must meet the applicable electrical safety codes and standards referenced in §851.23.

11. NANOTECHNOLOGY SAFETY—RESERVED

The Department has chosen to reserve this section since policy and procedures for nanotechnology safety are currently being developed. Once these policies and procedures have been approved, the rule will be amended to include them through a rulemaking consistent with the Administrative Procedure Act.

12. WORKPLACE VIOLENCE PREVENTION—RESERVED

The Department has chosen to reserve this section since the policy and procedures for workplace violence prevention are currently being developed. Once these policies and procedures have been approved, the rule will be amended to include them through a rulemaking consistent with the Administrative Procedure Act.

[71 FR 6931, Feb. 9, 2006; 71 FR 36661, June 28, 2006]

APPENDIX B TO PART 851—GENERAL STATEMENT OF ENFORCEMENT POLICY

I. INTRODUCTION

(a) This policy statement sets forth the general framework through which the U.S. Department of Energy (DOE) will seek to ensure compliance with its worker safety and health regulations, and, in particular, exercise the civil penalty authority provided to DOE in section 3173 of Public Law 107–314, Bob Stump National Defense Authorization Act for Fiscal Year 2003 (December 2, 2002) ("NDAA"), amending the Atomic Energy Act (AEA) to add section 234C. The policy set forth herein is applicable to violations of safety and health regulations in this part by DOE contractors, including DOE contractors who are indemnified under the Price-Anderson Act, 42 U.S.C. 2210(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to the regulations in this part. It is not intended to establish a "cookbook" approach to the initiation and resolution of situations involving noncompliance with the regulations in this part. Rather, DOE intends to consider the particular facts of each noncompliance in determining whether enforcement sanctions are appropriate and, if so, the appropriate magnitude of those sanctions. DOE may well deviate from this policy statement when appropriate in the circumstances of particular cases. This policy statement is not applicable to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval Nuclear Propulsion, or otherwise excluded from the scope of the rule.

(b) The DOE goal in the compliance arena is to enhance and protect the safety and health of workers at DOE facilities by fostering a culture among both the DOE line organizations and the contractors that actively seeks to attain and sustain compliance with the regulations in this part. The enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for the open and prompt identification and reporting of noncompliances, performance of effective root cause analysis, and initiation of comprehensive corrective actions to resolve both noncompliance conditions and program or process deficiencies that led to noncompliance.

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

(d) DOE may modify or remit civil penalties in a manner consistent with the adjustment factors set forth in this policy with or without conditions. DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate discretion in taking any enforcement action. Part of the function of a sound enforcement program is to assure a proper and continuing level of safety vigilance. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of safety requirements to DOE facilities and by promoting and coordinating the proper contractor and DOE safety compliance attitude toward those requirements.

II. PURPOSE

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

(a) Ensuring compliance by DOE contractors with the regulations in this part.

(b) Providing positive incentives for DOE contractors based on:

(1) Timely self-identification of worker safety noncompliances;

(2) Prompt and complete reporting of such noncompliances to DOE;

(3) Prompt correction of safety noncompliances in a manner that precludes recurrence; and

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

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

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

III. STATUTORY AUTHORITY

The Department of Energy Organization Act, 42 U.S.C. 7101–7385o, the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801–5911, and the Atomic Energy Act of 1954, as amended, (AEA) 42 U.S.C. 2011, require DOE to protect the public safety and health, as well as the safety and health of workers at DOE facilities, in conducting its activities, and grant DOE broad authority to achieve this goal. Section 234C of the AEA makes DOE contractors (and their subcontractors and suppliers thereto) covered by the DOE Price-Anderson indemnification system, subject to civil penalties for violations of the worker safety and health requirements promulgated in this part. 42 U.S.C. 2282c.

IV. RESPONSIBILITIES

(a) The Director, as the principal enforcement officer of the DOE, has been delegated the authority to:

(1) Conduct enforcement inspections, investigations, and conferences;

(2) Issue Notices of Violations and proposed civil penalties, Enforcement Letters, Consent Orders, and subpoenas; and

(3) Issue orders to compel attendance and disclosure of information or documents obtained during an investigation or inspection. The Secretary issues Compliance Orders.

