

SAFETY AND SECURITY ENFORCEMENT PROCESS OVERVIEW

August 2012

***OFFICE OF ENFORCEMENT AND OVERSIGHT
OFFICE OF HEALTH, SAFETY AND SECURITY
U.S. DEPARTMENT OF ENERGY***

Preface

Over the years, the United States Congress has given the Secretary of Energy authority to promulgate rules to provide assurance that U.S. Department of Energy (DOE) contractors provide a workplace free from recognized hazards, that the operations of our nuclear facilities minimize potential danger to life and property, and that our classified matter is protected from disclosure in the interest of national security. Congress institutionalized these mandates through amendments to the Atomic Energy Act, and Congress also provided DOE with enforcement authority to assure compliance with the associated rules. DOE's Office of Health, Safety and Security (HSS) and the Administrator of the National Nuclear Security Administration enforce safety and security rules that implement the Atomic Energy Act provisions on behalf of the Secretary of Energy.


As the owner of the facilities where work is performed by contractors, DOE has multiple mechanisms for ensuring that our contractors perform DOE's mission safely and securely. Regulatory enforcement is one of those mechanisms. As discussed in the general enforcement policy statements that accompany DOE's safety and security enforcement rules (i.e., 10 C.F.R. Parts 851, 820, and 824), the goals of the safety and security enforcement programs are to enhance and protect worker safety and health, nuclear safety, and classified information security by fostering a culture that seeks to attain and sustain compliance with these regulatory requirements. Beyond the compliance aspect, when one considers the human and operational costs that can result from failures to adhere to the safety and classified information security requirements, it becomes clear that a viable enforcement program is integral to efficient and sustainable accomplishment of DOE's mission.

In order to accomplish the enforcement goal effectively, the HSS Office of Enforcement and Oversight (HS-40), which is the office charged with implementing DOE's safety and security enforcement program, works closely with DOE program and site office managers to ensure that enforcement decisions fully consider the operational context within which an event or issue occurs, the safety or security significance of the potential violations, and contractor performance trends. However, HS-40 ultimately exercises its independence in taking action on those issues that are most appropriate for enforcement activity in order to serve as a deterrent to prevent future violations and in such a manner as to promote consistent application of available enforcement mechanisms. It is through this critically important approach that we can provide an impartial and transparent process that demonstrates to Congress, the public, and our workforce that failures to adhere to basic safety and classified information security standards are simply unacceptable.

The worker safety and health, nuclear safety, and classified information security rules provide wide latitude and discretion in such matters as investigating regulatory noncompliances, the treatment of mitigating and aggravating factors, and the appropriate outcome for an enforcement proceeding, based on the relevant facts and

circumstances. This *Enforcement Process Overview* (EPO) and the companion *Enforcement Coordinator Handbook* (ECH) are program guidance documents, developed by HS-40, that are intended to promote improved understanding of DOE's safety and security enforcement program and to facilitate transparency and consistency in its implementation. The EPO document, which has undergone numerous changes over the years, provides background information, discusses roles and responsibilities, and delineates various considerations used by HS-40 to determine enforcement outcomes. The ECH, newly developed in 2012, is intended to serve as a convenient reference for site and Headquarters enforcement coordinators to address those situations and questions typically encountered in the day-to-day execution of their compliance-assurance-related duties.

HS-40 periodically reviews these documents to ensure that they reflect current enforcement practices. The most recent versions (which always supersede previous versions) are available from the HS-40 website. We recognize that these documents serve multiple purposes and audiences, and so I encourage you to contact my staff with suggestions for improving their usefulness.



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August 1, 2012

Date

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This version of the Enforcement Process Overview (dated June 2012) supersedes all previous versions. Future revisions will be made, as necessary. The current version of this document can be obtained from the Office of Enforcement and Oversight website at: www.hss.doe.gov/enforce/process_guidance.html.

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Acronyms and Definitions

Acronyms

ALJ	Administrative Law Judge
CAIRS	Computerized Accident Incident Reporting System
C.F.R.	Code of Federal Regulations
DNFSB	Defense Nuclear Facilities Safety Board
DOE	U.S. Department of Energy
DOJ	Department of Justice
DOL	Department of Labor
ECH	Enforcement Coordinator Handbook
EFCOG	Energy Facility Contractors Group
EGS	Enforcement Guidance Supplement
EPO	Enforcement Process Overview
FNOV	Final Notice of Violation
FOIA	Freedom of Information Act
HSS	Office of Health, Safety and Security
HS-40	Office of Enforcement and Oversight
HS-41	Office of Worker Safety and Health Enforcement
HS-42	Office of Nuclear Safety Enforcement
HS-43	Office of Security Enforcement
IG	Office of the Inspector General
M&IA	Management and Independent Assessments
NNSA	National Nuclear Security Administration
NOV	Notice of Violation
NTS	Noncompliance Tracking System
OHA	Office of Hearings and Appeals
ORPS	Occurrence Reporting and Processing System
PAAA	Price-Anderson Amendments Act
PNOV	Preliminary Notice of Violation
SRO	Special Report Order
SSIMS	Safeguards and Security Information Management System
WEA	Worker Safety and Health Enforcement Action

Definitions

Contractor 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 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 and conducts work in a manner that complies with applicable requirements.

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

Director: Refers to the Director of the Office of Enforcement and Oversight.

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

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

Enforcement Outcome: The general term used to refer to the result of an enforcement evaluation or investigation of an event or condition involving noncompliances.

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

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

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

Notice of Violation: Refers to either a PNOV or a FNOV.

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

Repetitive Problems: Two or more different events or conditions separated in time with comparable causes/circumstances and which involve substantially similar work activities, locations, equipment, or individuals where it would be reasonable to assume that the contractor's corrective actions for the first occurrence should have prevented the subsequent event/condition.

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

I. Background and Applicability

Purpose of Enforcement Process Overview

This Enforcement Process Overview (EPO) sets forth the processes used by the U.S. Department of Energy (DOE) Office of Enforcement and Oversight (HS-40), within the Office of Health, Safety and Security (HSS), to implement DOE's regulatory obligations as authorized by the Atomic Energy Act. HS-40's enforcement functions in the areas of worker safety and health, nuclear safety, and classified information security are conducted by the following subordinate offices:

- The Office of Worker Safety and Health Enforcement (HS-41) implements DOE's congressionally-mandated worker safety and health enforcement program in accordance with 10 C.F.R. Part 851.
- The Office of Nuclear Safety Enforcement (HS-42) implements DOE's congressionally-mandated nuclear safety enforcement program in accordance with 10 C.F.R. Part 820.
- The Office of Security Enforcement (HS-43) implements DOE's congressionally-mandated security enforcement program in accordance with 10 C.F.R. Part 824.

The main body of this EPO primarily discusses various aspects of our approach to enforcement program implementation that are common to the three areas of enforcement mentioned above. Responsibilities of other Departmental offices and Federal agencies in the enforcement process are also briefly discussed. Supplemental information addressing areas considered to be of greater interest to DOE and contractor enforcement coordinators in the daily execution of their responsibilities, as well as the unique elements inherent in the three enforcement areas, are contained in the Enforcement Coordinator Handbook, which is available at www.hss.doe.gov/enforce/process_guidance.html.

Statutory Authority and Regulatory Framework

The Atomic Energy Act provides indemnification¹ to DOE contractors who manage and operate nuclear facilities in the DOE complex; associated subcontractors and suppliers are included under this coverage. In 1988, the Price-Anderson Amendments Act (PAAA) was signed into law to continue this indemnification. The rules that implement the PAAA subject 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 required that DOE-indemnified contractors, subcontractors, and suppliers be made subject to civil penalties for violations of DOE's

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

nuclear safety requirements. On August 17, 1993, DOE published its nuclear safety enforcement procedural rules and enforcement policy (10 C.F.R. Part 820, see especially Appendix A, *General Statement of Enforcement Policy*), which has since been amended several times. The Director of HS-40 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 indemnification levels until December 31, 2004, and required DOE to promulgate a final rule to establish and provide for enforcement of worker safety and health requirements. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 extended indemnification until December 31, 2006. The Energy Policy Act of 2005 extended indemnification of DOE contractors until December 31, 2025, increased liability coverage to approximately \$10 billion (plus inflation adjustments) per incident, and repealed waivers or exclusions for remission of civil penalties for nonprofit organizations upon the signing of a new contract.

The National Defense Authorization Act for Fiscal Year 2000 added new Section 234B to the Atomic Energy Act; on January 26, 2005, DOE published 10 C.F.R. Part 824 to implement this new Section. Section 234B provides 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. Title 10 C.F.R. Part 824 provides that civil penalties will be assessed for violations of requirements for the protection and control of classified information (Restricted Data, Formerly Restricted Data, and National Security Information).

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 violations of the worker safety and health regulation, and, in Appendix B, the enforcement policy for such violations. Part 851 provides that, beginning May 25, 2007, no work may be performed at a covered workplace unless an approved worker safety and health program is in place.

Title 10 C.F.R. Parts 820, 824, and 851 establish procedural rules governing enforcement activities against DOE contractors with agreements of indemnity for public liability, subcontractors, and suppliers. These entities may be held responsible for the acts of their employees who fail to observe nuclear safety, worker safety and health, and classified information security requirements.

