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DOE HANDBOOK

ENFORCEMENT HANDBOOK

ENFORCEMENT OF DOE NUCLEAR SAFETY REQUIREMENTS

U.S. Department of Energy
Washington, D.C. 20585

AREA MISC

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FOREWORD

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

- a. Fostering compliance with applicable DOE nuclear safety requirements;
- b. Providing positive incentives for contractors, subcontractors and suppliers who perform the following tasks:
 - (1) Timely self-identification of nuclear safety deficiencies,
 - (2) Prompt and complete reporting of such deficiencies to DOE,
 - (3) Root cause analyses of nuclear safety deficiencies,
 - (4) Prompt correction of nuclear safety deficiencies in a manner which precludes recurrence, and
 - (5) Identification of modifications in practices or facilities that can improve public or worker radiological health and safety.
- c. Deterring future violations of DOE nuclear safety requirements by DOE contractors; and,
- d. Encouraging the continuous overall improvement of operations at DOE nuclear facilities.

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CHAPTER 1 - GENERAL

1.1. Purpose of the Handbook

This Handbook provides detailed guidance and procedures to implement the General Statement of DOE Enforcement Policy (Enforcement Policy or Policy), described in 10 CFR 820 Appendix A 58FR 43680 (August 17, 1993). A copy of this Enforcement Policy is included for ready reference in Appendix D. The guidance provided in this Handbook is qualified, however, by the admonishment to exercise discretion in determining the proper disposition of each potential enforcement action. As discussed in subsequent chapters, the Enforcement and Investigation Staff will apply a number of factors in assessing each potential enforcement situation. Enforcement sanctions are imposed in accordance with the Enforcement Policy for the purpose of promoting public and worker health and safety in the performance of activities at DOE facilities by DOE contractors (and their subcontractors and suppliers) who are indemnified under the Price-Anderson Amendments Act, 42 U.S.C. 2210(d) (PAAA). These indemnified contractors, and their suppliers and subcontractors, will be referred to in this Handbook collectively as "DOE contractors." It should be remembered that the purpose of the Department's enforcement policy is to improve nuclear safety for our workers and the public, and this goal should be the prime consideration in exercising enforcement discretion.

1.2. Uses of the Handbook

- a. This Handbook is administered by the Enforcement and Investigation Staff currently located in the Office of Environment, Safety and Health. The Enforcement and Investigation Staff has responsibility for enforcing nuclear safety requirements at applicable DOE facilities and has also been assigned enforcement adjudication responsibility under 10 CFR Part 820, Subpart B. Further, the Enforcement and Investigation Staff has criminal referral responsibilities pursuant to the PAAA, as described in Section 1.2(d) below.
- b. This Handbook outlines the authority and responsibilities assigned to the Enforcement and Investigation Staff, the Office of Environment, Safety and Health. The Assistant Secretary for Environment, Safety and Health implements DOE's statutory enforcement program (Section 17 of the Price-Anderson Amendments Act of 1988 (PAAA) which authorizes citations and civil monetary penalties for violations of DOE nuclear safety regulations). The Director, Enforcement and Investigation Staff, has been delegated the authority to issue Notices of Violation and recommend proposed civil penalties (10 CFR 820.24, 25) for PAAA violations. Before issuing Notices of Violation, the Director will obtain signatures of other DOE officials as necessary.
- c. The Enforcement Program described in this Handbook is applicable to DOE contractors for violations of nuclear safety requirements under the authority of PAAA.
- d. Section 18 of the PAAA (42 U.S.C. 2273(c)) also makes DOE contractors subject to criminal penalties for knowing and willful violations of applicable DOE nuclear safety rules, regulations and orders. Since suspected criminal violations are referred to the Department of Justice (DOJ) for appropriate action, this Handbook addresses only civil matters. Referrals to DOJ do not preclude DOE from taking civil enforcement actions, appropriately coordinated with DOJ.
- e. PAAA is applicable to all indemnified DOE contractors; however, provisions for civil penalties do not apply to DOE contractors currently operating the following DOE National Laboratory sites:

Argonne
Los Alamos

Lawrence Livermore
Lawrence Berkeley
Fermi
Princeton Plasma Physics
Brookhaven
Pacific Northwest

It should be noted that these contractors are not exempt from citations (i.e., Notices of Violation) or criminal penalties. All other nonprofit educational institutions that are DOE contractors have automatic remission of civil penalties but are also not exempt from citations or criminal penalties.

- f. This Handbook uses both mandatory and permissive terms. Mandatory terms (e.g., "shall") require specific actions or decisions in the enforcement process consistent with the guidance in this Handbook. Permissive terms (e.g., "should") recognize the flexibility needed in the enforcement process. Terms such as "should" and "normally" establish the normal or expected course of action. To provide the necessary oversight and agency wide consistency, exceptions to the mandatory guidance and procedures in this Handbook may be authorized only by the Director, Enforcement and Investigation Staff.
- g. DOE will exercise appropriate discretion in determining the disposition of any potential enforcement action, which may vary from the guidance and procedures in this Handbook. It should be recognized that the guidance and procedures contained in this Handbook are internal to DOE only. Therefore, the failure to follow the guidance and procedures in this Enforcement Handbook is not a basis to invalidate an enforcement action.
- h. In general, all records and correspondence related to a pending enforcement action prior to the issuance of a Preliminary Notice of Violation (PNOV) are considered "predecisional" and shall be clearly labeled "Predecisional - Not for Public Disclosure."

1.3. Interim Enforcement Guidance

From time to time, enforcement issues will arise that will require the Enforcement and Investigation Staff to issue guidance to clarify the guidance and procedures set forth in this Handbook. The Director, Enforcement and Investigation Staff, will endeavor to provide such guidance in a timely manner, and assure its wide distribution. Such supplemental guidance will generally be forwarded to PAAA Coordinators at each site.

1.4. Definitions (See also 10 CFR 820.2)

- a. Contractor - Any person or entity under indemnification with DOE with the responsibility to perform activities in connection with any DOE facility, laboratory, or program subject to nuclear safety requirements. As used in this Handbook, reference to a contractor also includes its subcontractors or suppliers.
- b. Director, Enforcement and Investigation Staff - Director, Enforcement and Investigation Staff, refers to the Director of the Enforcement and Investigation Staff in the Office of Environment, Safety and Health.
- c. EH-1 - EH-1 refers to the Assistant Secretary for Environment, Safety and Health.
- d. Enforcement Adjudication - The adjudication process and procedures are set forth in 10 CFR Part 820, Subpart B. Includes adjudication of contested violations issued pursuant to the PAAA.

e. Excluded Facility or Activity - A facility or activity that is not subject to a DOE nuclear safety requirement as a result of exclusionary provisions in a substantive rule. This category may also include facilities or activities that do not meet an enforcement threshold that would make it appropriate for an enforcement action.

f. Exemption - Relief, waiver, or release from DOE nuclear safety requirements, either temporary or permanent, as granted by the responsible Secretarial Officer pursuant to the provisions of 10 CFR Part 820, Subpart E.

g. Price-Anderson Noncompliance (Violation) - The term noncompliance and violation are essentially interchangeable in that both terms connote a failure to comply with an applicable nuclear safety requirement. Noncompliances having the requisite safety significance will be subject to Notices of Violation and, if appropriate, civil penalties. Isolated minor noncompliances involving minimal or low safety significance will be tracked by the contractor and are subject to periodic review.

h. Nuclear Safety Requirements - Legally binding obligations which are set forth in applicable statutes, DOE regulations, and PAAA Compliance Orders, that govern specific nuclear activities and are subject to PAAA enforcement actions. DOE facilities and activities subject to DOE nuclear safety requirements may be subject to other requirements set forth in orders, notices, standards, safety guides, and Handbooks of "good practice." These other requirements are not enforceable through PAAA provisions. These other requirements may also be referred to elsewhere as "nuclear safety requirements" if they are related to nuclear activities, and, thus, care should be exercised as appropriate to differentiate the statutorily mandated PAAA enforceable requirements from other requirements.

i. PAAA Adjudication - The adjudication process and procedures set forth in 10 CFR Part 820, Subpart B. May also be defined as an enforcement adjudication.

j. Cognizant Secretarial Officers (CSOs) - The heads of DOE offices with responsibility for specific DOE facilities. These include the Assistant Secretaries, Environmental Restoration and Waste Management (EM), and Defense Programs (DP), and the Directors of Energy Research (ER), and Civilian Radioactive Waste Management (RW).

k. Secretarial Officer (SO) - The head of a Secretarial Office such as the Assistant Secretary for Environment, Health, and Safety or a CSO as defined above.

l. Similar Violation - A violation that reasonably could have been prevented by a contractor's implementation of corrective action for a previous violation.

m. System - As used in this Handbook, includes systems of administrative and managerial controls, as well as physical systems.

n. Willfulness - An attitude toward compliance with DOE nuclear safety requirements that ranges from deliberate intent to violate regulatory requirements or conduct that is so egregious that it constitutes a reckless disregard for a requirement. (Willfulness does not include acts that do not rise to the level of ordinary carelessness, for example, inadvertent clerical errors.)

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CHAPTER 2 - RESPONSIBILITIES AND AUTHORITIES

2.1. Scope of the Chapter

This chapter summarizes the responsibilities and authorities for enforcement activities established in the DOE Enforcement Program Procedural Rules (10 CFR 820) and the Enforcement Policy (10 CFR Part 820, Appendix A). Further detail on supporting roles to the Office of Enforcement and Investigation Staff is contained in a separate DOE Handbook, titled *DOE Enforcement Program — Roles and Responsibilities*.

2.2. Assistant Secretary, Environment, Safety and Health

The Office of the Assistant Secretary, Environment, Safety and Health DOE, has been assigned the responsibility by the Secretary of Energy to implement the enforcement authority provided to the Department in the PAAA. The Assistant Secretary, has the responsibility to provide personnel and resources for PAAA enforcement activities, except for those which are the specific responsibility of the Deputy Assistant Secretary for Naval Reactors as set forth in 10 CFR Part 820.

2.3. Director, Enforcement and Investigation Staff

The Director, Enforcement and Investigation Staff, has been designated principal officer for DOE enforcement activities for the PAAA. The Director manages all DOE enforcement activities pursuant to these statutes and delegations; directs the technical and legal reviews; supervises investigations; prepares enforcement actions; is responsible for the administrative litigation of contested enforcement actions, the issuance of Consent Orders to resolve contested issues, and the appropriate referral of criminal enforcement actions to DOJ. The Director obtains signatures of other DOE officials as necessary before issuing Notices of Violation. The Director is also responsible for providing guidance and training for implementation of Department's PAAA Enforcement Programs.

2.4. Enforcement and Investigation Staff

As directed by the Director, The Enforcement and Investigation Staff performs the following tasks, among other things:

- a. Reviews and evaluates available information on noncompliances and potential violations, including, information reported to the Noncompliance Tracking System. Completes the Noncompliance Review Form and recommends whether to conduct an investigation or initiate enforcement actions to the Director, Enforcement and Investigation Staff.
- b. Investigates potential violations of nuclear safety requirements as identified by internal or external sources, and prepares investigative reports and/or technical evaluations with appropriate findings and recommendations up to and including the recommendation of enforcement actions. These investigations are conducted in accordance with the *DOE Investigation Handbook*.
- c. Prepares for the Director's signature, all recommended enforcement actions, including PNOV's, FNOV's, civil penalties and appropriate transmittal letters to the contractor.
- d. Prepares an advance notification to the Secretary for all enforcement actions involving a civil penalty.
- e. Chairs and participates in enforcement conferences as directed by the Director, consistent with the guidance in this Handbook.

- f. Prosecutes contested enforcement actions consistent with the procedures set forth in 10 CFR Part 820, Subpart B, as directed by the Director.
- g. Resolves contested issues and actions through settlement between and among the parties and prepares Consent Orders for issuance by the Director.
- h. Periodically issues a DOE Report entitled "Resolution of DOE Enforcement Actions Taken Against Contractors, Subcontractors, and Suppliers."
- i. Maintains the Noncompliance Tracking System (NTS).
- j. Maintains a docket for (1) enforcement actions commencing with the filing of a PNOV; (2) interpretations issued pursuant to 10 CFR 820, Subpart D (interpretations of nuclear safety regulatory requirements issued by the Office of General Counsel); and (3) exemptions to nuclear safety requirements issued pursuant to 10 CFR 820, Subpart E. Docketing functions will be performed by the Office of Docketing Clerk.
- k. Maintains files for implementation plans developed pursuant to the Rules, exception decisions and legal interpretations of the General Counsel's Office.

2.5. Secretarial Notification and Consultation

For all enforcement actions involving proposed civil penalties (see Section XI of the Enforcement Policy), the Secretary will be notified in advance of service of an enforcement notification (EN). In addition, consultation with the Secretary is required before enforcement action is taken in any of the following cases:

1. Any proposed enforcement action where civil penalties in the aggregate are equal to or greater than \$100,000.
2. Any proposed enforcement action that involves a Severity Level I violation.
3. Any enforcement action that the Assistant Secretary, EH-1, concludes warrants the Secretary's involvement.
4. Any proposed enforcement action on which the Secretary asks to be consulted.

CHAPTER 3 - EVALUATION AND INVESTIGATION OF POTENTIAL VIOLATIONS, AND CONDUCT OF ENFORCEMENT CONFERENCES

3.1. Scope of the Chapter

This chapter provides guidance on the evaluation and investigation of potential violations, and the use of enforcement conferences. Guidance on preparation of enforcement actions is provided in Chapter 4.

3.2. General Overview of Enforcement Process

The steps in the enforcement process are outlined below. Although it is important to issue enforcement actions as promptly as possible, there may be circumstances in which the magnitude and/or complexity of a matter and the need for thoroughness may unavoidably delay the conclusion of an investigation. Consistent with DOE policy that encourages settlement of enforcement proceedings at any time, the Director, Enforcement and Investigation Staff, and the contractor can meet at any stage of the process and reach a settlement. Such a settlement would be set forth in a Consent Order (Ref. 10 CFR 820.23). If the Consent Order is signed before the commencement of an enforcement adjudication, it is final upon signature by the affected parties and the Director, Enforcement and Investigation Staff. If a Consent Order is signed after commencement of an enforcement adjudication, it will be final upon completion of the processes set forth in 10 CFR 820.23.

Enforcement Process Steps

1. Evaluate potential noncompliances reported in the Noncompliance Tracking System or identified by other sources, and complete Noncompliance Review Form to document evaluation.
2. Determine whether to initiate an investigation based on results of NTS Report evaluation, considering safety significance and other related factors.
3. Conduct investigation of a potential or alleged violation and prepare investigation report.
4. Determine whether there is a specific violation and, if so, identify the specific violation.
5. Decide whether or not to proceed after an assessment of investigation findings on safety significance, related factors, severity level and potential civil penalty as appropriate.
6. Conduct enforcement conference initiated by the Director, Enforcement and Investigation Staff, or upon request by contractor against whom the enforcement action is being considered.
7. Reevaluate whether the matter constitutes a noncompliance which merits preparation of an enforcement action.
8. Where warranted, the Director, Enforcement and Investigation Staff, recommends issuance of a PNOV, with or without civil penalty. Other proposed remedies may be set forth to correct the violation.
9. The contractor responds in writing within 30 days and may contest the notice with substantive evidence, contest the civil penalty, if applicable, or waive the right to contest.
10. The Director, Enforcement and Investigation Staff, recommends a determination on the matter, based on the entire evidence of record. As applicable, this includes issuance of a Final Notice of Violation (FNOV), civil penalty and other remedies to correct the violation.

