U.S. Department of Energy
Office of Enforcement

Enforcement Process Overview

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This version of the Enforcement Process Overview (dated June 2009) supersedes all previous versions. Future revisions will be added, as necessary. Ensure use of the proper version by checking with the Office of Enforcement website at: www.hss.energy.gov/Enforce/***.***

Acronyms and Terms of Reference

ALJ	Administrative Law Judge
CAIRS	Computerized Accident Incident Reporting System
CAP	Corrective Action Plan
CBDPP	Chronic Beryllium Disease Prevention Program
C.F.R.	Code of Federal Regulations
DART	Days Away, Restricted, or Transferred
DNFSB	Defense Nuclear Facilities Safety Board
DOE	Department of Energy
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DSA	Documented Safety Analysis
EA	Enforcement Action
EFCOG	Energy Facility Contractors Group
EGS	Enforcement Guidance Supplement
EOC	Extent of Condition
EPA	Environmental Protection Agency
ES&H	Environment, Safety and Health
FOIA	Freedom of Information Act
FNOV	Final Notice of Violation
GAO	U.S. General Accountability Office
HSS	Office of Health, Safety and Security
HS-40	Office of Enforcement
HS-70	Office of Security Policy
HS-80	Office of Security Technology and Assistance
IA	Independent Assessment
IG	Office of the Inspector General
IMI	Impact Measurement Index
M&IA	Management and Independent Assessments
MA	Management Assessment
NCR	Nonconformance Report
NEA	Nuclear Safety Enforcement Action
NNSA	National Nuclear Security Administration
NOV	Notice of Violation
NRC	Nuclear Regulatory Commission
NTS	Noncompliance Tracking System
OGC	Office of General Counsel
OHA	Office of Hearings and Appeals
ORPS	Occurrence Reporting and Processing System
OSHA	Occupational Safety and Health Administration
OSR	Operational Safety Requirement
PAAA	Price-Anderson Amendments Act
PNOV	Preliminary Notice of Violation
QA	Quality Assurance
QAP	Quality Assurance Program
RAM	Radioactive Material
RCA	Root Cause Analysis
SEA	Security Enforcement Action
SEC	Safety and Ecology Corporation
SRO	Special Report Order
SSIMS	Safeguards and Security Information Management System
SSC	Structures, Systems, and Components
TSR	Technical Safety Requirement
USQ	Unreviewed Safety Question
WEA	Worker Safety Enforcement Action
WSHP	Worker Safety and Health Program

Terms of Reference

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

Compliance Assurance: refers to the set of actions that a contractor should take to ensure that it operates DOE's facilities in a manner that complies with applicable requirements.

De Minimis Violations: a violation is considered *de minimis* if the condition has no direct or immediate impact to worker safety and health.

Enforcement Action: refers to a PNOV, FNOV, Consent Order, or Compliance Order and does not include an Enforcement Letter or a Special Report Order.

Enforcement Coordinator: refers to the DOE and/or contractor personnel assigned to serve as the principal interface in an organization for issues related to rule implementation, noncompliances, and enforcement proceedings.

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

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

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

Repetitive problems: generally surround two or more different events that involve substantially similar conditions, locations, equipment, or individuals.

I. Purpose and Applicability

This Enforcement Process Overview (EPO) sets forth the processes used by the Department of Energy (DOE) Office of Enforcement (HS-40), within the Office of Health, Safety, and Security (HSS), to implement its regulatory obligations as authorized by the Atomic Energy Act. The Office of Enforcement promotes continuous overall improvement in the areas of worker safety and health, nuclear safety, and classified information security through programs enforced by the following subordinate offices:

- The Office of Worker Safety and Health Enforcement implements DOE's congressionally mandated worker safety and health enforcement program in accordance with 10 C.F.R. Part 851.

- The Office of Price-Anderson Enforcement implements DOE's congressionally mandated nuclear safety enforcement program in accordance with 10 C.F.R. Part 820.

- The Office of Security Enforcement implements DOE's congressionally mandated security enforcement program in accordance with 10 C.F.R. Part 824.

The main body of this EPO provides the common approach to enforcement activities utilized by the Office of Enforcement. Responsibilities of other Departmental offices and Federal agencies in the enforcement process are also briefly discussed. Appendices A, B, and C provide supplemental information on the unique elements inherent in the three enforcement programs. Appendices D and E provide supplemental information about program reviews and contractor self-assessment processes, respectively.

Statutory Authority and Regulatory Framework

The Atomic Energy Act provides indemnification[1] to DOE contractors who manage and operate nuclear facilities in the DOE complex. In 1988, the Price-Anderson Amendments Act (PAAA) was signed into law to continue this indemnification. The PAAA subjects DOE-indemnified contractors, subcontractors, and suppliers to potential civil penalties for violations of DOE rules, regulations, and compliance orders relating to nuclear safety requirements. As part of its agreement to continue the indemnification coverage, Congress mandated that DOE enforce nuclear safety requirements to minimize the risk to workers and the public. On August 17, 1993, DOE published its nuclear safety enforcement procedural rules and enforcement policy (10 C.F.R. Part 820, Appendix A, *General Statement of Enforcement Policy*), which was further amended on September 2, 1997, March 22, 2000, and June 8, 2007. The Office of Enforcement has the responsibility to carry out the statutory enforcement authority provided to DOE in the PAAA.

The Bob Stump National Defense Authorization Act for Fiscal Year 2003 extended previously-approved

[1] By indemnifying the contractor, the government acts as an insurer against any findings of liability arising from the nuclear activities of the contractor within the scope of its contract.

indemnification levels until December 31, 2004, and required DOE to promulgate a final rule to enforce Occupational Safety and Health requirements. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 extended indemnification until December 2006. The Energy Policy Act of 2005 extended indemnification of DOE contractors until December 2025, increased liability coverage to $10 billion per incident, and repealed remission of civil penalties for nonprofit organizations upon the signing of a new contract.

On January 26, 2005, DOE published 10 C.F.R. Part 824 to implement Section 234B of the Atomic Energy Act. Section 234B stipulates that a DOE contractor or subcontractor who violates any rule, regulation, or order relating to the safeguarding or security of Restricted Data and/or other classified or sensitive information shall be subject to a civil penalty. In publishing 10 C.F.R. Part 824, DOE decided that civil penalties will be assessed only for violations of requirements for the protection of classified information (Restricted Data, Formerly Restricted Data, and National Security Information).

On February 9, 2006, DOE issued the *Worker Safety and Health Program* rule, 10 C.F.R. Part 851, which includes, in Subpart E, the enforcement process to be applied to worker safety and health violations, and, in Appendix B, the enforcement policy for such violations. Part 851 went into effect on February 9, 2007, and as of May 25, 2007, no work could be performed at a covered workplace unless an approved worker safety and health program was in place.

Title 10 C.F.R. Parts 820, 824, and 851 govern enforcement activities against DOE prime contractors, subcontractors, and suppliers. These entities will be held responsible for the acts of their employees who fail to observe nuclear safety, worker safety and health, and classified information security requirements.

Document Control and Supplemental Enforcement Guidance

The Office of Enforcement will clarify or supplement the Overview's guidance and procedures, as needed, by issuing revisions. Timely notification of such updates will be forwarded to DOE and contractor enforcement coordinators[2] at each site and will be included on the HSS Office of Enforcement website.

The Overview supersedes all previous versions and the following previously issued HS-40 guidance:

- *DOE Enforcement Program Roles and Responsibilities Guidance Handbook* (DOE-HDBK-1085-95)
- *Identifying, Reporting, and Tracking Nuclear Safety Noncompliances* (Operational Procedure, June 1988)
- *Enforcement of DOE Nuclear Safety Requirements under Price-Anderson Amendments Act of 1988* (Operational Procedure, June 1988)

[2] The term "enforcement coordinator" replaces the previously-used term "PAAA coordinator."

- *Implementation Guidance, Enforcement of DOE Classified Information Security Requirements Under Title 10, Code of Federal Regulations, Part 824* (Implementation Guidance, March 2006, Updated April 2007)

The EPO also includes general information from *Enforcement Guidance Supplements* (EGSs) issued by the Enforcement Program since its inception.

For reference, previous versions of the EPO and other historical guidance documents remain available at the Office of Enforcement website www.hss.energy.gov/Enforce/.

Application of Enforcement Program to Subcontractors and Suppliers

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

In the worker safety and health and classified information security areas, Parts 851 and 824 apply directly to DOE contractors, as well as to their subcontractors that have responsibilities for performing work at a DOE site in furtherance of a DOE mission, subject to certain exclusions. DOE may issue an NOV to a contractor or subcontractor for violation of a Part 851 or Part 824 requirement (reference 10 C.F.R. sections 851.5(a) and 824.2(a), respectively). Part 851 permits the imposition of a civil penalty or contract fee reduction for an indemnified contractor, including any associated subcontractor, with certain limitations as specified in the Rule. Part 824 permits the imposition of both a civil penalty and a contract fee reduction for contractors or subcontractors.

National Nuclear Security Administration (NNSA) Contractors and Facilities

Under 10 C.F.R. sections 820.13 (nuclear safety), 824.16 (classified information security), and 851.45 (worker safety and health), the NNSA Administrator, rather than the Director of the Office of Enforcement, issues subpoenas and notices of violation to contractors that manage and operate NNSA facilities. The NNSA Administrator acts after consideration of a recommendation from the Director of the Office of Enforcement.

Exemption/Deviation/Variance Requests

Upon contractor request, DOE may grant exemptions from nuclear safety regulations, deviations from classified

information security directives, and variances from Part 851 requirements.

The criteria and procedures for exemption relief from nuclear safety requirements are set forth in 10 C.F.R. Part 820, Subpart E and DOE Standard 1083-95, *Requesting and Granting Exemptions to Nuclear Safety Rules.* Exemptions are granted by the appropriate Secretarial Officer who is primarily responsible for the activity from which relief is requested.

Requests for deviations from classified information security requirements must comply with DOE Manual 470.4-1. Authority to grant a deviation is shared among the Office of Security Policy (HS-70), the local DOE site, and the cognizant program office. The approval process and format for deviation requests are discussed in DOE Manual 470.4-1.

Title 10 C.F.R. sections 851.30 through 851.34 establish a variance process for worker safety and health rules. Under section 851.30(a), the Under Secretary has the authority to grant variances after consideration of a recommendation from DOE's Chief Health, Safety and Security Officer.

Interpretation, Rulemaking, and Informal Information Requests

Interpretations of nuclear safety or worker safety and health regulations to a particular set of facts are issued by DOE's Office of General Counsel (OGC), as required by 10 C.F.R. sections 820.51 and 851.7.

Section 851.6 allows contractors to file a petition to initiate generally applicable rulemaking to amend any Part 851 worker safety and health requirement.

Instead of applying for a binding interpretative ruling, section 851.8 provides for contractor submission of an informal request for information on how to comply with Part 851. Requests concerning technical requirements must be submitted to HSS. Information regarding the general statement of enforcement policy in the Part 851 appendix should be directed to the Office of Enforcement.

DOE responses to informal requests under section 851.8 are advisory and therefore not binding on the Department. Enforcement actions for Part 851 violations are not precluded by a Department response to these requests.

II. Enforcement Philosophy

The Office of Enforcement's goal is to improve nuclear safety for workers and the public, occupational safety and health for workers, and the protection of classified information at DOE facilities.

The DOE enforcement program is a civil enforcement process that focuses on the performance of contractor organizations as it relates to compliance with nuclear safety, classified information security, and worker safety and health rules.

The Office of Enforcement does not issue EAs against individual contractor employees. If HS-40 becomes aware of the possibility of criminal behavior through any of its activities, the issue will be referred to the U.S. Department of Justice (DOJ), as further described in Chapter VII.

The Office of Enforcement's enforcement philosophy is to encourage early identification and self-reporting and prompt correction of deficiencies and violations of nuclear safety, classified information security, and worker safety and health requirements. DOE contractors are in the best position to identify and promptly correct noncompliances. Early identification, self-reporting, and prompt correction of deficiencies and violations by contractors are preferable to their identification by DOE (e.g., during line management or Independent Oversight reviews) or through an accident or event.

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

- Promoting management and compliance assurance attributes so that contractors can achieve excellence in safety and security without the need for EAs. Such attributes include rigorous self-assessment programs, positive safety and security cultures, and sustainable and effective corrective action processes.
- Promoting timely self-identification and correction of noncompliance conditions based upon underlying problems affecting compliance.
- Driving a continuous improvement focus, rather than acceptance of the status quo.
- Stimulating contractors' transition from a reactive, event-driven approach to identifying and correcting deficiencies toward a proactive, non-event-driven culture of critical self-evaluation and continuous improvement.
- Selectively issuing NOVs for significant safety or security noncompliances or significant precursor conditions, including repetitive or programmatic issues, near-misses, willful action, and worker retaliation.
- Periodically reviewing contractor screening and reporting processes by means of program reviews – including integrated program reviews (IPRs) – or focused inspections.

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

This EPO describes factors that HS-40 considers in judging positive steps taken by contractors, as well as the factors affecting the application of enforcement sanctions. If EAs are considered necessary, they are applied in accordance with the provisions of the enforcement policies noted in Chapter I, Purpose and Applicability.

III. Roles and Responsibilities

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

Background: The overall structure of the DOE enforcement program includes roles and responsibilities for HS-40, DOE line management, and contractors, which include:

- The Director, Office of Enforcement, within HSS, has program responsibility for the DOE enforcement program. To maintain effective interface, HS-40 works closely with DOE program, Field Element, and contractor management, primarily through enforcement coordinators.
- DOE program and Field Element managers have line management responsibility for safety and security and designate enforcement coordinators to serve as the principal interface with HS-40 and contractors on all enforcement matters.
- Contractor management is responsible for implementing DOE requirements and designating enforcement coordinators, who serve as the principal interface with the corresponding Field Element enforcement coordinator and HS-40. Enforcement coordinators serve as the principal lead in the contractor organization for issues related to Rule implementation, identification and reporting of noncompliances, and enforcement proceedings.

Director, Office of Enforcement

The Director manages all enforcement activities, directs the technical and legal reviews, supervises investigations, prepares EAs, and is responsible for the administrative litigation of contested EAs, issuance of consent orders, and referral of potential criminal actions to the DOJ and, in the case of waste, fraud, or abuse, to the Office of the Inspector General (IG).[3] The Director is authorized to issue enforcement correspondence and EAs, except for EAs involving NNSA facilities that require the signature of the Administrator, based upon the recommendation of the Director, Office of Enforcement.[4] The Director regularly communicates, to senior DOE and contractor management, the state of the enforcement program and observations on safety and security compliance issues. The Director also provides guidance and a familiarization training workshop for implementation of the DOE enforcement program.

[3] As necessary, the Deputy Director will assist the Director in the performance of enforcement program responsibilities and may serve as an alternate to the Director.

[4] If the Administrator disagrees with any aspect of a recommended EA, and the disagreement cannot be resolved, the matter may be referred to the Deputy Secretary of Energy for resolution.

Office of Enforcement Staff

Staff members:

- Review and evaluate information on noncompliances, including information reported to the Noncompliance Tracking System (NTS) and the Safeguards and Security Information Management System (SSIMS).
- Identify significant noncompliance conditions and recommend investigation, focused inspection, and/or NOV issuance.
- Conduct investigations or inspections associated with potential violations of DOE safety and security requirements, and prepare reports and/or technical evaluations.
- Participate in enforcement conferences and may chair the enforcement conference in the absence of the Director.
- Provide recommendations during post-conference, DOE-only discussions and deliberations.
- Inform DOE personnel of their obligation to maintain confidentiality on the details of planned EAs and communications until issuance of the action.
- Prepare all recommended EAs, including NOVs and transmittal letters to the contractor, as well as press releases.
- Prepare enforcement letters for precursor conditions that need attention but do not necessitate the issuance of an NOV.
- Conduct program reviews of noncompliance screening and reporting processes as well as selective compliance issues, and prepare summary reports for the Director's signature.
- Maintain the NTS.
- Maintain docket files and retrieval system for: all EAs; enforcement letters; exemptions to nuclear safety requirements issued pursuant to Part 820, Subpart E; and variances to worker safety and health requirements issued pursuant to Part 851, Subpart D.
- Conduct periodic familiarization training workshops (including introductory DOE enforcement program training for new DOE and contractor enforcement coordinators) and refresher training for DOE enforcement coordinators.
- Share information and guidance on EAs, lessons learned, compliance issues, and other program details through various mechanisms, including the Office of Enforcement website, updates to this EPO, coordinator conference calls, presentations at Energy Facility Contractors Group (EFCOG) sessions, and meetings with senior DOE and contractor managers.
- Prepare an annual report summarizing enforcement program activities and planned activities and initiatives for the coming year.

DOE and Contractor Management

For effective coordination and to ensure that DOE achieves a high level of safety and security performance, senior DOE

and contractor management must take on critical enabling roles, to include:

- Ensuring that safety and security are rigorously pursued in concert with program mission objectives and schedules.
- Demonstrating emphasis on safety and security compliance and performance, positive safety and security cultures, and an ethic of continuous improvement, as well as facilitating the transition from event-driven to a non-event-driven environment.
- Demonstrating strong support for the noncompliance screening and reporting process, assessment programs, and the corrective action process.
- Considering the regulatory screening and reporting program an integral part of the safety and security management programs and not "check the box" exercises.
- Placing the enforcement coordinator at a senior reporting level, demonstrating management commitment to the program, and providing access to senior management.
- Maintaining regular and open communication with the contractor, Program Office, and HS-40 on safety and security, noncompliance conditions, and noncompliance report resolution.

There are also critical enabling roles specific to each management group. For DOE Field Element senior management, it is important that staff be assigned to provide support to and participate in HS-40 investigations or reviews.

Contractor senior management also has the following critical enabling roles:

- Delegating authority to safety and security managers and the enforcement coordinator, and ensuring that clear roles for and responsibilities of the coordinator are defined.
- Driving the organization toward a centralized issues management system utilized as an action-forcing mechanism for sustainable and effective corrective actions.
- Driving the organization to achieve a level of performance sufficient to ensure that few programmatic or significant safety and security problems are disclosed by events (i.e., most are prevented through effective contractor performance self-assessment activities).

DOE Enforcement Coordinator

A key step toward facilitating improved performance, enhancing compliance with safety and security requirements, and interfacing with HS-40 is the designation of a point of contact from each DOE organization. Each DOE organization with responsibility for management or oversight of activities that come under the DOE safety and security rules should identify an enforcement coordinator. Roles and responsibilities include:

- Being knowledgeable of safety and security requirements and the enforcement process.
- Maintaining a broad understanding of the activities and operations undertaken by their contractor/organization.
- Acting as the focal point to promote effective communications within DOE and the contractor on DOE regulatory compliance matters.
- Identifying and openly communicating concerns and adverse trends to senior DOE and contractor management.
- Ensuring that Federal managers have a working knowledge of the DOE regulatory compliance program.
- Being knowledgeable of reporting thresholds with a keen sensitivity to identify programmatic issues, negative trends, and repetitive issues.
- Collecting information or coordinating with personnel to provide information and collaborate with HS-40 in evaluating noncompliances reported into the NTS and SSIMS.
- Coordinating the identification of DOE and contractor personnel for technical support to bring an issue to closure.
- Coordinating a periodic review of noncompliances tracked locally by the contractor.
- Conducting routine oversight of the contractor's program for identifying, screening, trending, reporting, correcting and closing noncompliances.
- Communicating to HS-40 any noncompliances that appear to be above the NTS reporting thresholds but that the contractor declined to report into NTS.
- Verifying the proper and timely completion of corrective actions (with the assistance of Facility Representatives and subject matter experts) for NTS and (with the assistance of designated security professionals) for SSIMS.
- Reviewing contractor effectiveness reviews performed for NTS reported noncompliances and ensuring appropriate follow-up actions.
- Entering verification/validation results into NTS and SSIMS with clear recommendations for closure.
- Providing input, with their DOE management, to the enforcement process (e.g., for preliminary investigation strategy discussions, enforcement conferences, and post-conference deliberations) and framing any NOV.
- Participating in dialogues between DOE and the contractor in any investigation or compliance review to ensure that the facts and technical issues surrounding the noncompliance are understood and the impacts on safety and security are considered.
- Maintaining regular communications and sharing lessons-learned among the DOE coordinators at their

respective site offices (DOE Program or Site Office Coordinator).

Contractor Enforcement Coordinator

The contractor enforcement coordinator is pivotal in driving improved safety and security performance. As the primary interface with HS-40 and with support from senior management, the coordinator can positively influence the organization's attention to and assurance of compliance with requirements. To achieve these benefits, each contractor organization should formally designate a contractor enforcement coordinator. Desired roles and responsibilities include:

- Being knowledgeable of the general safety and security requirements and the enforcement process. In some organizations, it may be appropriate to designate information security, nuclear safety, and worker safety and health leads to support the enforcement coordinator.
- Maintaining a broad understanding of the activities and operations undertaken by their contractor/organization.
- Serving as the focal point for issues related to Rule implementation and compliance, and championing excellence in the organization's compliance assurance and continuous improvement efforts.
- Through broad awareness of safety and security issues and performance across the organization, identifying and reporting to management areas of weakness or systemic problems not otherwise recognized by the organization.
- Maintaining a "questioning attitude" about nuclear safety, worker safety and health, and classified information security issues.
- Ensuring that contractor managers have a working knowledge of the DOE regulatory compliance program.
- Monitoring contractor compliance assurance program effectiveness and progress in moving toward a culture of critical self-evaluation and continuous improvement-focused organization.
- Managing or overseeing screening of problems, issues, findings, and conditions to identify noncompliances.
- Ensuring timely screening of a broad set of issues from a variety of sources (i.e., events, performance assessment reports, nonconformance reports, radiological assessment reports, SSIMS reports, inspections, and audits) for potential regulatory noncompliance.
- Being knowledgeable of reporting thresholds with a keen sensitivity to identify programmatic issues, negative trends, and repetitive issues.
- Regularly performing, or ensuring regular performance of, assessments to evaluate

implementation of the contractor's processes for screening and NTS, SSIMS[5], and internal reporting.

- Ensuring proper and timely reporting of noncompliances into NTS, SSIMS[6], and local tracking systems.
- Ensuring validation of NTS and SSIMS corrective actions prior to closure; verifying that corrective actions address the causes, are comprehensive, and have been completed; and marking NTS and SSIMS reports as "complete" only when all actions have been validated.
- Ensuring that comprehensive effectiveness reviews are conducted for NTS and SSIMS issues when corrective actions have been completed.
- Facilitating coordination and scheduling of responses to HS-40 requests for information, onsite investigations, enforcement conferences, focused inspections, and investigations.
- Actively participating in the dialogue between DOE and the contractor in any investigation, focused inspection, or compliance review to ensure that the facts and technical issues surrounding the noncompliance are understood, and that the actual or potential adverse impact on safety and security is considered.
- Maintaining an awareness of EAs and enforcement issues at other sites in the DOE complex, with appropriate follow-up to ensure that similar issues do not exist at the coordinator's own site.
- Regularly informing senior management of compliance issues, safety and security performance issues, EAs elsewhere in the DOE complex, and the status of the regulatory screening and reporting program.

[5] DOE Form 470.8, *Survey/Inspection Report Form,* may be used to report assessment results in SSIMS.
[6] Includes mandatory SSIMS reporting in accordance with DOE Manual 470.4-1, Section N, *Incidents of Security Concern*.

IV. Contractor Compliance Assurance and Reporting

Contractor Compliance Assurance

When the Office of Enforcement reviews or investigates noncompliance conditions, breakdowns may be found in the processes that the contractors use to ensure compliance. The Office of Enforcement typically notes these deficiencies in an NOV, enforcement letter, or program review report.

DOE's rules for nuclear safety, worker safety and health, and classified information security are structured to place responsibility for compliance on contractors. DOE's enforcement policies use the terminology of "compliance assurance" to refer collectively to the set of actions that a contractor should take to ensure the safe and secure operation of DOE facilities. For additional information, review DOE Order 226.1A, *Implementation of DOE Oversight Policy*.

Key attributes of top industry performers who assure compliance with governing safety and security requirements include:

- Designated key senior managers are responsible for and have the authority to set institutional requirements and provide oversight of implementation.
- A principal regulatory compliance officer serves as the institutional expert and interface on regulatory matters. For DOE safety and security rules, this officer is typically the enforcement coordinator.
- Comprehensive steps are taken to ensure that requirements are fully understood and effectively implemented down to the facility, process, and activity levels.
- Sound plans and procedures describe the policy-level requirements for the program within the organization.
- There is a strong focus on continuous improvement, including benchmarking against other contractors and adopting best practices to improve compliance.
- Comprehensive management and independent assessments (M&IAs) are effective in identifying deficiencies and broader problems as well as opportunities for continuous improvement.
- Critiques of performance by outside parties and peers are actively solicited.
- Rigorous problem resolution processes are in place to manage issue prioritization, assign responsibility, evaluate and determine causes, identify adverse trends and dominant issues, determine the extent of condition, develop corrective actions, track completion of corrective actions, and review the effectiveness of actions taken.
- Performance metrics and monitoring of trends are established to evaluate performance and compliance, and care is taken to assure that statistics are used appropriately and that incident reporting is encouraged and incentivized.

Additional critical roles and responsibilities that are crucial to accomplishing compliance assurance and sound performance are summarized in Chapter III, Roles and Responsibilities.

Contractor Screening Processes

DOE's goal is for contractors to implement safety and security requirements without noncompliance conditions. However, contractors should also focus on the identification and correction of any noncompliances to ensure continuous improvement. DOE's enforcement philosophy, as noted in Chapter II, encourages this goal by providing positive incentives for contractors to critically self-assess their activities and identify, report, and comprehensively correct noncompliance conditions in a timely manner.

DOE promotes a voluntary contractor process for screening problems and deficiencies to determine whether issues represent noncompliance conditions which are then self-reported into the NTS or SSIMS. The incentives for voluntary action are described in Chapter VIII, Civil Penalty Assessment. DOE considers prompt contractor identification, reporting, and effective correction of noncompliances in deciding whether to issue an NOV and/or to mitigate penalties. The desired attributes of the contractor screening and reporting processes are described below, along with commonly observed weaknesses in these processes.

