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DEPARTMENT OF ENERGY

10 CFR Part 820

Procedural Rules for DOE Nuclear Activities; General Statement of Enforcement Policy

AGENCY: Department of Energy.

ACTION: Interim rule; amendment of enforcement policy statement.

SUMMARY: The Department of Energy (DOE) is amending its General Statement of Enforcement Policy (Policy), which is contained in an Appendix to the Procedural Rules for DOE Nuclear Activities. DOE has reevaluated this Policy in consideration of the changing mission of DOE and experience gained from applying the Policy since its publication. Under the amended Policy, DOE no longer intends to base civil penalty amounts on the type of nuclear facility involved. The amended Policy also adds new sections on (1) DOE's use of enforcement letters to close out investigations, (2) self-identification and tracking systems, and (3) self-disclosing events.

DATES: This amended Policy takes effect on November 7, 1997. Although the amended Policy will be effective November 7, 1997, DOE invites and will consider public comment. Written comments must be received by November 7, 1997.

ADDRESSES: Written comment (5 copies) should be addressed to: R. Keith Christopher, U.S. Department of Energy, Office of Enforcement and Investigation, EH–10–GTN, 1000 Independence Avenue SW., Washington, DC 20585, (301) 903–0106. Written comments may be examined between 9 a.m. and 4 p.m., Monday through Friday, in: U.S. Department of Energy, Reading Room, room 1E–190, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–6020.

FOR FURTHER INFORMATION CONTACT: Howard Wilchins, U.S. Department of Energy, Office of Enforcement and Investigation, EH–10–GTN, 1000 Independence Avenue SW., Washington, DC 20585, (202) 903–0100.

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I. Background

DOE's Nuclear Safety Requirements [1] set forth the requirements for DOE's contractors, subcontractors and suppliers to ensure that DOE's nuclear facilities and activities are operated in a manner that protects worker and public safety and the environment. In promulgating Procedural Rules for DOE Nuclear Activities, DOE published a General Statement of Enforcement Policy (Policy) as Appendix A to 10 CFR Part 820, 58 FR 43680 (Aug. 17, 1993). The Policy provides the bases and processes DOE uses to take enforcement actions for violations of the DOE Nuclear Safety Requirements. The enforcement provisions embodied in Part 820 and reflected in the Policy are based on a philosophy of encouraging contractors to provide adequate protection of safety, health, and the environment in compliance with the DOE Nuclear Safety Requirements. The Policy provides for discretion in pursuing enforcement actions where contractors demonstrate initiative in safety management performance, self-identification of deficiencies, self-reporting of noncompliances to DOE, and prompt and comprehensive corrective actions for the deficiencies identified. Where a contractor's actions are not adequate, DOE may issue a Preliminary Notice of Violation and propose the assessment of civil penalties under the authority of the Price-Anderson Amendments Act of 1988 (PAAA).

Since the Policy was published in August 1993, DOE has accumulated experience in applying the Policy. The complexion of DOE's operating facilities and activities has changed over the past several years. In particular, its array of weapons production facilities and activities has been significantly reduced so that DOE now manages a broad mix of operating facilities, research and development activities, decontamination and decommissioning operations, and environmental management and restoration activities. DOE has reevaluated the structure of its Policy considering the changing mission of DOE and its experience with the Policy. This reevaluation found that the Policy emphasized hazards based on the type of nuclear facilities and activities, such as the risk to the public of an accident involving a reactor or a release of large quantities of radiological material. The Policy placed inadequate emphasis on violations that caused or potentially caused a significant hazard to a worker or the environment, regardless of the type of facility or activity involved, in determining the applicable base civil penalty. That result sent a message to contractors inconsistent with DOE's intent to focus attention on assuring the safe conduct of work at its facilities and during nuclear activities conducted for DOE.

