SAFETY AND SECURITY ENFORCEMENT PROCESS OVERVIEW

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Office of Enforcement
Office of Enterprise Assessments
U.S. Department of Energy

Preface

The Atomic Energy Act (AEA) of 1954, as amended, gives the Secretary of Energy (Secretary) the authority to establish rules, regulations, or orders necessary or desirable to promote the common defense and security of nuclear materials or to protect health or minimize danger to life or property. Subsequent amendments to the AEA give the Secretary the authority to levy penalties against U.S. Department of Energy (DOE) contractors indemnified under the AEA for violations of such rules, regulations, or orders. DOE implements these authorities through a safety and security enforcement program that is managed and administered by the Office of Enforcement, within the DOE Office of Enterprise Assessments (EA).

EA was established by Secretary Moniz in May 2014 during a reorganization of the functions previously performed by the Office of Health, Safety and Security. Part of the impetus for creating EA was to ensure the independence of the oversight and enforcement functions that EA implements on behalf of the Secretary. These functions are major elements of DOE's self-regulation of contractor safety and security performance. As the owner of the facilities where contractors hired by DOE perform work, DOE has multiple mechanisms for ensuring that those contractors perform DOE's mission safely and securely; regulatory enforcement is one of those mechanisms.

As discussed in the general enforcement policy statements that accompany DOE's safety and security enforcement rules (i.e., 10 C.F.R. Parts 851, 820, and 824), the goals of the safety and security enforcement program are to enhance and protect worker safety and health, nuclear safety, and classified information security by fostering a culture that seeks to attain and sustain compliance with DOE's regulatory requirements. Beyond the compliance aspect, when one considers the human and operational costs that can result from failures to adhere to safety and classified information security requirements, it becomes clear that a viable enforcement program is integral to efficient and sustainable accomplishment of DOE's missions.

To accomplish these goals effectively, the Office of Enforcement works closely with DOE program and field office managers to ensure that enforcement decisions fully consider the operational context in which an event or issue occurs, the safety or security significance of any potential violations, and contractor performance trends. However, the Office of Enforcement ultimately exercises its independence in taking action on issues that are most appropriate for enforcement activity in order to serve as a deterrent to prevent future violations and in such a manner as to promote consistent application of available enforcement mechanisms. Through this critically important approach, DOE has established an impartial and transparent process that demonstrates to Congress, the public, and our workforce that DOE's contractors will be held accountable for failures to adhere to basic safety and classified information security standards.

The worker safety and health, nuclear safety, and classified information security rules provide wide latitude and discretion in such matters as investigating regulatory noncompliances, considering mitigating and aggravating factors, and determining the appropriate outcome for an enforcement proceeding based on the relevant facts and circumstances. This Enforcement Process Overview and the companion Enforcement Coordinator Handbook are program guidance documents that the Office of Enforcement developed to promote improved understanding of

DOE's safety and security enforcement program and facilitate transparency and consistency in its implementation. This Overview document, which has undergone numerous changes over the years, provides background information, discusses roles and responsibilities, and delineates various considerations that the Office of Enforcement uses to determine enforcement outcomes. The Enforcement Coordinator Handbook is intended to serve as a convenient reference for site and Headquarters enforcement coordinators to address those situations and questions typically encountered in the day-to-day execution of their compliance-assurance-related duties.

The Office of Enforcement periodically reviews these documents to ensure that they reflect current enforcement practices and information gained in implementing the program. We recognize that these documents serve multiple purposes and audiences, and so I encourage you to contact me or my staff with suggestions for improving their usefulness.

Steven C. Simonson
Director
Office of Enforcement
Office of Enterprise Assessments

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This version of the Enforcement Process Overview (dated April 2015) supersedes all previous versions. Future revisions will be made, as necessary. The current version of this document can be obtained at: http://energy.gov/ea/services/enforcement/enforcement-program-and-process-guidance-and-information.

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Acronyms

AEA	Atomic Energy Act
ALJ	Administrative Law Judge
C.F.R.	Code of Federal Regulations
DOE	U.S. Department of Energy
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
EA	Office of Enterprise Assessments
ECH	Enforcement Coordinator Handbook
EPO	Enforcement Process Overview
FAR	Federal Acquisition Regulation
FNOV	Final Notice of Violation
FOIA	Freedom of Information Act
IG	Office of the Inspector General
M&IA	Management and Independent Assessments
MFA	Major Fraud Act
NNSA	National Nuclear Security Administration
NOV	Notice of Violation
NTS	Noncompliance Tracking System
OHA	Office of Hearings and Appeals
ORPS	Occurrence Reporting and Processing System
PAAA	Price-Anderson Amendments Act
PNOV	Preliminary Notice of Violation
SRO	Special Report Order
SSIMS	Safeguards and Security Information Management System

Definitions

Contractor Assurance System: Encompasses all aspects of the processes and activities designed to identify deficiencies and opportunities for improvement, report deficiencies to the responsible managers, complete corrective actions, and share lessons learned effectively across all aspects of operation.

Compliance Assurance: The set of actions that a contractor should take to ensure that it operates U.S. Department of Energy (DOE) facilities and conducts work in a manner that complies with applicable requirements.

De Minimis Violations: A violation of 10 C.F.R. Part 851 is considered de minimis if the condition has no direct or immediate impact to worker safety and health.

Director: Refers to the Director of the Office of Enforcement, who is also referred to as the Director of Enforcement.

Enforcement Action: Refers to a Preliminary Notice of Violation (PNOV), Final Notice of Violation (FNOV), or Compliance Order; does not include a Consent Order, Settlement Agreement, Enforcement Letter, or Special Report Order.

Enforcement Coordinator: A DOE or contractor individual assigned to serve as an organization's principal interface with the Office of Enforcement for issues related to rule implementation, noncompliances, and enforcement proceedings.

Enforcement Outcome: A general term referring to the result of an enforcement evaluation or investigation of an event or condition involving noncompliances.

Enforcement Sanction: A general term referring collectively to enforcement actions (see above), Consent Orders, Settlement Agreements, and Special Report Orders.

Indemnification: Refers to situations in which the government acts as an insurer against any findings of liability arising from the nuclear activities of the contractor within the scope of its contract.

Noncompliance: A condition that does not meet a DOE regulatory requirement.

Notice of Violation: Either a PNOV or FNOV.

Programmatic Problem: Generally involves some weakness in administrative or management controls, or their implementation, to such a degree that a broader management or process control problem exists.

Repetitive Problem: Two or more events or conditions, separated in time, that have comparable causes/circumstances and involve substantially similar work activities, locations, equipment, or

individuals, so that it would be reasonable to assume that the contractor's corrective actions for the first occurrence should have prevented the subsequent event/condition.

Violation: A DOE determination that a contractor has failed to comply with an applicable safety or security regulatory requirement.

I. Background and Applicability

Purpose of Enforcement Process Overview

This Enforcement Process Overview (EPO) describes the processes used by the U.S. Department of Energy (DOE or Department) Office of Enforcement, within the DOE Office of Enterprise Assessments (EA), to implement certain DOE regulatory authorities established by the Atomic Energy Act of 1954, as amended (AEA). These processes apply to the enforcement of Departmental requirements in the areas of worker safety and health, nuclear safety, and classified information security by the following subordinate offices within the Office of Enforcement:

- The Office of Worker Safety and Health Enforcement implements DOE's worker safety and health enforcement program in accordance with 10 C.F.R. Part 851, *Worker Safety and Health Program*, for requirements established in 10 C.F.R. Part 850, *Chronic Beryllium Disease Prevention Program*, and Part 851.

- The Office of Nuclear Safety Enforcement implements DOE's nuclear safety enforcement program in accordance with 10 C.F.R. Part 820, *Procedural Rules for DOE Nuclear Activities*, for requirements established in 10 C.F.R. Part 830, *Nuclear Safety Management*; Part 835, *Occupational Radiation Protection*; Part 708, *DOE Contractor Employee Protection Program*; and Section 820.11, *Information requirements*.

- The Office of Security Enforcement implements DOE's security enforcement program in accordance with 10 C.F.R. Part 824, *Procedural Rules for the Assessment of Civil Penalties for Classified Information Security Violations*, for requirements established in 10 C.F.R. Part 1016, *Safeguarding of Restricted Data*; Part 1045, *Nuclear Classification and Declassification*; and DOE directives and National Nuclear Security Administration (NNSA) policies pertaining to classified information security that are identified therein as enforceable pursuant to Part 824.

This document primarily discusses various aspects of the approach to enforcement program implementation that are common to the three areas of enforcement mentioned above. Responsibilities of other Departmental offices and Federal agencies in the enforcement process are also briefly discussed. Supplemental information addressing areas considered to be of greater interest to DOE and contractor enforcement coordinators in the daily execution of their responsibilities, as well as unique elements inherent in the three enforcement areas, are contained in the Enforcement Coordinator Handbook (ECH), which is available at http://energy.gov/ea/services/enforcement/enforcement-program-and-process-guidance-and-information.

Statutory Authority and Regulatory Framework

The AEA provides indemnification[1] to DOE contractors that manage and operate nuclear facilities in the DOE complex; associated subcontractors and suppliers are included under this coverage. In 1988, the Price-Anderson Amendments Act (PAAA) was enacted to continue this indemnification. As part of its agreement to continue indemnification coverage, Congress required DOE-indemnified contractors, subcontractors, and suppliers to be subject to civil penalties for violations of DOE's nuclear safety requirements. Consequently, on August 17, 1993, DOE published its nuclear safety enforcement procedural rule and enforcement policy (10 C.F.R. Part 820, see especially Appendix A, *General Statement of Enforcement Policy*), which has since been amended several times. The Director of Enforcement (Director) is responsible for carrying out the statutory enforcement authority provided to DOE in the PAAA and reflected in Section 234A, *Civil Monetary Penalties for Violation of Department of Energy Safety Regulations*, of the AEA.

The National Defense Authorization Act for Fiscal Year 2000 added a new Section 234B, *Civil Monetary Penalties for Violations of Department of Energy Regulations regarding Security of Classified or Sensitive Information or Data*, to the AEA, providing for the imposition of civil penalties for violations of Departmental information security requirements. Section 234B provides that a DOE contractor or subcontractor that violates any rule, regulation, or order relating to the safeguarding or security of Restricted Data and/or other classified or sensitive information shall be subject to a civil penalty. On January 26, 2005, DOE published 10 C.F.R. Part 824 to implement this new section. Title 10 C.F.R. Part 824 provides that civil penalties will be assessed for violations of requirements for the protection and control of classified information (Restricted Data, Formerly Restricted Data, and National Security Information).

In addition to extending the previously-approved indemnification levels until December 31, 2004, the Bob Stump National Defense Authorization Act for Fiscal Year 2003 required the Secretary of Energy to promulgate regulations for industrial and construction health and safety at DOE facilities and established provisions for enforcement of those regulations. On February 9, 2006, DOE issued 10 C.F.R. Part 851, which includes the safety and health requirements subject to enforcement and, in Subpart E, *Enforcement Process*, the enforcement process to be applied to violations of those requirements as authorized by Section 234C, *Worker Health and Safety Rules for Department of Energy Nuclear Facilities*, of the AEA.

Title 10 C.F.R. Parts 820, 824, and 851 establish the procedural rules governing enforcement against DOE contractors that are covered by the regulations. These contractors may be held responsible for the acts of their employees who fail to observe nuclear safety, worker safety and health, and classified information security requirements. For contractors that are indemnified by DOE under the AEA, such enforcement may include the imposition of civil penalties as prescribed by the regulations.

[1] By indemnifying the contractor, the government acts as an insurer against any findings of public liability arising from the nuclear activities of the contractor within the scope of its contract. As of the September 2013 inflation adjustment, the indemnification amount is approximately $12.7 billion.

Document Control and Supplemental Enforcement Guidance

This version of the EPO supersedes all previous versions and previously issued enforcement guidance (e.g., Enforcement Guidance Supplements), irrespective of form, unless otherwise noted. Some information from prior versions of this document has been transferred to the ECH. For example, Chapter IV, *Contractor Noncompliance Screening and Reporting Guidance*, of the ECH contains a list of the Enforcement Guidance Supplements that are still considered to reflect current enforcement policy and practices. The EPO and ECH are available at http://energy.gov/ea/services/enforcement/enforcement-program-and-process-guidance-and-information.

Application of Enforcement Program to Individuals, Subcontractors, and Suppliers

The DOE enforcement program is a civil enforcement process that focuses on the performance of contractor organizations relating to compliance with worker safety and health, nuclear safety, and classified information security rules. The program does not undertake enforcement proceedings against individual contractor employees. If the Office of Enforcement becomes aware of the possibility of criminal behavior through any of its activities, the issue will be referred to the U.S. Department of Justice (DOJ) and DOE's Office of the Inspector General (IG), as described further in Chapter VI, *Enforcement Outcomes*.

In general, DOE holds its prime contractors primarily responsible for safety and security at their respective sites of employment. DOE may issue a Notice of Violation (NOV) to the prime contractor for any violation by a subcontractor if deemed appropriate. However, depending upon the circumstances, an enforcement proceeding may also be initiated for a subcontractor or supplier, either alone or in addition to that involving the prime contractor. For nuclear safety issues, civil penalties may be levied against any indemnified contractor (and any subcontractor or supplier to a DOE indemnified contractor) pursuant to 10 C.F.R. Section 820.20, *Purpose and Scope*, and as addressed in the enforcement policy, Appendix A of Part 820. Nuclear safety requirements in Parts 820, 830, 835, and 708 apply directly to these indemnified subcontractors and suppliers. Noncompliances with such requirements are subject to the enforcement process described in Chapter VI. A civil penalty levied under Part 820 is independent of and may be in addition to any contract action taken by the cognizant DOE contracting officer.

In the worker safety and health and classified information security areas, Parts 851 and 824 apply directly to DOE contractors, and their subcontractors, with responsibilities for performing work at a DOE site in furtherance of a DOE mission, subject to certain exclusions. DOE may issue an NOV to a contractor or subcontractor for violating a Part 851 or Part 824 requirement (reference 10 C.F.R. Sections 851.5(a) and 824.2(a), respectively). Part 851 permits DOE to impose either a civil penalty or contract fee reduction (not both) on an indemnified contractor, as well as a civil penalty for their subcontractors at any tier, with certain limitations as specified in the Rule. Like Part 820, Part 824 permits imposing both a civil penalty and contract fee reduction.

National Nuclear Security Administration Contractors and Facilities

Under 10 C.F.R. Sections 820.13 (nuclear safety), 824.16 (classified information security), and 851.45 (worker safety and health), *Direction to NNSA Contractors*, the NNSA Administrator, rather than the Director of Enforcement, issues subpoenas and NOVs to indemnified contractors (including their subcontractors, and in the case of Part 820, their suppliers) that manage and operate NNSA facilities. The NNSA Administrator acts after considering a recommendation from the Director of Enforcement. Other enforcement matters involving NNSA are handled in accordance with the provisions of a memorandum of understanding between NNSA and EA.

Exemption/Equivalency/Variance Requests

Upon contractor request, DOE may grant exemptions from DOE nuclear safety requirements; equivalencies, exemptions, or waivers from classified information security regulations and directives; and variances from Part 851 requirements. Requirements for which a contractor has obtained an exemption/equivalency/variance/waiver will not be subject to enforcement.

