any person under contract (or its subcontractors or suppliers) with the Department of Energy with the responsibility to perform activities or to supply services or products that are subject to DOE Nuclear Safety Requirements.

Department means the United States Department of Energy or any predecessor agency.

Director means the DOE Official to whom the Secretary has assigned the authority to issue Notices of Violation under Subpart B of this Part, including the Director of Enforcement, or his designee. With regard to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion, the Director shall mean the Deputy Assistant Secretary for Naval Reactors or his designee.

Docketing Clerk means the Office in DOE with which documents for an enforcement action must be filed and which is responsible for maintaining a record and a public docket for enforcement actions commencing with the filing of a Preliminary Notice of Violation. It is also the Office with which interpretations, exemptions, and any other documents designated by the Secretary shall be filed.

DOE means the United States Department of Energy or any predecessor agency.

DOE Nuclear Safety Requirements means the set of enforceable rules, regulations, or orders relating to nuclear safety adopted by DOE (or by another Agency if DOE specifically identifies the rule, regulation, or order) to govern the conduct of persons in connection with any DOE nuclear activity and includes any programs, plans, or other provisions intended to implement these rules, regulations, orders, a Nuclear Statute or the Act, including technical specifications and operational safety requirements for DOE nuclear facilities. For purposes of the assessment of civil penalties, the definition of DOE Nuclear Safety Requirements is limited to those identified in 10 CFR 820.20(b).

DOE Official means the person, or his designee, in charge of making a decision under this part.

Enforcement adjudication means the portion of the enforcement process that commences when a respondent requests an on-the-record adjudication of the

assessment of a civil penalty and terminates when a Presiding Officer files an initial decision.

Exemption means the final order that sets forth the relief, waiver, or release, either temporary or permanent, from a DOE Nuclear Safety Requirement, as granted by the appropriate Secretarial Officer pursuant to the provisions of subpart E of this part.

Filing means, except as otherwise specifically indicated, the completion of providing a document to the Office of the Docketing Clerk and serving the document on the person to whom the document is addressed.

Final Notice of Violation means a document issued by the Director in which the Director determines that the respondent has violated or is continuing to violate a DOE Nuclear Safety Requirement and includes:

(i) A statement specifying the DOE Nuclear Safety Requirement to which the violation relates;

(ii) A concise statement of the basis for the determination;

(iii) Any remedy, including the amount of any civil penalty;

(iv) A statement explaining the reasoning behind any remedy; and

(v) If the Notice assesses a civil penalty, notice of respondent's right:

(A) To waive further proceedings and pay the civil penalty;

(B) To request an on-the-record adjudication of the assessment of the civil penalty; or

(C) To seek judicial review of the assessment of the civil penalty.

Final Order means an order of the Secretary that represents final agency action and, where appropriate, imposes a remedy with which the recipient of the order must comply.

General Counsel means the General Counsel of DOE or his designee.

Hearing means an on-the-record enforcement adjudication open to the public and conducted under the procedures set forth in Subpart B of this part.

Initial Decision means the decision filed by the Presiding Officer based upon the record of the enforcement adjudication out of which it arises.

Interpretation means a statement by the General Counsel concerning the meaning or effect of the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement which relates to a specific factual situation but may also be a ruling of general applicability where the General Counsel determines such action to be appropriate.

Nuclear Statute means any statute or provision of a statute that relates to a DOE nuclear activity and for which DOE is responsible.

Party means the Director and the respondent in an enforcement adjudication

under this Part.

Person means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State or political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity and any legal successor, representative, agent or agency of the foregoing; provided that person does not include the Department or the United States Nuclear Regulatory Commission. For purposes of civil penalty assessment, the term also includes affiliated entities, such as a parent corporation.

Preliminary Notice of Violation means a document issued by the Director in which the Director sets forth the preliminary conclusions that the respondent has violated or is continuing to violate a DOE Nuclear Safety Requirement and includes:

(i) A statement specifying the DOE Nuclear Safety Requirement to which the violation relates;

(ii) A concise statement of the basis for alleging the violation;

(iii) Any proposed remedy, including the amount of any proposed civil penalty; and

(iv) A statement explaining the reasoning behind any proposed remedy.

Presiding Officer means the Administrative Law Judge designated to be in charge of an enforcement adjudication who shall conduct a fair and impartial hearing, assure that the facts are fully elicited, adjudicate all issues, avoid delay, and shall have authority to:

(i) Conduct an adjudicatory hearing under this Part;

(ii) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;

(iii) Exercise the authority set forth in Section 820.8;

(iv) Admit or exclude evidence;

(v) Hear and decide questions of fact, law, or discretion, except for the validity of regulations and interpretations issued by DOE;

(vi) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(vii) Draw adverse inferences against a party that fails to comply with his orders;

(viii) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

Remedy means any action necessary or appropriate to rectify, prevent, or penalize a violation of the Act, a Nuclear Statute, or a DOE Nuclear Safety

Requirements, including the assessment of civil penalties, the requirement of specific actions, or the modification, suspension or recision of a contract.

Respondent means any person to whom the Director addresses a Notice of Violation.

Secretarial Officer means the Assistant Secretary or Office Director who is primarily responsible for the conduct of an activity under the Act. With regard to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion, Secretarial Officer shall mean the Deputy Assistant Secretary for Naval Reactors.

Secretary means the Secretary of Energy or his designee.

(b) Terms defined in the Act and not defined in these rules are used consistent with the meanings given in the Act.

(c) As used in this part, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.

 820.3 -- Separation of functions.

(a) Separation of Functions. After a respondent requests an on-the-record adjudication of an assessment of a civil penalty contained in a Final Notice of Violation, no person shall participate in a decision-making function in an enforcement proceeding if he has been, is or will be responsible for an investigative or prosecutorial function related to that proceeding or if he reports to the person responsible for the investigative or prosecutorial function.

(b) Director. The Director shall be responsible for the investigation and prosecution of violations of the DOE Nuclear Safety Requirements. After the request for an enforcement adjudication, the Director shall not discuss ex parte the merits of the proceeding with a DOE Official or any person likely to advise the DOE Official in the decision of the proceeding.

(c) Presiding Officer. A Presiding Officer shall perform no duties inconsistent with his responsibilities as a Presiding Officer, and will not be responsible to or subject to the supervision or direction of any officer or employee engaged in the performance of an investigative or prosecutorial function. The Presiding Officer may not consult any person other than a member of his staff or a special assistant on any fact at issue unless on notice and opportunity for all parties to participate, except as required for the disposition of ex parte matters as authorized by law.

 820.4 -- Conflict of interest.

A DOE Official may not perform functions provided for in this part regarding any matter in which he has a financial interest or has any relationship that would make it inappropriate for him to act. A DOE Official shall withdraw at any time from any action in which he deems himself disqualified or unable to act for any reason. Any interested person may at any time request the General Counsel to disqualify a DOE Official or request that the General Counsel disqualify himself. In the case of an enforcement adjudication, a motion to disqualify shall be made to the Presiding Officer.

The request shall be supported by affidavits setting forth the grounds for disqualification of the DOE Official. A decision shall be made as soon as practicable and information may be requested from any person concerning the matter. If a DOE Official is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in this section shall replace him.

 820.5 -- Service.

(a) General rule. Any document filed with the Docketing Clerk must be served on the addressee of the document and shall not be considered filed until service is complete and unless accompanied by proof of service; provided that the filing with the Docketing Clerk of any document addressed to the DOE Official shall be considered service on the DOE Official.

(b) Service in an Enforcement Adjudication. Any document filed in an enforcement adjudication must be served on all other participants in the adjudication.

(c) Who may be served. Any paper required to be served upon a person shall be served upon him or upon the representative designated by him or by law to receive service of papers. When an attorney has entered an appearance on behalf of a person, service must be made upon the attorney of record.

(d) How service may be made. Service may be made by personal delivery, by first class, certified or registered mail or as otherwise authorized or required by the DOE Official. The DOE Official may require service by express mail.

(e) When service is complete. Service upon a person is complete:

(1) By personal delivery, on handing the paper to the individual, or leaving it at his office with his clerk or other person in charge or, if there is no one in charge, leaving it in a conspicuous place therein or, if the office is closed or the person to be served has no office, leaving it at his usual place of residence with some person of suitable age and discretion then residing there;

(2) By mail, on deposit in the United States mail, properly stamped and addressed; or

(3) By any other means authorized or required by the DOE Official.

(f) Proof of service. Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, and may be made by:

(1) Written acknowledgement of the person served or his counsel;

(2) The certificate of counsel if he has made the service;

(3) The affidavit of the person making the service; or

(4) Any other means authorized or required by the DOE Official.

(g) Deemed service. If a document is deemed filed under this Part, then the

service requirements shall be deemed satisfied when the document is deemed filed.

 820.6 -- Computation and extension of time.