DOE in recent years has placed greater responsibility on management and operating and other contractors to assure the safety of the public, workers, and the environment for the activities that they perform. This has included use of incentive or award fees to recognize proper performance by contractors, integration of safety management

[1] 10 CFR § 820.2 defines ''DOE Nuclear Safety Requirements'' as ''the set of enforceable rules, regulations, or orders relating to nuclear safety adopted by DOE (or by another Agency if DOE specifically identifies the rule, regulation, or order) to govern the conduct of persons in connection with any DOE nuclear activity and includes any programs, plans, or other provisions intended to implement these rules, regulations, orders, a Nuclear Statute or the [Atomic Energy] Act, including technical specifications and operational safety requirements for DOE nuclear facilities. For purposes of the assessment of civil penalties, the definition of DOE Nuclear Safety Requirements is limited to those identified in 10 CFR § 820.20(b).'' Section 820.20(b) states that civil penalties may be assessed on the basis of a violation of any DOE Nuclear Safety Requirements, a Compliance Order, or any program, plan, or other provision required to implement such Requirement or Compliance Order.

systems, and application of enforcement sanctions for significant cases where DOE Nuclear Safety Requirements have not been met. DOE's amendment to the Policy is consistent with the philosophy of emphasizing the importance of protecting workers, the public and the environment. The amendment also clarifies DOE's enforcement processes and policies so that DOE's expectations and protocols are better understood. Comments received will be considered and additional amendments made if necessary. This amended Policy will take effect 30 days from the date of publication.

II. Amendments to Policy

A. Base Civil Penalty Structure

The PAAA, as modified by the Federal Civil Penalties Inflation Adjustment Act of 1990, establishes a statutory limit of $110,000[2] on the amount of civil penalties DOE can assess for each violation. DOE is eliminating the civil penalty structure that is based on the categorization of the type of nuclear facility, but it is retaining and modifying that portion of the structure based on the three Severity Levels of violations. DOE is simplifying the determination of civil penalties by moving from two tables to one table. DOE is removing Table 1A in newly-designated Section IX which is based on categorization of five types of nuclear facilities.

Eliminating the sliding scale of civil penalties based on the categorization of type of nuclear facility will better reflect DOE's current mission and practices. The categorization of facility approach, although similar to that in NRC's enforcement policy,[3] is not appropriate for DOE's current programs where both large, complex facilities and activities, and smaller, but not necessarily less hazardous, facilities and activities are often operated and managed by the same contractors. A violation affecting the environment or the health and safety of a worker or the public can occur both at high hazard facilities and activities, and at relatively low hazard facilities and activities at the same site. Accordingly, DOE is removing the facility categories table from the Policy as a means of establishing the base civil penalty.

DOE is redesignating Table 1B as Table 1 and revising it to set civil penalty percentages for violations of Severity Levels I, II, and III as a percentage of the maximum statutory limit for civil penalties per violation per day. Severity Level I violations are assessed at the highest level of civil penalty of 100% of the statutory limit per violation per day. Severity Level II is set at 50% of the statutory limit. Severity Level III is set at 10% of the statutory limit.

For Severity Level III violations, DOE is reducing the percentage of the statutory limit from 20% to 10%. DOE believes that a 10% penalty for Category Level III will more accurately reflect its intent to lower civil penalties for noncompliances of small or indirect safety consequences and to encourage contractor responsibility for correcting noncompliances. Except in unusual circumstances, DOE would not assess a civil penalty for violations of Severity Level III. There is no change to the percentages for Severity Levels I and II.

In the revised table, the dollar amount of the civil penalty to which the percentages apply has been deleted so that the percentages now apply to the statutory limit of the maximum civil penalty that can be assessed, whatever that may be at the time. DOE is required to adjust the statutory limit for inflation at least every four years. *See* footnote 2. This approach is intended to establish a direct relationship between the magnitude of the base civil penalty and the significance of the violation.

B. Enforcement Letters

In its experience with enforcement over the past several years, DOE has developed the Enforcement Letter to close out investigations. An Enforcement Letter is an administrative action which has been incorporated into the enforcement process to streamline the process and to better communicate to contractors the status of DOE closure of enforcement investigations and DOE expectations for corrective action of a noncompliance.