(b) The NNSA Administrator, rather than the Director, signs, issues and serves the following actions that direct NNSA contractors:

(1) Subpoenas;

(2) Orders to compel attendance; and

(3) Determines to disclose information or documents obtained during an investigation or inspection, PNOVs, Notices of Violations, and Final Notices of Violations. The NNSA Administrator acts after consideration of the Director's recommendation.

V. PROCEDURAL FRAMEWORK

(a) Title 10 CFR part 851 sets forth the procedures DOE will use in exercising its enforcement authority, including the issuance of Notices of Violation and the resolution of an administrative appeal in the event a DOE contractor elects to petition the Office of Hearings and Appeals for review.

(b) Pursuant to 10 CFR part 851 subpart E, the Director initiates the enforcement process by initiating and conducting investigations and inspections and issuing a Preliminary Notice of Violation (PNOV) with or without a proposed civil penalty. The DOE contractor is required to respond in writing to the PNOV within 30 days, either: (1) Admitting the violation and waiving its right to contest the proposed civil penalty and paying it; (2) admitting the violation but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty; or (3) denying that the violation has occurred and providing the basis for its belief that the PNOV is incorrect. After evaluation of the DOE contractor's response, the Director may determine: (1) That no violation has occurred; (2) that the violation occurred as alleged in the PNOV but that the proposed civil penalty should be remitted in whole or in part; or (3) that the violation occurred as alleged in the PNOV and that the proposed civil penalty is appropriate, notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a Final Notice of Violation (FNOV) or an FNOV and proposed civil penalty.

(c) An opportunity to challenge an FNOV is provided in administrative appeal provisions. See 10 CFR 851.44. Any contractor that receives an FNOV may petition the Office of Hearings and Appeals for review of the final notice in accordance with 10 CFR part 1003, Subpart G, within 30 calendar days from receipt of the final notice. An administrative appeal proceeding is not initiated until the DOE contractor against which an FNOV has been issued requests an administrative hearing rather than waiving its right to contest the FNOV and proposed civil penalty, if any, and paying the civil penalty. However, it should be emphasized that DOE encourages the voluntary resolution of a noncompliance situation at any time, either informally prior to the initiation of the enforcement process or by consent order before or after any formal proceeding has begun.

VI. SEVERITY OF VIOLATIONS

(a) Violations of the worker safety and health requirements in this part have varying degrees of safety and health significance. Therefore, the relative safety and health risk of each violation must be identified as the first step in the enforcement process. Violations of the worker safety and health requirements are categorized in two levels of severity to identify their relative seriousness. Notices of Violation issued for noncompliance when appropriate, propose civil penalties commensurate with the severity level of the violations involved.

(b) To assess the potential safety and health impact of a particular violation, DOE

will categorize the potential severity of violations of worker safety and health requirements as follows:

(1) A Severity Level I violation is a serious violation. A serious violation shall be deemed to exist in a place of employment if there is a potential that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. A Severity Level I violation would be subject to a base civil penalty of up to 100% of the maximum base civil penalty of $75,000.

(2) A Severity Level II violation is an other-than-serious violation. An other-than-serious violation occurs where the most serious injury or illness that would potentially result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to employees but does have a direct relationship to their safety and health. A Severity Level II violation would be subject to a base civil penalty up to 50% of the maximum base civil penalty ($37,500).

(c) De minimis violations, defined as a deviation from the requirement of a standard that has no direct or immediate relationship to safety or health, will not be the subject of formal enforcement action through the issuance of a Notice of Violation.

VII. ENFORCEMENT CONFERENCES

(a) The purpose of the enforcement conference is to:

(1) Assure the accuracy of the facts upon which the preliminary determination to consider enforcement action is based;

(2) Discuss the potential or alleged violations, their significance and causes, and the nature of and schedule for the DOE contractor's corrective actions;

(3) Determine whether there are any aggravating or mitigating circumstances; and

(4) Obtain other information which will help determine whether enforcement action is appropriate and, if so, the extent of that enforcement action.

(b) All enforcement conferences are convened at the discretion of the Director.

(c) The PNOV will normally be issued promptly, before the opportunity for an enforcement conference, following the inspection/investigation. In some cases an enforcement conference may be conducted onsite at the conclusion of an inspection/investigation.

(d) The contractor may request an enforcement conference if they believe additional information pertinent to the enforcement action could best be conveyed through a meeting.