DOE's safety and security enforcement program enforces requirements established at:

- 10 C.F.R. Parts 830, 835, and 708², as well as Section 820.11, for nuclear safety
- 10 C.F.R. Parts 850 and 851, for worker safety and health

² See Section VIII, Contractor Employee Whistleblower Protection

- 10 C.F.R. Parts 1016 and 1045, as well as any DOE security directives that are enforceable pursuant to 10 C.F.R. Part 824, for classified information security.

Document Control and Supplemental Enforcement Guidance

This version of the EPO document supersedes all previous versions and supersedes previously issued HS-40 guidance, irrespective of form (e.g., Enforcement Guidance Supplements – EGS), unless otherwise noted. Some of the information from the prior version of this document (dated June 2009) has been transferred to the Enforcement Coordinator Handbook (also available from the HS-40 website). For example, Chapter IV of the Enforcement Coordinator Handbook contains a list of the EGSs that are still considered to reflect HS-40 enforcement policy and practices.

For reference, other historical guidance documents remain available at the HS-40 website: www.hss.doe.gov/enforce/archive.html.

Application of Enforcement Program to Individuals, Subcontractors, and Suppliers

The DOE enforcement program is a civil enforcement process that focuses on the performance of contractor organizations relating to compliance with worker safety and health, nuclear safety, and classified information security rules. HS-40 does not initiate an enforcement proceeding 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) and DOE's Office of the Inspector General (IG), as further described in Chapter VI.

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 proceeding may also be initiated for the subcontractor, either alone or in addition to that involving 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 VI.

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, as well as a civil penalty for their

subcontractors at any tier, with certain limitations as specified in the Rule. Part 824 permits the imposition of both a civil penalty and a contract fee reduction.

National Nuclear Security Administration Contractors and Facilities

Under 10 C.F.R. Sections 820.13 (nuclear safety), 824.16 (classified information security), and 851.45 (worker safety and health), the National Nuclear Security Administration (NNSA) Administrator, rather than the Director of HS-40, issues subpoenas and NOVs to indemnified contractors (including their subcontractors, and in the case of Part 820, their suppliers) that manage and operate NNSA facilities. The NNSA Administrator acts after consideration of a recommendation from the Director of HS-40. Other enforcement matters involving NNSA are handled in accordance with the provisions of a Memorandum of Understanding between NNSA and HSS.

Exemption/Equivalency/Variance Requests

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

The criteria and procedures for exemption relief from nuclear safety requirements are set forth in 10 C.F.R. Part 820, Subpart E, and DOE Standard 1083-2009, *Processing Exemptions to Nuclear Safety Rules and Approval of Alternate Methods for Documented Safety Analyses*. Exemptions are granted by the Secretarial Officer who is primarily responsible for the activity from which relief is requested, provided that the Secretarial Officer primarily responsible for environment, safety, and health matters has the authority to grant exemptions relating to radiological protection of workers, the public, and the environment.

Requests for equivalencies and exemptions from classified information security requirements must comply with DOE policy requirements. Such equivalencies and exemptions are approved by the cognizant program Secretarial Officer or the NNSA administrator. The approval process for equivalency and exemption requests is discussed in DOE Orders 251.1C and 470.4B, Attachment 1.

Title 10 C.F.R. Sections 851.30 through 851.34 establish a variance process for worker safety and health requirements. 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 are issued by DOE's Office of General Counsel, as provided in 10 C.F.R. Sections 820.51 and 851.7.

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

As an alternative to 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 should be submitted to the HSS Office of Worker Safety and Health Policy. Information requests regarding the general statement of enforcement policy in the Part 851 appendix should be directed to HS-40.

DOE responses to informal requests under Section 851.8 are advisory and are, 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

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

HS-40'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 enforcement involvement. Such attributes include rigorous and critical self-assessment programs, positive safety and security cultures, and sustainable and effective corrective action processes.
- Promoting timely contractor processes for self-identification and correction of noncompliance conditions based upon addressing underlying problems affecting compliance.
- Stimulating contractors' transition from a reactive, event-driven approach to identifying and correcting deficiencies through a proactive, non-event-driven culture of critical self-evaluation and continuous improvement.
- Issuing NOVs for significant safety or classified information security noncompliances or significant precursor conditions, including repetitive or programmatic issues, near-misses, willful action, and worker retaliation.
- Selectively agreeing to settlement for cases involving both a lesser degree of safety or security significance and aggressive, comprehensive contractor investigation, causal analysis, and corrective action implementation.
- Periodically reviewing contractor processes for screening, reporting, and correcting noncompliances, as well as self-assessment processes by means of regulatory assistance reviews.
- Openly sharing information on enforcement outcomes to serve as lessons learned to promote proactive continuous improvement.

DOE's rules for worker safety and health, nuclear safety, and classified information security are structured to place responsibility for compliance on contractors. DOE's enforcement policies use the 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. It is HS-40's view that successful contractor regulatory compliance programs are characterized by:

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

These attributes also enter into HS-40 deliberations when evaluating noncompliant conditions for investigation and considering whether, upon request, to enter into settlement for an enforcement proceeding.

The EPO describes factors that HS-40 considers in judging positive steps taken by contractors, as well as mitigating or aggravating factors affecting an enforcement outcome. If an enforcement sanction is considered necessary, these factors are applied in accordance with the provisions of the enforcement policies noted in the EPO.

III. Roles and Responsibilities

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

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

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

Director, Office of Enforcement and Oversight³

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

³ As necessary, the HS-40 Deputy Director for Enforcement will assist the Director in the performance of enforcement program responsibilities.

HS-40 Enforcement Staff

Staff members:

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

DOE and Contractor Line Management

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

- Demonstrating strong support for the noncompliance screening and reporting process, assessment programs, and the corrective action process.

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- Designating an individual to serve as the enforcement coordinator, and placing that individual at a sufficiently senior reporting level to facilitate management awareness of regulatory compliance issues.
 - Maintaining regular and open communication with the contractor, Program Office, and HS-40 on safety and security, noncompliance conditions, and noncompliance report resolution.
 - Working with HS-40 to facilitate expeditious resolution and closure of enforcement matters.
 - Ensuring that staff are available to support and participate in HS-40 investigations or reviews.

DOE Enforcement Coordinator [Refer to the Enforcement Coordinator Handbook for more information]

Although DOE's enforcement program applies only to indemnified DOE contractors (and associated subcontractors and suppliers⁴), the DOE Headquarters and Field Element enforcement coordinators play an important role in helping HS-40 enforcement staff understand DOE line management's perspectives on events, program deficiencies, and contractor performance. In addition, DOE enforcement coordinators assist in coordinating site visits, document requests, and other interactions with site contractors.

Contractor Enforcement Coordinator [Refer to the Enforcement Coordinator Handbook for more information]

This individual typically is responsible for key aspects of the contractor's processes for identifying, screening, and reporting noncompliances, and also serves as the primary regulatory-compliance interface with HS-40 for the sharing of information, facilitating site visits (where warranted), and acting as a liaison with senior contractor management to keep them informed of enforcement proceedings. As such, the contractor enforcement coordinator plays a critical role in facilitating the execution of DOE's enforcement program.

⁴ With the exception of 10 C.F.R. Part 851, which does not apply to DOE contractor suppliers.

IV. Contractor Noncompliance Identification and Reporting

Contractor Screening Processes

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

DOE promotes a voluntary contractor process for screening worker safety and health and nuclear safety problems and deficiencies to determine whether issues represent noncompliant conditions that are then self-reported into NTS; use of DOE's SSIMS for reporting noncompliant classified information security conditions is mandatory. The incentives for voluntary action are described in Chapter VII, *Civil Penalty and Monetary Remedy Determination*. DOE considers prompt contractor identification, reporting, and effective correction of noncompliances in deciding whether to investigate noncompliance issues, undertake an enforcement proceeding, and/or impose sanctions. 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 noncompliant 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 adverse events occur, HS-40's expectation is that after taking appropriate compensatory measures, 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.

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

- Contractor assessments: Problems may be identified during internal management and independent assessments (M&IAs) or self-assessments.
- Internal review processes: These include receipt inspection, maintenance and surveillance activities, and subcontractor and supplier surveillances.

- **Worker identification:** In an organization that promotes compliance and safety/security-consciousness, when workers observe abnormal conditions or potential deficiencies, they report them through a defined process. Ultimately, these observations should be reported to management and entered into the appropriate issues management process.
- **External assessments:** Problems may be identified during the course of external assessments, surveillances, inspections, and visits conducted by the Independent Oversight component of HS-40; 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 DOJ, the Department of Transportation, or the U.S. Government Accountability Office. 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 classified information 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).

Contractor Internal Assessment Programs

DOE has consistently stressed the importance of contractor assessment programs as an effective tool in proactively identifying noncompliant conditions before those deficiencies manifest themselves in significant safety and security events.

In shifting from an event-driven to a non-event-driven culture, it is expected that most noncompliances will be identified through contractor internal assessment activities. The term “assessment” is not limited to activities associated with formal M&IAs. Rather, the term is used broadly to also refer to other types of self-identifying activities, such as audits, engineering reviews, surveillances, trend analyses, and problem/event precursors that are identified by workers and supervisors during routine performance of their activities.

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 entered into the system and are being tracked does not necessarily

imply self-identification (i.e., through assessment). The important objective is to reduce the number of events and significant near misses by improving performance assessment processes.