Noncompliance Identification

Rigorous assessment processes, effective trending and evaluation of historical data, worker and management attentiveness, and technical inquisitiveness are the preferred primary means of identifying problems, some of which will represent noncompliance conditions. DOE intends for issues to be discovered through proactive means—preferably before an event occurs. If issues are not found in a timely manner, DOE's goal and expectation is for the problem to be found through an assessment activity or by worker attentiveness before it results in an adverse event. Obviously, the least desirable case is disclosure of a problem through an investigation, survey, or evaluation following an adverse event. When significant events occur, HS-40's expectation is that the contractor will undertake an appropriate level of investigation, causal analysis, extent-of-condition review, and aggressive corrective action in an expeditious manner to prevent recurrence of the event.

To meet these expectations, contractor efforts need to focus first on implementation of requirements, effective assessment processes, and establishment of a positive safety and security culture in which individuals can raise questions and report potential problems to management without fear of harassment, intimidation, or retaliation.

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

- Contractor assessments: Problems may be identified during internal M&IAs or self-assessments.

- Internal review processes: These include receipt inspection, maintenance and surveillance activities, and subcontractor and supplier surveillances.
- Worker identification: In an organization that promotes compliance and safety-consciousness, when workers observe abnormal conditions or potential deficiencies, they report them through a defined process. Ultimately, these observations should be reported to management and entered into the appropriate problem resolution process.
- External assessments: Problems may be identified during the course of external assessments, surveillances, inspections, and visits conducted by the DOE Office of Independent Oversight; DOE IG; DOE Field, Site, Program, or Operations Office; HSS Voluntary Protection Program; Defense Nuclear Facilities Safety Board (DNFSB); or state and Federal agencies, including the Environmental Protection Agency (EPA), Department of Transportation (DOT), or U.S. Government Accountability Office (GAO). Note: If the contractor has an effective internal assessment program, only a minimal number of problems should remain to be identified through these mechanisms. The goal should be that outside organizations never reveal a significant safety or security issue that the contractor organization does not already know and is not already addressing.
- Data review: Trending and evaluation of operational data and issues management databases are used to identify adverse trends, dominant problem areas, and potential repetitive events or conditions.
- Employee concerns: An additional source for the identification of problems may be concerns reported into an employee concerns program.
- Event-related: Problems may be identified during the internal investigation of an undesirable event, such as those reflected in the Occurrence Reporting and Processing System (ORPS) or a Security Incident Notification Report (DOE Form 471.1).

The processes noted above may identify problems ranging from serious events with corresponding underlying programmatic problems and noncompliances, to relatively minor issues that may need attention but do not represent noncompliances. To determine which are noncompliances and what reporting is appropriate, contractors need to have effective processes for screening the problems. Such screening processes should be under the purview of the contractor's enforcement coordinator, be governed by one or more formal procedures, and receive input from a broad range of noncompliance identification mechanisms. Sources of issues to be screened for noncompliances include:

- Internal M&IA findings
- External assessment findings
- Internal issues management or deficiency reporting system
- Nonconformance reports
- Radiological event or radiological deficiency reports
- Injury reports

- Computerized Accident/Incident Reporting System (CAIRS)
- Occupational Safety and Health Administration (OSHA) 300 logs
- ORPS reports
- Operating logs (for issues involved in non-ORPS events)
- Protective Force Daily Event Logs
- Security Incident Notification and Inquiry Reports
- SSIMS reports
- Security inspection, survey, self-assessment, and special reports
- Employee concerns
- Subcontractor deficiency resolution processes analogous to those listed above.

Common Deficiencies in the Contractor Screening Process

Historically, HS-40 has observed a number of common weaknesses or errors in processes for screening deficiencies for potential noncompliance conditions. Although contractors should structure their processes to meet *all* of the objectives and guidance in this chapter, the following common weaknesses or errors should be considered as lessons learned that warrant particular management attention:

- Failure to consider all appropriate sources for screening (assessment reports, etc.).
- Screening out issues because they were corrected promptly.
- Screening out issues that are noncompliant with requirements, but are judged to be of low significance.
- Establishing criteria that are not stipulated in the Rule, with the effect of limiting the applicability of the Rule; for example, treating as noncompliances *only* matters covered specifically in the safety basis, or *only* violations of work controls in work involving direct handling of nuclear material, or *only* violations of procedures specifically listed in Rule-required program plans.

Further examples are contained within the program-specific appendices of this document and in program review reports available on the Office of Enforcement website.

NTS and SSIMS Reporting

The Office of Enforcement has discretion in pursuing EAs for many conditions that are contractor-identified, are promptly and properly reported to DOE, and receive prompt and effective corrective actions. Processes have been established for direct reporting to DOE of noncompliance conditions that are potentially more significant and require closer monitoring by HS-40 and contractor enforcement coordinators. Such conditions may include certain events or issues in ORPS.

DOE's centralized, web-based systems allow contractors to report promptly any noncompliances that meet DOE's established reporting thresholds. NTS and SSIMS are the automated systems used for reporting noncompliances directly to DOE. NTS is used for reporting nuclear safety and worker safety and health noncompliances, and SSIMS is used for classified information security noncompliances. Appendices A, B, and C provide additional information about program-specific reporting for each of the three enforcement areas, including information about reporting thresholds. Identified noncompliances that do not meet the reporting thresholds should be reported into a contractor's internal issues tracking system and trended to identify potential recurring or programmatic issues.

Access to NTS and SSIMS is limited to authorized users, and training and support are available. The contractor's enforcement coordinator initially approves contractor employee access to the NTS. DOE provides formal authorization to access the NTS in accordance with information at: www.hss.energy.gov/Enforce/nts.html. NTS provides on-line "Help" to guide and train users in use of the system.

SSIMS is a classified system, and access is limited to authorized users. SSIMS training and system security assistance are available from the HSS Office of Security Technology and Assistance (HS-80).

The Office of Enforcement takes steps to improve interfaces between the NTS and other DOE data-reporting processes for sharing common data, where possible. Changes or improvements in this area are addressed on the NTS web page and through the system's on-line "Help" functions. The NTS web page is located at: https://nts.eh.doe.gov.

Reporting a Programmatic or Repetitive Nuclear Safety or Worker Safety and Health Noncompliance

DOE expects programmatic or repetitive noncompliances to be reported. A programmatic problem is typically discovered through a review of multiple events or conditions with a common cause, but may also be found through causal analysis of a single event. A programmatic problem generally involves some weakness in administrative or management controls, or their implementation, to such a degree that a broader management or process control problem exists. When management determines that a problem or series of events or conditions dictates the need for broad corrective actions to improve management or process controls, management has concluded that the problem is programmatic.

Repetitive problems are generally two or more different events that involve substantially similar conditions, locations, equipment, or individuals. These tend to be narrower in scope than a programmatic problem, and it is reasonable to assume that they should have been prevented by a contractor's corrective actions for a previous noncompliance condition. Repetitive problems typically involve similar circumstances or root causes, separated by a period of time that suggests the possibility of a common solution.

Programmatic or repetitive problems should not be considered only when NTS reporting is required. DOE's expectations for safety and security management and quality

improvement processes dictate that when a problem arises, consideration is given to the potential scope of the problem. Further, assessment and trending activities should be in place to identify potential programmatic and repetitive problems in a timely manner. Enforcement coordinators' database reviews may provide an additional avenue for identifying programmatic and repetitive noncompliance conditions. Programmatic or repetitive deficiencies identified through such processes are normally placed in a corrective action management process, and then go through the screening process to identify any noncompliances.

Reporting an Intentional Nuclear Safety or Worker Safety and Health Noncompliance or Misrepresentation

DOE expects any intentional noncompliance involving nuclear safety or worker safety and health rules to be reported. An intentional or willful noncompliance may involve records that are falsified intentionally, such as indicating that work or surveys occurred in circumstances in which the worker knows that such an activity did not occur. The determination that a record is false, based on additional evidence that the work did not occur, provides the basis for categorizing the condition as an intentional noncompliance or misrepresentation that should be reported into the NTS. An NTS report is warranted, irrespective of the significance of the activity involving a false record; the act of falsifying the record and providing inaccurate information is serious and warrants significant DOE and contractor management attention.

As another example, an intentional noncompliance may involve a case in which a worker is warned by a co-worker that a certain contemplated action would violate requirements, and then proceeds to take the action anyway. The co-worker's reporting of the incident becomes the evidence that the noncompliance was intentional.

HS-40 expects that a matter should be treated as an intentional noncompliance and reported into the NTS whenever there is evidence indicating that the noncompliance was intentional or willful. The determination of intention requires careful consideration. Failure of a worker to perform a required action, for example, is not necessarily evidence of negligence or an intentional disregard of requirements. Such a failure could result for many reasons (e.g., a lapse in recalling the training. or inadequate training) and does not necessarily indicate an intentional disregard of safety or security requirements. A noncompliance should be reported as intentional or willful only if there is supporting evidence that the individual intentionally or negligently falsely reported or otherwise disregarded requirements.

Reporting a Worker Retaliation

HS-40 has added an explicit NTS reporting noncompliance category that addresses reporting of retaliations against workers who raise nuclear or worker safety and health concerns. Worker retaliations were previously considered a "willful" violation under NTS reporting threshold categories.

HS-40 has received several inquiries about reporting a worker retaliation. Questions raised include the appropriate time to report, whether reporting may undermine a contractor's defense if the contractor challenges the worker's

allegation of a safety noncompliance, and whether an allegation of reprisal must be filed in accordance with 10 C.F.R. Part 708 procedures for a retaliation to have occurred.

Although the specific details associated with a noncompliance must be considered while evaluating reportability, HS-40 is providing the following general guidance for reporting worker retaliation:

- The standard NTS reporting requirement – reporting within 20 days of the date of noncompliance determination – also applies to retaliation issues. In such cases, the nuclear safety or worker safety and health nexus is typically clear, and the issue is when the retaliation is "determined". For NTS reporting purposes, "determination" refers to the date when an authoritative body makes an initial decision that retaliation has occurred. The authoritative body can be either the contractor's employee concerns program or similar avenue, following an investigation into the matter, or an outside agency, such as the DOE Office of Hearings and Appeals (OHA) or the Department of Labor (DOL). Although a contractor may disagree with an initial determination, these decisions are authoritative in nature. Forgoing NTS reporting until the appellate process is complete is not considered timely and would preclude potential mitigation if an NOV is issued.

- HS-40 recognizes contractor concerns that reporting initial determinations of worker retaliation may undermine the contractor's defense in subsequent appeals. To resolve these concerns, the NTS report can simply acknowledge that such a decision was issued, and may also include details on the contractor's planned path forward.

- A worker need not file a claim under Part 708 for retaliation to have occurred. For example, if a worker raises a retaliation claim to the contractor employee concerns program, which subsequently decides in favor of the employee, then retaliation did occur and would be NTS reportable if a nuclear safety or worker safety and health nexus exists. Contractor corrective action that provides an appropriate and satisfactory remedy to the worker (e.g. reinstatement) does not affect the existence of the noncompliance, but rather affects the safety significance and the HS-40 decision to issue an NOV or mitigate a proposed penalty.

NTS and SSIMS Report Content and Closure

The initial description of a noncompliance may be limited. DOE does not require contractors to complete a full investigation and causal analysis before reporting a noncompliance or a security incident, nor does DOE pursue a Preliminary Notice of Violation (PNOV) based solely on the initial description of a noncompliance or the initial Security Incident Notification Report. However, DOE expects the contractor to update the NTS/SSIMS report as additional information becomes available.

In general, the NTS and SSIMS reports should summarize the noncompliance, along with appropriate information so that HS-40 personnel have sufficient information to understand the circumstances of the noncompliance or the

events that led to the incident. If there is a corresponding ORPS report, the NTS report may simply refer to the specific ORPS report to enable NTS readers to locate further details about the event.

For classified information security noncompliances, a security notification report for an event and subsequent inquiry report must be completed and entered into SSIMS. Submission of these reports is not required for security self-assessments that do not identify any noncompliances; however, the assessment findings should still be entered into SSIMS.

An NTS or SSIMS report should provide more information specifically related to the noncompliance(s) than is covered in the ORPS or initial security incident report. Additionally, the NTS and SSIMS reports should state the principal corrective actions needed to address the noncompliance conditions; these may be a subset of those listed in the ORPS or security incident report. Examples of the level of detail that contractors provide for these reports can be viewed in the NTS and SSIMS.

DOE expects NTS and SSIMS reports to be submitted based simply on the reporting thresholds and Impact Measurement Index (IMI) requirements, as described in Appendices A, B, and C. A decision to report should not be based on the contractor's evaluation of safety or security significance, or a prediction of whether HS-40 would pursue an investigation after receiving the report. However, contractors may include their preliminary assessment of a noncompliance's significance in the "Description of Noncompliance Condition" portion of an NTS report or in the narrative portion of the SSIMS report.

Contractors are expected to identify and implement as many corrective actions as needed to resolve a noncompliance and provide reasonable assurance that recurrences will be prevented. The Office of Enforcement expects the corrective action section of an NTS or SSIMS report to include those principal corrective actions related to the noncompliance. The listing of a single corrective action indicating the intent to develop a corrective action plan is insufficient. When the corrective actions have been completed and all completion dates entered into the NTS/SSIMS systems, the contractor should mark the report "Completed."

At this point, it is essential that the cognizant DOE Field Element validate that the corrective actions were effectively completed. The Field Element enforcement coordinator subsequently indicates in the NTS either that the Field Element is satisfied with all corrective actions completed, or that a discrepancy remains and further action to HS-40 is recommended. After the Field Element indicates that all corrective actions have been completed and verified, HS-40 staff reviews the NTS report closure status and the Field Element recommendation/response. Barring any identified concerns, HS-40 closes the report, and the report's status is subsequently changed in the database.

For classified information security noncompliances, inquiry officials must verify that corrective actions have been completed and forward a final report to line management for action and to HS-80. This closure would be recorded in SSIMS. The Inquiry Report in SSIMS is officially closed after

the office director/site management concurs with the staff recommendation to do so, and the report's status is changed in SSIMS.

Contractor Tracking of Non-NTS/SSIMS Reportable Noncompliances

For enforcement purposes, reporting a noncompliance that is below an NTS reporting threshold into a contractor's tracking system also constitutes formal reporting to DOE. The Office of Enforcement expects these noncompliances to be tracked and managed to resolution by the contractor's internal issues management or corrective action process. HS-40 could later choose to take action on these issues if, for example, a program review shows that the contractor is not taking effective action to correct the issue.

Contractors are also expected to use their internal tracking processes to capture, track, and trend nuclear safety, worker safety and health, and classified information security noncompliance conditions. An adequate noncompliance reporting process should, at a minimum:

- In some form, annotate those problems or issues that are noncompliances.
- Indicate how the problem was discovered.
- Reference the specific Rule section violated.
- Ensure proper resolution (development and completion of corrective actions) of the noncompliance.
- Allow retrieval of the noncompliances for review and trending by the contractor and DOE.
- Be readily accessible by DOE Field and Program Office coordinators, as well as HS-40 staff when on site.

As noted, contractor problem resolution processes should provide a means for trending and evaluating data to identify adverse trends, dominant problems, and potential repetitive problems. The Office of Enforcement has observed that effective screening and reporting processes include provisions for reviewing, trending, and evaluating internally tracked noncompliance conditions.

V. Office of Enforcement Communications

The Office of Enforcement believes that frequent and open communication is essential to achieving the goals of the enforcement program, which include promoting safety and security improvements at DOE sites. To encourage such improvements, the Office of Enforcement undertakes program reviews, issues enforcement letters, promotes information sharing within the DOE complex, and holds an annual training workshop for enforcement coordinators.

Program Reviews

The Office of Enforcement conducts program reviews of contractor processes for the identification, screening, reporting, and correction of noncompliances. These program reviews also address contractors' M&IA processes. The purpose of these reviews is to ensure that contractors apply a sound process to identify noncompliances, make proper decisions on reportability, and undertake timely steps to correct noncompliances. With regard to assessments, HS-40's review focuses on the contractor's effectiveness in identifying issues and on specific improvements in their processes. A program review may also focus on selected compliance issues such as radiation protection, safety basis, and quality assurance (QA) within the nuclear safety enforcement area.

The Office of Enforcement may conduct program reviews of nuclear safety, worker safety and health, and classified information security separately or may conduct an IPR that concurrently evaluates the relevant contractor processes in all three areas (nuclear safety, worker safety and health, and classified information security) in a single review.

Program reviews are typically planned and scheduled on a near-term, quarterly basis. Selected contractors are contacted prior to the review in conjunction with a document request. Programs are selected for review based on a number of factors, such as input from Field Element personnel, site reporting history, results of prior program reviews, HS-40's familiarity with the contractor's program, and changes in the contractor's program. On occasion, HS-40 may conduct a program review in conjunction with a noncompliance investigation.

Typically, DOE and contractor enforcement coordinators are formally notified of planned program reviews approximately four weeks in advance of the review. The HS-40 staff member leading the review contacts the DOE Field Element enforcement coordinator before issuing the program review notification; this coordinator then acts as HS-40's liaison to the Field Element and contractor management and oversees arrangements in support of the program review. The notification contains details on participants, scheduling, agenda items, and other logistics. As part of the notification, HS-40 requests specific documentation from the contractor relating to the implementation of its program. Specifics regarding the document submittal are included in the request; typically, the contractor is asked to provide documentation within ten working days. Appendix D includes a sample program review document request, which may be tailored to the specifics of each review.

The program review is generally conducted by a number of HS-40 representatives and typically lasts several days.

Office of Enforcement staff conduct entrance and exit meetings with DOE and the contractor as part of the review. Preliminary conclusions on the strengths and weaknesses of the contractor's program are discussed during the exit meeting.

The Office of Enforcement conducts the review using the review criteria provided in Appendix D. The scope of a particular review may be either broader or more limited than implied by the criteria, depending upon the specifics of the review.

The Office of Enforcement typically sends a draft report describing the scope and results of the program review to the local DOE office for comments about 30 days after the onsite review. This draft is for DOE internal use only and is not intended to be shared with the contractor. After DOE comments are incorporated, the report is shared with the contractor for technical accuracy review and comment. The final program review report and accompanying transmittal letter are typically distributed within 30 days after receipt of contractor comments. Copies of the final report are mailed directly to the contractor and affiliated DOE offices, and all program review reports are posted on the HS-40 website.

The final program review report describes both program strengths and weaknesses in an effort to promote communication and lessons learned among the contractor community. The Office of Enforcement recognizes that some strengths may be program- or site-specific, so it is not necessarily intended that other contractor programs implement actions to emulate the program strengths described in a report to a specific contractor.

The Office of Enforcement intends that contractors correct identified weaknesses, after appropriate consultation with and approval by local DOE. While such action and coordination are not mandatory, the contractor's failure to correct identified weaknesses in a regulatory screening and reporting program may result in a potential reduction or loss of mitigation if HS-40 subsequently issues an NOV for a similar weakness.

In some cases, a program review may identify noncompliances that the contractor had not previously recognized or addressed (though this is not the focus or intent of such reviews). The contractor will be informed of any identified noncompliances as soon as possible, and HS-40 will subsequently determine whether to address such matters in an NOV or enforcement letter.

The program review approach described above is used for major DOE sites. For contractor programs where the scope of DOE operations is relatively small, HS-40 conducts limited, or "desktop," reviews, using an abbreviated document request, that may or may not involve an onsite visit. A sample document request for a desktop review is provided in Appendix D.

Enforcement Letters

If HS-40 identifies a matter of safety or security concern but decides not to issue a PNOV, HS-40 may issue an enforcement letter as stated in 10 C.F.R. sections 820.21(g) (nuclear safety) and 851.40(j) (worker safety and health) and Part 824, Appendix A, Paragraph VII (classified information

security). An enforcement letter is not a formal EA in that it imposes no requirements, enforcement citation, or penalty on the contractor. The enforcement letter usually identifies one or more conditions: (A) where performance may have been deficient but not of sufficient significance to warrant an NOV, and/or (B) where contractor attention is required to avoid a more serious condition that would result in an NOV. Thus, the enforcement letter can serve as a strong warning on matters that need attention, and may also highlight any contractor actions that were appropriate and contributed to the decision not to issue a PNOV. The Office of Enforcement consults with DOE enforcement coordinators on the message and conclusions in the enforcement letter prior to issuance.

Enforcement letters typically do not require a response to HS-40. Instead, HS-40 continuously monitors contractor performance and, as part of normal interface, regularly communicates with the contractor and local DOE Field Element for follow-up and resolution of the matter.

Enforcement Program Information Sharing

The Office of Enforcement uses a variety of means to disseminate lessons learned and program changes related to noncompliances and enforcement.

The major source of information shared by HS-40 is on its Internet website, which provides information to the Federal and contractor communities and the general public. The website provides relevant Federal regulations, standards, OGC interpretations, EAs, enforcement letters, press releases, enforcement guidance, program review letters, annual reports, and coordinator training workshop information. The Office of Enforcement routinely updates its website to support timely communication and to promote lessons learned across the complex. The Office of Enforcement website is accessed frequently (more than 100,000 times per year), indicating that the website is a valuable avenue of communications for the DOE enforcement program.

Additional avenues of communication include HS-40 participation in EFCOG senior management meetings and EFCOG Safety and Security Regulatory, Security and Contractor Assurance Working Groups; periodic teleconferences with DOE enforcement coordinators; providing information on EAs to the DOE Lessons Learned Program; periodic briefing of Safety and Security Directors; and frequent meetings with contractor and DOE senior managers.

Enforcement Program Annual Training Workshop

The Office of Enforcement also shares information about its expectations and processes through its annual training workshop for enforcement coordinators. The workshop typically includes a one-day introductory training session for new DOE and contractor coordinators, and a one-to-two-day refresher and case study sessions for enforcement coordinators. The workshop highlights noncompliance-related actions taken during the prior year, circumstances of the problems, and the bases for HS-40 action, as well as the status of ongoing initiatives and changes to the enforcement program.

VI. Investigation Process

Overview

The goal of the enforcement program is to encourage proactive behavior by contractors to improve safety and security performance so that EAs are not required. The result of such proactive behavior is that contractors will find and address safety and security issues through performance assessments and other similar processes before they result in safety or security events[7].

When circumstances warrant the consideration of an NOV, however, HS-40 uses the investigation process described in this chapter. Note that this process has substantial flexibility, so the actual steps taken may differ from case to case.

The following steps typically occur for a noncompliance that HS-40 decides to investigate:

- Determine whether a noncompliance requires an investigation, based on a significance evaluation or other contributing factors, and obtain the Director's concurrence.
- Initiate the investigation activities in a timely manner.
- Conduct an HS-40 investigation strategy meeting.
- Inform Field Element and Program Office management.
- Provide a formal notification letter to the contractor informing them of the pending investigation, including a request for information.
- Conduct an onsite investigation.
- Prepare an investigation report.
- Decide whether to close the case with an enforcement letter or PNOV.
- Conduct an enforcement conference (if deemed necessary).
- Determine the severity level of the violations, the associated civil penalty or contract fee censure, and application of mitigation factors.

Any resulting EA is processed using the guidance presented in Chapter VII, Enforcement Process.

Investigation Process Timelines

Typical timelines for key milestones in an investigation are as follows:

Decision to Investigate (45 calendar days)

- Identification of Issue
- Management Review/Approval
- Request for Documents
- Announcement Letter

Investigation (120 calendar days)

- Review of Documents

[7] The Office of Enforcement considers a "near miss" to be a safety event, because in such cases, safety breakdowns have already occurred and the absence of an injury is simply fortuitous in most cases.

- Onsite Interviews
- Investigation Report

Enforcement Action (60 calendar days)

- Enforcement Conference
- Draft PNOV
- Quality Review Board/Technical Edit Reviews
- Review and Issuance

Decision to Investigate

A decision to investigate is based on a significance evaluation of the safety and/or security risks associated with a particular noncompliance. For acts of retaliation or willful noncompliances, HS-40 considers the significance associated with the nature of the violation itself, in addition to the safety or security risk of any underlying issue or noncompliance. Contractor employees or employee representatives may submit investigation requests to the Office of Enforcement for nuclear safety, worker safety and health, or classified information security issues.

Safety/Security Significance Determination

The Office of Enforcement generally investigates only those noncompliances with greater safety or security significance than the general population of reported noncompliances. The judgment of significance considers the actual safety or security significance and associated programmatic breakdowns. The Office of Enforcement also considers safety or security significance when determining the sanctions to be imposed in an EA. Specific criteria for these determinations, relevant to each of the three enforcement programs, are provided in Appendices A, B, and C.

Review of NTS and SSIMS Reports

Office of Enforcement staff, in coordination with DOE enforcement coordinators, routinely review noncompliances reported into the NTS and SSIMS. Submission of a noncompliance report does not necessarily mean that an EA will be taken. Rather, HS-40 will review and evaluate available information before making a determination about a possible EA.

When a noncompliance is reported into the NTS or SSIMS, the report is assigned to an HS-40 staff member for a review that encompasses:

- An evaluation of the facts contained in the report and, possibly, other information to determine whether a requirement has been violated.
- An initial evaluation of the noncompliance's safety and/or security significance to determine whether a more comprehensive evaluation by HS-40 is warranted.

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

After this review, the staff member makes a recommendation to the cognizant Office Director on whether to undertake further action. If no further investigation is to be performed, HS-40 simply tracks the noncompliance report to closure and trends the information. If it is concluded that a more comprehensive review, focused inspection, or investigation is to be performed, then the procedures described in this chapter apply.

Occasionally, HS-40 staff and the DOE enforcement coordinators may also evaluate non-NTS or non-SSIMS reportable noncompliance issues documented in the contractor's internal reporting system. An evaluation may result from a program review but may also be initiated by an unexpected decline in NTS or SSIMS reporting by a contractor or an apparent inconsistency between a contractor's reporting system (e.g., ORPS and NTS). The results of the evaluation are then considered, along with other information, in the HS-40 decision process.