The criteria and procedures for exemption relief from nuclear safety requirements are set forth in 10 C.F.R. Part 820, Subpart E, *Exemption Relief*, and DOE Standard 1083-2015, *Processing Exemptions to Nuclear Safety Rules and Approval of Alternate Methods for Documented Safety Analyses*. Exemptions are granted by the Secretarial Officer who is primarily responsible for the activity to which a requirement relates, except that the Secretarial Officer primarily responsible for environment, safety, and health matters (i.e., the NNSA Administrator for NNSA facilities and the Associate Under Secretary for Environment, Health, Safety and Security for non-NNSA facilities) has the authority to grant exemptions relating to radiological protection of workers, the public, and the environment.

Requests for equivalencies and exemptions from directives requirements related to classified information security must comply with DOE policy requirements. Such equivalencies and exemptions are approved by the cognizant program Secretarial Officer or NNSA Administrator. The approval process for these equivalency and exemption requests is discussed in DOE Orders 251.1C, *Departmental Directives Program*, and 470.4B, *Safeguards and Security Program*, Attachment 1. Exemptions from the procedural provisions of 10 C.F.R. Part 1045 may be granted by the DOE Director of Classification, and DOE may grant specific waivers from 10 C.F.R. Part 1016 requirements.

Title 10 C.F.R. Part 851, Subpart D, *Variances*, establishes a variance process for worker safety and health requirements. Under Section 851.30(a), the cognizant Under Secretary has the authority to grant variances after considering a recommendation from DOE's Office of Environment, Health, Safety and Security.

Interpretation, Rulemaking, and Informal Information Requests

Interpretations of DOE's nuclear safety or worker safety and health regulatory requirements, and the classified information security requirements in 10 C.F.R. Part 1016, are issued by DOE's

Office of General Counsel as provided in 10 C.F.R. Sections 820.51, *General Counsel*; 851.7, *Requests for a Binding Interpretative Ruling*; and 1016.7, *Interpretations*.

For the worker safety and health requirements, as an alternative to applying for a binding interpretative ruling, Section 851.8, *Informal Requests for Information*, provides for contractor submission of an informal request for information on how to comply with Part 851. Such requests must be submitted to the DOE Office of Environment, Health, Safety and Security. Information requests regarding the general statement of enforcement policy in the Part 851 appendix should be directed to the Office of Enforcement.

II. Enforcement Philosophy

DOE's enforcement philosophy is to encourage early identification, timely self-reporting, and prompt correction of deficiencies and violations of worker safety and health, nuclear safety, and classified information security requirements. DOE contractors are in the best position to identify and promptly correct noncompliances, and DOE provides substantial incentives for early identification, self-reporting, and prompt correction of deficiencies and violations by contractors rather than identification by DOE (e.g., during line management or EA reviews) or through an accident or event.

The Office of Enforcement's implementation approach is founded on the following key elements:

- Promoting management and compliance assurance attributes so contractors can achieve excellence in safety and security without the need for enforcement involvement. Such attributes include rigorous and critical self-assessment programs, timely processes for self-identification and correction of noncompliance conditions and any underlying problems affecting compliance, positive safety and security cultures, and sustainable and effective corrective action processes.

- Stimulating contractors' transition from a reactive, event-driven approach to identifying and correcting deficiencies through a proactive, non-event-driven culture of critical self-evaluation and continuous improvement.

- Coordinating with DOE Program Offices and Field Elements to foster effective implementation of the enforcement program's tenets of transparency, fairness, and consistency.

- Issuing NOVs for significant safety or classified information security noncompliances or significant precursor conditions, including repetitive or programmatic issues, near-misses, willful action, and worker retaliation.

- Selectively agreeing to settle cases involving both a lesser degree of safety or security significance and aggressive, comprehensive contractor investigation, causal analysis, and corrective action implementation.

- Periodically reviewing contractor processes for screening, reporting, and correcting noncompliances, as well as self-assessment processes, through regulatory assistance reviews.

- Openly sharing information on enforcement outcomes to serve as lessons learned to promote proactive continuous improvement.

DOE's rules for worker safety and health, nuclear safety, and classified information security are structured to place responsibility for compliance on contractors. DOE's enforcement policies use the term "compliance assurance" to refer collectively to the set of actions that a contractor

should take to ensure the safe and secure operation of DOE facilities. It is the Office of Enforcement's view that successful contractor regulatory compliance assurance programs are characterized by:

- Critical and comprehensive self-assessments to identify non-compliant conditions
- An effective process for trending and analyzing operational issues for repetitive or programmatic noncompliances
- A rigorous noncompliance identification and screening process that considers a wide range of performance information sources
- A corrective action development process that maps corrective actions against a well-defined (and appropriately graded) causal analysis that carefully considers extent of condition
- A well-integrated issues management process for systematic tracking and closure of corrective actions.

These attributes also enter into the Office of Enforcement's deliberations when evaluating noncompliant conditions for investigation and considering whether, upon request, to enter into settlement for an enforcement proceeding.

The EPO describes factors that the Office of Enforcement considers in judging contractors' positive steps, as well as mitigating or aggravating factors affecting an enforcement outcome. If an enforcement sanction is considered necessary, these factors are applied in accordance with the provisions of the enforcement policies noted in the appendices to the enforcement procedural rules (10 C.F.R. Parts 820, 824, and 851) and this EPO.

III. Roles and Responsibilities

DOE and contractor personnel are expected to ensure strong safety and classified information security compliance and performance; an effective compliance assurance process; timely and proper identification, reporting, and resolution of noncompliances; and effective interface with the enforcement program community.

The overall structure of the DOE safety and security enforcement program includes roles and responsibilities for the Office of Enforcement, DOE line management, and contractors, which include:

- The Director of Enforcement has program responsibility for the DOE safety and security enforcement program. To maintain effective interfaces, the Director works closely with DOE Program Office, Field Element, and contractor management, primarily through individuals serving as enforcement coordinators.

- DOE Program Office and Field Element managers have line management responsibility for safety and security and should designate enforcement coordinators to serve as the principal interface with the Office of Enforcement and contractors on all enforcement matters.

- Contractor management is responsible for implementing DOE requirements and designating individuals (usually referred to as enforcement coordinators) who serve as the principal interface with the corresponding DOE Field Element enforcement coordinator and the Office of Enforcement.

Director, Office of Enforcement

The Director manages all enforcement activities, directs technical and legal reviews, oversees the investigative process and the determination/preparation of appropriate enforcement outcomes, and refers potential criminal actions to DOJ and the IG. The Director is authorized to issue enforcement correspondence and levy sanctions, except for cases involving NNSA contractors where the sanction requires action by the Administrator, after considering the recommendation of the Director. The Director regularly communicates, to senior DOE and contractor management, the state of the enforcement program and observations on safety and classified information security compliance issues. The Director also provides guidance for outreach and training-related activities that help to facilitate the implementation of DOE's enforcement program.

Office of Enforcement Staff

Staff members:

- Maintain operational awareness of assigned sites and regularly interface with Program Office, Field Element, and contractor enforcement coordinators
- Review and evaluate information on noncompliances, including information reported into the Noncompliance Tracking System (NTS) and Safeguards and Security Information Management System (SSIMS)
- Identify significant noncompliant conditions and recommend investigation, inspection, and/or development of an enforcement letter
- Conduct investigations or inspections associated with potential violations of DOE safety and classified information security requirements, and prepare reports and/or technical evaluations
- Participate in enforcement conferences
- Provide recommendations during pre- and post-conference, DOE-only discussions and deliberations
- Prepare initial drafts of enforcement products
- Inform DOE personnel of their obligation to maintain confidentiality on the details of planned enforcement activities, internal DOE communications and deliberations relating to investigations, and draft outcome documents
- Notify Program Office, Field Element, and contractor enforcement coordinators of the impending issuance of an enforcement outcome document
- Conduct reviews of noncompliance screening, reporting, and self-assessment processes
- Maintain the NTS
- Maintain docket files and a retrieval system for enforcement proceedings and other activities requiring an administrative record
- Conduct periodic enforcement outreach, including workshops and site-specific training/familiarization visits, for DOE and contractor enforcement coordinators and managers.

DOE and Contractor Line Management

For effective coordination and to ensure that DOE achieves a high level of safety and security performance, DOE and contractor line management perform several important functions directly related to successful execution of DOE's enforcement program, including:

- Demonstrating strong support for the noncompliance screening and reporting process, assessment programs, and corrective action process
- Designating an individual to serve as the enforcement coordinator, and placing that individual at a sufficiently senior reporting level to facilitate management awareness of regulatory compliance issues
- Maintaining regular and open communication among the contractor, Field Element, Program Office, and Office of Enforcement on safety and security issues, noncompliance conditions, and noncompliance report resolution
- Working with the Office of Enforcement to facilitate expeditious resolution and closure of enforcement matters
- Ensuring that staff are available to support and participate in enforcement investigations or reviews.

DOE Enforcement Coordinator

Refer to the Enforcement Coordinator Handbook for more information

Although DOE's enforcement program pertains to contractor activities, the DOE Headquarters and Field Element enforcement coordinators play an important role in helping the Office of Enforcement understand DOE line management's perspectives on events, program deficiencies, and contractor performance. In addition, DOE enforcement coordinators assist in coordinating site visits, document requests, and other interactions with site contractors.

Contractor Enforcement Coordinator

Refer to the Enforcement Coordinator Handbook for more information

A contractor enforcement coordinator is typically responsible for key aspects of the contractor organization's processes for identifying, screening, and reporting noncompliances. This coordinator usually serves as the contractor's principal lead for issues related to implementation of DOE's safety and security regulations and is the primary regulatory-compliance interface with enforcement staff for sharing information, facilitating site visits (where warranted), and acting as a liaison with senior contractor management to keep them informed of enforcement proceedings. As such, the contractor enforcement coordinator plays a critical role in facilitating the execution of DOE's enforcement program.

IV. Contractor Noncompliance Identification and Reporting

Contractor Screening Processes

DOE's goal is for contractors to identify and correct any noncompliances before they lead to adverse events or are discovered by an external entity, including DOE. DOE's enforcement philosophy, as noted in Chapter II, *Enforcement Philosophy*, encourages this goal by providing positive incentives for contractors to critically self-assess their activities and identify, report, and comprehensively correct noncompliance conditions in a timely manner.

DOE promotes a voluntary contractor process for screening worker safety and health and nuclear safety problems and deficiencies to determine whether issues represent noncompliant conditions that may then be self-reported into NTS; use of DOE's SSIMS for reporting certain noncompliant classified information security conditions is mandatory. The incentives for voluntary action are described in Chapter VII, *Civil Penalty and Monetary Remedy Determination*. DOE considers prompt contractor identification and reporting and effective correction of noncompliances in deciding whether to investigate noncompliance issues, undertake an enforcement proceeding, and/or impose sanctions. Additional information regarding the desired attributes of contractor screening and reporting processes, and some commonly observed weaknesses in these processes, is provided in the ECH.

Noncompliance Identification

Rigorous assessment processes, effective trending and evaluation of data, worker and management attentiveness, and technical inquisitiveness are the preferred primary means of identifying problems, some of which will represent noncompliant conditions. DOE intends for safety and security issues and noncompliances to be discovered through proactive means – preferably before an event occurs. Obviously, the least desirable case is disclosure of a problem through an investigation, inquiry, or evaluation after an adverse event.[2] When adverse events occur, the Office of Enforcement's expectation is that the contractor, after taking appropriate compensatory measures, will undertake an appropriate level of investigation, causal analysis, extent-of-condition review, and aggressive corrective action in an expeditious manner to prevent the event and any noncompliances from recurring.

Methods of identifying problems include, but are not limited to:

- Contractor assessments: Problems may be identified during internal management and independent assessments (M&IAs) or self-assessments.

- Internal review processes: These include receipt inspections, maintenance and surveillance activities, and subcontractor and supplier surveillances.

[2] As discussed later in this document and in the enforcement policy statements that accompany Parts 820, 824, and 851, these events are referred to as "self-disclosing." Whether the Office of Enforcement provides mitigation for such events will depend on whether the contractor's processes should have identified the underlying noncompliances that contributed to the event before it occurred.

- Worker identification: In an organization that promotes compliance and safety/security-consciousness, when workers observe abnormal conditions or potential deficiencies, they report them through a defined process. Ultimately, these observations should be reported to management and entered into the appropriate issues management process for evaluation and resolution.

- External assessments: Problems may be identified during the course of external assessments, surveillances, inspections, and visits conducted by EA; the DOE IG; DOE Field, Site, Program, Project, or Operations Offices; the DOE Voluntary Protection Program; the Defense Nuclear Facilities Safety Board; or state and Federal agencies, including the DOJ, Environmental Protection Agency, Department of Transportation, or U.S. Government Accountability Office. Note: If the contractor has an effective internal assessment program, a minimal number of problems should remain to be identified through these mechanisms. The goal should be that outside organizations never reveal a significant safety or classified information security issue that the contractor organization does not already know about and is not already addressing.

- Data review: Trending and evaluation of operational data and issues management databases are used to identify adverse trends, dominant problem areas, and potential repetitive events or conditions.

- Employee concerns: An additional source for the identification of problems may be concerns reported into an employee concerns program.

- Event-related: Problems may be identified during the internal investigation of an undesirable event, such as those reflected in the Occurrence Reporting and Processing System (ORPS) or a Security Incident Notification Report (DOE Form 471.1).

Contractor Internal Assessment Programs

DOE has consistently stressed the importance of contractor assessment programs as an effective tool in proactively identifying noncompliant conditions before they are manifest in significant safety and security events. In shifting from an event-driven to a non-event-driven culture, it is expected that most noncompliances will be identified through contractor internal assessment activities. The term “assessment” is not limited to activities associated with formal M&IAs. Rather, the term is used broadly to also refer to other types of self-identifying activities, such as audits, engineering reviews, surveillances, trend analyses, and problem/event precursors that are identified by workers and supervisors during routine performance of their activities.

Some self-disclosing events do not explicitly meet NTS or SSIMS reporting thresholds or criteria and are tracked in a contractor’s internal tracking system. The fact that such issues have been entered into a system by the contractor and are being tracked does not necessarily imply self-identification (i.e., through assessment). The important objective is to reduce the number of events and significant near misses by improving performance assessment processes.

The Office of Enforcement generally investigates significant events or conditions that disclose underlying safety and classified information security issues. These issues usually could have

been identified through an effective assessment process. Many contractor assessment processes have been observed to be deficient because they failed to find problems before disclosure by an adverse event, and Office of Enforcement investigation reports regularly cite assessment program deficiencies that contributed to the event under investigation. Appendix A, *Contractor Corrective Action Processes and Assessments*, of the ECH describes some common assessment program deficiencies that the Office of Enforcement has observed. In addition, the Office of Enforcement encourages the DOE community to review and use the assessment guidance developed by the Energy Facility Contractors Group as a starting point for improving assessment processes. This information is available on the Energy Facility Contractors Group website.

NTS and SSIMS Reporting

The Office of Enforcement has discretion in pursuing enforcement activity for many conditions that are contractor-identified, are promptly and properly reported to DOE, and receive prompt and effective corrective actions. DOE has established processes for directly reporting to DOE noncompliant conditions that are potentially more significant and require closer monitoring by enforcement staff and DOE and contractor enforcement coordinators. Such conditions include certain events or issues that are required to be reported in ORPS or SSIMS.