(a) Computation. In computing any period of time set forth in this Part, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal legal holiday, the stated time period shall be extended to include the next business day.

(b) Extensions of time. A DOE Official may grant an extension of any time period set forth in this Part.

(c) Service by mail. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document. Where a pleading or document is served by express mail, only two (2) days shall be added.

 820.7 -- Questions of policy or law.

(a) Certification. There shall be no interlocutory appeal from any ruling order, or action decision of a DOE Official except as permitted by this section. A Presiding Officer in an enforcement adjudication may certify, in his discretion, a question to the Secretary, when the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and either an immediate decision will materially advance the ultimate termination of the proceeding, or subsequent review will be inadequate or ineffective.

(b) Decision. The certified question shall be decided as soon as practicable. If the Secretary determines that the question was improvidently certified, or if he takes no action within thirty days of the certification, the certification is dismissed. The Secretary may decide the question on the basis of the submission made by the Presiding Officer or may request further information from any person.

 820.8 -- Evidentiary matters.

(a) General. A DOE Official may obtain information or evidence for the full and complete investigation of any matter related to a DOE nuclear activity or for any decision required by this part. A DOE Official may sign, issue and serve subpoenas; administer oaths and affirmations; take sworn testimony; compel attendance of and sequester witnesses; control dissemination of any record of testimony taken pursuant to this section; subpoena and reproduce books, papers, correspondence, memoranda, contracts, agreements, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

(b) Special Report Orders. A DOE Official may issue a Special Report Order (SRO) requiring any person involved in a DOE nuclear activity or otherwise subject to the jurisdiction of DOE to file a special report providing information relating to a DOE Nuclear Safety Requirement, the Act, or a Nuclear Statute, including but not limited to written answers to specific

questions. The SRO may be in addition to any other reports required by this Part.

(c) Extension of Time. The DOE Official who issues a subpoena or SRO pursuant to this section, for good cause shown, may extend the time prescribed for compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance.

(d) Reconsideration. Prior to the time specified for compliance, but in no event more than 10 days after the date of service of the subpoena or SRO, the person upon whom the document was served may request reconsideration of the subpoena or SRO with the DOE Official who issued the document. If the subpoena or SRO is not modified or rescinded within 10 days of the date of the filing of the request, the subpoena or SRO shall be effective as issued and the person upon whom the document was served shall comply with the subpoena or SRO within 20 days of the date of the filing. There is no administrative appeal of a subpoena or SRO.

(e) Service. A subpoena or SRO shall be served in the manner set forth in □ 820.5, except that service by mail must be made by registered or certified mail.

(f) Fees. (1) A witness subpoenaed by a DOE Official shall be paid the same fees and mileage as paid to a witness in the district courts of the United States.

(2) If a subpoena is issued at the request of a person other than an officer or agency of the United States, the witness fees and mileage shall be paid by the person who requested the subpoena. However, at the request of the person, the witness fees and mileage shall be paid by the DOE if the person shows:

(i) The presence of the subpoenaed witness will materially advance the proceeding; and

(ii) The person who requested that the subpoena be issued would suffer a serious hardship if required to pay the witness fees and mileage. The DOE Official issuing the subpoena shall make the determination required by this subsection.

(g) Enforcement. If any person upon whom a subpoena or SRO is served pursuant to this section, refuses or fails to comply with any provision of the subpoena or SRO, an action may be commenced in the United States District Court to enforce the subpoena or SRO.

(h) Certification. (1) Documents produced in response to a subpoena shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom the subpoena was directed or his authorized agent that a diligent search has been made for each document responsive to the subpoena, and to the best of his knowledge, information, and belief all such documents responsive to the subpoena are being produced unless withheld on the grounds of privilege pursuant to paragraph (i) of this section.

(2) Any information furnished in response to an SRO shall be accompanied by the sworn certification under penalty of perjury of the person to whom it was directed or his authorized agent who actually provides the information that to

the best of his knowledge, information and belief a diligent effort has been made to provide all information required by the SRO, and all information furnished is true, complete, and correct unless withheld on grounds of privilege pursuant to paragraph (i) of this section.

(3) If any document responsive to a subpoena is not produced or any information required by an SRO is not furnished, the certification shall include a statement setting forth every reason for failing to comply with the subpoena or SRO.

(i) Withheld information. If a person to whom a subpoena or SRO is directed withholds any document or information because of a claim of attorney-client or other privilege, the person submitting the certification required by paragraph (h) of this section also shall submit a written list of the documents or the information withheld indicating a description of each document or information, the date of the document, each person shown on the document as having received a copy of the document, each person shown on the document as having prepared or been sent the document, the privilege relied upon as the basis for withholding the document or information, a memorandum of law supporting the claim of privilege, and an identification of the person whose privilege is being asserted.

(j) Statements/testimony.

(1) If a person's statement/testimony is taken pursuant to a subpoena, the DOE Official shall determine whether the statement/testimony shall be recorded and the means by which it is recorded.

(2) A person whose statement/testimony is recorded may procure a copy of the transcript by making a written request for a copy and paying the appropriate fees. Upon proper identification, any potential witness or his attorney has the right to inspect the official transcript of the witness' own statement or testimony.

(k) Sequestration. The DOE Official may sequester any person who furnishes documents or gives testimony. Unless permitted by the DOE Official, neither a witness nor his attorney shall be present during the examination of any other witnesses.

(l) Attorney. (1) Any person whose statement or testimony is taken may be accompanied, represented and advised by his attorney; provided that, if the witness claims a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(2) The DOE Official shall take all necessary action to regulate the course of testimony and to avoid delay and prevent or restrain contemptuous or obstructionist conduct or contemptuous language. The DOE Official may take actions as the circumstances may warrant in regard to any instances where any attorney refuses to comply with directions or provisions of this section.

 820.9 -- Special assistant.

A DOE Official may appoint a person to serve as a special assistant to assist the DOE Official in the conduct of any proceeding under this part. Such appointment may occur at any appropriate time. A special assistant shall be subject to the disqualification provisions in 820.5. A special assistant may

perform those duties assigned by the DOE Official, including but not limited to, serving as technical interrogators, technical advisors and special master.

 820.10 -- Office of the Docketing Clerk.

(a) Docket. The Docketing Clerk shall maintain a docket for enforcement actions commencing with the issuance of a Preliminary Notice of Violation, interpretations issued pursuant to subpart D of this part, exemptions issued pursuant to subpart E of this part, and any other matters designated by the Secretary. A docket for an enforcement action shall contain all documents required to be filed in the proceeding.

(b) Public inspection. Subject to the provisions of law restricting the public disclosure of certain information, any person may, during Department business hours, inspect and copy any document filed with the Docketing Clerk. The cost of duplicating documents shall be borne by the person seeking copies of such documents. The DOE Official may waive this cost in appropriate cases.

(c) Transcript. Except as otherwise provided in this part, after the filing of a Preliminary Notice of Violation, all hearings, conferences, and other meetings in the enforcement process shall be transcribed verbatim. A copy of the transcript shall be filed with the Docketing Clerk promptly. The Docketing Clerk shall serve all participants with notice of the availability of the transcript and shall furnish the participants with a copy of the transcript upon payment of the cost of reproduction, unless a participant can show that the cost is unduly burdensome.

 820.11 -- Information requirements.

(a) Any information pertaining to a nuclear activity provided to DOE by any person or maintained by any person for inspection by DOE shall be complete and accurate in all material respects.

(b) No person involved in a DOE nuclear activity shall conceal or destroy any information concerning a violation of a DOE Nuclear Safety Requirement, a Nuclear Statute, or the Act.

 820.12 -- Classified, confidential, and controlled information

(a) General rule. The DOE Official in charge of a proceeding under this part may utilize any procedures deemed appropriate to safeguard and prevent disclosure of classified, confidential, and controlled information, including Restricted Data and National Security Information, to unauthorized persons, with minimum impairment of rights and obligations under this part.

(b) Obligation to protect restricted information. Nothing in this part shall relieve any person from safeguarding classified, confidential, and controlled information, including Restricted Data or National Security Information, in accordance with the applicable provisions of federal statutes and the rules, regulations, and orders of any federal agency.

Subpart B-Enforcement Process

 820.20 -- Purpose and scope.

(a) Purpose. This subpart establishes the procedures for investigating the

nature and extent of violations of the DOE Nuclear Safety Requirements, for determining, whether a violation has occurred, for imposing an appropriate remedy, and for adjudicating the assessment of a civil penalty.

(b) Basis for civil penalties. DOE may assess civil penalties against any person subject to the provisions of this part who has entered into an agreement of indemnification under 42 U.S.C. 2210(d) (or any subcontractor or supplier thereto), unless exempted from civil penalties as provided in paragraph (c) of this section, on the basis of a violation of:

(1) Any DOE Nuclear Safety Requirement set forth in the Code of Federal Regulations;

(2) Any Compliance Order issued pursuant to subpart C of this part; or

(3) Any program, plan or other provision required to implement any requirement or order identified in paragraphs (b)(1) or (b)(2) of this section.