Review of Other Sources of Noncompliance Information

The Office of Enforcement regularly monitors sources of information other than the NTS and SSIMS, including:

- Individual ORPS reports
- CAIRS reports
- Security incidents that may indicate potential compromises or risks to classified information
- DOE Field Element or Headquarters inspections, surveys, or assessments
- DNFSB reports
- Areas of concern raised by senior DOE management
- Information provided by the DOE OHA or the DOE IG
- Allegations communicated directly to HS-40 by a contractor or DOE worker
- Media reports of events, accidents, or injuries
- Congressional inquiries
- Information from other agencies, including the Nuclear Regulatory Commission (NRC), the DOL, OSHA, or state and local officials.

DOE expects that initial notification of significant noncompliances, including classified information security noncompliances, will come primarily from contractor and DOE enforcement coordinators, as part of the desired communications maintained with HS-40. However, when material becomes available from these other sources, HS-40 will evaluate the conditions and request additional information from contractor and DOE enforcement coordinators.

Intentional or Willful Noncompliance

Willful noncompliance with a nuclear safety, classified information security, or worker safety and health requirement receives close attention by HS-40. Like other noncompliances, these should be reported into NTS and

SSIMS. HS-40 may consider such a condition to be more significant than the significance of the corresponding noncompliance itself. A willful violation is considered significant *per se*, regardless of the issue to which it pertains.

Request for an Office of Enforcement Investigation

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

A worker or worker representative may also submit an anonymous request for an inspection or investigation, or may request confidentiality. When requesting confidentiality, the requester should be aware that although HS-40 will take every precaution to avoid disclosing the individual's identity, the nature of the issue itself may provide some indication of who the requester is. Furthermore, if HS-40 does initiate an investigation, maintaining the requester's confidentiality may limit the effectiveness of that investigation. These limitations will be fully discussed with the requester to ensure that they are understood. Regardless of whether a requester is anonymous, requests confidentiality, or allows his or her identity to be known, HS-40 will treat each request equally and seriously, and will work toward an appropriate conclusion.

Note that section 851.20(a)(6) requires management to establish procedures for employees to report, without reprisal, job-related fatalities, injuries, illnesses, incidents, and hazards, and make recommendations about appropriate ways to control those hazards. In addition, sections 851.20(b)(7), 851.20(b)(8), and 851.20(b)(9) give a worker the right, again without reprisal, to express concerns related to worker safety and health, to decline to perform an assigned task if the task poses an imminent risk of death or serious physical harm, and to stop work if he or she discovers employee exposures to imminently dangerous conditions or other serious hazards.

The Office of Enforcement expects that before requesting an investigation, workers and their representatives will exhaust all contractor and local DOE mechanisms to express and resolve their concerns.

An investigation request may be made through submission of DOE Form 440.2, *Request for Investigation or Inspection of Safety or Security Violations*, which is available on the DOE Directives website at http://www.directives.doe.gov/pdfs/forms/440-2.pdf. Completed forms may be faxed to 301-903-3560 or mailed to the following address:

HS-40/Germantown Building
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20874-1290

The request for investigation should, to the extent possible, include the following information:

- Requestor's name, job title, and contact information (phone number, e-mail address, work address). If the request is made by a worker representative, it should also describe the nature of the representation (e.g., union, elected representative, attorney) and the name of the worker or workers for whom the request is made.
- Request for confidentiality (if preferred).
- Date of request.
- The DOE site location.
- Employer's name.
- Company responsible for the condition or potential violation.
- Specific work area where the alleged condition or potential violation exists (e.g., building, facility, work area, laboratory/room number).
- Description of the alleged condition or potential violation, including activities involved, number of workers potentially exposed and for what duration, any previous incidents (e.g., injuries, near misses) involving the hazard, and the requestor's role in the activity. Supporting documentation or information (internal inspection results, e-mails, written workplace procedures, etc.) should also be included.
- Description and results of efforts to resolve the concern through existing contractor and local DOE mechanisms, including the formal employee concerns program. Include available documentation of such efforts, if any.
- Signature of the requestor.

On receiving such a request, HS-40 notifies the Program and Field Element enforcement coordinators of the receipt and nature of the request. If so requested, HS-40 will honor the requestor's desire for confidentiality. The Office of Enforcement then evaluates the request using the process described in this chapter to determine whether an investigation is warranted. If additional information is needed to make this determination, HS-40 coordinates with the DOE enforcement coordinator and the requestor (where appropriate) to obtain the information needed to make the determination.

The judgment to pursue or not pursue such requests rests solely with HS-40 and is based on all of the information and evidence available to HS-40, including that obtained from DOE enforcement coordinators or other sources. If HS-40 decides to undertake such an investigation, the investigation process described in this chapter will be followed.

The Office of Enforcement communicates to the requestor its decision and the basis of its determination on whether to investigate, and the results of any investigation are documented and processed as described in this chapter. At the end of the process, the requestor is notified of the results.

The Office of Enforcement processes anonymous requests for investigation in the same manner. However, as noted,

evaluation of the investigation request may be hampered by not having access to the individual(s) with first-hand knowledge and information about the alleged noncompliance.

It should be noted that 10 C.F.R. Part 824 does not specifically include provisions for individuals to request investigations. However, a worker or worker representative may submit an anonymous request for an investigation of classified information security issues to HS-40 (as described above). The Office of Enforcement will consider such requests and determine whether an investigation is warranted using the decision process that is used for identifying and evaluating potential noncompliances gleaned from other information sources. As with nuclear safety and worker safety and health, if the individual requesting an investigation of a classified information security issue requests confidentiality, HS-40 will take every precaution to avoid disclosing the individual's identity; however, the nature of the issue itself may provide some indication of the identity of the requester.

Noncompliance Investigation

Planning

The Office of Enforcement generally commences investigation activities as soon as staff schedules permit after a decision is made to conduct an investigation. However, if a Type A or Type B accident investigation is under way, HS-40 typically postpones its investigation until after the accident investigation report has been issued, relying to the extent possible on facts presented in the Type A or B investigation report. Similarly, if a criminal investigation is in process for incidents involving classified information, the Enforcement Office will coordinate with the law enforcement agency to determine when to initiate an enforcement investigative action.

An initial step in the investigation activity is to conduct a strategy meeting on the case with the Director, the lead HS-40 staff member assigned to oversee NTS and security reports (for example, SSIMS) from the respective contractor, and other HS-40 personnel and technical advisors assigned to the case. The purpose of this session is to establish the approach HS-40 intends to follow in identifying potential violations, establishing relevant facts and circumstances, determining significance, and deciding the need for an onsite investigation. Results of the strategy meeting are typically discussed only with affected DOE offices.

Notification and Information Request

Following the investigation strategy meeting, HS-40 communicates with the appropriate DOE Field and Program Office management to notify them of the planned investigation. The Office of Enforcement then sends the contractor a formal notice letter from the Director informing it of HS-40's plans to conduct an investigation and the areas to be addressed, and reminding the contractor of the cost segregation requirement[8]. The notification letter may also contain a request for information to support the investigation. In urgent situations, HS-40 may forgo the normal notification

[8] Contractors are required to segregate costs in accordance with the provisions of Public Law 100-700, *Major Fraud Act of 1988*.

process and require immediate access to contractor facilities, under the authority of section 851.40(a) for worker safety and health issues, sections 820.8(a) and 820.21(a) for nuclear safety issues, and section 824.5 for classified information security issues.

If an onsite investigation is to be conducted, HS-40 formally notifies the contractor and associated enforcement coordinators by letter (usually in its initial correspondence) of the need for the investigation and the planned dates. Office of Enforcement staff, in coordination with the contractor, establishes an agenda and a list of individuals to be interviewed.

The Office of Enforcement's information request is aimed at obtaining documentation that aids in understanding the facts and circumstances of the noncompliance condition. Investigation activities include a comprehensive review of the materials submitted by the contractor and usually an onsite investigation. In some cases, HS-40 may determine that investigation activities can be adequately conducted without a site visit.

Subpoena Authority

Obtaining information through informal, cooperative means is the most efficient process, both for HS-40 and the contractor. If a contractor is reluctant to provide any documentation—before, during, or after the investigation—HS-40 is empowered by sections 820.8(a) and 820.21(h) (nuclear safety), 824.5 (classified information security), and 851.40(k) (worker safety and health) to obtain it by issuance of a subpoena, if necessary.

Complete and Accurate Information from Contractors

DOE relies on the accuracy and completeness of information provided by its contractors. Section 820.11, *Information Requirements*, requires that any information pertaining to a nuclear activity, provided to or maintained for DOE by a contractor, shall be complete and accurate in all material respects. Similarly, section 851.40(b) requires contractors to provide complete and accurate records and documentation to HS-40 in support of worker safety and health related investigation activities. Failure to comply with these requirements could involve either intentional or unintentional error conditions. Unintentional errors in safety or security documents and records are undesirable; they should be considered noncompliances with the above referenced regulations and should be reviewed for possible reporting into the NTS. Intentional errors, such as falsification, destruction, or concealment of records or information, should be treated as willful noncompliances and addressed as discussed above.

Part 824, Appendix A, Paragraph V.f. contains similar expectations related to the timeliness, completion, and accuracy of information provided by contractors.

In the absence of a request, sections 820.21(e) (nuclear safety) and 851.40(g) (worker safety and health) allow a contractor to submit to HS-40 any document, statement of facts, or memorandum of law to explain the contractor's position or to provide pertinent information to a matter under investigation.

Onsite Investigation Initiation

An onsite investigation typically commences with a DOE-only meeting to discuss the HS-40 team's concerns and the areas to be pursued, and to obtain DOE Field Element input on the matter. The Office of Enforcement usually follows that session with an opening conference that includes both DOE and contractor personnel to summarize the purpose of the visit, the issues under review, and the protocols for interactions, subsequent communications, and deliberations. For worker safety and health issues, union representatives for any workers involved with the noncompliance(s) or issues under investigation are offered the opportunity to attend the opening conference. During the investigation, HS-40 may interview workers and managers, inspect facilities and work areas, review records, and identify additional documentation required by HS-40.

Focused Inspections

Title 10 C.F.R. sections 820.21(a), 824.5, and 851.40(a) authorize HS-40 to conduct inspections to determine contractor compliance with nuclear safety, classified information security, and worker safety and health requirements, respectively. The Office of Enforcement expects that contractors will perform effective assessments of their compliance with nuclear safety, worker safety and health, and classified information security requirements in addition to the many other reviews that are performed by DOE elements and other organizations, such as the DNFSB. The Office of Enforcement has the option of using the results of other DOE reports, such as Program Office or field readiness assessments or HSS Office of Independent Oversight inspections, in lieu of conducting its own routine inspections.

Management issues, serious injuries and accidents, actual and potential compromises of classified information, or adverse performance trends may lead HS-40 to conduct focused inspections on specific areas of concern. Focused inspections are normally limited in scope and duration and concentrate on specific areas of concern. The Office of Enforcement may choose to conduct focused inspections for any reason.

Examples of focused inspection activities include:

- Observations made during the onsite portion of an investigation may indicate a potential compliance problem in a specific location or functional area (e.g., during a building walkthrough, the enforcement specialist notes numerous electrical safety hazards and determines that a focused inspection is needed to evaluate electrical safety issues in the building or facility, or observes conditions where classified information is left unattended or without adequate protection and determines that an inspection is needed to evaluate the prevalence of these conditions).

- A review of data may suggest a possible negative compliance trend in a specific type of work activity or functional area (e.g., a trend analysis of NTS, SSIMS, or ORPS data suggests an increase in an activity across the Department). The Office of Enforcement

may then determine that a series of focused inspections is warranted at sites to evaluate the trend and its compliance implications.

Regardless of whether HS-40 observes other relevant conditions during an onsite investigation, a focused inspection may be conducted in conjunction with the onsite portion of an investigation at the discretion of HS-40. If a focused inspection is to be conducted in conjunction with an investigation, the enforcement specialist notifies the contractor (as well as the DOE and contractor enforcement coordinators) as soon as practical that the scope of the investigation will expand, or has been expanded. This notification describes the general scope of the focused inspection. If additional subject matter expertise is needed for the focused inspection, HS-40 may schedule a follow-up visit to conduct the focused inspection.

Exit Meetings

It is HS-40's intent that the preliminary results of a focused inspection or investigation be provided to the contractor at the exit briefing, which summarizes any noncompliance conditions noted by the team so that the contractor can address them in a timely manner. If the findings of the focused inspection or investigation are generally complete, HS-40 may consider the exit briefing as an informal enforcement conference (see below) and will so notify the contractor. Following such onsite enforcement conferences, HS-40 permits the contractor up to two weeks to provide supplemental information to clarify the facts and circumstances or to refute the preliminary conclusions presented at the conference.

Investigation Report/Documentation

When investigation activities are completed, the investigation team will document the results. In some cases, the available documentation may be sufficient to support proceeding directly to a PNOV without HS-40 developing an investigation report or other investigation documentation.

When documentation, such as an investigation report or focused inspection report, is the sole basis for HS-40's conclusions on noncompliance(s), the documentation typically includes:

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

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

- Duration
- Management involvement

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

If an onsite informal enforcement conference is conducted, a conference summary is included as part of the documentation.

The investigation documentation includes HS-40's recommendation to the Director on any subsequent course of action, such as:

- Holding an enforcement conference
- Proceeding directly to a PNOV
- Not pursuing a PNOV.

If the Director's decision is to conduct an enforcement conference, the contractor is notified by letter and the investigation report is enclosed. If HS-40 directly issues a PNOV, this action is processed as discussed in Chapter VII.

The decision to proceed with a PNOV and not issue and investigation report rests with the Director (or NNSA Administrator, for NNSA facilities, after recommendation from the Director). If HS-40 determines that violations did not occur or were of lower significance, HS-40 may decide not to proceed with a PNOV. In some cases, HS-40 may close the case by issuing an enforcement letter (described in Chapter V). In some cases, HS-40 may issue the investigation report with the issuance of the PNOV—for example, when an enforcement conference is held at the conclusion of an onsite investigation.

Enforcement Conference

Subsequent to the completion of an investigation, an informal enforcement conference may be held between DOE and the contractor to discuss the investigation. HS-40's authority to conduct an enforcement conference can be found in 10 C.F.R. sections 820.22 (nuclear safety) and 851.40(h) (worker safety and health) and Part 824, Appendix A, Paragraph VI (classified information security). The primary purpose of an informal enforcement conference is to provide an opportunity for the contractor to address the facts and noncompliances noted by HS-40 in its investigation documentation, and to explain the steps being taken to resolve the noncompliances and underlying causes. An informal enforcement conference may be convened, at the sole discretion of the Director; a contractor may request an enforcement conference, but the Director has the responsibility and authority to decide whether to conduct a conference. Although not mandatory, an enforcement conference is suggested by HS-40 for most enforcement cases. The Director may choose, in certain cases, not to

hold a conference. For example, an enforcement conference is generally not held for a nuclear safety issue that is expected to result in a nuclear safety-related severity level III violation. Additionally, an enforcement conference may not be necessary when the findings of the investigation are clear and undisputed.

Scheduling and Notification

In general, if an enforcement conference is planned, it is held before a PNOV is issued. To provide for timely processing of an enforcement proceeding, the contractor is typically informed of the intent to conduct a conference at least two weeks in advance.

The Office of Enforcement typically notifies the contractor by a letter, signed by the Director, detailing the enforcement conference date, time, and location. The notification letter generally includes or references documents covering the facts and circumstances of the noncompliance(s), typically in the form of an investigation report or other investigation documentation, HS-40's conclusions on the noncompliance(s), and any issues that the contractor should discuss.

In some cases, HS-40 may hold an enforcement conference on site at the end of a focused inspection or investigation, generally when the facts and circumstances are clear and no further review of information is needed to identify the noncompliance(s). In such a case, after the Director authorizes the conference and designates the HS-40 staff member who will chair it, the HS-40 team notifies the contractor during the inspection or investigation that an enforcement conference will be held at the completion of the onsite visit.

The Office of Enforcement may also find it necessary to convene an enforcement conference even when the investigation report was previously issued along with the PNOV, or if the Office has otherwise proceeded directly to a PNOV without an investigation report or other investigation documentation.

Attendance

DOE personnel, as a minimum, should include the Director or HS-40 staff member who will chair the conference, the responsible HS-40 staff and technical advisors involved in the case, Program Office and Field Element management representatives, and the enforcement coordinators from the Field or Program Office. It is also highly desirable that senior Field Element and Program Office management attend the enforcement conference. These individuals are notified of the conference and, through verbal or e-mail communications, strongly encouraged to attend. Other DOE personnel may attend at the request of, and as permitted by, the Director.

The attending contractor personnel should, as a minimum, include senior contractor management (e.g., Laboratory Director, President), key management personnel involved in the event or conditions as well as the actions to correct the underlying problems, and the contractor enforcement coordinator. Participation by representatives from the Board of Directors and corporate management of the parent company or governing university is strongly encouraged.

As stated in DOE's enforcement policies[9], enforcement conferences are pre-decisional actions intended to provide a forum for open and candid discussion regarding a potential enforcement issue. Therefore, they are normally closed meetings between DOE and the contractor, including, at times, the parent organization's management. The enforcement conferences are closed to the media and the public.

Conduct of Enforcement Conference

To encourage candor, conferences are normally informal and no transcripts are made. The Director, or HS-40 staff designee, chairs enforcement conferences. After preliminary opening comments by the Director and the introduction of attendees, the conference is turned over to the contractor to address key factors related to the case. During the conference, all DOE officials are encouraged to pose questions to seek clarification or to ensure that key points are addressed.

The contractor should identify any factual issues related to HS-40's investigation or inspection report, or any document relied on by HS-40 in identifying noncompliances. Additionally, the contractor should address the causes of the noncompliances, its views of their significance, the corrective actions taken to correct the immediate problems and to prevent recurrence, and the application of mitigation and discretion factors.

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

At the conclusion of the contractor's presentation and response to questions from DOE, HS-40 closes the conference and makes it clear that the final DOE decision on the matters will be made after the conference and will be provided to the contractor at a later date.

Post-Conference DOE-Only Meeting

Following the enforcement conference, and after all the contractor's personnel and representatives have departed,

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

the Director or designee reconvenes the DOE participants for preliminary discussions. The intent is to arrive at a consensus on any facts presented by the contractor, whether a PNOV should be issued, the violations that occurred, their significance and severity level, the application of civil penalties, treatment of mitigation factors, and messages that should be communicated in the transmittal letter for the PNOV. These discussions represent the preliminary deliberations on any EA.

Enforcement Conference Summary Report

After the post-conference DOE-only meeting, HS-40 prepares a brief report documenting the enforcement conference discussions. This summary report typically includes the contractor's position on the accuracy of facts in the HS-40 investigation report or other documents that are the basis for any potential violations, a brief description of significant additions or corrections to the factual information, a brief description of any significant additional information that affects the significance or mitigation factors, and a summary of the contractor's short- and long-term corrective actions.

Before finalizing the conference summary report, HS-40 solicits comments and input from the DOE Program and Field Element via the DOE enforcement coordinators. The conference summary report is typically attached to the PNOV.

Confidentiality/Disclosure of Pre-decisional Enforcement Information

Investigation-related information is privileged and considered pre-decisional. Pre-decisional matters by DOE are not communicated to the contractor or members of the public. For example, during the investigation phase of a case, discussions within DOE on planned areas or issues to investigate, lines of inquiry, preliminary conclusions on potential violations, and preliminary conclusions on mitigation factors are privileged.

Additionally, following the enforcement conference and before issuance of the PNOV, all discussions and deliberations within DOE about a pending PNOV, including the post-conference DOE-only meeting, are pre-decisional and carefully controlled.

In consultation with appropriate DOE officials, the Director is responsible for all decisions regarding the release of pre-decisional information to contractors and the public. Prior to any disclosure, DOE must determine that the release of information is not precluded by the Freedom of Information Act (FOIA) (5 U.S.C. 552), implemented by DOE at 10 C.F.R. Part 1004.[10]

[10] FOIA exempts nine categories of records from its disclosure requirements. The following exemptions, codified at 10 C.F.R. 1004.10(b), apply to Office of Enforcement activities: Exemption 2 – Circumvention of Statute, Exemption 3 – Statutory Exemption, Exemption 4 – Commercial/Proprietary Information, Exemption 5 – Privileged Information, Exemption 6 – Personal Privacy, Exemption 7 – Law Enforcement, Exemption 8 – Financial Institutions, and Exemption 9

Protected pre-decisional information may include the potential violations to be cited, the potential severity level of the alleged violations, civil or contract penalty amounts, and the nature or context of a PNOV. The criteria listed below are followed by HS-40 and should similarly be followed by other DOE personnel who have access to enforcement-related information for input, validation, or action:

- No information is immediately released to the contractor or the public on the findings or conclusions of an investigation.
- The investigation report documenting the findings and conclusions of the investigation is released to the contractor only after the Director's approval. The contractor is provided this report to ensure the accuracy of facts, the contractor's understanding of alleged violations, and adequate preparation for any subsequent enforcement conference. Because the investigation report is part of the ongoing investigation, it is considered pre-decisional and is not released to the public.
- No information on a pending PNOV is released to the public or the contractor during the time period between the enforcement conference and the issuance of a PNOV, unless so authorized by the Director.
- Pre-decisional enforcement information is released to the contractor only when necessary to ensure that prompt corrective actions are taken to address a safety or security matter that is not already being addressed.
- Upon issuance of a PNOV, the DOE transmittal letter and PNOV are placed in the Office of Enforcement docket file and on the Office of Enforcement website. Only then is this information available to the general public.
- For nuclear safety matters, between the issuance of a PNOV and the issuance of a final order, all meetings or conferences between DOE and the contractor pertaining to the enforcement case are transcribed as required by section 820.10(c).

- Wells. Exemption 1 does not apply because it concerns the protection of information classified by Executive Order.

VII. Enforcement Process

Once the circumstances surrounding a noncompliance and its safety or security significance are understood and any enforcement conference and preliminary deliberations are completed, it is HS-40's responsibility to consider the appropriate EA. Possible EAs include PNOVs, consent orders,[11] and compliance orders.[12] This chapter describes the process of developing the EA, including HS-40's considerations in that process, as well as alternatives to an EA.

Overview

The process below summarizes the most typical enforcement process.

- Office of Enforcement staff develops a proposed aggregation of violations, specific violations to be cited, appropriate severity levels, corresponding civil penalties, and draft communication to the contractor.
- Office of Enforcement solicits Field and Program Office comments on the proposed action and correspondence, and the Director's approval (or NNSA Administrator for NNSA contractors).
- DOE issues the PNOV or other action.
- The contractor has 30 days to respond in writing and may contest the notice with substantive evidence not previously considered; contest the civil penalty; request additional mitigation, if applicable; or accept the notice and waive the right to contest.
- If the PNOV is uncontested, it automatically becomes a final order.
- If the PNOV is contested, the Director (or NNSA Administrator for NNSA facilities) considers the arguments made and determines the final action. DOE's response to the contractor converts the PNOV to a final notice of violation (FNOV).
- Once an FNOV is issued, 10 C.F.R. Parts 820, 851, and 824 provide an opportunity for the contractor to appeal, if desired. If the contractor does not appeal, the FNOV becomes a final order.
- Records related to an EA are entered in the HS-40 docket.

The Director is authorized to issue PNOVs, FNOVs, final orders, and consent orders for non-NNSA facilities and consent orders for NNSA facilities. The NNSA Administrator issues PNOVs, FNOVs, and final orders for NNSA facilities based upon the recommendation of the Director. Compliance orders must be executed by the Secretary. Consent and compliance orders follow some of the elements of the above process; the unique aspects of these actions are addressed later in this chapter.

[11] Applicable only to Nuclear Safety and Worker Safety and Health EAs.
[12] Applicable only to Nuclear Safety EAs.

Administrative Matters

Docket File

Title 10 C.F.R. section 820.10 specifies the establishment of Office of the Docketing Clerk for nuclear safety matters, with responsibilities for maintaining docket files for each enforcement case, exemption decisions, and interpretations, as well as maintaining files of approved nuclear safety program plans. The Docketing Clerk is also assigned responsibilities for notification and filings associated with any adjudication proceeding. To implement these requirements and responsibilities, the Office of the Docketing Clerk has been established in the Office of Enforcement.

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

Assignment of Enforcement Action Number

The Office of the Docketing Clerk assigns an EA number to each proposed EA after the decision is made to issue a PNOV, as a way to administratively docket and track cases. EA designations have been developed to identify the relevant enforcement programs – i.e., nuclear safety enforcement action (NEA), worker safety and health enforcement action (WEA), and classified information security enforcement action (SEA). EA numbers are assigned sequentially according to the year of issuance and enforcement area (e.g., WEA-2008-01, NEA-2008-01, SEA-2008-01). Once an EA number is assigned to an enforcement matter, all subsequent filings, memoranda, and correspondence for that case should include the contractor name and complete EA number. EA numbers are also assigned for consent orders and compliance orders.

Target Enforcement Process Schedule

HS-40 strives to move as expeditiously as possible in each enforcement case, within the limits of staff availability and existing caseload. The Office of Enforcement attempts to meet the following schedule guidelines, recognizing that the circumstances of a particular case may dictate changes and that the Director has discretion to decide case priority and the processing schedule for each case:

- To allow for expeditious completion of an enforcement proceeding, the enforcement conference is usually scheduled within four weeks after completion and issuance of the investigation report. As a minimum, HS-40 gives the contractor at least two weeks' notice of the intent to convene a conference.

- Following an enforcement conference, HS-40 generally issues its decision, typically a PNOV, within four weeks.

- If issued, the FNOV is generally released within four weeks after receipt of a substantive response to the PNOV from the contractor, either denying the violation or seeking further mitigation of the severity level or civil penalty.

Issuing a Press Release

Press releases are generally issued for PNOVs and are discretionary for other EAs. After the EA has been signed, the Director forwards the package to the contractor by e-mail to provide immediate notice of the action, and sends the official copy via certified mail. The Office of Enforcement generally prepares the draft press release and assists the DOE and/or NNSA Office of Public Affairs in completing it. The contractor organization is normally given notice about two hours before a press release is issued and the EA is posted on the Office of Enforcement's website.