11. An FNOV (without a civil penalty) becomes a Final Order 15 days after service, unless modified by an order from the Secretary. FNOV's with a civil penalty become a Final Order if the contractor does not contest the Notice of within 30 days, and agrees to pay the civil penalty and perform the other remedies set forth in the FNOV.
12. The contractor may request an on-the-record adjudication of an FNOV and civil penalty. This request will initiate a PAAA adjudication with an Administrative Law Judge appointed by the Secretary to serve as presiding officer. Alternatively an action can be commenced in Federal District Court. Responsibility for prosecuting matters in Federal District will be coordinated with the DOE General counsel and DOJ. (The PAAA adjudication process is set forth in 10 CFR Part 820, Subpart B, and will not be discussed further in this Handbook.)

3.3. Identification of Nuclear Safety Noncompliances

Conditions that are not in compliance with nuclear safety requirements may be identified through various activities and sources, including the following:

- Information reported by contractors, in DOE's Noncompliance Tracking System;
- Formal inspections or assessments by the contractors, DOE Field Offices, or Environment, Safety and Health;
- Reports from DOE field personnel and EH site representatives;
- Information provided by the DOE Office of Inspector General or the Office of Contractor Employee Protection;
- Allegations communicated to DOE from outside the organization;
- Media reports of nuclear facility activities;
- Congressional inquiries;
- Defense Nuclear Facilities Safety Board (DNFSB) inquiries or reports; and,
- Information from other agencies, including the Nuclear Regulatory Commission, Department of Labor, Department of Transportation or state and local officials.

It is anticipated that the primary source of such information will be the contractors themselves since 10 CFR Part 820, Appendix A provides positive incentives for the prompt identification and reporting of all potential nuclear safety violations. The primary vehicle that will be used by contractors is the Noncompliance Tracking System that is maintained by DOE. Guidance on contractor self-tracking and reporting through NTS is provided in a separate DOE Handbook, *Identification, Reporting and Tracking of Nuclear Safety Noncompliances*. That Handbook also provides guidance for a contractor self-tracking process and the use of threshold guidance for only reporting the most safety significant noncompliances into the NTS system if a contractor implements an appropriate self-tracking process.

The preferred path is for the contractor to report potential noncompliances into the NTS. Thus, if DOE or another external entity identifies a noncompliance condition, the preferred process would be for that entity to notify the contractor so that it could report the noncompliance into the NTS. The contractor reporting into NTS will include a

summary of the noncompliance, duration since occurrence, corrective actions, and other information related to the noncompliance to support DOE's review to make an initial determination of safety significance. Guidance on DOE's review of contractor's NTS reports is provided in the following section.

Matters that constitute a significant regulatory concern and could involve high or potential impact on the public or workers are categorized as severity level I or II violations. Severity level III violations involve events or activities that have the potential to result in localized impact on workers or the environment. They are less serious, but of more than a minor nature. They will be monitored to determine whether, in aggregate in discrete areas, they could lead to more serious problems. In such circumstances, they will be escalated for enforcement purposes. When a category I, II or III violation has occurred, the contractor will be required to respond within 45 days of the occurrence, describing any corrective actions taken to prevent recurrence and stating the date by which the corrective action will be complete.

It should be noted that although the following sections refer to the identification, documentation, and significance of violations, the use of the term "violation" in the context of these sections refers to "potential violations" of DOE nuclear safety rules or other PAAA enforceable nuclear safety requirements. The term noncompliance and violation are essentially interchangeable in that both terms connote a failure to comply with an applicable nuclear safety requirement. In general DOE will use the term "noncompliance" for those matters in which the contractor has identified a condition that does not comply with nuclear safety requirements. Noncompliances having the requisite safety significance, as determined by DOE, will be subject to Notices of Violation, and if appropriate, civil penalties. Isolated minor noncompliances involving minimal or low safety significance will not be subject to enforcement actions but will be subject to periodic review, such as to identify recurring noncompliances.

3.4. Evaluation of Noncompliances

DOE's Enforcement and Investigation Staff is responsible for reviewing noncompliance reports for consideration of more comprehensive investigation and potential enforcement action. The objectives of the review follow:

1. Review of the facts contained in the available information to confirm that a DOE nuclear safety requirement has actually been violated.
2. Evaluate the safety significance of the noncompliance to determine if a more comprehensive investigation is warranted.

This evaluation is to be performed for NTS and other reports that are above the minimum thresholds established in DOE Handbook *Identification, Reporting and Tracking of Nuclear Safety Noncompliances*. For those reports above the threshold, and other noncompliance conditions that are judged to be potentially safety significant, DOE will perform an evaluation using the "Noncompliance Review Form" in Appendix A to this Handbook.

The evaluation and preparation of the "Noncompliance Review Form" will be performed by the Enforcement and Investigation Staff, and recommendations reviewed and approved by the Director, Enforcement and Investigation Staff.

Where the evaluation concludes that a more comprehensive investigation is required for consideration of enforcement action, an investigation would be initiated by the Enforcement and Investigation Staff. Guidance for this investigation is contained in the following section.

3.5. Investigation of Potential Violations

3.5.1. Investigation of Circumstances of the Noncompliance

Once a violation that warrants investigation has been identified, the facts surrounding the matter must be investigated and assembled. The information documented should be specific regarding times, dates, titles of persons, and the structures, systems and components involved in the violation. The investigation documentation should contain a detailed discussion of the findings to substantiate any health and safety issues and violations of nuclear safety requirements subject to DOE enforcement actions. In most matters, there may be need to supplement information initially received from others. In order to develop the appropriate enforcement action, information for each violation (or group of violations) should be documented to address the following questions, as applicable and appropriate, considering the significance and complexity of the violation(s) and available resources:

- a. What DOE nuclear safety requirement was violated?
- b. How was the requirement violated?
- c. When was the requirement violated and what was the duration of the violation?
- d. Who violated the requirement?
- e. How and by whom (contractor, DOE or other) was the violation discovered?
- f. Was the violation required to be reported by the contractor and, if so, what was the applicable reporting requirement?
- g. Was the violation reported by the contractor and, if so, when and by whom was it reported?
- h. If the violation was reported by the contractor, but the report was not timely, why was the report not timely?
- i. Was the report complete and accurate?
- j. What was the apparent root cause and contributing causal factors for the violation? Did the contractor aggressively pursue this information?
- k. Were there multiple examples of a particular violation?
- l. Is the evidence indicative of programmatic problems or is it an isolated case?
- m. Was the contractor's management aware or should it have been aware of the violation?
- n. What were the opportunities and when did they exist for the contractor's staff and management to be aware of the violation?
- o. Is there evidence that any level of the contractor's management was involved directly or indirectly in the violation and to what extent?

- p. What were the circumstances surrounding the violation, such as system configuration and operational conditions, which would affect its significance?
- q. Are there other circumstances surrounding the violation that increase or decrease its significance?
- r. What short-term corrective and remedial action was taken by the contractor and when was it taken?
- s. Did DOE have to intervene to accomplish satisfactory short-term correction and remedial action?
- t. Did the contractor aggressively pursue long-term remedies with the department including proper scheduling and funding of such remedies?
- u. Were there previous, similar DOE or contractor inspection, assessment, or audit findings and, if so, should the corrective actions from those findings have prevented this violation?
- v. Was the noncompliance condition identified in any implementation plan for the affected facility or for any facility at the site (i.e., a close-out or process control failure)?
- w. Did any action (or failure to act) by DOE contribute to this violation?

3.5.2. Consideration of Safety Significance

Once the circumstances surrounding a violation are understood and documented, the significance and the commensurate severity level should be determined as part of the investigation. The following provide several factors to be considered in a determination of safety significance and severity level.

If an Immediate Hazard to Workers or the Public:

If facility workers, the public or the environment are likely to be endangered by the continuation of the conditions created by the violation, or if there is a lack of reasonable assurance that activities will be properly conducted, the responsible CSO or other appropriate official should initiate immediate action to correct the condition and promptly discuss with the Director, Enforcement and Investigation Staff, as appropriate, the need for an immediately effective order or other formal directive such as a Compliance Order issued by the Secretary. In these instances 10 CFR Part 820, Subpart C provides that the action may be taken before issuing an investigation report or holding an enforcement conference. Violations of conditions in Compliance Orders may subject the contractor to a separate enforcement action or may increase the severity of enforcement action associated with the underlying noncompliance condition.

Factors Affecting Safety Significance:

In determining the safety significance of a violation, the evaluation should consider the potential hazard to workers inside and outside the facility, to the public and to the environment. In addition, the managerial policies and practices that may represent contributing factors should be considered. Consideration should be given to the matter as a whole in light of the circumstances surrounding the violation. There may be cases in which the hazard is low, but the failures of management are significant in light of the circumstances surrounding the violation and, therefore, the severity level should be based on the management failure(s) and not simply the apparent hazard. The following factors should also be considered:

- a. Did the violation actually or potentially have an impact on health and safety? A violation that involves no actual threat but which had the potential to have an impact on health and safety may be very

significant, depending upon the risk of the potential threat, i.e., its likelihood, and the possible consequences involved.

- b. What was the root cause of the violation? Was it caused by training deficiencies? Failure to follow procedures? Inadequate procedures? Failure to properly follow-up on activities or commitments? These broader programmatic weaknesses may have more significance than the particular hardware or equipment affected by the violation.
- c. Is the violation an isolated incident or were there multiple examples of similar violations in the same time frame? Is it indicative of a management or programmatic breakdown? Management or programmatic breakdowns may be more severe than an isolated incident.
- d. Was management aware of or involved in the violation and, if it was involved, at what level of management, and to what extent? Violations in which management was directly involved, in general, are more significant than those of which management was unaware. Violations involving upper-level management should be considered more significant than those involving first-line supervisors. Inattentiveness on the part of management should also be considered, i.e., should management have been aware of the violation?
- e. What was the duration of the violation? If the condition existed for an extended period, without discovery and correction, the risk generally will be proportional to the duration of the violation and the severity level of the violation should be increased.
- f. Was DOE notified promptly and provided complete information by the contractor when a violation was found? Delay in providing a comprehensive report to DOE may indicate lack of contractor initiative to improve safety at a facility. Furthermore, failure of a contractor to report a violation to DOE in accordance established reporting requirements may be considered a violation itself, in addition to the violation that occurred.
- g. Was the violation inadvertent or did it involve willfulness and, if it did, to what extent? (See Section 1.4. for the definition of willfulness and Section 5.5. for guidance regarding willful violations.)
- h. Was the violation related to a condition in a Compliance Order? See 10 CFR 820.40 - 820.43. These violations may be more significant because contractors have prior notice of the violation and have not taken appropriate actions to correct it after having been directed to do so by the Secretary.

Aggregation of Violations for Increased Severity Level:

A group of violations may be evaluated in the aggregate: (1) if they have the same underlying cause or are attributable to management deficiencies, or (2) they contributed to the same underlying effect, and (3) the resulting severity level is a I, II or III.

Any circumstance involving numerous violations should be considered for aggregation at a Severity Level II or III and when appropriate, Severity Level I. However, both the number and nature of the violations should be considered. Numerous violations that are related, for example, those involving training, procedures, safety evaluations, or management controls should be considered for aggregation. A group of noncompliances can also be aggregated and designated a violation at the appropriate severity level; if the facts and circumstances merit such an action.

(Aggregation of violations to a higher severity level should not be confused with the use of multiple examples in Notices of Violation or the use of the multiple-occurrences in determining a severity level.)

Repetitive Violations

Repetitive violations are of concern because DOE expects a contractor's corrective actions to be effective in eliminating the source of the problem causing the violation. DOE expects contractors to learn from their past failures and not depend on DOE's assessment programs to identify and correct violations of nuclear safety requirements. Therefore, special attention is appropriate for repetitive violations and escalated action should be considered. At the same time, it is recognized that there are many different circumstances that need to be considered. The following general guidance is provided. It should be noted that for purposes of this Handbook, the term "repetitive" violations is interchangeable with the term "similar" violations.

- a. A "similar" or "repetitive" violation is defined as a violation that reasonably could have been prevented by a contractor's corrective action for a previous noncompliance condition or violation of nuclear safety requirements.
- b. Previous noncompliance reports, enforcement actions, assessment reports, or "open items" listings from assessment reports, etc., should be used, as appropriate, to evaluate the contractor's prior enforcement history, including noncompliance items, to identify repetitive violations.

3.5.3. Incorporation of Related Violations

During the course of the development of an enforcement action, additional information may be developed by DOE or the contractor involving other violations of DOE nuclear safety requirements related to the action being considered for enforcement.

These related violations are to be incorporated, if practical, into the pending enforcement action. The purpose of incorporating these violations into the pending action is to focus the contractor's attention on the problem area, ensure that all relevant violations are considered whenever the enforcement action is being evaluated, and ensure that the safety significance of the violations is evaluated appropriately.

The related violations may be identified at any stage of the enforcement process. If new evidence is identified after the enforcement action has been transmitted to the contractor, the additional related findings are to be brought to the attention of the contractor through a supplemental preliminary notice of violation. If inclusion in the current enforcement action is deemed to be practical and appropriate, the additional violation, the background or reference material, and any clarifying information should be forwarded to the contractor. If not considered feasible to be included in the current enforcement action, the Director, Enforcement and Investigation Staff, may initiate a separate enforcement action, making appropriate reference to the current one.

3.5.4. Investigation Preliminary Recommendations on Enforcement Action

Based on the information obtained in the investigation, the consideration of other factors affecting safety significance, and any particular history of performance by the contractor, the investigation needs to draw conclusions and put forth a recommendation on enforcement action. This should include a recommendation on severity level and consideration of monetary civil penalty and mitigation factors, as appropriate.

Chapter 4 provides guidance on the determination of severity level and corresponding civil penalty and adjustments. Preliminary recommendations should be based on this guidance, and subsequently adjusted if further information becomes available in the enforcement process.

3.5.5. Enforcement Actions by other Agencies

DOE contractors may be subject to enforcement action by other federal agencies (such as NRC, DOT, DOL-OSHA, or EPA), state, or local government agencies. Sometimes, the violation of a DOE nuclear safety rule may also constitute a violation of another federal, state or local requirement. DOE may consider these other actions in formulating its own enforcement action to assure that the overall remedy is appropriate for the infraction, except if restricted from doing so by legal restraints or agreements between DOE and other agencies.

3.6. Informal Enforcement Conferences

Informal enforcement conferences may be called at any time at the discretion of the Director, Enforcement and Investigation Staff, or requested by the contractor. The primary purpose of an informal enforcement conference is to discuss the preliminary conclusions of an investigation, inquiry, inspection, or other documented sources of information which provide a basis for concluding that a violation of DOE nuclear safety requirements may have occurred. The initial enforcement conference should take place prior to issuance of a PNOV. The conference will include discussion of the safety significance and cause(s) of the violation, any mitigating or aggravating circumstances along with any other relevant information. As appropriate, more than one enforcement conference can be scheduled.