(c) Exemptions. The following contractors, and subcontractors and suppliers thereto, are exempt from the assessment of civil penalties under this subpart with respect to the activities specified below:

(1) The University of Chicago for activities associated with Argonne National Laboratory;
(2) The University of California for activities associated with Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and Lawrence Berkeley National Laboratory;

(3) American Telephone and Telegraph Company and its subsidiaries for activities associated with Sandia National Laboratory;

(4) University Research Association, Inc. for activities associated with FERMI National Laboratory;

(5) Princeton University for activities associated with Princeton Plasma Physics Laboratory;

(6) The Associated Universities, Inc. for activities associated with the Brookhaven National Laboratory; and

(7) Battelle Memorial Institute for activities associated with Pacific Northwest Laboratory.

(d) Nonprofit educational institutions. Any educational institution that is considered nonprofit under the United States Internal Revenue Code shall receive automatic remission of any civil penalty assessed under this part.

 820.21 -- Investigations.

(a) The Director may initiate and conduct investigations and inspections relating to the scope, nature and extent of compliance by a person with the Act and the DOE Nuclear Safety Requirements and take such action as he deems necessary and appropriate to the conduct of the investigation or inspection, including any action pursuant to 820.8.

(b) Any person may request the Director to initiate an investigation or inspection pursuant to paragraph (a) of this section. A request for an investigation or inspection shall set forth the subject matter or activity to be investigated or inspected as fully as possible and include supporting documentation and information. No particular forms or procedures are required.

(c) Any person who is requested to furnish documentary evidence, information or testimony in an investigation or during an inspection shall be informed, upon written request, of the general purpose of the investigation or inspection.

(d) Information or documents that are obtained during any investigation or inspection shall not be disclosed unless the Director directs or authorizes the public disclosure of the investigation. Upon such authorization, the information or documents are a matter of public record and disclosure is not precluded by the Freedom of Information Act, 5 U.S.C. 552 and 10 CFR part 1004. A request for confidential treatment of information for purposes of the Freedom of Information Act shall not prevent disclosure by the Director if disclosure is determined to be in the public interest and otherwise permitted or required by law.

(e) During the course of an investigation or inspection any person may submit at any time any document, statement of facts or memorandum of law for the purpose of explaining the person's position or furnish information which the person considers relevant to a matter or activity under investigation or inspection.

(f) If facts disclosed by an investigation or inspection indicate that further action is unnecessary or unwarranted, the investigation may be closed without prejudice to further investigation or inspection by the Director at any time that circumstances so warrant.

 820.22 -- Informal conference.

The Director may convene an informal conference to discuss any situation that might be a violation of the Act or a DOE Nuclear Safety Requirement, its significance and cause, any correction taken or not taken by the person, any mitigating or aggravating circumstances, and any other useful information. The Director may compel a person to attend the conference. This conference will not normally be open to the public and there shall be no transcript.

 820.23 -- Consent order.

(a) Settlement policy. DOE encourages settlement of an enforcement proceeding at any time if the settlement is consistent with the objectives of the Act and the DOE Nuclear Safety Requirements. The Director and a person may confer at any time concerning settlement. These settlement conferences shall not be open to the public and there shall be no transcript.

(b) Consent order. Notwithstanding any other provision of this Part, DOE may at any time resolve any or all issues in an outstanding enforcement proceeding with a Consent Order. A Consent Order must be signed by the Director and the person who is its subject, or a duly authorized representative, must indicate agreement to the terms contained therein and must be filed. A Consent Order need not constitute an admission by any person

that the Act or a DOE Nuclear Safety Requirement has been violated, nor need it constitute a finding by the DOE that such person has violated the Act or a DOE Nuclear Safety Requirement. A Consent Order shall, however, set forth the relevant facts which form the basis for the Order and what remedy, if any, is imposed.

(c) Effect on enforcement adjudication. If a Consent Order is signed after the commencement of an enforcement adjudication, the adjudication of the issues subject to the Consent Order shall be stayed until the completion of the Secretarial Review Process. If the Consent Order becomes a Final Order, the adjudication shall be terminated or modified as specified in the Order.

(d) Secretarial review. A Consent Order shall become a Final Order 30 days after it is filed unless the Secretary files a rejection of the Consent Order or a Modified Consent Order. A Modified Consent Order shall become a Final Order if the Director and the person who is its subject sign it within 15 days of its filing.

 820.24 -- Preliminary notice of violation.

(a) If the Director has reason to believe a person has violated or is continuing to violate a provision of the Act or a DOE Nuclear Safety Requirement, he may file a Preliminary Notice of Violation. The Notice and any transmittal documents shall contain sufficient information to fairly apprise the respondent of the facts and circumstances of the alleged violations and the basis of any proposed remedy, and to properly indicate what further actions are necessary by or available to respondent.

(b) Within 30 days after the filing of a Preliminary Notice of Violation, the respondent shall file a reply.

(c) The reply shall be in writing and signed by the person filing it. The reply shall contain a statement of all relevant facts pertaining to the situation that is the subject of the Notice. The reply shall state any facts, explanations and arguments which support a denial that a violation has occurred as alleged; demonstrate any extenuating circumstances or other reason why the proposed remedy should not be imposed or should be mitigated; and furnish full and complete answers to the questions set forth in the Notice. Copies of all relevant documents shall be submitted with the reply. The reply shall include a discussion of the relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE.

(d) The respondent may terminate an enforcement action if the reply agrees to comply with the proposed remedy and waives any right to contest the Notice or the remedy. If a respondent elects this option, the Preliminary Notice of Violation shall be deemed a Final Order upon the filing of the reply.

 820.25 -- Final notice of violation.

(a) General rule. If, after reviewing the reply submitted by the respondent, the Director determines that a person violated or is continuing to violate a provision of the Act or a DOE Nuclear Safety Requirement, he may file a Final Notice of Violation. The Final Notice shall concisely state the determined violation, any designated penalty, and further actions necessary by or available to respondent.

(b) Effect of final notice. (1) If a Final Notice of Violation does not contain a civil penalty, it shall be deemed filed as a Final Order 15 days after the Final Notice is filed unless the Secretary files a Final Order which modifies the Final Notice.

(2) If a Final Notice of Violation contains a civil penalty, the respondent must file within 30 days after the filing of the Final Notice:

(i) A waiver of further proceedings;

(ii) A request for an on-the-record adjudication; or

(iii) A notice of intent to seek judicial review.

(c) Effect of waiver. If a respondent waives further proceedings, the Final Notice of Violation shall be deemed a Final Order enforceable against the respondent. The respondent must pay any civil penalty set forth in the Notice of Violation within 60 days of the filing of waiver unless the Director grants additional time.

(d) Effect of request. If a respondent files a request for an on-the-record adjudication, then an enforcement adjudication commences.

(e) Effect of notice of intent.

If a respondent files a Notice of Intent, the Final Notice of Violation shall be deemed a Final Order enforceable against the respondent.

(f) Amendment. The Director may amend the Final Notice of Violation at any time before an action takes place pursuant to paragraph (b) of this section. An amendment shall add fifteen days to the time periods under paragraph (b) of this section.

(g) Withdrawal. The Director may withdraw the Final Notice of Violation, or any part thereof, at any time before an action under paragraph (b) of this section.

 820.26 -- Enforcement adjudication.

If a respondent files a request for an on-the-record adjudication, an enforcement adjudication is initiated and the Docketing Clerk shall notify the Secretary who shall appoint an Administrative Law Judge to be the Presiding Officer.

 820.27 -- Answer.

(a) General. If a respondent files a request for an on-the-record adjudication pursuant to 820.25, a written answer to the Final Notice of Violation shall be filed at the same time the request is filed.

(b) Contents of the answer. The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the Final Notice of Violation with regard to which respondent has any knowledge, information or belief. Where respondent has no knowledge, information or belief of a particular factual allegation and so states, the allegation is deemed denied.

The answer shall also state the circumstance or argument that is alleged to constitute the grounds of defense and the facts that respondent intends to place at issue.

(c) Failure to admit, deny, or explain. Failure of respondent to admit, deny, or explain any material factual allegation contained in the Final Notice of Violation constitutes an admission of the allegation.

(d) Amendment of the answer. The respondent may amend the answer to the Final Notice of Violation upon motion granted by the Presiding Officer.

 820.28 -- Prehearing actions.

(a) General. The Presiding Officer shall establish a schedule for the adjudication and take such other actions as he determines appropriate to conduct the adjudication in a fair and expeditious manner.