HS-40 generally investigates significant events that disclose underlying safety and classified information security issues. These are usually issues that could have been identified through an effective assessment process. Many contractor assessment processes are known to have been deficient because they failed to find problems before disclosure by an adverse event. Appendix A of the Enforcement Coordinator Handbook describes some of the common assessment program deficiencies noted by HS-40. Enforcement sanctions issued by HS-40 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 assessment guidance developed by the Energy Facility Contractors Group (EFCOG) as a starting point in improving their assessment processes. This information is available on the EFCOG website.

NTS and SSIMS Reporting

HS-40 has discretion in pursuing enforcement activity for many conditions that are contractor-identified, are promptly and properly reported to DOE, and receive prompt and effective corrective actions. DOE has established processes for direct reporting to DOE of noncompliant conditions that are potentially more significant and require closer monitoring by HS-40 and contractor enforcement coordinators. Such conditions include certain events or issues that are required to be reported in ORPS or SSIMS.

DOE's centralized, reporting systems allow contractors to report promptly any noncompliances that meet DOE's established reporting thresholds. NTS and SSIMS are the automated systems used for reporting noncompliances directly to DOE. NTS is used for the voluntary reporting of nuclear safety and worker safety and health noncompliances, as described in DOE's enforcement policies (Appendix A to Part 820 and Appendix B to Part 851); SSIMS is used for the mandatory reporting of classified information security incidents, and may be used to report compliance-related issues. The Enforcement Coordinator Handbook provides additional information about program-specific reporting for each of the three enforcement areas, including information about reporting thresholds. Identified noncompliances that do not meet the 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. The contractor's enforcement coordinator initially approves contractor employee access to the NTS. DOE provides formal authorization to access NTS; users must register to obtain access 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 SSIMS training and system security assistance are available from the HSS Office of Security.

HS-40 takes steps to improve interfaces between NTS and other DOE data-reporting processes for sharing common data, where possible. Changes or improvements in this area are addressed on the NTS webpage and through the system's on-line "Help" functions.

Regulatory Assistance Reviews

HS-40 conducts regulatory assistance reviews of contractor processes for identifying, screening, reporting, and correcting noncompliances. The purpose of these reviews is to provide feedback on the extent to which contractors have implemented sound processes for identifying noncompliances, making decisions on reportability, and undertaking timely steps to correct noncompliances. A regulatory assistance review may also focus on selected compliance issues such as electrical safety, radiation protection, or adverse trends in classified information incidents, and may include a training component if requested by the site. In addition to identifying potential improvements in a site's regulatory compliance program, these reviews provide an opportunity for HS-40 to develop a level of confidence in the information being reported into NTS and SSIMS.

Regulatory assistance reviews are typically planned, scheduled, and conducted through a collaborative process involving site contractor and DOE Field Element personnel. This process is intended to maximize the usefulness of the review while minimizing the impact on affected site personnel; consequently, the review is generally conducted by a small team of HS-40 representatives (usually two or three) from the cognizant component office (i.e., HS-41, 42, or 43) and typically lasts several days. Interest in these reviews is solicited by HS-40 staff based on a number of factors, such as input from Program Office and Field Element personnel, site reporting history, results of prior reviews, HS-40's familiarity with the contractor's program, and changes in the contractor's program.

After the regulatory assistance review has been arranged, HS-40 formally notifies DOE and contractor line management and enforcement coordinators approximately two months in advance of the review. The notification contains details on participants, scheduling, agenda items, and other logistics. The DOE Field Element enforcement coordinator often acts as HS-40's liaison to the contractor, although if the site prefers, the contractor enforcement coordinator may oversee arrangements in support of the review.

As part of the onsite review, HS-40 staff conduct entrance and exit meetings with DOE and the contractor, and preliminary conclusions are discussed during the exit meeting. About 30 calendar days after the onsite review, HS-40 typically sends a draft report describing the scope and results of the review, including program strengths and recommendations for improving the site's regulatory compliance program, to the local DOE office and contractor for comments. Copies of the final report are mailed directly to the contractor and affiliated DOE offices, and all regulatory assistance review reports are posted on the HS-40 website. HS-40 does not require any response to the report,

and any actions to make program modifications based on the report recommendations are at the site's discretion. Irrespective of the driver for program improvements, having an effective regulatory compliance program is one consideration in HS-40's deliberative process regarding mitigation for safety/security-significant violations of DOE's safety and classified information security requirements.

Upon request, HS-40 conducts follow-up visits to review actions taken by the contractor to address recommendations or suggestions identified as a result of a prior regulatory assistance review. These visits are scheduled so as to allow adequate time for corrective actions to be implemented and their effectiveness evaluated, and feedback is provided informally rather than through a formal report.

V. Investigation Process

Overview

When a significant safety or classified information security event occurs or condition is found to exist, 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 investigative process typically includes the following steps:

- Engage Field Element and Program Office management and obtain their perspectives.
- Determine whether a noncompliance requires an investigation, based on a significance evaluation and other contributing factors, and obtain the Director's concurrence.
- Provide a formal notification letter to the contractor informing them of the pending investigation and the need to segregate costs⁵.
- Conduct an onsite investigation.
- Prepare an investigation report.
- Conduct an enforcement conference (if deemed necessary).
- Determine the appropriate enforcement outcome (e.g., NOV, Enforcement Letter).
- As necessary for the outcome, determine the severity level of the violations, application of mitigation factors, and the associated civil penalty or monetary remedy.

Any resulting enforcement sanction is processed using the guidance presented in Chapter VI, *Enforcement Outcomes*.

Investigation Process Timelines

HS-40 strives to move as expeditiously as possible in each enforcement case, within the limits of staff availability, existing caseload, and the complexity of the case. HS-40 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:

⁵ Contractors are required to segregate costs in accordance with the provisions of the Major Fraud Act, Public Law 100-700 (November 19, 1988) as amended by Public Law 111-350 (January 4, 2011).

Decision to Investigate (45 calendar days from event or condition discovery)

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

Investigation (120 calendar days from decision to investigate)

- Review of Documents
- Onsite Interviews
- Investigation Report.

Enforcement Outcome (90 calendar days from issuance of the investigation report)

- Enforcement Conference (as necessary)
- Draft Preliminary Notice of Violation (PNOV), Consent Order, or other Outcome (as appropriate)
- Site (Federal and/or Contractor) and Legal Sufficiency Reviews
- Management Concurrence and Issuance.

Decision to Investigate

A decision to investigate is based on an evaluation of the safety and/or security significance associated with a particular noncompliance. For acts of retaliation or willful noncompliances, HS-40 considers the significance of the retaliation or the willful violations in addition to the safety or security implications of any underlying issue or noncompliance. Contractor employees or employee representatives may submit investigation requests to HS-40 for worker safety and health, nuclear safety, or classified information security issues, as described later in this chapter.

Safety/Security Significance Determination

HS-40 generally investigates only those noncompliances with greater safety or security significance than the general population of reported noncompliances. The judgment of significance considers the safety or security significance and associated programmatic breakdowns. HS-40 also considers safety or security significance when determining the penalty to be imposed in an enforcement sanction.

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

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

- The extent to which hazards were not adequately identified or evaluated.
- The extent to which protective measures or hazard controls were violated, defeated, or not properly established.
- The extent to which workers were not trained or otherwise equipped to perform work safely.

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

- The extent or severity, or both, of an actual adverse nuclear safety event or condition, or the potential that it could occur.
- The extent to which the safety barriers intended to prevent an abnormal or accident condition have been violated, defeated, or 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.

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

Irrespective of whether a potential case is one involving the worker safety, nuclear safety, or classified information security areas, or a combination of areas, various other important factors 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 cases (related or not related).
- Lack of timely notification to DOE or reporting into NTS/SSIMS, consistent with DOE expectations.

- Slow contractor response to investigate or to take appropriate corrective actions, or both.
- Poor safety and/or security performance history.
- Violation of a Compliance Order.

The presence of one or more of these factors generally increases the safety and/or security significance and may be of sufficient concern to lead to an investigation, even when the significance of the event without these factors would not necessarily dictate such an outcome. After considering these factors and the significance of the underlying event, 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.

Review of NTS and SSIMS Reports

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

When a noncompliance is reported into 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 HS-40 staff review often involves communication with DOE Field Element staff and the contractor. If the information in NTS or SSIMS is not sufficient to evaluate the significance of the issues, the staff member obtains additional information, such as an event critique, 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. If it is concluded that a more comprehensive evaluation or investigation is to be performed, then the procedures described in this chapter apply.

Review of Other Sources of Noncompliance Information

HS-40 regularly monitors sources of information other than NTS and SSIMS, including:

- ORPS reports
- Computerized Accident/Incident Reporting System reports
- Security incident reports that may indicate potential compromises or risks to classified information
- DOE Field Element or Headquarters inspections, surveys, periodic safety performance analyses, or assessments
- DNFSB reports, letter, and Recommendations
- Areas of concern raised by senior DOE management
- Information provided by the DOE Office of Hearings and Appeals (OHA) or the DOE Inspector General
- Allegations communicated directly to HS-40 by a contractor, DOE worker, or union official
- Media reports of events, accidents, or injuries
- Congressional inquiries
- Information from other agencies, including the Nuclear Regulatory Commission, the Department of Labor (DOL), the Occupational Safety and Health Administration, DOJ, or state and local officials.