Enforcement letters serve to communicate to the contractor DOE's decision not to issue a Preliminary Notice of Violation for a noncompliance that has been reported to DOE, DOE's basis for not pursuing enforcement in that case, and notice to the contractor of DOE's expectations for implementation of the contractor's commitments to take actions to correct the noncompliance. While the Enforcement Letter is not addressed in the current Policy and would not be used in all cases where DOE decides not to pursue a Preliminary Notice of Violation, it has served an effective role in several investigations that DOE has undertaken involving more complex matters or those of some safety significance. The amended Policy adds Section VIII to describe DOE's use of Enforcement Letters.

C. Self-Identification and Tracking Systems

The amended Policy adds a new paragraph 5 in newly-designated Section IX on self-identification and tracking systems. This paragraph emphasizes that contractors should be proactive in identifying and reporting noncompliances before they result in an event with potential safety consequences and should take prompt and effective corrective actions to correct noncompliances to preclude recurrence. Contractors have tended to rely on self-reporting to expect significant reduction or full remission of civil penalties for simply reporting noncompliances that occur. The amended Policy encourages contractors to use the full spectrum of appropriate safety management responses such as prompt self-identification, reporting, and timely and effective corrective action to improve nuclear safety.

The present Policy notes that DOE would consider partial reduction of a civil penalty if a contractor self-identifies the noncompliance and reports it to DOE. With the impracticality of formally reporting all noncompliances with DOE Nuclear Safety Requirements, including, for example, minor or trivial noncompliances with procedures, DOE will allow contractors an option of self-tracking those noncompliances that fall below certain threshold levels. In DOE's enforcement guide, *Guidance for Identifying, Reporting and Tracking Nuclear Safety Noncompliances*,[4] DOE recommends threshold levels. For noncompliances below the threshold, DOE will accept a contractor's self-tracking as acceptable self-reporting if DOE has access to the contractor's self-tracking system and the contractor has tagged the items as noncompliances

[2] The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134), requires Federal agencies to regularly adjust each civil monetary penalty provided by law within the jurisdiction of the agency. As amended, the law requires each agency to make an initial inflationary adjustment for all applicable civil penalties, and to make further adjustments at least once every four years. DOE has promulaged a new Subpart G in 10 CFR Part 820, 62 FR 4618 (Sept. 2, 1997) (final rule), to establish by regulation that $110,000 is the new maximum civil penalty per violation per day authorized by 42 U.S.C. 2282a and 28 U.S.C. 2461 note.''

[3] Nuclear Regulatory Commission, General Statement of Policy and Procedure for Enforcement Actions, 61 FR 65561 (Oct. 18, 1996) (revision of policy).

[4] *Guidance for Identifying, Reporting and Tracking Nuclear Safety Noncompliances,* and Addendum, *Noncompliance Tracking System Users Manual,* DOE–HDBK–1089–95, July 1995. This guide is available through the DOE Technical Standards Program on the internet at http://apollo.osti.gov/html/techstds/techstds.html.

with DOE Nuclear Safety Requirements. For reporting items of noncompliance of potentially greater safety significance above the thresholds, contractors may elect to report through the voluntary DOE Noncompliance Tracking System (NTS), which is also described in the guide.

D. Self-Disclosing Events

A new paragraph 6 is added in newly-designated Section IX on self-disclosing events. Reduction of civil penalties may not be appropriate when a violation is disclosed by an event or discovered through the subsequent investigation of the root cause of an event (*i.e.*, a self-disclosing event) because the disclosure is not the result of contractor initiative. The new paragraph clarifies how DOE would consider reducing penalties for self-disclosing events. In general, a self-disclosing event does not constitute self-identification of the noncomplying event, even if the contractor reported it promptly after the event. A determination to reduce civil penalties for identification of an event after the fact will depend on various factors, including the duration of the noncompliance, and ease and opportunities for identification.