(b) Prehearing conference. The Presiding Officer, at any time before a hearing begins, may direct the parties and their counsel, or other representatives, to appear at a conference before him to consider, as appropriate:

(1) The settlement of the case;

(2) The simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits;

(5) The limitation of the number of expert or other witnesses;

(6) Setting a time and place for the hearing; and

(7) Any other matters that may expedite the disposition of the proceeding.

(c) Exchange of witness lists and documents. Unless otherwise ordered by the Presiding Officer, at least five (5) days before any prehearing conference, each party shall make available to all other parties, as appropriate, the names of the expert and other witnesses it intends to call, together with a brief narrative summary of their expected testimony, and copies of all documents and exhibits that each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.

(d) Prehearing conference order. The Presiding Officer shall prepare an order incorporating any action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

(e) Alternative to prehearing conference. If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or sua sponte,

may direct the parties to make appropriate filings with him to accomplish any of the objectives set forth in this section.

(f) Other discovery. (1) Except as provided by paragraph (c) of this section, further discovery under this section shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order to take further discovery shall make a motion therefor. Such a motion shall set forth:

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The proposed time and place where it will be taken. If the Presiding Officer determines that the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to the inference that the information to be discovered would be adverse to the party from whom the information was sought, or the issuance of a default order under 820.38.

 820.29 -- Hearing.

(a) General. Except as otherwise provided by this Part or the Presiding Officer, a hearing shall be conducted in accordance with the Federal Rules of Evidence. The Presiding Officer shall have the discretion to admit all evidence that is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, if he believes the evidence might facilitate the fair and expeditious resolution of the proceeding. But such evidence may be reasonably limited by the Presiding Officer in scope and length in order to permit prompt resolution of the proceeding. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information, and shall protect classified and unclassified controlled nuclear information, as well as any other information protected from public disclosure pursuant to law or regulation. The

confidential, trade secret, or classified or otherwise protected status of any information shall not, however, preclude its being introduced into evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence in camera, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion that arise out of that portion of the evidence that is confidential, includes trade secrets, is classified, or is otherwise protected.

(b) Subpoenas. The attendance of witnesses or the production of documentary evidence may be required by subpoena.

(c) Examination of witnesses. There shall be no direct oral testimony by witnesses, except as permitted by the Presiding Officer. In lieu of oral testimony, the Presiding Officer shall admit into the record as evidence verified written statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall have delivered a copy of the statement to the Presiding Officer and the opposing counsel not less than 10 days prior to the date the witness is scheduled to testify. The witness presenting the statement shall swear or affirm that the statement is true and accurate to the best of his knowledge, information, and belief and shall be subject to appropriate oral cross-examination upon the contents thereof provided such cross-examination is not unduly repetitious.

(d) Burden of presentation; burden of persuasion. The Director has the burden of going forward with and of proving that the violation occurred as set forth in the Notice of Violation and that the proposed civil penalty is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the Notice of Violation. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

 820.30 -- Post-hearing filings.

Within fifteen days after the filing of the transcript of the hearing, or within such longer time as may be fixed by the Presiding Officer, any party may file for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. Reply briefs may be filed within ten days of the filing of briefs. All filings shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

 820.31 -- Initial decision.

(a) Initial Decision. The Presiding Officer shall file an Initial Decision as soon as practicable after the period for filing reply briefs under 820.30 has expired. The Initial Decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, any remedy and a proposed Final Order. A party may file comments on an Initial Decision within fifteen days of its filing.

(b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred and that a civil penalty is appropriate, the Initial

Decision shall set forth the dollar amount of the civil penalty. If the Presiding Officer decides to assess a penalty different in amount from the penalty assessed in the Final Notice of Violation, the Initial Decision shall set forth the specific reasons for the increase or decrease.

 820.32 -- Final Order.

(a) Effect of Initial Decision. The Initial Decision shall be deemed filed as a Final Order thirty days after the filing of the Initial Decision unless the Secretary files a Final Order that modifies the Initial Decision or the Secretary files a Notice of Review.

(b) Notice of review. If the Secretary files a Notice of Review, he shall file a Final Order as soon as practicable after completing his review. The Secretary may, at his discretion, order additional procedures, remand the matter or modify the remedy, including an increase or decrease in the amount of the civil penalty from the amount recommended to be assessed in the Initial Decision.

(c) Payment of a civil penalty. The respondent shall pay the full amount of any civil penalty assessed in the Final Order within thirty (30) days after the Final Order is filed unless otherwise agreed by the parties.

 820.33 -- Default order.

(a) Default. The Presiding Officer, upon motion by a party or the filing of a Notice of Intent to issue a Default Order sua sponte, may find a party to be in default if the party fails to comply with the provisions of this Part or an order of the Presiding Officer. The alleged defaulting party shall have ten days to answer the motion or the Notice of Intent. No finding of default shall be made against the respondent unless the Director presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the Final Notice of Violation and a waiver of respondent's rights to an on-the-record adjudication of such factual allegations. Default by the Director shall result in an order to dismiss the Final Notice of Violation with prejudice.

(b) Effect of Default Order. When the Presiding Officer finds a default has occurred, he shall file a Default Order against the defaulting party. This order shall constitute an Initial Decision.

(c) Contents of a default order. A Default Order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of fact, law or discretion, and the remedy.

 820.34 -- Accelerated decision.

(a) General. The Presiding Officer, upon motion of any party or sua sponte, may at any time render an Accelerated Decision in favor of the Director or the respondent as to all or any part of the adjudication, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the adjudication. In addition, the Presiding Officer, upon motion of the respondent, may render at any time an Accelerated Decision to dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of

failure to establish a prima facie case or other grounds that show no right to relief on the part of the Director.

(b) Effect of Accelerated Decision. (1) If an Accelerated Decision is rendered as to all the issues and claims in the adjudication, the decision constitutes an Initial Decision of the Presiding Officer, and shall be filed with the Docketing Clerk.

(2) If an Accelerated Decision is rendered on less than all issues or claims in the adjudication, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon file an interlocutory order specifying the facts that appear substantially uncontroverted, and the issues and claims upon which the adjudication will proceed.

 820.35 -- Ex Parte discussions.

At no time after a respondent has requested an on-the-record adjudication of the assessment of a civil penalty shall a DOE Official, or any person who is likely to advise a DOE Official in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside DOE, with any DOE staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to a DOE Official during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. Any oral communication shall be set forth in a written memorandum and served on all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

 820.36 -- Filing, form, and service of documents.

(a) Filing in an enforcement proceeding. The original and three copies of any document in an enforcement proceeding shall be filed with the Docketing Clerk commencing with the filing of a Preliminary Notice of Violation.

(b) Form of documents in an enforcement proceeding. (1) Except as provided herein, or by order of the DOE Official, there are no specific requirements as to the form of documents filed in an enforcement proceeding.

(2) The first page of every document shall contain a caption identifying the respondent and the docket number.

(3) The original of any document (other than exhibits) shall be signed by the person filing it or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Docketing Clerk and all participants to the proceeding. A person who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under

this part.

(5) The Docketing Clerk may refuse to file any document that does not comply with this section. Written notice of such refusal, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any document refused for filing.

 820.37 -- Participation in an adjudication.

(a) Parties. In an enforcement adjudication, the Director and the respondent shall be the only parties; provided that the Presiding Officer may permit a person to intervene as a party if the person demonstrates it could be liable in the event a civil penalty is assessed.

(b) Appearances. Any party to an enforcement adjudication may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

(c) Amicus Curiae. Persons not parties to an enforcement adjudication who wish to file briefs may so move. The motion shall identify the interest of the person and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

 820.38 -- Consolidation and severance.

(a) Consolidation. The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more enforcement adjudications under this part where there exists common parties or common questions of fact or law, consolidation would expedite and simplify consideration of the issues, and consolidation would not adversely affect the rights of parties engaged in otherwise separate adjudications.

(b) Severance. The Presiding Officer may, by motion or sua sponte, for good cause shown order any enforcement adjudication severed with respect to any or all parties or issues.

 820.39 -- Motions.

(a) General. All motions in an enforcement adjudication except those made orally, shall be in writing, state the grounds therefor with particularity, set forth the relief or order sought, and be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon.

(b) Answer to motions. Except as otherwise specified by a particular provision of this Part or by the Presiding Officer, a party shall have the right to file a written answer to the motion of another party within 10 days after the filing of such motion. The answer shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no answer is filed within the designated period, the party may be deemed to have waived any objection to the granting of the motion. The Presiding Officer

may set a shorter or longer time for an answer, or make such other orders concerning the disposition of motions as he deems appropriate.

(c) Decision. The Presiding Officer shall rule on a motion as soon as practicable after the filing of the answer. The decision of the Presiding Officer on any motion shall not be subject to administrative appeal.

Subpart C-Compliance Orders

□ 820.40 -- Purpose and scope.

This subpart provides for the issuance of Compliance Orders to prevent, rectify or penalize violations of the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement and to require action consistent with the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement.