DOE expects that initial notification of significant noncompliances, including classified information security noncompliances, will come primarily from contractor and DOE enforcement coordinators, as part of the desired communications maintained with 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, as needed.

Request for an HS-40 Investigation

In some cases, an investigation may be initiated based on a request. Title 10 C.F.R. Section 851.40(c) provides that a worker or his/her representative has the right to request that the Director initiate an investigation or inspection 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 equal seriousness, and will work toward an appropriate conclusion.

HS-40 expects that workers and their representatives will express and attempt to resolve their concerns through contractor and local DOE mechanisms, including provisions delineated in 10 C.F.R. 851.20(a)(6), prior to requesting an enforcement investigation, although such steps are not required. 10 C.F.R. 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 worker reasonably believes that the task poses an imminent risk of death or serious physical harm, and to stop work if he or she discovers employee exposures to imminently dangerous conditions or other serious hazards.

An investigation request may be made through submission of DOE Form 440.2, *Request for Investigation or Inspection of Safety or Security Violations*, which is available on HS-40's website at:

http://www.hss.doe.gov/enforce/Request_investigation.html.

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

On receiving such a request, HS-40 notifies the Program and Field Element enforcement coordinators of the receipt and nature of the request. If so requested, HS-40 will make every effort to honor the requester's desire for confidentiality. HS-40 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 requester (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.

HS-40 communicates to the requester 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. When an investigation is conducted, the requester is notified of the results upon completion.

HS-40 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 a request for an investigation of classified information security issues to HS-40 (as described above). HS-40 will consider such requests and determine whether an investigation is warranted using the same decision process 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, consistent with law, to avoid disclosing the individual's identity; however, the nature of the issue itself may provide some indication of the identity of the requester.

Noncompliance Investigation

Planning

HS-40 generally commences investigation activities as soon as staff schedules permit after a decision is made to conduct an investigation. However, if an accident investigation is being conducted by a Federal Accident Investigation Board, HS-40 typically postpones its enforcement investigation until after the accident investigation report has been issued, relying to the extent possible on facts presented in the DOE investigation report. Similarly, if a criminal investigation is in process for incidents involving classified information or safety issues, HS-40 will coordinate with the law enforcement agency to determine when to initiate a DOE enforcement investigative action.

An initial (internal) step in the investigation activity is to establish the approach that HS-40 intends to follow in identifying potential violations; establishing relevant facts and circumstances; determining significance; and deciding the need for, and the timing of, an onsite investigation. Initially, these deliberations are typically discussed only with cognizant managers and staff within the affected DOE Program Office and Field Element.

Notification and Information Request

Following the decision to conduct a formal investigation, HS-40 sends a notification letter to the contractor informing the contractor of HS-40's intent to conduct an investigation, the areas to be addressed, and the cost segregation requirement. The notification letter may also contain a request for information to support the investigation, although this is often handled through subsequent e-mail communication. In urgent situations, HS-40 may forgo the normal notification process and require immediate access to contractor facilities, under the authority of Section 851.40(a) for worker safety and health issues, Sections 820.8(a) and 820.21(a) for nuclear safety issues, and Section 824.5 for classified information security issues.

If an onsite investigation is to be conducted, HS-40 coordinates the schedule for the investigation, an agenda, and a list of individuals to be interviewed with the cognizant Federal and contractor enforcement coordinators. HS-40's information request is aimed at obtaining documentation that aids in understanding the facts and circumstances of the noncompliant condition(s). 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 – the Director is empowered by Sections 820.8(a) and 820.21(h) (nuclear safety), 824.5 (classified information security), and 851.40(k) (worker safety and health) to obtain it by issuance of a subpoena, if necessary⁶.

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

⁶ In matters dealing with NNSA contractors, the NNSA Administrator, rather than HS-40, issues subpoenas.

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 NTS or SSIMS. Intentional errors, such as falsification, destruction, or concealment of records or information, should be treated as willful noncompliances and reported into NTS. Part 824, Appendix A, Paragraph V.f. contains similar expectations related to the timeliness, completion, and accuracy of information provided by contractors.

In the absence of a request from HS-40, 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 among the HS-40 investigation team, DOE Program Office (as available), and DOE Field Element participants 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 HS-40 investigation team usually follows that session with an opening meeting 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 workers involved with the noncompliance(s) or issues under investigation are offered the opportunity to attend the opening conference or be present during an interview, if requested by any represented worker. During the investigation, HS-40 may interview workers and managers, inspect facilities and work areas, review records, and identify additional documentation needs. DOE Program Office and Field Element enforcement coordinators are encouraged to participate in onsite activities, provided that such participation will not negatively impact the conduct of interviews.

Exit Meetings

It is HS-40's intent that the preliminary results of an investigation be provided to the contractor (and any Union representatives who participated in the opening meeting or during the investigation) at the exit briefing, which summarizes any noncompliance conditions noted by the team, so that the contractor can address them in a timely manner. This information will be conveyed verbally; no written information will be provided. Even if the facts and circumstances are clear and no further review of information is needed to identify the noncompliance(s), HS-40's practice is to complete internal deliberations away from the site and separately schedule any enforcement conference, if one is to be conducted.

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.

An investigation report typically includes:

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

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

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

If HS-40 proceeds directly to PNOV issuance, this action is processed as discussed in Chapter VI. The decision to proceed with a PNOV and not issue an investigation report

rests with the Director (or NNSA Administrator, for NNSA contractors, 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 agreeing to settle the matter or by issuing an enforcement letter (both described in Chapter VI).

Enforcement Conference

Subsequent to the completion of an investigation, an enforcement conference is usually 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), 851.40(h) (worker safety and health), and Part 824, Appendix A, Paragraph VI (classified information security). The primary purpose of an enforcement conference is an opportunity for the contractor to provide:

- Information to ensure that the facts and potential noncompliances noted by HS-40 in its investigation documentation are accurate
- Any necessary clarifications
- Explanations of the steps being taken to resolve the noncompliances and underlying causes
- Any other relevant mitigating factors.

An enforcement conference may be convened at the sole discretion of the Director. A contractor may request an enforcement conference, but the Director has the responsibility and authority to decide whether to conduct a conference. Although not mandatory, an enforcement conference is suggested 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 (see Chapter VII). Additionally, an enforcement conference may not be necessary when the findings of the investigation are clear and undisputed, and the contractor chooses not to convey any additional information for consideration by HS-40. HS-40 may also elect to convene an enforcement conference if HS-40 has proceeded directly to a PNOV without an investigation report or other investigation documentation.

Scheduling and Notification

To allow for expeditious completion of an enforcement proceeding, the enforcement conference is usually scheduled within six weeks after completion and issuance of the investigation report. HS-40 works collaboratively with DOE and contractor line management to identify the date, time, and location suitable for all parties, after which HS-40 will notify the appropriate parties. The notification generally includes or references documents covering the facts and circumstances of the noncompliance(s),

typically in the form of an investigation report or other investigation documentation, HS-40's conclusions on the potential noncompliance(s), and any issues that the contractor should discuss.

Attendance

DOE personnel, at a minimum, should include the Director, Deputy Director for Enforcement, or other HS-40 staff member (who will chair the conference), the responsible HS-40 staff and technical advisors involved in the case, senior Program Office and Field Element management representatives, and the enforcement coordinators from the Field or Program Office. These individuals are notified of the conference and, through verbal or 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 include senior contractor management (e.g., Laboratory Director, President), key management personnel involved in the event or conditions as well as the actions to correct the underlying problems, and the contractor enforcement coordinator.

As stated in DOE's enforcement policies⁷, enforcement conferences are pre-decisional mechanisms 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.

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

Pre-Conference DOE-Only Meeting

Before the enforcement conference, the Director or designee convenes the DOE participants for brief, preliminary discussions. The intent is to familiarize DOE personnel from the Headquarters Program Office and Field Element regarding the enforcement process and to discuss DOE line management perspectives on the case itself and other factors relevant to contractor performance.

⁷ *General Statement of DOE Enforcement Policy*, 10 C.F.R. Part 820, Appendix A, as amended, for nuclear safety violations; *General Statement of Enforcement Policy*, 10 C.F.R. Part 851, Appendix B, for worker safety and health violations; and *General Statement of Enforcement Policy*, 10 C.F.R. Part 824, Appendix A, for classified information security violations.

Conduct of Enforcement Conference

To encourage candor, conferences are normally informal and no transcripts are made. The Director, Deputy Director for Enforcement, 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. In addition, the contractor should discuss or provide any further information to support any previously-submitted request for a Consent Order.

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. A 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 administrative record 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 of the contractor's personnel and representatives have departed, the Director or designee reconvenes the DOE participants for preliminary discussions. The intent is to discuss any facts presented by the contractor, the violations that occurred, their significance and severity level, the application of penalties, and the treatment of mitigation factors. While it is desirable to reach general agreement during this meeting on the appropriate enforcement outcome and any messages that should be communicated in enforcement correspondence, additional HS-40 staff deliberations are typically required to arrive at a final decision on

the recommended enforcement outcome. The final decision on the enforcement outcome rests with the Director or the NNSA Administrator, as appropriate.

Enforcement Conference Summary

After the post-conference DOE-only meeting, HS-40 prepares a brief summary that documents the enforcement conference discussions. This summary typically includes the contractor's position on the accuracy of facts in the 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 synopsis of the contractor's short- and long-term corrective actions. Before finalizing the conference summary, and as part of the PNOV drafting process, HS-40 solicits comments and input from the DOE Program Office and Field Element via the DOE enforcement coordinators. The conference summary is typically attached to the PNOV if a PNOV is issued.

