

## **CHAPTER 4 - ENFORCEMENT ACTIONS**

All PAAA enforcement actions are initiated by the Director. The Director will obtain approvals from other DOE officials as necessary. This chapter provides guidance for the preparation of enforcement actions which are PNOV, FNOV, Consent Orders. Compliance Orders, authorized by 10 CFR 820, Subpart C, 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 should 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**

A PNOV is a finding by DOE that, based on the evidence developed in its investigation, a violation of a nuclear safety rule has occurred. A contractor is entitled to respond to the PNOV either by concurring or acquiescing to its conclusions or by setting forth additional evidence which was not previously presented in the investigation and which could lead to an outcome different from that set forth in the Notice.

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. A 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 (the "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 is apportioned for each violation.

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 DOE and, if applicable, of the contractor's option to request mitigation for any or all of any penalties being proposed.

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

#### **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 the DOE Office of Enforcement and Investigation 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 an enforcement conference was conducted and reference to the 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 (10 CFR 820, Appendix A, Section VIII), 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. 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.
- m. 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 actions, and results of future assessments.
  - n. A statement that the DOE transmittal letter, PNOV, and the contractor's response will be placed on the Office of Enforcement and Investigation's web site.

#### **4.1.3. Settlement with Contractor**

In accordance with 10 CFR 820.23, DOE will consider 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 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. The decision whether to resolve a matter through a Consent Order is solely within the discretion of DOE. A press release will usually be issued advising the public that the matter has been resolved.

##### **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, in coordination with DOE field staff, will review the contractor's response for the adequacy of its corrective actions and request additional information from the contractor if necessary. In determining whether appropriate corrective actions have 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 may be acknowledged, usually within 30 days after its receipt, if appropriate. If there is an admission, however, in general it will be unnecessary to issue an FNOV since the PNOV will become final.

###### *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 will review the contractor's corrective actions in a manner similar to that for cases proposed without civil penalties. The PNOV will become an FNOV without further action. Upon receipt of proof of payment for the civil penalty, the Director 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. No PNOV, 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 will prepare a response to the contractor addressing the contractor's point(s) of contention and the acceptability of its corrective actions. If the contractor's response does not present additional information, then the Director should prepare a brief response addressing the point(s) of contention. Even if the contractor's response does not present new information, if an error in the enforcement action is identified, it should be corrected. 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 may consult with the SO or 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. If appropriate, an FNOV may 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 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. The Director may 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 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 Office of Enforcement and Investigation 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 actions. Even if the contractor's response does not present new information, if an error in the enforcement action is identified, it should be corrected. 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 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.

**c. Denial of Violation**

If there is a denial in full by the contractor that a violation has occurred, the Director 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 4.1.4. below). Pursuant to 10 CFR 820.26, the contractor's sole remedy under circumstances where an FNOV has been issued and a civil penalty imposed is to request an on-the-record adjudication. Section 820.27 requires the contractor to file a written answer to the FNOV and sets forth specific guidance regarding the contents of the answer. The matter will then proceed at the direction of the Presiding Officer appointed by the Secretary.

**4.1.4. Final Notice of Violation**

Upon evaluation of contractor responses and all other relevant evidence, the Director may take one of the following actions, as 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 will be updated based on any new information 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 D provides suggested formats for FNOVs and transmittal letters. These are provided for guidance, and may be modified as appropriate for particular enforcement actions.

It should be noted that issuance of an FNOV in matters in which the facts and penalties are uncontested is completely discretionary since the PNOV will constitute an FNOV under such circumstances.

**4.2. Severity Level**

The DOE Office of Enforcement and Investigation reviews each case being considered for enforcement action on its own merits to ensure that the severity of a violation is characterized at the level best suited to the significance of the particular violation. In some cases, special circumstances may warrant an adjustment to the severity level categorization.