□ 820.41 -- Compliance order.

The Secretary may issue to any person involved in a DOE nuclear activity a Compliance Order that:

(a) Identifies a situation that violates, potentially violates, or otherwise is inconsistent with the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement;

(b) Mandates a remedy or other action; and,

(c) States the reasons for the remedy or other action.

□ 820.42 -- Final Order.

A Compliance Order is a Final Order that constitutes a DOE Nuclear Safety Requirement that is effective immediately unless the Order specifies a different effective date.

□ 820.43 -- Appeal.

Within fifteen days of the issuance of a Compliance Order, the recipient of the Order may request the Secretary to rescind or modify the Order. A request shall not stay the effectiveness of a Compliance Order unless the Secretary issues an order to that effect.

Subpart D-Interpretations

□ 820.50 -- Purpose and scope.

This subpart provides for interpretations of the Act, Nuclear Statutes, and DOE Nuclear Safety Requirements. Any written or oral response to any written or oral question which is not provided pursuant to this subpart does not constitute an interpretation and does not provide any basis for action inconsistent with the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement.

 820.51 -- General counsel.

The General Counsel shall be the DOE Official responsible for formulating and issuing any interpretation concerning the Act, a Nuclear Statute or a DOE Nuclear Safety Requirement.

 820.52 -- Procedures.

The General Counsel may utilize any procedure which he deems appropriate to comply with his responsibilities under this subpart. All interpretations issued under this subpart must be filed with the Office of the Docketing Clerk which shall maintain a docket for interpretations.

Subpart E-Exemption Relief

 820.60 -- Purpose and scope.

This subpart provides for exemption relief from provisions of DOE Nuclear Safety Requirements at nuclear facilities.

 820.61 -- Secretarial Officer.

The Secretarial Officer who is primarily responsible for the activity to which a DOE Nuclear Safety Requirement relates may grant a temporary or permanent exemption from that requirement as requested by any person subject to its provisions; provided that, the Secretarial Officer responsible for environment, safety and health matters shall exercise this authority with respect to provisions relating to radiological protection of workers, the public and the environment. This authority may not be further delegated.

 820.62 -- Criteria.

The criteria for granting an exemption to a DOE Nuclear Safety Requirement are determinations that the exemption:

(a) Would be authorized by law;

(b) Would not present an undue risk to public health and safety, the environment, or facility workers;

(c) Would be consistent with the safe operation of a DOE nuclear facility; and

(d) Involves special circumstances, including the following:

(1) Application of the requirement in the particular circumstances conflicts with other requirements; or

(2) Application of the requirement in the particular circumstances would not serve or is not necessary to achieve its underlying purpose, or would result in resource impacts which are not justified by the safety improvements; or

(3) Application of the requirement would result in a situation significantly different than that contemplated when the requirement was adopted, or that is significantly different from that encountered by others similarly situated; or

(4) The exemption would result in benefit to human health and safety that compensates for any detriment that may result from the grant of the exemption; or

(5) Circumstances exist which would justify temporary relief from application of the requirement while taking good faith action to achieve compliance; or

(6) There is present any other material circumstance not considered when the requirement was adopted for which it would be in the public interest to grant an exemption.

 820.63 -- Procedures.

The Secretarial Officer shall utilize any procedures deemed necessary and appropriate to comply with his responsibilities under this subpart. All exemption decisions must set forth in writing the reasons for granting or denying the exemption, and if granted, the basis for the determination that the criteria in 820.62 have been met and the terms of the exemption. All exemption decisions must be filed with the Office of the Docketing Clerk which shall maintain a docket for exemption decisions issued pursuant to this subpart.

 820.64 -- Terms and conditions.

An exemption may contain appropriate terms and conditions including, but not limited to, provisions that :

(a) Limit its duration;

(b) Require alternative action;

(c) Require partial compliance; or

(d) Establish a schedule for full or partial compliance.

 820.65 -- Implementation plan.

With respect to a DOE Nuclear Safety Requirement for which there is no regulatory provision for an implementation plan or schedule, an exemption may be granted to establish an implementation plan which reasonably demonstrates that full compliance with the requirement will be achieved within two years of the effective date of the requirement without a determination of special circumstances under 820.62(d).

 820.66 -- Appeal.

Within fifteen (15) days of the filing of an exemption decision by a Secretarial Officer, the person requesting the exemption may file a Request to Review with the Secretary, or the Secretary may file, sua sponte, a Notice of Review. The Request to Review shall state specifically the respects in which

the exemption determination is claimed to be erroneous, the grounds of the request, and the relief requested.

 820.67 -- Final order.

If no filing is made under Section 820.66, an exemption decision becomes a Final Order fifteen (15) days after it is filed by a Secretarial Officer. If filing is made under 820.66, an exemption decision becomes a Final Order 45 days after it is filed by a Secretarial Officer, unless the Secretary stays the effective date or issues a Final Order that modifies the decision.

Subpart F-Criminal Penalties

 820.70 -- Purpose and scope.

This subpart provides for the identification of criminal violations of the Act or DOE Nuclear Safety Requirements and the referral of such violations to the Department of Justice.

 820.71 -- Standard.

If a person subject to the Act or the DOE Nuclear Safety Requirements has, by act or omission, knowingly and willfully violated, caused to be violated, attempted to violate, or conspired to violate any section of the Act or any applicable DOE Nuclear Safety Requirement, the person shall be subject to criminal sanctions under the Act.

 820.72 -- Referral to the Attorney General.

If there is reason to believe a criminal violation of the Act or the DOE Nuclear Safety Requirements has occurred, DOE may refer the matter to the Attorney General of the United States for investigation or prosecution.

Appendix A to Part 820-General Statement of Enforcement Policy

I. Introduction

This policy statement sets forth the general framework through which the U.S. Department of Energy (DOE) will seek to ensure compliance with its enforceable nuclear safety regulations and orders (hereafter collectively referred to as DOE Nuclear Safety Requirements) and, in particular, exercise the civil penalty authority provided to DOE in the Price Anderson Amendments Act of 1988, 42 U.S.C. 2282a (PAAA). The policy set forth herein is applicable to violations of DOE Nuclear Safety Requirements by DOE contractors who are indemnified under the Price Anderson Act, 42 U.S.C. 2210(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to DOE's Nuclear Safety Requirements as specified in the PAAA. It is not intended to establish a "cookbook" approach to the initiation and resolution of situations involving noncompliance with DOE Nuclear Safety Requirements. Rather, DOE intends to consider the particular facts of each noncompliance situation in determining whether enforcement sanctions are appropriate and, if so, the appropriate magnitude of those sanctions. DOE may well deviate from this policy statement

when appropriate in the circumstances of particular cases. This policy statement is not applicable to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion.

Both the Department of Energy Organization Act, 42 U.S.C. 7101, and the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011, require DOE to protect the public health and safety, as well as the safety of workers at DOE facilities, in conducting its nuclear activities, and grant DOE broad authority to achieve this goal.

The DOE goal in the compliance arena is to enhance and protect the radiological health and safety of the public and worker at DOE facilities by fostering a culture among both the DOE line organizations and the contractors that activity seeks to attain and sustain compliance with DOE Nuclear Safety Requirements. The enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for the open and prompt identification and reporting of noncompliances, and the initiation of comprehensive corrective actions to resolve both the noncompliance conditions and the program or process deficiencies that led to noncompliance.

In the development of the DOE enforcement policy, DOE recognizes that the reasonable exercise of its enforcement authority can help to reduce the likelihood of serious incidents. This can be accomplished by providing greater emphasis on a culture of safety in existing DOE operations, and strong incentives for contractors to identify and correct noncompliance conditions and processes in order to protect human health and the environment. DOE wants to facilitate, encourage, and support contractor initiatives for the prompt identification and correction of problems. These initiatives and activities will be duly considered in exercising enforcement discretion.

The PAAA provides DOE with the authority to compromise, modify, or remit civil penalties with or without conditions. In implementing the PAAA, DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate discretion in taking any enforcement action. Part of the function of a sound enforcement program is to assure a proper and continuing level of safety vigilance. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of safety requirements to nuclear facilities and by promoting and coordinating the proper contractor and DOE safety compliance attitude toward those requirements.

II. Purpose

The purpose of the DOE enforcement program is to promote and protect the radiological health and safety of the public and workers at DOE facilities by:

a. Ensuring compliance by DOE contractors with applicable DOE Nuclear Safety Requirements.

b. Providing positive incentives for a DOE contractor's:

(1) Timely self-identification of nuclear safety deficiencies,

(2) Prompt and complete reporting of such deficiencies to DOE,

(3) Root cause analyses of nuclear safety deficiencies,

(4) Prompt correction of nuclear safety deficiencies in a manner which precludes recurrence, and

(5) Identification of modifications in practices or facilities that can improve public or worker radiological health and safety.

c. Deterring future violations of DOE requirements by a DOE contractor.

d. Encouraging the continuous overall improvement of operations at DOE nuclear facilities.