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

VIII. ENFORCEMENT LETTER

(a) In cases where DOE has decided not to conduct an investigation or inspection or issue a Preliminary Notice of Violation (PNOV), DOE may send an Enforcement Letter, signed by the Director to the contractor. The Enforcement Letter is intended to communicate the basis of the decision not to pursue enforcement action for a noncompliance. The Enforcement Letter is intended to direct contractors to the desired level of worker safety and health performance. It may be used when DOE concludes that the specific noncompliance at issue is not of the level of significance warranted to conduct an investigation or inspection or for issuance of a PNOV. Even where a noncompliance may be significant, the Enforcement Letter may recognize that the contractor's actions may have attenuated the need for enforcement action. The Enforcement Letter will typically recognize how the contractor handled the circumstances surrounding the noncompliance, address additional areas requiring the contractor's attention, and address DOE's expectations for corrective action.

(b) In general, Enforcement Letters communicate DOE's expectations with respect to any aspect of the requirements of this part, including identification and reporting of issues, corrective actions, and implementation of the contractor's safety and health program. DOE might, for example, wish to recognize some action of the contractor that is of particular benefit to worker safety and health that is a candidate for emulation by other contractors. On the other hand, DOE may wish to bring a program shortcoming to the attention of the contractor that, but for the lack of worker safety and health significance of the immediate issue, might have resulted in the issuance of a PNOV. An Enforcement Letter is not an enforcement action.

(c) With respect to many noncompliances, an Enforcement Letter may not be required. When DOE decides that a contractor has appropriately corrected a noncompliance or that the significance of the noncompliance is sufficiently low, it may close out its review simply through an annotation in the DOE Noncompliance Tracking System (NTS). A closeout of a noncompliance with or without an Enforcement Letter may only take place after DOE has confirmed that corrective actions have been completed.

IX. ENFORCEMENT ACTIONS

(a) This section describes the enforcement sanctions available to DOE and specifies the conditions under which each may be used. The basic sanctions are Notices of Violation and civil penalties.

(b) The nature and extent of the enforcement action is intended to reflect the seriousness of the violation. For the vast majority of violations for which DOE assigns severity levels as described previously, a Notice of Violation will be issued, requiring a formal response from the recipient describing the nature of and schedule for corrective actions it intends to take regarding the violation.

1. Notice of Violation

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

(b) DOE will use the Notice of Violation as the standard method for formalizing the existence of a violation and, in appropriate cases as described in this section, the Notice of Violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in this section, DOE may refrain from the issuance of an otherwise appropriate Notice of Violation. However, a Notice of Violation will virtually always be issued for willful violations, or if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances.

(c) DOE contractors are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for noncompliance with the worker safety and health requirements.

(d) DOE expects its contractors to have the proper management and supervisory systems in place to assure that all activities at covered workplaces, regardless of who performs them, are carried out in compliance with all the worker safety and health requirements. Therefore, contractors are normally held responsible for the acts of their employees and subcontractor employees in the conduct of activities at covered workplaces. Accordingly, this policy should not be construed to excuse personnel errors.

(e) The limitations on remedies under section 234C will be implemented as follows:

(1) DOE may assess civil penalties of up to $75,000 per violation per day on contractors (and their subcontractors and suppliers) that are indemnified by the Price-Anderson Act, 42 U.S.C. 2210(d). *See* 10 CFR 851.5(a).

(2) DOE may seek contract fee reductions through the contract's *Conditional Payment of Fee* Clause in the Department of Energy Acquisition Regulation (DEAR). *See* 10 CFR 851.4(b); 48 CFR parts 923, 952, 970. Policies for contract fee reductions are not established by this policy statement. The Director and appropriate contracting officers will coordinate their efforts in compliance with the statute. *See* 10 CFR 851.5(b).

(3) For the same violation of a worker safety and health requirement in this part, DOE may pursue either civil penalties (for indemnified contractors and their subcontractors and suppliers) or a contract fee reduction, but not both. *See* 10 CFR 851.5(c).

(4) A ceiling applies to civil penalties assessed on certain contractors specifically listed in 170d. of the Atomic Energy Act, 42 U.S.C. 2282a(d), for activities conducted at specified facilities. For these contractors, the total amount of civil penalties and contract penalties in a fiscal year may not exceed the total amount of fees paid by DOE to that entity in that fiscal year. *See* 10 CFR 851.5(d).