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, 10 CFR 820, Appendix A, provides guidance on the classification of severity level for violations, based largely on such determinations of safety significance and other factors related to the violation. Severity level definitions set forth in Section VI should be used as a starting point by DOE reviewers. A 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, the resulting classification may 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" may be used instead of "penalties" throughout the Notice. In this case, one of the following statements may be considered 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. Severity Level I and II Violations**

Severity Levels I and II are generally reserved for cases involving actual or potential substantial exposures or contamination of workers or the public, or indicate the potential for such cases occurring due to management or programmatic issues. Specific considerations that may raise the severity



level of a violation even in the absence of a significant exposure risk include the following:

- a. prior knowledge that the violation existed but was not corrected;
- b. extended duration of a violation that was readily detectable by normal self-assessment activities;
- c. multiple and/or repetitive examples of a violation evidencing a significant management failure to ensure programmatic implementation of regulatory requirements.

Programmatic deficiencies that could lead to such an adverse safety impact would normally be Severity Level II unless the potential or actual safety consequences to workers or the public warrant Severity Level I. At times a violation leads to an incident of low personnel exposure or minimal potential consequences to workers or the public. If this violation was less significant because of fortuitous circumstances rather than being limited by discrete program controls, the violation would normally be considered a Severity Level II problem.

#### **4.2.3. 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, where appropriate, as an 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 for additional information on exemption relief.)
- 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) of the contractor's corrective actions.**

#### **4.2.4. Severity Level III Violations**

**Section VI of the Enforcement Policy provides that Notices of Violation need not be issued for noncompliance items which are minor variances with nuclear safety requirements. Such discretion is exercised so that DOE can focus its enforcement activities on matters that have greater 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. Further, Severity Level III violations should be considered for contractors which permit recurring noncompliances without taking effective corrective actions. Severity Level III enforcement actions generally should be focused on those issues that the contractor does not address appropriately.**

**DOE may generally refrain from issuing a PNOV (a) if the contractor timely identifies and reports a noncompliance violation; (b) if DOE is satisfied with the root cause analysis and corrective actions; and (c) if the matter does not appear to be of a recurring nature, pose an extreme safety hazard, or have a potential to lead to a more serious event. However, these noncompliances will be monitored to assure appropriate corrective actions are 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.**

**If the actual or potential consequences to workers or the public are minimal, associated noncompliances are generally considered as Severity Level III. Even if direct safety consequences to workers or the public are not readily apparent for each noncompliance, they may be collectively considered a Severity Level III violation if they indicate a programmatic deficiency.**

#### **4.3. Base Civil Penalties**

**In assessing a civil penalty for a violation, the Table in the Enforcement Policy,**

10 CFR 820, Appendix A, should be used to determine the appropriate base civil penalty based on the severity level of the violation.

In addition, general guidance on severity levels is provided in the Enforcement Policy. The Enforcement Policy states that civil penalties are designed to emphasize the need for lasting remedial action, to deter future violations, and to underscore 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. Civil penalties would not normally be proposed for Severity Level III violations, except in circumstances where a civil penalty may be appropriate to demonstrate the importance of adherence to DOE's nuclear safety requirements, or where violations are similar to previous violations for which the contractor did not take effective corrective actions.

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 \$110,000 per violation per day.

#### **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. In addition, civil penalties are normally assessed for all knowing and conscious violations of any nuclear safety requirement, including the information requirements in 10 CFR 820.11. Civil penalties should be considered for Severity Level III violations that are similar to previous violations for which effective corrective actions were not taken.

#### **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 actions for one violation would prevent recurrence of the other violation(s).
  - 2. If corrective actions are 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:

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

#### **4.4. Adjustment of Base Civil Penalty**

After the appropriate base civil penalty is determined for a contractor, the civil penalty adjustment factors outlined in the Enforcement Policy, 10 CFR 820, Appendix A, 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 safety 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 as specified in Table I of the Enforcement Policy. However, in no instance can escalation cause the daily penalty to exceed the \$110,000 per day statutory ceiling per violation. The following subsections should be used in conjunction with the guidance in the Enforcement Policy, 10 CFR 820, Appendix A.

#### **4.4.1. Per-Day Provisions**

The PAAA establishes a maximum civil penalty that can be imposed by DOE of \$110,000 per violation per day.<sup>1</sup> Thus a noncompliance condition that exists for several days could be pursued by DOE as an enforcement action with a base civil penalty substantially above \$110,000. DOE's policy will be to use the Table 1 Severity Level values as the base starting point, and consider multiples of that value based on the number of days that the noncompliance condition existed.