III. Statutory Authority

Section 17 of the PAAA makes most DOE contractors covered by the DOE Price-Anderson indemnification system, and their subcontractors and suppliers, subject to civil penalties for violations of applicable DOE nuclear safety rules, regulations and orders. 42 U.S.C. 2282a. Furthermore, Section 18 of the PAAA makes all employees of DOE contractors, and their subcontractors and suppliers, subject to criminal penalties, including monetary penalties and imprisonment, for knowing and willful violations of applicable DOE nuclear safety rules, regulations and orders. 42 U.S.C. 2273(c). Suspected, or alleged, criminal violations are referred to the Department of Justice for appropriate action. 42 U.S.C. 2271. Therefore, DOE's enforcement authority and policy will apply only to civil penalties since decisions on criminal violations are the responsibility of the Department of Justice. However, referral of a case to the Department of Justice does not preclude DOE from taking civil enforcement action in accordance with this policy statement. Such actions will be coordinated with the Department of Justice to the extent practicable.

IV. Responsibilities

The Director, as the principal enforcement officer of the DOE, has been delegated the authority to conduct enforcement investigations and conferences, issue Notices of Violations and proposed civil penalties, and represent DOE in an enforcement adjudication.

V. Procedural Framework

10 CFR part 820 sets forth the procedures DOE will use in exercising its enforcement authority, including the issuance of Notices of Violation and the resolution of contested enforcement actions in the event a DOE contractor elects to litigate contested issues before an Administrative Law Judge.

Pursuant to 10 CFR 820.22, the Director initiates the civil penalty process by issuing a Preliminary Notice of Violation and Proposed Civil Penalty (PNOV). The DOE contractor is required to respond in writing to the PNOV, either admitting the violation and waiving its right to contest the proposed civil penalty and paying it, admitting the violation but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty, or denying that the violation has occurred and providing the basis for its belief that the PNOV is incorrect. After evaluation of the DOE contractor's response, the Director of Enforcement may determine that no violation has occurred, that the violation occurred as

alleged in the PNOV but that the proposed civil penalty should be remitted in whole or in part, or that the violation occurred as alleged in the PNOV and that the proposed civil penalty is appropriate notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a Final Notice of Violation (FNOV) or an FNOV and Proposed Civil Penalty.

An opportunity to challenge a proposed civil penalty either before an Administrative Law Judge or in a United States District Court is provided in the PAAA, 42 U.S.C. 2282a(c), and 10 CFR part 820 sets forth the procedures associated with an administrative hearing, should the contractor opt for that method of challenging the proposed civil penalty. A formal administrative enforcement proceeding pursuant to section 554 of the Administrative Procedures Act is not initiated until the DOE contractor against which a civil penalty has been proposed requests an administrative hearing rather than waiving its right to contest the civil penalty and paying it. However, it should be emphasized that DOE encourages the voluntary resolution of a noncompliance situation at any time, either informally prior to the initiation of an administrative proceeding or by consent order after a formal proceeding has begun.

VI. Severity of Violations

Violations of DOE Nuclear Safety Requirements have varying degrees of safety significance. Therefore, the relative importance of each violation must be identified as the first step in the enforcement process. Violations of DOE Nuclear Safety Requirements are categorized in three levels of severity to identify their relative safety significance, and Notices of Violation are issued for noncompliance which, when appropriate, propose civil penalties commensurate with the severity level of the violation(s) involved.

Severity Level I has been assigned to violations that are the most significant and Severity Level III violations are the least significant. Severity Level I is reserved for violations of DOE Nuclear Safety Requirements which involve actual or high potential for adverse impact on the safety of the public or workers at DOE facilities. Severity level II violations represent a significant lack of attention or carelessness toward responsibilities of DOE contractors for the protection of public or worker safety which could, if uncorrected, potentially lead to an adverse impact on public or worker safety at DOE facilities. Severity Level III violations are less serious but are of more than minor concern: i.e., if left uncorrected, they could lead to a more serious concern. In some cases, violations may be evaluated in the aggregate and a single severity level assigned for a group of violations.

Isolated minor violations of DOE Nuclear Safety Requirements will not be the subject of formal enforcement action through the issuance of a Notice of Violation. However, these minor violations will be identified as noncompliances and tracked to assure that appropriate corrective/remedial action is taken to prevent their recurrence, and evaluated to determine if generic or specific problems exist. If circumstances demonstrate that a number of related minor noncompliances have occurred in the same time frame (e.g. all identified during the same assessment), or that related minor noncompliances have recurred despite prior notice to the DOE contractor and sufficient opportunity to correct the problem, DOE may choose in its discretion to consider the noncompliances in the aggregate as a more serious violation warranting a Severity Level III designation, a Notice of Violation and a possible civil penalty.

The severity level of a violation will be dependent, in part, on the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent or negligent violations will be viewed differently than those in which there is gross negligence, deception or wilfulness. In addition to the significance of the underlying violation and level of culpability involved, DOE will also consider the position, training and experience of the person involved in the violation. Thus, for example, a violation may be deemed to be more significant if a senior manager of an organization is involved rather than a foreman or non-supervisory employee. In this regard, while management involvement, direct or indirect, in a violation may lead to an increase in the severity level of a violation and proposed civil penalty, the lack of such involvement will not constitute grounds to reduce the severity level of a violation or mitigate a civil penalty. Allowance of mitigation in such circumstances could encourage lack of management involvement in DOE contractor activities and a decrease in protection of public and worker health and safety.

Other factors which will be considered by DOE in determining the appropriate severity level of a violation are the duration of the violation, the past performance of the DOE contractor in the particular activity area involved, whether the DOE contractor had prior notice of a potential problem, and whether there are multiple examples of the violation in the same time frame rather than an isolated occurrence. The relative weight given to each of these factors in arriving at the appropriate severity level will be dependent on the circumstances of each case.

DOE expects contractors to provide full, complete, timely, and accurate information and reports. Accordingly, the severity level of a violation involving either failure to make a required report or notification to the DOE or an untimely report or notification, will be based upon the significance of, and the circumstances surrounding, the matter that should have been reported. A contractor will not normally be cited for a failure to report a condition or event unless the contractor was actually aware, or should have been aware of the condition or event which it failed to report.

VII. Enforcement Conferences

Should DOE determine, after completion of all assessment and investigation activities associated with a potential or alleged violation of DOE Nuclear Safety Requirements, that there is a reasonable basis to believe that a violation has actually occurred, and the violation may warrant a civil penalty or issuance of an enforcement order, DOE will normally hold an enforcement conference with the DOE contractor involved prior to taking enforcement action. DOE may also elect to hold an enforcement conference for potential violations which would not ordinarily warrant a civil penalty or enforcement order but which could, if repeated, lead to such action. The purpose of the enforcement conference is to assure the accuracy of the facts upon which the preliminary determination to consider enforcement action is based, discuss the potential or alleged violations, their significance and causes, and the nature of and schedule for the DOE contractor's corrective actions, determine whether there are any aggravating or mitigating circumstances, and obtain other information which will help determine the appropriate enforcement action.

DOE contractors will be informed prior to a meeting when that meeting is considered to be an enforcement conference. Such conferences are informal

mechanisms for candid pre-decisional discussions regarding potential or alleged violations and will not normally be open to the public. In circumstances for which immediate enforcement action is necessary in the interest of public or worker health and safety, such action will be taken prior to the enforcement conference, which may still be held after the necessary DOE action has been taken.

VIII. Enforcement Actions

This section describes the enforcement sanctions available to DOE and specifies the conditions under which each may be used. The basic sanctions are Notices of Violation and civil penalties. In determining whether to impose enforcement sanctions, DOE will consider enforcement actions taken by other Federal or State regulatory bodies having concurrent jurisdiction, e.g., instances which involve NRC licensed entities which are also DOE contractors, and in which the NRC exercises its own enforcement authority.

The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. For the vast majority of violations for which DOE assigns severity levels as described previously, a Notice of Violation will be issued, requiring a formal response from the recipient describing the nature of and schedule for corrective actions it intends to take regarding the violation. Administrative actions, such as determination of award fees where DOE contracts provide for such determinations, will be considered separately from any civil penalties that may be imposed under this Enforcement Policy. Likewise, imposition of a civil penalty will be based on the circumstances of each case, unaffected by any award fee determination.

Notice of Violation

A Notice of Violation (either a Preliminary or Final Notice) is a document setting forth the conclusion of the DOE Office of Nuclear Safety that one or more violations of DOE Nuclear Safety Requirements has occurred. Such a notice normally requires the recipient to provide a written response which may take one of several positions described in Section V of this policy statement. In the event that the recipient concedes the occurrence of the violation, it is required to describe corrective steps which have been taken and the results achieved; remedial actions which will be taken to prevent recurrence; and the date by which full compliance will be achieved.