Closing an Enforcement Action

The Office of Enforcement does not close the enforcement case at the time when the contractor concedes the violation and pays any civil penalty. DOE keeps the enforcement case open until it has confirmed through the NTS or SSIMS that appropriate corrective actions have been completed. If corrective actions are not completed in a timely manner or if DOE Field Element personnel find that the corrective actions were not properly completed, HS-40 could decide to take further EA, such as issuing a PNOV.

Notices of Violation

Preparation of a PNOV

A PNOV is a finding by DOE that, based on the evidence developed in its investigation, a safety or security rule violation has occurred. The PNOV includes the following elements, as a minimum:

- A concise, clear statement of the requirement(s) that was violated (legal citation for the violation).
- A brief statement describing 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).
- The severity level proposed for the violation or problem area (if violations are grouped in the aggregate—see below).
- The civil penalty proposed for each violation or group of violations, as applicable. For a Part 851 violation, as discussed below, a monetary penalty via contractual means is an option.

The "contrary to" paragraph should clearly demonstrate how the DOE requirement was not met. It should specifically refer to evidentiary material, such as the specific standard procedure or specification that proves the violation. The PNOV also informs the contractor of the required response to DOE.

A group of violations that are related to the same requirement or a single event may be evaluated in the aggregate. A group of aggregated violations is designated a violation at the appropriate severity level warranted by the facts and circumstances of the specific case. By addressing a group of violations that individually may have minor safety or security significance, the PNOV can highlight the more significant condition or underlying programmatic problem. Thus, when aggregated in this manner, violations may have a higher severity level than the individual violations. In

addition, the circumstances involving an event and a series of corresponding violations may not warrant citing each of the violations individually, so the violations may be aggregated to mitigate the associated civil penalties.

The Director and HS-40 staff prepare the draft of the PNOV and conduct any other required internal discussions within DOE before arriving at a position on the required action. The draft PNOV, transmittal letter, and the conference summary are provided to Field and Program Office personnel via the DOE enforcement coordinators for review and comment. For NNSA facilities, the proposed action is forwarded with a transmittal memorandum summarizing the basis for the recommended action to the NNSA Administrator for signature.

Civil Penalties

Civil penalties are monetary sanctions designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of contractor self-identification, reporting, and correction of noncompliances.

Civil penalties are authorized under 10 C.F.R. section 820.20(b), 824.4(c), and 851.5(a) for nuclear safety, classified information security, and worker safety and health noncompliances, respectively. The Office of Enforcement imposes civil penalties through the issuance of a PNOV. Chapter VIII, Civil Penalty Assessment, discusses the civil penalty calculation process.

Reduction of Contract Fees for Worker Safety and Health Noncompliances

Title 10 C.F.R. section 851.5(b) authorizes DOE to reduce contract fees or payments. HS-40 and the cognizant DOE Program and Site office levy this sanction through a PNOV. The Director and appropriate contracting officers will coordinate their efforts in compliance with section 851.5(b).

Under section 851.5(c), for the same violation of a worker safety and health requirement under Part 851, DOE may pursue either civil penalties or a contract fee reduction but not both.

PNOV Transmittal Letter

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

- When and where the inspection, investigation, or assessment was conducted.

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

Contractor Response to a PNOV

The contractor is required to respond to a PNOV either by accepting its conclusions or by presenting new, previously unconsidered evidence that could lead to a different outcome. The PNOV typically informs the contractor that the contents of the reply should include: (1) any facts, explanations, and arguments supporting a denial that the violation occurred as alleged; (2) any extenuating circumstances or the reason why the proposed remedy should not be imposed or should be mitigated; (3) full and complete answers to any questions set forth in the PNOV; and (4) a discussion of the relevant authorities that support the position asserted, including rulings, regulations, interpretations and previous DOE decisions. The contractor is also asked to delineate in the NTS or SSIMS, with target and completion dates, the corrective actions that have been or will be taken to avoid further violations.

For nuclear safety PNOVs, the contractor response is due within 30 days of the PNOV's date of filing; for worker safety and health and classified information security PNOVs, the contractor response is due within 30 days of the PNOV's date of receipt. The Director, HS-40 staff, and responsible Field and Program Office personnel carefully review the contractor's response. If additional information is provided, HS-40 will consider whether the action should be modified.

If the contractor admits that the violation(s) occurred as described in the PNOV and pays any proposed civil penalty, HS-40 sends the contractor a letter that acknowledges receipt of the monetary penalty and deems the PNOV to be a final order. Acknowledgment letters are generally issued within 30 days after receipt of the contractor's response to the PNOV.

The contractor has the option to challenge DOE's facts, the determination of violations, DOE's conclusions on significance or severity level, application of mitigation

factors, or other elements regarding the PNOV. Following a review, the Director may conclude that it is appropriate to move to an FNOV.

If the contractor challenges any aspect of the PNOV, the challenge is carefully reviewed by HS-40 in conjunction with DOE Field and Program Office management. On evaluation of contractor responses and all other relevant evidence, the Director may take one of the following actions, as deemed appropriate:

- Rescind all, or part, of the proposed civil (or monetary) penalty.
- Rescind all, or part, of the PNOV.
- Issue the FNOV and impose a civil penalty, as authorized by law, in cases where the PNOV is not fully rescinded.

Final Notice of Violation (FNOV)

If the contractor admits the violation(s) as presented in the PNOV and pays any associated civil penalty, the PNOV automatically becomes a final order, thus eliminating the need for a separate FNOV.

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

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

Administrative Adjudication

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

Nuclear Safety and Classified Information Security Noncompliances – Administrative Hearing

To contest an FNOV containing a civil penalty, 10 C.F.R. sections 820.25 and 824.7 provide that a contractor file a request with HS-40 for an on-the-record adjudication within 30 days after issuance of the FNOV. An administrative hearing presided by an Administrative Law Judge (ALJ) will be initiated upon HS-40 receipt of this request. Under 10 C.F.R. sections 820.29(d) and 824.12(e), DOE has the burden of proving that the noncompliance occurred as set

forth in the FNOV and that the proposed civil penalty is appropriate. The contractor against whom the FNOV has been issued then has the burden of presenting any defense to the allegations within the FNOV. These regulations require that the ALJ decide each matter of controversy upon a preponderance of the evidence.

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

A contractor that contests an FNOV issued under Part 820 or Part 824 is not required to file a request for administrative adjudication in order to retain the right to judicial review. Under 10 C.F.R. sections 820.25 and 824.14, a contractor may elect to file a notice of intent to seek judicial review within 30 calendar days of receiving an FNOV. The Office of Enforcement will promptly assess a civil penalty by final order to allow for Federal District Court review without an administrative hearing.

Worker Safety and Health Noncompliances – Administrative Appeal

For a contested worker safety and health FNOV, there is no initial administrative hearing presided by an ALJ. Under 10 C.F.R. section 851.44, an aggrieved contractor must petition OHA within 30 calendar days of receipt of a FNOV by following the appeals process in 10 C.F.R. Part 1003, Subpart G.

OHA reviews an initial decision based on an evidentiary record prepared by the Office of Enforcement. Under section 851.43, a contractor relinquishes the right to judicial review unless a petition for administrative appellate review is submitted to OHA.

Consent Order

For nuclear safety and worker safety and health matters, contractors are provided opportunities to seek settlement with DOE through a consent order for a noncompliance that could have proceeded to an investigation and possible NOV (reference 10 C.F.R. sections 820.23 and 851.41, respectively). A consent order is a document, signed by both the Director and a contractor, containing stipulations or conclusions of fact or law, and a remedy acceptable to both DOE and the contractor.[13] Normally, there is no press release for a consent order. Consent orders are not issued for classified information security matters, but 10 C.F.R. section 824.4(e) authorizes the Director to settle with a contractor at any time during the enforcement process.

Consistent with DOE policy that encourages settlement of enforcement proceedings at any time, the Director and the contractor can meet at any stage of the process and reach a settlement in the form of a consent order. The consent order identifies the facts related to specific safety requirements and the agreed-upon remedy. It need not include a finding that a violation has in fact occurred, and the contractor is not

[13] For DOE and NNSA facilities, the Director signs and issues consent orders.

necessarily required to admit that any such violation occurred.

Prior HS-40 guidance on consent orders (as originally communicated in EGS 03-01 and prior versions of this document) established a high standard for the issuance of consent orders, along with a fairly detailed set of performance expectations, criteria, and required documentation. Experience with the consent order criteria and subsequent reflection by HS-40 have revealed the approach to be unnecessarily rigid, in that it limits flexibility and discretion in the Office's decision-making. Consequently, HS-40 will consider the following general criteria during future deliberations on the advisability of issuing a consent order in a particular situation. These criteria are consistent with the overall intent of the prior approach, but are less detailed and allow for flexibility in consideration.

1. The Office of Enforcement must have a level of confidence, developed over time, in the contractor's senior management and their ability to effectively implement safety and security programs and investigate specific noncompliance issues. This confidence forms the basis for HS-40 to rely on the contractor's investigation.

2. The Office of Enforcement determines, through independent review and consultation with appropriate DOE line management, that the contractor's specific investigation into the noncompliance is thorough and credible, and that developed corrective actions are comprehensive in scope and appear adequate to address the issue. Guidance on the criteria HS-40 uses in the evaluation of contractor investigations and corrective actions are contained in Appendix E.

3. Issuance of the consent order must provide a positive benefit to HS-40 and DOE. This benefit is typically realized through a reduction in the level of personnel resources required to investigate the noncompliances, and an overall expedited enforcement process.

It is in the contractor's best interest to submit its request for a consent order as early as possible. Consistent with the above criteria, if HS-40 has already expended significant resources in the independent investigation of an issue, it is less likely to receive a positive benefit from issuing a consent order. Consent order requests should be made in writing and should include the contractor's justification as to why a consent order is appropriate in the particular instance. The contractor's investigation/causal analysis should always be provided; HS-40 may also request additional documentation to aid in deliberations.

The Office of Enforcement will review a contractor's request, and any associated documentation, before deciding to issue a consent order. In making the determination, HS-40 also consults with and takes into account the views and recommendations of DOE and NNSA Headquarters line management personnel, as well as Field Element personnel who have responsibility for safe operation of the various facilities in question.

In choosing to issue a consent order, HS-40 exercises its enforcement discretion based upon the contractor's

aggressive response to the event, and its confidence in the contractor's ability to effectively manage and implement safety programs and investigate specific noncompliance issues. After issuance, HS-40 continues to coordinate with the Field Element to monitor progress on the implementation of corrective actions, as appropriate, and the overall effectiveness of applied controls.

The use of a settlement agreement in the form of a consent order is often beneficial to both DOE and the contractor: it avoids a potential investigation by DOE and possible enforcement proceedings, including the potential issuance of an NOV with the imposition of a civil penalty. However, DOE may subsequently issue an NOV if it later becomes known that any of the facts or information provided were false or inaccurate, or if commitments to take corrective actions are not met.

Compliance Order

The Secretary is authorized to issue a compliance order for nuclear safety and worker safety and health violations (reference Part 820, Subpart C and section 851.4, respectively), and classified information security violations (reference section 824.4(b)). A compliance order is generally considered in circumstances where an immediate and serious safety or security problem exists and repeated efforts by DOE to assure completion of appropriate corrective actions by the contractor(s) have failed such that a significant safety or security deficiency persists. In such a case, HS-40, in consultation with Field and Program Office management, begins to prepare a compliance order, including briefing material for the Secretary. A compliance order may be issued and signed only by the Secretary. Failure to comply with a compliance order could subject the recipient to further EA, including an NOV.

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

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

Along with the compliance order, DOE may also issue an NOV with corresponding citations for the violations that have occurred and impose appropriate civil penalties.

Criminal Penalties – Referral to the Department of Justice

Department security policies and Part 820, Subpart F, state that the DOE may refer a nuclear safety matter or a security event to DOJ if DOE determines that a potential criminal action has occurred. Under section 820.71, a contractor, by an act or omission that knowingly and willfully violates, causes to be violated, attempts to violate, or conspires to violate any nuclear safety requirement, will be subject to criminal penalties. Although not specified in Part 851 for worker safety and health issues, HS-40, as a matter of practice, follows the Part 820 approach for worker safety and health matters that are believed to involve a potential criminal action.

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

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

VIII. Civil Penalty Assessment

To calculate civil penalties, the Office of Enforcement initially determines the severity level of the violation by assessing the safety or security significance of each noncompliance. The severity level corresponds to a base civil penalty that HS-40 will escalate or mitigate by discretionary adjustment factors.

Severity Level

The Office of Enforcement reviews each potential enforcement case 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.

Chapter VI, Investigation Process, and Appendices A, B, and C provide guidance on determining safety and security significance, including other factors that affect significance. Guidance on the classification of safety and security violations is provided in DOE's enforcement policies as follows:

- For nuclear safety violations, Section VI of the *General Statement of Enforcement Policy*, Appendix A to Part 820. Violations are categorized as severity level I, II, or III.
- For classified information security violations, Section V of the *General Statement of Enforcement Policy*, Appendix A to Part 824. Violations are categorized as severity level I, II, or III.
- For worker safety and health violations, Section VI of the *General Statement of Enforcement Policy*, Appendix B to Part 851. Violations are categorized as severity level I or II.

DOE uses these definitions as a starting point for determining a recommended severity level. In considering the severity level, DOE considers both the actual and potential consequence (safety or security significance) of the violations, and the severity level may be adjusted up or down by DOE, based on the circumstances of the particular violation. The following sections summarize HS-40's general approach to some common factors that affect adjustment of severity level.

Aggregation of Violations

When several violations are evaluated in the aggregate, indicating a broader underlying problem, the underlying problem is generally assigned a higher severity level than that which the individual examples may have deserved. The resulting categorization may be referred to as a "Severity Level (specify) problem" rather than a "Severity Level (specify) violation."

Severity Level Escalation

DOE's nuclear safety, classified information security, and worker safety and health enforcement policies permit an increase of the base civil penalty if corrective actions are substantially inappropriate. For example, if DOE must

expend substantial effort to convince the contractor to take corrective action, or if 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, HS-40 may consider escalating the civil penalty above the base amount.

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

- The position, training, and experience of the individual involved in the violation. DOE generally considers instances involving managers to be more severe, particularly if senior management is involved.
- Prior notice of the problem. If such notice was clearly given—whether internal, such as an internal assessment, or external, such as by DOE—failure to adequately correct the problem results in a more significant action.
- Duration of a violation. If the matter existed for some time and was clearly identifiable through assessment activities, tests, inspections, or direct observation by workers or management in the course of conducting work activities or facility surveys, HS-40 generally categorizes the condition at a higher level.
- Past performance of the contractor in the particular activity area involved, with a particular emphasis on areas of longstanding deficiencies and insufficient corrective actions.
- Multiple or recurrent examples of a violation in the same time frame rather than an isolated occurrence.

The Office of Enforcement considers these aspects of each case and addresses them appropriately in its investigation report. Additionally, these areas of concern are emphasized in the NOV transmittal letter.

For worker safety and health violations, these factors are not used to determine severity level. However, they may be considered as adjustments to the base civil (or contract) penalty.

Civil Penalty Factors Not Affecting Severity Level

DOE's enforcement policies establish various factors to be considered that may affect mitigation or escalation of the civil penalty. These factors are not generally considered in determining the severity level (to avoid a "double hit" for those factors). Such factors include adequacy of identification of the violation, reporting, causal analysis, and corrective actions. See the Adjustment of Base Civil Penalty section, below, for additional information.

Low Significance Violations

In accordance with DOE's enforcement policies, NOVs need not be issued for noncompliance items that represent minor variances from safety or classified information security requirements. Part 851, Appendix B, section VI, refers to such conditions as "de minimis violations." Part 824 indicates that an NOV may not be warranted if the matter does not appear to be of a recurring nature, pose an

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

For nuclear safety and classified information security noncompliances, severity level III violations should be reserved for cases where calling attention to less-significant conditions can be expected to stimulate the contractor to address those conditions before they result in more-significant conditions or events. HS-40 may also use an enforcement letter to direct contractor attention to resolving such precursor conditions in worker and nuclear safety and classified information security. In cases where HS-40 uses enforcement letters to focus contractor management attention on an issue, but subsequent performance identifies that corrective actions have been ineffective in resolving the noncompliance, HS-40 will consider the need for additional enforcement action.

DOE would not normally issue a PNOV for severity level III violations if: (A) the contractor identifies and reports a noncompliance condition in a timely manner, (B) DOE is satisfied with the causal analysis and corrective actions, and (C) the matter does not appear to be of a recurring nature.

Base Civil Penalty

The worker safety and health (Part 851, Appendix B), nuclear safety (Part 820, Appendix A), and classified information security (Part 824, Appendix A) enforcement policies state that civil penalties are designed to emphasize the importance of compliance and to deter future violations, as well as to encourage early identification and reporting of violations, and their prompt correction. Furthermore, the overall outcome of the NOV developed by HS-40, including the magnitude of the civil penalty, generally takes into account the gravity, circumstances, and extent of the conditions surrounding the violation. As a result, HS-40 may either group related violations or cite them separately, so that the resulting enforcement outcome is commensurate with the significance of the case.

The respective enforcement policies establish base civil penalty amounts by severity level that are a percentage of the maximum civil penalty per violation per day. Table 1 provides the current civil penalty values.

Table 1. Base Civil Penalty Amounts (as of 5/2009) (percentage of maximum civil penalty per violation per day)

	Worker Safety & Health	Nuclear Safety	Classified Information Security
Severity Level I	100% (70K)	100% (110K)	100% (100K)
Severity Level II	50% (35K)	50% (55K)	50% (50K)
Severity Level III	Does not apply	10% (11K)	10% (10K)

Civil penalties are not typically proposed for nuclear safety or security severity level III violations. However, a civil penalty may be appropriate in some circumstances to emphasize the importance of adherence to DOE's nuclear safety and classified information security requirements, or when the violation(s) is similar to previous violations for which the contractor had not taken effective corrective action. Once HS-40 has established the specific violation(s) to cite (including any grouped violations) and their applicable severity level(s), the base civil penalty is established for each, using the applicable table provided in the Part 820, 824, and 851 enforcement policies.

Adjustment of Base Civil Penalty

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

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

Mitigation for Identification and Reporting

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

Timely self-identification means identifying a nuclear safety, worker safety and health, or classified information security problem before it leads to an incident with undesirable consequences. The contractor's focus should be on performance assessment or other means and processes to identify such problems, rather than being forced to react to an event. Hence, if identification of a noncompliance is the result of contractor initiative or through a contractor's efforts to understand the broader implications of a particular noncompliance condition or incident, DOE would generally grant mitigation for self-identification, assuming that proper reporting occurred. However, where an event discloses the existence of a problem and the underlying noncompliances are identified only as a consequence of routine review of the incident, DOE would likely not grant mitigation for self-identification, even if eventually reported by the contractor. The enforcement policies refer to this situation as a "self-

disclosing" event. DOE's desire is for contractors to self-identify problems before they lead to events with actual or potential safety or security consequences, primarily through excellence in performance assessment programs.

Mitigation for Corrective Actions

DOE expects prompt, comprehensive, and effective corrective actions for safety and classified information security violations. As noted, up to 50 percent of the base civil penalty may be mitigated if these factors are present. In applying this factor, HS-40 considers (depending on the circumstances) the timeliness of the actions, the contractor's initiative to take action, the rigor with which the contractor identifies the underlying cause(s), the adequacy of extent-of-condition reviews, whether this is a repetitive problem or occurrence for which prior corrective actions were ineffective, and the comprehensiveness of the corrective actions.

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

- The Office of Enforcement does not normally give credit for a contractor's corrective actions if DOE intervention was needed to broaden the scope or increase the extent of the corrective action.
- Mitigation is also not appropriate merely because immediate remedial actions are taken to correct a condition; broader corrective actions to prevent recurrence must be evident.
- The corrective action effort must include adequate and timely causal determination, extent-of-condition review, and corrective action development. The Office of Enforcement's guideline for judging timeliness in this area is that most investigations, causal analyses, and development of corrective actions should typically be completed within 45 days of identifying the noncompliance; HS-40 also recognizes that some significant events with broad deficiencies may need longer than the recommended 45 days. Contractor failures associated with timely and adequate analysis and corrective action development could lead to full or partial reduction in the allowed mitigation.
- The judgment on adequacy of corrective actions is based on whether the actions appear sufficiently comprehensive to correct the noncompliance and prevent recurrence. The Office of Enforcement solicits DOE Field and Program Office input on this judgment.
- Due to the time required to form a basis for a judgment on effectiveness and the need for a timely EA, HS-40 may not have complete data on the effectiveness of corrective actions when making this judgment. However, if data is available, it will be factored into the judgment on corrective action mitigation.
- If the violation or event is found to have followed a precursor event that should have led to earlier

recognition, or if there is a recurring problem, HS-40 does not normally provide full mitigation for corrective actions. These conditions indicate that prior corrective actions were not effective and were not timely. However, comprehensive action once the problem is finally recognized could be considered in partial mitigation, judging by the egregiousness of the failure to previously correct the problem, its duration, the seriousness of the subsequent event, and the degree of DOE involvement in effecting the proper attention.

Appendix E provides information on common breakdowns and weaknesses in the contractor investigation, causal analysis, and corrective action processes that HS-40 has observed. This information provides lessons learned for contractors to consider as they assess and strive to improve their own processes.

Application of "Per Day" Provisions

The statutory maximum civil penalty ($110,000 for nuclear safety, $100,000 for classified information security, and $70,000 for worker safety and health) in 10 C.F.R. sections 820.81, 824.4(c) and 824.4(d), and 851.5(a), respectively, are the maximum amounts per violation per day. Thus, a noncompliance condition that exists for several days could result in a PNOV with a base civil penalty substantially above the base per-day amount.

The Office of Enforcement's policy is to generally use the base single-day amount as the starting point for most violations, and to consider multiples of that value by applying the per-day provisions for the most significant longstanding or recurring problems. Contractors have been on notice for some time that recurring violations will be dealt with severely in the enforcement process.

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

The number of days cited in an enforcement action is consistent with the seriousness of the violations and their resulting actual or potential consequence.

Multiple Separate Violations

The above Severity Level section noted that HS-40 could aggregate individual violations into a single "problem" and cite that problem at a higher severity level. Additionally, HS-40 can separately cite multiple violations and impose civil penalties for each of the multiple violations in a citation. Each violation is subject to the statutory per-day limit. This

means, for example, that a single event involving violations of worker safety, radiological protection, classified information security, and QA requirements could result in a PNOV individually citing these violations and imposing a civil penalty for each.

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

Exercise of Discretion

Because DOE wants to encourage and support contractors' initiative in prompt self-identification, reporting, and correction of problems, DOE's enforcement policies grant HS-40 broad discretionary authority to recognize positive steps by contractors. This discretionary authority can include deciding not to pursue an NOV, grouping violations to reduce the magnitude of the NOV, or mitigating a civil penalty. However, as discussed previously, enforcement discretion can also be used to escalate the magnitude of an NOV in appropriate circumstances.

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

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

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

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

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

Ability of Contractor to Pay Civil Penalty

DOE's nuclear safety, classified information security, and worker safety and health enforcement policies grant HS-40 discretion in adjusting civil penalties based on judgment of the contractor's ability to pay (reference Part 820, Appendix A, Paragraph IX, Part 824, Appendix A, Paragraph VIII, and Part 851, Appendix B, Paragraph IX, respectively). Although the policies generally regard the safety and security significance of a violation as a primary consideration in assessing a civil penalty, the contractor's (including subcontractor's) ability to pay may be a secondary consideration. DOE does not levy civil penalties with the intent of putting a contractor into bankruptcy. To discontinue contractor management and operation of a DOE site or facility, DOE would terminate the contract rather than impose civil penalties. However, the burden of proving inability to pay is on the contractor and must be conclusively demonstrated by a present financial condition—not a future condition. If it appears that the economic impact of a civil penalty might put a contractor into bankruptcy, or interfere with a contractor's ability to safely or securely conduct activities or correct the violation to bring its program into full regulatory compliance, or both, it could be appropriate to decrease the base civil penalty.

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

IX. Contractor Employee Whistleblower Protection

The DOE Contractor Employee Protection Program, established in Part 708, applies to complaints of reprisals or retaliation against DOE contractor employees for certain conditions (protected activities), including employee disclosures, participations, or refusals related to various matters involving nuclear safety and/or worker safety and health issues. Specifically, Part 708 provides employees with a process to file a complaint concerning retaliation and to obtain restitution from the contractor in the event of a finding of reprisal under the Rule.

In the Federal Register notice adopting Part 708, Part 708 was designated a nuclear safety rule enforceable under the PAAA. Additionally, Part 708 states that insofar as an act of retaliation by a DOE contractor results from an employee's involvement in matters of nuclear safety in connection with a DOE nuclear activity, the retaliation could constitute a violation of a DOE nuclear safety requirement and could warrant relief to the employee under Part 708, and the imposition of civil penalties on the DOE contractor under Part 820.

The *Worker Safety and Health Program* final rule, Part 851, contains, in section 851.20, specific worker safety and health rights that parallel the employee-protected activities of Part 708. Acts of retaliation involving worker safety and health issues could warrant relief to the employee similar to that described above for Part 708, as well as the imposition of civil or contract penalties against the DOE contractor under Part 851.

Based on these rules, HS-40 has the authority to issue civil penalties against the company responsible for retaliation associated with protected activities involving either nuclear or worker safety and health matters. The Office of Enforcement conducts these activities for the purpose of issuing NOVs and civil penalties to DOE contractor entities in an effort to prevent acts of retaliation and to address violations of DOE nuclear and worker safety and health rules as discussed above.

It is important to note that the process for reviewing complaints and authorizing remedies to the individual complainant does not reside with HS-40, as discussed in more detail below. Employees subjected to and seeking appropriate resolution of a potential act of retaliation need to follow the process described in Part 708. Activities conducted by HS-40 cannot be viewed as a substitute for following Part 708 procedures.