Confidentiality/Disclosure of Pre-decisional Enforcement Information

Investigation-related information is privileged and considered pre-decisional. Pre-decisional matters 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 completion of the investigation phase, which is usually indicated by the enforcement conference (if held), all discussions and deliberations (including the post-conference DOE-only meeting) within DOE about a specific enforcement outcome, including the terms of any proposed settlement, are pre-decisional and should be carefully controlled to prevent distribution to non-DOE staff.

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 1004.⁸

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

⁸ FOIA exempts nine categories of records from its disclosure requirements. The following exemptions, codified at 10 C.F.R. 1004.10(b), apply to HS-40 activities: Exemption 3 – Statutory Exemption, Exemption 4 – Commercial/Proprietary, Exemption 5 – Privileged Information, Exemption 6 – Personal Privacy, Exemption 7 – Law Enforcement, Exemption 8 – Financial Institutions, and Exemption 9 – Wells. Exemption 1 does not apply because it concerns the protection of information classified by Executive Order.

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 either before or after issuance of an enforcement outcome unless required by law or authorized by the Director.
- No information on a pending NOV or Compliance Order is released to the public or the contractor until it is formally issued by DOE, unless authorized by the Director. Final "proposed" Consent Orders and settlement agreements are released to the contractor by HS-40 for consideration only after being agreed to by HS-40 and DOE, including NNSA, line management; final Consent Orders and settlement agreements are released to the public after signature by all parties.
- Draft HS-40 enforcement outcome documents marked as Official Use Only and having a "For DOE/NNSA Review Only" header are considered pre-decisional and are intended for review only by DOE Field Element and cognizant DOE managers/staff within the Headquarters program offices.
- Following issuance of any enforcement outcome document, the transmittal letter and accompanying document are placed on HS-40's website. Only then is this information available to the general public.

VI. Enforcement Outcomes

After the circumstances surrounding a noncompliance and its safety or security significance are understood and any enforcement conference and preliminary deliberations are completed, it is HS-40's responsibility to consider the appropriate enforcement outcome. Possible outcomes include PNOVs, settlement (i.e., Consent Orders⁹ and Settlement Agreements¹⁰), Compliance Orders, Special Report Orders¹¹ (SROs), enforcement letters, or no further action. This chapter describes the process of developing these outcome documents, including HS-40's considerations in that process.

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

Notice of Violation

Preparation of a PNOV

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

- A concise, clear statement of the requirement(s) that was violated (legal citation for the requirement).
- A brief statement describing the circumstances of the violation(s), including the date(s) of the violation(s) and the facts to demonstrate that the requirement(s) was not met (e.g., "contrary to" paragraphs).
- The severity level proposed for the violation or problem area (if violations are grouped in the aggregate—see below).
- The remedy proposed for each violation or group of violations, as applicable. For a Part 851 violation, as discussed below, a monetary penalty via contractual means in lieu of a civil penalty is an option; a PNOV issued under Part 820, 851,

⁹ Applicable only to Nuclear Safety and Worker Safety and Health.

¹⁰ Applicable only to Classified Information Security.

¹¹ Applicable only to Nuclear Safety.

or 824 may also prescribe non-monetary remedies, such as actions to rectify or prevent a violation.

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 enforcement conference summary are provided to Field and Program Office personnel via the DOE enforcement coordinators for review and comment. For NNSA contractors, the proposed action is forwarded with a transmittal memorandum summarizing the basis for the recommended action to the NNSA Administrator for signature.

Remedies

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

Civil penalties are monetary sanctions designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of contractor self-identification, reporting, and correction of noncompliances. Civil penalties are authorized for indemnified contractors under 10 C.F.R. Section 851.5(a) and 820.20(b), and under 824.4(c) for any person entering into an agreement with DOE, for worker safety and health, nuclear safety, and classified information security noncompliances, respectively. HS-40 proposes civil penalties through the issuance of a PNOV. Chapter VII, *Civil Penalty and Monetary Remedy Determination*, discusses the civil penalty calculation process.

As indicated above, DOE is also authorized to impose certain non-monetary remedies, including actions (i.e., corrective actions) necessary to rectify or prevent a rule violation. Although PNOVs issued to date have not included proposed corrective actions, HS-40 may, in unusual circumstances, exercise discretion and include verbiage in the PNOV that proposes to direct the contractor to undertake actions to correct the violations and prevent recurrence. Failure by the contractor to effectively complete these actions after

the PNOV becomes a Final Order would be legally enforceable as a violation of the terms of the Final Order and constitute grounds for further enforcement activity.

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 for violation of a worker safety and health requirement (consistent with the applicable contract provisions). However, Section 851.5(c) provides that DOE may pursue either civil penalties or a contract fee reduction, but not both, for the same violation of a worker safety and health requirement under Part 851. When a contract fee or payment reduction is accomplished through the contracting process, an associated PNOV typically mentions that DOE imposed a fee/payment reduction in lieu of a civil penalty. The Director and appropriate contracting officers coordinate their efforts to ensure compliance with Section 851.5(b) and (c). DOE Acquisition Regulations require that contracting officers coordinate with HS-40 before pursuing a contract fee reduction relating to a violation of a Departmental worker safety and health regulation (see 48 C.F.R. 923.7002(a)(5)).

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 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 or investigation was conducted.
- Who identified the violation(s) (i.e., the contractor, DOE, or other external source).
- Whether and how the violation was reported.
- Whether an enforcement conference was conducted, and reference to any conference 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 civil penalty, 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 remedy.

- The necessary contractor response (see Contractor Response to a PNOV, below).
- A statement that DOE will determine what, if any, further action is required after review of the contractor's response to the PNOV, proposed corrective action, and results of future assessments.

Contractor Response to a PNOV

The contractor is required to respond in writing to a PNOV either by accepting its conclusions or by presenting new, previously unconsidered information to contest the findings or to substantiate the basis for mitigating or not imposing the proposed remedy. The PNOV typically informs the contractor that the contents of the reply must include: (1) any facts, explanations, and arguments supporting a denial that the violation occurred as alleged; (2) any extenuating circumstances or the reason why the proposed remedy should not be imposed or should be mitigated; (3) full and complete answers to any questions set forth in the PNOV; (4) a discussion of the relevant authorities that support the position asserted, including rulings, regulations, interpretations, and previous DOE decisions; and (5) copies of all relevant documents. The contractor is also asked to delineate in NTS or SSIMS, with target and completion dates, the corrective actions that have been or will be taken to avoid further violations.

For nuclear safety PNOVs, the contractor response is due within 30 calendar days of the PNOV's date of filing; for worker safety and health and classified information security PNOVs, the contractor response is due within 30 calendar 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 proposed by the PNOV should be modified.

If the contractor does not reply within the specified time or chooses to not contest the PNOV, HS-40 sends the contractor a letter that deems the PNOV to be a Final Order; a separate FNOV is not issued. Acknowledgment letters are generally issued within 30 calendar days after receipt of the contractor's response to the PNOV.

The contractor has the option to challenge DOE's facts, the determination of violations, DOE's conclusions on significance or severity level, application of mitigation factors, or other elements regarding the PNOV.

If the contractor challenges any aspect of the PNOV, the challenge is 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 penalty.

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

Final Notice of Violation

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

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

Administrative Adjudication

HS-40 processes are designed to ensure the completeness of the information provided by the investigation team, the accuracy of documentation referenced, and the correctness of the violations cited. Contractors have substantial opportunity to provide input during the process and feedback on factual accuracy. Accordingly, the need for a contractor appeal is rare. Nevertheless, the regulations establish procedures for contractors to contest an FNOV.

Nuclear Safety and Classified Information Security Enforcement Action – Administrative Hearing

To contest an FNOV containing a civil penalty, 10 C.F.R. Sections 820.25 and 824.7 require that a contractor file a request with HS-40 for an on-the-record adjudication or a notice of intent to seek judicial review within 30 calendar days after filing or issuance, respectively, of the FNOV. If an on-the-record adjudication is requested, an administrative hearing presided by an Administrative Law Judge (ALJ) will be initiated upon HS-40 receipt of this request. This process is described in detail in 10 C.F.R. Sections 820.27 through 820.29 and 824.8 through 824.13. Under 10 C.F.R. Sections 820.29(d) and 824.12(e), DOE has the burden of proving that the noncompliance occurred as set forth in the FNOV and that the proposed civil penalty is appropriate. The contractor 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 based upon the preponderance of the evidence.

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

A contractor that contests an FNOV issued under Part 820 or Part 824 is not required to file a request for administrative adjudication 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. HS-40 will promptly assess the civil penalty provided in the FNOV by order to allow for Federal District Court review without an administrative hearing.

Worker Safety and Health Enforcement Action – Administrative Appeal

For a contested worker safety and health FNOV, under 10 C.F.R. Section 851.44, an aggrieved contractor must petition the DOE OHA within 30 calendar days of receipt of an FNOV by following the appeals process in 10 C.F.R. Part 1003, Subpart G.