DOE's centralized reporting systems allow contractors to report promptly any noncompliances that meet DOE's established reporting thresholds. NTS and SSIMS are the automated systems used for reporting noncompliances directly to DOE. NTS is used for the voluntary reporting of nuclear safety and worker safety and health noncompliances, as described in DOE's enforcement policies (Appendix A to Part 820 and Appendix B to Part 851, *General Statement of Enforcement Policy*); SSIMS is used for the mandatory reporting of certain classified information security incidents in accordance with DOE Order 470.4B and may be used to report other compliance-related issues.

The ECH provides additional information about program-specific reporting for each of the three enforcement areas, including information about reporting thresholds. Identified noncompliances that do not meet the NTS or SSIMS reporting thresholds should be reported into a contractor's internal issues tracking system, annotated as a compliance-related problem, and trended to identify potential recurring or programmatic issues.

Access to NTS and SSIMS is limited to authorized users. DOE provides formal authorization to access NTS; users must register to obtain access at: http://energy.gov/ea/noncompliance-tracking-system-registration-and-reporting. NTS provides online "Help" to guide and train users on how to use the system. SSIMS is a classified system, and SSIMS training and system security assistance are available from the Office of Security within the DOE Office of Environment, Health, Safety and Security.

Regulatory Assistance Reviews

The Office of Enforcement conducts regulatory assistance reviews of contractor processes for identifying, screening, reporting, and correcting noncompliances. The purpose of these reviews is to provide feedback on the extent to which contractors have implemented sound processes for identifying noncompliances, making decisions on reportability, and undertaking timely steps to correct noncompliances. A regulatory assistance review may also focus on selected compliance issues such as electrical safety, radiation protection, or adverse trends in classified information incidents, and may include a training component if requested by the site. In addition to identifying potential improvements in a site's regulatory compliance program, these reviews provide an opportunity for the Office of Enforcement to develop a level of confidence in the information the contractor is reporting into NTS and SSIMS.

Regulatory assistance reviews are typically planned, scheduled, and conducted through a collaborative process involving site contractor and DOE Field Element personnel. This process is intended to maximize the usefulness of the review while minimizing the impact on affected site personnel; consequently, the review is generally conducted by a small team of enforcement staff (usually two or three) from the cognizant component office (i.e., Worker Safety and Health Enforcement, Nuclear Safety Enforcement, or Security Enforcement) and typically lasts two to three days. Interest in these reviews is solicited by enforcement staff based on several factors, including input from Program Office and Field Element personnel, site reporting history, results of prior reviews, the Office of Enforcement's familiarity with the contractor's program, and changes in the contractor's program.

After a regulatory assistance review has been arranged, the Office of Enforcement formally notifies DOE and contractor line management and their enforcement coordinators approximately two months before the review. The notification contains details on participants, scheduling, agenda items, and other logistics. The DOE Field Element enforcement coordinator often acts as the Office of Enforcement's liaison to the contractor, although if the site prefers, the contractor enforcement coordinator may oversee arrangements in support of the review.

As part of the onsite review, enforcement staff conduct entrance and exit meetings with DOE and the contractor, and preliminary observations are discussed during the exit meeting. After the onsite review, the Office of Enforcement sends a draft report describing the scope and results of the review, including program strengths and recommendations for improving the site's regulatory compliance program, to the local DOE office and contractor for comments. The final report is typically addressed to the contractor, with copies provided to the affiliated DOE offices. The Office of Enforcement does not require any response to the report, and any actions to make program modifications based on the report recommendations are at the site's discretion. Irrespective of what drives program improvements, having an effective regulatory compliance program is one consideration in the Office of Enforcement's deliberative process regarding mitigation for significant violations of DOE's safety and classified information security requirements.

Upon request, the Office of Enforcement conducts follow-up visits to review actions taken by the contractor to address recommendations or suggestions identified as a result of an assistance

review. These visits are scheduled to allow adequate time for implementing corrective actions and evaluating their effectiveness. Feedback from these visits is provided informally rather than through a formal report.

V. Investigation Process

Overview

When a significant safety or classified information security event occurs or condition is identified, the Office of Enforcement uses the investigation process described in this chapter. Note that this process has substantial flexibility, so the actual steps taken may differ from case to case.

The investigative process typically includes the following steps:

- Engage Field Element and Program Office management and obtain their perspectives
- Determine whether the event or condition warrants investigation, based on a significance evaluation and other contributing factors, and obtain the Director's concurrence
- Provide a formal notification letter to the contractor informing them of the pending investigation and the need to segregate costs[3]
- Conduct an onsite investigation
- Prepare an investigation report
- Conduct an enforcement conference (if deemed necessary)
- Determine the appropriate enforcement outcome (e.g., NOV, enforcement letter)
- As necessary for the outcome, determine the severity level of the violations, applicable mitigating factors, and associated civil penalty or monetary remedy.

Any resulting enforcement sanction is processed using the guidance presented in Chapter VI.

Investigation Process Timelines

The Office of Enforcement strives to move as expeditiously as possible in each enforcement case, within the limits of staff availability, existing caseload, and complexity of the case. The office attempts to meet the following schedule guidelines, recognizing that the circumstances of a particular case may dictate changes and that the Director has discretion to decide case priority and the processing schedule for each case:

Decision to Investigate (60 calendar days from event or condition discovery)

- Identification of Issue
- Management Review/Approval

[3] Contractors are required to segregate costs in accordance with the provisions of the Major Fraud Act, Public Law 100-700 (November 19, 1988) as amended by Public Law 111-350 (January 4, 2011).

- Notice of Investigation Letter
- Request for Documents.

Investigation (120 calendar days from decision to investigate)

- Review of Documents
- Onsite Investigation
- Investigation Report.

Enforcement Outcome (120 calendar days from issuance of the investigation report)

- Enforcement Conference (as necessary)
- Draft Preliminary Notice of Violation (PNOV), Consent Order, or other Outcome (as appropriate)
- DOE Program Office, Field Element, and Office of General Counsel Reviews
- EA Management Concurrence and Issuance.

Decision to Investigate

A decision to investigate is based on an evaluation of the safety and/or security significance associated with a particular noncompliance. For acts of retaliation or willful noncompliances, the Office of Enforcement considers the significance of the retaliation or willful violations in addition to the safety or security implications of any underlying issue or noncompliance. Contractor employees or employee representatives may submit investigation requests to the Office of Enforcement for worker safety and health, nuclear safety, or classified information security issues, as described later in this chapter.

Safety/Security Significance Determination

The Office of Enforcement generally investigates only noncompliances with substantially greater safety or security significance than the general population of reported noncompliances. The judgment of significance considers the safety or security significance and associated programmatic breakdowns. The Office of Enforcement also considers safety or security significance when determining the penalty to be imposed in an enforcement sanction.

For worker safety and health noncompliances, the determination of safety significance is based on established requirements for identifying hazards and implementing protective measures and controls for those hazards, as embodied in DOE's worker safety and health regulation:

- The extent or severity, or both, of an injury or illness that actually occurred, or the potential that it could occur

- The extent to which hazards were not adequately identified or evaluated

- The extent to which protective measures or hazard controls were violated, defeated, or improperly established

- The extent to which workers were not trained or otherwise equipped to perform work safely

For nuclear safety noncompliances, the determination of safety significance is based on the "defense-in-depth" approach to nuclear safety embodied in DOE's nuclear safety regulations:

- The extent or severity, or both, of an actual adverse nuclear safety event or condition, or the potential that it could occur

- The extent to which the safety barriers intended to prevent an abnormal or accident condition have been violated, defeated, or improperly established

- The extent to which mitigating safety features intended to protect workers or the public in an abnormal or accident condition have been violated, defeated, or improperly established.

For classified information security noncompliances, the determination of security significance is based on the extent to which national security was or may have been impacted, considering both the likelihood of the threat and the potential consequences involved. If the Program Office completed a damage assessment, it is also considered during the course of the enforcement process.

The following is a list of events and conditions that generally reflect sufficiently high safety or security significance that the need for further evaluation to determine whether an investigation is warranted would be unnecessary. For events or conditions involving one or more of the following characteristics resulting from DOE operations, the Office of Enforcement will typically issue a Notice of Investigation letter promptly:

- Fatality, terminal injury/illness, or permanent, disabling injury

- Injury or illness to three or more workers requiring medical treatment beyond first aid

- Inadvertent criticality, or loss of double contingency such that no credited controls are available to prevent criticality

- Loss of control of cooling for irradiated nuclear assemblies

- Worker or public radiation exposure above 10 C.F.R. Part 835 dose limits

- Identification of significant radioactive material/contamination off site

- Loss, theft, unauthorized access, or compromise of classified information that could significantly impact the national security (i.e., Top Secret, Sensitive Compartmented Information, Special Access Program Information, Weapons Design Information)

- Willful noncompliances that place safety or classified information at risk

- Substantiation by the U.S. Department of Labor (DOL) or DOE Office of Hearings and Appeals (OHA) of worker retaliation for raising a safety or security concern

- Safety- or security-significant repetitive violations associated with a prior enforcement action or prior Federal Accident Investigation Board investigation

- Violation of a Compliance Order or noncompliance with the term(s) of a Consent Order.

Irrespective of whether a potential case exhibits one of the foregoing characteristics, various other factors are considered in evaluating cases for investigation and determining the enforcement outcome. These factors include:

- Management involvement in, awareness of, or contribution to a noncompliance

- A repetitive or recurring noncompliance that occurs over a period of time

- Prior notice by DOE of the problem, and inadequate resolution by the contractor

- Duration of the noncompliance

- Multiple examples of a noncompliance identified during an evaluation

- Discovery of the noncompliance by DOE or another external organization

- Willful noncompliance or falsification of information

- Prior enforcement cases (related or unrelated)

- Lack of timely notification or reporting to DOE in accordance with contract requirements

- Slow contractor response to investigate or take appropriate corrective actions, or both

- Poor safety and/or security performance history.

The presence of one or more of these factors generally increases the safety and/or security significance and may be of sufficient concern to lead to an investigation even when the significance of the event/condition without these factors would not necessarily dictate such an outcome. After considering these factors and the significance of the underlying event/condition, the Office of Enforcement decides whether the matter warrants an investigation. Typically, the initial recommendation comes from enforcement staff. The decision to investigate rests with the Director.

Review of NTS and SSIMS Reports

Office of Enforcement staff, in coordination with DOE enforcement coordinators, routinely review noncompliances reported into NTS and SSIMS. Submitting a noncompliance report does not necessarily mean that an enforcement proceeding will be initiated. Rather, the Director and staff review and evaluate the available information before determining possible action.

When a noncompliance is reported into NTS or SSIMS, the report is assigned to an Office of Enforcement staff member for a review that encompasses:

- An evaluation of the facts contained in the report, and possibly other information, to determine whether a requirement has been violated

- An initial evaluation of the noncompliance's safety and/or security significance to determine whether a more comprehensive evaluation by the Office of Enforcement is warranted.

The enforcement staff review often involves communication with DOE Field Element staff and the contractor. If the information in NTS or SSIMS is not sufficient to evaluate the significance of the issues, the staff member obtains additional information such as an event critique, causal analysis, or the contractor's investigation or preliminary inquiry report.

After this review, the staff member makes a recommendation to the cognizant enforcement Office Director on whether to undertake further action. If no further investigation is to be performed, the Office of Enforcement simply tracks the noncompliance report to closure. Enforcement staff will communicate this decision to the cognizant Field Element and contractor enforcement coordinator if the enforcement staff's evaluation involved substantive dialogue and multiple document requests from the site. If a more comprehensive evaluation or investigation is to be performed, then the procedures described further in this chapter apply.

Review of Other Sources of Noncompliance Information

Enforcement staff regularly monitor sources of information other than NTS and SSIMS, including:

- ORPS reports

- Computerized Accident/Incident Reporting System reports

- Security incident reports that may indicate potential compromises or risks to classified information

- DOE Field Element or Headquarters inspections, surveys, periodic safety performance analyses, or assessments

- Defense Nuclear Facilities Safety Board reports, letters, and recommendations

- Areas of concern raised by senior DOE management
- Information provided by OHA or the IG
- Allegations communicated directly to the Office of Enforcement by a contractor, DOE worker, or union official
- Media reports of events, accidents, or injuries
- Congressional inquiries
- Information from other agencies, including the Nuclear Regulatory Commission, DOL, Occupational Safety and Health Administration, DOJ, or state and local officials.

DOE expects that initial notification of significant noncompliances, including classified information security noncompliances, will come primarily from contractor and DOE enforcement coordinators, as part of the desired communications maintained with the Office of Enforcement. However, when material becomes available from these other sources, enforcement staff will evaluate the conditions and request additional information from contractor and DOE enforcement coordinators, as needed.

Request for an Enforcement Investigation

In some cases, an investigation may be initiated based on a request. Title 10 C.F.R. Section 851.40(c) provides that a worker or his/her representative has the right to request that the Director initiate an investigation or inspection into contractor compliance with worker safety and health requirements. Similarly, Section 820.21(b) provides any person the opportunity to request an investigation or inspection into nuclear safety compliance issues.

A worker or worker representative may also submit such a request anonymously, or may request confidentiality. When confidentiality is requested, the Office of Enforcement will take every precaution to avoid disclosing the individual's identity. Despite the Office of Enforcement's efforts to maintain confidentiality, the nature of the issue itself may reveal the requester's identity. Furthermore, if the Office of Enforcement does initiate an investigation, maintaining the requester's confidentiality may limit the effectiveness of the investigation. These limitations will be fully discussed with the requester to ensure that they are understood. Regardless of whether a requester is anonymous, requests confidentiality, or allows his or her identity to be known, the Office of Enforcement will treat each request with equal seriousness, and will work toward an appropriate conclusion.

The Office of Enforcement expects that workers and their representatives will express and attempt to resolve their concerns through contractor and local DOE mechanisms, including provisions delineated in 10 C.F.R. Section 851.20(a)(6), before requesting an enforcement investigation, although such steps are not required. 10 C.F.R. Section 851.20(a)(6) requires management to establish procedures for employees to report, without reprisal, job-related fatalities, injuries, illnesses, incidents, and hazards, and to make recommendations about appropriate ways to control those hazards. In addition, Sections 851.20(b)(7), 851.20(b)(8), and

851.20(b)(9) give a worker the right (again without reprisal) to express concerns related to worker safety and health, to decline to perform an assigned task if the worker reasonably believes that the task poses an imminent risk of death or serious physical harm, and to stop work if he or she discovers employee exposures to imminently dangerous conditions or other serious hazards.

An investigation request may be made by submitting DOE Form 440.2, *Request for Investigation or Inspection of Safety or Classified Information Security Violations*, which is available on the EA website at: http://energy.gov/ea/request-investigation-or-inspection-safety-or-classified-information-security-violations.

Completed forms may be faxed confidentially to 301-903-3560 or mailed to the following address:

EA-10/Germantown Building
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

The request for investigation should, to the maximum extent possible, include all of the information requested on the form. In particular, it is important to include a detailed description of the alleged condition or potential violation and the requester's role in the activity, as well as the identification of the specific DOE safety regulation, DOE security regulation/policy, and/or company procedures that may have been violated.