3.6.1. Enforcement Actions that Generally Will Require Enforcement Conferences

An enforcement conference will normally be held in each of the following cases:

- a. Those involving potential Civil Penalty actions at any severity level.
- b. Selected Severity Level III violations which, if repeated, could lead to an enforcement action at a high severity level.
- c. Significant numbers of recurring noncompliances.
- d. Similar Severity Level III violations for which a civil penalty may be considered.

In addition, the Director, Enforcement and Investigation Staff, may require a conference in any circumstance in which it is appropriate for the clarification of matters in controversy and/or may lead to an improvement in nuclear safety for workers and the public. A contractor may request a conference at any time if none has been set by the Director and such requests should be liberally granted.

3.6.2. Scheduling and Notification of Enforcement Conferences

In general, if an initial enforcement conference is planned, it should be held before the PNOV is issued, usually within four weeks after completion of the Enforcement and Investigation Staff investigation that supports the basis for the proposed enforcement action. The contractor should normally be informed of the staff's intent to conduct an enforcement conference at least two weeks in advance of the scheduled conference.

Refer to Section 5.2. for special procedures for cases that have been referred to DOJ because these cases require coordination with DOJ and approval of the Director, Enforcement and Investigation Staff, prior to scheduling an enforcement conference.

If immediate enforcement action is necessary, the action may be taken before an enforcement conference (see Section 3.5.). Subsequent to taking immediate enforcement action, an enforcement conference may be held.

An enforcement conference should normally be held at DOE-HQ unless documentation is so voluminous that it is appropriate for such a conference to be held on the site of the documentation. In situations where numerous personnel may need to be consulted during a course of a conference, consideration should be given to scheduling the conference either at the DOE Operations Office or the site. In general, such conferences should be informal without a formal transcript of the proceedings.

3.6.3. Attendance at Enforcement Conferences

a. DOE Personnel

1. The Assistant Secretary, EH-1, may attend all conferences at his or her discretion.
2. Designated Enforcement and Investigation Staff shall attend all enforcement conferences in person. The Director, Enforcement and Investigation Staff, will normally chair the enforcement conference or designate a staff individual to chair the conference.
3. The Cognizant Secretarial Officer (CSO) or other DOE Field Management representatives should attend enforcement conferences to provide input regarding the safety significance of the violation, root causes, special circumstances and comprehensiveness of corrective action.
4. In order to promote fulfillment of its responsibilities under 10 CFR Part 820 Subpart D, representatives of the Office of General Counsel may be invited by the Director, Enforcement and Investigation Staff, to attend those conferences involving complex or novel legal issues or those involving a complex or significant investigation.
5. Investigatory organizations may be invited by the Director, Enforcement and Investigation Staff, to attend those enforcement conferences that involve a complex or significant investigation, or those that could potentially result in referral for special investigation.
6. Other EH personnel may attend the conference at the request and under the direction of the Director, Enforcement and Investigation Staff.

b. DOE Contractor Personnel

1. In order to assure a positive outcome from such activity the Director, Enforcement and Investigation Staff, shall ensure that contractor management participates in the enforcement conference at the appropriate level. This may require participation by senior management of the parent organization of the DOE contractor, if determined to be appropriate by the Director.
2. The Director, Enforcement and Investigation Staff, should give consideration to requiring attendance of the person(s) involved at the enforcement conference. It may be beneficial for DOE management to hear firsthand that individual's explanation for the actions taken to understand more completely the circumstances of the violation.
3. Contractors may invite their attorneys or consultants to attend conferences. However, if classified information is disclosed or discussed, appropriate clearances must be exhibited to DOE personnel.

c. Media and Members of the Public

As stated in the Enforcement Policy, enforcement conferences are predecisional actions and may involve classified information. Therefore, they are normally closed meetings between DOE and the contractor (including the parent organization's management). This excludes the media and public from enforcement conferences, although in some instances, a press conference may be held afterwards or a press release issued if the Director, Enforcement and Investigation Staff, or the Secretary believes it is appropriate.

3.6.4. Notification to Contractor of Informal Enforcement Conference

DOE will generally prepare Notification of Scheduled Enforcement Conference to inform the contractor and DOE personnel of the plans and schedule for the Enforcement Conference. The notification should describe the issues to be discussed to help focus the conference on the issues and make it as meaningful as possible. It is important to ensure that the contractor understands what is expected of them at the conference. In general, telephone discussions with the contractor may supplement the notification letter to convey and/or clarify the issues to be discussed.

The notification should include the following:

- (a) Schedule and location for the Enforcement Conference;
- (b) DOE attendees planned for the conference, and personnel who should attend from the contractor organization;
- (c) Summary of DOE's conclusions and basis on the potential violation based on information received to date;
- (d) Any particular points or information the contractor should address in the Enforcement Conference;
- (e) If time permits, the Notification should include an outline or agenda of the specific issues to be discussed.

3.6.5. Conduct of Enforcement Conferences

a. Management Participation

Once a decision is made to hold an enforcement conference, the Director, Enforcement and Investigation Staff, determines the level of management representation required of the contractor, as well as the level of DOE management participation in cooperation with other DOE offices.

b. Conference Procedures

Enforcement conferences will be chaired by members of the Enforcement and Investigation Staff. The Enforcement and Investigation Staff shall be responsible for directing the Enforcement Conference and as such, all positions on the proposed enforcement action shall be presented by the DOE Chair or, at the discretion of the Chair, by other appropriate DOE staff. This will assure preparation of an appropriate agenda and assure that DOE enforcement positions are not compromised.

c. Areas of Discussion

1. DOE's understanding of the facts and circumstances surrounding the violation or problem should be discussed at the enforcement conference. These discussions should include the safety significance of the violation and the contractor's understanding of the violation (i.e., whether or not the contractor agrees that the violation occurred, and, if not, what additional facts it believes are relevant). In addition, the contractor's explanation of the causes of the violation, its views of its safety significance of the violation, the corrective actions taken to correct the immediate problems and to prevent future occurrences; and, if appropriate, any aggravating or mitigating factors should be discussed. The contractor should provide documented support of its positions if this information has not been submitted earlier.
2. The primary purpose of the conference is to obtain information relevant to the enforcement action and to have an open, frank discussion of all elements of the violation. Its primary purpose is not to negotiate sanctions. Although the contractor may provide information that may be relevant to determining severity levels and civil penalty amounts, in general the discussion will not focus on issues such as specific severity levels, civil penalty amounts, mitigation percentages, or the nature and content of any orders. (See Section 3.14. for additional guidance concerning the release of predecisional enforcement information to contractors.) If the contractor offers its views on such issues, the Enforcement and Investigation Staff will make clear that final DOE decisions on such matters will be made subsequent to the conference and will be provided to the contractor at a later date.

d. Depth of Detail

1. The following guidelines are appropriate to consider with respect to the depth of detail and degree of debate permitted at enforcement conferences.
2. The depth of detail of the discussion should be related to the complexity and significance of the issues. Most of the detailed information discussed should have been included in the documented basis for the violation.
3. The information discussed should be sufficient to highlight the alleged violation, any related violations, how the violation was discovered, how DOE was notified of the violation, the cause of the violation, and the corrective actions planned or taken including whether or not those corrective actions, including the promptness of such actions, are considered by DOE to be adequate.
4. An enforcement conference is not to be used as a forum for protracted debate. Once the pertinent facts have been established, the DOE Chair should recognize that a difference of opinion may exist, and keep the enforcement conference moving forward.
5. If a contractor's stated position or the facts it presents are different from those of DOE, this should be acknowledged to preclude silence on the Enforcement and Investigation Staff's part being misunderstood as a sign of agreement. This can be done in a summary statement which recognizes the differences in position between DOE and the contractor without prolonging debate of an issue or point of fact.

3.6.6. Identification of Additional Violations

In the event additional facts are disclosed or developed at or after the enforcement conference that could lead to the identification of additional violations, special efforts should be taken to substantiate these violations with

probative evidence before they are included in a proposed enforcement action. In addition, the contractor should have an opportunity to discuss the apparent violation(s) in a subsequent informal enforcement conference before it is formalized and should provide any additional relevant information. Likewise, the Director, Enforcement and Investigation Staff, may request a follow-up enforcement conference. (See the guidance in Section 3.12. for the related issue of development of additional enforcement actions.)

3.6.7. Enforcement Conference Summary Report

After the enforcement conference, a brief report is to be prepared by the Enforcement and Investigation Staff to document the conference discussions. It is not necessary to summarize all discussion but all relevant discussion should be included. The summary report should include the following information, as applicable:

1. The date and place of the Enforcement Conference.
2. A list of the Enforcement Conference attendees from DOE and the contractor.
3. A brief description of the contractor's position, i.e., if the contractor agrees with the findings or if the contractor takes issue with the potential violation(s).
4. A list of any documents presented at the conference.
5. A summary of the factual information which provides the basis for the violation.
6. A brief description of significant additions or corrections to the factual information which is the basis for the violation.
7. A brief description of any significant additional information which affects the management causes or safety significance of each violation.
8. A description of any other points of significant disagreement.
9. A brief description of the contractor's short-term and long-term corrective and remedial actions that it has implemented or has committed to implement.
10. An analysis of all of the above information establishing DOE's conclusion on the violation at that point in time.

The summary is especially important for those cases in which new information is provided, errors are identified in the documented basis for the violation, or significant clarifications of information are provided. In some limited circumstances, it is possible that providing a copy of documents produced at the conference may be sufficient to summarize the enforcement conference discussions.

This summary report should be prepared so that it may be issued to all DOE Enforcement Conference attendees no later than the date the PNOV is issued, if the issuance of a PNOV is warranted by the facts and circumstances. The report should be clearly marked as "Predecisional Information, Not for Public Release." In the event it is decided that a PNOV should not be issued, the summary report should be provided to attendees within 21 days of the enforcement conference.

Finally, enforcement conference summary reports should be screened to make sure that classified information is not included. A copy of the summary report should be provided to EH-1. A letter should be sent to the

contractor, including such information about the enforcement conference as may be appropriate under the circumstances of the matter in controversy.

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CHAPTER 4 - ENFORCEMENT ACTIONS

All formal PAAA enforcement recommendations are initiated by the Director, Enforcement and Investigation Staff. For any of these, the Director will obtain signatures of other DOE officials as necessary. This Chapter provides guidance for the preparation of these enforcement actions. Enforcement actions include Preliminary Notices of Violation (PNOV) and Final Notices of Violation (FNOV). Compliance Orders, authorized by Subpart C of 10 CFR Part 820, must be initiated by the Secretary.

After a violation has been identified, documented, and evaluated with respect to safety significance and severity level, the material in this chapter is to be used as guidance in the preparation of the citation.

4.1. Preliminary and Final Notices of Violation

4.1.1. Preparation of Preliminary Notice of Violation (PNOV)

A PNOV should include the following elements as a minimum:

1. A concise, clear statement of the requirement(s) that was violated, (legal citation for the violation).
2. brief statement of the circumstances of the violation, including the date(s) of the violation and the facts to demonstrate that the requirement was not met (e.g., "contrary to" paragraph). Each violation, including a violation with multiple examples, will usually contain a single "contrary to" statement.
3. The severity level proposed for the violation, or problem area if violations are classified in the aggregate.
4. The civil penalty proposed for each violation, if applicable. If more than one violation is involved, the amount of the penalty for each violation should be apportioned.

The "contrary to" paragraph should clearly demonstrate how the DOE nuclear safety requirement was not met. When appropriate, specific reference should be made to inadequacies in underlying programs or plans that implement the requirement. The PNOV or FNOV also informs the contractor of the response required to be made to DOE and, if applicable, of the contractor's option to request mitigation for any or all of any penalties being proposed.

The Appendix B Checklist should be consulted for guidance in preparing an enforcement action.

Appendix C provides example formats for PNOV's as guidance only, and may be modified as needed for individual enforcement actions.

4.1.2. Transmitting PNOV to Contractor

The cover letter transmitting the PNOV to the contractor should include sufficient factual information described in "executive summary" format to permit contractor management to understand DOE's safety and management concerns, how DOE determined the sanctions that it is proposing, and where DOE concludes the contractor should focus its attention to improve its performance. The letter should be specific enough that the contractor receives a clear message as to how DOE has applied the Enforcement Policy and should clearly indicate which of the contractor's actions reflect good performance and which actions require additional attention. The letter should include the following elements as appropriate:

- a. When and where an inspection or assessment was conducted.
- b. Who identified the violation, i.e., the contractor, DOE, or other external or internal sources, and reference to related reports.
- c. If and how the violation was reported.
- d. When and where enforcement conference was conducted and reference to conference report.
- e. A description of the violation(s), including the DOE requirements violated, the duration of the violation(s), the operational mode of the facility at the time of the violation(s), if applicable, the apparent root cause of the violation(s), and any other major attributes of the violation(s) necessary for supporting a determination of the safety significance of the violation(s).
- f. A discussion of the significance of the violation including both the technical and the management failures, as appropriate, and how the significance of the violation led to the determination of the severity level.
- g. An analysis of any factor, such as management cooperation, management deficiencies or willfulness that caused the severity level to be escalated or decreased from the normal severity level for the type of violation. For those cases in which violations are aggregated based on management breakdowns, i.e., where there are multiple violations, the discussion should indicate that the violations are categorized as a Severity Level (X) problem rather than a Severity Level (X) violation. (The PNOV should also be categorized in this manner.)
- h. A description of the status of compliance or corrective actions to date, or the date when compliance will be achieved, e.g., "DOE recognizes that immediate corrective action was taken when the violation was identified," "corrective actions have been initiated and appear acceptable," "facility will remain (or remained) shutdown," or "facility curtailed operation until completion of corrective actions." Special emphasis in this area is necessary when DOE decisions on restart of operations are being considered. Any compensatory measures or corrective actions prior to restart should be addressed.
- i. A statement of the results that DOE expects to achieve through issuance of the proposed enforcement action, focusing on correction of the underlying problem(s) addressed by the violation(s).
- j. A description of the proposed enforcement sanction/civil penalty, if applicable.
- k. A discussion of the application of the adjustment factors in the Enforcement Policy (Section VIII.C.), including the reasons for mitigation or escalation of the base civil penalty. The discussion should be specific and should address each of the factors for which mitigation or escalation of the base civil penalty was deemed appropriate, including those cases in which weighing all the factors resulted in no change to the base civil penalty.
- l. In the event a civil penalty is imposed, payment shall be made by check or money order payable to the Treasurer of the United States and mailed to the Director, Enforcement and Investigation Staff, in the Office of Environment, Safety and Health.
- m. A description of the response that is necessary from the contractor and the time within which it is expected to be received. The paragraph discussing the response required should be expanded if a particular response is desired.

- n. A statement that DOE will determine, what, if any, further enforcement action is required after review of the contractor's response to the PNOV, proposed corrective action, and results of future assessments. The letter should also notify the contractor that settlement with DOE at anytime during an enforcement proceeding is encouraged.
- o. A statement that the DOE transmittal letter, PNOV, and the contractor's response will be placed in the DOE Freedom of Information Reading Room.