The procedures for implementing Part 708 provide an individual with multiple options for pursuing a remedy for retaliation. Generally, such matters can be heard either by the DOE's OHA or by the DOL. There are procedural and other reasons for selecting an appropriate forum for the matter, and that choice will not in any way affect the manner in which HS-40 addresses the issue. In general, HS-40's practice is to delay acting on a retaliation matter against a DOE contractor until OHA or DOL has completed its process (i.e., investigation, hearing, initial decision, and final agency decision).

Normally, HS-40 will commence enforcement activities when an agency issues a final order and will not wait for all possible appeals to be exhausted. However, based on the long time period for the appeal process and the long time period for appeals in general, HS-40 has subsequently determined that deferral until appeals are complete causes delays that are too long and are generally not appropriate. Deferrals are to be used to avoid duplication of government investigation and adjudicatory efforts in pursuit of an appropriate remedy. It is clear that, barring unforeseen circumstances, the record is generally complete when an agency issues a final order.

It is also important to note that although HS-40 defers the start of enforcement activities as they relate to an act of retaliation (as described in the preceding paragraph), HS-40 does not defer actions to address any associated substantive nuclear or worker safety and health issue that represents a noncompliance, consistent with normal HS-40 processes as described in this document. Such a noncompliance could lead to an HS-40 investigation and a PNOV solely intended to address the underlying nuclear or worker safety and health rule violation well before the Office issues an action related to the act of retaliation.

The Office of Enforcement considers many factors associated with retaliation cases when exercising enforcement discretion. These factors include the magnitude of the retaliation, the management level associated with the retaliation, the DOE contractor's response after the retaliation with respect to its work force, and the overall safety record of the contractor. The contractor's positive performance would not normally cause the Office to forgo action on the retaliation, but could impact whether and how mitigation would be considered. Similarly, negative performance on the part of the contractor could be a factor in considering enforcement escalation. Another consideration is whether the retaliation resulted from the employee reporting his/her concerns to DOE or to another government agency. The ultimate decision about whether to take enforcement activity on a claim of retaliation does not depend on whether the underlying nuclear or worker safety and health concern proves to be valid. In other words, the act of retaliation is itself a safety concern, because of the chilling effect it has on employees' willingness to speak up about safety issues.

X. Application of Enforcement Process to Special Conditions

Recurring/Repetitive Problems

As noted in Chapter IV, Contractor Compliance Assurance and Reporting, recurring or repetitive problems should result in a contractor submitting an NTS report. The Office of Enforcement factors in such problems when considering safety and security significance during NTS or SSIMS report reviews or other initial identification of noncompliance conditions, and when making decisions on cases to investigate. Chapter IV identifies recurring and repetitive problems as a factor that impacts the EA outcome, usually causing HS-40 to not mitigate or partially mitigate a noncompliance in accordance with the corrective action criteria. Recurring and repetitive problems may also provide a basis for a Quality Improvement citation for a nuclear safety violation.

A large percentage of the cases that HS-40 investigates involve recurring issues—i.e., problems identical or similar to those that led to a serious previous event or condition within the same organization, facility, or site. Recurring problems indicate that the organization's corrective action management processes are flawed, in that either the prior corrective actions were not effective in preventing recurrence, or the corrective actions were not maintained. In turn, this means that the causal analysis may be deficient, trending processes may not be sufficiently developed, extent-of-condition reviews may not be performed or effective, or performance assessment processes do not discover issues before they result in significant safety or security events. In general, senior management attention often focuses on safety or security only after a very serious event or an EA. In the Institute of Nuclear Power Operations' terms (one of that organization's eight principles that form the basis for an excellent safety culture), leaders have not sufficiently demonstrated (as opposed to talked about) a commitment to safety.

Insufficient management commitment to safety and security is unacceptable at this stage of maturity of the DOE complex, in that it demonstrates too little attention to finding and fixing precursor issues and appropriately responding to safety and security events. As a result, HS-40 has put the contractor community on notice that EAs involving recurring issues will generally result in a significantly greater civil penalty than would otherwise have been the case—for example, greater use of DOE's "per day" authority, separate citation of violations rather than aggregation, escalation of the severity level of the violations, or a combination of these remedies depending upon the circumstances.

To illustrate the underlying problem area(s) that can contribute to a recurrence of problems, lessons-learned information is provided in Appendix E. The information in Appendix E addresses contractor investigation, causal analysis, and corrective action deficiencies and contractor assessment program weaknesses that have been observed by HS-40.

Contractor Transition

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

The incoming contractor organization is expected to assume full responsibility for safe and secure operation and compliance with DOE safety and security requirements on the date it assumes contract responsibility for the site or facility. During its due-diligence review, the incoming contractor normally identifies any significant individual or programmatic issues of noncompliance with DOE requirements; these are then addressed with the appropriate DOE Field and Program Office management before transfer of responsibility for the site or facility. Additionally, after assuming responsibility, the incoming contractor should: (A) report any noncompliance conditions identified during the due-diligence period that meet NTS reporting thresholds and SSIMS reporting criteria, and (B) assume, from the outgoing contractor, responsibility for completing or assuring completion of corrective actions and problem resolution that were ongoing at the time of turnover.

The Office of Enforcement may exercise reasonable discretion in considering a noncompliance issue that surfaces soon after the incoming contractor assumes responsibility, and that could not have reasonably been identified during the due-diligence period. The Office of Enforcement generally does not pursue an EA during this early, near-term period if the contractor, upon identifying the condition, reports the noncompliance to the NTS, SSIMS, or its internal tracking system (as appropriate) and responds with timely and effective corrective actions. However, for serious events or accidents, such as serious worker injury, compromise/potential compromise of classified information having a significant impact on national security, or substantial actual or potential radiological uptake or exposure, HS-40 would normally evaluate the issue for a potential EA, regardless of timing.

Contractor Internal Assessment Programs

Over the past few years, HS-40 has stressed the importance of contractor assessment programs as an effective tool in proactively identifying conditions adverse to quality before those deficiencies manifest themselves in significant safety and security events.

The Director has emphasized the importance of shifting from an event-driven to a non-event-driven culture and, accordingly, has established a goal of having the great majority of all noncompliances being identified through contractor internal assessment activities. The term "assessment" is not limited to activities associated with formal M&IAs. Rather, the term is used broadly to also refer to other types of self-identifying activities, such as audits,

engineering reviews, surveillances, trend analyses, and problem/event precursors that are identified by workers and supervisors during routine performance of their activities.

Distinguishing between "event-driven" and "non-event-driven" noncompliances involves some level of subjectivity. For example, assessments are often performed as a result of events; NTS or SSIMS may indicate that reports are driven by such assessments. In some cases, the assessment may simply expand upon issues that were self-disclosing as a result of the event. In other cases, the assessment may have a broad scope and identify issues that were not self-disclosing as a result of the event.

Many self-disclosing events do not explicitly meet NTS or SSIMS reporting thresholds or criteria and are tracked in a contractor's internal tracking system. The fact that such issues have been identified does not necessarily imply self-identification through assessment.

The Office of Enforcement examines contractor NTS and SSIMS reports and internal tracking systems to determine whether deficiencies were self-disclosing or identified by an effective assessment program. The important objective is to reduce the number of events and significant near misses by improving performance assessment processes.

The Office of Enforcement generally investigates significant events that disclose underlying safety, classified information security, and management issues. These are usually issues that could have been identified through an effective assessment process. However, many contractor assessment processes are known to have been deficient because they failed to find problems before disclosure by an adverse event. Appendix E describes some of the common assessment program deficiencies noted by HS-40 and summarizes the Office's approach to reviewing assessment programs. The Office of Enforcement's EAs regularly cite assessment program deficiencies that contributed to the event under investigation. For this reason, HS-40 encourages the DOE community to review and use the performance assessment guide prepared by the EFCOG Safety and Security Regulatory Working Group as a starting point in improving their assessment processes. The guide is available on the EFCOG website.

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

Over the past several years, HS-40 has noted a number of cases that involved both nuclear safety and worker safety and health issues. Such cases included, for example, a fire or explosion that affected or may have affected radiological materials and worker safety and health, violation of lockout/tagout requirements affecting nuclear safety systems and the potential for an electrical shock, or a series of both nuclear and worker safety and health events that demonstrated a programmatic problem in work planning or execution. Past EAs focused on and cited only the related nuclear safety violations because the worker safety and health rule had not yet been issued at the time of these events. Cases with implications in both nuclear and worker safety areas will continue to surface. With the issuance of Part 851 in February 2006, if such a case occurs, HS-40 will conduct an integrated investigation that reviews the facts, circumstances, and noncompliances of both areas.

Additionally, if HS-40 pursues a PNOV for noncompliances in multiple areas, it would generally be a combined action that cites both nuclear and worker safety violations. Such actions will be coordinated so that the same violation, as well as any associated civil penalty, is not cited twice in both nuclear safety and worker safety and health areas. On the other hand, a single event or occurrence might have certain noncompliances in the nuclear safety area and certain other noncompliances in the worker safety and health area.

Coordinating reviews and enforcement proceedings for both areas ensures proper consideration of the diverse noncompliances that may have occurred.

The potential also exists that nuclear safety and worker safety and health cases may involve classified information security noncompliances. If such a situation arises, an integrated investigation will be conducted.

Appendix A – Worker Safety and Health Enforcement

This Appendix provides supplemental information for the worker safety and health enforcement program. It complements the main body of the Overview by addressing elements unique to 10 C.F.R. Part 851 and the Office of Enforcement approach to the enforcement of worker safety and health noncompliances. Appendix A includes the following information:

A.1 Reporting Worker Safety and Health Noncompliances into NTS
A.2 References to Implementing Guidance for 10 C.F.R. Part 851
A.3 Additional Requirements and Parameters Unique to Safety and Health Enforcement

A.1 Reporting Worker Safety and Health Noncompliances[1] into NTS

Reporting thresholds are established as shown in Table A-1. Use of these thresholds is discussed in Chapter IV and A.3.1 and A.3.2.

Table A.1 - Noncompliances Associated With Occurrences (DOE Manual 231.1-2)

Use the specific criteria in the DOE Manual for the reporting thresholds

Reporting Criteria Group	Subgroup	Occurrence Category and Summary Description[2]
1. Operational Emergencies[3]	N/A	(1) Operational Emergency (2) Alert (3) Site Area Emergency (4) General Emergency
2. Personnel Safety and Health	A. Occupational Illnesses/Injuries	(1) Fatality/terminal illness (2) Inpatient hospitalization of $\geq$ 3 personnel (3) > 3 personnel having DART (days away, restricted, or transferred) cases (4) Personnel exposure > limits requiring medical treatment (5) Personnel exposure > limits (6) Serious occupational injury
	B. Fires/Explosions	(1) Unplanned fire/explosion within primary confinement/containment (2) Unplanned fire/explosion in a nuclear facility that activates a fire suppression system (3) Unplanned fire/explosion in a non-nuclear facility
	C. Hazardous Energy Control	(1) Process failure resulting in burn, shock (2) Process failure/discovery of uncontrolled energy source
10. Management Concerns/Issues	N/A	(3) Near miss (Significance Categories 1 through 3)

The simple occurrence of an event in any of the listed categories is not enough to warrant NTS reporting. Reportable noncompliances require the identification of a 10 C.F.R. Part 851 noncompliance in conjunction with the event. Contractors identifying a significant worker safety and health noncompliance in association with an event type or category not listed on the table should evaluate the event for NTS reportability.

Table A.2 - Other NTS Reportable Conditions

Management Issue Noncompliances[4]
Repetitive Noncompliances
Programmatic Issue
Intentional Violation or Misrepresentation
Substantiated violations of 851.20(a)(6) or (9) - Reprisals
Other Significant Conditions
Conditions meeting the criteria of Severity Level I (serious) violations[5]

Notes to Tables

1 Noncompliances with 10 C.F.R. Parts 850 and 851.

2 These summary descriptions are a brief characterization of the related criteria. Use the full statement of the criteria contained in DOE Manual 231.1-2 to establish NTS reportability of event-related occupational safety and health noncompliances.

3 Report worker safety and health noncompliances associated with any of the DOE Manual 231.1-2 Operational Emergency categories (Operational Emergency, Alert, Site Area Emergency, General Emergency).

4 Refer to Chapter IV, pages 17-19, for a description of these types of noncompliances.

5 Conditions of noncompliance identified by any method or means (e.g., assessments, inspections, observations, employee concerns, event evaluation) that would not otherwise be reported into NTS as either a Management Issue or Occurrence, but that represent a condition or hazard that has the potential to cause death or serious physical harm (injury or illness). These conditions include imminent danger situations.

A.2 References to Implementing Guidance for 10 C.F.R. Part 851

The Preamble to 10 C.F.R. Part 851 indicates that the DOE will provide additional guidance for implementing Part 851. This Overview provides such guidance. Table A-2 delineates the topics that are addressed in this Overview and the specific sections of the Overview that contain the new guidance.

Table A.3 - 10 C.F.R. Part 851 References to Forthcoming Guidance and Enforcement Process Overview Cross-Reference

10 C.F.R. Part 851 Section	Topic	Enforcement Process Overview
Preamble at Page 6866	Multi-employer worksites – prime contractor's liability for violations by another DOE-contractor	Appendix A, A.3.5, p.70
Preamble at Page 6866	Voluntary reporting thresholds	Chapter IV, p. 16, *NTS and SSIMS Reporting,* and Appendix B
Preamble at Page 6874	NTS reporting thresholds	Chapter X, p. 60, *Contractor Transition*, Appendix A, A.3.1, p. 68, and Appendix B, B.2.1, p. 78
Preamble at Page 6874	Affirmative defenses to enforcement actions	EPO provides guidance on applying enforcement discretion to investigation decisions, structuring an enforcement action, and mitigation considerations.
Preamble at Page 6874	Possible citation of prime contractor for subcontractor violation	Chapter I, p.1, *Statutory Authority and Regulatory Framework* and Chapter I, p.3, *Application of Enforcement Program to Subcontractors and Suppliers*
Preamble at Page 6875	Enforcement policy for subcontractors	Chapter I, p.3, *Application of Enforcement Program to Subcontractors and Suppliers*, and Appendix A
Preamble at Page 6877	Enforcement actions involving both nuclear safety and worker safety and health, and limits on combined penalties	Chapter X, p. 61, *Combined Nuclear Safety, Worker Safety and Health, and Classified Information Security Noncompliances*
Preamble at Page 6878	General Duty Clause	Appendix A, A.3.6, p. 70
Preamble at Page 6879	Terminology "free from hazards" in General Duty Clause	Appendix A, A.3.6, p. 70
Preamble at Page 6882	Multi-employer worksites – prime contractor's liability for violations by another DOE-contractor	Chapter I, p.3, *Application of Enforcement Program to Subcontractors and Suppliers*

Preamble at Page 6883	Multi-employer worksites – prime contractor's liability for violations by a subcontractor	Chapter I, p.3, *Application of Enforcement Program to Subcontractors and Suppliers*, and Appendix A, A.3.5, p. 70
Preamble at Page 6896	Use of National Consensus Standards	Need for any enforcement guidance will be determined after HS-40 prepares guidance on open issues in this area.
Preamble at Page 6904	Guidance on screening of potential violations, enforcement process, and appeals process	Overview document in general, and Chapters IV, VI, and VII in particular.
Preamble at Page 6904	NTS reporting thresholds	Chapter X, p. 60, *Contractor Transition*, Appendix A, A.3.1, p. 68, and Appendix B, B.2.1, p. 78
Preamble at Page 6904	Affirmative defenses for enforcement actions	EPO provides guidance on applying enforcement discretion to investigation decisions, structuring an enforcement action, and mitigation considerations.
Preamble at Page 6905	Inspection protocols	Refer to Chapters I – X of this document for guidance on the enforcement process, and Chapter VI in particular for investigation and focused inspection activities.
Preamble at Page 6905	NTS reporting thresholds	Chapter X, p. 60, *Contractor Transition*, Appendix A, A.3.1, p. 68, and Appendix B, B.2.1, p. 78
Preamble at Page 6910	Unpreventable employee misconduct	Appendix A, A.3.7, p. 72
Preamble at Page 6924	Enforcement policy for subcontractors and suppliers	Chapter I, p.1, *Statutory Authority and Regulatory Framework* and Chapter I, p.3, *Application of Enforcement Program to Subcontractors and Suppliers,* and Appendix A, A.3.5, p. 70
Preamble at Page 6927	Unpreventable employee misconduct	Appendix A, A.3.7, p. 72
Preamble at Page 6928	Enforcement philosophy on contractor self-reporting and NTS reporting processes including thresholds	Chapter II, p. 5, *Enforcement Philosophy*
Preamble at Page 6928	Coordination of DOE reporting processes	Chapter IV, p. 14, *Contractor Screening Processes*

A.3 Additional Requirements and Parameters Unique to Worker Safety and Health Enforcement

A.3.1 Reporting into NTS

For worker safety and health enforcement purposes, prompt reporting is generally considered to be within 20 calendar days after determining that a noncompliance exists. Some of the noncompliance conditions may be evident when an event occurs, and the NTS report should be filed in a timely manner for those noncompliances.

To obtain consideration for worker safety and health enforcement discretion as well as mitigation based on prompt reporting, the contractor should report noncompliances into the NTS in accordance with the reporting thresholds for worker safety and health noncompliances in Table A-1 in Section A.1 of this Appendix. Conditions that are below the NTS reporting thresholds should be entered into the contractor's internal tracking system.

Although NTS reports are usually entered by contractor personnel, DOE enforcement coordinators may also submit an NTS report if the contractor declines to do so. However, the preferred approach is to first discuss the reportability of the matter with the contractor.

A.3.2 ORPS Occurrence Associated with a Noncompliance

A number of ORPS event categories have significant safety implications. The Office of Enforcement is interested in the reporting of identified worker health and safety rule noncompliances that are associated with one of these potentially significant safety events—that is, the noncompliance(s) led to the ORPS-reportable event or condition, or the event or condition subsequently resulted in discovery of the noncompliance(s). A contractor is expected to report into NTS the noncompliances associated with an event or condition that meets any of the ORPS criteria listed in Table A-1 in Section A.1 of this Appendix and the corresponding notes.

NTS reporting is in the contractor's best interest when a worker health and safety rule noncompliance is identified in association with an ORPS-reportable event in the specified categories. NTS reporting is not necessary if the event does not indicate an associated noncompliance.

A.3.3 Safety Significance/Investigation Decision – Worker Safety and Health

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

- The extent or severity, or both, of an injury or illness that actually occurred or the potential that it could occur.
- The extent to which hazards were not adequately identified or evaluated.
- The extent to which protective measures or hazard controls were violated, defeated, or not properly established.

The breakdowns in levels of controls associated with an event or condition, along with the actual or potential consequences of the event or condition, establish the relative safety significance. However, various other factors important to worker safety and health are also considered in evaluating cases for investigation and determining the enforcement outcome:

- Management involvement in, awareness of, or contribution to a noncompliance.
- A repetitive or recurring noncompliance.
- Prior notice by DOE of the problem, and inadequate resolution by the contractor.
- Duration of the noncompliance.
- Multiple examples of a noncompliance, as opposed to a single occurrence.
- Discovery of the noncompliance by DOE or another external organization.
- Willful noncompliance or falsification of information.
- Prior enforcement actions (related or not related).
- Lack of timely notification to DOE or reporting into the NTS.
- Slow contractor response to investigate or to take appropriate corrective actions, or both.
- Poor safety performance history, combined with prior enforcement actions.
- Violation of a compliance order.

The presence of one or more of these factors generally increases the safety significance and may be of sufficient concern to lead to an investigation, even when the basic safety significance alone would not necessarily dictate such an outcome. After considering these factors and the basic safety significance, HS-40 decides whether the matter warrants an investigation. Typically, the initial recommendation comes from HS-40 staff, and the decision to investigate rests with the Director.

A.3.4 Pending Part 851 Variance Requests

Contractors may have pending variances to Part 851 because of the time needed for DOE variance review and approval. The Office of Enforcement may apply enforcement discretion when a violation involves a regulatory provision of 10 C.F.R. Part 851 for which the contractor has a pending variance request. This process is similar to HS-40's approach to the backlog of pending contractor exemptions during the early stages of 10 C.F.R. Part 835 implementation.

If the identified contractor takes action in good faith and implements any necessary interim protective measures or compensatory actions in a timely manner to provide for adequate worker protection, application of DOE's enforcement authority in such cases would not advance the Department's goals as stated in Appendix B of Part 851. In these narrow cases, HS-40 does not intend to take enforcement action.

A.3.5 Multiple Employer Worksite

Many DOE sites have multiple contractors and subcontractors performing work at the same workplace, which can make managing worker safety and health more challenging. Subparts B and C of Part 851 contain comprehensive requirements that each contractor must follow to protect its employees. However, given the complexity of working with other contractors and subcontractors on site, coordination of work planning and execution to ensure worker safety and health must be given special consideration.

When investigating a matter involving risk to workers from multiple contractors, HS-40 determines the full extent of responsibility among those contractors for exposing employees to hazards. In such cases, HS-40's investigation will focus on determining which contractor(s): A) created the hazard; B) had responsibility for correcting and controlling the hazard; and C) exposed the employees to the hazard. To establish the extent of contractor responsibility, HS-40 reviews available records and procedures that describe roles and responsibilities, determines whether responsible employees have received appropriate training, and ascertains the actual practices and conditions in the workplace. The Office of Enforcement may cite any contractor found responsible, whether or not the contractor's own employees were exposed to the hazard in question.

If an enforcement action is taken, HS-40 also considers both mitigating and aggravating circumstances for each contractor involved, in accordance with the enforcement process described in this document. At a minimum, DOE would expect a contractor whose workers are exposed to a hazard to promptly correct the hazard (if it has the authority to do so) or to remove its workers from the exposure in a timely manner, adequately protect its employees, and promptly notify the responsible contractor to correct the hazard.

A.3.6 General Duty Clause

DOE will take enforcement action against a contractor who fails to provide a place of employment that is free from recognized hazards that are causing, or have the potential to cause, death or serious physical harm to workers, in accordance with section 851.10(a). The intent of section 851.10(a) is to parallel the requirements set forth in the OSHA general duty clause, Section 5(a)(1) of the Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. 654).

Contractors have a clear obligation to protect workers from death and serious physical harm resulting from recognized workplace hazards, even where:

- There is no existing standard that covers the hazard.

- There is doubt whether a particular standard applies to the hazard.
- A particular safety and health standard is inadequate to protect the contractor's workers against the specific hazard that the standard addresses, and the contractor is aware of the inadequacy.

In such situations, contractors must undertake any feasible actions to eliminate or abate such hazards. If all four of the following questions can be answered in the affirmative, a contractor will be considered to be in noncompliance with section 851.10(a) and may be subject to appropriate enforcement action and penalties:

1. *Are workers being exposed to a hazard?* This means that the hazard exists, workers are exposed to the hazard, and the contractor has failed to remove the hazard. A hazard is defined as a "danger which threatens physical harm to employees." The contractor is not expected to follow any pre-defined abatement method, step, or precaution but to use any and all feasible means to protect employees from the hazard.

   It is also important to attempt to identify, as early as possible, any general workplace hazards that could lead to a condition that creates another hazard or may result in an event. An undetected hazard may become apparent after the occurrence of an event, especially if it results in an injury or fatality. Contractors must be constantly vigilant to detect and correct any existing hazard, as well as any new hazard—for example, those that may result from a change in a process or work practice, or from the use of new or additional equipment.

2. *Is the hazard a recognized hazard?* This means that the contractor knew or should have known about the hazard in the situation, the hazard is obvious, or the hazard is recognized within the contractor's industry (i.e., it is identified and addressed in a recognized industry consensus standard, or other credible industry guidance or documentation). Using a work practice that is contrary to an accepted industry practice or standard, or contrary to a supplier's standard for use, or that safety experts in the industry acknowledge creates a particular hazard, indicates that the employer should have known about the hazard.

   A contractor's recognition of a hazard is also evidenced by the contractor documenting or reporting any injury related to the hazard, as well as by workers calling the contractor's attention to the hazard. Any written or oral statements made by the contractor or a supervisor that relate to the hazard also establish knowledge of the hazard.

   If the hazard is unrecognized within the industry, DOE would still hold a contractor responsible for recognizing and correcting the hazard if DOE concludes that the hazard should have been recognized by a reasonable person.

3. *Is the hazard causing, or does it have the potential to cause, death or serious physical harm?* The hazard must be classified as Severity Level I or "serious," meaning that there is a potential for serious injury, illness, or death if the hazard is not eliminated or controlled. This can include any potential acute or chronic impairment of the body that affects life

functioning on or off the job (usually requiring treatment by a medical doctor), whether temporary or permanent. Alternatively, it could be an illness that significantly reduces physical or mental efficiency (e.g., occupational asthma).

4. *Do feasible and useful methods exist to correct the hazard?* The hazard must be correctable, i.e., there is a feasible and known way for the employer to correct, eliminate, or at least significantly reduce the hazard, either by applying an appropriate control or having workers use adequate personal protective equipment.

A.3.7 Employee Misconduct

Employee misconduct is a condition where the contractor was not aware of the problem or the underlying behavior, the contractor can demonstrate that other similar problems or behavior had not occurred, and the misconduct was a direct violation of an adequate work control that had been effectively implemented and was otherwise uniformly met.

Such a condition, if established by the contractor, would excuse the contractor from citation for a violation of a worker safety and health requirement. This approach parallels a similar defense identified by OSHA. Other factors may also provide a basis for HS-40 to exercise discretion in not pursuing an enforcement action, not pursuing issuance of a civil penalty, or applying mitigation in an enforcement action.

A.3.8 Coordinating Application of Civil Penalty and Contract Fee Reduction

Title 10 C.F.R. section 851.5 states that contractors indemnified under the Atomic Energy Act are subject to either civil or contract penalties, but not both. In addition, section 851.1 states that only contract penalties can be levied against non-indemnified contractors since they are not subject to civil penalties. Most of DOE's contractors are indemnified under section 170d of the Atomic Energy Act. Those that are not indemnified under section 170d are handled under the contract remedy provisions of the Rule. The preamble to Part 851 (see pages 6871 and 6876 of the *Federal Register*, vol. 71, no. 27, February 9, 2006) also states that for a worker safety violation, the Director will coordinate with the appropriate DOE Program Office and Field Element contract representatives on the type of monetary penalty (either contract or civil) and the amount to be assessed.