2. Civil Penalty

(a) A civil penalty is a monetary penalty that may be imposed for violations of requirements of this part. *See* 10 CFR 851.5(a). Civil penalties are designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of DOE contractor self-identification, reporting, and correction of violations of the worker safety and health requirements in this part.

(b) Absent mitigating circumstances as described below, or circumstances otherwise warranting the exercise of enforcement discretion by DOE as described in this section, civil penalties will be proposed for Severity Level I and II violations.

(c) DOE will impose different base level penalties considering the severity level of the violation. Table A–1 shows the daily base civil penalties for the various categories of severity levels. However, as described below in section IX, paragraph b.3, the imposition of civil penalties will also take into account the gravity, circumstances, and extent of the violation or violations and, with respect to

the violator, any history of prior similar violations and the degree of culpability and knowledge.

(d) Enforcement personnel will use risk-based criteria to assist the Director in determining appropriate civil penalties for violations found during investigations and inspections.

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

(f) DOE will review each case on its own merits and adjust the base civil penalty values upward or downward. As indicated below, Table A–1 identifies the daily base civil penalty values for different severity levels. After considering all relevant circumstances, civil penalties may be adjusted up or down based on the mitigating or aggravating factors described later in this section. In no instance will a civil penalty for any one violation exceed the statutory limit of $75,000 per day. In cases where the DOE contractor had knowledge of a violation and has not reported it to DOE and taken corrective action despite an opportunity to do so, DOE will consider utilizing its per day civil penalty authority. Further, as described in this section, the duration of a violation will be taken into account in adjusting the base civil penalty.

TABLE A–1—SEVERITY LEVEL BASE CIVIL PENALTIES

Severity level	Base civil penalty amount (Percentage of maximum per violation per day)
I	100
II	50

3. Adjustment Factors

(a) DOE may reduce a penalty based on mitigating circumstances or increase a penalty based on aggravating circumstances. DOE's enforcement program is not an end in itself, but a means to achieve compliance with the worker safety and health requirements in this part. Civil penalties are intended to emphasize the importance of compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of violations of the worker safety and health requirements in this part by the DOE contractors themselves rather than by DOE, and the prompt correction of any violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance with the worker safety and health requirements in this part. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting, and prompt correction of conditions that may constitute, or lead to, violations of the worker safety and health requirements in this part, before, rather than after, DOE has identified such violations. Thus, DOE contractors should almost always be aware of worker safety and health noncompliances before they are discovered by DOE. Obviously, worker safety and health is enhanced if noncompliances are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a noncompliance until later, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of worker safety and health-related noncompliances by DOE contractors has the added benefit of allowing information that could prevent such noncompliances at other facilities in the DOE complex to be shared with other appropriate DOE contractors.

(b) Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting, and prompt correction of conditions which constitute, or could lead to, violations of the worker safety and health requirements. Thus, the civil penalty may be reduced for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

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

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

(e) Additionally, adjustment to the amount of civil penalty will be dependent, in part, on

the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent violations will be viewed differently from those in which there is gross negligence, deception, or willfulness. In addition to the severity of the underlying violation and level of culpability involved, DOE will also consider the position, training and experience of those involved in the violation. Thus, for example, a violation may be deemed to be more significant if a senior manager of an organization is involved rather than a foreman or non-supervisory employee.

(f) Other factors that will be considered in determining the civil penalty amount are the duration of the violation (how long the condition has presented a potential exposure to workers), the extent of the condition (number of instances of the violation), the frequency of the exposure (how often workers are exposed), the proximity of the workers to the exposure, and the past history of similar violations.

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

4. Identification and Reporting

Reduction of up to 50% of the base civil penalty shown in Table A–1 may be given when a DOE contractor identifies the violation and promptly reports the violation to the DOE. Consideration will be given to, among other things, the opportunity available to discover the violation, the ease of discovery and the promptness and completeness of any required report. No consideration will be given to a reduction in penalty if the DOE contractor does not take prompt action to report the problem to DOE upon discovery, or if the immediate actions necessary to restore compliance with the worker safety and health requirements are not taken.