A per day calculation of a civil penalty will normally be considered (a) when the significance of the violations is such that use of a single day base civil penalty is not sufficient to convey the seriousness of the violation or circumstances leading to the violations, and (b) when sufficient opportunities existed to identify the violations. Examples of substantial opportunity to identify the violation include the following: (1) management was aware of the violation and chose not to take appropriate action to remedy the problem; or (2) the violation existed for an extended period as a result of a failure to perform established surveillance, assessment or quality assurance (QA) activities that, if performed as required, would have resulted in timely detection of the problem.

Reduction of up to 50% of the base civil penalty shown in Table 1 may be given when a DOE contractor identifies the violation and promptly reports the violation to DOE. In weighing this factor, consideration will be given to,

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<sup>1</sup>Adjusted for the Federal Civil Penalties Inflation Adjustment Act of 1990, as adjusted by the Debt Collection Improvement Act of 1996, the current maximum civil penalty is \$110,000 per violation per day. See 62 FR 52479 (Nov. 7, 1997).

among other things, (1) whether prior opportunities existed to discover the violation, and if so, the age and number of such opportunities; (2) the extent to which proper contractor controls should have identified or prevented the violation; (3) whether discovery of the violation resulted from a contractor self-monitoring activity; (4) the extent of DOE involvement in discovering the violation or prompting the contractor to identify the violation; and (5) the promptness and completeness of any required report.

DOE will normally not give credit for a contractor's corrective actions if DOE intervention was required to broaden the scope or increase the extent of the corrective actions. Mitigation is not appropriate merely because immediate actions are taken to correct a condition, since basic corrective actions to resolve an identified problem are necessary as a matter of routine. Adequate attention to the broader implications or underlying programmatic deficiencies must also be addressed if such are indicated by the occurrence or recent history.

#### **4.4.2. Multiple Separate Violations**

DOE may cite separately and impose civil penalties for each of the multiple violations in a citation, even if they are related to a single event. Each violation is subject to the statutory limit of \$110,000 per day. This means, for example, that a single event involving a violation of radiological protection requirements, and also involving violation of (QA) requirements, could result in a PNOV citing these violations and include a civil penalty associated with each.

The significance of a particular occurrence and the circumstances of the violations may dictate that DOE identify the multiple violations involved and impose civil penalties for each violation. This action communicates the right emphasis on the significance of the violations and the attention that is required by the contractor to correct the conditions that led to the violations.

A particular violation case is not closed by DOE when a contractor concedes the violation and pays any civil penalty. DOE will keep a violation case open until it has confirmed that appropriate corrective actions have been completed. If corrective actions are not completed in a timely manner, DOE could decide to take further enforcement action, such as escalating the civil penalty contained in the FNOV.

#### **4.4.3. 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. No credit will be given if timely effort to restore compliance with the regulatory requirement is not undertaken.

It should be recognized that a self-disclosing event, in which the event itself discloses problems that represent violations of nuclear safety requirements, does not represent contractor initiative in self-identifying the problems. DOE's priority is for contractor initiative to identify such problems before they lead to events with actual or potential nuclear safety consequences. The disclosure by an event that such problems exist does not constitute self-identification for the purposes of applying enforcement mitigation considerations. DOE's policy on consideration of self-disclosing events is addressed in the Enforcement Policy.

In weighing the factor of mitigation for self-identification and reporting, 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 general, mitigation should not be considered if the report is received after an event that is considered a self-disclosing event.

In addition, if a separate civil penalty is being assessed for a reporting violation, it is not 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 issues a late report of an event. Instead, a separate violation and associated civil penalty should be considered, consistent with the Enforcement Policy.

#### **4.4.4. 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 to remediate a problem. Mitigation is appropriate only when corrective actions are comprehensive in nature rather than being narrowly focused on the noncompliance issue. Generally the contractor would require a clear understanding of the scope of the violation in order for its corrective actions to be considered under this factor. 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. If the base civil penalty is not reduced, the cover letter may include an explanation of 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 actions are 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 is clear that the contractor should have recognized the condition adverse to safety.

#### **4.4.5. 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 835) or QA Programs (see 10 CFR 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 Level(s) I and/or 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 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:

- a. 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.
- b. 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.
- c. 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.