The current enforcement process includes a determination by the Director of HS-40, in consultation with the appropriate Program Office and Field Element, that an enforcement action will be taken against a contractor and that a monetary penalty will be assessed. To ensure adequate consultation, HS-40 has built certain coordination steps into its enforcement process (see Chapter VI, Investigation Process) to ensure that both DOE Program and Field Element representatives' perspectives and views are considered throughout the entire enforcement process. The Office of Enforcement is actively working with DOE Program and Field Element representatives on revising its enforcement process to further address the added level of

coordination needed to ensure effective implementation of both civil and contract penalties.

A.3.9 Applicability of Part 851 and "Work for Others"

Part 851 states that it applies to the conduct of contractor activities at DOE sites where a contractor is an entity under contract to DOE "that has responsibilities for performing work at a DOE site in furtherance of a DOE mission." Often, DOE facilities, particularly in the science arena, are made available to representatives of various institutions, companies, and foreign organizations to conduct research studies and activities. Questions have been raised as to whether enforcement would apply to worker safety issues that involve such workers performing research for others using DOE facilities. DOE's OGC has developed guidance on the application of Part 851 to work for others, as well as general guidance on the issues of who is a DOE contractor and what work is in furtherance of the DOE mission. This guidance, which may be subject to revision, is provided in a position paper available on the following website:

www.hss.energy.gov/healthsafety/WSHP/rule851/851final.html

The Part 851 enforcement process that is outlined in this Overview applies to those contractors and that work where the OGC has determined that Part 851 is applicable, as detailed in the above position paper.

A.3.10 Legacy Worker Safety Issues

It is expected that some pre-existing conditions at various DOE facilities may not be in compliance with Part 851 requirements, and the facility changes that would be needed to come into compliance may be impractical and expensive. Anticipated issues involve existing code of record that predates and differs from Part 851 requirements, previously granted equivalencies to Part 851 referenced standards, application of consensus standards, and other similar issues.

DOE's OGC has developed guidance on application of Part 851 to legacy issues such as code of record and reference standards. That guidance is contained in a position paper on the following website (this guidance may be revised from time to time):

www.hss.energy.gov/healthsafety/WSHP/rule851/851final.html

The Part 851 enforcement process that is outlined in this document applies to those contractors and that work where OGC has determined that Part 851 is applicable, as detailed in the above position paper.

A.3.11 Offsite Support for Emergencies

Part 851 applies to services provided under contract to DOE on a DOE site. In some cases, HS-40 may determine that it may apply to emergency response support. In any evaluation for potential enforcement, the following points will be of primary consideration:

- Whether the agreement for services is a contractual relationship and consequently falls within the scope of the Rule.
- Where the activities took place.

Contractors are expected to conduct appropriate baseline needs assessments to ensure that 10 C.F.R. Part 851 program requirements are addressed. Except for unusual or egregious deficiencies, HS-40 generally exercises discretion in evaluating noncompliances occurring during an emergency or event response involving offsite municipal fire-fighting or emergency response agencies, even when contractual relationships bring them under the scope of Part 851. Enforcement focus is normally directed toward the operating or management/integrating contractor in evaluating how well the program requirements are met. As in any potential enforcement situation, HS-40 will evaluate the situation based on its own specific merits.

Appendix B – Nuclear Safety Enforcement

This Appendix provides supplemental information for the nuclear safety enforcement program. It complements the main body of the Overview by addressing elements unique to 10 C.F.R. Parts 820, 830, and 835 and the Office of Enforcement approach to the enforcement of nuclear safety noncompliances. Appendix B includes the following information:

B.1 Reporting Nuclear Safety Noncompliances into NTS
B.2 Additional Requirements and Parameters Unique to Nuclear Safety Enforcement
B.3 Situation-Specific Nuclear Safety Enforcement Guidance

B.1 Reporting Nuclear Safety Noncompliances[1] into NTS

Reporting thresholds are established as shown in Table B-1. Use of these thresholds is discussed in Chapter IV and B.2.1 and B.2.2.

Table B.1 - Noncompliances Associated With Occurrences (DOE Manual 231.1-2)

Use the specific criteria in the DOE Manual for the reporting thresholds

Reporting Criteria Group	Subgroup	Occurrence Category and Summary Description[2]
1. Operational Emergencies[3]	N/A	(1) Operational Emergency (2) Alert (3) Site Area Emergency (4) General Emergency
2. Personnel Safety and Health	B. Fires/Explosions	(1) Unplanned fire/explosion
3. Nuclear Safety Basis	A. Technical Safety Requirement (TSR) Violations	(1) Violation of TSR/Operational Safety Requirement (OSR) Safety Limit (2) Violation of other TSR/OSR requirement (3) Violation of DSA hazard control
	B. Documented Safety Analysis (DSA) Inadequacies	(1) Positive unreviewed safety question (USQ)
	C. Nuclear Criticality Safety	(1) Loss of all valid criticality controls

4. Facility Status	A. Safety Structure/System/Component (SSC) Degradation	(1) SSC performance degradation[4]
	B. Operations	(2) Actuation of Safety Class SSC (4) Facility Evacuation
5. Environmental	A. Releases	(1) Radionuclide release
6. Contamination/Radiation Control	A. Loss of Control of Radioactive Material (RAM)	(1) Offsite RAM exceeding DOE limits (2) Loss of RAM (>100X 835 App. E)
	B. Spread of Radioactive Contamination	(1) Offsite radioactive contamination[5]
	C. Radiation Exposure	(1) Exceedance of DOE dose limits (2) Unmonitored exposure (3) Single exposure > thresholds
	D. Personnel Contamination	(1) Offsite medical assistance (2) Offsite personnel/clothing contamination (3) Onsite personnel/clothing contamination[6]
7. Nuclear Explosive Safety	N/A	(1) Damaged nuclear explosive (2) Introduction of electrical energy (3) Safety feature compromise (4) Inadvertent substitution (5) Violation of a safety rule (6) Damage to a training unit

Table B.2

Management Issue Noncompliances[7]
Repetitive Noncompliances
Programmatic Issue
Intentional Violation or Misrepresentation
Substantiated worker retaliation[8] with a nuclear safety nexus

Notes to Tables

1. Reporting noncompliances with any of the nuclear safety rules or other nuclear safety requirements.
2. These summary descriptions are a brief characterization of the related criteria. Use the full statement of the criteria contained in Manual 231.1-2 to

establish NTS reportability of event-related nuclear safety noncompliances.

3. Report nuclear safety noncompliances associated with any of the DOE Manual 231.1-2 Operational Emergency categories (Operational Emergency, Alert, Site Area Emergency, General Emergency).
4. Report noncompliances associated with a degradation of Safety Class Structure, System, or Component preventing satisfactory performance of its design function when required to be operable or in operation.
5. Report noncompliances associated with an offsite spread of contamination event where a contamination level exceeds 100 times the applicable value identified in 10 C.F.R. Part 835, Appendix D.
6. Report noncompliances associated with a personnel/personal clothing contamination where a contamination level exceeds 100 times the applicable total contamination value identified in 10 C.F.R. Part 835, Appendix D.
7. Refer to Chapter IV, pages 16-18, for a description of these types of noncompliances.
8. Worker retaliation as defined in 10 C.F.R. Part 708.

B.2 Additional Requirements and Parameters Unique to Nuclear Safety Enforcement

B.2.1 Reporting into NTS

For nuclear safety enforcement purposes, prompt reporting is generally considered to be within 20 calendar days after determining that a noncompliance exists. Some of the noncompliance conditions may be evident when an event occurs, and the NTS report should be filed in a timely manner for those noncompliances.

To obtain consideration for nuclear safety enforcement discretion as well as mitigation based on prompt reporting, the contractor should report noncompliances into the NTS in accordance with the reporting thresholds in Appendix B.1, and enter those that are below the NTS reporting thresholds into the contractor's internal tracking system.

Although NTS reports are usually entered by contractor personnel, DOE enforcement coordinators may also submit an NTS report if the contractor declines to do so. However, the preferred approach is to first discuss the reportability of the matter with the contractor.

B.2.2 ORPS Occurrence Associated with a Noncompliance

A number of ORPS event categories have significant safety implications. The Office of Enforcement is interested in the reporting of identified nuclear or worker health and safety rule noncompliances that are associated with one of these potentially significant safety events—that is, the noncompliance(s) led to the ORPS-reportable event or condition, or the event or condition subsequently resulted in the noncompliance(s). A contractor is expected to report into NTS the noncompliances associated with an event or condition that meets any of the ORPS criteria listed in Appendix B.1, Table B-1, and the corresponding notes.

It is emphasized that NTS reporting is in the contractor's best interest when a nuclear or worker health and safety rule noncompliance is identified in association with an ORPS reportable event in the specified categories. NTS reporting is not necessary if the event lacks an associated noncompliance.

B.2.3 Safety Significance/Investigation Decision – Nuclear Safety

When making the decision whether to investigate an identified nuclear safety noncompliance, HS-40 first makes a determination of safety significance (actual and potential) of the noncompliance. For nuclear safety noncompliances, the determination of safety significance is based on the "defense-in-depth" approach to nuclear safety embodied in DOE's nuclear safety regulations:

- The extent to which the safety barriers intended to prevent an abnormal or accident condition have been violated, defeated, or not properly established.
- The extent to which mitigating safety features intended to protect workers or the public in an abnormal or accident

condition have been violated, defeated, or not properly established.

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

The breakdowns in levels of controls associated with an event or condition, along with the actual or potential consequences of the event or condition, establish the relative safety significance. However, various other factors important to worker safety and health are also considered in evaluating cases for investigation and determining the enforcement outcome:

- Management involvement in, awareness of, or contribution to a noncompliance.
- A repetitive or recurring noncompliance.
- Prior notice by DOE of the problem, and inadequate resolution by the contractor.
- Duration of the noncompliance.
- Multiple examples of a noncompliance as opposed to a single occurrence.
- Discovery of the noncompliance by DOE or other external organization.
- Willful noncompliance or falsification of information.
- Prior enforcement actions (related or not related).
- Lack of timely notification to DOE or reporting into the NTS.
- Slow contractor response to investigate or to take appropriate corrective actions, or both.
- Poor safety performance history combined with prior enforcement actions.
- Violation of a compliance order.

The presence of one or more of these factors generally increases the safety significance and may be of sufficient concern to lead to an investigation, even when the basic safety significance alone would not necessarily dictate such an outcome. After considering these factors and the basic safety significance, HS-40 decides whether the matter warrants an investigation. Typically, the initial recommendation comes from HS-40 staff, and the decision to investigate rests with the Director.

B.2.4 Special Report Order

In special circumstances, HS-40 may issue a special report order (SRO) requiring a contractor to file a special report providing specific information relative to DOE nuclear safety requirements as provided in 10 C.F.R. section 820.8(b).[14] This discretionary enforcement tool is typically used in situations where HS-40 desires detailed and focused information related to a noncompliance with nuclear safety requirements. Examples of the type of information requested may include details on the corrective actions taken by the contractor, a review of contractor self-assessments performed relevant to the issue, a retrospective review of similar prior issues, an identification

[14] The NNSA Administrator issues SROs for NNSA facilities.

of underlying issues, or a written response to specific questions relating to the circumstances of the noncompliance.

The SRO requires that the contractor provide HS-40, and the NNSA where applicable, with the requested information within a specified period of time. The SRO does not impose an enforcement citation or civil penalty. However, based on HS-40 evaluation of the DOE contractor's response to the SRO, a decision will be made whether further enforcement activity is needed to address noncompliances.

B.3 Situation-Specific Nuclear Safety Enforcement Guidance

To better support and describe the implementation of the Department's nuclear safety enforcement program, over the years HS-40 has developed guidance (in the form of EGSs) to address emerging situations or specific questions from representatives of the enforcement community. Where appropriate, the information contained in those EGSs has been incorporated into the body of this Enforcement Process Overview. However, the following EGSs, although still viewed as containing relevant information, deal with topics or situations too specific for inclusion in this general guide.

- **EGS 99-01:** Enforcement of 10 C.F.R. section 830.120 (QA Rule) for Facilities Below Hazard Category III (07/01/99)
- **EGS 99-02:** DOE Enforcement Activities of Internal Dosimetry Program Requirements (07/16/1999)
- **EGS 00-01:** Enforcement Position Relative to the Discovery/Control of Legacy Contamination (05/04/2000)
- **EGS 00-03:** Specific Issues on Applicability of 10 C.F.R. Part 830 (09/12/2000)
- **EGS 01-01:** Nuclear Weapons Program Enforcement Issues (10/15/2001)

The above EGSs are available for review on the Office of Enforcement webpage at:

http://www.hss.energy.gov/Enforce/handbks.html.

Appendix C – Classified Information Security Enforcement

This Appendix provides supplemental information for the classified information security enforcement program. It complements the main body of the Overview by addressing elements unique to 10 C.F.R. Part 824 and the Office of Enforcement approach to the enforcement of classified information security noncompliances. Appendix C includes the following information:

C.1 Categorizing Classified Information Security Noncompliances/Severity Levels
C.2 Additional Requirements and Parameters Unique to Classified Information Security Enforcement

C.1 Categorizing Classified Information Security Noncompliances/Severity Levels

DOE uses a graded approach for identifying and categorizing classified information security noncompliances. This approach provides a structure for reporting timelines and the level of detail for inquiries into, and root cause analysis (RCA) of, specific classified information security noncompliances.

C.1.1 Identification of Classified Information Security Noncompliances

Noncompliances of classified information security concerns include actions, inactions, or events that have occurred at a site that:

1. Pose threats to the national security.
2. Create potentially serious or dangerous classified information security situations.
3. Potentially endanger the health and safety of the workforce or public (excluding safety-related items).
4. Degrade the effectiveness of the safeguards and classified information security programs.
5. Adversely impact the ability of organizations to protect classified information.

C.1.2 Categorization of Classified Information Security Noncompliances

Classified information security noncompliances are categorized in accordance with their potential to cause serious damage to national security or place DOE classified information at risk. There are four categories of noncompliances that are based on the relative classified information security severity of the incident. The categories are identified by an IMI number (see the IMI tables, Tables C.1 through C.4, below). Each of the four categories is further subdivided into specific subcategories based on the security topical areas (classified information security, physical protection, protective force, personnel security, and nuclear material control and accountability). Classified information noncompliances fall under the subcategory of classified information security.

The IMI number is used to categorize the classified information security significance of the incident, establish reporting timelines, assist with trending analysis, and identify each classified information security noncompliance or combination of noncompliances. The following is the basis for the IMI categories:

IMI-1 – Actions, inactions, or events that pose the most serious threats to national security interests and/or critical DOE assets, create serious classified information security situations, or could result in death in the workforce or general public.

IMI-2 – Actions, inactions, or events that pose threats to national security interests and/or critical DOE assets or that potentially create dangerous situations.

IMI-3 – Actions, inactions, or events that pose threats to DOE classified information security interests or that potentially degrade the overall effectiveness of the Department's protection of classified information and other safeguards and classified information security programs.

IMI-4 – Actions, inactions, or events that could pose threats to DOE by adversely impacting the ability of organizations to protect DOE classified information and other safeguards and classified information security interests.

The IMI Tables follow.

Table C.1. Reportable Categories of Incidents of Security Concern, Impact Measurement Index 1 (IMI-1)

IMI-1 Actions, inactions, or events that pose the most serious threats to national security interests and/or critical DOE assets, create serious security situations, or could result in deaths in the workforce or general public.

Contract requirements relating to DOE O 151.1B, *Comprehensive Emergency Management System,* dated 10-29-03, and facility emergency management plans may require more stringent reporting times for IMI-1 type incidents than listed here. Shorter reporting times should be determined on an individual incident basis and applied accordingly and incorporated into the contract.

Incident Type	Report within 1 hour	Report within 8 hours	Report monthly
1. Confirmed or suspected loss, theft, or diversion of a nuclear device or components.	X		
2. Confirmed or suspected loss, theft, diversion, or unauthorized disclosure of weapon data.	X		
3. Confirmed or suspected loss, theft, or diversion of Category I or II quantities of special nuclear material (SNM).	X		
4. A shipper-receiver difference involving a loss in the number of items which total a Category I or II quantity of SNM.	X		
5. Confirmed or suspected loss, theft, diversion, unauthorized disclosure of Top Secret information, Special Access Program (SAP) information, or Sensitive Compartmented Information (SCI), regardless of the medium, method, or action resulting in the incident.	X		
6. Confirmed or suspected intrusions, hacking, or break-ins into DOE computer systems containing TS information, SAP information, or SCI.	X		
7. Confirmed or suspected physical intrusion attempts or attacks against DOE facilities containing nuclear devices and/or materials, classified information, or other national security related assets.	X		
8. Confirmed or suspected attacks against DOE Federal and contractor employees that adversely impact a facility's or site's security posture.	X		
9. Confirmed or suspected acts or attempts of terrorist-type actions.	X		
10. Confirmed reports of DOE or DOE contractor employees making threats against Departmental facilities, employees, or the U.S. Government.	X		
11. Confirmed threats that immediately endanger personnel health or safety and may require immediate protective force/law enforcement intervention.	X		
12. Dangerous weapons and firearms-related incidents where an individual is killed, wounded, or an intentional discharge occurs.	X		
13. Confirmed or suspected acts of sabotage, at any DOE facility, that places the safety or security of personnel, facilities, or the public at risk.	X		
14. Confirmed compromise of root/administrator privileges in DOE unclassified computer systems that have a significant possibility of being contaminated with TS information, SAP information, or SCI.	X		
15. Confirmed compromise of root/administrator privileges in DOE computer systems containing Secret or Confidential information.	X		

IMI-1 Actions, inactions, or events that pose the most serious threats to national security interests and/or critical DOE assets, create serious security situations, or could result in deaths in the workforce or general public.			
16. Confirmed intrusions into information systems containing classified information.	X		
17. Instances of malicious code that cause disruption, degradation, or compromise of information systems for an entire site/facility.	X		
18. Instances of malicious code that allow unauthorized or undetected access to information systems containing classified information (Top Secret, Secret, Confidential, SAP information, or SCI).	X		

Table C.2. Reportable Categories of Incidents of Security Concern, Impact Measurement Index 2 (IMI-2)

IMI-2 Actions, inactions, or events that pose threats to national security interests and/or critical DOE assets or that potentially create dangerous situations.			
Incident Type	Report within 1 hour	Report within 8 hours	Report monthly
1. Suspected loss, theft, or diversion of any radioactive material not categorized as special nuclear materials (SNM), or dangerous materials that could pose a health threat or endanger security.		X	
2. Confirmed or suspected intrusions, hacking, or break-ins into DOE computer systems containing Secret or Confidential classified information.		X	
3. Any amount of SNM found in an exceptionally dangerous/hazardous unapproved storage environment, or unapproved mode of transportation/transfer.		X	
4. Alarms or other loss detection indicators for security areas containing a Category I or II quantity of SNM that cannot be proven false within 24 hours.		X	
5. Inventory differences exceeding alarm limits in Category I and II SNM material balance areas, where there is no indication or reason to believe the difference is created by loss, theft, or diversion.		X	
6. Confirmed or suspected unauthorized disclosure, loss, or potential loss of Secret matter regardless of the medium, method, or action resulting in the incident.		X	
7. Actual or suspected technical interceptions of any level of classified information.		X	
8. Actions, by electronic or physical means, that interfere with any DOE safeguards and security practices.		X	
9. Notifications, by any media or source, of validated threats that do not appear to immediately threaten personal safety or health.		X	
10. Loss of classified information that must be reported to other Government agencies or foreign organizations.		X	
11. Unsecured classified repositories of any type, including safes, doors, or other protective encasements, that contain Top Secret information, Special Access Program information, or Sensitive Compartmented Information.		X	
12. The loss of any DOE classified interest that requires State or local government or other Federal agency notification.		X	
13. Confirmed compromise of root/administrator privileges in DOE unclassified computer systems.		X	

14. Confirmed compromise of root/administrator privileges in DOE unclassified computer systems that have a significant possibility of being contaminated with Secret or Confidential information.		X	
15. Potential compromise of root/administrator privileges in DOE computer systems containing classified information.		X	
16. Instances of malicious code that cause disruption/degradation or compromise of information systems dedicated to safety, security, or critical operations.		X	
17. Detection of activities involving individuals who have been confirmed as physically watching/casing/surveilling a site in an effort to gather information to aid in the conduct of a terrorist-type attack.		X	

Table C.3. Reportable Categories of Incidents of Security Concern, Impact Measurement Index 3 (IMI-3)

IMI-3 Actions, inactions, or events that pose threats to DOE security interests or that potentially degrade the overall effectiveness of the Department's safeguards and security protection program.

Incident Type	Report within 1 hour	Report within 8 hours	Report monthly
1. A shipper-receiver difference or inventory difference involving a gain in the number of items for which the additional items total a Category I or II quantity of special nuclear material (SNM).		X	
2. Bomb-related incidents at any DOE facility, including location of a suspected device.		X	
3. Confirmed or suspected unauthorized disclosure, loss, or potential loss of Confidential matter by any medium, method, or action.		X	
4. Confirmed or alleged noncompliance with laws or DOE directives/standards that jeopardizes protection of the facility or site security interests.		X	
5. Demonstrators or protestors that cause site and facility damage.		X	
6. Labor strikes that could degrade or impede the required protection of the facility or site.		X	
7. Physical violence or threat of retaliation against facility security personnel.		X	
8. Dangerous weapons and firearms-related incidents involving protective force operations/personnel where an unauthorized weapon discharge occurs.		X	
9. Loss or theft of DOE firearms or ammunition, per DOE M 470.4-3, *Protective Force*.		X	
10. Unplanned/unscheduled power outages that cause a disruption/degradation of physical security systems and that would allow unauthorized or undetected entry to access controlled/protected areas.		X	
11. Incidents involving the attempted or actual introduction of controlled and prohibited items into Limited, Exclusion, Protected, or Material Access Areas, excluding unauthorized cellular phones or personal digital assistants where there is no potential for compromise of classified or unclassified controlled information.		X	
12. Confirmed or suspected malicious activities, including but not limited to stealing badges or vehicle licenses.		X	

13. Discovery of malicious activities, disorderly conduct, or vandalism that disrupts facility activities or causes damage between $10K and $100K.		X	
14. Circumvention of established access control procedures into a security area (excluding Property Protection Area).		X	
15. Inventory differences exceeding alarm limits in Category III SNM material balance areas or inventory differences greater than 50 g of Tritium, where there is no indication or reason to believe the difference is created by loss, theft, or diversion.		X	
16. A shipper-receiver difference involving a loss in the number of items which total a Category III or IV quantity of SNM.		X	
17. Confirmed or suspected loss, theft, or diversion of Category III or IV quantities of SNM.		X	
18. Intrusion attempts into information systems containing classified information.		X	
19. Confirmed intrusions into unclassified information systems that are not publicly available (e.g., behind a firewall).		X	
20. Confirmed instances of "denial of service" attacks on information systems that result in disruption of site/facility ability to access the Internet, disruption of site/facility information systems operations, or disruption of site/facility information system protection measures (e.g., firewall).		X	
21. Unauthorized network scans/probes on information systems possessing classified information.		X	
22. Incidents of apparent surveillance of facilities or operations (studying, photographing, low over-flights, outsiders questioning employees or protective force, unusual calls for information, etc.).		X	

Table C.4. Reportable Categories of Incidents of Security Concern, Impact Measurement Index 4 (IMI-4)

IMI-4 Actions, inactions, or events that could pose threats to DOE by adversely impacting the ability of organizations to protect DOE safeguards and security interests.

Incident Type	Report within 1 hour	Report within 8 hours	Report monthly
1. Identified special nuclear materials (SNM) inventory differences beyond alarm limits in a Category IV SNM material balance area where there is no indication or reason to believe the difference is created by loss, theft, or diversion.			X
2. Significant shipper-receiver differences that exceed 200g of fissile material and the combined limit of error for the shipment.			X
3. Alarms or other loss detection indicators, excluding inventory differences and shipper-receiver differences, for a security area containing a Category III or IV quantity of SNM.			X
4. A shipper-receiver difference or inventory difference involving a gain in the number of items for which the additional items total to a Category III or IV quantity of SNM.			X

5. Confirmed or suspected unauthorized disclosure of Unclassified Controlled Nuclear Information, Export Control information, and unclassified Naval Nuclear Propulsion Information by any medium, method, or action.			X
6. Non-credible bomb threats at any DOE nuclear or non-nuclear facility.			X
7. Unsecured classified repositories of any type including safes, doors, or other protective encasements in which no likely classified disclosure occurred. If the repository contains Top Secret information, Special Access Program information, or Sensitive Compartmented Information, report under the IMI-1, IMI-2, or IMI-3 category, as appropriate.			X
8. Peaceful demonstrations or protests that do not threaten facility or site security interests or activities.			X
9. Failure to adhere to established procedures contributing to the misuse or misprocessing of or failure to maintain security badges and passes.			X
10. Loss of security badges in excess of 5 percent of total issued during 1 calendar year.			X
11. Failure to adhere to established procedures contributing to the mismanagement or faulty application of the DOE Human Reliability Program.			X
12. Failure to adhere to established administrative procedures contributing to problems with foreign visitors.			X
13. Classified information sent by e-mail that is contained within the firewall. All parties involved are cleared to the level of information transmitted, and the affected systems are identified, taken offline, and appropriately stored in approved areas pending sanitization. If more than 8 hours are required to isolate the affected systems, then such incidents will be handled as suspected compromises in accordance with their classification levels and categories.			X
14. Unauthorized cellular phones and personal electronic devices (e.g., PDAs) introduced into a Limited Area, Protected Area, or Material Access Area, where there is no potential for compromise of classified or unclassified controlled information.			X
15. Circumvent established access control procedures into a Property Protection Area.			X
16. High rate/amount of loss (excluding natural disasters) or theft of Government property.			X

C.1.3 Significance Determination

Based on the Incident Significance assigned by the Office of Security Enforcement, the following are the recommended actions to be taken:

***High*:** Enforcement problem of the highest order that almost always needs closer review and/or investigation. These circumstances almost always result in some form of enforcement action to properly respond to the significance of the noncompliance condition.