5. Self-Identification and Tracking Systems

(a) DOE strongly encourages contractors to self-identify noncompliances with the worker safety and health requirements before the noncompliances lead to a string of similar and potentially more significant events or consequences. When a contractor identifies a noncompliance, DOE will normally allow a reduction in the amount of civil penalties, unless prior opportunities existed for contractors to identify the noncompliance. DOE will normally not allow a reduction in civil penalties for self-identification if significant DOE intervention was required to induce the contractor to report a noncompliance.

(b) Self-identification of a noncompliance is possibly the single most important factor in considering a reduction in the civil penalty amount. Consideration of self-identification is linked to, among other things, whether prior opportunities existed to discover the violation, and if so, the age and number of such opportunities; the extent to which proper contractor controls should have identified or prevented the violation; whether discovery of the violation resulted from a contractor's self-monitoring activity; the extent of DOE involvement in discovering the violation or in prompting the contractor to identify the violation; and the promptness and completeness of any required report. Self-identification is also considered by DOE in deciding whether to pursue an investigation.

(c) DOE will use the voluntary Noncompliance Tracking System (NTS) which allows contractors to elect to report noncompliances. In the guidance document supporting the NTS, DOE will establish reporting thresholds for reporting noncompliances of potentially greater worker safety and health significance into the NTS. Contractors are expected, however, to use their own self-tracking systems to track noncompliances below the reporting threshold. This self-tracking is considered to be acceptable self-reporting as long as DOE has access to the contractor's system and the contractor's system notes the item as a noncompliance with a DOE safety and health requirement. For noncompliances that are below the NTS reportability thresholds, DOE will credit contractor self-tracking as representing self-reporting. If an item is not reported in NTS but only tracked in the contractor's system and DOE subsequently determines that the noncompliance was significantly mischaracterized, DOE will not credit the internal tracking as representing appropriate self-reporting.

6. Self-Disclosing Events

(a) DOE expects contractors to demonstrate acceptance of responsibility for worker safety and health by proactively identifying noncompliances. When the occurrence of an event discloses noncompliances that the contractor could have or should have identified before the event, DOE will not generally reduce civil penalties for self-identification, even if the underlying noncompliances were reported to DOE. In deciding whether to reduce any civil penalty proposed for violations revealed by the occurrence of a self-disclosing event, DOE will

consider the ease with which a contractor could have discovered the noncompliance and the prior opportunities that existed to discover the noncompliance. If a contractor simply reacts to events that disclose potentially significant consequences or downplays noncompliances which did not result in significant consequences to worker safety and health, such contractor actions do not constitute the type of proactive behavior necessary to prevent significant events from occurring and thereby to improve worker safety and health.

(b) The key test is whether the contractor reasonably could have detected any of the underlying noncompliances that contributed to the event. Examples of events that provide opportunities to identify noncompliances include, but are not limited to:

(1) Prior notifications of potential problems such as those from DOE operational experience publications or vendor equipment deficiency reports;

(2) Normal surveillance, quality assurance performance assessments, and post-maintenance testing;

(3) Readily observable parameter trends; and

(4) Contractor employee or DOE observations of potential worker safety and health problems.

(c) Failure to utilize these types of events and activities to address noncompliances may result in higher civil penalty assessments or a DOE decision not to reduce civil penalty amounts.

(d) Alternatively, if, following a self-disclosing event, DOE finds that the contractor's processes and procedures were adequate and the contractor's personnel generally behaved in a manner consistent with the contractor's processes and procedures, DOE could conclude that the contractor could not have been reasonably expected to find the single noncompliance that led to the event and thus, might allow a reduction in civil penalties.

7. Corrective Action To Prevent Recurrence

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to identify root cause and prevent recurrence, may result in an increase or decrease in the base civil penalty shown in Table A–1. For example, appropriate corrective action may result in DOE's reducing the proposed civil penalty up to 50% from the base value shown in Table A–1. On the other hand, the civil penalty may be increased if initiation of corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor, consideration will be given to, among other things, the appropriateness, timeliness and degree of initiative associated with the corrective action. The comprehensiveness of the corrective action will also be considered, taking into account factors such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

8. DOE's Contribution to a Violation

There may be circumstances in which a violation of a DOE worker safety and health requirement results, in part or entirely, from a direction given by DOE personnel to a DOE contractor to either take or forbear from taking an action at a DOE facility. In such cases, DOE may refrain from issuing an NOV, or may mitigate, either partially or entirely, any proposed civil penalty, provided that the direction upon which the DOE contractor relied is documented in writing, contemporaneously with the direction. It should be emphasized, however, that pursuant to 10 CFR 851.7, interpretative ruling of a requirement of this part must be issued in accordance with the provisions of 851.7 to be binding. Further, as discussed above in this policy statement, lack of funding by itself will not be considered as a mitigating factor in enforcement actions.