E. Summary of Changes

The Department is making formatting changes throughout Appendix A to conform to **Federal Register** codification requirements. As a result, paragraph designations such as a., b., c., etc. have been added to sections currently containing multiple undesignated paragraphs. The Department is also making substantive changes by adding new Section VIII, Enforcement Letter, and redesignating the remaining sections accordingly. Newly-redesignated Section IX has been reprinted in its entirety to: add paragraph designations throughout; add paragraph 5, Self-Identification and Tracking Systems, and paragraph 6, Self-Disclosing Events; remove Table 1A and revise and redesignate Table 1B as Table 1 in paragraph 2 Civil Penalty; correct cross-references to the Tables throughout the section; change references to Section VIII to read ''this section'' to reflect the redesignation; remove the phrase ''and a categorization of DOE facilities operated'', and revise ''facilities'' to read ''Severity Levels'' in paragraph 2c.; remove the phrase ''and different categories of facilities,'' revise the phrase ''$100,000 per day'' to read ''the statutory limit'' in paragraph 2e. In paragraph 8, the reference to 10 CFR 820.60 is corrected to read ''820.50.'' In newly-designated Section XII, the phrase ''$100,000'' has been changed to read ''the statutory limit'' in paragraph a.

III. Procedural Requirements

A. Review Under Executive Order 12866

This amended Policy is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), and, thus, has not been reviewed by the Office of Information and Regulatory Affairs of the Office of Management and Budget for this purpose.

B. Review Under the Paperwork Reduction Act

No new information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, are imposed by this amended Policy.

C. Review Under the National Environmental Policy Act

The Department has determined that this amended Policy is not a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and does not require preparation of an environmental impact statement or an environmental assessment. Today's action is covered under Categorical Exclusion A.5 in DOE guidelines implementing NEPA (Appendix A to Subpart D, 10 CFR part 1021), which applies to the interpretation or amendment of an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.

D. Review Under Executive Order 12612

Executive Order 12612, ''Federalism,'' 52 FR 41685 (Oct. 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among various levels of government, the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This action will not have a substantial direct effect on the institutional interest or traditional functions of the States or various levels of government.

E. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section (3) of Executive Order 12988 requires Executive agencies to review regulations to determine whether the applicable standards in section 3 are met. DOE has completed the required review and determined that, to the extent permitted by law, this amended Policy meets the relevant standards of Executive Order 12988.

F. Congressional Notification

Consistent with the Small Business Regulatory Enforcement Fairness Act of 1996, DOE will submit to Congress a report regarding the issuance of this amended Policy prior to the effective date set forth at the beginning of this notice. The report will note that the Office of Management and Budget has determined that this amended Policy does not constitute a ''major rule'' under that Act. 5 U.S.C. 801, 804.

List of Subjects in 10 CFR Part 820

Government contracts, DOE contracts, Nuclear safety, Civil penalty, Criminal penalty.

Issued in Washington, D.C., on September 19, 1997.

Tara O'Toole,

Assistant Secretary for Environment, Safety and Health.

For the reason set forth in the preamble, 10 CFR part 820 is amended as set forth below:

PART 820—PROCEDURAL RULES FOR DOE NUCLEAR ACTIVITIES

1. The authority citation for Part 820 continues to read as follows:

Authority: 42 U.S.C. 2201, 2282(a), 7191.

Appendix A to Part 820—[Amended]

2. Appendix A to Part 820—General Statement of Enforcement Policy is amended by adding paragraph designations in the following sections:

In Section I., Introduction, add the paragraph designations a. b. c. d. and e. to the five paragraphs.

In Section V., Procedural Framework, add the paragraph designations a. b. and c. to the three paragraphs.

In Section VI., Severity of Violations, add the paragraph designations a. b. c. d. e. and f. to the six paragraphs.

In Section VII, Enforcement Conferences, add the paragraph designations a. and b. to the two paragraphs.