***Serious*:** Closer review or investigation of the circumstances and extent of noncompliance should be undertaken. These can result in an enforcement action.

***Marginal*:** Noncompliance condition that should be evaluated in consideration of Contributing Factors to the extent that information can be obtained from the DOE/NNSA Enforcement Coordinator and/or the Security Director on these factors. In some cases, this could result in closer review and investigation, and may result in an enforcement action.

***Low*:** Noncompliance condition that should be evaluated with the Contributing Factors to the extent that information can be obtained from the DOE/NNSA Enforcement Coordinator and/or the Security Director on these factors. These will rarely result in a closer review or investigation, or subsequent enforcement action.

C.2 Additional Requirements and Parameters Unique to Classified Information Security Enforcement

One of the goals of the Department's classified information security enforcement program is to encourage contractors to develop self-assessment processes that can identify security noncompliances. Contractors should report self-identified security deficiencies and provide the status of corrective actions to the Office of Security Enforcement. This voluntary reporting process is in addition to the mandatory security incident reporting requirements contained in DOE Manual 470.4-1, Section N, *Incidents of Security Concern*.

Currently, contractors may report self-identified nuclear safety and worker safety and health noncompliances into NTS. Until recently, however, there was no equivalent reporting system for classified information security noncompliances. As a result, in December 2008, DOE implemented system enhancements to SSIMS that provide for reporting security incidents (i.e., IMI-1, -2, -3 and -4).

C.2.1 SSIMS Background and Reporting

For security enforcement purposes, SSIMS is the means for contractors to promptly identify and report classified information security noncompliances, including events and self-assessment results, and the resulting corrective actions. Event reporting timeframes are based upon security significance and adhere to Impact Measurement Indices as identified in DOE Manual 470.4-1, *Safeguards and Security*

Program Planning and Management, Section N. In event cases, additional noncompliances that led to the event may not be identified until the RCA and preliminary inquiry have been completed, but are reported within the Inquiry Report.

The Office of Security Enforcement recommends that contractor organizations, in coordination with the enforcement coordinator, review the results of any self-assessment or other internal reviews/trending procedures for classified information security deficiencies. Any identified noncompliances should be reported into SSIMS under the "SA" (self assessment) survey type within the SSIMS survey screens along with associated corrective actions developed from the causal/root cause analysis.

To ensure a consistent approach in security noncompliances reported by contractors, the Office of Security Enforcement has developed the following list of thresholds:

- Programmatic Noncompliance: Programmatic issues are typically discovered through a review of multiple events or conditions with a common cause; however, they may also be identified through a causal analysis or a single security event/incident. Programmatic issues usually involve weaknesses in administrative or management controls (i.e., security plans, standard operating procedures, physical security configuration) or the implementation of these controls. Additionally, when management determines the existence of conditions that require broad corrective actions to improve management or process controls, management has concluded that the problem is programmatic.

- Repetitive Noncompliance: Generally, repetitive noncompliances involve two or more different security deficiencies that include substantially similar conditions, locations, organizations, programs, classification levels, classified information/matter, or individual(s). It is reasonable to assume that the subsequent deficiencies should have been appropriately averted by the contractor's corrective actions associated with the previous noncompliance.

- Intentional/Willful Noncompliance or Misrepresentation: An intentional/willful noncompliance or misrepresentation may involve inventory records or inventory results that are falsified intentionally, such as classified removable electronic media inventory activities. A noncompliance should be reported as intentional or willful only if there is supporting evidence that the individual intentionally or negligently falsely reported, or otherwise disregarded classified information security requirements.

The specific noncompliance threshold should be reflected in the finding comments section of the SSIMS report along with a description of the self-identified security concern.

C.2.2 Security Significance/Investigation Decision – Classified Information Security

In determining the significance of a classified information security violation, the documented evaluation should consider the potential impact on national security. If the Program Office completed a damage assessment, it is considered during the course of the enforcement process. Additionally, any managerial policies and practices that may

represent contributing factors must 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 impact is low, but the failures of management are significant. Therefore, the severity level may be based upon the management failure(s) and not simply the low impact on national security. The following are examples of some factors that should be considered:

- Did the violation actually or potentially have an impact on national security? A violation that involves no actual risk but that could have had an impact on national security may be very significant, depending upon the risk of the potential threat (i.e., its likelihood) and the possible consequences involved.

- Was the violation self identified/reported into SSIMS during an assessment/evaluation and were corrective actions implemented to prevent recurrence? Substantial incentive through civil penalty mitigation may be provided for contractors that self-identify/report noncompliances and promptly implement corrective actions.

- What was the root cause of the violation? Was it caused by training deficiencies? Failure to follow procedures? Inadequate procedures? Failure to follow up properly on activities or commitments? These broader programmatic weaknesses may have more significance than the present violation.

- Is the violation an isolated incident or were there multiple examples of similar violations in the same timeframe? Is it indicative of a management or programmatic breakdown? Management or programmatic breakdowns may be more severe than an isolated incident.

- 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 may be 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?

- What was the duration of the violation? If the condition existed for an extended period without discovery and correction, the risk generally is proportionate to the duration of the violation, and the severity level of the violation should be increased.

- 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 understand the significance of the violation at a facility. Furthermore, failure of a contractor to report a violation to DOE in accordance with established reporting requirements may be considered a violation itself, in addition to the violation that occurred.

- Was the violation inadvertent or did it involve willfulness, and, if it did, to what extent? (See Chapter VI for guidance regarding willful noncompliances.)

- Was the violation related to a condition in a compliance order? These violations may be more significant because contractors have had prior notice of the violation and have not taken appropriate actions to correct it after having been directed to do so by the Secretary.

- Did the actual or potential impact involve severe consequences to national security or involve lesser, but still substantial consequences?

Appendix D – Program Review

D.1 Typical Agenda

The meeting agenda for a program review will vary based on scope and circumstances, but the example below is typical of a program review for a site:

Monday	Team Travels to Site	
Tuesday	Badge Office	8:00 – 8:30
	Informal Entrance Briefing (DOE and Contractor)	8:30 – 9:00
	Overview Presentation by Contractor	9:00 – 10:00
	Program Review Data Collection	10:00 – 5:00
Wednesday	Program Review Data Collection	8:00 – 5:00
Thursday	Program Review Data Collection	8:00 – 3:00
	Informal Exit Briefing	3:00 – 4:30
Friday	Team Travels Home	

Interviewees: Contractor interviewees may include the enforcement coordinator; QA manager; radiological control manager; environment, safety, and health (ES&H) manager; safeguards and security director; lessons learned program manager; senior management personnel performing noncompliance screens; individuals responsible for tracking corrective actions; personnel performing QA, radiological control, or worker safety assessments; security inquiry officials, members of regulatory compliance, safety, or oversight committees; and individuals with knowledge of specific events resulting in NTS or SSIMS reports.

D.2 Standard Document Request

D.2.1 General

In addition to the specific documents requested below, provide any additional information that would provide a perspective on the implementation of the regulatory compliance program (e.g., annual regulatory compliance performance report, annual security survey report, independent oversight report, GAO report, or IG report).

1. Organization Chart for the entire facility. Please include specific organizational charts for the organizations that contain the following positions: Enforcement Coordinator, Radiological Controls and QA Managers, Security Manager, (Security) Incident Program Manager and Enforcement Coordinator for security, if different from the coordinator for safety-related enforcement programs. The purpose of this data request is to be able to understand the following: 1) overall company structure; 2) the types and number of distinct operating/line management functions (e.g., production, research, maintenance, environmental restoration, decontamination and decommissioning, construction); 3) the relationship among the organizations responsible for operations, laboratory health, safety and security and the corporate health, safety and security organizations; and 4) responsibilities for noncompliance reporting and screening functions for nuclear safety, worker safety, and security.

2. The section of the facility procedure that identifies the roles and responsibilities of each of the above positions, to include enforcement coordinator and screeners for noncompliances.

Note: Although there are data/information requests in the list below that appear closely related, we do not further consolidate the request for the sake of clarity and to facilitate facility response since the data/information may exist in different documents.

D.2.2 Worker Safety and Health Related Document Request

1. Latest, approved Worker Safety and Health Program (WSHP) and Chronic Beryllium Disease Prevention Program (CBDPP), if applicable.

2. Procedures for identifying, evaluating/screening, reporting, and tracking potential 10 C.F.R. Parts 850 and 851 noncompliances.

3. Procedures related to causal analysis and corrective action processes, to include verification and closure of corrective actions.

4. Procedures for identifying and evaluating programmatic and recurring issues.

5. List of 10 C.F.R. Parts 850 and 851 noncompliances tracked internally since [month and year] (sorted by facility/project and by date).

6. Summary listing of issues evaluated for 10 C.F.R. Parts 850 and 851 applicability and NTS reporting for the past

12 months. For each issue, identify issue title, source of issue (e.g., assessment/inspection name and number to include functional area assessments/inspections, investigation title and number, ORPS number, OSHA 300 log entry number, CAIRS case number), outcome of screen, regulatory standards considered, and status of corrective actions.

7. List of internal and external assessments, inspections, and investigations related to worker safety and health performed in the past 12 months, including safety and health functional area assessments and DOE Facility Representative assessments/surveillances.

8. Copies of DOE and contractor assessments of your 10 C.F.R. Parts 850 and 851 programs since [month and year].

9. Copies of any documents related to tracking and trending of 10 C.F.R. Parts 850 and 851 noncompliances.

10. List and copies of any corrective action plans submitted to the Head of the Field Element for approval in conjunction with the WSHP or CBDPP, and status of corrective action implementation and completion.

11. List of sub-tiered contractors by contract and project for the past 12 months.

12. List of assessments/inspections of sub-tiered contractors over the past 12 months.

13. List of construction/decontamination and decommissioning projects/locations, contractor/subcontractor names, and a brief description of each project.

14. Examples of documents (e.g., contract terms and conditions, contract clauses) demonstrating how 10 C.F.R. Parts 850 and 851 requirements are communicated to subcontractors.

15. Any procedures or guidance provided to subcontractors regarding expectations for identifying, screening, and reporting worker safety and health noncompliances.

16. List of employee concerns related to worker safety and health issues that have been submitted in the past 12 months.

17. List of lessons learned that have been reviewed to identify potential worker safety and health noncompliances related to site operations and activities.

D.2.3 Nuclear Safety Related Document Request

1. Procedures for the nuclear safety noncompliance identification and reporting program, including those related to the identification, screening, and reporting of nuclear safety noncompliances.

2. Procedures for the site quality improvement process, including causal analysis and corrective action processes (verification and closure of corrective actions).

3. Procedures for identification and evaluation of programmatic and recurring issues.

4. Summary listing of internally tracked nuclear safety noncompliances for the past 12 months, sorted by year or date.

5. Summary listing or printout of issues screened for PAAA applicability and NTS reporting for the past 12 months. File/form should include issue title, source of issue (assessment number, Radiological Incident Reports or ORPS number), outcome of screen, and status of corrective actions, if possible.

6. List of M&IAs performed (internal and external) related to the QA, Nuclear Safety, and Radiological Protection programs or compliance/implementation of those programs during the past 12 months.

7. Copies of any DOE and contractor assessments of your PAAA Program during the past 12 months.

8. Summary listing (including title and status) of all radiological deficiency reports and quality deficiency reports, including Nonconformance Reports (NCRs), for the past 12 months.

9. List of assessments related to the QA, Nuclear Safety, and radiological protection programs of subcontractor's for the past 18 months.

10. Procedures governing M&IA programs. Include procedure(s) controlling the performance of the 10 C.F.R. section 835.102 internal audit program.

11. Copies (going back for 12 months) of any metrics used by the Facility to evaluate and monitor performance of the noncompliance identification and reporting program.

D.2.4 Classified Information Security Related Document Request

1. Site implementing policy and procedures for the following topics: reporting incidents of security concern, to include initial reporting, conduct of inquiries and causal/root analysis determination; corrective action tracking, closeout, and validation; SSIMS implementation; self-assessment program; security incident trending; and security training.

2. Summary listing of all internally tracked classified information security deficiencies/findings over the past 24 months, sorted by year, if possible. Listing should also reflect which findings are currently open or closed.

3. Summary listing of all security incidents involving the protection of classified information for the past 12 months. Listing should also reflect which incidents are currently open or closed.

4. Copies of the most recent security survey conducted by DOE and the contractor's requisite self-assessment.

5. Copies of any security incident trending for the past 24 months.

6. Copies of any lessons learned resulting from the trending of security incidents and deficiencies identified during internal and external assessments.

D.3 Review Criteria

The following criteria have been developed as a guide for performing program reviews. The criteria may be used (wholly or in part) during the conduct of the review. HS-40 staff may evaluate additional areas, as appropriate. Many of the following criteria may be evaluated before the onsite visit by reviewing documentation obtained independently or through the document request.

D.3.1 General

A. Verify through discussion and document review that formally approved policy/procedures are in place to describe the program. Determine whether procedures describe key program elements (roles and responsibilities, training, screening/reporting, trend evaluation, cause determination, tracking and completion of corrective actions, closure validation) in sufficient detail to provide for effective implementation.

B. Verify through discussion and review of organizational charts that a contractor enforcement coordinator has been formally designated and has adequate authority and independence to make decisions without undue pressure from the line organization. Determine whether adequate numbers of qualified support/matrix staff are available to meet program responsibilities. Verify that the enforcement coordinator is knowledgeable of nuclear, occupational safety, and information security requirements, and the overall enforcement process.

C. Verify through discussion and document review that formal training has been established and is implemented on site (may be category/target specific - general training for managers, specialized training on forms/procedures for screeners, etc.).

D. Verify through discussion that the scope of the regulatory screening and reporting program applies to activities performed by subcontractors and suppliers, as well as principal site contractors. Ensure through review that policies and procedures reflect this scope.

E. Determine through discussion whether the enforcement coordinator routinely discusses noncompliance trends with senior management. Verify that the enforcement coordinator has direct and frequent access to the site senior manager.

F. Determine whether the enforcement coordinator is acting in an expanded coordinator role as proposed by HS-40. Specifically, does the coordinator act as the champion for continuous improvement of nuclear safety, worker safety, and security performance at the site? Does the enforcement coordinator act as a resource to provide senior management the “big picture” vision of safety and security performance and inform them of perceived vulnerabilities? Is the coordinator an advocate for the contractor’s compliance assurance efforts?

G. Determine if the contractor enforcement program has been effectively integrated to include nuclear safety, worker safety, and classified information security.

D.3.2 Identification and Screening of Noncompliances

A. Verify through review that noncompliance identification/screening procedures and security reporting criteria ensure that a diverse set of source documents is forwarded for screening. Source documents should include assessments (both internal and external), NCRs, ORPS, employee concerns, deficiency reports, safety reports, injury reports, CAIRS, OSHA 300 logs, radiological deficiency reports, SSIMS reports, Security Incident Notification and Inquiry Reports, Protective Force Daily event logs, and security survey and self-assessment reports.

B. Verify through review that procedures ensure that all applicable noncompliances are captured; noncompliances should not be screened out on the basis of inappropriate criteria. (Note: Examples of inappropriate criteria noted to date have included ruling out noncompliances on the basis of prompt corrective action, judgment of low significance by evaluator, or judgment that the noncompliance did not directly involve the handling of nuclear material or the compromise of classified information.)

C. Verify through interviews that personnel who perform initial screens of source documents are qualified (typically subject matter experts in the areas of QA, radiological controls, safety basis, worker safety, classified matter protection or control, cyber security, and the security incident program) and have received training on the screening process.

D. Review screening documentation for the past year to verify that a broad spectrum of source documents (see list in D.3.2, A, above) is represented. Determine whether input from secondary sources (i.e., subcontractor/supplier-related information) is being included.

E. Before the site visit, review recent site operating experience via review of ORPS, DNFSB trip reports, inspection reports, SSIMS/Inquiry reports, etc. Evaluate for potential trends, programmatic issues, etc. Determine through onsite review whether these deficiencies were appropriately dispositioned.

F. Independently select several contractor source documents (e.g., assessment reports, deficiency reports, security survey reports) identifying deficiencies that represent potential noncompliances. Determine through review of screening documentation whether these source documents were formally screened and appropriately dispositioned.

G. Verify that items identified as regulatory noncompliances are forwarded for review of NTS reportability (see D.3.3, below).

H. Verify that items identified as noncompliances are entered into a formal problem resolution and tracking system to correct the noncompliance, and are identified as regulatory noncompliances on that system.

I. Review the status list of non-reportable noncompliances identified by the contractor over the past year for the

following attributes:

- A "reasonable" number of noncompliances were identified, based on volume of activities and number of source documents screened.
- The noncompliances reflect a mix of 10 C.F.R. Parts 830, 835, 851, and 824 items and were identified through the assessment program as well as through events.
- Corrective actions are completed on schedule, with appropriate follow-up if not completed.

J. Review selected ORPS, SSIMS reports, and deficiency report items that were judged not to be noncompliances to evaluate the contractor's judgment process.

D.3.3 Evaluation for Reportability

A. Verify through review that procedures used to describe/control the process of evaluating identified noncompliances for NTS reportability and security reporting criteria include the following:
   - Identification/designation of individuals with responsibilities for evaluation for reportability, approval, and NTS or SSIMS report generation.
   - Formal process to be used for reportability determination, with documentation of results. Specific evaluation criteria/thresholds should be included in the procedure.
   - Methodology for evaluating potential repetitive or programmatic noncompliances.

B. Verify through interview that individuals who make the final determination on NTS reportability or SSIMS reporting criteria are qualified and have received appropriate training.

C. Verify that incidents of security concern are being appropriately categorized (IMI-1,-2, -3, or -4), reported within the requisite timeframe, and the inquiry report completed in accordance with requirements.

D. Verify that reportability threshold criteria and reporting timeframes contained in procedure(s) are consistent with HS-40 guidance and that procedures do not allow screening-out of reportable noncompliances through use of inappropriate criteria (see D.3.2, B, above).

E. Review the status list of NTS non-reportable noncompliances identified by the contractor over the past year for the following attributes:
   - Observable trends and/or potential programmatic noncompliances are appropriately recognized and reported by the contractor.
   - For selected noncompliances of apparent significance, the contractor used an appropriate judgment process to determine NTS non-reportability.
   - The ratio of total number of NTS non-reportable/ reportable noncompliances is appropriate. (Note: Although ratios will vary, one would expect the number of NTS non-reportables to be greater than reportables, particularly at sites with a well-functioning assessment program.)
   - Adequate documentation exists for several recent instances in which noncompliances were evaluated

as requiring NTS reportability to show that the decision process was performed in accordance with procedure, the conclusion was appropriate, and NTS reporting was timely (generally within 20 calendar days after determining a noncompliance condition exists).

- The contractor's process for evaluating regulatory noncompliances for repetitiveness ensures an appropriate judgment within a reasonable timeframe. (Note: At one reviewed site, contractor procedures required an annual review for trending/repetitiveness. This timeframe did not provide for effective and timely identification of recurring deficiencies. More commonly, sites review individual noncompliances as they occur – a "rolling window.")

F. Determine whether program performance indicator data (number of NTS reportable noncompliances, total number of noncompliances, etc.) is maintained and routinely reported to senior management.

G. Review recent NTS reports or SSIMS reports to determine the ratio of contractor self-identified to non-self-identified noncompliances. For this purpose, "self-identified" includes assessment-based and rollup issues; "non-self-identified" includes event-disclosed and external assessment issues. Determine whether the contractor enforcement coordinator tracks this ratio as a performance metric and trends this metric as well. (Note: As site assessment processes mature, it is expected that the percentage of self-identified noncompliances will increase.)

D.3.4 Cause Determination/Corrective Action Closure

A. Verify through review that contractor procedures include or require the following elements relative to corrective action development, tracking, and closure:

- Identified noncompliances and associated corrective actions are formally tracked.
- Significant noncompliances are evaluated by formal causal analysis. Corrective actions are developed and implemented in a timely manner.
- Validation/verification of completion of corrective actions takes place for significant noncompliances prior to closure.
- Effectiveness reviews of corrective actions are conducted for significant noncompliances.

B. Review documentation for selected NTS or SSIMS reportable noncompliances to ensure that:

- A formal investigation/causal analysis is performed in a timely manner (generally within 45 days of determining that a safety noncompliance exists and generally 60 days after determining an incident of security concern occurred.).
- Developed corrective actions correlate to causes identified through analysis.
- For repetitive noncompliances, the causal analysis for the more recent noncompliance takes into account earlier noncompliances, corrective actions, and their efficacy.

- The NTS or the SSIMS report and corrective actions are provided as input into the site lessons-learned process, as appropriate.
- Actions actually taken to close a corrective action are the same as those committed to in the original action.
- The verification process for corrective actions is effectively implemented in accordance with procedures.

C. Review the summary of corrective action closure status for identified noncompliances and any related databases (deficiency reports, ES&H assessments, SSIMS, etc.) to determine whether the contractor is completing actions within committed milestone dates.

D. Determine through discussion and a review of relevant procedures whether the contractor's processes for investigation/causal analysis include the following attributes:

- Extent-of-condition reviews
- Precursor/historical reviews
- Evaluation of assessment performance
- Effectiveness reviews of corrective actions.

E. Verify, through a review of completed investigations/causal analyses for one or two recent significant events or other deficiencies, whether:

- The analysis reflects an appropriate depth and breadth.
- The elements including extent of condition, precursor review, assessment performance, and effectiveness review are reflected in either the investigation or the corrective action plan, or both.

D.3.5 Assessments/Quality Improvement

A. Review the requested assessments for overall adequacy, clarity of findings, etc.

B. Verify that identified assessment findings are reviewed for applicability and NTS reportability/Security Incident/SSIMS reporting criteria. Independently select several significant assessment findings and cross-check them against screening/evaluation documentation to verify that they were appropriately reviewed.

C. Compare preliminary HS-40 program review findings with the results of contractor assessments of this area. Discuss differences with appropriate staff (enforcement coordinator, lead auditor, etc.).

D. Review any actions taken by the contractor to improve its assessment processes in the past two years.

E. Verify, through a review of completed assessment documentation and thorough discussion, that a process is in place to regularly monitor the performance of the site regulatory compliance program. The process should include assessments (management or independent), use of metrics, and daily review and oversight by the enforcement coordinator of the performance of the site program activities. This should include regular review and oversight by the coordinator of personnel making noncompliance screening and reporting decisions. Discuss with coordinators the use of results of program

reviews performed at other sites to either evaluate or benchmark their performance, or both.

F. Verify, through a review of documentation and discussion, that the contractor's M&IA processes are adequately described in approved procedures and instructions. Determine whether the procedures adequately address:

- Organizational responsibilities
- Assessment prioritization, planning, and methodology
- Training and qualification requirements
- Reporting and records.

G. Select and review the assessment schedule and completion status for the contractor's independent assessment (IA) group and at least two management assessment (MA) units. Verify that procedural expectations for scope and scheduling are met and that a reasonable scope of activities is being assessed in a timely fashion. For assessments that were not completed, evaluate the reasons or factors for not completing them.

H. Select examples of completed management and IAs for review of overall adequacy and consistency with procedural requirements. Determine if a reasonable percentage of performed assessments are identifying findings. Verify that quality problems identified during the assessments were evaluated and that significant problems were entered into a formal corrective action system consistent with site procedures.

I. Review other sources of performance information in conjunction with the program review, such as radiological deficiency reports, NCRs, noncompliance screens, ORPS reports, SSIMS reports, inspection reports, and external assessments. Based on that review, determine whether reviewed M&IA results are generally consistent with other indicators. If inconsistencies exist, determine whether they are known by assessment management and the rationale for such inconsistencies.

D.3.6 Other Evaluations

A. The Office of Enforcement may obtain information related to selected occurrences to understand their significance and compliance issues associated with for those events.

B. The Office of Enforcement may also conduct a limited records review of worker safety issues or incidents of security concern.

C. The Office of Enforcement may also conduct limited worker safety or classified information processing workplace walk-throughs as part of the program review.

D. The Office of Enforcement may also chose to evaluate other information related to compliance for selected topical areas within Parts 824, 830, 835, and 851.

D.4 Desktop Review of Smaller Contractors

D.4.1 Typical Information Request

A. Provide a listing of your facilities and activities that are subject to the requirements of (1) Part 835, (2) Part 830

(Subpart A), (3) Part 830 (Subpart B), and (4) Part 824. A brief characterization of the activities conducted at each would be helpful. (For any that are defense-related, do not include classified or sensitive information.)

B. Identify your coordinator for noncompliance matters, and provide a contact phone number and email address.

C. Provide your policies and procedures that implement your processes for noncompliance identification, screening, NTS and internal reporting, security incident reporting, and corrective action resolution processes. Alternatively, provide a description of the portions of these processes that are not controlled by a formal procedure.

D. Provide your policies and procedures that implement M&IA programs required by 10 C.F.R. Part 830, or provide a description of those processes.

E. Provide copies of logs/spreadsheets used in the screening of safety and security deficiencies (including title/subject) over the past 12 months that determined whether these were (1) noncompliances, and/or (2) reportable into NTS or SSIMS.

F. Provide a copy of your OSHA log of injuries and illnesses over the past 12 months, and your most recent OSHA 300 summary report.

G. Provide a summary listing (including title/subject and status of resolution) of all the site's internally-tracked safety and security noncompliances over the past 12 months that were determined to be below the NTS reporting threshold or not meeting the security incident reporting criteria.

D.4.2 Review Criteria/Plan

A. Verify (ensure) that the contractor has designated an enforcement coordinator. (Add this to the list of coordinators, if not already shown.)

