

agreement of indemnification under section 170d. of the AEA (the Price-Anderson Act). The contract provisions must specify the degrees of violations and the amount of the reduction attributable to each degree of violation.

DOE is implementing this statutory mandate to include provisions for the reduction in fees in contracts for violations of this part pursuant to the contract's *Conditional Payment of Fee* clause. Most DOE management and operating contracts currently contain such a clause providing for reductions of earned fee, fixed fee, profit, or share of cost savings that may otherwise be payable under the contract if performance failures relating to environment, safety and health occur. See 48 CFR 970.5215-3, *Conditional Payment of Fee, Profit, or Incentives* (applicable to DOE management and operating contracts and other contracts designated by the Procurement Executive). DOE proposed to amend this clause to set forth the specific criteria and conditions that may precipitate a reduction of earned or fixed fee, profit, or share of cost savings under the contract. The clause would establish reduction ranges that correlate to three specified degrees of performance failures relating to environment, safety and health. See 66 FR 8560 (Feb. 1, 2001) (notice of proposed rulemaking). In the final rule, DOE intends to clarify that the term "environment, health and safety" includes matters relating to "worker health and safety" and to apply the same reduction ranges and degrees of performance failure to worker safety and health. In a parallel provision, proposed § 851.4(b) also would implement this statutory mandate by making a contractor who fails to comply with the requirements of the general rule in proposed § 851.100 subject to a reduction in fees or other payments under a contract with DOE pursuant to the contract's *Conditional Payment of Fee* clause.

### 3. Relationship of Civil Penalties and Contract Fee Reductions

As a general matter, DOE intends to use civil penalties as the remedy for most violations where DOE may elect between remedies. DOE expects to invoke the provisions for reducing contract fees only in cases involving especially egregious violations or that indicate a general failure to perform under the contract with respect to worker safety and health. Such violations would call into question a contractor's commitment and ability to achieve the fundamental obligation of providing safe and healthy workplaces for workers because of factors such as

willfulness, repeated violations, death, serious injury, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls. Because such violations indicate a general failure to perform under the contract with respect to worker safety and health where both remedies are available and DOE elects to use a reduction in fee, DOE would expect to reduce fees substantially under the *Conditional Payment of Fee* clause.

### 4. Limitations on Penalties

Section 234Cd. imposes three specific limitations on DOE's authority to seek monetary remedies. Specifically, DOE may not (1) both reduce contract fees and assess civil penalties for the same violation of a worker protection requirement; (2) assess both civil penalties authorized by section 234A (nuclear safety and radiological protection regulations) and by section 234C (worker safety and health regulations) for the same violation; and, (3) with respect to those nonprofit contractors specifically listed as exempt from civil penalties for nuclear safety violations in subsection d. of section 234A of the AEA, assess an aggregate amount of civil penalties and contractor penalties in a fiscal year in excess of the total amount of fees paid by DOE to that nonprofit entity in that fiscal year. Proposed §§ 851.4(d), (e) and (f) sets forth these statutory limitations.

### 5. Enforcement Procedures

Proposed subpart C of part 851 sets forth the administrative procedures DOE would use to issue enforcement actions and impose civil penalties. In general, DOE has based these procedures on the existing procedural regulations for nuclear safety enforcement in 10 CFR part 820, which has provided the basis for implementing a successful nuclear safety compliance program since the mid 1990s. See Procedural Rules for DOE Nuclear Activities, 10 CFR part 820, 58 FR 43680 (Aug. 17, 1993), amended, 62 FR 52481 (Oct. 8, 1997) and 65 FR 15220 (Mar. 22, 2000). The proposed procedures would provide for investigations and inspections, subpoenas, informal conferences, enforcement letters, settlements, consent orders, preliminary notices of violations, and final notices of violations. Contractors would take administrative appeals of final notices of violations to DOE's Office of Hearings and Appeals rather than an administrative law judge as provided for in 10 CFR part 820. Unlike section 234A of the AEA, section 234C does not

provide for the use of administrative law judges and other procedural mechanisms. A decision of the Office of Hearings and Appeals would exhaust a contractor's administrative remedies with respect to a final notice of violation and would constitute a final order of DOE.

The proposed regulations would assign responsibility for carrying out these enforcement procedures to the "Director," which proposed § 851.3 would define as "the DOE Official to whom the Secretary has assigned the authority to investigate the nature and extent of compliance with the requirements of" the proposed regulations. DOE expects this function would be assigned to the current Director of the Office of Price-Anderson Enforcement in the Office of Environment, Health and Safety, who is the person to whom the Secretary has assigned the responsibility for enforcing the DOE nuclear safety regulations in 10 CFR parts 820, 830, and 835.

While proposed § 851.201(j) would permit the Director to send an enforcement letter to a contractor to communicate DOE's expectations for compliance with the proposed regulations, the primary responsibility lies with the Program Secretarial Officer for ensuring that a contractor has an approved worker safety and health program that is adequate to achieve a level of protection at least substantially equivalent to the level of protection that existed in 2002 for DOE workplaces comparable to those covered workplaces addressed by the program and that has sufficient detail to allow the Director to conduct inspections or investigations to determine compliance. Proposed § 851.201(j) would make clear that an enforcement letter may not create the basis for any legally enforceable requirement under this part.

With respect to exercising certain functions that might be interpreted as giving direction to DOE's National Nuclear Security Administration's contractors, proposed § 851.206 would make the Administrator of the NNSA responsible for exercising such functions. These functions would be signing and issuing subpoenas, orders to compel attendance, orders disclosing information obtained during an investigation, preliminary notices of violation and final notices of violation. In taking such actions, the NNSA Administrator would consider the Director's recommendations. A similar division of responsibilities has been made for enforcing the DOE nuclear safety regulations under part 820. See *Memorandum of Understanding between NNSA and the Assistant*