3. Appendix A to Part 820 is amended by redesignating Sections VIII through XI as Sections IX through XII and adding a new Section VIII to read as follows:

Appendix A to Part 820—General Statement of Enforcement Policy

* * * * *

VIII. Enforcement Letter

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

b. In many investigations, 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 an investigation simply through an annotation in the DOE Noncompliance Tracking System (NTS). *See Guidance for Identifying, Reporting and Tracking Nuclear Safety Noncompliances,* and Addendum, *Noncompliance Tracking System Users Manual,* DOE–HDBK–1089–95, July 1995. 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.

4. Newly-designated Section IX, Enforcement Action, is revised to read as follows:

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. In determining whether to impose enforcement sanctions, DOE will consider enforcement actions taken by other Federal or State regulatory bodies having concurrent jurisdiction, e.g., instances which involve NRC licensed entities which are also DOE contractors, and in which the NRC exercises its own enforcement authority.

b. The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. 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. Administrative actions, such as determination of award fees where DOE contracts provide for such determinations, will be considered separately from any civil penalties that may be imposed under this Enforcement Policy. Likewise, imposition of a civil penalty will be based on the circumstances of each case, unaffected by any award fee determination.

1. Notice of Violation

a. A Notice of Violation (either a Preliminary or Final Notice) is a document setting forth the conclusion of the DOE Office of Nuclear Safety that one or more violations of DOE Nuclear Safety Requirements has 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, if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances, or if the circumstances otherwise warrant increasing Severity Level III violations to a higher severity level.

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 DOE Nuclear Safety Requirements. Should a contractor believe that a shortage of funding precludes it from achieving compliance with one or more DOE Nuclear Safety Requirements, it must pursue one of two alternative courses of action. First, it may request, in writing, an exemption from the requirement(s) in question from the appropriate Secretarial Officer (SO), explicitly addressing the criteria for exemptions set forth in 10 CFR 820.62. A justification for continued operation for the period during which the exemption request is being considered should also be submitted. In such a case, the SO must grant or deny the request in writing, explaining the rationale for the decision. Second, if the criteria for approval of an exemption cannot be demonstrated, the contractor, in conjunction with the SO, must take appropriate steps to modify, curtail, suspend or cease the activities which cannot be conducted in compliance with the DOE Nuclear Safety Requirement(s) in question.

d. DOE expects the contractors which operate its facilities to have the proper management and supervisory systems in place to assure that all activities at DOE facilities, regardless of who performs them, are carried out in compliance with all DOE Nuclear Safety Requirements. Therefore, contractors are normally held responsible for the acts of their employees and subcontractor employees in the conduct of activities at DOE facilities. Accordingly, this policy should not be construed to excuse personnel errors.

e. Finally, certain contractors are explicitly exempted from the imposition

of civil penalties pursuant to the provisions of the PAAA, 42 U.S.C. 2282a(d), for activities conducted at specified facilities. See 10 CFR 820.20(c). In addition, in fairness to non-profit educational institutions, the Department has determined that they should be likewise exempted. See 10 CFR 820.20(d). However, compliance with DOE Nuclear Safety Requirements is no less important for these facilities than for other facilities in the DOE complex which work with, store or dispose of radioactive materials. Indeed, the exempted contractors conduct some of the most important nuclear-related research and development activities performed for the Department. Therefore, in order to serve the purposes of this enforcement policy and to emphasize the importance the Department places on compliance with all of its nuclear safety requirements, DOE intends to issue Notices of Violation to the exempted contractors and non-profit educational institutions when appropriate under this policy statement, notwithstanding the statutory and regulatory exemptions from the imposition of civil penalties.

2. Civil Penalty

a. A civil penalty is a monetary penalty that may be imposed for violations of applicable DOE Nuclear Safety Requirements, including Compliance Orders. See 10 CFR 820.20(b). 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 DOE Nuclear Safety Requirements.