Appendix C includes example formats of transmittal letters for PNOV's. These are provided for guidance only and may be modified as appropriate for particular enforcement actions.

4.1.3. Settlement with Contractor

In accordance with 10 CFR 820.23, DOE encourages the settlement of any enforcement action or proceeding at any time during the enforcement process. All settlements must be consistent with the objectives of the PAAA, DOE nuclear safety requirements, and Enforcement Policy. The contractor should be encouraged to participate in a settlement conference with the Director, Enforcement and Investigation Staff, or his designee.

In general, a settlement will be finalized in a settlement agreement. However, if it is in the public interest, the terms of settlement will be set forth in a Consent Order signed by the Director and the contractor. Unless modified by the Secretary within 30 days of filing, the Consent Order will be final and the enforcement action shall be terminated or modified as specified in the order. A press release will usually be issued, however, advising the public that the matter has been resolved. (See 10 CFR 820.23 for Consent Order process).

(a) Admission of Violation

For Enforcement Action With No Civil Monetary Penalty

If the contractor admits that the violation(s) occurred as stated in the PNOV, the Director, Enforcement and Investigation Staff, in coordination with DOE field staff, will review the contractor's response for the adequacy of its corrective action and request additional information from the contractor if necessary. In determining whether appropriate corrective action has been taken, consideration should be given to proper contractor identification of the root cause(s) of the violation(s). The Director may consult with the SO or CSO, and/or DOE Operations Office responsible for the contractor's activities. The contractor's response is to be acknowledged usually within 30 days after its receipt. The matter should be closed with the issuance of an FNOV.

For Enforcement Action With Civil Monetary Penalty

If the contractor admits that the violation(s) occurred as stated in the PNOV and does not contest the Proposed Imposition of Civil Penalty, the Director, Enforcement and Investigation Staff, will review the contractor's corrective action in a manner similar to that for cases proposed without civil penalties. The Director will usually issue an FNOV within 8 weeks. Upon receipt of proof of payment for the civil penalty, the Director, Enforcement and Investigation Staff, will send the contractor a letter that acknowledges receipt of the monetary penalty and states that the corrective actions described in the contractor's response will be examined during future assessments. After the Director provides the acknowledgment letter to the contractor, the Enforcement and Investigation Staff will close out the docket file, thereby formally terminating the proceeding.

No FNOV, with or without a civil penalty, will be closed until the plan to resolve a violation has been fully implemented.

(b) Contention of Proposed Enforcement Action

The contractor may challenge DOE's facts or conclusions regarding the PNOV action by taking one or more of the following steps:

1. Dispute one or more of the facts or conclusions underlying a violation.
2. Dispute one or more of the violations.
3. Challenge DOE's conclusion regarding the significance or severity level of the violation(s).
4. Request mitigation of the proposed civil penalty.
5. Dispute the proposed enforcement action but pay the civil penalty in order to resolve the matter in controversy.

For Enforcement Action With No Civil Monetary Penalty

Each response should be carefully reviewed to ensure that DOE's action was appropriate. The Director, Enforcement and Investigation Staff, will prepare a response to the contractor addressing the contractor's point(s) of contention and the acceptability of its corrective action. If the contractor's response does not present additional information, then the Director, Enforcement and Investigation Staff, should prepare a brief response addressing the point(s) of contention. If an error in the enforcement action is identified, the error should be corrected whether or not the contractor's response presents new information. If the contractor presents additional information not previously disclosed, a more detailed response may be appropriate. The Director should consider in his response the timeliness of the provision of information not previously disclosed. The Director will usually consult, as appropriate, with the SO, CSO, or Operations Office responsible for the contractor's activities.

Contractor responses which contest enforcement actions should be acknowledged by the Director, usually within 30 days. An FNOV should also be issued by the Director at that time.

For Enforcement Action With Civil Monetary Penalty

1. If the contractor contests some aspect of the proposed enforcement action and does not pay the proposed civil penalty, the Director, Enforcement and Investigation Staff, should review the contractor's response and prepare a written evaluation of that response. The evaluation should address the contractor's points of contention and should include a restatement of each disputed violation, a summary of the contractor's position concerning each disputed violation, DOE's evaluation of each position, and the DOE conclusion. As appropriate, the Director will usually consult with the SO, CSO, or Operations Office responsible for the contractor's activities. If information is provided which changes the conclusion set forth in the PNOV, the basis for such reconsideration and conclusions should be set forth in the FNOV. In addition to the evaluation, the Director should prepare a transmittal letter, FNOV and imposition of Civil Monetary Penalty within approximately 45 days of receipt of the contractor's response.

2. If a contractor contests some aspect of the proposed enforcement action but still pays the civil penalty, the Director, Enforcement and Investigation Staff, should review the contractor's points of contention. If the contractor presents additional information not previously disclosed, then careful consideration should be given to the appropriateness of the original proposed substantive action. In addition, the Enforcement and Investigation Staff should prepare a response for possible inclusion in the acknowledgement letter sent by the Director. The Director may consult with the SO, CSO, or Operations Office responsible for the contractor's activities. However, if the contractor's response does not contain new information, then the Director should provide a brief response addressing only those issues that are significant and appropriate along with an assessment of the contractor's corrective action. If an error in the enforcement action is identified, the error should be corrected whether or not the contractor's response presents new information. Contractor responses that contest enforcement actions but pay civil penalties should be acknowledged, usually within 45 days.

If the contractor has paid a monetary penalty and then, based on the above review of the contractor's response, it appears that part or all of the penalty was clearly paid in error, the portion of payment improperly assessed should be returned to the contractor. The Director, Enforcement and Investigation Staff, will advise the contractor and arrange to have a check issued from the appropriate government office. After it is determined that the check has been issued, the Director, will send a letter to the contractor explaining the rescission to the civil monetary penalty and conclude the proceeding in accordance with the facts of the case.

3. Denial of Violation

In the event there is a denial in full by the contractor that a violation has occurred, the Director, Enforcement and Investigation Staff, will conduct a complete review of the case file prior to a decision to withdraw the PNOV or release the FNOV based on the evidence addressed (See Section 4.1.1. below). Pursuant to 10 CFR Part 820.26, the contractor's sole remedy under circumstances where an FNOV has been issued is to request an on-the-record adjudication. Part 820.27 requires the contractor to file a written answer to the FNOV as well and sets forth specific guidance regarding the contents of the answer. The matter will then proceed at the direction of the Presiding Officer.

- 4.1.1. Final Notice of Violation (FNOV)

Upon evaluation of contractor responses and all other relevant evidence, the Director, Enforcement and Investigation Staff, as appropriate, may take one of the following actions, as deemed appropriate:

- a. Rescind all, or part, of the proposed civil penalty;
- b. Determine that no violation has occurred and rescind the PNOV;
- c. Issue the FNOV and impose a civil penalty, as authorized by law.

The FNOV will generally follow the same format and content as the PNOV, but updated based on any new information, and to reflect DOE's final conclusions on the matter. The Director will obtain signatures of other DOE officials as necessary prior to issuance of the FNOV. Appendix C provides suggested formats for FNOV's and transmittal letters. These are provided for guidance, and may be modified as appropriate for particular enforcement actions.

4.2. Severity Level

Guidance was provided in the Investigation Section (Section 3.5) on determination of safety significance, and obtaining other information pertinent to the violation. Section VI of the *General Statement of Enforcement Policy*, Appendix A to 10 CFR 820, provides guidance on the classification of Severity Level for violations, based largely on such determination of safety significance and other factors related to the violation. The Enforcement Policy, Section VI definitions should be used as a starting point by DOE reviewers on a recommended Severity Level. Severity Level may be adjusted up or down by DOE based on the circumstances of the particular violation. This can include consideration of multiple violations in the aggregate.

4.2.1. Aggregation of Violations

When several violations or noncompliances are evaluated in the aggregate and assigned a single higher severity level (see Section 3.5.3.), the resulting classification should be referred to as a Severity Level (specify) problem versus Severity Level (specify) violation. In addition, when several violations are considered in the aggregate and assessed one civil penalty, the term "penalty" is to be used instead of "penalties" throughout the Notice. In this case, one of the following statements may be used after the severity level classification:

Cumulative Civil Penalty - \$XXX,XXX (assessed equally between (among) the (insert number) violations).

Cumulative Civil Penalty - \$XXX,XXX (assessed \$XXX,XXX for Violation A, \$XXX,XXX for Violation B, and \$XXX,XXX for Violation C, etc.).

Also note that the total number of violations specified should correspond to the number of "contrary to" statements in the Notice.

4.2.2. Penalty Mitigation Factors Not Affecting Severity Level

Whether the contractor promptly finds and provides a timely report for a problem and whether the contractor takes prompt corrective actions are normally not considered in determining the severity level of a violation, unless these factors are part of the violation itself. After the severity level is determined, these factors are considered in evaluating and proposing the appropriate enforcement action including, where appropriate, or adjustment of any civil penalty commensurate with the severity level of the violation. Other factors that do not affect the severity level, but could affect the adjustment (up or down) of a base civil penalty are as follows:

- a. What role did DOE play in the violation? Did DOE approve the noncompliance condition? If so, was the approval in writing or was it oral? Was DOE previously aware of the noncompliance condition and condone it through inaction? Lack of DOE funding is not a basis for civil penalty mitigation. It is important to remember that DOE scheduling change approvals, exemptions or other relief pertaining to nuclear safety rules must be in writing from the SO or the Operations Office, depending on the nature of the relief in order to be valid. See 10 CFR 820.60 - 820.63.
- b. Were appropriate corrective actions taken by the contractor to prevent recurrence? Factors to be considered include the degree of initiative shown by the contractor, timeliness and appropriateness of actions taken, and proper root cause identification. Also, consideration is given to the comprehensiveness (broadly addressing areas of concern vs. narrowly focused) the contractor's corrective actions.

4.2.3. Severity Level III Violations

Sections VI and VII.D of the Policy provide that Notices of Violation need not be issued for noncompliance items which are variances with nuclear safety requirements. Such discretion is exercised so DOE can focus its enforcement activities on matters that have an actual or potential significant impact on nuclear safety. It also encourages contractors to identify and correct variances and, at the same time, avoid unnecessary effort spent on the associated administrative work for both DOE and contractors that can be better spent on improving safety. Noncompliance items that do not result in Notices of Violation should still be tracked to identify repetitive conditions or to assess generic or facility-specific problems.

From an enforcement perspective, Severity Level III violations should be issued to contractors who are not exercising initiative and identifying and effectively correcting noncompliances without DOE involvement and who permit recurring noncompliances to occur without taking effective corrective actions. Severity Level III enforcement actions generally should be focused on those issues that the contractor does not address appropriately.

In general, if the contractor timely identifies and reports a noncompliance violation, if DOE is satisfied with the root cause analysis and corrective action, and if the matter does not appear to be of a recurring nature or pose an extreme safety hazard, then DOE would generally refrain from issuing a PNOV. However, these noncompliances will be monitored to assure appropriate corrective action is taken to prevent recurrence.

In the event such noncompliances are not properly addressed, they can be grouped and escalated to a Severity Level III violation.

4.3. Base Civil Penalties

In assessing a civil penalty for a violation, Tables 1A and 1B of 10 CFR Part 820, Appendix A should be used to determine different severity levels and types of facilities and activities involved.

In addition, general guidance on severity levels is provided in Sections VI and VIII of the Enforcement Policy. Section VIII states that civil penalties are designed to emphasize the need for lasting remedial action, for deterring future violations, and underscoring the importance of DOE contractor self-identification, reporting and correction of violations of nuclear safety requirements. Furthermore, the imposition of civil penalties generally takes into account the gravity, circumstances, and extent of the violation, along with any history of prior similar violations and the degree of culpability. It may be appropriate to increase the size of the base penalty on the basis of the amount of nuclear materials inventoried, the potential hazards associated with them, and the size and nature of the contractor operations and program.

Furthermore, the Enforcement Policy states that in cases involving (1) ineffective contractor programs for identifying problem(s) or correcting them, (2) willfulness, (3) flagrant DOE-identified violations, (4) repeated poor performance in an area of concern, or (5) serious breakdowns in management controls, DOE has discretion to assess a civil penalty up to the statutory limit of \$100,000 per violation per day, regardless of the facility category.

4.3.1. Applicability

A civil penalty is normally proposed for Severity Level I or II violations, absent mitigating circumstances, and for any willful violations. Civil penalties should be considered for Severity Level III violations that are similar to previous violations for which effective corrective action was not taken. In addition, civil penalties are normally assessed for knowing and conscious violations of the reporting requirements in 10 CFR Part 830.50 and the information requirements in 10 CFR 820.11.

4.3.2. Violation Grouping

Depending upon the circumstances of a case, violations may be considered in a number of ways:

- a. Each Severity Level I, II, or III violation may be assessed a separate civil penalty.
- b. Several violations stemming from the same cause or problem area may be evaluated in the aggregate, assigned a single severity level, and assessed a total civil penalty.
- c. If more than one cause or problem area is identified, separate civil penalties may be considered for each cause or problem area.
 1. The determination of whether there is more than one cause or problem area can be made by evaluating whether corrective action for one violation would prevent recurrence of the other violation(s).
 2. If corrective action is required in more than one area, separate civil penalties may be assessed.
- d. Separate penalties may be assessed for separate violations stemming from a single problem area if the violations were separated over time.
- e. The determination to group violations or to consider each violation as separate is also a function of the significance of the case and the emphasis and message to be provided to the contractor.

4.3.3. Application of Pre- Versus Post-Revised Enforcement Policy

If the Enforcement Policy is revised so that factors that are considered with respect to the assessment and adjustment of base civil penalties are changed, the following general guidance should be used in the absence of specific guidance to the contrary, in determining whether the pre- versus post-revised Policy should be applied:

1. Consider when the violation occurred, when it was identified, and how it is cited.
2. For those cases in which mitigation (partial or full) of the civil penalty is considered appropriate, the policy must be a reasoned, tempered response to the contractor's situation and properly consider any changes in the Enforcement Policy.

4.4. Adjustment of Base Civil Penalty

After the appropriate base civil penalty is determined for a contractor depending on the facility category, the civil penalty adjustment factors outlined in the Enforcement Policy Section VIII are used to determine the magnitude of the civil monetary penalty that is to be assessed.

The single most important goal of the DOE Enforcement Program is to encourage early identification, reporting, and prompt correction of nuclear safety deficiencies and violations of DOE nuclear requirements by the contractors themselves, rather than DOE. Consequently, DOE provides substantial incentive for the early self-identification, reporting, and correction of problems which constitute, or could lead to, violations of DOE nuclear safety requirements. The base civil penalty may be increased up to the statutory limit, decreased, or completely mitigated based on the application of the adjustment factors.

Since the adjustment factors are additive, the penalty for any one violation could exceed the daily base civil penalty for the facility category as specified in Table IA of the Enforcement Policy. However, in no instance can escalation cause the daily penalty to exceed the \$100,000 per day statutory amount per violator, regardless of facility category. The following subsections should be used in conjunction with the guidance in Section VIII of the Enforcement Policy.