#### **4.4.6. 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 noncompliance is promptly identified by the DOE contractor, prior to some self-disclosing event, and reported into NTS or the contractor's self-tracking system consistent with reporting thresholds. In this case the self-tracking system should be accessible to DOE, and DOE PAAA site personnel should be notified of the report.
  - (2) The violation is not willful, or a violation that could not reasonably have been prevented by the DOE contractor's corrective actions for a previous violation.

- (3) The DOE contractor, upon discovery of the noncompliance, has taken, or has begun to take, prompt and appropriate action to correct the noncompliance.
  - (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.
  - (5) The violation is not a repeat or similar violation to a previous one for which appropriate corrective actions to preclude recurrence should have been taken.
- 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 special comprehensive compliance verification program, design reconstitution program, or other program that has a defined scope and timetable which is being aggressively implemented and reported.
  - (2) Comprehensive corrective actions have been taken or are well underway within a reasonable time following identification.
  - (3) It was not likely to be identified by routine contractor efforts such as normal surveillance, self-monitoring or QA activities.
- c. DOE may reduce the severity level of violations involving Not-For-Profit entities to the extent that they have satisfactorily met the mitigation factors discussed above.

DOE will not issue a Notice of Violation for cases in which the violation discovered by DOE or the DOE contractor cannot reasonably be linked to the conduct of that contractor in the design, construction or operation of the DOE facility involved. This exercise of discretion is conditioned on prompt and appropriate remedial action taken by the DOE contractor upon identification of the past violation. This does not include a past violation where actions by the present contractor should have identified the violation previously (e.g., an inadequate radiological survey by the present contractor that missed the improper storage of contaminated material by a previous contractor.)

#### **4.4.7. Refraining from Issuing a Civil Penalty**

Further discretion is provided DOE in the issuance of civil penalties in the Enforcement Policy. If specified criteria are met (as summarized here), DOE may, when issuing a PNOV, 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 actions 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 actions must be promptly taken. These problems must be the type that would not likely be identified in normal surveillance or QA 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 PNOV as further reasons why a monetary penalty was not imposed.

#### **4.4.8. Ability of Contractor to Pay Civil Penalty**

Although the Table in the Enforcement Policy generally takes 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, unaffected by any award fee determination.

#### **4.5. Administrative Matters**

##### **4.5.1. Assignment of Enforcement Action 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 PNOV. It is a method of administratively docketing and tracking cases. EA numbers are assigned sequentially according to the year of issuance (i.e., EA 93-01, EA 93-02, 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**

- a. For routine enforcement actions, if the Director 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 denying the violation or seeking mitigation of the severity level or civil penalty. Enforcement actions (Severity Levels 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.
- b. 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 the Office of Enforcement and Investigation, the Office of the Assistant Secretary for Environment, Safety and Health should usually be notified prior to the issuance of a PNOV.
- c. If there is a significant delay in prosecuting a violation, the Director should, upon request, prepare a memorandum for the Secretary and/or The Office of the Assistant Secretary for Environment, Safety and Health, as appropriate, to explain the following:
  - (1) The basis for such a delay;
  - (2) The basis for an Office of Enforcement and Investigation decision with a specific focus on what effect, if any, the delay in

making the decision may have on the proposed action. This decision includes consideration of factors such as the following:

- (a) Are the expected benefits to human health and safety and protection of the environment justified by continuing to pursue this action?
- (b) How is the effectiveness of the proposed enforcement action likely to be affected by the delay?
- (c) Should the focus of the action be modified as a result of the delay?
- (d) 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, 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 PNOVs and FNOVs at the discretion of DOE management. After the enforcement action has been signed, the Director 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 the Office of the Assistant Secretary for Environment, Safety and Health, as appropriate. Generally, a press release will not be issued until the contractor has been in receipt of the enforcement action for 48 hours.

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

The Director, 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 a PNOV.

- a. **In general, no information will be released to the public prior to the release of a PNOV.**
  
- b. **Predecisional enforcement information will only be released to the contractor in accordance with the provisions set forth in Section 3.6. above, (1) to permit preparation for an enforcement conference or (2) to ensure that prompt correction actions are taken to obtain compliance. In other circumstances, however, such information should not be made available to the contractor prior to the release of a PNOV. Upon completion of service of a PNOV, the DOE transmittal letter and PNOV will be placed on the Office of Enforcement and Investigation's web site on the Internet.**