DOE will use the Notice of Violation as the standard method for formalizing the existence of a violation and, in appropriate cases as described in Section VIII, the notice of violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in Section VIII, DOE may refrain from the issuance of an otherwise appropriate Notice of Violation. However, a Notice of Violation will virtually always be issued for willful violations, if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances, or if the circumstances otherwise warrant increasing Severity Level III violations to a higher severity level.

DOE contractors are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for

noncompliance with DOE Nuclear Safety Requirements. Should a contractor believe that a shortage of funding precludes it from achieving compliance with one or more DOE Nuclear Safety Requirements, it must pursue one of two alternative courses of action. First, it may request, in writing, an exemption from the requirement(s) in question from the appropriate Secretarial Officer (SO), explicitly addressing the criteria for exemptions set forth in 10 CFR 820.62. A justification for continued operation for the period during which the exemption request is being considered should also be submitted. In such a case, the SO must grant or deny the request in writing, explaining the rationale for the decision. Second, if the criteria for approval of an exemption cannot be demonstrated, the contractor, in conjunction with the SO, must take appropriate steps to modify, curtail, suspend or cease the activities which cannot be conducted in compliance with the DOE Nuclear Safety Requirement(s) in question.

DOE expects the contractors which operate its facilities to have the proper management and supervisory systems in place to assure that all activities at DOE facilities, regardless of who performs them, are carried out in compliance with all DOE Nuclear Safety Requirements. Therefore, contractors are normally held responsible for the acts of their employees and subcontractor employees in the conduct of activities at DOE facilities. Accordingly, this policy should not be construed to excuse personnel errors.

Finally, certain contractors are explicitly exempted from the imposition of civil penalties pursuant to the provisions of the PAAA, 42 U.S.C. 2282a(d), for activities conducted at specified facilities. See 10 CFR 820.20(c). In addition, in fairness to non-profit educational institutions, the Department has determined that they should be likewise exempted. See 10 CFR 820.20(d). However, compliance with DOE Nuclear Safety Requirements is no less important for these facilities than for other facilities in the DOE complex which work with, store or dispose of radioactive materials. Indeed, the exempted contractors conduct some of the most important nuclear-related research and development activities performed for the Department. Therefore, in order to serve the purposes of this enforcement policy and to emphasize the importance the Department places on compliance with all of its nuclear safety requirements, DOE intends to issue Notices of Violation to the exempted contractors and non-profit educational institutions when appropriate under this policy statement, notwithstanding the statutory and regulatory exemptions from the imposition of civil penalties.

Civil Penalty

A civil penalty is a monetary penalty that may be imposed for violations of applicable DOE Nuclear Safety Requirements, including Compliance Orders. See 10 CFR 820.20(b). Civil penalties are designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of DOE contractor self-identification, reporting and correction of violations of DOE Nuclear Safety Requirements.

Absent mitigating circumstances as described below, or circumstances otherwise warranting the exercise of enforcement discretion by DOE as described in Section VIII, civil penalties will be proposed for Severity Level I and II violations. Civil penalties will be proposed for Severity Level III violations which are similar to previous violations for which the contractor did not take effective corrective action. "Similar" violations are those which could reasonably have been expected to have been prevented by corrective

action for the previous violation. DOE normally considers civil penalties only for similar Severity Level III violations that occur over a reasonable period of time to be determined at the discretion of DOE.

DOE will impose different base level civil penalties, considering the severity level of the violation(s), and a categorization of DOE facilities operated by Price-Anderson indemnified contractors. Tables 1A and 1B show the daily base civil penalties for the various categories of facilities. However, as described above in Section IV, the imposition of civil penalties will also take into account the gravity, circumstances, and extent of the violation or violations and, with respect to the violator, any history of prior similar violations and the degree of culpability and knowledge.

Regarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty be such that it puts a DOE contractor out of business. Contract termination, rather than civil penalties, is used when the intent is to terminate these activities. The deterrent effect of civil penalties is best served when the amount of such penalties takes this factor into account. However, DOE will evaluate the relationship of affiliated entities to the contractor (such as parent corporations) when it asserts that it cannot pay the proposed penalty.

DOE will review each case involving a proposed civil penalty on its own merits and adjust the base civil penalty values upward or downward appropriately. As indicated above, Tables 1A and 1B identify the daily base civil penalty values for different severity levels and different categories of facilities. After considering all relevant circumstances, civil penalties may be escalated or mitigated based upon the adjustment factors described below in Section VIII. In no instance will a civil penalty for any one violation exceed $100,000 per day. However, it should be emphasized that if the DOE contractor is or should have been aware of a violation and has not reported it to DOE and taken corrective action despite an opportunity to do so, each day the condition existed may be considered as a separate violation and, as such, subject to a separate civil penalty. Further, as described above in Section VIII, the duration of a violation will be taken into account in determining the appropriate severity level of the base civil penalty.

Table 1A-Base Civil Penalties

Facility categories	Base civil penalty fn 1
Category A reactors (>20 MWTh)	$ 100,000
Transuranic material production, processing, reprocessing, handling, storage, or waste disposal facilities; device assembly facilities	75,000
Non-Transuranic material, production, processing, reprocessing, handling, storage or waste disposal facilities	50,000
Category B reactors (<20 MWTh), including critical facilities fn 2	10,000
All other nuclear facilities, including those with inventories consisting	10,000

solely of sealed sources fn 3

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fn 1 Potential base civil penalties set forth in this table are, pursuant to the PAAA, per day for each violation.

fn 2 Critical Facilities are experimental facilities used to measure neutron multiplication characteristics (at essentially zero power) of assemblies of fuel, moderator and other materials.

fn 3 This category includes facilities that handle or store transuranic or non-transuranic materials consisting solely in sealed sources.

Table 1B.-Severity Level Base Civil Penalties

Severity level	Base civil penalty amount (Percentage of amount in table 1A)
I	100
II	50
III	20

Adjustment Factors

DOE's enforcement program is not an end in itself, but a means to achieve compliance with DOE Nuclear Safety Requirements, and civil penalties are not collected to swell the coffers of the United States Treasury, but to emphasize the importance of compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of nuclear safety deficiencies and violations of DOE Nuclear Safety Requirements by the DOE contractors themselves rather than by DOE, and the prompt correction of any deficiencies and violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance with DOE Nuclear Safety Requirements. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting and prompt correction of nuclear safety-related problems that may constitute, or lead to, violations of DOE Nuclear Safety Requirements before, rather than after, DOE has identified such violations. Thus, DOE contractors will almost always be aware of nuclear safety problems before they are discovered by DOE. Obviously, public and worker health and safety is enhanced if deficiencies are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a deficiency until later on, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of nuclear safety-related problems by DOE contractors has the added benefit of allowing information which could

prevent such problems at other facilities in the DOE complex to be shared with all appropriate DOE contractors.

Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting and prompt correction of problems which constitute, or could lead to, violations of DOE Nuclear Safety Requirements. Thus, application of the adjustment factors set forth below may result in no civil penalty being assessed for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

On the other hand, ineffective programs for problem identification and correction are unacceptable. Thus, for example, where a contractor fails to disclose and promptly correct violations of which it was aware or should have been aware, substantial civil penalties are warranted and may be sought, including the assessment of civil penalties for continuing violations on a per day basis.

Further, in cases involving willfulness, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls, DOE intends to apply its full statutory enforcement authority where such action is warranted.

Identification and Reporting

Reduction of up to 50% of the base civil penalty shown in Tables 1A and 1B may be given when a DOE contractor identifies the violation and promptly reports the violation to the DOE. In weighing this factor, consideration will be given to, among other things, the opportunity available to discover the violation, the ease of discovery and the promptness and completeness of any required report. No consideration will be given to a reduction in penalty if the DOE contractor does not take prompt action to report the problem to DOE upon discovery, or if the immediate actions necessary to restore compliance with DOE Nuclear Safety Requirements or place the facility or operation in a safe configuration are not taken.

Corrective Action To Prevent Recurrence

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to identify root cause and prevent recurrence, may result in up to a 50% increase or decrease in the base civil penalty shown in Tables 1A and 1B. For example, very extensive corrective action may result in reducing the proposed civil penalty as much as 50% of the base value shown in Table 1A. On the other hand, the civil penalty may be increased as much as 50% of the base value if initiation or corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor, consideration will be given to, among other things, the appropriateness, timeliness and degree of initiative associated with the corrective action. The comprehensiveness of the corrective action will also be considered, taking into account factors such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

DOE's Contribution to a Violation

There may be circumstances in which a violation of a DOE Nuclear Safety Requirement results, in part or entirely, from a direction given by DOE

personnel to a DOE contractor to either take, or forbear from taking an action at a DOE facility. In such cases, DOE may refrain from issuing an NOV, and may mitigate, either partially or entirely, any proposed civil penalty, provided that the direction upon which the DOE contractor relied is documented in writing, contemporaneously with the direction. It should be emphasized, however, that pursuant to 10 CFR 820.60, no interpretation of a DOE Nuclear Safety Requirement is binding upon DOE unless issued in writing by the General Counsel. Further, as discussed in Section VIII of this policy statement, lack of funding by itself will not be considered as a mitigating factor in enforcement actions.