4.4.1. Identification and Reporting

This factor may be used to decrease a civil penalty for a violation by up to 50 percent if a contractor promptly identifies its occurrence and promptly reports the violation to DOE.

In weighing this factor, consideration should be given to, among other things, prior knowledge of the noncompliance condition, the opportunity available to discover the violation, ease of discovery, and the promptness and completeness of any required report. No consideration should be given to a reduction in penalty if the contractor does not take immediate action to correct the problem upon discovery.

If the contractor identifies the violation but DOE does not decrease the civil penalty on the basis of that identification, the discussion in the cover letter to the contractor should very specifically and clearly articulate the reason for not mitigating the civil penalty. For example, the discussion might explain why it is reasonable to conclude that the contractor should have identified the violation sooner.

In addition, if a separate civil penalty is being assessed for a reporting violation, it may not be appropriate to increase the civil penalty on the basis of the identification and reporting factor if a contractor fails to make a required report, or if it issues a late report of an event. Instead, a separate violation and associated civil penalty should be issued consistent with the Enforcement Policy. Also, since this factor has been established to encourage contractors to identify and report their violations, some mitigation may be given for self-disclosing events. However, for mitigation to be considered appropriate, the contractor should also have demonstrated initiative in identifying the potential root cause(s) of the event.

4.4.2. Corrective Action

This factor may be used to either decrease or increase a base civil penalty by up to 50 percent depending on the promptness and extent to which the contractor takes corrective action, including actions to prevent recurrence. Some corrective actions are always expected. Generally, the contractor's corrective actions to be considered under this factor would begin after it is evident that the contractor has a clear understanding of the scope of the violation. Application of this factor should consider (depending on the circumstances) the timeliness of the actions, the contractor's initiative to take action, the rigor with which the contractor identifies the root cause(s), and the degree of comprehensiveness of the corrective actions. Corrective action that is inappropriately focused will normally result in no adjustment to the amount of the civil penalty.

Mitigation of the base civil penalty may be appropriate if there was essentially no other reasonable action that the contractor could have taken. In the event that the base civil penalty is not reduced, the cover letter should include explanation as to what further action the contractor should have taken.

Escalation of the base civil penalty may be appropriate if DOE has to make substantial effort to get the contractor to take corrective action. Escalation is also appropriate for cases in which the contractor's corrective action is considered untimely and inadequate due to the contractor's failure to fully recognize or understand the extent of the problem. A separate civil penalty assessment may be appropriate based on the contractor's failure to take adequate corrective actions after it was clear that the contractor should have recognized the condition adverse to safety.

4.4.3. Multiple Examples/Repetitive Violations

As a general rule, multiple examples of the same violation with a specific requirement during the period covered by an inspection or assessment should be included in one citation. The "contrary to" paragraph should generally state the violation and then identify the examples. These examples may reference failures to comply with implementing plans or programs which are included in the nuclear safety requirements such as site or facility Radiation Protection Programs (See 10 CFR Part 835) or Quality Assurance Programs (See 10 CFR Part 830.120). When the examples of a particular violation are numerous, sufficient examples should be cited to convey the scope of the violation and programmatic breakdowns, and to provide a basis for assessing the effectiveness of the contractor's corrective actions. Normally three to five examples should be adequate. However, in cases where there are clearly several Severity I and/or Level II violations, each violation should be cited separately. Use of multiple examples in Notices should not be confused with either (1) the concept of aggregation of violations or with (2) the use of the multiple occurrences for assessing severity level.

The cover letter transmitting the enforcement action should state that repetitive violations were considered and should identify those past violations specifically. It should note further that in the absence of lasting corrective action, more significant enforcement action may be taken.

The following graduated enforcement scheme should normally be applied to repetitive violations:

1. For a violation repeated the first time (second occurrence), hold an enforcement conference, decide whether a civil penalty may be warranted and discuss the repetition in the cover letter transmitting the PNOV.
2. For the second repetition of the violation (third occurrence) or multiple repetitive violations, hold an enforcement conference and recommend issuance of a civil penalty if there are no adequate mitigating circumstances.
3. Repetitive violations that were the subject of previous enforcement action that are particularly egregious repetitive violations, may warrant special DOE management consideration beyond an escalated civil penalty.

4.4.4. Refraining from Issuing a Civil Penalty

Further discretion is provided DOE in the issuance of civil penalties in Section VIII.D.1-5 of the Enforcement Policy. If specified criteria are met (as summarized here), DOE may, when issuing an NOV, refrain from issuing a civil penalty in order to encourage prompt self-reporting and correction of violations, and to otherwise further the interests of justice through recognition of proper attributes of voluntary compliance. In addition, the violation may not be willful or one that could reasonably be expected to have been corrected by the contractor's correction of a previous violation. Finally, corrective action by the contractor must preclude recurrence of the violation and the underlying conditions which caused it.

In addition, DOE may refrain from issuing a civil penalty for past problems which are found by the contractor as a result of special design reviews and inspections (such as Design Reconstruction Programs). These reviews must have a well-defined scope and schedule, and comprehensive corrective action is promptly taken. These problems must be such that they would not likely be identified in normal surveillance or quality assurance activities by the contractor.

In these situations, the imposition of a civil penalty might deter the voluntary compliance aspects of the DOE enforcement program and other objectives of DOE safety improvement initiatives. These programmatic

objectives should be noted in the notice of violation as further reasons why a monetary penalty was not imposed.

4.4.5. Ability of Contractor to Pay Civil Penalty

Although Tables 1A and 1B of 10 CFR Part 820, Appendix A, generally take into account the safety significance of a violation as a primary consideration in assessing a civil penalty, the contractor's (including subcontractor's, vendor's and supplier's) ability to pay may be a secondary consideration. It is not the purpose of DOE enforcement actions to be so severe as to put the contractor into bankruptcy. Contract termination, rather than civil penalties, is used to terminate contractor activities for DOE. However, the burden of proving inability to pay is on the contractor and must be conclusively demonstrated by a present financial condition--not 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 conduct activities and/or correct the violation to bring its program into full regulatory compliance, it may be appropriate to decrease the base civil penalty. However, it is expected that this discretion would rarely be used. Economic hardship must be clearly demonstrated by the contractor. The Director may also request assistance from other DOE offices to substantiate a mitigating financial condition. Furthermore, administrative actions, such as determination of award fees when provided for in DOE contracts, will be considered separately from any civil penalties imposed under this enforcement policy. Likewise, imposition of a civil penalty will be based on the circumstances of each case (as discussed in this Handbook), unaffected by any award fee determination.

4.5. Administrative Matters

4.5.1. Assignment of Enforcement Action (EA) Number

Enforcement action (EA) numbers are assigned to all proposed enforcement actions by the Office of Docketing Clerk, after a decision is made to issue a preliminary notice of violation. It is a method of administratively docketing and tracking cases. EA numbers are assigned sequentially according to the year of issuance (i.e., 93-001, 93-002, etc.). Once an EA number has been assigned to an enforcement matter, all filings, memoranda, and correspondence for that case should include the case name and its complete EA number.

4.5.2. Target Enforcement Process Schedules

- (1) For routine enforcement actions, if the Director, Enforcement and Investigation Staff, determines that the violations are at least Severity Level III, he/she should recommend issuance of the PNOV generally within four weeks from the date of the enforcement conference. The FNOV, if issued, will generally be released within four weeks after a substantive response from the contractor. Enforcement actions (Severity Level I, II, or III) should be processed expeditiously with a goal of issuing the FNOV and Civil Penalty generally not more than eight weeks from the date of the contractor's complete response.
- (2) If the decision on whether or not to initiate enforcement action is made more than 18 months after a potential violation is initially identified, or more than 18 months after referral of a potential violation to Enforcement and Investigation Staff, the Assistant Secretary, EH-1, and the Secretary should be notified prior to the issuance of a PNOV.
- (3) If there is a significant delay in prosecuting a violation, the Director, Enforcement and Investigation Staff, should prepare a memorandum for the Secretary and/or EH-1, as appropriate, to--
 - a. Explain the basis for such a delay;

- b. Explain the basis for Enforcement and Investigation Staff's decision with a specific focus on what effect, if any, the delay in making the decision may have on the proposed action. This includes consideration of factors such as--
- Are the expected benefits to human health and safety and protection of the environment justified by continuing to pursue this action?
 - How is the effectiveness of the proposed enforcement action likely to be affected by the delay?
 - Should the focus of the action be modified as a result of the delay?
 - Has the delay affected DOE's ability to find or obtain credible evidence from organizations or individuals?

The above are examples of factors that may be relevant in a delayed enforcement action, but are not an exhaustive list of the possible considerations. The Director, Enforcement and Investigation Staff, in the exercise of his/her discretion, should include a discussion of any other relevant factors that bear on the particular PNOV that is being proposed.

4.5.3. Press Releases

Press releases may be issued for FNOVs at the discretion of DOE management. After the enforcement action has been signed, the Director, Enforcement and Investigation Staff, will forward the package to the contractor, certified mail return receipt requested. The need for a press release and the timing and method of its release will be determined in cooperation with the Office of Public Affairs, the Secretary and EH-1, as appropriate.

4.5.4. Release of Predecisional Enforcement Information to Contractors and to the Public

The Director, Enforcement and Investigation Staff, in consultation with appropriate DOE officials, is responsible for all decisions regarding the release of predecisional information to contractors and to the public. Such information includes matters such as potential severity level of the alleged violation, civil penalty amount and the nature/context of an NOV.

- a. In general, no predecisional information will be released to the public.
- b. Predecisional enforcement information will only be released to the contractor when necessary to ensure that prompt corrective actions are taken to obtain compliance. However, in general, such information should not be made available to the contractor prior to release of a PNOV. Upon completion of service of a PNOV, the DOE transmittal letter and PNOV will be placed in the DOE Freedom of Information Reading Room.

CHAPTER 5 - ADDITIONAL ENFORCEMENT GUIDANCE

5.1. Notices of Violation for Suppliers and Subcontractors

Notices of Violation (both PNOV and FNOV) are used for subcontractors and suppliers as well as prime contractors who fail to meet nuclear safety requirements and commitments related to DOE activities. Enforcement for subcontractors and suppliers to Price-Anderson indemnified DOE contractors is addressed in Section IX of the Enforcement Policy. Certain nuclear safety Rules apply directly to subcontractors and suppliers. For example, the Rule on Accuracy of Information, 10 CFR Part 820.11, requiring complete and accurate information being submitted to DOE. Additionally, the Rule on Defect Identification and Reporting, 10 CFR Part 830.122, when issued, will apply directly to subcontractors and suppliers. Violations of these requirements will be subject to the same enforcement process described in this Handbook.

Additionally, nuclear safety requirements may be contained in contract requirements with DOE contractors and are not directly imposed by DOE on the subcontractors and suppliers. For example, a subcontractor may be required to have a QA program that meets the requirements of 10 CFR 830.120 in order to do work for the contractor. Violations of that QA program may subject the subcontractor to PAAA enforcement. The PNOV for a subcontractor or supplier would be similar to that prepared for a DOE Contractor, but will also include the following elements:

1. Any contract terms that subject the subcontractor or supplier to DOE nuclear safety requirements and the severity level proposed for the violation or problem area.
2. Where the subcontractor or supplier to DOE is subject to nuclear safety requirements, the civil penalty proposed for each violation may apply equally to the prime contractor if appropriate. If more than one violation is involved, it is necessary to apportion the amount of the penalty for each violation.

The Notice of Violation (NOV) informs the subcontractor or supplier of the response requested by DOE.

Where the violation of nuclear safety rules by the subcontractor or supplier has affected the work of the prime contractor, NOV's to multiple parties may be issued for the same occurrence. Contractors have responsibility for the performance of their subcontractors through the oversight responsibilities of their QA Programs. Care should be exercised to determine the relevant facts in these circumstances and to assess responsibility in accord with those facts.

5.2. Department of Justice (DOJ) Referrals

5.2.1. Policy on Withholding Action

As a general policy, if a matter has been referred to the DOJ, in the absence of an immediate need to take action for health and safety reasons, issuance of a DOE enforcement action should be held in abeyance. The purpose of this postponement is to avoid potential compromise of or conflict with the DOJ case, pending DOJ concurrence that the enforcement action will not affect its prosecution. The Director, Enforcement and Investigation Staff, is responsible for coordinating enforcement matters with DOJ.

5.2.2. DOJ Declinations

It is expected that if DOJ determines that a referred case lacks prosecutorial merit, it will notify DOE (Director, Enforcement and Investigation Staff) by a letter of declination. When this is received, the Director,

Enforcement and Investigation Staff will then determine whether to proceed with enforcement action. Proceeding with enforcement would then follow the same process described in this Handbook.

5.3. Discrimination for Engaging in Protected Activities

5.3.1. Background and Purpose

This section provides guidance regarding cases involving discrimination against contractor employees for engaging in protected activities. The responsibilities of DOE in protecting the rights of employees are specified in 10 CFR Part 708, "DOE Contractor Employee Protection Program" (Part 708). Part 708 establishes criteria and procedures for the investigation, hearing, and review of allegations from DOE contractor employees that relate to employer reprisal or discrimination resulting from employee disclosure of information relating to unsafe conditions, or violations of laws and regulations that involve fraud, mismanagement, waste, abuse, or safety. DOE has determined that Part 708 is a Nuclear Safety Requirement as defined in Part 820, and thus any violation of the whistleblower protection Provisions of Part 708 might subject a contractor to PAAA enforcement. (See 57 FR 20796, May 15, 1992.) Thus if a retaliatory act occurred as a result of a worker raising nuclear safety concerns, the act of retaliation will constitute a violation subject to enforcement sanction.

To the extent that the complaint involves underlying issues related to nuclear safety, the Enforcement and Investigation Staff and the Office of Contractor Employee Protection (OCEP) have established guidelines that prescribe the cooperation and working arrangements between them to investigate and resolve (1) the issues relating to discrimination, and (2) the issues relating to nuclear safety that might subject contractors to enforcement action. These cooperative arrangements and further guidance are described below.

5.3.2. General

It is DOE's policy that the protected activities of employees under Part 708 include contractor, subcontractor or supplier employee reporting of potential safety concerns to DOE. (Part 708 protection does not apply to disclosures or complaints made to parties other than DOE and Congress.) In addition, for purposes of this guidance, discrimination should be broadly defined and includes intimidation or harassment that could lead a person to reasonably expect that, if he/she makes allegations about what he/she believes are unsafe conditions, the compensation, terms, conditions, and privileges of employment could be affected.

If a discrimination complaint is raised to any DOE employee that potentially raises a nuclear safety issue, the complainant should be informed that--

1. In order to protect employee rights against discrimination under Part 708, the complaint must be filed with DOE through the Head of Field Element within 60 days of the occurrence or the discovery of the discrimination.
2. OCEP will consider the allegations of reprisal and the Enforcement and Investigation Staff will consider any nuclear safety concerns raised by the complainant.

Enforcement action may result from the investigation if it is determined that discrimination by the contractor (or its subcontractors or suppliers) had a chilling effect on the reporting of safety concerns. DOE enforcement action may be appropriate even though the specific employee-employer discrimination issues are resolved through reconciliation, information, settlement or adjudication before the DOE Office of Hearings and Appeals.