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

Issuing a Press Release or Fact Sheet

Press releases are generally issued only for PNOVs, but they may be considered for other enforcement outcomes. HS-40 generally prepares the draft press release with input from the DOE Office of Public Affairs. After the PNOV has been signed, the Director forwards the PNOV to the contractor by e-mail to provide immediate notice of the action, and sends the official copy via certified mail. Subsequent public issuance of the PNOV and accompanying press release is coordinated with a series of telephone and/or e-mail notifications of DOE and contractor line management and the affected Congressional delegations before posting the PNOV and press release on the HS-40 website.

For PNOVs issued to NNSA contractors, recent practice has been for HS-40 to develop fact sheets in lieu of press releases. Similar to a press release, a fact sheet summarizes the facts of the safety or security incident, includes a general reference to the violations cited, and includes a brief statement on DOE's statutory authority to issue an enforcement action. The NNSA Office of Public Affairs determines the distribution of such fact sheets, and fact sheets are posted on HS-40's webpage along with the associated PNOV.

Consent Order / Settlement Agreement

Contractors are provided opportunities to seek settlement with DOE through Consent Orders (worker safety and health and nuclear safety) or settlement agreements

(classified information security) for noncompliances that could have proceeded to investigations and possible PNOVs (reference 10 C.F.R. Sections 851.41, 820.23, and 824.4(e), respectively). A Consent Order or settlement agreement is a document, signed by both the Director and a duly authorized representative of the contractor, containing stipulations or conclusions of fact or law, and a remedy (monetary, specific corrective actions, or both) acceptable to both DOE and the contractor¹². Normally, there is no press release for a settlement. In most cases, requests for settlement are initiated by a contractor; however, in some circumstances, and after first considering DOE line management perspectives, HS-40 may indicate to contractor line management early in the proceeding that settlement is a preferred outcome.

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

The primary purpose of settlement is to reduce the amount of time and staff resources necessary on the part of both DOE and the contractor to bring an enforcement proceeding to a close (i.e., as soon as possible after the HS-40 “Intent to Investigate” letter is issued). Thus, the greatest benefits accrue when settlement negotiations are begun early in the enforcement proceeding. However, given the settlement provisions in the rules (identified above), DOE may still consider settlement appropriate (albeit of reduced value) if an agreement is reached relatively late in the proceeding. Conversely, given the safety/security significance of the event, settlement may not be appropriate even if requested early in an enforcement proceeding.

Settlement Criteria

The appropriateness of settlement depends on the facts and circumstances of each case, and so it is not possible to provide a detailed list of all of the factors that must be met for settlement to be warranted. At a minimum, for the Director of Enforcement and Oversight to agree to settlement early in a proceeding before HS-40 has conducted an investigation, the Director must have a level of confidence (based on the contractor’s demonstrated track record for noncompliance reporting, causal analysis, and issues management prior to the proceeding and/or consultation with appropriate DOE line management) that the contractor’s specific investigation into the noncompliance(s) was thorough and credible, all of the noncompliances associated with the event or condition were promptly and accurately reported to DOE, and the corrective actions are comprehensive in scope and appear adequate to address the issue and prevent

¹² For NNSA contractors, Consent Orders and settlement agreements are signed jointly by the Director, the NNSA Administrator, and a duly authorized representative of the contractor.

recurrence. However, irrespective of the above, to appropriately address the deterrence aspect of the enforcement program goals, particularly for those events of high safety or security significance, HS-40 will generally not grant any request for settlement that involves violations of the worker safety and health, nuclear safety, or classified information security rules involving one or more of the following situations¹³:

- Events or circumstances that result in (or have/had the likely potential to result in):
 - death
 - serious physical harm
 - persistent exposure to hazardous/toxic materials.
- Absence of (or major deficiencies in) an approved documented safety analysis for any facility with radioactive material inventory exceeding Hazard Category 2 threshold quantities, or violation of a Technical Safety Requirement/Operational Safety Requirement Safety Limit.
- Credible threat to nuclear explosive safety, or loss of double contingency such that no credited controls are available to prevent criticality.
- Radiation exposures (actual or significant potential) in excess of 10 C.F.R. Part 835 occupational dose limits, or the spread of contamination with potential for significant exposure by co-located workers or the public.
- Quality assurance deficiencies in procurement, fabrication, or installation resulting in questionable performance of safety-significant and safety class systems, structures, and components, or operational deficiencies resulting in a substantially reduced confidence in the ability to operate within the safety basis envelope, in an operating nuclear facility.
- Loss or compromise of classified information that could be expected to cause exceptionally grave damage to national security.
- Worker retaliation.
- Willful violations (including record falsification or other attempt to cover up).
- Recurrent violation – repeat of a noncompliance (or similar noncompliance) that was the subject of a previous HS-40 enforcement sanction or contracting officer action.

¹³ This list is not all inclusive; HS-40 will continue to exercise its discretion for determining the suitability of settlement, depending on the facts and circumstances of each case.

- Event/deficiency response and analysis by the contractor that required significant attention by DOE line management or HS-40.

Settlement Process

As a matter of policy, HS-40 requires that settlement requests be made in writing to the Director, HS-40, and must include the contractor's justification as to why a Consent Order or settlement agreement is appropriate in the particular instance. The contractor's investigation/causal analysis should always be provided; HS-40 may also request additional documentation to aid in deliberations.

HS-40 will review a contractor's request, and any associated documentation, before deciding to issue (or recommend) a Consent Order or settlement agreement. In making the determination or recommendation, 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 and secure operation of the facilities or activities in question.

The process for developing, reviewing, and issuing a Consent Order or a settlement agreement is similar to that for a PNOV. However, because the contractor must agree to the terms and conditions, HS-40 provides the contractor an opportunity to review and provide comments on a "proposed" agreement, which is a result of discussions between HS-40 and DOE line management on the settlement terms. After considering contractor comments, HS-40 finalizes the settlement, obtains contractor signature, and then posts the settlement on the HS-40 website.

After acceptance of the settlement agreement by the contractor, 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. 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, DOE has the option of subsequently issuing a PNOV.

Enforcement Proceeding Cost Recovery

Background

The Major Fraud Act (MFA) of 1988 as amended, 41 U.S.C. § 4310, and its associated implementing cost principle in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 31.205-47, establish limitations on DOE's ability to reimburse contractors for costs incurred by the contractor in connection with an administrative proceeding commenced by the Department. The MFA and FAR cover DOE's enforcement proceedings authorized under 10 C.F.R. Parts 820, 824, and 851. Such proceedings commence with HS-40's issuance of a Notice of Intent to investigate to a contractor. Receipt of this notice requires the contractor to track and segregate costs incurred in support of the investigation from other potentially allowable costs.

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

The Departmental decision to settle an enforcement proceeding and provide for the reimbursement of investigation-related costs as a term of settlement is distinct from the decision regarding the *allowability of such costs* (i.e., the decision that the costs are otherwise allowable and allocable under the FAR). The cognizant contracting officer is responsible for determining the allowability of all costs, including investigation-related costs, based on all of the FAR requirements (48 C.F.R. § 31.201-2). As a result, the HS-40 Director has the authority to negotiate a settlement agreement or consent order (e.g., 10 C.F.R. § 851.41) and the authority to provide as a settlement term that the contractor may recover up to 80 percent of investigation related costs if the costs are determined by the cognizant contracting officer to be otherwise allowable and allocable under the FAR (41 U.S.C. §§ 4310(d) and (f)(2)(A)). The HS-40 Director cannot guarantee contractors that such costs will be determined to be allowable.

For settlements with NNSA contractors, the allowability determination for investigation related expenses is handled differently than for DOE contractors. Both the HS-40 Director and the NNSA Administrator jointly decide to issue a settlement agreement or consent order and collectively determine whether to permit contractor recovery enforcement proceeding expenses up to the 80 percent maximum as a term of settlement. As the Senior Procurement Executive for NNSA, the NNSA Administrator has authority to determine the specific allowability percentage and may designate a cognizant contracting officer to perform this function.

Review Considerations

Consistent with the MFA, the FAR, and guidance provided by DOE's Office of General Counsel, HS-40 (and as appropriate, the NNSA Administrator) may, on a case-by-case basis, decide to allow for contractor reimbursement of investigation-related expenses, in an amount not to exceed 80 percent of such costs, if the costs are determined by the cognizant contracting officer to be otherwise allowable and allocable under the FAR and if ALL of the following conditions are satisfied:

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

noncompliances are promptly reported via NTS or SSIMS.

- During the two years preceding the noncompliance discovery at a site or facility under the contractor's cognizance:
 - No Compliance Order, PNOV, Consent Order, Settlement Agreement, or Enforcement Letter was issued for a similar event or condition.
 - The contractor has not been directed by the cognizant contracting officer to address a similar or related event or issue.
 - The contractor has not been subject to a fee reduction, withholding of fee, or DOE or NNSA stop-work order for a similar or related event or issue.
- Within 30 calendar days of receiving a Notice of Intent to Investigate from HS-40, the contractor has requested settlement via a letter sent to the Director and provided detailed documentation supporting the settlement.
- The contractor's internal investigation is of sufficient scope and depth, includes a rigorous causal analysis, and has adequately considered the extent of the condition. Proposed corrective actions have a clear linkage to the causal analysis, appear appropriate to address identified noncompliances and prevent recurrence, are timely, and include effectiveness reviews following completion.
- Significant Federal intervention was not required at any stage (i.e., investigation, causal analysis, extent-of-condition, corrective action development and implementation) to ensure a comprehensive and effective post-event response by the contractor.