Exercise of Discretion

Because DOE wants to encourage and support DOE contractor initiative for prompt self-identification, reporting and correction of problems, DOE may exercise discretion as follows:

a. In accordance with the previous discussion, DOE may refrain from issuing a civil penalty for a violation which meets all of the following criteria:

(1) The violation is promptly identified and reported to DOE before DOE learns of it.

(2) The violation is not willful or a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

(3) The DOE contractor, upon discovery of the violation, has taken or begun to take prompt and appropriate action to correct the violation.

(4) The DOE contractor has taken, or has agreed to take, remedial action satisfactory to DOE to preclude recurrence of the violation and the underlying conditions which caused it.

b. DOE may refrain from proposing a civil penalty for a violation involving a past problem, such as in engineering design or installation, that meets all of the following criteria:

(1) It was identified by a DOE contractor as a result of a formal effort such as a Safety System Functional Inspection, Design Reconstitution program, or other program that has a defined scope and timetable which is being aggressively implemented and reported;

(2) Comprehensive corrective action has been taken or is well underway within a reasonable time following identification; and

(3) It was not likely to be identified by routine contractor efforts such as normal surveillance or quality assurance activities.

DOE will not issue a Notice of Violation for cases in which the violation discovered by the DOE contractor cannot reasonably be linked to the conduct of that contractor in the design, construction or operation of the DOE facility involved, provided that prompt and appropriate action is taken by the DOE contractor upon identification of the past violation to report to DOE and remedy the problem.

c. DOE may refrain from issuing a Notice of Violation for an item of noncompliance that meets all of the following criteria:

(1) It was promptly identified by the DOE nuclear entity;

(2) It is normally classified at a Severity Level III;

(3) It was promptly reported to DOE;
(4) Prompt and appropriate corrective action will be taken, including measures to prevent recurrence; and

(5) It was not a willful violation or a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

d. DOE may refrain from issuing a Notice of Violation for an item of noncompliance that meets all of the following criteria:

(1) It was an isolated Severity Level III violation identified during a Tiger Team inspection conducted by the Office of Environment, Safety and Health, during an inspection or integrated performance assessment conducted by the Office of Nuclear Safety, or during some other DOE assessment activity.

(2) The identified noncompliance was properly reported by the contractor upon discovery.

(3) The contractor initiated or completed appropriate assessment and corrective actions within a reasonable period, usually before the termination of the onsite inspection or integrated performance assessment.

(4) The violation is not willful or one which could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

In situations where corrective actions have been completed before termination of an inspection or assessment, a formal response from the contractor is not required and the inspection or integrated performance assessment report serves to document the violation and the corrective action. However, in all instances, the contractor is required to report the noncompliance through established reporting mechanisms so the noncompliance issue and any corrective actions can be properly tracked and monitored.

e. If DOE initiates an enforcement action for a violation at a Severity Level II or III and, as part of the corrective action for that violation, the DOE contractor identifies other examples of the violation with the same root cause, DOE may refrain from initiating an additional enforcement action. In determining whether to exercise this discretion, DOE will consider whether the DOE contractor acted reasonably and in a timely manner appropriate to the safety significance of the initial violation, the comprehensiveness of the corrective action, whether the matter was reported, and whether the additional violation(s) substantially change the safety significance or character of the concern arising out of the initial violation.

It should be emphasized that the preceding paragraphs are solely intended to be examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of

any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or Notice of Violation issued when, in DOE's judgment, such action is warranted on the basis of the circumstances of an individual case.

IX. Procurement of Products or Services and the Reporting of Defects

DOE's enforcement policy is also applicable to subcontractors and suppliers to DOE Price-Anderson indemnified contractors. Through procurement contracts with these DOE contractors, subcontractors and suppliers are generally required to have quality assurance programs that meet applicable DOE Nuclear Safety Requirements. Suppliers of products or services provided in support of or for use in DOE facilities operated by Price-Anderson indemnified contractors are subject to certain requirements designed to ensure the high quality of the products or services supplied to DOE facilities that could, if deficient, adversely affect public or worker safety. DOE regulations require that DOE be notified whenever a DOE contractor obtains information reasonably indicating that a DOE facility (including its structures, systems and components) which conducts activities subject to the provisions of the Atomic Energy Act of 1954, as amended or DOE Nuclear Safety Requirements either fails to comply with any provision of the Atomic Energy Act or any applicable DOE Nuclear Safety Requirement, or contains a defect or has been supplied with a product or service which could create or result in a substantial safety hazard.

DOE will conduct audits and assessments of its contractors to determine whether they are ensuring that subcontractors and suppliers are meeting their contractual obligations with regard to quality of products or services that could have an adverse effect on public or worker radiological safety, and ensure that DOE contractors have in place adequate programs to determine whether products or services supplied to them for DOE facilities meet applicable DOE requirements and that substandard products or services are not used by Price-Anderson indemnified contractors at the facilities they operate for DOE. As part of the effort of ensuring that contractual and regulatory requirements are met, DOE may also audit or assess subcontractors and suppliers. These assessments could include examination of the quality assurance programs and their implementation by the subcontractors and suppliers through examination of product quality.

When audits or assessments determine that subcontractors or suppliers have failed to comply with applicable DOE Nuclear Safety Requirements or to fulfill contractual commitments designed to ensure the quality of a safety significant product or service, enforcement action will be taken. Notices of Violations and civil penalties will be issued, as appropriate, for DOE contractor failures to ensure that their subcontractors and suppliers provide products and services that meet applicable DOE requirements. Notices of Violations and civil penalties will also be issued to subcontractors and suppliers of DOE contractors which fail to comply with the reporting requirements set forth in any other applicable DOE Nuclear Safety Requirements.

X. Inaccurate and Incomplete Information

A violation of DOE Nuclear Safety Requirements for failure to provide complete and accurate information to DOE, 10 CFR □ 820.11, can result in the full range of enforcement sanctions, depending upon the circumstances of the particular case and consideration of the factors discussed in this section.

Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a DOE contractor normally will be categorized based on the guidance in Section VI, "Severity of Violations".

DOE recognizes that oral information may in some situations be inherently less reliable than written submittals because of the absence of an opportunity for reflection and management review. However, DOE must be able to rely on oral communications from officials of DOE contractors concerning significant information. In determining whether to take enforcement action for an oral statement, consideration will be given to such factors as

(a) The degree of knowledge that the communicator should have had regarding the matter in view of his or her position, training, and experience;

(b) The opportunity and time available prior to the communication to assure the accuracy or completeness of the information;

(c) The degree of intent or negligence, if any, involved;

(d) The formality of the communication;

(e) The reasonableness of DOE reliance on the information;

(f) The importance of the information that was wrong or not provided; and

(g) The reasonableness of the explanation for not providing complete and accurate information.

Absent gross negligence or willfulness, an incomplete or inaccurate oral statement normally will not be subject to enforcement action unless it involves significant information provided by an official of a DOE contractor. However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to DOE by an official of a DOE contractor or others on behalf of the DOE contractor, if a record was made of the oral information and provided to the DOE contractor thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the DOE contractor and was not subsequently corrected in a timely manner.

When a DOE contractor has corrected inaccurate or incomplete information, the decision to issue a citation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether DOE or the DOE contractor identified the problem with the communication, and whether DOE relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the DOE contractor prior to reliance by DOE, or before DOE raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after DOE relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected.

If the initial submission was accurate when made but later turns out to be erroneous because of newly discovered information or advance in technology, a citation normally would not be appropriate if, when the new information became available, the initial submission was corrected.

The failure to correct inaccurate or incomplete information that the DOE contractor does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, an unintentionally inaccurate or incomplete submission may be treated as a more severe matter if a DOE contractor later determines that the initial submission was in error and does not correct it or if there were clear opportunities to identify the error.

XI. Secretarial Notification and Consultation

The Secretary will be provided written notification of all enforcement actions involving proposed civil penalties. The Secretary will be consulted prior to taking action in the following situations:

a. Proposals to impose civil penalties in an amount equal to or greater than $100,000;

b. Any proposed enforcement action that involves a Severity Level I violation;

c. Any action the Director believes warrants the Secretary's involvement; or

d. Any proposed enforcement action on which the Secretary asks to be consulted.

[FR Doc. 93-19159 Filed 8-16-93; 8:45 am]

BILLING CODE 6450-01-P