5.3.3. General Guidelines for Processing Whistleblower Complaints Involving Nuclear Safety Issues

The following guidelines coordinate the processing of Part 708 whistleblower reprisal complaints with Part 820 PAAA enforcement procedures and shall apply to all Part 708 complaints involving nuclear safety concerns:

1. The OCEP will be promptly provided with a copy of all complaints, reports of investigation, and decisions or orders associated with allegations of reprisal for raising nuclear safety concerns at DOE nuclear facilities.
2. Without regard to the status of any related whistleblower reprisal complaint, the Director, Enforcement and Investigation Staff, will conduct all necessary investigations and take appropriate enforcement action with respect to the underlying nuclear safety concern(s). In that regard, except as provided below, review of the underlying nuclear safety concern(s) would not include review of the reprisal aspect of a case.
3. Subject to the exceptions set forth in 5 and 6 below, the Director, Enforcement and Investigation Staff, will await the completion of the investigation of the whistleblower reprisal complaint by the OCEP. Additionally, DOE would wait for the results of any subsequent adjudication by the Office of Hearings and Appeals, before deciding whether to initiate PAAA enforcement action against a contractor for alleged acts of reprisal against contractor employees in violation of the Part 708 Whistleblower Rule.
4. In determining whether to initiate a PAAA enforcement action, the Director will review the whistleblower report of investigation and the adjudicatory record to determine if an adequate basis exists to take PAAA enforcement action, or whether additional investigation and development of evidence is required.
5. Irrespective of the status of the whistleblower reprisal complaint, in egregious cases the Director may, at his discretion, proceed with a safety investigation which includes review of the allegations of reprisal. Such egregious cases would include (i) cases involving credible allegations alleging willful or intentional violations of DOE nuclear safety rules, regulations, orders or Federal statutes which, if proven, would require criminal referrals to DOJ for prosecutorial review; or, (ii) cases involving significant public health and safety implications, e.g., the allegations of reprisal suggest widespread managerial involvement and require immediate action or involve clear examples of high level management involvement in the retaliatory act.
6. The Director will also retain the option of initiating a safety investigation including review of any allegations of reprisal in the following cases:
 - a. When the whistleblower reprisal complaint fails for procedural reasons and cannot be brought under the rule;
 - b. When the whistleblower reprisal complaint is settled before the whistleblower investigation has been completed; and,
 - c. When the whistleblower investigation concludes that retaliation occurred but the case is settled and no adjudicatory hearing is completed.
7. At any time reprisal issues are included in investigative activity, the investigator(s) will expressly apprise all parties to the case and persons interviewed that the investigative activity is pursuant to a

PAAA nuclear safety procedure and not a employee protection procedure under the Part 708 Whistleblower Rule.

8. At any time reprisal issues are intended to be included in investigatory activity by Enforcement and Investigation Staff, it will advise the OCEP and will thereafter keep that office fully and timely apprised of the status of the case.

5.4. Accuracy of Information

Guidance on treatment of violations involving erroneous information is found in Section X of the Enforcement Policy. Normally, citations for failure to provide complete and accurate information are made with reference to the applicable DOE nuclear safety regulation. Citations may also be made with reference to the information requirements of 10 CFR 820.11. For egregious cases involving willfulness, an adjustment to the severity level should be considered for action (See Section 5.5).

5.5. Willful Violations

Under the Enforcement Policy, a civil penalty is normally proposed for willful violations at any severity level. Every case involving a willful violation should be considered for an action, and may require referral to DOJ for consideration of criminal sanctions. Willful violations at any severity level are unacceptable and will not be tolerated. These violations are significant in themselves. Even if a violation could be considered for enforcement discretion, in general, an NOV and Civil Penalty will be issued for willful violations.

APPENDIX A

NONCOMPLIANCE REVIEW FORM

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NTS Noncompliance No. _____

NONCOMPLIANCE REVIEW FORM

Date: _____

1. Enforcement Evaluator: _____
2. Contractor Name: _____
3. Site/Facility: _____
4. Facility Function: _____
5. Lead DOE Representative: _____
6. Date Noncompliance (NC) Identified: _____
7. Date NC Reported: _____
8. Potentially Escalated NC's (include specific requirements violated): _____

9. Determination of Safety Significance/Apparent Severity Levels: _____

10. Root Causes: _____

11. Method of Identification (Contractor, DOE/Field or Operations, DOE HQ or Other, i.e., State or Federal Inspector, Allegation, DNFSB, etc.): _____

12. Corrective Actions Taken or Planned to Date: _____

13. Prior Contractor Performance (CP's, Similar NC's, No. of NC's): _____

14. Prior Notice of Previous Problems (Audits, Lessons-Learned, etc.): _____

15. Multiple Examples: _____

16. Duration: _____

17. Recommendation: _____

18. Enforcement Director's Review of Recommended Actions: _____

19. Enforcement Director's Signature: _____

20. Date Signed: _____

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APPENDIX B

CHECKLIST FOR

PREPARATION OF ENFORCEMENT ACTIONS

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CHECKLIST FOR PREPARATION OF A PROPOSED ENFORCEMENT ACTION

CONTRACTOR: _____

FACILITY: (Name and Category based on 10 CFR 820, Appendix A (Table IA, and Appenix B)

EA NUMBER: _____

A. Summarize Recommended Enforcement ActionB. Brief Summary of Inspection or Assessment FindingsC. Analysis of the Root Cause and the Message to be Provided to the ContractorD. Discuss Basis for Severity Level, including the following:

1. Safety significance or gravity of violation
2. Degree of culpability of contractor with regard to violation, i.e., inadvertent vs gross negligence, deception or willfulness.
3. Position, training and experience of person(s) involved in violation.
4. Duration of violation.
5. Past performance and similar violations.
6. Prior notice of potential problem.
7. Multiple examples within same time frame.
8. Timely and complete notification to DOE, in accordance with reporting requirements.
9. Ability to pay.
10. Aggregation of violations for increased severity level, considering number and nature of each violation.

E. Include Rationale for Each Factor Used in Adjustment of Base Civil Penalty:

- | | Maximum
Possible
Adjustment |
|--|-----------------------------------|
| 1. Prompt identification and reporting | (-50% to +0%) |
| 2. Corrective action(s) to prevent recurrence | (±50%) |
| a. Timeliness | |
| b. Root cause identification | |
| c. Appropriateness of actions | |
| d. Degree of initiative shown | |
| e. Comprehensiveness of actions, i.e., narrowly focused or
broadly addressing areas of concern. | |
| 3. Possible DOE contribution to a violation | (+0% to -100%) |

- a. Written, contemporaneous direction required from DOE regarding contractor actions or forbearance or actions.
 - b. Interpretations of nuclear safety requirements valid only when issued in writing by DOE General Counsel.
 - c. Lack of DOE funding not a basis for penalty mitigation.
- F. Provide Justification if Not Proposing a Civil Penalty for a Repetitive Severity Level III Violation.
- G. Provide Confirmation That This Action Is Consistent With Similar Actions Taken by Enforcement and Investigation Staff or Provide Explanation for Any Inconsistencies.

APPENDIX C

SUGGESTED FORMATS FOR

ENFORCEMENT ACTIONS

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Suggested Formats For Enforcement Actions

This Appendix includes formats that may be used in preparing and processing enforcement packages. These formats are provided as guidance, and may be modified as needed for individual enforcement actions.

Form 1: Cover Letter for Enforcement Action Without a Civil Penalty

Form 2: *Preliminary Notice of Violation (for all violations without a civil penalty)

Form 3: Cover Letter for Enforcement Action With a Civil Penalty

Form 4: *Preliminary Notice With All Violations Assessed a Civil Penalty

Form 5: *Preliminary Notice With Some Violations Assessed a Civil Penalty and Some Not Assessed a Civil Penalty

Form 6: Cover Letter for Order Imposing Civil Monetary Penalty

Form 7: Order Imposing Civil Monetary Penalty

*Essentially the same formats may be used for Final Notices of Violation.

Key to Format Notation

<u>Symbol</u>	<u>Meaning</u>
() or _____	Fill in the blank with the appropriate information.
()	Text within parentheses indicates the optional use of an alternative word or an optional choice or the plural form of the word preceding the parentheses.
[]	Text within brackets indicates narrative guidance that should be followed in terms of addressing specific elements that should be included in the particular document.
" "	Text within quotes indicates a suggested sentence or language.

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FORM 1: Cover letter for Enforcement Action Without a Civil Penalty

(Name of Contractor)

(Address)

EA No. _____

Gentlemen:

SUBJECT: PRELIMINARY* NOTICE OF VIOLATION
DOE INSPECTION REPORT NO(S). XX-XXX/YY-NN) [if applicable, add DOE ASSESSMENT REPORT
NO(S). X-XX-XXX")]

This refers to the (inspection) (assessment) conducted on (dates) at the (plant name) facility. [At a minimum, the narrative that follows should address the following areas: (1) who identified the violation(s), e.g., the contractor or DOE, (2) if and how it was reported, e.g., Occurrence Report, etc., and (3) when the assessment or inspection report(s) related to this action were issued.]**

[This section should include the following: (1) a description of the event or circumstances that resulted in the violation(s), (2) the length of time the violation(s) lasted or when was it identified, (3) the operational mode of the facility at the time of the violation(s), and (4) the root cause(s) of the violation(s). It should also include a discussion of the significance of the violation(s) including the technical safety significance and the potential risk to workers and to the public. It should discuss the nuclear safety message that should be conveyed to the contractor. It should also discuss how this significance relates to severity level categorization. It should also include an analysis of any factors which caused the severity level to be different from the normal severity level for the type of involved violation(s); for example, programmatic deficiencies or willfulness.] Therefore, this (these) violation(s) has (have) been categorized at Severity Level _____. [Alternatively, "Therefore, the violations are classified in the aggregate as a Severity Level _____ problem.]

In accordance with the "General Statement of Enforcement Policy" (Enforcement Policy) 10 CFR Part 820, Appendix A, a civil penalty is considered for a Severity Level _____ violation (problem). However, after review of the facts of this case, I have decided that a civil penalty will not be proposed in this case because (explanation based on mitigating factors in the Enforcement Policy, the various discretion factors in 10 CFR Part 820, Appendix A, Section VIII.D (or other considerations).

You are required to respond to this letter and should follow the instructions specified in the enclosed Notice of Violation (Notice) when preparing your response. In your response, you should document the specific actions taken and any additional actions you plan to prevent recurrence. [Other specific responses required should be addressed, as appropriate.]

(Contractor)

After reviewing your response to this Notice, including your proposed corrective actions and the results of future assessments or inspections, DOE will determine whether further enforcement action is necessary to ensure compliance with DOE nuclear safety requirements.

Sincerely,

Director
Enforcement and Investigation Staff
Office of the Assistant Secretary for Environment, Safety and Health

Enclosure:

Preliminary Notice of Violation

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

[Notes: * - The same format may be used for a Final Notice of Violation (FNOV).
** - Include for FNOV only.]

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FORM 2: PNOV (for all violations without a civil penalty)*
PRELIMINARY NOTICE OF VIOLATION*

(Name of Contractor)

(Facility Name)

EA No. _____

During a DOE (inspection) (assessment) conducted on (date(s)) (a) violation(s) of DOE nuclear safety requirements was (were) identified. In accordance with the "General Statement of Enforcement Policy," 10 CFR Part 820, Appendix A, the violation(s) is (are) listed below:

A. (State DOE Nuclear Safety requirement that was violated.)

Contrary to the above, (date and the basis for the preliminary determination**that a violation occurred or is continuing to occur.

This a Severity Level __ violation (problem).

1/ Pursuant to the provisions of 10 CFR Part 820.24**, (name of contractor) is hereby required to submit a written statement or explanation to the Director, Enforcement and Investigation Staff, Attention: Office of the Docketing Clerk, EH-3, CXXI, U.S. Department of Energy, 19901 Germantown Rd., Germantown, MD 20874-1290 with copies to the Manager, DOE _____ Operations Office, and the DOE-Cognizant Secretarial Office, Headquarters for the facility that is the subject of this Notice, within 30 days of the date of the letter transmitting this Notice of Violation (Notice). This reply should be clearly marked as a "Reply to a Preliminary Notice of Violation" and should include for each violation: (1) the reason for the violation, or, if contested, the basis for disputing the violation, (2) the corrective steps that have been taken and the results achieved, (3) the corrective steps that will be taken to avoid further violations, and (4) the date when full compliance will be achieved.

Dated at (City, State)
this __ day of (Month) 19(XX)

Director
Enforcement and Investigation Staff
Office of Environment, Safety and Health

[Notes: * - The same format may be used for a Final Notice of Violation (FNOV)—also see **, below.
** - For an FNOV "preliminary determination pursuant to the provisions of 10 CFR Part 820.24" should be changed to a "determination pursuant to the provisions of 10 CFR Part 820.25" that a violation had occurred.]

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FORM 3: Cover Letter for Enforcement Action with Civil Penalty

(Name of Contractor)

(Address)

EA No. ____

Gentlemen:

SUBJECT: PRELIMINARY* NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL PENALTY(IES) - \$XXX,XXX DOE INSPECTION REPORT NO(S). XX-XXX/YY/NN) [if applicable, add "AND DOE ASSESSMENT REPORT NO(S). X-XX-XXX)"]

This refers to the (inspection) (assessment) conducted on (dated) at the (plant name) facility. [At a minimum, the narrative that follows should address the following areas: (1) who identified the violation, e.g., the contractor or DOE, (2) if and how it was reported, e.g., Occurrences Report, (3) when the assessment or inspection report(s) related to this action was (were) issued] and (4) if and when an enforcement conference was held.]**

[This section should include the following: (1) a description of the event or circumstances that resulted in the violation(s), (2) the length of time the violation(s) lasted or when it was identified, (3) the operational mode of the facility at the time of the violation(s), and (4) the root cause(s) of the violation(s).]

[This section should include a discussion of the significance of the violation(s) including the technical safety significance and the potential risk to workers and to the public. It should discuss the nuclear safety message that should be conveyed to the contractor. It should also discuss how this significance relates to severity level categorization. It should also include an analysis of any factors which caused the severity level to be different from the normal severity level for the type of involved violation(s); for example, programmatic deficiencies or willfulness.] Therefore, in accordance with the "General Statement of Enforcement Policy," (Enforcement Policy) 10 CFR Part 820, Appendix A, this violation has been categorized at Severity Level _____. [Alternatively, "Therefore, in accordance with the "General Statement Enforcement Policy" (Enforcement Policy) 10 CFR Part 820, Appendix A, the violations are classified in the aggregate as a Severity Level ____ problem."]

[This section should recognize the status of the contractor's corrective actions to date, the status of compliance, or the date when compliance will be achieved. Such as, "The staff recognizes that immediate corrective action was taken when the violation was identified."]

Contractor

To emphasize (state the area where improvement is needed, i.e., the purpose of the action), I am issuing the enclosed Preliminary Notice of Violation and Proposed Imposition of Civil Penalty(ies) (Notice) in the amount of \$XXX,XXX for the Severity Level ____ violation(s) (problem(s)). The base value of a civil penalty for a Severity Level ____ violation (problem) is \$XXX,XXX. The escalation and mitigation factors in the Enforcement Policy were considered.