On receiving such a request, the Office of Enforcement notifies the Program and Field Element enforcement coordinators of the receipt and nature of the request. If so requested, enforcement staff will make every effort to honor the requester's desire for confidentiality. Enforcement staff then evaluate the request using the process described in this chapter to determine whether an investigation is warranted. If additional information is needed to make this determination, the Office of Enforcement coordinates with the DOE enforcement coordinator and the requester (where appropriate) to obtain the information needed to make the determination.

The judgment whether to pursue a formal investigation or inspection rests solely with the Director of Enforcement and is based on all the information and evidence available, including that obtained from DOE enforcement coordinators or other sources. If the Office of Enforcement decides to undertake an investigation, the investigation process described in this chapter will be followed.

The Office of Enforcement communicates to the requester its decision and the basis of its determination on whether to investigate. The results of any investigation are documented and processed as described in this chapter. When an investigation is conducted, the requester is notified of the results upon completion.

Anonymous requests for investigation are processed in the same manner. However, limiting access to the individual(s) with first-hand knowledge and information about the alleged noncompliance may hamper the Office of Enforcement's evaluation of the request.

It should be noted that 10 C.F.R. Part 824 does not specifically include provisions for individuals to request investigations. However, a worker or worker representative may submit a request for an investigation of classified information security compliance issues to the Office of Enforcement as described above. Enforcement staff will consider such requests and determine whether an investigation is warranted using the same decision process as when evaluating potential noncompliances gleaned from other information sources. As with nuclear safety and worker safety and health, if the individual requesting an investigation of a classified information security issue requests confidentiality, the Office of Enforcement will take every precaution, consistent with law, to avoid disclosing the individual's identity; however, the nature of the issue itself may provide some indication of the identity of the requester.

Fact-Finding Visits

In some cases, the Office of Enforcement may wish to conduct a site visit to collect additional information before deciding whether to initiate a formal investigation. Such cases would typically involve a complex series of potential noncompliances, a delay in completing the contractor's investigation, or a related event that occurs during an ongoing enforcement investigation. Fact-finding visits are short, onsite data gathering efforts intended to facilitate a decision about whether to conduct a formal investigation.

Noncompliance Investigation

Planning

The Office of Enforcement generally commences investigation activities as soon as staff schedules permit after a decision is made to conduct an investigation. However, if a Federal Accident Investigation Board is conducting an investigation, the Office of Enforcement typically delays its investigation until after the accident investigation is complete, relying to the extent possible on facts presented in the Board's investigation report. Similarly, if a criminal investigation is in process for incidents involving classified information or safety issues, the Office of Enforcement will coordinate with the cognizant law enforcement agency to determine when to initiate a DOE enforcement investigative action.

An initial (internal) step in the investigation activity is to establish the approach that the Office of Enforcement intends to follow in identifying potential violations; establishing relevant facts and circumstances; determining significance; and deciding the need for, and timing of, an onsite investigation. Initially, these deliberations are typically discussed only with cognizant managers and staff within the affected DOE Program Office and Field Element.

Notification and Information Request

Following the decision to conduct a formal investigation, the Director of Enforcement sends a notification letter informing the contractor of the Office of Enforcement's intent to conduct an investigation, the areas to be addressed, and the cost segregation requirement. The notification letter may also contain a request for information to support the investigation, although this is often handled through subsequent email communication. The Office of Enforcement's information request is aimed at obtaining documents that aid in understanding the facts and circumstances of the noncompliant condition(s). In urgent situations, the Office of Enforcement may forgo the normal notification process and require immediate access to contractor facilities, under the authority of Section 851.40(a) for worker safety and health issues, Sections 820.8(a) and 820.21(a) for nuclear safety issues, and Section 824.5, *Investigations*, for classified information security issues. The Notice of Investigation letters are posted to an EA website after being issued to the contractor and remain on the website until the investigation concludes.

If an onsite investigation is to be conducted, the Office of Enforcement coordinates the schedule for the investigation, an agenda, and a list of individuals to be interviewed with the cognizant DOE and contractor enforcement coordinators. In some cases, the Director may determine that investigation activities can be adequately conducted without a site visit.

Subpoena Authority

Obtaining information through informal, cooperative means is the most efficient process for the Office of Enforcement and the contractor. If a contractor is reluctant to provide any requested documentation – before, during, or after the investigation – the Director is empowered by Sections 820.8(a) and 820.21(h) (nuclear safety), 824.5 (classified information security), and 851.40(k) (worker safety and health) to obtain it by issuing a subpoena, if necessary.[4]

Complete and Accurate Information from Contractors

DOE relies on the accuracy and completeness of information provided by its contractors. Section 820.11, *Information Requirements*, requires that any information pertaining to a nuclear activity provided to or maintained for DOE by a contractor, shall be complete and accurate in all material respects. Similarly, Section 851.40(b) requires contractors to provide complete and accurate records and documentation to the Office of Enforcement in support of worker safety and health-related investigation activities. Failure to comply with these requirements could involve either intentional or unintentional error conditions. Unintentional errors in documents and records are undesirable; they should be considered noncompliances with the above referenced regulations and should be reviewed for possible reporting into NTS. Intentional errors, such as falsification, destruction, or concealment of records or information, should be treated as willful noncompliances and reported into NTS. Part 824, Appendix A, Paragraph V.f., contains similar expectations for the timeliness, completeness, and accuracy of information provided by contractors as it relates to classified information security requirements.

[4] In matters dealing with NNSA contractors, the NNSA Administrator, rather than the Director of Enforcement, issues subpoenas.

In the absence of a request from the Office of Enforcement, Sections 820.21(e) (nuclear safety) and 851.40(g) (worker safety and health) allow a contractor to submit to the office any document, statement of facts, or memorandum of law to explain the contractor's position or to provide pertinent information to a matter under investigation.

Onsite Investigation Initiation

An onsite investigation typically commences with a DOE-only meeting among the enforcement investigation team, DOE Program Office (as available), and DOE Field Element to discuss the enforcement team's concerns and the areas to be pursued and to obtain the DOE Field Element's input on the matter. The enforcement investigation team usually follows the DOE-only session with an opening meeting that includes DOE and contractor personnel to summarize the purpose of the visit; the issues under review; and the protocols for interactions, subsequent communications, and deliberations. For worker safety and health issues, Union representatives for workers involved with the noncompliance(s) or issues under investigation are offered the opportunity to attend the opening conference or be present during an interview, if requested by a represented worker. During the investigation, enforcement staff may interview workers and managers, inspect facilities and work areas, review records, and identify additional documentation needs. DOE Program Office and Field Element enforcement coordinators are encouraged to participate in onsite activities, provided that such participation will not negatively impact the conduct of interviews.

Interview Attendance

The Office of Enforcement generally limits contractor attendance in interviews to only the employee(s) being interviewed and, if requested by the interviewee, his or her Union or other personal representative. The Office of Enforcement limits interview attendance to ensure that interviewees feel free to express themselves without undue influence. Interviews with company managers and groups (e.g., a causal analysis team) may be less limited depending on the circumstances. In almost all cases, the contractor's legal counsel will not be permitted to attend interviews, unless it can be demonstrated that such counsel has been specifically requested by the interviewee or the interviewee is a company principal that is directly represented by such counsel. In general, the Director of Enforcement has the authority to permit or restrict attendees in interviews pursuant to the broad authorities in Sections 820.21(a), 824.5, and 851.40(a). These sections permit the Director to take actions deemed necessary and appropriate to the conduct of the investigation.

Exit Meetings

The Office of Enforcement intends that the preliminary results of an investigation, when available, be provided to the contractor (and any Union representatives who participated in the opening meeting or during the investigation) at an exit briefing. An exit briefing summarizes any noncompliance conditions the team noted, so that the contractor can address them in a timely manner. This information will be conveyed verbally; no written information will be provided. Even if the facts and circumstances are clear and no further review of information is needed to identify the noncompliance(s), the Office of Enforcement's practice is to complete internal

deliberations away from the site and separately schedule an enforcement conference, if one is to be conducted.

Investigation Report/Documentation

When investigation activities are complete, the investigation team will document the results. In most cases, the Office of Enforcement issues an investigation report that documents the findings of the investigation and provides a rationale for and proposes the next step in the investigation process. The contractor is provided this report to ensure the accuracy of facts, facilitate the contractor's understanding of the potential regulatory violations, and allow the contractor to prepare for any subsequent enforcement conference.

An investigation report typically includes:

- A brief summary of the facts and circumstances of the potential noncompliance(s) and, if applicable, associated event(s)
- The potential noncompliance(s) that occurred and the regulatory requirement(s) involved
- Specific document references or other factual details related to the potential noncompliances
- A discussion of safety or security significance
- Facts that may be relevant to consideration of enforcement mitigation (and potential escalation, if applicable).

The investigation and documentation also address the following factors, if relevant to the potential noncompliance(s):

- Duration
- Management involvement
- Timeliness of reporting
- Causal analysis
- Extent of condition
- Assessment performance relative to the deficiencies
- Recurring events or problems
- Prior DOE notice
- Immediate actions
- Corrective action plans
- Plans to conduct effectiveness reviews.

The investigation report and other investigation-related documents prepared by the Office of Enforcement are considered pre-decisional. Because the investigation report is pre-decisional and its public release could damage DOE and contractor interests relating to an ongoing enforcement proceeding, the investigation report is marked Official Use Only both during its

development and when it is ultimately issued to the contractor. Investigation reports are not made publicly available, and the contents of draft investigation reports are not shared with the contractor until the report is formally transmitted from the Director of Enforcement to the contractor. Thus, in addition to being marked Official Use Only, draft investigation reports contain a "For DOE/NNSA Review Only" header when provided to the cognizant DOE Field Element and Program Office for review to indicate that the report is not to be shared with the contractor until it is issued.

In some cases, the information obtained during an investigation may be sufficient to support proceeding directly to a PNOV without developing an investigation report or other investigation documentation. If the Office of Enforcement proceeds directly to PNOV issuance, this action is processed as discussed in Chapter VI. The decision to proceed with a PNOV instead of issuing an investigation report rests with the Director (or NNSA Administrator, for NNSA contractors, after a recommendation from the Director). On the other hand, if the Office of Enforcement determines that any violations identified were of lower significance, the Director may decide not to proceed with a PNOV. The Director may close the case by agreeing to settle the matter or by issuing an enforcement letter (both described in Chapter VI).

Enforcement Conference

After an investigation report is issued, an enforcement conference is usually held between DOE and the contractor to discuss the investigation. The Director's authority to conduct an enforcement conference may be found in 10 C.F.R. Sections 820.22, *Informal Conference* (nuclear safety); 851.40(h) (worker safety and health); and Part 824, Appendix A, Paragraph VI, *Enforcement Conferences* (classified information security). The enforcement conference is an opportunity for the contractor to provide:

- Information to ensure that the facts and potential noncompliances noted by the Office of Enforcement in its investigation report or other documentation are accurate
- Any necessary clarifications
- Explanations of the steps being taken to resolve the noncompliances and underlying causes
- Any other relevant mitigating factors.

An enforcement conference may be convened at the sole discretion of the Director. A contractor may request an enforcement conference, but the Director has the responsibility and authority to decide whether to conduct a conference. Although not mandatory, an enforcement conference is suggested for most enforcement cases in the interest of due process. The Director may choose, in certain cases, not to hold a conference. For example, an enforcement conference is generally not held for a nuclear safety issue that is expected to result in a nuclear safety-related severity level III violation (see Chapter VII). Additionally, an enforcement conference may not be necessary when the findings of the investigation are clear and undisputed, and the contractor chooses not to convey any additional information for consideration by the Director. The Director may also elect to convene an enforcement conference if the Office of Enforcement has

proceeded directly to a PNOV without an investigation report or other investigation documentation.

Scheduling and Notification

To expedite completion of an enforcement proceeding, the enforcement conference is usually scheduled to occur within 30 business days after the investigation report is issued. The desired time frame for conducting the enforcement conference is conveyed in the investigation report transmittal letter. The Office of Enforcement consults with the affected DOE and contractor line management to identify the date, time, and location suitable for all parties, after which the Office of Enforcement will notify the appropriate parties. Enforcement conferences are typically held at the applicable DOE site, but may also be convened at DOE Headquarters. The notification generally includes or references documents covering the facts and circumstances of the noncompliance(s), typically in the form of an investigation report or other investigation documentation; conclusions about the potential noncompliance(s); and any issues that the contractor should discuss.

Attendance

DOE personnel, at a minimum, should include the Director of Enforcement and/or the Director of the cognizant subordinate enforcement office, the responsible enforcement staff and any technical advisors involved in the case, senior Program Office and Field Element management representatives, and the enforcement coordinators from the Field or Program Office. These individuals are notified of the conference and, through verbal or email communications, strongly encouraged to attend. Other DOE personnel may attend if requested or permitted by the Director.

The attending contractor personnel should include senior contractor management (e.g., Laboratory Director, President), key management personnel involved in the event or conditions as well as the actions to correct the underlying problems, and the contractor enforcement coordinator.

As stated in DOE's enforcement policies[5], enforcement conferences are pre-decisional mechanisms intended to provide a forum for open and candid discussion regarding a potential enforcement issue. Therefore, these conferences are normally closed meetings between DOE and the contractor and occasionally the parent organization's management. Enforcement conferences are closed to the media and the public.

For an enforcement investigation involving multiple contractors, DOE considers each contractor to be a party to a separate case. Accordingly, DOE typically convenes a separate enforcement conference with contractor management for each party.

[5] *General Statement of DOE Enforcement Policy*, 10 C.F.R. Part 820, Appendix A, as amended, for nuclear safety violations; *General Statement of Enforcement Policy*, 10 C.F.R. Part 851, Appendix B, for worker safety and health violations; and *General Statement of Enforcement Policy*, 10 C.F.R. Part 824, Appendix A, for classified information security violations.

Pre-Conference DOE-Only Meeting

Before the enforcement conference, the Director or his designee convenes the DOE participants for brief, preliminary discussions to familiarize the DOE personnel with the enforcement process and discuss DOE line management perspectives on the case and other factors relevant to the contractor's performance.

Conduct of Enforcement Conference

To encourage candor, enforcement conferences are normally informal, and no transcripts are made. The Director of Enforcement or a staff designee chairs the conference. After preliminary opening comments by the Director and attendee introductions, the conference is turned over to the contractor to address key factors related to the case. The DOE officials in attendance are encouraged to ask questions for clarity or to ensure that key points are addressed during the conference.

The contractor should identify any factual issues related to the Office of Enforcement's investigation report, or any document the office relied on in identifying noncompliances. Additionally, the contractor should address its view of the causes and significance of the noncompliances, the corrective actions taken and planned to correct the problems and prevent recurrence, and the application of mitigation and discretion factors. In addition, the contractor should discuss or provide relevant information to support any previously-submitted request for settlement.

The level of detail of the contractor's briefing should be related to the complexity and significance of the issues. In general, a summary of the noncompliances, how they were discovered, their causes, and related circumstances is helpful. Such summaries do not need to be detailed. However, a substantive, thorough discussion of the corrective actions and measures to ensure that the violations will not recur is critical. It is also beneficial to demonstrate that representatives from the Board of Directors and corporate management from the parent company or governing university are involved in the oversight of safety and classified information security performance and committed to ensuring that the violations are corrected. A conference typically lasts two to three hours, but contractors are permitted to take whatever time they need. Any material that the contractor provides at the enforcement conference is placed in the administrative record for the case.