Compliance Order

The Secretary is authorized to issue a Compliance Order to prevent, rectify, or penalize violations of nuclear safety and worker safety and health requirements, and acts or omissions causing or creating a risk of loss, compromise, or unauthorized disclosure of classified information (reference Part 820, Subpart C, Section 851.4, and Section 824.4(b), respectively). A Compliance Order is generally considered in circumstances where an immediate and serious safety or security problem exists and repeated efforts by DOE to 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 enforcement sanctions.

The Compliance Order generally identifies violations of worker safety and health regulations, nuclear safety 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 a PNOV with corresponding citations for the violations that have occurred and impose appropriate remedies.

Special Report Order

In special circumstances, the Director or NNSA Administrator, as appropriate, may issue a 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 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 NNSA where applicable, with the requested information within a specified period of time. The SRO does not impose a monetary 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.

Enforcement Letter

If HS-40 identifies a matter of safety or security concern but decides not to pursue an enforcement investigation or issue an NOV, the Director may issue an enforcement letter consistent with 10 C.F.R. Sections 851.40(j) (worker safety and health), 820.21(g) (nuclear safety), or Part 824, Appendix A, Paragraph VII (classified information security). An enforcement letter is not a formal enforcement sanction in that it imposes no requirements, enforcement citation, or penalty on the contractor. The enforcement letter usually identifies one or more conditions: (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

¹⁴ The NNSA Administrator issues SROs for NNSA contractors.

attention, and may also highlight any contractor actions that were appropriate and contributed to the decision not to issue a PNOV. HS-40 consults with DOE line management 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.

Criminal Penalties – Referral to the Department of Justice

Department security policies and Part 820, Subpart F, state that DOE may refer a nuclear safety matter or a security event to DOJ if DOE determines that a potential criminal action has occurred. In such cases, the Director will also notify the IG, as required by DOE Order 221.1, *Reporting Fraud, Waste and Abuse to the Office of Inspector General*. 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 DOJ, any DOE enforcement proceeding would be held in abeyance, unless immediate action is needed for health, safety, or national security reasons. The purpose of postponing DOE action is to avoid potential compromise of or conflict with the DOJ case, pending DOJ's concurrence that the proceeding will not affect any potential prosecution. The Director is responsible for coordinating enforcement matters with DOJ.

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

Administrative Matters

Docket File

Title 10 C.F.R. Section 820.10 specifies establishing an Office of the Docketing Clerk for nuclear safety matters, with responsibilities for maintaining docket files for each enforcement case, as well as exemption decisions and interpretations issued pursuant to 10 C.F.R. Part 820. The Docketing Clerk is also assigned responsibilities for notification and filings associated with any adjudication proceeding. To implement these requirements and responsibilities, the Office of the Docketing Clerk has been established in HS-40.

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 Document Number

The Office of the Docketing Clerk assigns a unique alpha-numeric designation code to each proposed enforcement outcome document as a way to administratively track cases. Designations identify the relevant enforcement program (i.e., W – worker safety and health, N – nuclear safety, S – classified information security) and the type of sanction (i.e., EA – enforcement action, CO – Consent Order, EL – enforcement letter, SRO – Special Report Order). Numbers are assigned sequentially according to the calendar year of issuance and enforcement area (e.g., WEA-2011-01). After a document number is assigned to an enforcement matter, all subsequent filings, memoranda, and correspondence for that case should include the contractor name and complete document number.

VII. Civil Penalty and Monetary Remedy Determination

To calculate civil penalties and monetary remedies (for Consent Orders and settlement agreements), HS-40 initially determines the severity level of the violation(s) by assessing the safety or security significance of each noncompliance. The severity level corresponds to a base civil penalty that HS-40 will escalate or mitigate by the application of discretionary adjustment factors.

Severity Level

HS-40 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 V, *Investigation Process*, and the Enforcement Coordinator Handbook 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 worker safety and health violations, Section VI of Appendix B to Part 851, *General Statement of Enforcement Policy*. Violations are categorized as severity level I or II, or *de minimis*.
- For nuclear safety violations, Section VI of Appendix A to Part 820, *General Statement of Enforcement Policy*. Violations are categorized as severity level I, II, or III.
- For classified information security violations, Section V of Appendix A to Part 824, *General Statement of Enforcement Policy*. Violations are categorized as severity level I, II, or III.

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 consequences (safety or security significance) of the violations, and the severity level may be adjusted 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 may be assigned a higher severity level than that which the individual examples may have deserved.

Severity Level Escalation

DOE's worker safety and health, nuclear safety, and classified information security enforcement policies permit an increase of the base civil penalty based on the presence of certain aggravating factors, but not to exceed the maximum permissible penalty. This penalty escalation can be accomplished either by escalating the severity level, which will invoke a higher base civil penalty (as shown in Table 1, below), or by directly increasing the base civil penalty for the existing severity level.

DOE's nuclear safety and classified information security enforcement policies establish specific considerations that may raise the severity level of a violation even in the absence of a significant nuclear 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, 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 timeframe rather than an isolated occurrence.

HS-40 considers these aspects of each case and addresses them appropriately in its investigation report. Additionally, these areas of concern are emphasized in the PNOV transmittal letter. For worker safety and health violations, these factors are not used to determine severity level; rather, they may form the basis for direct increases to the base civil (or contract) penalty. However, as noted above, irrespective of whether the severity level or the base civil penalty has been escalated, the final civil penalty cannot exceed the maximum allowed by statute for each cited noncompliance.

Low Significance Violations

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

security requirements. This discretion is intended to allow DOE to focus its enforcement activities on matters that have greater actual or potential significant impact on worker and nuclear safety and the security of classified information. However, noncompliances that do not result in an NOV should still receive appropriate contractor attention to ensure that they are adequately corrected, and 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 activity.

Base Civil Penalty

The worker safety and health (Part 851, Appendix B), nuclear safety (Part 820, Appendix A), and classified information security (Part 824, Appendix A) enforcement policies state that civil penalties are designed to emphasize the importance of compliance and to deter future violations, as well as to encourage early identification and reporting of violations, and their prompt correction. Furthermore, the overall outcome of a PNOV 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 January/2012)
(with percentage of maximum civil penalty per violation per day)

	Worker Safety & Health	Nuclear Safety	Classified Information Security
Severity Level I	\$75k (100%)	\$150k (100%)	\$110k (100%)
Severity Level II	\$37.5k (50%)	\$75k (50%)	\$55k (50%)
Severity Level III	Does not apply	\$15k (10%)	\$11k (10%)

Civil penalties are not typically proposed for nuclear safety or security 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. However, a civil penalty may be appropriate in some circumstances to emphasize the importance of adherence to DOE's nuclear safety and classified information security requirements, or when the violation(s) is similar to previous violations for which the contractor had not taken effective corrective action.

After 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 851, 820, and 824 enforcement policies.

Adjustment of Base Civil Penalty

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

DOE provides substantial incentive for early self-identification and reporting of violations (up to 50 percent mitigation of the base civil 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 worker safety and health, nuclear safety, or classified information security problem before it leads to an incident with undesirable consequences. The contractor's focus should be on performance assessment or other means and processes to identify such problems, rather than being forced to react to an

event. 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 noncompliant condition or incident, DOE would generally grant mitigation for self-identification, assuming that proper reporting occurred. However, where an event discloses the existence of underlying noncompliances, DOE would likely not grant mitigation for self-identification, even if 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 and Escalation for Corrective Actions

DOE expects prompt, comprehensive, and effective corrective actions for safety and classified information security violations. As noted, up to 50 percent of the base civil penalty may be mitigated if these factors are present. Conversely, the base civil penalty may be increased by up to 50 percent for deficient corrective action processes. In applying these factors, 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.

HS-40 considers the following circumstances or factors in applying its authority to provide mitigation and to provide positive incentives for desired contractor actions:

- HS-40 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, corrective action development, and a corrective action effectiveness review. HS-40's guideline for judging timeliness in this area is that most investigations, causal analyses, and development of corrective actions should typically be completed within 45 calendar days of identifying the noncompliance; HS-40 also recognizes that some significant events with broad deficiencies may need longer than the recommended 45 calendar days. Contractor failures associated with timely and adequate analysis and corrective action development could lead to full or partial reduction in the allowed mitigation.

- The judgment on adequacy of corrective actions is based on whether the actions appear sufficiently comprehensive to correct the noncompliance and prevent recurrence. HS-40 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 timely enforcement activity, HS-40 may not have complete data on the effectiveness of corrective actions to make a 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 of the problem, or if there is a recurring problem, HS-40 does not normally provide full mitigation for corrective actions. Furthermore, in such cases, where a violation of DOE's nuclear safety quality improvement requirements has occurred, HS-40 typically provides no mitigation for corrective actions. These conditions indicate that prior corrective actions were not effective. However, comprehensive action after the problem is finally recognized could be considered in partial mitigation, judging by the severity 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 A of the Enforcement Coordinator Handbook provides information on common breakdowns and weaknesses observed by HS-40 in the contractor investigation, causal analysis, and corrective action processes. This information provides lessons learned for contractors to consider as they assess and strive to improve their own processes.