[This section should include a discussion of the application of the adjustment factors in the Enforcement Policy (10 CFR Part 820, Appendix A, Section VIII.B&C) including reasons for mitigation and/or escalation of the base civil penalty. The discussion should be specific and should address the factors for which mitigation and/or escalation of the base civil penalty was deemed appropriate, including those cases in which weighing all the factors results in no change to the base civil penalty. It should also include a statement addressing those factors that were clearly not relevant, such as, "The other adjustment factors in the Policy were considered and not further adjustment to the base civil penalty is considered appropriate."]

[This section should include one of the following conclusions, depending on the outcome of the case. For cases in which the base civil penalty has been either increased or decreased: "Therefore, based on the above, the base civil penalty has been increased (decreased) by __ percent." For cases in which there is no adjustment: "Therefore, based on the above, no adjustment to the base civil penalty has been deemed appropriate." For cases in which the mitigation and escalation for the factors balanced: "Therefore, on balance, no adjustment to the base civil penalty has been deemed appropriate."]

[This section should include a discussion of any violation(s) included in the enforcement action which are not assessed a civil penalty, making reference to the exercise of discretion provision of the Enforcement Policy, 10 CFR Part 820, Appendix A, VIII.D.]

You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. In your response, you should document the specific actions taken and any additional actions you plan to prevent recurrence. [Other specific responses required should be addressed as appropriate.] After reviewing your response to this Notice, including your proposed corrective actions and the results of future inspections, DOE will determine whether further enforcement action is necessary to ensure compliance with DOE nuclear safety requirements.

Sincerely,

Director
Enforcement and Investigation Staff
Office of Environment, Safety and Health

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Enclosure: Preliminary Notice of Violation and Proposed Civil Penalty(ies)

[Notes: * - The same format may be used for a Final Notice of Violation (FNOV).
** - Include for FNOV only.]

FORM 4: Preliminary Notice With All Violations Assessed a Civil Penalty

PRELIMINARY NOTICE OF VIOLATION*
AND
PROPOSED IMPOSITION OF CIVIL PENALTY(IES)

(Name of Contractor)

(Facility Name)

EA No. _____

During a DOE (inspection) (assessment) conducted on (date(s)) (a) violation(s) of DOE requirements was (were) identified. In accordance with the "General Statement of Enforcement Policy," 10 CFR Part 820, Appendix A, the Department of Energy proposes to impose a civil penalty(ies) pursuant to Section 234A of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2282 a., and 10 CFR Part 820. The particular violation(s) and associated civil penalty(ies) are set forth below:

A. (State DOE nuclear safety requirement that was violated.)

Contrary to the above, (date and the basis for the preliminary determination** that a violation had occurred or was continuing to occur.)

This is a Severity Level ____ violation (problem).
Civil Penalty - \$XXX,XXX.

B. (State requirement that was violated.)

Contrary to the above, (date and the basis for the preliminary determination** that a violation had occurred or was continuing to occur.)

This is a Severity Level ____ violation (problem).
Civil Penalty - \$XXX,XXX

[Note: When several violations are considered in the aggregate and assessed one civil penalty, use the term penalty instead of penalties throughout the Notice, refer to it as a problem versus a violation, and include either of the following statements: "Cumulative Civil Penalty - \$XXX,XXX (assessed equally between (among) the (insert number) violations.)" or "Cumulative Civil Penalty - \$XXX,XXX (assessed \$XXX,XXX for Violation A, \$XXX,XXX for Violation B and \$XXX,XXX for Violation C, etc.)" Also note that the total number of violations specified should correspond to the number of "contrary to" statements in the Notice.]

Pursuant to the provisions of 10 CFR 820.24**, (name of contractor) (Contractor) is hereby required to submit a written statement or explanation to the Director, Enforcement and Investigation Staff, Attention: Office of the Docketing Clerk, EH-3, CXXI, U.S. Department of Energy, 19901 Germantown Rd., Germantown, MD 20874-1290, within 30 days of the date of this Preliminary Notice of Violation and Proposed

Imposition of Civil Penalty(ies) (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation" and should include for each alleged violation: (1) admission or denial of the alleged violation, (2) the reasons for the violation if admitted,

and if denied, the reasons why, (3) the corrective steps that have been taken and the results achieved, (4) the corrective steps that will be taken to avoid further violations, and (5) the date when full compliance will be achieved.

Within the same time as provided for the response required above under 10 CFR 820.24, the contractor shall pay the civil penalty(ies) (imposed under Section 234a of the Act) by check, draft or money order payable to the Treasurer of the United States and mailed to the Director, Enforcement and Investigation Staff, Office of Environment, Safety and Health. The contractor shall make payment in the amount of the civil penalty proposed above, or the cumulative amount of the civil penalties if more than one civil penalty is proposed, or may protest imposition of the civil penalty(ies), in whole or in part, by a written answer addressed to the Director, Enforcement and Investigation Staff, U.S. Department of Energy. Should the contractor fail to answer within the time specified, an order imposing the civil penalty(ies) will be issued. Should the contractor elect to file a request for an on-the-record adjudication, in accordance with 10 CFR 820.26 and also file an answer in accordance with 10 CFR 820.27 protesting the civil penalty(ies), in whole or in part, such answer should be clearly marked as an "Answer to a Notice of Violation" and may: (1) deny the violation(s) listed in this Notice, in whole or in part, (2) demonstrate extenuating circumstances, (3) show substantive error in this Notice, or (4) show other reasons why the penalty(ies) should not be imposed. In addition to protesting the civil penalty(ies) in whole or in part, such answer may request remission or mitigation of the penalty(ies).

In requesting mitigation of the proposed penalty(ies), the adjustment factors addressed in Section VIII.C. of 10 CFR Part 820, Appendix A, should be addressed. Any written answer in accordance with 10 CFR 820.27 should be set forth separately from the statement or explanation in reply pursuant to 10 CFR 820.24,** but may incorporate parts of the 10 CFR 820.24** reply by specific reference (e.g., citing page and paragraph numbers) to avoid repetition. The attention of the contractor is directed to the other provisions of 10 CFR 820, regarding the adjudication process and the procedures for imposing (a) civil penalty(ies). In the event of a failure to pay any civil penalty(ies) due which subsequently has been determined in accordance with the applicable provisions of 10 CFR Part 820, this matter may be referred to the Attorney General, and the penalty(ies), unless compromised, remitted, or mitigated, may be collected by civil action pursuant to Section 234A of the Atomic Energy Act of 1954, Amended 42 U.S.C. 2282a.

Preliminary Notice of Violation

The response noted above (Reply to Notice of Violation, letter with payment of civil penalty(ies), and Answer to a Notice of Violation) should be addressed to: Director, Office of Enforcement, Office of the Assistant Secretary for Environment, Health and Safety, U.S. Department of Energy, ATTN: Hearing Clerk, Washington, D.C. 20585, with a copy to the manager, DOE ____ Operations Office, and the DOE Headquarters, Cognizant Secretarial Officer for the facility that is the subject of this Notice.

Director
Enforcement and Investigation Staff
Office of the Assistant Secretary for
Environment, Safety and Health

Dated at (City, State)
this day of Month 19(XX)

- [Notes: * - The same format may be used for a Final Notice of Violation (FNOV). See also **, below.
 ** - For an FNOV, "preliminary determination pursuant to the provisions of 10 CFR Part 820.24" should be changed to a
 "determination pursuant to the provisions of 10 CFR Part 820.25."]

*FORM 5: Preliminary Notice With Some Violations Assessed a Civil Penalty
and Some Violations Not Assessed a Civil Penalty*

PRELIMINARY* NOTICE OF VIOLATION
AND
PROPOSED IMPOSITION OF CIVIL PENALTY(IES)

(Name of Contractor)

(Facility Name)

EA No. ____

During a DOE (inspection) (assessment) conducted on (date(s)) violations of DOE nuclear safety requirements were identified. In accordance with the "General Statement of Enforcement Policy," 10 CFR Part 820, Appendix A, the Department of Energy proposed to impose (a) civil penalty(ies) pursuant to Section 234A of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282a., and 10 CFR 820. The particular violations and associated civil penalty(ies) are set forth below:

I. Violations Assessed a Civil Penalty

A. (State requirement that was violated.)

Contrary to the above, (date and the basis for the preliminary determination** that a violation had occurred or was continuing to occur.

This is a Severity Level ____ violation (problem).
Civil Penalty - \$XXX,XXX.

B. (State requirement that was violated)

Contrary to the above, (date and the basis for the preliminary determination** that a violation had occurred or was continuing to occur.

This is a Severity Level ____ violation (problem).
Civil Penalty - \$XXX,XXX.

[Note: When several violations are considered in the aggregate and assessed one civil penalty, use the term penalty instead of penalties throughout the Notice, refer to it as a problem versus a violation, and include either of the following statements: "Cumulative Civil Penalty - \$XXX,XXX (assessed equally between (among) the (insert number) violations)" or "Cumulative Civil Penalty - \$XXX,XXX (assessed \$XXX,XXX for Violation A, \$XXX,XXX for Violation B, and \$XXX,XXX for Violation C, etc.)." Also note that the total number of violations specified should correspond to the number of "contrary to" statements in the Notice.]

Preliminary Notice of Violation

II. Violations Not Assessed a Civil Penalty

A. (State requirement that was violated)

Contrary to the above, (date and the basis for the belief** that a violation had occurred or was continuing to occur.

This is a Severity Level ____ violation (problem).

B. (State requirement that was violated.)

Contrary to the above, (date and the basis for the belief** that a violation had occurred or was continuing to occur.

This is a Severity Level ____ violation (problem).

Pursuant to the provisions of 10 CFR Part 820.24**, (name of contractor) (Contractor) is hereby required to submit a written statement or explanation to the Director, Enforcement and Investigation Staff, U.S. Department of Energy, Washington, D.C. 20585, within 30 days of the date of this Preliminary Notice of Violation and Proposed Imposition of Civil Penalty(ies) (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation" and should include for each alleged violation: (1) admission or denial of the alleged violation, (2) the reasons for the violation if admitted, and if denied, the reasons why, (3) the corrective steps that have been taken and the results achieved, (4) the corrective steps that will be taken to avoid further violations, and (5) the date when full compliance will be achieved. Consideration may be given to extending the response time for good cause shown.

Within the same time as provided for the response required above under 10 CFR 820.24**, the contractor may pay the civil penalty(ies) by letter addressed to the Director, Office of Enforcement, Office of the Assistant Secretary for Environment, Health and Safety, U.S. Department of Energy, with a check, draft, money order, or electronic transfer payable to the Treasurer of the United States in the amount of the civil penalty proposed above, or the cumulative amount of the civil penalties if more than one civil penalty is proposed, or may protest imposition of the civil penalty(ies), in whole or in part, by a written answer addressed to the Director, Enforcement and Investigation Staff, Attention: Office of the Docketing Clerk, EH-3, CXXI, 19901 Germantown Rd., Germantown, MD 20874-1290. Should the contractor fail to answer within the time specified, an order imposing the civil penalty(ies) will be issued. Should the contractor elect to file an answer in accordance with 10 CFR 820.27 protesting the civil penalty(ies), in whole or in part, such answer should be clearly marked as an "Answer to a Notice of Violation" and may: (1) deny the violation(s) listed in this Notice, in whole or in part, (2) demonstrate extenuating circumstances, (3) show error in this Notice, or (4) show other reasons why the penalty(ies) should not be imposed. In addition to protesting the civil penalty(ies), in whole or in part, such answer may request remission or mitigation of the penalty(ies).

Preliminary Notice of Violation

In requesting mitigation of the proposed penalty(ies), the factors addressed in Section VIII.C of 10 CFR Part 820, Appendix A should be addressed. Any written answer in accordance with 10 CFR 820.27 should be set forth separately from the statement or explanation in reply pursuant to 10 CFR 820.24**, but may incorporate parts of the 10 CFR 820.24** reply by specific reference (e.g., citing page and paragraph numbers) to avoid repetition. The attention of the contractor is directed to the other provisions of 10 CFR 820, regarding the procedure for imposing a civil penalty(ies).

Upon failure to pay any civil penalty(ies) due which subsequently has been determined in accordance with the applicable provisions of 10 CFR 2.205, this matter may be referred to the Attorney General, and the penalty(ies), unless compromised, remitted, or mitigated, may be collected by civil action pursuant to Section 234A of the Act, 42 U.S.C. 2282a.

The response noted above (Reply to Notice of Violation, letter with payment of civil penalty(ies), and Answer to a Notice of Violation) should be addressed to: Director, Enforcement and Investigation Staff, Attention: Office of the Docketing Clerk, EH-3, CXXI, U.S. Department of Energy, 19901 Germantown Rd., Germantown MD 20874-1290, with a copy to the Manager, DOE ____ Operations Office, and the DOE Headquarters, Cognizant Secretarial Officer responsible for the facility subject to this Notice of Violation.

Director
Enforcement and Investigation Staff
Office of Environment, Safety and Health

Dated at (City, State)
this ____ day of (Month) 19~~(XX)~~

[Notes: * - The same format may be used for a Final Notice of Violation (FNOV) - See also ** below.
** - For an FNOV, "preliminary determination pursuant to the provisions of 10 CFR Part 820.24" should be changed to a "determination pursuant to the provisions of 10 CFR Part 820.25."]

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FORM 6: Cover Letter for Order Imposing Civil Monetary Penalty

(Name of Contractor)

(Address)

EA No. _____

Gentlemen:

SUBJECT: ORDER IMPOSING CIVIL MONETARY PENALTY - \$XXX,XXX

(Name of Facility)

This letter refers to your letter dated (date) in response to the Notice of Violation and Proposed Imposition of Civil Penalty(ies) (Notice) sent to you by our letter dated (date). Our letter and Notice describe (state number of violations), identified (state how identified, DOE inspection, assessment or other).

To emphasize (use the same language from the original letter proposing the civil penalty), a civil penalty(ies) of \$XXX,XXX was proposed.

In your response(s) you (state in this area whether contractor admits/denies facts in the Notice and specific requests made by contractor in response).

After consideration of your response(s), we have concluded for the reasons given in the appendix attached to the enclosed Order Imposing Civil Monetary Penalty that (state conclusion). Accordingly, we hereby serve the enclosed Order on (name of contractor) imposing a civil monetary penalty in the amount of \$XXX,XXX. We will review the effectiveness of your corrective actions during subsequent inspections or assessments.

Sincerely,

Director
Enforcement and Investigation Staff
Office of Environment, Safety, and Health

Enclosures:
Order Imposing Civil Monetary Penalty

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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FORM 7: Order Imposing Civil Monetary Penalty

UNITED STATES
DEPARTMENT OF ENERGY

In the Matter of (CONTRACTOR)
for (Facility Name)
EA No. _____

ORDER IMPOSING CIVIL MONETARY PENALTY

I

(Name of contractor) (Contractor) is the organization responsible for the safety at the (DOE facility name) in accordance with Contract No. _____ with the U.S. Department of Energy. This contract authorizes Contractor to (operate) (maintain) (decontaminate) (decommission) (etc.) this facility in accordance with the conditions specified therein.