At the conclusion of the contractor's presentation and response to questions from DOE, the Director closes the conference and explains that the final DOE decision on the matter will be made after the conference and provided to the contractor at a later date.

Post-Conference DOE-Only Meeting

After the enforcement conference, and after all of the contractor's personnel and representatives have departed, the Director or designee reconvenes the DOE participants for preliminary discussions. The purpose of this meeting is to discuss any facts presented by the contractor; the violations that occurred, including their significance and severity level; the application of

penalties; and the treatment of mitigation factors. Reaching general agreement during this meeting on the appropriate enforcement outcome and any messages that should be communicated in enforcement correspondence is desirable, but additional deliberations are typically required to arrive at a final decision on the recommended enforcement outcome. The final decision on the enforcement outcome rests with the Director or NNSA Administrator, as appropriate.

Enforcement Conference Summary

After the post-conference DOE-only meeting, the Office of Enforcement prepares a brief summary that documents the enforcement conference discussions. This summary typically includes the contractor's position on the accuracy of facts in the investigation report or other documents that are the basis for any potential violations, a brief description of significant additions or corrections to the factual information, a brief description of any significant additional information that affects the significance or mitigation factors, and a synopsis of the contractor's short- and long-term corrective actions. Before finalizing the conference summary, and as part of the process of drafting the case outcome document, the Office of Enforcement solicits comments and input from the DOE Program Office and Field Element via the DOE enforcement coordinators. The conference summary is typically attached to the PNOV if a PNOV is issued. If a PNOV is not issued, the conference summary becomes part of the administrative record for the case.

Confidentiality/Disclosure of Pre-decisional Enforcement Information

As discussed previously, investigation-related information is privileged and considered pre-decisional. Pre-decisional matters are not communicated to members of the public, only to the contractor when authorized by the Director of Enforcement. After completion of the investigation phase, which is usually indicated by the enforcement conference (if held), all discussions and deliberations (including the post-conference DOE-only meeting) within DOE about a specific enforcement outcome are pre-decisional and should be carefully controlled to prevent distribution to non-DOE personnel. Protected pre-decisional information includes, but is not limited to, the nature or context of a PNOV, the potential violations to be cited, the potential severity level of the alleged violations, civil or contract penalty amounts, considerations regarding settlement, and the possible terms of a settlement agreement.

If the investigation report or other investigation-related information is the subject of a Freedom of Information Act (FOIA) (5 U.S.C. 552) request, the Director of Enforcement, in consultation with appropriate DOE officials, is responsible for all decisions regarding the release of pre-decisional information to a requestor in accordance with 10 C.F.R. Sections 820.21(d) and 851.40(e), the FOIA, and DOE's FOIA implementing regulation at 10 C.F.R. Part 1004, *Freedom of Information*.

VI. Enforcement Outcomes

After the circumstances surrounding a noncompliance and its safety or security significance are understood and any enforcement conference and preliminary deliberations are completed, it is the Director of Enforcement's responsibility to consider the appropriate enforcement outcome. Possible outcomes include PNOVs, settlement (i.e., Consent Orders[6] and Settlement Agreements[7]), Compliance Orders, Special Report Orders[8] (SROs), enforcement letters, or no further action. This chapter describes the process for developing these outcome documents, including enforcement's considerations in that process.

The Director of Enforcement is authorized to issue PNOVs, Final Notices of Violation (FNOVs), Consent Orders, settlement agreements, and SROs for non-NNSA contractors, as well as enforcement letters for all DOE contractors, including NNSA. The NNSA Administrator issues PNOVs, FNOVs, and SROs for NNSA contractors after considering the recommendation of the Director. Consistent with recent practice, Consent Orders and settlement agreements for NNSA contractors are issued jointly by NNSA and the Office of Enforcement. Compliance Orders must be executed by the Secretary of Energy. Consent Orders, settlement agreements, and Compliance Orders follow some elements of the PNOV process; the unique aspects of these actions are addressed later in this chapter.

Notice of Violation

Preparation of a PNOV

A PNOV is a preliminary finding by DOE, based on the evidence developed during the investigation, that a safety or classified information security rule violation has occurred or is continuing to occur. The PNOV includes the following elements, as a minimum:

- A concise, clear statement of the requirement(s) that was violated (i.e., legal citation for the requirement).
- A brief statement describing the circumstances of the violation(s), including the date(s) of the violation(s) and the facts to demonstrate that the requirement(s) was not met (e.g., "contrary to" paragraphs).
- The severity level proposed for the violation or problem area (if violations are grouped in the aggregate – see below).
- The remedy proposed for each violation or group of violations, as applicable. As discussed below, a monetary penalty may be assessed via contractual means in lieu of a civil penalty.

[6] Applicable only to Nuclear Safety and Worker Safety and Health.
[7] Applicable only to Classified Information Security.
[8] Applicable only to Nuclear Safety.

A group of violations that are related to the same requirement or a single event may be evaluated in the aggregate. A group of aggregated violations is designated a violation at the appropriate severity level warranted by the facts and circumstances of the specific case. By addressing a group of violations that individually may have minor safety or security significance, the PNOV can highlight a more significant condition or underlying programmatic problem. Thus, when aggregated in this manner, the violation may have a higher severity level than the individual violations. In addition, the circumstances involving an event and a series of corresponding violations may not warrant citing the violations individually. As a result, the violations may be aggregated to mitigate the associated civil penalties.

The Director and enforcement staff prepare a draft of the PNOV and conduct any other required internal discussions within DOE before arriving at a position on the outcome. The draft PNOV, transmittal letter, and enforcement conference summary are provided to Field Element and Program Office personnel via the DOE enforcement coordinators for review and comment. For NNSA contractors, after addressing Field Element and NNSA Headquarters comments, the proposed action is forwarded with a transmittal memorandum summarizing the basis for the recommended action to the NNSA Administrator for consideration.

Remedies

Under the enforcement procedural rules, PNOVs must include the proposed remedy for each alleged violation, including the amount of any civil penalty. In 10 C.F.R. Sections 820.2 and 851.3, *Definitions*, "remedy" is defined as any action (including, but not limited to, the assessment of civil penalties and/or the requirement of specific actions) necessary or appropriate to rectify, prevent, or penalize a violation of a regulatory requirement.

Civil penalties are monetary sanctions designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of contractor self-identification, reporting, and correction of noncompliances. Civil penalties are authorized for indemnified contractors under 10 C.F.R. Sections 851.5(a) and 820.20(b), and under 824.4(c) for any person entering into an agreement with DOE, for worker safety and health, nuclear safety, and classified information security noncompliances, respectively. Civil penalties are proposed through the issuance of a PNOV. Chapter VII discusses the civil penalty calculation process.

Impact of Contract Fee Reduction on Civil Penalty Determination for Noncompliances

Title 10 C.F.R. Section 851.5(b) authorizes DOE to reduce contract fees or other payments for violation of a worker safety and health requirement (consistent with the applicable contract provisions). In addition, Section 851.5(c) prescribes the limitation that DOE may pursue *either* civil penalties or a contract fee reduction, but not both, for the same violation under Part 851.

DOE Acquisition Regulations require that contracting officers coordinate with the Office of Enforcement before pursuing a contract fee reduction relating to a violation of a Departmental worker safety and health regulation (see 48 C.F.R. 923.7002(a)(5)). The Office of Enforcement will review any relevant contract actions to ensure compliance with Section 851.5(c) and to

ensure that there is a clear correlation between the violation(s) and an associated monetary impact. The PNOV will identify whether a fee/payment reduction has been levied in lieu of a civil penalty and will typically identify the amount of the reduction.

Parts 820 and 824 do not specifically allow or prohibit both a contract fee reduction and civil penalty for the same violations. However, for purposes of consistent enforcement program implementation, the Office of Enforcement will consider reducing or forgoing a civil penalty for PNOVs issued under Parts 820 and 824 when a fee reduction is levied for and clearly linked to an event or condition and the noncompliances that are the subject of the enforcement action.

PNOV Transmittal Letter

The cover letter transmitting the PNOV to the contractor includes sufficient factual information, described in “executive summary” format, to permit contractor management to understand DOE's safety, security, and management concerns; how DOE determined the proposed sanctions; and where DOE concludes that the contractor should focus attention to improve performance. The letter is specific enough that the contractor can clearly understand how the Office of Enforcement or NNSA Administrator applied the enforcement policy, and identifies contractor actions that reflect good performance and areas that require additional attention. The letter includes the following elements, as appropriate:

- When and where the inspection or investigation was conducted
- Who identified the violation(s) (i.e., the contractor, DOE, or other external source)
- Whether and how the violation was reported
- Whether an enforcement conference was conducted, and reference to any conference summary
- A summary of the violations, severity level, and any other major attributes of the violations that are related to their safety or security significance
- Any factors that affected the escalation of the civil penalty, such as the repetitive nature of a condition, extended duration of violations, management deficiencies, or willfulness
- Discussion of application of mitigation factors
- Identification of the resulting proposed remedy
- The necessary contractor response (see Contractor Response to a PNOV, below)
- A statement that DOE will determine what, if any, further action is required after review of the contractor's response to the PNOV, proposed corrective action, and results of future assessments.

Contractor Response to a PNOV

Under 10 C.F.R. Sections 820.24 and 851.42, *Preliminary Notice of Violation*, the contractor is obligated to respond in writing to a PNOV pertaining to nuclear safety or worker safety and health. The reply should clearly indicate whether the contractor accepts the conclusions and agrees to comply with the proposed remedy, or present new, previously unconsidered information to contest the findings or substantiate the basis for mitigating or not imposing the proposed remedy. The PNOV typically informs the contractor that the contents of the reply must include: (1) any facts, explanations, and arguments supporting a denial that the violation occurred as alleged; (2) any extenuating circumstances or the reason why the proposed remedy should not be imposed or should be mitigated; (3) full and complete answers to any questions set forth in the PNOV; (4) a discussion of the relevant authorities that support the position asserted, including rulings, regulations, interpretations, and previous DOE decisions; and (5) copies of all relevant documents. The contractor is also asked to delineate in NTS or SSIMS, with target and completion dates, the corrective actions that have been or will be taken to avoid further violations.

For nuclear safety PNOVs, the contractor response is due within 30 calendar days of the PNOV's date of filing; for worker safety and health PNOVs, the contractor response is due within 30 calendar days of PNOV receipt. The classified information security enforcement program provides that the contractor may respond to a PNOV by filing a reply within 30 days.

If the contractor does not reply within the specified time or chooses to not contest the PNOV, the Director sends the contractor a letter that deems the PNOV a Final Order; a separate FNOV is not issued. Acknowledgment letters are generally issued within 30 calendar days after receipt of the contractor's response to the PNOV.

The contractor has the option to challenge DOE's facts, the determination of violations, DOE's conclusions on significance or severity level, application of mitigation factors, or other elements of the PNOV. If the contractor challenges any aspect of the PNOV, the information is reviewed by the Office of Enforcement in conjunction with DOE Field and Program Office management. After evaluating the contractor's response and all other relevant evidence, the Director or NNSA Administrator may take one of the following actions, as deemed appropriate:

- Rescind all, or part, of the proposed civil penalty
- Rescind all, or some, of the violations cited in the PNOV
- Issue an FNOV (see below) and impose the civil penalty, as authorized by law, in cases where the PNOV is not fully rescinded.

Final Notice of Violation

The FNOV generally follows the same format and content as the PNOV, but is updated based on any new information to reflect DOE's final conclusions on the matter. The Director is authorized to issue FNOVs for non-NNSA contractors, and the NNSA Administrator issues FNOVs for NNSA contractors.

A nuclear safety FNOV without a civil penalty becomes a Final Order 15 calendar days after it is filed unless modified by an order from the Secretary of Energy. A classified information security FNOV without a civil penalty becomes a Final Order 15 days after it is issued. All nuclear safety, classified information security, and worker safety and health FNOVs with a civil penalty become Final Orders if the contractor does not contest the FNOV within 30 calendar days, pays any civil penalty, and complies with the other requirements set forth in the FNOV.

Administrative Adjudication

The enforcement program implementation processes are designed to ensure the completeness of the information provided by the investigation team, the accuracy of documentation referenced, and the correctness of the violations cited. Contractors have substantial opportunity to provide input during the process and feedback on factual accuracy. Accordingly, the need for a contractor appeal is rare. Nevertheless, the regulations establish procedures for contractors to contest an FNOV.

Nuclear Safety and Classified Information Security Enforcement Action – Administrative Hearing

To contest an FNOV containing a civil penalty, 10 C.F.R. Sections 820.25 and 824.7, *Final Notice of Violation*, require the contractor to file a request with the Office of Enforcement for an on-the-record adjudication or a notice of intent to seek judicial review within 30 calendar days after the FNOV has been filed or issued, respectively. An administrative hearing presided by an Administrative Law Judge (ALJ) will be initiated upon request for an on-the-record adjudication. This hearing process is described in detail in 10 C.F.R. Sections 820.27 through 820.29 and 824.8 through 824.13. Under 10 C.F.R. Sections 820.29(d) and 824.12(e), DOE has the burden of proving that the noncompliance occurred as set forth in the FNOV and that the proposed civil penalty is appropriate. The contractor that has been issued the FNOV then has the burden of presenting any defense to the allegations in the FNOV. The regulations require that the ALJ decide each matter of controversy based on the preponderance of the evidence.

For Part 820 and Part 824 violations, there is no administrative appeal provision. If a contractor disagrees with an ALJ's decision after it becomes a Final Order, relief must be sought in Federal District Court.

A contractor that contests an FNOV issued under Part 820 or Part 824 is not required to file a request for administrative adjudication to retain the right to judicial review. Under 10 C.F.R. Sections 820.25 and 824.14, *Special Procedures*, a contractor may elect to file a notice of intent to seek judicial review within 30 calendar days of receiving an FNOV.

Worker Safety and Health Enforcement Action – Administrative Appeal

To contest a worker safety and health FNOV in accordance with 10 C.F.R. Section 851.44, *Administrative Appeal*, the contractor must petition the DOE OHA within 30 calendar days of

receiving the FNOV by following the appeals process in 10 C.F.R. Part 1003, Subpart G, *Private Grievances and Redress*.

Pursuant to 10 C.F.R. Section 1003.77(a), OHA issues a decision and order based on the petition and other relevant information received or obtained during the proceeding. Under Section 851.43, *Final Notice of Violation*, a contractor relinquishes the right to judicial review unless a petition for administrative appellate review is submitted to OHA.

Consent Order/Settlement Agreement

Contractors are given opportunities to seek settlement with DOE through Consent Orders (worker safety and health and nuclear safety) or settlement agreements (classified information security) for noncompliances that could have proceeded to investigations and possible PNOVs (reference 10 C.F.R. Sections 851.41, *Settlement*; 820.23, *Consent Order*; and 824.4(e), respectively). A Consent Order or settlement agreement is a document, signed by the Director and a duly authorized representative of the contractor, containing stipulations or conclusions of fact or law and a remedy (e.g., monetary, specific corrective actions, or both) acceptable to DOE and the contractor.[9] Consistent with Congress' appropriations to the Department and the Miscellaneous Receipts Act (31 U.S.C. § 3302(b)), a monetary remedy must be deposited into DOE's account with the U.S. Treasury Department and cannot be offset or otherwise applied to perform remedial actions on behalf of the contractor, Department, or any other entity. Requests for settlement are usually initiated by a contractor; however, in some circumstances, after first considering DOE line management perspectives, the Office of Enforcement may indicate to the contractor early in the proceeding that settlement is a preferred outcome.