B. Regulatory Screening/Reporting Procedure:

- Verify that the contractor has a procedure to ensure consistent screening of potential noncompliances.
- Verify that typical quality problem sources are screened (radiation protection deficiencies, quality deficiencies, and assessment findings if different from other sources).
- Verify that the procedure does not introduce inappropriate criteria that result in excluding issues from applicability or NTS reportability.
- Verify that the procedure calls for non-NTS noncompliance issues to be tracked internally, identified as such, and managed to closure.
- Verify that the timeline requirements in the procedure are consistent with HS-40 guidance for timely decisions.

C. Logs of issues screened for noncompliance applicability:

- Verify that the set of issues represent substantive problems and include matters from assessments, programmatic problems, and worker/supervisor/manager observations in addition to matters from events.

- Briefly review a few of these screens to ensure that inappropriate criteria are not generally used to screen out matters from regulatory applicability.
- Check ORPS for an example or two of matters that should have been screened, and confirm that they were screened.
- Identify matters that may have been screened inappropriately.

D. Logs of noncompliance issues screened out from NTS reportability:

- Check a few of these screens to make sure that inappropriate criteria are not generally used to screen out matters from NTS reportability.
- Identify matters or incidents that may have been screened or categorized incorrectly.
- Check the contractor's set of NTS or SSIMS reports over the past year (if any) to confirm that proper decisions were made on reportability, issues were comprehensively investigated and evaluated (RCA, etc.), and appropriate and timely actions were taken.

E. Internally tracked noncompliance issues:

- Determine whether the set of such issues is a reasonably size, given the type of operations conducted, and whether the set includes a reasonable mix of QA, radiation protection, and safety basis issues.
- Confirm that these issues are identified as nonreportable noncompliances and tracked to closure.
- Confirm, for several examples, that closure appears to be timely

Appendix E – Contractor Corrective Action Processes and Assessments

This Appendix provides supplemental information about contractor compliance assurance and corrective action processes. It complements the main body of the Overview by providing additional details on these processes, which can be useful in reviewing QA activities and the effectiveness of contractor corrective actions. The information is also useful in assessing mitigation during enforcement activities. The information in this Appendix can be relevant to all three programs (worker safety and health and classified information security). Appendix E includes the following information:

E.1 Contractor Investigation, Causal Analysis, and Corrective Action
E.2 Contractor Assessment Program Weaknesses

E.1 Contractor Investigation, Causal Analysis, and Corrective Action

As part of the investigation of potential nuclear safety or classified information security noncompliances, HS-40 routinely reviews contractors' investigations of noncompliances, preliminary inquiry reports, the associated causal analyses, and the corrective actions developed to resolve the noncompliance and prevent recurrence. During those reviews, HS-40 has noted several common deficiencies. Additionally, many of the Office's enforcement actions involve recurrent events or deficiencies, indicating weaknesses in contractor processes for developing and implementing effective corrective actions. The Office of Enforcement provides this information as potential lessons learned for the DOE contractor community.

The Office of Enforcement believes that the following lessons-learned information is also applicable to worker safety and security, even though the observations to date result from nuclear safety enforcement experience. Contractor investigation, causal analysis, and corrective action processes are typically institutional in nature and cover both safety and security functional areas as they relate to managing events and deficiency resolution.

E.1.1 Investigation, Causal Analysis, and Corrective Action Process

E.1.1.1 Relevant Requirements and Other Regulatory Drivers

Specifically for nuclear safety, section 830.122(c), criterion 3, *Management/Quality Improvement*, establishes DOE requirements for investigating identified nuclear safety deficiencies, determining underlying causes, and developing and implementing effective corrective actions to both correct the deficiency and prevent recurrence. Additionally, Part 820, Appendix A, *Nuclear Safety Enforcement Policy*, delineates incentives for contractors' timely and comprehensive corrective actions for noncompliances, including application of discretion and/or mitigation.

Although the worker safety rule does not mandate a quality improvement process, the enforcement provisions of Part 851, and its Enforcement Policy in Appendix B, establish regulatory drivers through crediting contractors' timely and comprehensive corrective actions as one of the factors in applying enforcement discretion and possible mitigation. The preamble to Part 851 also notes that for contractor violations indicative of egregious and/or general performance failures (which may be manifested by recurrent deficiencies and violations), contract penalties may be applied.

When HS-40 notes general deficiencies during its investigation activities or observes recurring problems and repetitive events, the Office cannot make a favorable judgment regarding compliance with the QA Rule requirements or granting discretion or mitigation as delineated

in the above enforcement policies. It is hoped that contractors will evaluate and improve their processes in these areas and avoid these types of deficiencies. The information presented here is not intended to establish new requirements or to serve as a comprehensive guide on the approach to causal analysis or corrective action management. General program guidance has already been developed by the Department[15] and a variety of industry groups, such as the Institute for Nuclear Power Operations. The following areas are discussed here because they represent common deficiencies.

E.1.1.2 General Principles

The Office of Enforcement generally expects that a contractor conducting an investigation/causal analysis will ensure that the personnel who conduct the investigation are adequately trained and qualified, that the investigation includes appropriate scope and depth, and that corrective actions are timely and clearly relate to identified causes. This expectation applies both to contractor investigations of events and to investigations of safety/security issues identified as a result of more proactive means (e.g., assessments).

Consistent with section 830.7, the level and effort of the contractor investigation and corrective actions should be commensurate with the significance and complexity of the problem—that is, a graded approach should be applied. For example, identification of apparent causes may be an appropriate endpoint when investigating less-significant problems, while a full RCA would be appropriate for more significant or complex issues. As one point of reference, many contractors use the NTS reportability as one of several criteria for determining whether to perform a RCA or a less-rigorous apparent cause analysis.

E.1.1.3 Scope of Investigation

Once a deficiency or quality problem has been identified, it must be fully evaluated and characterized so that it can be corrected. As part of its review of a contractor's investigation of a nuclear, worker safety, or security problem, HS-40 typically questions whether the investigation included the following elements:

- Extent-of-condition (EOC) review
- Precursor or historical review (including the effectiveness of prior corrective actions)
- Evaluation of assessment performance.

1. Extent-of-Condition Review

Once a significant quality problem has been identified, an EOC review should be performed to determine the full extent and generic implications of the problem—for example, determining whether the same problem/condition exists elsewhere (transportability of condition) and whether the same root or underlying causes of the problem/condition may be affecting performance in other applications (transportability of cause). Areas to be

[15] See DOE Guide 414.1-2A, *Quality Assurance Management System Guide for use with 10 C.F.R. section 830.120 and DOE Order 414.1*; DOE-NE-STD-1004-92, *Root Cause Analysis Guidance Document;* DOE 231.1-2, *Occurrence Reporting Causal Analysis Guide*; DOE Guide 225.1A-1, *Implementation Guide for use with DOE Order 275.1, Accident Investigation*.

covered as part of an effective EOC review vary with the specifics of the identified problem, but generally include the following:

- Looking for the same problem in applications, locations or facilities other than where originally found.
- Looking for other manifestations of the identified root cause or underlying causes of the problem.
- Looking for similar or related problems or problems that can be anticipated based on the identified problem.
- Reviewing prior applications of the deficient process or procedure to see whether earlier deficiencies had gone unnoticed.

The approach used in conducting an EOC review may also vary with the details and significance of the identified problem (i.e., a graded approach). Typically, an EOC review includes a series of focused field observations or assessments in conjunction with document reviews; a simple review of site trending data or quality problem tracking systems rarely provides the specificity needed to adequately assess the scope of the problem.

The most common performance deficiency in this area is the simple failure to do an EOC review for deficiencies with a clear potential for generic applicability. In addition, contractors sometimes simply search event databases for similar prior events or for general negative performance trends, and call such searches EOC reviews. Although HS-40 understands that database reviews have value (e.g., as a precursor/historical review), they do not constitute an effective EOC review. Inappropriate use of this terminology may give senior management false confidence that an identified problem is limited in scope.

2. Precursor/Historical Review

A contractor's investigation and analysis of an identified quality problem should include a review to determine whether the same or similar problem has occurred previously. This determination addresses both the problem condition and the underlying causes to determine whether the problem is recurrent. If a quality problem is determined to be recurrent, the contractor's analysis should determine why prior corrective actions were not effective in preventing recurrence. The results of that evaluation should be factored into the corrective actions developed for the current event or problem. Unlike an EOC review, a precursor or historical review is retrospective in nature and can usually be conducted effectively using site database information on events, assessment results, etc.

3. Evaluation of Assessment Performance

Over the past two years, HS-40 has increasingly focused on the implementation and effectiveness of contractors' assessment programs in improving nuclear safety performance. The Office has concluded that self-identification through implementation of an effective internal assessment program (rather than by reacting to events) is a cost-effective way to improve nuclear safety, worker safety, and classified information security performance, and that contractors should strive to

implement non-event driven (rather than event-driven) nuclear safety, worker safety, and classified information security programs.

Consequently, when conducting an event investigation, HS-40 typically asks whether the subject safety or security noncompliance should have reasonably been identified through the contractor's assessment program. Based on the initial answers, follow-up questions can help identify deficiencies in assessment scheduling, quality, or corrective action development and implementation. The effectiveness of tools for self-identifying and tracking/trending deficiencies may be evaluated during an event investigation. Also, the development of corrective actions and independent validation of the effectiveness of the corrective actions will be evaluated. The Office of Enforcement recommends that, where appropriate, contractors perform a similar evaluation as part of their investigation of an event or other nuclear safety, worker safety and health, and security problems.

E.1.1.4 Causal Analysis

An effective causal analysis is essential in developing appropriate corrective actions for an identified nuclear safety, worker safety and health, or classified information security problem. Numerous causal analysis techniques and methodologies are currently used within the contractor community. The Office of Enforcement has no preference, assuming that each is used in an appropriate fashion by trained and qualified personnel.

1. Depth of Analysis

The depth of the contractor's causal analysis should reflect the significance and complexity of the quality problem/incident of security concern or event under analysis. Some problems may be easily understood, while others may require considerable in-depth analysis.

Based on review of a large number of contractor causal analyses, HS-40 considers the most frequent deficiency in this area to be the tendency for analyses to be truncated before getting to underlying issues; that is, they do not go "deep" enough. In particular, HS-40 has found that contractors often end their analyses at some failure condition (e.g., failure to follow procedures, inadequate training, inadequate administrative controls) and then identify this condition as the root or underlying cause. Although convenient for binning and trending purposes, these failure conditions do not always represent satisfactory endpoints. A more detailed causal analysis should go further and ask why the procedure was not followed, why the training was inadequate, or why there was an inadequate administrative control.

2. Cultural/Organizational Factors

"Worker failure to follow procedures" is often cited as an underlying cause, with corrective actions focusing on retraining or disciplining the worker or revising the procedure or process. Although such actions may be appropriate in some cases, contractors should also investigate whether organizational and management issues contributed to the failure. The cultural or

organizational factors that may underlie worker procedural compliance issues can include the following:

- Perceived differences in management's actions versus their words.
- Local supervisory influences contrary to management's stated expectations.
- Emphasis on production or schedule.
- Inconsistent application of standards across the institution.
- Longstanding organizational practices conflicting with procedures and becoming the default process.
- Examples set by fellow workers.
- Desire for a successful experiment or evolution.

A comprehensive investigation of a safety problem or incident of security concern should attempt to identify all the particular influences that caused the problem, including the management or supervisory influences that affect workers' behavior. These underlying factors may be difficult to identify or "get to" in an investigation and may require a senior-level effort, special expertise, or a number of one-on-one interviews.

3. Breadth of Analysis

The Office of Enforcement has also noted that some causal analyses do not identify all significant issues associated with an event. For example, HS-40 is typically just as interested in the reasons why a longstanding nuclear safety noncompliance persisted without being identified as in the specific causes of the original noncompliance. Often, such questions are not asked as part of the causal analysis, which tends to focus on the specific failure condition.

E.1.1.5. Corrective Actions

The Office of Enforcement evaluates contractor corrective action plans (CAPs) as part of the routine review of submitted NTS and SSIMS reports during program reviews and as part of an investigation into a nuclear safety, worker safety and health, or security problem. The Office of Enforcement uses the general criteria outlined below to evaluate corrective actions, and also relies on the judgment of cognizant DOE/NNSA representatives when evaluating the adequacy of contractor corrective actions:

- Clear linkage to causal analysis – identifying whether the contractor has developed corrective actions for all root and significant contributing/underlying causes identified through the causal analysis process.
- Appropriateness of corrective actions – verifying that stated corrective actions make sense and appear appropriate for the problem being addressed (e.g., behavioral or culture issues are not being addressed by a procedure revision) and that deliverables are clearly stated and achievable.
- Timeliness of corrective actions – verifying that schedules for corrective action completion reflect an appropriate priority and do not extend past a reasonable timeframe. The Office of Enforcement expects that any delays in

corrective action completion will be justifiable and limited in number and extent.

- Verification of effectiveness – determining whether the contractor included a verification of effectiveness (described below) as a planned corrective action for significant or complex safety or security problems.

Several contractors conduct "effectiveness reviews" as a corrective action for significant nuclear safety issues. These reviews, typically performed several months after the other corrective actions are completed, are intended to assess workplace performance in the subject area and to determine whether the corrective actions have been effective. Effectiveness reviews can also be performed as an element of the IA process.

The Office of Enforcement views the practice of conducting an effectiveness review as a positive one that should reduce the incidence of recurrent events. For NTS reportable noncompliances, the contractor may either list the planned effectiveness review as one of the NTS report's formal corrective actions (which may involve keeping the NTS report open for a longer period of time) or track it separately. Implementing an effectiveness review approach does not alter HS-40's expectation that the contractor and local DOE personnel verify completion of corrective actions before closing an NTS report.

The results of a contractor's effectiveness review for an NTS-reported noncompliance may require supplemental NTS reporting. If the review concludes that corrective actions have been ineffective in resolving the noncompliance, then the contractor should either update the existing NTS report (if still open) or submit a new NTS report. Updated information should include the results of the effectiveness review and newly-developed corrective actions.

E.1.2 Case Examples

Some of the specific deficiencies in this area are illustrated in examples available on the Office of Enforcement website:

- In cases where enforcement action was taken, those that cite the QA Rule *Quality Improvement* section generally involve conditions where the investigation, causal analysis, and/or corrective action processes were inadequate.
- The transmittal letter for enforcement action cases may identify deficiencies in the investigation, causal analysis, and/or corrective actions, and also may affect considerations of mitigation.
- The transmittal letter or the PNOV may note the recurring nature of the event or underlying problems, thus indicating deficiencies in the contractor's investigation, causal analysis, and corrective action processes.
- Program review reports may also note deficiencies in corrective action processes.

E.2 Contractor Assessment Program Weaknesses

E.2.1 Background

Title 10 C.F.R. section 830.121(a) requires that contractors conducting activities that affect, or may affect, the nuclear safety of DOE nuclear facilities must conduct work in accordance with the QA criteria in section 830.122. Section 830.122(i) identifies criteria specific to the conduct of MAs, and section 830.122(j) identifies criteria for IAs. Both assessment functions are required but, where appropriate, must be implemented in a graded approach consistent with section 830.7. Additionally, in the worker safety area, failure to discover problems (e.g., by having an ineffective assessment process) can lead to loss of mitigation in an enforcement action.

Supplemental DOE guidance specific to assessments is set out in DOE Guide 414.1-1A, *Management Assessment and Independent Assessment Guide*. DOE Guide 414.1-1A provides significant detail and guidance on assessment program purpose, objectives, and implementation. In addition, the EFCOG has issued an assessment guide, *Implementing the Assessment Process at the Department of Energy Facilities*, that describes the types of assessments, steps in the assessment process, obstacles to implementing an effective assessment program, and ways to overcome these obstacles. The EFCOG assessment guide can be found at:

http://www.efcog.org/wg/ssr/documents.htm

When conducted effectively, contractor assessment activities are part of a significant performance feedback loop, allowing the proactive identification and correction of safety deficiencies that might otherwise result in significant events. However, over the past several years, DOE enforcement actions have indicated a need for improvement in the conduct of contractor assessment programs, including:

- A lack of assessment activity in significant safety-related areas.
- Ineffective assessments, as evidenced by the absence of assessment findings in areas where programmatic problems have been disclosed through other means (e.g., operational history, events).
- Weaknesses in the effective correction and closure of assessment issues, resulting in recurrent and longstanding deficiencies.

During investigations of potential regulatory noncompliances, HS-40 typically reviews contractor assessment performance and results as they specifically relate to the subject area of the investigation. The Office of Enforcement will continue its emphasis on evaluating the implementation of contractor assessment programs as described below. In addition, through the use of program reviews, HS-40 will seek to measure contractor performance in transitioning to a non-event driven culture by focusing on contractor assessment initiatives aimed at improving the ability to proactively identify conditions adverse to quality. The emphasis here is on continuous assessment process improvement and not on

contractor "binning" of regulatory noncompliances to demonstrate reaching of a numerical percentage.

E.2.2 M&IA Programs Review Criteria

The Office of Enforcement intends to use the M&IA review criteria listed in Section E.2.3 as an internal guide during evaluations of contractor assessment program implementation in order to promote consistency. These criteria largely reflect relevant section 830.122 requirements, logical extensions of those requirements, or the evaluation of contractor performance against their applicable procedures. The criteria do not reflect supplemental DOE or external guidance relative to M&IA programs, and HS-40 will not use such guidance to evaluate contractor programs except as it is incorporated into contractor QA program (QAP) documentation. This evaluation approach merely reflects HS-40's regulatory perspective and should not be viewed as encouragement to contractors to limit their programs.

E.2.3 Criteria for Evaluating M&IA Program Implementation

The Office of Enforcement will increase its emphasis on evaluating contractor assessment program compliance by:

- Broadening the scope of routine noncompliance investigations to include increased evaluation and follow-up of contractor assessment program deficiencies.
- Continued monitoring of contractor-reported information, with increased attention to assessment- or corrective action-related items.
- As necessary, conducting contractor M&IA program compliance reviews (in response to negative performance indicators or DOE request).
- Reviewing the NTS database to evaluate progress in shifting from an event-driven to a non-event-driven culture.
- Determining to what extent specific assessment program improvement initiatives have been undertaken to drive assessment program improvement.

Consistent with the Part 830 scope and HS-40's jurisdictional authority, HS-40's review activities are directed toward evaluating the compliance of contractor M&IA program activities with section 830.122 M&IA nuclear safety requirements for those facilities and activities subject to the requirements. Enforcement action for identified noncompliances will be pursued as appropriate, consistent with the specifics of the noncompliance and in full consideration of any mitigating factors.

The review criteria are intended to promote consistency, not to represent new or supplemental requirements. Contractor compliance will be evaluated directly against applicable Part 830 criteria, the contractor's documented QAP, and associated policies and procedures.

The following review criteria have been developed to support HS-40 evaluations of contractor implementation of the M&IA requirements of section 830.122. Sections E.2.3.1 through E.2.3.3 contain general programmatic criteria that may be used during any review; Section E.2.3.4 contains more focused criteria and is intended for use (along with applicable

general criteria from E.2.3.1 through E.2.3.3) during an investigation of a specific event or noncompliance.

The contractor's documented QAP describes how the contractor will satisfy section 830.122 QA criteria consistent with the graded-approach provisions of section 830.7. Thus, the following criteria should be adjusted as necessary to reflect the specific commitments and provisions of the subject contractor QAP.

E.2.3.1 Programs and Procedures

A. Verify that the contractor's QAP documentation describes how the contractor meets the M&IA criteria of section 830.122, and that the QAP description reflects current conditions, and that referenced procedures are correct, etc.

B. Verify that the contractor's MA and IA processes are adequately described in approved procedures or instructions. Determine whether the procedures adequately address:

- Organizational responsibilities
- Assessment prioritization, planning, and methodology
- Training/qualification requirements
- Reporting and records
- Assessment follow-up actions.

C. Verify that the contractor's process for quality problem resolution and corrective action is described in formal procedures. Determine whether the procedures adequately address:

- Organizational responsibilities
- Problem/deficiency significance evaluation
- Responsibilities and criteria for conducting causal determinations
- Corrective action development and approval
- Documentation of disposition and resolution
- Corrective action closeout
- Verification of effectiveness.

D. Verify that the group responsible for performing IAs is reasonably and obviously independent from, and has no direct responsibility for, the work being assessed. Also verify that the IA group is assigned appropriate authority to perform their assessment function.

E. Verify that a process has been established to ensure that IA assessors are appropriately trained, qualified, and knowledgeable in the areas to be assessed.

F. Verify that the MA program/procedures require the direct participation of management-level individuals in the conduct of MAs. (Unless defined differently in contractor procedures, "management-level" or "management" includes second-level supervision and higher.) Specific support activities (e.g., data collection) may be delegated to staff, but managers are expected to be directly involved

in the process, and the resulting MAs should represent the evaluation and conclusions of management.

G. Verify the contractor's progress in shifting from an event-driven to a non-event-driven culture.

H. Verify the extent to which specific assessment program improvement initiatives have been undertaken to drive assessment program improvement.

E.2.3.2 MA Implementation

A. Select at least two MA assessment units (e.g., facilities, operational divisions) and review the current MA schedule and completion status. Verify that procedural expectations for scope and scheduling are met and that management processes are assessed. For assessments that were not completed, evaluate the rationale for not completing them.

B. Select examples of completed MAs for detailed review. This review should include the assessment report, supporting documentation as necessary, any associated CAP, and selected corrective action closure documentation. The review should:

- Verify that the assessment was planned, conducted, and reported in accordance with procedural requirements.
- Verify through review and interview that management was involved in completing the assessment (involvement may include participation in data collection or evaluation of results).
- Verify that personnel performing the assessment were trained in the assessment process and knowledgeable of the program, system, or process being assessed.
- Verify that quality problems identified during the assessment were evaluated and that significant problems were entered into a formal corrective action system consistent with site procedures.
- Review causal analyses and corrective actions associated with significant assessment findings. Verify that causal analyses evaluate the EOCs and that corrective actions address causes and appear appropriate to prevent recurrence.
- Verify that corrective actions are assigned to specific "owners," have associated milestone dates, and are being completed/closed in a timely fashion.
- Review closure documentation for selected corrective actions to verify that completed actions are consistent with planned actions. Determine whether adequate evidence exists to support closure.

C. Review additional sources of performance information (e.g., prior or subsequent MAs, external assessments, and occurrence reports) for one of the assessment units discussed in item E.2.3.2, B, above. Determine whether the subject MA results are consistent with other indicators of performance and whether findings identified during the subject MA represent longstanding or recurring problems.

D. Review MA program documentation to determine whether the contractor includes methods in addition to assessments (e.g., event review, performance indicators,

etc.,) in its overall MA strategy. In such instances, for one of the assessment units discussed in E.2.3.2, B, above, determine through personnel interviews and review of selected documentation whether:

- MA methods are consistent with applicable procedures.
- Identified quality problems are appropriately tracked, controlled, and resolved consistent with procedures.

E. Based on interviews with management representatives and review of MA results (from E.2.3.2, B, above), evaluate the effectiveness of the MA process in identifying and correcting problems that hinder the organization from achieving its objectives.

E.2.3.3 IA Implementation

A. Review the current IA schedule. Verify that procedural expectations for scope and scheduling are being met. The IA schedule should demonstrate that assessments are being performed to measure item and service quality; to measure the adequacy of work performance; and to promote improvement.

Although HS-40's emphasis in this area should be on evaluating performance against the contractor's procedural requirements, the HS-40 reviewer should consider the following during review of the IA schedule:

- Determine whether the scheduling process considers such factors as risk; time since last assessment; operational activities during the assessment period; and feedback from trending, events, and other assessments.
- The schedule should show that significant facilities, operations, and functional areas are assessed on a periodic basis.
- The IA schedule (or individual assessment scope) should reflect the observation/evaluation of work activities and practices.

B. Review the completion status of the IA schedule. For scheduled assessments that were not completed, evaluate the rationale for not completing.

C. Select several completed IAs for detailed review (assessments selected by the HS-40 reviewer should reflect a mix of facilities and topic areas). The review should include the assessment report, backup assessment documentation as necessary, selected associated CAPs, and selected corrective action closure documentation. The review should:

- Verify that the assessments were planned, conducted, and reported in accordance with procedural requirements.
- Verify that assessors participating in the assessments were qualified in accordance with procedures and knowledgeable in the areas being assessed.
- Verify that assessment findings (i.e., quality problems, issues) were evaluated and significant findings were entered into a formal corrective action system consistent with site procedures.

- Review causal analyses and corrective actions associated with significant assessment findings. Verify that causal analyses evaluate the EOCs and that corrective actions address causes and appear appropriate to prevent recurrence.
- Verify that corrective actions are assigned to specific "owners," have associated milestone dates, and are being completed/closed in a timely fashion.
- Review closure documentation for selected corrective actions to verify that completed actions are consistent with planned actions. Determine whether adequate evidence exists to support closure.

D. Review additional sources of performance information (e.g., prior or subsequent IAs, external assessments, occurrence reports) for one of the assessed facilities or topic areas discussed in item E.2.3.3, C, above. Determine whether the subject IA results are consistent with other indicators of performance and whether findings identified during the subject IA represent longstanding or recurring problems.

E. Based on interviews with IA and line management representatives and review of IA results (from E.2.3.3, C, above), evaluate the effectiveness of the IA process in identifying quality problems and promoting improvement.

E.2.3.4 Review as Part of Office of Enforcement Specific Investigation

As part of the investigation document request (or at the onset of the site visit), request any recent (within approximately 24 months) prior assessments that evaluated performance within the subject area of the investigation. Determine/perform the following:

- Review and evaluate the general adequacy of the assessments, using the applicable review criteria E.2.3.2, B, or E.2.3.3, C.
- If prior assessments identified quality problems similar to those evident during the current investigation, determine the following through review and interview:
  - Whether effective causal analyses were performed for the prior quality problems consistent with procedural requirements.
  - Whether the identified corrective actions for the prior quality problems reflected the causes identified during the causal analysis and were effectively completed.
- If no prior assessments were performed in the subject area of the investigation, determine whether the contractor has met procedural requirements for scope and scheduling, using the applicable review criteria E.2.3.2, A or E.2.3.3, A.