II

An (inspection) (assessment) of the Contractor's activities was conducted on (or during) (date). The results of this (inspection) (assessment) indicated that the Contractor had not conducted its activities in full compliance with DOE nuclear safety requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty(ies) (Notice) was served upon the Contractor by letter dated (date). The Notice states the nature of the violation(s), the provision(s) of the DOE's nuclear safety requirements that the Contractor had violated, and the amount of the civil penalty(ies) proposed for the violation(s).

The Contractor responded to the Notice dated (date). In its response, the Contractor stated [describe the contractor's arguments].

III

After consideration of the Contractor's response and the statements of fact, explanation, and argument for mitigation contained therein, the DOE staff has determined, as set forth in the Appendix to this Order, that the violation(s) occurred as stated and that the penalty(ies) proposed for the violation(s) designated in the Notice should be imposed.

IV

In view of the foregoing and pursuant to Section 234A of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. §2282a., and 10 CFR Part 820, IT IS HEREBY ORDERED THAT:

The Contractor pay a civil penalty(ies) in the amount of \$XXX,XXX within 30 days of the date of this Order, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and mailed to the Director, Enforcement and Investigation Staff, Attention: Office of the Docketing Clerk, EH-3, CXXI, U.S. Department of Energy, 19901 Germantown Rd., Germantown, MD 20874-1290.

V

The Contractor may request a hearing within 30 days of the date of this Order. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing," Director, Enforcement and Investigation Staff, Attention: Office of the Docketing Clerk, EH-3, CXXI, U.S. Department of Energy, 19901 Germantown Rd., Germantown MD, 20874-1290. Copies also should be sent to the Manager DOE _____ Operations Office, and the DOE Headquarters Cognizant Secretarial Officer responsible for the facility subject to this Order.

If a hearing is requested, the Department will issue an Order designating the time and place of the hearing. If the Contractor fails to request a hearing within 30 days of the date of this Order, the provisions of this Order shall be final without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Contractor requests a hearing as provided above, the issues to be considered at such hearing shall be:

- (a) whether the Contractor was in violation of the Department's nuclear safety requirements as set forth in the Notice references in Section II above, and
- (b) whether, on the basis of such violation, this Order should be sustained.*

FOR THE U. S. DEPARTMENT OF ENERGY

Director
Enforcement and Investigation Staff
Office of Environment, Safety and Health

Dated at (City, State)
this ____ day of (Month) 19(XX)

[Notes: * - For those cases where the Contractor has specifically admitted all the violations, delete (a) and (b) and use the following:

"Whether on the basis of the violations admitted by the Contractor, this Order should be sustained."

For those cases where the Contractor has admitted some of the violations, delete existing (a) and (b) and use the following:

"(a) [reference the violations not admitted], and

"(b) whether, on the basis of such violations and the additional violations set forth in the Notice of Violation that the Contractor admitted, this Order should be sustained."]

APPENDIX D

10 CFR PART 820

ENFORCEMENT POLICY

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

§ 820.62 Criteria.

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

- (a) Would be authorized by law;
- (b) Would not present an undue risk to public health and safety, the environment, or facility workers;
- (c) Would be consistent with the safe operation of a DOE nuclear facility; and
- (d) Involves special circumstances, including the following:

- (1) Application of the requirement in the particular circumstances conflicts with other requirements; or
- (2) Application of the requirement in the particular circumstances would not serve or is not necessary to achieve its underlying purpose, or would result in resource impacts which are not justified by the safety improvements; or
- (3) Application of the requirement would result in a situation significantly different than that contemplated when the requirement was adopted, or that is significantly different from that encountered by others similarly situated; or
- (4) The exemption would result in benefit to human health and safety that compensates for any detriment that may result from the grant of the exemption; or
- (5) Circumstances exist which would justify temporary relief from application of the requirement while taking good faith action to achieve compliance; or
- (6) There is present any other material circumstance not considered when the requirement was adopted for which it would be in the public interest to grant an exemption.

§ 820.63 Procedures.

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

shall maintain a docket for exemption decisions issued pursuant to this subpart.

§ 820.64 Terms and conditions.

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

- (a) Limit its duration;
- (b) Require alternative action;
- (c) Require partial compliance; or
- (d) Establish a schedule for full or partial compliance.

§ 820.65 Implementation plan.

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

§ 820.66 Appeal.

Within fifteen (15) days of the filing of an exemption decision by a Secretarial Officer, the person requesting the exemption may file a Request to Review with the Secretary, or the Secretary may file, *sua sponte*, a Notice of Review. The Request to Review shall state specifically the respects in which the exemption determination is claimed to be erroneous, the grounds of the request, and the relief requested.

§ 820.67 Final order.

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

Subpart F—Criminal Penalties

§ 820.70 Purpose and scope.

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

§ 820.71 Standard.

If a person subject to the Act or the DOE Nuclear Safety Requirements has, by act or omission, knowingly and willfully violated, caused to be violated, attempted to violate, or conspired to

violate any section of the Act or any applicable DOE Nuclear Safety Requirement, the person shall be subject to criminal sanctions under the Act.

§ 820.72 Referral to the Attorney General.

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

Appendix A to Part 820—General Statement of Enforcement Policy

I. Introduction

This policy statement sets forth the general framework through which the U.S. Department of Energy (DOE) will seek to ensure compliance with its enforceable nuclear safety regulations and orders (hereafter collectively referred to as DOE Nuclear Safety Requirements) and, in particular, exercise the civil penalty authority provided to DOE in the Price Anderson Amendments Act of 1988, 42 U.S.C. 2282a (PAAA). The policy set forth herein is applicable to violations of DOE Nuclear Safety Requirements by DOE contractors who are indemnified under the Price Anderson Act, 42 U.S.C. 2210(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to DOE's Nuclear Safety Requirements as specified in the PAAA. It is not intended to establish a "cookbook" approach to the initiation and resolution of situations involving noncompliance with DOE Nuclear Safety Requirements. Rather, DOE intends to consider the particular facts of each noncompliance situation in determining whether enforcement sanctions are appropriate and, if so, the appropriate magnitude of those sanctions. DOE may well deviate from this policy statement when appropriate in the circumstances of particular cases. This policy statement is not applicable to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion.

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

The DOE goal in the compliance arena is to enhance and protect the radiological health and safety of the public and worker at DOE facilities by fostering a culture among both the DOE line organizations and the contractors that activity seeks to attain and sustain compliance with DOE Nuclear Safety Requirements. The enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for

the open and prompt identification and reporting of noncompliances, and the initiation of comprehensive corrective actions to resolve both the noncompliance conditions and the program or process deficiencies that led to noncompliance.

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

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

II. Purpose

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

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

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

- (1) Timely self-identification of nuclear safety deficiencies.
- (2) Prompt and complete reporting of such deficiencies to DOE.
- (3) Root cause analyses of nuclear safety deficiencies.
- (4) Prompt correction of nuclear safety deficiencies in a manner which precludes recurrence, and

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

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

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

III. Statutory Authority

Section 17 of the PAAA makes most DOE contractors covered by the DOE Price-Anderson indemnification system, and their subcontractors and suppliers, subject to civil penalties for violations of applicable DOE nuclear safety rules, regulations and orders. 42 U.S.C. 2282a. Furthermore, Section 18 of

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

IV. Responsibilities

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

V. Procedural Framework

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

Pursuant to 10 CFR § 820.22, the Director initiates the civil penalty process by issuing a Preliminary Notice of Violation and Proposed Civil Penalty (PNOV). The DOE contractor is required to respond in writing to the PNOV, either admitting the violation and waiving its right to contest the proposed civil penalty and paying it, admitting the violation but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty, or denying that the violation has occurred and providing the basis for its belief that the PNOV is incorrect. After evaluation of the DOE contractor's response, the Director of Enforcement may determine that no violation has occurred, that the violation occurred as alleged in the PNOV but that the proposed civil penalty should be remitted in whole or in part, or that the violation occurred as alleged in the PNOV and that the proposed civil penalty is appropriate notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a Final Notice of Violation (FNOV) or an FNOV and Proposed Civil Penalty.

An opportunity to challenge a proposed civil penalty either before an Administrative Law Judge or in a United States District Court is provided in the PAAA. 42 U.S.C. 2282a(c), and 10 CFR part 820 sets forth the procedures associated with an administrative hearing, should the contractor opt for that method of challenging the proposed civil penalty. A formal administrative enforcement proceeding pursuant to section 554 of the Administrative Procedures Act is not

initiated until the DOE contractor against which a civil penalty has been proposed requests an administrative hearing rather than waiving its right to contest the civil penalty and paying it. However, it should be emphasized that DOE encourages the voluntary resolution of a noncompliance situation at any time, either informally prior to the initiation of an administrative proceeding or by consent order after a formal proceeding has begun.

VI. Severity of Violations

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

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

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

The severity level of a violation will be dependent, in part, on the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent or negligent violations will be viewed differently than those in which there is gross negligence, deception or willfulness. In

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

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

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

VII. Enforcement Conferences

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

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

VIII. Enforcement Actions

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

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

Notice of Violation

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

DOE will use the Notice of Violation as the standard method for formalizing the existence of a violation and, in appropriate cases as described in Section VIII, the notice of violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in Section VIII, DOE may refrain from the issuance of an otherwise appropriate Notice of Violation. However, a Notice of Violation will virtually always be issued for willful violations, if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are

no other mitigating circumstances, or if the circumstances otherwise warrant increasing Severity Level III violations to a higher severity level.

DOE contractors are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for noncompliance with DOE Nuclear Safety Requirements. Should a contractor believe that a shortage of funding precludes it from achieving compliance with one or more DOE Nuclear Safety Requirements, it must pursue one of two alternative courses of action. First, it may request, in writing, an exemption from the requirement(s) in question from the appropriate Secretarial Officer (SO), explicitly addressing the criteria for exemptions set forth in 10 CFR 820.62. A justification for continued operation for the period during which the exemption request is being considered should also be submitted. In such a case, the SO must grant or deny the request in writing, explaining the rationale for the decision. Second, if the criteria for approval of an exemption cannot be demonstrated, the contractor, in conjunction with the SO, must take appropriate steps to modify, curtail, suspend or cease the activities which cannot be conducted in compliance with the DOE Nuclear Safety Requirement(s) in question.

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

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

Civil Penalty

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

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

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

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

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

such, subject to a separate civil penalty. Further, as described above in Section VIII, the duration of a violation will be taken into account in determining the appropriate severity level of the base civil penalty.

TABLE 1A—BASE CIVIL PENALTIES

Facility categories	Base civil penalty ¹
Category A reactors (>20 MWth)	\$100,000
Transuranic material production, processing, reprocessing, handling, storage, or waste disposal facilities; device assembly facilities	75,000
Non-Transuranic material, production, processing, reprocessing, handling, storage or waste disposal facilities	50,000
Category B reactors (<20 MWth), including critical facilities ²	10,000
All other nuclear facilities, including those with inventories consisting solely of sealed sources ³	10,000

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

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

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

TABLE 1B.—SEVERITY LEVEL BASE CIVIL PENALTIES

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

Adjustment Factors

DOE's enforcement program is not an end in itself, but a means to achieve compliance with DOE Nuclear Safety Requirements, and civil penalties are not collected to swell the coffers of the United States Treasury, but to emphasize the importance of compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of nuclear safety deficiencies and violations of DOE Nuclear Safety Requirements by the DOE contractors themselves rather than by DOE, and the prompt correction of any deficiencies and violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance

with DOE Nuclear Safety Requirements. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting and prompt correction of nuclear safety-related problems that may constitute, or lead to, violations of DOE Nuclear Safety Requirements before, rather than after, DOE has identified such violations. Thus, DOE contractors will almost always be aware of nuclear safety problems before they are discovered by DOE. Obviously, public and worker health and safety is enhanced if deficiencies are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a deficiency until later on, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of nuclear safety-related problems by DOE contractors has the added benefit of allowing information which could prevent such problems at other facilities in the DOE complex to be shared with all appropriate DOE contractors.

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

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

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

Identification and Reporting

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

Corrective Action To Prevent Recurrence

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to

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

DOE's Contribution to a Violation

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

Exercise of Discretion

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

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

(1) The violation is promptly identified and reported to DOE before DOE learns of it.
(2) The violation is not willful or a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

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

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

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

(1) It was identified by a DOE contractor as a result of a formal effort such as a Safety

System Functional Inspection, Design Reconstitution program, or other program that has a defined scope and timetable which is being aggressively implemented and reported;

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

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

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

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

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

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

(3) It was promptly reported to DOE;

(4) Prompt and appropriate corrective action will be taken, including measures to prevent recurrence; and

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

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

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

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

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

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

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

e. If DOE initiates an enforcement action for a violation at a Severity Level II or III and,

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

It should be emphasized that the preceding paragraphs are solely intended to be examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or Notice of Violation issued when, in DOE's judgment, such action is warranted on the basis of the circumstances of an individual case.

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

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

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

ensuring that contractual and regulatory requirements are met, DOE may also audit or assess subcontractors and suppliers. These assessments could include examination of the quality assurance programs and their implementation by the subcontractors and suppliers through examination of product quality.

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

X. Inaccurate and Incomplete Information

A violation of DOE Nuclear Safety Requirements for failure to provide complete and accurate information to DOE, 10 CFR § 820.11, can result in the full range of enforcement sanctions, depending upon the circumstances of the particular case and consideration of the factors discussed in this section. Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a DOE contractor normally will be categorized based on the guidance in Section VI, "Severity of Violations".

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

oral statement, consideration will be given to such factors as

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

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

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

(d) The formality of the communication;

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

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

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

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

When a DOE contractor has corrected inaccurate or incomplete information, the decision to issue a citation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether DOE or the DOE contractor identified the problem with the communication, and whether DOE relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the DOE

contractor prior to reliance by DOE, or before DOE raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after DOE relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected.

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

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

XI. Secretarial Notification and Consultation

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

- a. Proposals to impose civil penalties in an amount equal to or greater than \$100,000;
- b. Any proposed enforcement action that involves a Severity Level I violation;
- c. Any action the Director believes warrants the Secretary's involvement; or
- d. Any proposed enforcement action on which the Secretary asks to be consulted.

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CONCLUDING MATERIAL

Review Activity:

<u>DOE</u>	<u>Field Offices</u>
DP	AL
EH	CH
EM	ID
NE	NV
NS	OR
RW	RL
ER	SF
AD	SR
FE	Fernald

Preparing Activity:

DOE-EH-31

Project Number:

MISC-0028

National Laboratories

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LLNL
LANL
PNL
Sandia

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Amarillo Area Office
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1. The submitter of this form must complete blocks 1 through 8.
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NOTE: This form may not be used to request copies of documents, nor to request waivers, deviations, or clarification of specification requirements on current contractors. Comments submitted on this form do not constitute or imply authorization to waive any portion of the referenced document(s) or to amend contractual requirements.

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Public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Office of Information Resources Management Policy, Plans and Oversight, Records Management Division, HR-422 - GTN, Paperwork Reduction Project (1910-0900), U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, DC 20585; and to the Office of Management and Budget (OMB) Paperwork Reduction Project (1910-0900), Washington, DC 20503.

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