Consistent with the enforcement procedural rules, which permit settlement of enforcement proceedings at any time, the Director and the contractor can meet at any stage of the process and reach a settlement (in the form of a Consent Order or settlement agreement) as long as the settlement is consistent with the objectives of the AEA and the relevant Rules. The settlement identifies the facts related to specific safety or security requirements that may have been violated and the agreed-upon remedy. The settlement need not include a finding that a violation has occurred, and the contractor is not required to admit that any such violation occurred.

The primary purpose of settlement is to reduce the amount of time and resources that DOE and the contractor must spend to resolve an enforcement proceeding (i.e., as soon as possible after the Notice of Investigation letter is issued). Thus, the greatest benefits accrue when settlement negotiations begin early in the enforcement proceeding. However, given the settlement provisions in the rules, DOE may still consider settlement appropriate (albeit of reduced value) if an agreement is reached later in the proceeding. Conversely, given the safety/security significance of the event or condition, settlement may not be appropriate even if requested early in an enforcement proceeding.

[9] Consistent with recent practice, Consent Orders and settlement agreements for NNSA contractors are signed jointly by the Director of Enforcement and the NNSA Administrator.

Settlement Criteria

The appropriateness of settlement depends on the facts and circumstances of each case. Therefore, providing a detailed list of all factors that must be met for settlement to be warranted is impossible. *At a minimum*, for the Director of Enforcement to agree to settlement early in a proceeding before conducting an investigation, the Director must have a level of confidence (based on the contractor's demonstrated track record for noncompliance reporting, causal analysis, and issues management before the proceeding and/or consultation with appropriate DOE line management) that the contractor's specific investigation into the noncompliance(s) was thorough and credible, all of the noncompliances associated with the event or condition were promptly and accurately reported to DOE, and the corrective actions are comprehensive in scope and appear adequate to address the issue and prevent recurrence. However, irrespective of the above, to appropriately address the deterrence aspect of the enforcement program goals, particularly for events of high safety or security significance, the Office of Enforcement will generally not grant any request for settlement that involves violations of the worker safety and health, nuclear safety, or classified information security rules involving one or more of the following situations[10]:

- Events or circumstances that result in (or are likely to result in):
    - death
    - serious physical harm
    - persistent exposure to hazardous/toxic materials

- Absence of (or major deficiencies in) an approved documented safety analysis for any facility with radioactive material inventory exceeding Hazard Category 2 threshold quantities, or violation of a Technical Safety Requirement Safety Limit or Operational Safety Requirement Safety Limit

- Credible threat to nuclear explosive safety, or loss of double contingency such that no credited controls are available to prevent criticality

- Radiation exposures (actual or significant potential for) greater than 10 C.F.R. Part 835 occupational dose limits, or the spread of contamination with the potential for significant exposure to co-located workers or the public

- Quality assurance deficiencies in procurement, fabrication, or installation resulting in questionable performance of safety-significant and safety class systems, structures, and components, or operational deficiencies resulting in a substantially reduced confidence in the ability to operate within the safety basis envelope in an operating nuclear facility

- Loss or compromise of classified information that could be expected to cause exceptionally grave damage to national security

[10] This list in not all inclusive; the Office of Enforcement will continue to exercise its discretion for determining the suitability of settlement, depending on the facts and circumstances of each case.

- Worker retaliation
- Willful violations (including record falsification or other attempt to cover up)
- Recurrent violation – repeat of a noncompliance (or similar noncompliance) that was the subject of a previous enforcement sanction or contracting officer action
- Event/deficiency response and analysis by the contractor that required significant attention by DOE line management or the Office of Enforcement.

Settlement Process

As a matter of policy, settlement requests must be made in writing to the Director of Enforcement and include the contractor's justification as to why a Consent Order or settlement agreement is appropriate in the particular instance. The contractor's investigation/causal analysis should always be provided, and the Office of Enforcement may request additional documentation to aid in deliberations.

Enforcement staff will review the contractor's request, and any associated documentation, before deciding to issue (or recommend) a Consent Order or settlement agreement. In making the determination or recommendation, the Office of Enforcement also consults with and takes into account the views and recommendations of DOE and NNSA Headquarters line management personnel, as well as Field Element personnel knowledgeable of the facilities or activities in question.

The process for developing, reviewing, and issuing a Consent Order or settlement agreement is similar to that for a PNOV. However, because the contractor must agree to the terms and conditions, the Director provides the contractor an opportunity to review and provide comments on a "proposed" agreement, which is a result of discussions between the Office of Enforcement and DOE line management on the settlement terms. After considering contractor comments, the Director finalizes the settlement for issuance to the contractor, obtains the contractor's signature, and then posts the settlement on an EA website.

After the settlement agreement is finalized, enforcement staff continue to coordinate with the Field Element to monitor progress on corrective action implementation, as appropriate, and the overall effectiveness of applied controls. If it later becomes known that any facts or information provided were false or inaccurate, or if commitments to take corrective actions are not met, DOE can subsequently issue a PNOV.

Enforcement Proceeding Cost Recovery

Background

The Major Fraud Act (MFA) of 1988 as amended, 41 U.S.C. § 4310, and its associated implementing cost principle in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 31.205-47, limit DOE's ability to reimburse contractors for costs incurred by the contractor in

connection with an administrative proceeding commenced by the Department. The MFA and FAR cover DOE's enforcement proceedings authorized under 10 C.F.R. Parts 820, 824, and 851. Such proceedings commence with the Office of Enforcement's issuance of a Notice of Investigation letter to a contractor. Upon receiving this notice, the contractor is required to track and segregate costs incurred in support of the investigation from other potentially allowable costs.

The MFA and FAR generally prohibit reimbursement of contractor costs related to the investigation where, among other circumstances, the proceeding results in the imposition of a monetary penalty (41 U.S.C. §§ 4310(b) and (c)(3); 48 C.F.R. § 31.205- 47(b)(2)). However, the MFA grants DOE the authority to agree to reimburse a contractor for up to 80 percent of its costs incurred in connection with DOE's investigation if the proceeding "is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the Federal Government . . . to the extent specifically provided in that agreement" (41 U.S.C. §§ 4310(d) and (f)(2)(A)). All costs allowed must be "determined to be otherwise allowable and allocable under the FAR" (41 U.S.C. § 4310(f)(2)(A)).

DOE's decision to settle an enforcement proceeding and provide for the reimbursement of investigation-related costs as a term of settlement is distinct from the decision regarding the allowability of such costs (i.e., the decision that the costs are otherwise allowable and allocable under the FAR). The cognizant contracting officer is responsible for determining the allowability of all costs, including investigation-related costs, based on all of the FAR requirements (48 C.F.R. § 31.201-2). The Director of Enforcement has the authority to negotiate a settlement agreement or Consent Order. The Director may also provide as a settlement term contractor recovery of up to 80 percent of investigation-related costs if the cognizant contracting officer determines the costs to be otherwise allowable and allocable under the FAR (41 U.S.C. §§ 4310(d) and (f)(2)(A)). The Director cannot guarantee contractors that such costs will be determined to be allowable.

For settlements with NNSA contractors, the allowability determination for investigation-related expenses is handled differently than for DOE contractors. The Director of Enforcement makes recommendations to the NNSA Administrator regarding whether to issue a settlement agreement or Consent Order and whether to permit contractor recovery of enforcement proceeding expenses up to the 80 percent maximum as a term of settlement. As the Senior Procurement Executive for NNSA, the NNSA Administrator has authority to determine the specific allowability percentage and may designate a cognizant contracting officer to perform this function.

For both DOE and NNSA contractors, the costs associated with implementing corrective actions for an event or condition investigated by the Office of Enforcement are allowable under the MFA. Pursuant to DOE General Counsel guidance, corrective action costs are not considered a "proceeding" cost because the costs would have been incurred regardless of whether DOE decided to investigate the underlying compliances.

Review Considerations

Consistent with the MFA, FAR, and guidance provided by DOE's Office of General Counsel, the Director of Enforcement (and as appropriate, the NNSA Administrator) may, on a case-by-case basis, decide to reimburse contractors for up to 80 percent of investigation-related expenses (if the costs are determined by the cognizant contracting officer to be otherwise allowable and allocable under the FAR), if all of the following conditions are satisfied:

- For programmatic or repetitive deficiencies, the issues and all underlying noncompliances are initially identified by the contractor and promptly reported via NTS or SSIMS. Similarly, for self-disclosing events, all underlying noncompliances are promptly reported via NTS or SSIMS.

- During the two years preceding the noncompliance discovery at a site or facility under the contractor's cognizance:

    - No Compliance Order, PNOV, Consent Order, Settlement Agreement, or Enforcement Letter was issued for a similar event or condition.

    - The contractor has not been directed by the cognizant contracting officer to address a similar or related event or issue.

    - The contractor has not been subject to a fee reduction, withholding of fee, or DOE or NNSA stop-work order for a similar or related event or issue.

- Within 30 calendar days of receiving a Notice of Investigation letter from the Office of Enforcement, the contractor has requested settlement via a letter to the Director that provides detailed documentation supporting the settlement request.

- The contractor's internal investigation is of sufficient scope and depth, includes a rigorous causal analysis, and has adequately considered the extent of the condition. Proposed corrective actions have a clear linkage to the causal analysis, appear appropriate to address identified noncompliances and prevent recurrence, are timely, and include effectiveness reviews following completion.

- Significant DOE intervention was not required at any stage (i.e., investigation, causal analysis, extent-of-condition, corrective action development and implementation) to ensure a comprehensive and effective post-event response by the contractor.

Compliance Order

The Secretary of Energy is authorized to issue a Compliance Order to prevent, rectify, or penalize violations of nuclear safety and worker safety and health requirements, and acts or omissions causing or creating a risk of loss, compromise, or unauthorized disclosure of classified information (reference Part 820, Subpart C, *Compliance Orders*; Section 851.4, *Compliance Order*; and Section 824.4(b), respectively). A Compliance Order is generally considered in

circumstances where an immediate and serious safety or security problem exists and repeated efforts by DOE to ensure completion of appropriate corrective actions by the contractor have failed such that a significant deficiency persists. In such cases, the Director of Enforcement, in consultation with Field and Program Office management, prepares a Compliance Order, including briefing material for the Secretary. A Compliance Order may be issued and signed only by the Secretary. Failure to comply with a Compliance Order could subject the recipient to further enforcement sanctions.

The Compliance Order generally identifies violations of the worker safety and health, nuclear safety, or classified information security regulations; describes the conditions or underlying problems that have not been adequately corrected; and provides specific contractor actions that must be completed, the basis for the actions, and required completion dates. Requirements in the Compliance Order are effective immediately, unless a different effective date is specified in the order. For worker safety and health violations, the contractor is required to post the Compliance Order in a prominent location at or near where the violation(s) occurred, and the order must remain posted until the violation(s) are corrected.

Within 15 calendar days of the issuance of a Compliance Order, the recipient of the order may request that the Secretary rescind or modify it. A request does not stay the effectiveness of a Compliance Order unless the Secretary issues an order to that effect.

In addition the Compliance Order, DOE may issue a PNOV with corresponding citations for the violations and impose appropriate remedies.

Special Report Order

In certain circumstances, the Director or NNSA Administrator, as appropriate, may issue an SRO requiring a contractor to file a special report that provides specific information relative to DOE nuclear safety requirements as provided in 10 C.F.R. Section 820.8(b). This discretionary enforcement tool is typically used in situations where the Office of Enforcement desires detailed and focused information related to a noncompliance with nuclear safety requirements. Examples of the types of information requested may include details on corrective actions taken by a contractor, a review of contractor self-assessments performed relevant to the issue, a retrospective review of similar prior issues, an identification of underlying issues, or a written response to specific questions relating to the circumstances of a noncompliance.

The SRO requires the contractor to provide the Office of Enforcement (and NNSA where applicable) with the requested information within a specified time period. The SRO does not impose a monetary penalty or other remedy. However, based on the Director's evaluation of the contractor's response to the SRO, the Director will make a decision about whether further enforcement activity is needed to address noncompliances.

Enforcement Letter

If the Office of Enforcement identifies a matter of safety or security concern but decides not to pursue an enforcement investigation or issue an NOV, the Director may issue an enforcement

letter consistent with 10 C.F.R. Sections 851.40(j) (worker safety and health), 820.21(g) (nuclear safety), or Part 824, Appendix A, Paragraph VII, *Enforcement Letter* (classified information security). An enforcement letter is not a formal enforcement sanction in that it imposes no requirements, enforcement citation, or penalty on the contractor. The enforcement letter usually identifies one or more conditions: (1) where performance may have been deficient but not of sufficient significance to warrant an NOV; and/or (2) where contractor attention is required to avoid a more serious condition that would result in an NOV. Thus, the enforcement letter can serve as a strong warning on matters that need attention. An enforcement letter may also highlight any contractor actions that were appropriate and contributed to the decision not to issue a PNOV, and some letters have been issued solely to recognize positive contractor actions. The Office of Enforcement consults with DOE line management on the message and conclusions in the enforcement letter before issuance.

Enforcement letters typically do not require a response from the contractor. Instead, enforcement staff continue to monitor contractor performance and, as part of normal interface, regularly communicate with the contractor and local DOE Field Element for follow-up and resolution of the matter.

Because enforcement letters do not contain sanctions and are not intended to be punitive, it is the Office of Enforcement's position that DOE line management should not penalize a contractor using contractual means merely for receiving an enforcement letter. While it may be appropriate for DOE line management to address the underlying events or issues that are the subject of an enforcement letter through its contract management mechanisms, merely receiving such a letter from the Office of Enforcement should not be construed as detrimental to the contractor.

Communications Protocols

The Office of Enforcement takes special care and deliberate action to notify the contractor before the impending issuance of an enforcement outcome document, particularly because all outcome documents are made publicly available on an EA website and may generate media inquiries. The Office of Enforcement will notify the cognizant Program Office, Field Element, and contractor enforcement coordinator at least 24 hours before issuing a final enforcement outcome document to a contractor. For Consent Orders and Settlement Agreements, this notification will be provided both before the draft order or agreement is provided to the contractor for review and after it has been signed by the Director of Enforcement and, if applicable, the NNSA Administrator.

The notification to the enforcement coordinators will include the type of document that will be issued, the day that the document will be issued to the contractor by email (the original signed copy is sent via certified mail), and the anticipated day that the document will be posted to an EA website. If the outcome document is to be accompanied by a press release, the Office of Enforcement will specify the time when the DOE Office of Public Affairs plans to post the press release to the DOE home page at http://energy.gov/. In most cases, the outcome document will not be publicly released by posting to the Internet until at least 24 hours after it has been issued to the contractor. Office of Enforcement staff will attempt to make the notifications by telephone so that the office obtains positive acknowledgement that the notification has been received. The

enforcement coordinators are expected to notify the appropriate managers within their respective organizations of any impending Office of Enforcement actions.