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. Civil penalties will be proposed for Severity Level III violations which are similar to previous violations for which the contractor did not take effective corrective action. ''Similar'' violations are those which could reasonably have been expected to have been prevented by corrective action for the previous violation. DOE normally considers civil penalties only for similar Severity Level III violations that occur over a reasonable period of time to be determined at the discretion of DOE.

c. DOE will impose different base level civil penalties considering the severity level of the violation(s) by Price-Anderson indemnified contractors. Table 1 shows the daily base civil penalties for the various categories of severity levels. However, as described above in Section IV, 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. 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 it asserts that it cannot pay the proposed penalty.

e. DOE will review each case involving a proposed civil penalty on its own merits and adjust the base civil penalty values upward or downward appropriately. As indicated above, Table 1 identifies the daily base civil penalty values for different severity levels. After considering all relevant circumstances, civil penalties may be escalated or mitigated based upon the adjustment factors described below in this section. In no instance will a civil penalty for any one violation exceed the statutory limit. However, it should be emphasized that if the DOE contractor is or should have been aware of a violation and has not reported it to DOE and taken corrective action despite an opportunity to do so, each day the condition existed may be considered as a separate violation and, as such, subject to a separate civil penalty. Further, as described in this section, the duration of a violation will be taken into account in determining the appropriate severity level of the base civil penalty.

TABLE 1.—SEVERITY LEVEL BASE CIVIL PENALTIES

Severity level	Base civil penalty amount (percentage of maximum civil penalty per violation per day)
I	100
II	50
III	10

3. Adjustment Factors

a. DOE's enforcement program is not an end in itself, but a means to achieve compliance with DOE Nuclear Safety Requirements, and civil penalties are not collected to swell the coffers of the United States Treasury, but 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 nuclear safety deficiencies and violations of DOE Nuclear Safety Requirements by the DOE contractors themselves rather than by DOE, and the prompt correction of any deficiencies and violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance with DOE Nuclear Safety Requirements. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting and prompt correction of nuclear safety-related problems that may constitute, or lead to, violations of DOE Nuclear Safety Requirements before, rather than after, DOE has identified such violations. Thus, DOE contractors will almost always be aware of nuclear safety problems before they are discovered by DOE. Obviously, public and worker health and safety is enhanced if deficiencies are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a deficiency until later on, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of nuclear safety-related problems by DOE contractors has the added benefit of allowing information which could prevent such problems at other facilities in the DOE complex to be shared with all appropriate DOE contractors.

b. Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting and prompt correction of problems which constitute, or could lead to, violations of DOE Nuclear Safety Requirements. Thus, application of the adjustment factors set forth below may result in no civil penalty being assessed 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 unacceptable. 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 willfulness, flagrant DOE-identified 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.

4. Identification and Reporting

Reduction of up to 50% of the base civil penalty shown in Table 1 may be given when a DOE contractor identifies the violation and promptly reports the violation to the DOE. In weighing this factor, 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 DOE Nuclear Safety Requirements or place the facility or operation in a safe configuration are not taken.

5. Self-Identification and Tracking Systems

a. DOE strongly encourages contractors to self-identify noncompliances with DOE Nuclear Safety Requirements before the noncompliances lead to a string of similar and potentially more significant events or consequences. When a contractor identifies a noncompliance through its own self-monitoring activity, DOE will normally allow a reduction in the amount of civil penalties, regardless of whether 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 has established a voluntary Noncompliance Tracking System (NTS) which allows contractors to elect to report noncompliances. In the guidance document supporting the NTS (DOE–HDBK–1089–95), DOE has established reporting thresholds for reporting items of noncompliance of potentially greater safety significance into the NTS. Contractors may, however, 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 Nuclear Safety Requirement. For noncompliances that are below the 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 finds the facts and their safety significance have been 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 safety of the public, workers, and the environment and to proactively identify noncompliance conditions in their programs and processes. 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. When the occurrence of an event discloses noncompliances that the contractor could have or should have identified before the event, DOE will not generally allow a reduction in civil penalties for self-identification, even if the underlying noncompliances were reported to DOE. If a contractor simply reacts to events that disclose potentially significant consequences or downplays noncompliances which did not result in significant consequences to workers, the public, and the environment, such contractor actions do not lead to the improvement in nuclear safety contemplated by the Act.