9. Exercise of Discretion

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

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

(1) The violation is promptly identified and reported to DOE before DOE learns of it or the violation is identified by a DOE independent assessment, inspection or other formal program effort.

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

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

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

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

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

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

(e) The preceding paragraphs are examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or Notice of Violation issued when, in DOE's judgment, such action is warranted.

X. INACCURATE AND INCOMPLETE INFORMATION

(a) A violation of the worker safety and health requirements to provide complete and accurate information to DOE, 10 CFR 851.40, can result in the full range of enforcement sanctions, depending upon the circumstances of the particular case and consideration of the factors discussed in this section. Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a DOE contractor normally will be categorized based on the guidance in section IX, "Enforcement Actions."

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

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

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

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

(4) The formality of the communication;

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

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

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

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

(d) When a DOE contractor has corrected inaccurate or incomplete information, the decision to issue a citation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether DOE or the DOE contractor identified the problem with the communication, and whether DOE relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the DOE contractor prior to reliance by DOE, or before DOE raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after DOE relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected.

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

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

[71 FR 6931, Feb. 9, 2006, as amended at 74 FR 66033, Dec. 14, 2009]

PART 860—TRESPASSING ON DEPARTMENT OF ENERGY PROPERTY

Sec.

AUTHORITY: Sec. 161, 68 Stat. 948, sec. 229, 70 Stat. 1070; (42 U.S.C. 2201; 2278a); sec. 104, 88 Stat. 1237, sec. 105, 88 Stat. 1238 (42 U.S.C. 5814, 5815); sec. 5, Pub. L. 100–185, 101 Stat. 1279 (18 U.S.C. 3559); sec. 6, Pub. L. 100–185, 101 Stat. 1280 (18 U.S.C. 3571); sec. 7041, Pub. L. 100–690, 102 Stat. 4899 (18 U.S.C. 3559).

SOURCE: 58 FR 47985, Sept. 14, 1993, unless otherwise noted.

§ 860.1 Purpose.

The regulations in this part are issued for the protection and security of facilities, installations and real property subject to the jurisdiction or administration, or in the custody of, the Department of Energy.

§ 860.2 Scope.

The regulations in this part apply to all facilities, installations and real property subject to the jurisdiction or administration of the Department of Energy or in its custody which have been posted with a notice of the prohibitions and penalties set forth in this part.

§ 860.3 Trespass.

Unauthorized entry upon any facility, installation or real property subject to this part is prohibited.

§ 860.4 Unauthorized introduction of weapons or dangerous materials.

Unauthorized carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon any facility, installation or real property subject to this part, is prohibited.

§ 860.5 Violations and penalties.

(a) Whoever willfully violates either § 860.3 or § 860.4 shall, upon conviction, be guilty of an infraction punishable by a fine of not more than $5,000.

(b) Whoever willfully violates either § 860.3 or § 860.4 with respect to any facility, installation or real property enclosed by a fence, wall, floor, roof, or other structural barrier shall upon conviction, be guilty of a Class A misdemeanor punishable by a fine not to exceed $100,000 or imprisonment for not more than one year, or both.

§ 860.6 Posting.

Notices stating the pertinent prohibitions of §§ 860.3 and 860.4 and penalties of § 860.5 will be conspicuously posted at all entrances of each designated facility, installation or parcel of real property and at such intervals along the perimeter as will provide reasonable assurance of notice to persons about to enter.

§ 860.7 Effective date of prohibition on designated locations.

The prohibitions in §§ 860.3 and 860.4 shall take effect as to any facility, installation or real property on publication in the FEDERAL REGISTER of the notice designating the facility, installation or real property and posting in accordance with § 860.6.

§ 860.8 Applicability of other laws.

Nothing in this part shall be construed to affect the applicability of the provisions of State or other Federal laws.