

Secretary for Environment, Health and Safety, Jan. 12, 2001, <http://tis-nt.eh.doe.gov/enforce/handbks/20010108mou.pdf>. Under both part 820 and proposed part 851, the Director would continue to be able to sign enforcement letters and consent orders applicable to NNSA contractors.

6. General Statement of Enforcement Policy

As a guidance document for enforcing this rule, DOE is proposing to issue a general statement of enforcement policy as Appendix B. The proposed policy would set forth the general framework which DOE would follow to ensure compliance with the proposed regulations and to issue enforcement actions and exercise civil penalty authority. The proposed policy would not be binding and would not create any legally enforceable requirements pursuant to this part. It would only provide guidance as to how DOE generally expects to seek compliance with the proposed regulations and to deal with any violations of the proposed regulations.

The proposed policy is intended to achieve dual purposes of promoting proactive behavior on the part of DOE contractors to improve worker safety and health performance and of deterring contractors from violating the proposed regulations. The proposed policy would encourage DOE contractors to self-identify, report and correct worker safety and health noncompliances and would provide adjustment factors to escalate or mitigate civil penalties on the basis of the nature of the violation and the behavior of the contractor.

To accomplish these purposes, the proposed policy would incorporate the basic outlines of DOE's well-established nuclear safety enforcement program in part 820. The enforcement policy would utilize the part 820 severity levels I, II, and III and related adjustment factors. These severity levels and adjustment factors in the policy incorporate concepts OSHA uses in its enforcement program including whether a violation is serious, other-than-serious, willful, repeated, or *de minimis*.

Specifically, the proposed policy would provide guidance on the treatment of violations in three severity levels. A severity level I violation would be a serious violation, which would involve the potential that death or serious physical harm could result from a condition in a workplace, or from one or more practices, means, methods, operations, or processes used in connection with a workplace. A severity level I violation would be subject to a

base civil penalty of up to 100% of the maximum base civil penalty or \$70,000.

A severity level II violation is an other-than-serious violation, which would involve a potential that the most serious injury or illness that might result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed 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 or \$35,000.

A severity level III violation is a *de minimis* violation. DOE may evaluate minor noncompliances to determine if generic or specific problems exist and consider them in the aggregate as a more serious violation. A severity level III violation would be subject to a base civil penalty up to 10% of the maximum base civil penalty or \$7,000.

DOE could modify or remit these base civil penalties consistent with mitigation and adjustment factors set forth in the proposed policy. Factors include 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. These factors are the same as those used for part 820 and are similar to the adjustment factors in the proposed *Conditional Payment of Fee* rule but the factors in the proposed fee rule include additional focus on performance under the contract.

Regarding the factor of ability of DOE contractors to pay the civil penalties, the policy provides that it is not DOE's intention that the economic impact of a civil penalty would put a DOE contractor out of business. The policy would also provide that when a contractor asserts that it cannot pay the proposed penalty, DOE would evaluate the relationship of affiliated entities to the contractor such as parent corporations.

Based on the adjustment factors relating to a noncompliance, DOE could mitigate a civil penalty from the statutory maximum of \$70,000 per violation per day. Mitigation factors used to reduce a civil penalty include whether a DOE contractor promptly identified and reported a violation and took effective corrective actions. Factors used to increase penalties (but not over the statutory maximum of \$70,000) would include whether a violation is repeated or involves willfulness, death, serious physical harm, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or

serious breakdowns in management controls.

As noted previously, when both remedies are available, DOE may consider a reduction in contract fees if a violation is especially egregious or indicates a general failure to perform under the contract with respect to worker safety and health. In determining whether to refer a violation to the appropriate DOE official responsible for administering reductions in fee pursuant to the *Conditional Payment of Fee* clause, the Director will generally focus on the factors stated above, 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. In cases where DOE may elect between civil penalties and a contract penalty, these kinds of factors may also lead DOE to consider a reduction in fee if they raise doubts about a contractor's overall performance or ability to perform its contract with proper regard for worker safety and health.

In proposing the base civil penalties for the types of violations in this policy, DOE set the starting base amounts at levels higher than the average OSHA penalty for several reasons. DOE's activities are conducted by large, experienced management and operating contractors and their subcontractors and suppliers. Through the contractual relationships that DOE has with these entities, DOE is in constant dialogue concerning the management and operation of DOE's sites and the performance of its governmental missions. DOE has the authority to require these contractors to develop their own worker safety and health programs for DOE approval and to select standards tailored to the work and the hazards. Moreover, DOE may unilaterally direct contractors to include various provisions in their programs. Thus, the Director is in a position to enforce against these programs and can provide incentives for proactive compliance. The policy strongly encourages self-identification of violations, self-reporting, tracking systems and corrective action programs. Moreover, DOE also has the authority and flexibility to coordinate and choose either a civil penalty or fee reduction remedy based on the enforcement policy and the fee reduction contract clause. The proposed enforcement structure of this rule fits the DOE complex better than would a generic system as found in OSHA's enforcement programs.

Finally, as a tool for implementing the enforcement policy, DOE intends to