Application of “Per Day” Provisions

The statutory maximum civil penalty (\$75,000 for worker safety and health, \$150,000 for nuclear safety, and \$110,000 for classified information security) in 10 C.F.R. Sections 851.5(a), 820.81, and 824.4(c) and 824.4(d), respectively, are the maximum amounts per violation per day. Thus, a noncompliance condition that exists for several days could result in a PNOV with a base civil penalty substantially above the base per-day amount. HS-40's policy is to generally use the base single-day amount as the starting point for most violations, and to consider multiples of that value by applying the per-day provisions for the most significant longstanding or recurring problems.

A per-day calculation of a civil penalty will normally be considered when the violation is significant enough that the single-day base civil penalty would not convey the seriousness of the violation or circumstances leading to the violations, particularly if the violations existed for more than a single day and there were substantial opportunities to identify them. Examples of substantial opportunities to identify the violation include 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, but related, violations into a single “problem” and cite that problem at a higher severity level. Additionally, HS-40 can separately cite multiple, related violations and impose civil penalties for each of the different violations in a citation. Each violation is subject to the statutory per-day limit. This means, for example, that a single event involving violations of different worker safety, radiological protection, classified information security, and quality assurance requirements could result in a PNOV individually citing these violations and imposing a civil penalty for each.

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

Exercise of Discretion

Because DOE wants to encourage and support contractors’ initiative in prompt self-identification, reporting, and correction of problems, DOE’s enforcement policies grant 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 penalty, or mitigating a civil penalty. However, as discussed previously, enforcement discretion can also be used to escalate the magnitude of a penalty in appropriate circumstances.

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

- The contractor identifies the noncompliance prior to 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 or Monetary Remedy

DOE's worker safety and health, nuclear safety, and classified information security enforcement policies grant HS-40 discretion in adjusting civil penalties based on judgment of the contractor's ability to pay (reference Part 851, Appendix B, Section IX; Part 820, Appendix A, Section IX; and Part 824, Appendix A, Section VIII, 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 DOE line management and contracting officials to substantiate a mitigating financial condition.

Monetary Remedy Determination

Consent Orders and settlement agreements do not include a civil penalty; they do, however, typically provide for a monetary remedy. For any settlement involving a monetary remedy, HS-40 initially determines the number and severity of the potential noncompliances, appropriately considers mitigating factors, and then calculates what the civil penalty would have been had the outcome been an NOV. When appropriate, HS-40 then reduces that amount to both recognize the financial benefit (to both DOE and the contractor) of settlement and to provide additional incentive to settle.

VIII. Contractor Employee Whistleblower Protection

The DOE Contractor Employee Protection Program, established in 10 C.F.R. Part 708, applies to complaints of reprisal or retaliation made by DOE contractor employees against their employers for certain conditions (protected activities), including employee disclosures, participations, or refusals related to various matters involving worker safety and health and/or nuclear safety issues. Specifically, Part 708 provides employees with a process to file a complaint concerning retaliation and to obtain restitution and other remedies from the contractor in the event of a finding of reprisal under the Rule. DOL provides similar mechanisms in 29 C.F.R. Part 24, *Procedures For The Handling Of Retaliation Complaints Under The Employee Protection Provisions Of Six Environmental Statutes And Section 211 Of The Energy Reorganization Act Of 1974, As Amended*. Either option is available for DOE contractor employees to pursue remedies for retaliation in response to raising safety concerns at DOE facilities, and although there are procedural and other reasons for selecting a particular forum for the matter, that choice by the individual will not affect the manner in which HS-40 addresses the issue.

Enforcement by HS-40 of regulations prohibiting retaliation in the worker safety and health and nuclear safety areas is institutionalized through different mechanisms. The *Worker Safety and Health Program* final rule, Part 851, contains, in Section 851.20, specific worker safety and health rights that are included in the employee-protected activities of Part 708. Acts of retaliation involving worker safety and health issues could result in the imposition of civil or contract penalties against a DOE contractor under Part 851.

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

Furthermore, Part 820, Appendix A, Section XIII, "Whistleblower Enforcement Policy," which was added by the March 2000 amendment, (1) states that an act of retaliation by a DOE contractor proscribed under 10 C.F.R. Part 708 that results from an employee's involvement in a nuclear-safety-related activity "...may constitute a violation of a DOE Nuclear Safety Requirement under 10 C.F.R. part 820," and (2) indicates that information

¹⁵ The designation of Part 708 as a DOE Nuclear Safety Requirement is consistent with the Price Anderson Amendments Act of 1988 (Public Law 100-408), which authorizes DOE to impose civil penalties in the event of a violation of any "rule, regulation, or order relating to nuclear safety prescribed or issued by the Secretary of Energy pursuant to [the Atomic Energy Act]."

obtained from DOL proceedings concerning whistleblower protection (implemented in 29 C.F.R. Part 24) may also be used to support enforcement proceedings under Part 820.

In general, HS-40's practice is to delay acting on a retaliation matter until DOE's OHA or DOL has completed its process (i.e., investigation, hearing, initial decision, and final agency decision) and has ruled that retaliation occurred, but HS-40 does not wait for all possible appeals to be exhausted. Based on the long time period for the appeal process, HS-40 has determined that deferral until appeals are complete is not justified due to the amount of time required to bring the case to closure and experience to date that, barring unforeseen circumstances, the record is generally complete when OHA or DOL issues a Final Order.

It is important to note that the authority for reviewing complaints and providing remedies to the individual complainant (i.e., restitution) pursuant to either Part 708 or Part 24 does not reside with HS-40. Employees subjected to and seeking appropriate resolution of a potential act of retaliation need to follow the process described in Part 708 or Part 24. 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 worker safety and health or nuclear safety issue that represents a noncompliance. Such a noncompliance could lead to an HS-40 investigation and a PNOV solely intended to address the underlying worker safety and health or nuclear safety rule violation well before HS-40 issues an enforcement outcome related to the act of retaliation.

HS-40 considers many factors when evaluating cases of alleged retaliation. These factors include the complainant's employment status, the management level associated with the retaliation, the contractor's response after the retaliation with respect to its work force, and the overall safety record of the contractor. The contractor's positive performance would not normally cause HS-40 to terminate an enforcement proceeding for the retaliation, but could impact whether and how mitigation would be considered. Similarly, negative performance on the part of the contractor could be a factor in considering enforcement escalation. 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 initiate an enforcement proceeding on a claim of retaliation does not depend on whether the underlying nuclear or worker safety and health concern proves to be valid. In other words, the act of retaliation is itself a safety concern, because of the chilling effect it has on employees' willingness to speak up about safety issues.

IX. Application of Enforcement Process to Special Conditions

Recurring/Repetitive Problems

As noted in Chapter IV, *Contractor Noncompliance Identification and Reporting*, recurring or repetitive noncompliances should result in a contractor submitting an NTS report. HS-40 factors in such problems when considering safety and security significance during NTS or SSIMS report reviews or other initial identification of noncompliance conditions, and when making decisions on cases to investigate. Chapter IV identifies recurring and repetitive noncompliances as a factor that impacts the enforcement 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.

Some 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 may indicate that the organization’s corrective action management processes are flawed, in that either the prior corrective actions were not effective in preventing recurrence, or the corrective actions were not maintained. 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.

DOE expects management commitment to safety and security, as exemplified by attention to finding and fixing precursor issues and appropriately responding to safety and security events. Consequently, enforcement proceedings involving recurring issues will generally result in a significantly greater civil penalty than would otherwise have been the case – 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.

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 enforcement sanction against the outgoing contractor for any case of noncompliance that occurred during the contract period.

The incoming contractor organization is expected to assume full responsibility for safe and secure operation and compliance with DOE safety and security requirements on the date it assumes contract responsibility for the site or facility. During its due-diligence review, the incoming contractor normally identifies any significant individual or programmatic issues of noncompliance with DOE requirements; these 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.

HS-40 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. HS-40 generally does not pursue an enforcement proceeding during this early, near-term period if the contractor, upon identifying the condition, reports the noncompliance to NTS, SSIMS, or its internal tracking system (as appropriate) and responds with timely and effective corrective actions. However, for serious events or accidents, such as serious worker injury, substantial actual or potential radiological uptake or exposure, or compromise/potential compromise of classified information having a significant impact on national security, HS-40 would normally evaluate the issue for a potential enforcement proceeding, regardless of timing.

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

Over the past several years, HS-40 has noted a number of cases that involved both worker safety and health and nuclear safety issues. Examples of such cases include a fire or explosion that affected or may have affected worker safety and health and radiological materials, violation of lockout/ tagout requirements affecting the potential for an electrical shock and nuclear safety system operations, or a series of both worker safety and health and nuclear safety events that demonstrated a programmatic problem in work planning or execution. Past enforcement sanctions focused on and cited only the related nuclear safety violations because the worker safety and health rule had not been issued at the time of these events. Cases with implications in both nuclear and worker safety areas will continue to surface. If such cases are subject to investigation, 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 worker safety and health and nuclear violations. Such actions will be coordinated so that the same violation, as well as any

associated civil penalty, is not imposed twice under both the worker safety and health and nuclear safety rules, as is prohibited by Section 851.5(e). On the other hand, a single event or occurrence might have certain noncompliances in the worker safety and health area and certain other noncompliances in the nuclear safety area that are cited separately within the PNOV. The potential also exists for worker safety and health and nuclear safety cases to involve classified information security noncompliances. If such a situation arises, an integrated investigation will be conducted and the outcome handled in accordance with this paragraph.