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 assessments, and post-maintenance testing;

(3) readily observable parameter trends; and

(4) contractor employee or DOE observations of potential safety problems. 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.

c. For example, a critique of the event might find that one of the root causes was a lack of clarity in a Radiation Work Permit (RWP) which led to improper use of anti-contamination clothing and resulting uptake of contamination by the individual. DOE could subsequently conclude that no reduction in civil penalties for self-identification should be allowed since the event itself disclosed the inadequate RWP and the contractor could have, through proper independent assessment or by fostering a questioning attitude by its workers and supervisors, identified the inadequate RWP before the event.

d. Alternatively, if, following a self-disclosing event, DOE found 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 procedural 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 up to a 50% increase or decrease in the base civil penalty shown in Table 1. For example, very extensive corrective action may result in reducing the proposed civil penalty as much as 50%

of the base value shown in Table 1. On the other hand, the civil penalty may be increased as much as 50% of the base value if initiation or 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 Nuclear Safety 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, and 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 820.50, no interpretation of a DOE Nuclear Safety Requirement is binding upon DOE unless issued in writing by the General Counsel. Further, as discussed in this section of 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 problems, DOE may exercise discretion as follows:

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

(1) The violation is promptly identified and reported to DOE before DOE learns of it.

(2) The violation is not willful or 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 which caused it.

b. DOE may refrain from proposing a civil penalty for a violation involving a past problem, such as in engineering design or installation, that meets all of the following criteria:

(1) It was identified by a DOE contractor as a result of a formal effort such as a Safety System Functional Inspection, Design Reconstitution program, or other program that has a defined scope and timetable which is being aggressively implemented and reported;

(2) Comprehensive corrective action has been taken or is well underway within a reasonable time following identification; and

(3) It was not likely to be identified by routine contractor efforts such as normal surveillance or quality assurance activities.

c. 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.

d. DOE may refrain from issuing a Notice of Violation for an item of noncompliance that meets all of the following criteria:

(1) It was promptly identified by the DOE nuclear entity;

(2) It is normally classified at a Severity Level III;

(3) It was promptly reported to DOE;

(4) Prompt and appropriate corrective action will be taken, including measures to prevent recurrence; and

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

e. DOE may refrain from issuing a Notice of Violation for an item of noncompliance that meets all of the following criteria:

(1) It was an isolated Severity Level III violation identified during a Tiger Team inspection conducted by the Office of Environment, Safety and Health, during an inspection or integrated performance assessment conducted by the Office of Nuclear Safety, or during some other DOE assessment activity.

(2) The identified noncompliance was properly reported by the contractor upon discovery.

(3) The contractor initiated or completed appropriate assessment and corrective actions within a reasonable period, usually before the termination of the onsite inspection or integrated performance assessment.

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

f. 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 or integrated performance assessment 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 issue and any corrective actions can be properly tracked and monitored.

g. If DOE initiates an enforcement action for a violation at a Severity Level II or III 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 safety significance of the initial violation, the comprehensiveness of the corrective action, whether the matter was reported, and whether the additional violation(s) substantially change the safety significance or character of the concern arising out of the initial violation.

h. It should be emphasized that the preceding paragraphs are solely intended to be 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 on the basis of the circumstances of an individual case.

5. Newly designated Section X., Procurement of Products or Services and the Reporting of Defects, is amended by adding the paragraph designations a. b. and c. to the first three paragraphs.

6. Newly designated Section XI., Inaccurate and Incomplete Information, is amended by adding the paragraph designations a. and b. to the first two paragraphs, redesignating paragraphs (a) through (g) as (b)(1) through (b)(7), and adding the paragraph designations c., d., e. and f. to the remaining paragraphs.