For contractors that do not have a designated enforcement coordinator, the Office of Enforcement will notify a principal of the company.

If the outcome document is a PNOV, EA also notifies the DOE Office of Congressional and Intergovernmental Affairs and Office of the Chief Financial Officer of impending issuance of the PNOV and after the PNOV has been issued to the contractor. After the PNOV has been issued to the contractor, these offices typically inform the Congressional committees with jurisdiction over DOE activities and appropriations at the affected site that a PNOV has been issued. For PNOVs issued to NNSA contractors, similar notifications may be made at the discretion of the NNSA Associate Administrator for External Affairs.

Issuing a Press Release or Fact Sheet

Press releases are generally issued only for PNOVs, but may be considered for other enforcement outcomes. The Office of Enforcement prepares the draft press release with input from the DOE Office of Public Affairs. After the PNOV has been signed, the Director transmits the PNOV to the contractor by email to provide immediate notice of the action. Subsequent public issuance of the PNOV and accompanying press release is then coordinated through the series of notifications of DOE and contractor line management and the affected Congressional delegations, as described above, before posting the PNOV on an EA website and the press release on the DOE home page.

For PNOVs issued to NNSA contractors, recent practice has been for the Office of Enforcement to develop fact sheets instead of press releases. Similar to a press release, a fact sheet summarizes the facts of the safety or security incident or issue, includes a general reference to the violations cited, and includes a brief statement on DOE's statutory authority to issue an enforcement action. The NNSA Office of Public Affairs determines the distribution of such fact sheets, and they are posted on an EA webpage along with the associated PNOV.

Criminal Penalties – Referral to the Department of Justice

Department security policies and Part 820, Subpart F, *Criminal Penalties*, state that DOE may refer a security or nuclear safety matter to DOJ if DOE determines that a potential criminal action has occurred. In such cases, the Director will also notify the IG, as required by DOE Order 221.1A, *Reporting Fraud, Waste and Abuse to the Office of Inspector General*. Under Section 820.71, *Standard*, a contractor, by an act or omission, that knowingly and willfully violates, causes a violation of, attempts to violate, or conspires to violate any nuclear safety requirement, will be subject to criminal penalties. Although not specified in Part 851 for worker safety and health issues, the Office of Enforcement, as a matter of practice, follows the Part 820 approach for worker safety and health matters that are believed to involve a potential criminal action.

As a general policy, if a matter has been referred to DOJ, any DOE enforcement proceeding would be held in abeyance, unless immediate action is needed for health, safety, or national security reasons. The purpose of postponing DOE action is to avoid potential compromise of or conflict with the DOJ case, pending DOJ's concurrence that the proceeding will not affect any potential prosecution. The Director is responsible for coordinating enforcement matters with DOJ.

If DOJ determines that a referred case lacks prosecutorial merit, it notifies DOE by a letter of declination. On receiving this letter, the Director determines whether to initiate an enforcement proceeding, which would then follow the process described in this document.

Administrative Matters

Docket File

Title 10 C.F.R. Section 820.10, *Office of the Docketing Clerk*, specifies establishing an Office of the Docketing Clerk for nuclear safety matters, with responsibilities for maintaining docket files for each enforcement case, as well as exemption decisions and interpretations issued pursuant to 10 C.F.R. Part 820. The Docketing Clerk is also assigned responsibilities for notification and filings associated with any adjudication proceeding. To implement these requirements and responsibilities, the Office of the Docketing Clerk has been established in the Office of Enforcement.

Part 851 (worker safety and health) and Part 824 (classified information security) do not establish requirements for the Docketing Clerk; however, the Docketing Clerk performs similar functions for these enforcement programs.

Assignment of Enforcement Document Number

The Office of the Docketing Clerk assigns a unique alpha-numeric designation to each proposed enforcement outcome document as a way to track cases administratively. Designations identify the relevant enforcement program (i.e., W – worker safety and health, N – nuclear safety, S – classified information security) and the type of sanction (i.e., EA – enforcement action, CO – Consent Order, SA – Settlement Agreement, EL – enforcement letter, SRO – Special Report Order). Numbers are assigned sequentially according to the calendar year of issuance, enforcement area, and type of sanction (e.g., WEA-2015-01). After a document number is assigned to an enforcement matter, all subsequent filings, memoranda, and correspondence for that case should include the contractor name and complete document number.

VII. Civil Penalty and Monetary Remedy Determination

To calculate civil penalties, the Office of Enforcement initially determines the severity level of the violation(s) by assessing the safety or security significance of each noncompliance. The severity level corresponds to a base civil penalty amount that may then be escalated or mitigated by the application of discretionary adjustment factors.

Severity Level

The Office of Enforcement reviews the individual merits of each enforcement case to ensure that the severity level assigned to a violation is best suited to the significance of that violation. Special circumstances may sometimes warrant an adjustment to the severity level.

Chapter V, *Investigation Process*, and the ECH provide guidance on determining safety and security significance, including factors that affect significance. Guidance for categorizing safety and security violations is provided in DOE's enforcement policies as follows:

- For worker safety and health violations, Section VI, *Severity of Violations*, of Appendix B to Part 851. Violations are categorized as severity level I or II, or de minimis.

- For nuclear safety violations, Section VI, *Severity of Violations*, of Appendix A to Part 820. Violations are categorized as severity level I, II, or III.

- For classified information security violations, Section V, *Severity of Violations*, of Appendix A to Part 824. Violations are categorized as severity level I, II, or III.

DOE uses the definitions provided in these policies as a starting point for determining a recommended severity level. In considering the severity level, DOE considers the actual and potential consequences (safety or security significance) of the violations. The severity level may be adjusted by DOE, based on the circumstances of the particular violation. The following sections summarize the Office of Enforcement's general approach to some common factors that affect adjustment of severity level.

Aggregation of Violations

When several violations are evaluated in the aggregate, indicating a broader underlying problem, the underlying problem may be assigned a higher severity level than the individual examples may have deserved.

Severity Level Escalation

DOE's enforcement policies permit an increase of the base civil penalty consistent with the presence of certain aggravating factors, but not beyond the maximum permissible penalty. This penalty escalation can be accomplished either by escalating the severity level, which will invoke a higher base civil penalty (as shown in Table 1 below), or by directly increasing the base civil penalty for the existing severity level.

DOE's enforcement policies establish specific considerations that may raise the severity level of a violation even in the absence of a significant safety or security risk. These include:

- The position, training, and experience of the individual involved in the violation. DOE generally considers instances involving managers to be more severe, particularly if senior management is involved.

- Prior notice of the problem. If such notice was clearly given – whether internal, such as an internal assessment, or external, such as by DOE – failure to adequately correct the problem results in a more significant action.

- Duration of a violation. If the matter existed for some time and was clearly identifiable through assessment activities, tests, inspections, or direct observation by workers or management, the Office of Enforcement generally categorizes the condition at a higher level.

- Past performance of the contractor in the particular activity area involved, with a particular emphasis on areas of longstanding deficiencies and insufficient corrective actions.

- Multiple or recurrent examples of a violation in the same timeframe rather than an isolated occurrence.

The Office of Enforcement considers these aspects of each case and addresses them appropriately in its investigation report. Additionally, these areas of concern are emphasized in the PNOV transmittal letter. For worker safety and health violations, these factors are not used to determine severity level; rather, they may form the basis for direct increases to the base civil (or contract) penalty. However, as noted above, irrespective of whether the severity level or the base civil penalty has been escalated, the final civil penalty cannot exceed the maximum allowed by statute for each cited noncompliance.

Low Significance Violations

In accordance with DOE's enforcement policies, PNOVs need not be issued for noncompliance items that represent minor deviations from safety or classified information security requirements. Part 851, Appendix B, Section VI, refers to such conditions as "de minimis violations." Part 824 indicates that an NOV may not be warranted if the matter involves isolated minor violations of classified information security requirements. This discretion is intended to allow DOE to focus

its enforcement activities on matters that have greater actual or potential significant impact on worker and nuclear safety and the security of classified information. However, noncompliances that do not result in an NOV should still receive appropriate contractor attention to ensure that they are adequately corrected and should be properly tracked and evaluated to identify repetitive conditions or assess generic or facility-specific problems.

For nuclear safety and classified information security noncompliances, severity level III violations are generally reserved for cases where calling attention to less significant conditions can be expected to stimulate the contractor to address those conditions before they result in more significant conditions or events. The Director of Enforcement may also use an enforcement letter to direct contractor attention to resolving such precursor conditions in worker and nuclear safety and classified information security. In cases where the Director uses an enforcement letter to focus contractor management attention on an issue, but subsequent performance identifies that corrective actions have been ineffective in resolving the noncompliance, the Office of Enforcement will consider the need for additional enforcement activity.

Base Civil Penalty

The worker safety and health (Part 851, Appendix B), nuclear safety (Part 820, Appendix A), and classified information security (Part 824, Appendix A) enforcement policies state that civil penalties are designed to emphasize the importance of compliance and to deter future violations as well as to encourage early identification and reporting of violations and their prompt correction. The overall outcome of a PNOV, including the magnitude of the civil penalty, generally takes into account the gravity, circumstances, and extent of the conditions surrounding the violation. As a result, the Office of Enforcement may either group related violations or cite them separately, so that the resulting enforcement outcome is commensurate with the significance of the case.

The respective enforcement policies establish base civil penalty amounts by severity level that are a percentage of the maximum civil penalty per violation per day. DOE is required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (as amended by the Debt Collection Improvement Act of 1996) to adjust the maximum, per-day civil penalty amounts at least once every four years for inflation. Table 1 provides the civil penalty values in effect as of the January 2014 inflationary adjustment for each enforcement area.

Table 1. Base Civil Penalty Amounts (as of January 2014)
(with percentage of maximum civil penalty per violation per day)

	Worker Safety & Health	Nuclear Safety	Classified Information Security
Severity Level I	$80k (100%)	$160k (100%)	$120k (100%)
Severity Level II	$40k (50%)	$80k (50%)	$60k (50%)
Severity Level III	Not Applicable	$16k (10%)	$12k (10%)

Civil penalties are not typically proposed for nuclear safety or security severity level III violations if: (1) the contractor identifies and reports the noncompliance condition in a timely manner; (2) DOE is satisfied with the causal analysis and corrective actions; and (3) the matter does not appear to be of a recurring nature. However, a civil penalty may be appropriate in some circumstances to emphasize the importance of adherence to DOE's nuclear safety and classified information security requirements, or when the violation(s) is similar to previous violations for which the contractor had not taken effective corrective action.

After the Office of Enforcement has established the specific violation(s) to cite (including any grouped violations) and the applicable severity level(s), the base civil penalty is established for each, using the current base civil penalty amounts and the applicable table provided in the Part 851, 820, and 824 enforcement policies.

Adjustment of Base Civil Penalty

After the appropriate base civil penalty is determined for a case, the civil penalty adjustment factors outlined in the enforcement policies are used to determine the civil monetary penalty that is to be assessed.

DOE provides substantial incentive for early self-identification and reporting of violations (up to 50 percent mitigation of the base civil penalty). Substantial mitigation (up to an additional 50 percent) is also possible if corrective action is prompt and aggressive. Accordingly, DOE considers several factors in assessing each potential enforcement situation. In determining whether a penalty will be mitigated, DOE considers, among other factors, the opportunity available to discover the violation, the ease of discovery, the promptness and completeness of the notification report to DOE, and the scope and promptness of the corrective actions.

Mitigation for Identification and Reporting

The base civil penalty may be reduced by up to 50 percent if the contractor identified the violation and promptly reported the violation to DOE. In weighing this factor, consideration will be given to, among other things, whether the problem was disclosed through an event; whether prior opportunities existed to discover the violation and, if so, the number and timeframes of such opportunities; prior knowledge of the violation; the extent to which proper contractor controls should have identified the violation; whether the violation was discovered through a contractor assessment activity or by an external body, such as DOE; and the promptness and completeness of any noncompliance report.

Timely self-identification means identifying a worker safety and health, nuclear safety, or classified information security problem before it leads to an incident with undesirable consequences. The contractor's focus should be on performance assessment or other means and processes to identify such problems, rather than being forced to react to an event. Thus, if identification of a noncompliance is the result of contractor initiative or through a contractor's efforts to understand the broader implications of a particular issue or condition, DOE would generally grant mitigation for self-identification, assuming that proper reporting occurred. However, where an event discloses the existence of underlying noncompliances, DOE would

likely not grant mitigation for self-identification, even if promptly reported by the contractor. The enforcement policies refer to this situation as a "self-disclosing" event. DOE's desire is for contractors to self-identify problems before they lead to events with actual or potential safety or security consequences, primarily through excellence in performance assessment programs.

Mitigation and Escalation for Corrective Actions

DOE expects prompt, comprehensive, and effective corrective actions for safety and classified information security violations. As noted, up to 50 percent of the base civil penalty may be mitigated if these factors are present. Conversely, the base civil penalty may be increased by up to 50 percent for deficient corrective action processes. In applying these factors, the Office of Enforcement considers (depending on the circumstances) the timeliness of the actions, the contractor's initiative to take action, the rigor with which the contractor identifies the underlying cause(s), the adequacy of extent-of-condition reviews, whether there is a repetitive problem or occurrence for which prior corrective actions were ineffective, and the comprehensiveness of the corrective actions.

The Office of Enforcement considers the following circumstances or factors in applying its authority to provide mitigation and positive incentives for desired contractor actions:

- Enforcement does not normally give credit for a contractor's corrective actions if DOE intervention was needed to broaden the scope or increase the extent of the corrective actions.

- Mitigation is also not appropriate merely because immediate remedial actions are taken to correct a condition; broader corrective actions to prevent recurrence must be evident.

- The corrective action effort must include adequate and timely causal determination, extent-of-condition review, corrective action development, and a corrective action effectiveness review. The Office of Enforcement's guideline for judging timeliness in this area is that most investigations, causal analyses, and development of corrective actions should typically be completed within 45 calendar days of identifying the noncompliance; although it is recognized that some significant events with broad deficiencies may need longer than the recommended 45 calendar days. Contractor failures associated with timely and adequate analysis and corrective action development could lead to full or partial reduction in the allowed mitigation.

- The judgment on adequacy of corrective actions is based on whether the actions appear sufficiently comprehensive to correct the noncompliance and prevent recurrence. Enforcement staff solicit DOE Field and Program Office input on this judgment.

- Because of the time required to form a basis for a judgment on effectiveness and the need for timely enforcement activity, the Office of Enforcement may not have complete data on the effectiveness of corrective actions to make a judgment. However, if such information is available, it will be factored into the judgment on corrective action mitigation.

- If the violation or event is found to have followed a precursor event that should have led to earlier recognition of the problem, or if there is a recurring problem for which prior corrective actions were implemented, the Office of Enforcement does not normally provide full mitigation for corrective actions. Furthermore, in cases where a violation of DOE's nuclear safety quality improvement requirements has occurred, the Office of Enforcement typically provides no mitigation for corrective actions. These conditions indicate either a failure to take corrective action or that prior corrective actions were not effective.

Appendix A of the ECH provides information on common weaknesses observed by the Office of Enforcement in contractor investigation, causal analysis, and corrective action processes. This information provides lessons learned for contractors to consider as they assess and strive to improve their own processes.