7. Newly-designated Section XII, Secretarial Notification and Consultation, is amended by revising ''$100,000'' to read ''the statutory limit'' in paragraph a.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 96–NM–149–AD; Amendment 39–10116; AD 97–18–06]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Boeing Model 737 series airplanes, that requires revising the FAA-approved maintenance program to prohibit the use of pressure washing within the wheel well or on the landing gear and to prohibit the use of pumps and/or nozzles for washing wheel wells or the landing gear; or incorporation of a certain Temporary Revision to the Boeing Airplane Maintenance Manual into the FAA-approved maintenance program. This amendment is prompted by a review of the design of the flight control systems on Model 737 series airplanes. The actions specified by this AD are intended to prevent corrosion of certain equipment due to the use of inappropriate pressure washing techniques. Corrosion of bearings, cables, electrical connectors, or other equipment in the main wheel well, if not detected and corrected in a timely manner, could result in reduced controllability of the airplane.

DATES: Effective November 12, 1997.

The incorporation of reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of November 12, 1997.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: David Herron, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2672; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Boeing Model 737 series airplanes was published in the **Federal Register** on August 28, 1996 (61 FR 44239). That action proposed to require revising the FAA-approved maintenance program to prohibit the use of pressure washing within the wheel well or on the landing gear and to prohibit the use of pumps and/or nozzles for washing wheel wells or the landing gear.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Support for the Proposal

One commenter supports the proposal.

Request To Revise Statement of Findings of Critical Design Review Team

One commenter requests the second paragraph of the Discussion section that appeared in the preamble to the proposed rule be revised to accurately reflect the findings of the Critical Design Review (CDR) team. The commenter asks that the FAA delete the one sentence in that paragraph, which read: ''The recommendations of the team include various changes to the design of the flight control systems of these airplanes, as well as correction of certain design deficiencies.'' The commenter suggests that the following sentences should be added: ''The team did not find any design issues that could lead to a definite cause of the accidents that gave rise to this effort. The recommendations of the team include various changes to the design of the flight control systems of these airplanes, as well as incorporation of certain design improvements in order to enhance its already acceptable level of safety.''

The FAA does not find that a revision to this final rule in the manner suggested by the commenter is necessary, since the Discussion section of a proposed rule does not reappear in a final rule. The FAA acknowledges that the CDR team did not find any design issue that could lead to a definite cause of the accidents that gave rise to this effort. However, as a result of having conducted the CDR of the flight control systems on Boeing Model 737 series airplanes, the team indicated that there are a number of recommendations that should be addressed by the FAA for each of the various models of the Model 737. In reviewing these recommendations, the FAA has concluded that they address unsafe conditions that must be corrected through the issuance of AD's. Therefore, the FAA does not concur that these design changes merely ''enhance [the Model 737's] already acceptable level of safety.''

Request To Withdraw the Proposal: Existing Procedures Are Adequate

Several commenters request that the proposed rule be withdrawn since pressure washing procedures exist that adequately clean the wheel wells and landing gear, yet provide protective shielding for various components.

The FAA does not concur that this final rule should be withdrawn for the reason requested by the commenters. Since the issuance of the proposal, the FAA has reviewed and approved a new Temporary Revision to the Airplane Maintenance Manual (AMM), Chapter 12–40–0, that lists specific components that require protection from exposure to moisture. The Temporary Revision describes procedures to shield and protect these specific components from moisture during pressure washing. Therefore, the FAA has revised paragraph (a) of this final rule to provide an alternative method of compliance for the requirements of this AD by incorporating the Temporary Revision into the AMM.

Request To Withdraw the Proposal: No Supporting Data

Several commenters contend that there are no data or records of in-service findings that support the conclusion that corrosion of the wheel wells or the landing gear is induced by proper pressure washing. One commenter considers that the improper use of pressure equipment, lack of protection of critical areas, and improper lubrication techniques are the more significant and likely causes of any corrosion occurring in the wheel well. The commenter suggests that the appropriate action to minimize the possibility of corrosion is: proper training of cleaning personnel, use of proper equipment, protection of critical