Application of "Per Day" Provisions

The maximum civil penalty, as adjusted for inflation ($80,000 for worker safety and health, $160,000 for nuclear safety, and $120,000 for classified information security), in 10 C.F.R. Sections 851.5(a); 820.81, *Amount of Penalty*; and 824.4(c) and 824.4(d); respectively, are the maximum amounts per violation per day. Thus, a noncompliance condition that exists for several days could result in a PNOV with a base civil penalty substantially above the base per-day amount. The Office of Enforcement's policy is to generally use the base single-day amount as the starting point for most violations, and to consider multiples of that value by applying the per-day provisions for the most significant longstanding or recurring problems.

A per-day calculation of a civil penalty will normally be considered when the violation is significant enough that the single-day base civil penalty would not convey the seriousness of the violation or circumstances leading to the violations, particularly if the violations existed for more than a single day and there were substantial opportunities to identify them. Examples of substantial opportunities to identify the violation include: (1) management was aware of the violation and chose not to take appropriate action to remedy the problem; (2) the violation existed for an extended period and the problem would have been identified if effective assessment or evaluation activities were in place; and (3) there was prior notice of the violations through enforcement activities (such as PNOVs). The number of days cited in an enforcement action is consistent with the seriousness of the violations and their resulting actual or potential consequence.

Multiple Separate Violations

The above Severity Level section noted that the Office of Enforcement could aggregate individual, but related, violations into a single "problem" and cite that problem at a higher severity level. Additionally, the Office of Enforcement can separately cite multiple, related violations and impose civil penalties for each of the different violations in a citation. Each violation is subject to the statutory per-day limit. This means, for example, that a single event involving violations of different worker safety, radiological protection, classified information security, and quality assurance requirements could result in a PNOV individually citing these violations and imposing a civil penalty for each.

The significance of a particular occurrence and the circumstances of the violations may dictate that DOE identify the multiple violations involved and impose civil penalties for each to emphasize appropriately the significance of the violations and the attention that is required by the contractor to correct the conditions that led to the violations. Additionally, in cases where longstanding or recurrent noncompliant conditions exist, DOE will consider separately citing (as applicable) the failure of the contractor assessment program to identify the condition and the failure of the corrective action program to effectively resolve it.

Exercise of Discretion

Because DOE wants to encourage and support contractors' initiative in prompt self-identification, reporting, and correction of problems, DOE's enforcement policies grant the Director of Enforcement broad discretionary authority to recognize positive steps by contractors. This discretionary authority can include deciding not to pursue an NOV, grouping violations to reduce the magnitude of the penalty, or mitigating a civil penalty. However, as discussed previously, enforcement discretion can also be used to escalate the magnitude of a penalty in appropriate circumstances.

A decision to not pursue an enforcement proceeding is generally based on meeting all of the following criteria:

- The contractor identifies the noncompliance prior to a self-disclosing event and promptly reports the noncompliance into NTS, SSIMS, or the contractor's self-tracking system, consistent with reporting thresholds.
- The violation is not willful.
- It is not a repetitive violation that could reasonably be expected to have been prevented by appropriate corrective actions for a previous violation.
- Upon discovery of the noncompliance, the contractor promptly takes, or begins to take, action to correct the condition.
- The contractor takes, or commits to taking, comprehensive corrective actions.
- The event is not a serious or potentially serious event.

When a PNOV will be issued, the decision to aggregate violations to reduce the potential magnitude of the PNOV generally results from: (1) unusually positive actions by the contractor in identifying and correcting the violations; or (2) ongoing improvements that the contractor had already started but were not yet fully effective when the violations occurred.

In addition, discretion may be applied for latent conditions or legacy issues discovered by a contractor that are likely due to the actions or inaction of a previous contractor. Whether to apply discretion will depend on several factors, including whether the current contractor should have identified the problem earlier through routine activities, such as surveillance, survey, or

assessment activities; whether the current contractor should have identified the problem through a required inspection or baseline review; whether the current contractor should have identified the problem in its due-diligence reviews; or whether the current contractor was notified of the existing problem by DOE or the prior contractor. In any such cases, the current contractor must have taken prompt and appropriate action upon identification and properly reported the noncompliance condition to receive consideration for this application of discretion.

Ability of Contractor to Pay Civil Penalty or Monetary Remedy

DOE's worker safety and health, nuclear safety, and classified information security enforcement policies grant the Director of Enforcement discretion in adjusting civil penalties based on judgment of the contractor's ability to pay (reference Part 851, Appendix B, Section IX; Part 820, Appendix A, Section IX; and Part 824, Appendix A, Section VIII, *Enforcement Actions*, respectively). Although the policies generally regard the safety and security significance of a violation as the primary consideration in assessing a civil penalty, the contractor's (including subcontractor's) ability to pay may be a secondary consideration. DOE does not levy civil penalties with the intent of putting a contractor into bankruptcy. To discontinue contractor management and operation of a DOE site or facility, DOE would terminate the contract rather than impose civil penalties. However, the burden of proving inability to pay is on the contractor and must be conclusively demonstrated by a present financial condition, not speculation about a future condition. If it appears that the economic impact of a civil penalty might put a contractor into bankruptcy, or interfere with a contractor's ability to safely or securely conduct activities or correct the violation to bring its program into full regulatory compliance, or both, it may be appropriate to decrease the base civil penalty.

This discretion is expected to be used rarely, and only when the contractor can clearly demonstrate economic hardship. The Director may also request assistance from DOE line management and contracting officials to substantiate a mitigating financial condition.

Monetary Remedy Determination

Consent Orders and settlement agreements do not include a civil penalty, but typically provide for a monetary remedy. For any settlement involving a monetary remedy, the Office of Enforcement initially determines the number and severity of the potential noncompliances, appropriately considers mitigating factors, and then calculates what the civil penalty would have been had the outcome been an NOV. When appropriate, the Office of Enforcement may then reduce the remedy amount to recognize the financial benefit of settlement early in the enforcement process. Reducing the penalty also provides additional incentive to settle.

VIII. Contractor Employee Whistleblower Protection

The *DOE Contractor Employee Protection Program*, established in 10 C.F.R. Part 708, applies to complaints of reprisal or retaliation made by DOE contractor employees against their employers for certain conditions (protected activities), including employee disclosures, participations, or refusals related to various matters involving worker safety and health and/or nuclear safety issues. Specifically, Part 708 provides employees with a process to file a complaint concerning retaliation and obtain restitution and other remedies from the contractor in the event of a finding of reprisal under the Rule. DOL provides similar mechanisms in 29 C.F.R. Part 24, *Procedures For The Handling Of Retaliation Complaints Under The Employee Protection Provisions Of Six Environmental Statutes And Section 211 Of The Energy Reorganization Act Of 1974, as amended*.

Either option is available for DOE contractor employees to pursue remedies for retaliation in response to raising safety concerns at DOE facilities. Although there are procedural and other reasons for selecting a particular forum for the matter, that choice by the individual will not affect how the Office of Enforcement addresses the issue.

Enforcement of the regulations prohibiting retaliation in the worker safety and health and nuclear safety areas by the Office of Enforcement is institutionalized through different mechanisms. Part 851, contains, in Section 851.20, *Management Responsibilities and Worker Rights and Responsibilities*, specific worker safety and health rights that are included in the employee-protected activities of Part 708. Acts of retaliation involving worker safety and health issues could result in the imposition of civil or contract penalties against a DOE contractor under Part 851.

The Department's intent regarding enforcement of instances of reprisal in matters of nuclear safety is laid out in the May 15, 1992, clarification of the 10 C.F.R. Part 820 notice of proposed rulemaking; the Preamble to the August 17, 1993, Final Rule for 10 C.F.R. Part 820; and the March 22, 2000, amendment of Part 820, Appendix A. The first two references indicate that the definition of Nuclear Safety Requirement was intended to include existing and future regulations in the C.F.R. that relate to nuclear safety in connection with DOE nuclear activities. Additionally, both references specify that a reprisal by a DOE contractor resulting from an employee's involvement in matters of nuclear safety would constitute a violation of a DOE Nuclear Safety Requirement.

Furthermore, Part 820, Appendix A, Section XIII, *Whistleblower Enforcement Policy*, which was added by the March 2000 amendment, (1) states that an act of retaliation by a DOE contractor proscribed under 10 C.F.R. Part 708 that results from an employee's involvement in a nuclear-safety-related activity "may constitute a violation of a DOE Nuclear Safety Requirement under 10 C.F.R. part 820;" and (2) indicates that information obtained from DOL proceedings concerning whistleblower protection (implemented in 29 C.F.R. Part 24) may also be used to support enforcement proceedings under Part 820.

In general, the Office of Enforcement's practice is to delay acting on a retaliation matter until DOE's OHA or DOL has completed its process (i.e., investigation, hearing, initial decision, and

final agency decision) and has ruled that retaliation occurred, without waiting for all possible appeals to be exhausted. Based on the long time period for the appeal process, the Director of Enforcement has determined that deferral until appeals are complete is not justified due to the amount of time required to bring the case to closure and experience to date that, barring unforeseen circumstances, the record is generally complete when OHA or DOL issues a Final Order.

It is important to note that the authority for reviewing complaints and providing remedies *to the individual complainant* (i.e., restitution) pursuant to either 10 C.F.R. Part 708 or 29 C.F.R. Part 24 does not reside with the Office of Enforcement. Employees subjected to and seeking appropriate resolution of a potential act of retaliation need to follow the process described in one of those regulations. It is also important to note that although the Office of Enforcement defers the start of enforcement activities as they relate to an act of retaliation (as described in the preceding paragraph), the Office of Enforcement does not defer actions to address any associated substantive worker safety and health or nuclear safety issue that represents a noncompliance. Such a noncompliance could lead to an enforcement investigation and a PNOV that addresses the underlying worker safety and health or nuclear safety rule violation well before the Office of Enforcement issues an outcome related to the act of retaliation.

The Office of Enforcement considers many factors when evaluating cases of alleged retaliation. These factors include the complainant's employment status, the management level associated with the retaliation, the contractor's response after the retaliation with respect to its work force, and the overall safety record of the contractor. The contractor's positive performance would not normally preclude an enforcement proceeding for the retaliation, but could impact whether and how mitigation would be considered. Similarly, negative performance on the part of the contractor could be a factor in considering enforcement escalation. The ultimate decision about whether to initiate an enforcement proceeding on a claim of retaliation does not depend on whether the underlying nuclear or worker safety and health concern proves to be valid. In other words, the act of retaliation is itself a safety concern, because of the chilling effect it has on employees' willingness to speak up about safety issues.

IX. Application of Enforcement Process to Special Conditions

Recurring/Repetitive Problems

As noted in Chapter IV, *Contractor Noncompliance Identification and Reporting*, recurring or repetitive noncompliances should result in a contractor submitting an NTS report. The Office of Enforcement factors in such problems when considering safety and security significance during NTS or SSIMS report reviews or other initial identification of noncompliance conditions, and when making decisions on cases to investigate. Chapter IV identifies recurring and repetitive noncompliances as a factor impacting the enforcement outcome, usually causing the Office of Enforcement to not mitigate or partially mitigate a penalty based on the corrective action criteria. Recurring and repetitive problems may also provide a basis for a quality improvement citation for a nuclear safety violation.

Some cases that the Office of Enforcement investigates involve recurring issues – i.e., problems identical or similar to those that led to a serious previous event or condition in the same organization, facility, or site. Recurring problems may indicate that the organization's corrective action management processes are flawed, in that either the prior corrective actions were not effective in preventing recurrence, or the corrective actions were not maintained. Consequently, this may mean that the causal analysis was deficient, extent-of-condition reviews were not performed or were ineffective, trending processes are not sufficiently developed, or performance assessment processes are not discovering issues before they result in significant safety or security events.

DOE expects management commitment to safety and security, as exemplified by attention to finding and fixing precursor issues and appropriately responding to safety and security events. Consequently, enforcement proceedings involving recurring issues will generally result in a significantly greater civil penalty than would otherwise have been the case (e.g., greater use of DOE's "per day" authority, separate citation of violations rather than aggregation, escalation of the severity level of the violations, or a combination of these remedies depending upon the circumstances).

Contractor Transition

DOE periodically transfers management and operating responsibility for a DOE site, facility, or activity to a different contractor. During such transitions, appropriate planning is required. The transition process normally includes a period of review and due diligence on the part of the incoming contractor. DOE's expectation is that the outgoing contractor retains responsibility for compliance with DOE safety and security requirements during the period of its contract, up to and including the date of turnover to the incoming contractor. However, even after turnover, DOE could pursue an enforcement sanction against the outgoing contractor for any case of noncompliance that occurred during the contract period.

The incoming contractor organization is expected to assume full responsibility for safe and secure operation and compliance with DOE safety and security requirements on the date it assumes contract responsibility for the site or facility. During its due diligence review, the

incoming contractor normally identifies any significant individual or programmatic issues of noncompliance with DOE requirements; these issues are then addressed with the appropriate DOE Field and Program Office management before transfer of responsibility for the site or facility. Additionally, after assuming responsibility, the incoming contractor should: (1) report any noncompliance conditions identified during the due diligence period that meet NTS reporting thresholds and SSIMS reporting criteria, and (2) assume, from the outgoing contractor, responsibility for completing or ensuring completion of corrective actions and problem resolution that were ongoing at the time of turnover.

The Office of Enforcement may exercise discretion in considering a noncompliance issue that surfaces soon after the incoming contractor assumes responsibility, and that could not reasonably have been identified during the due diligence period. The Office of Enforcement generally does not pursue an enforcement proceeding during this early, near-term period if the contractor, upon identifying the condition, reports the noncompliance into NTS, SSIMS, or its internal tracking system (as appropriate) and responds with timely and effective corrective actions. However, for serious events or accidents, such as serious worker injury, substantial actual or potential radiological uptake or exposure, or compromise/potential compromise of classified information having a significant impact on national security, the Director of Enforcement would normally evaluate the issue for a potential enforcement proceeding regardless of timing.

Combined Worker Safety and Health, Nuclear Safety, and Classified Information Security Noncompliances

Over the past several years, the Office of Enforcement has noted several cases involving both worker safety and health and nuclear safety issues. Examples of such cases include a fire or explosion that affected or may have affected worker safety and health and radiological materials, violation of lockout/tagout requirements providing the potential for an electrical shock associated with nuclear safety system operations, and a series of worker safety and health and nuclear safety events that demonstrated a programmatic problem in work planning or execution. Cases with implications in both the nuclear safety and worker safety areas will continue to occur. If such cases are subject to investigation, the Office of Enforcement will conduct an integrated investigation that reviews the facts, circumstances, and noncompliances in both areas.

Additionally, if the Office of Enforcement pursues a PNOV for noncompliances in multiple areas, the PNOV will generally be a combined action that cites both worker safety and health and nuclear safety violations. Such actions will be coordinated so that the same violation, as well as any associated civil penalty, is not imposed twice under the worker safety and health and nuclear safety rules, as is prohibited by Section 851.5(e). On the other hand, a single event or occurrence might have certain noncompliances in the worker safety and health area and certain other noncompliances in the nuclear safety area that are cited separately in the PNOV. The potential also exists for worker safety and health and nuclear safety cases to involve classified information security noncompliances. If such a situation arises, an integrated investigation will be conducted and the outcome handled in accordance with this paragraph.