

## **Best Practice Title: Request for Consent Order / Settlement Agreement**

**Facility:** The guidance contained in this document is based on philosophies used at multiple sites across the DOE complex.

**Point of Contact:** Stuart Meredith, (630) 252-6312, smeredith@anl.gov

**Brief Description of Best Practice:** This document provides guidance on the process for requesting a Consent Order / Settlement Agreement from the DOE Office of Enforcement. Members of the EFCOG Safety Working Group, Regulatory and Enforcement Subgroup (SWG-RE) and the DOE Office of Enforcement developed it collaboratively.

**Why the best practice was used:** Based on when the situation warrants it, the Office of Enforcement is actively promoting the use of Consent Orders / Settlement Agreements to the Contractor Community to resolve safety and security investigations in lieu of enforcement actions.

**What are the benefits of the best practice:** This best practice will provide the Contractor Community, specifically those who are unfamiliar with the Consent Order / Settlement Agreement process, with guidance and information to consider in determining whether to request a Consent Order / Settlement Agreement and in making such a request.

**What problems/issues were associated with the best practice:** The Contractor Community repeatedly expressed difficulty in understanding the approach and criteria for requesting a Consent Order / Settlement Agreement from the Office of Enforcement.

**How the success of the Best Practice was measured:** This guidance document is new, and so it does not have a performance history with which to evaluate its success or failure. This guidance document was vetted through the EFCOG Community and the DOE Office of Enforcement. Much of the information provided in this document is also discussed during the regular EFCOG Working Group meetings, and feedback from the attendees at those meetings was positive.

**Description of process experience using the Best Practice:** This guidance document is new and does not have a history of process experience to describe. However, the guidance provided in the document reflects best business practices used throughout the DOE complex.

# **EFCOG Guidance Document:**

## **Request for Consent Order / Settlement Agreement**

## **Definition**

(Source: *Safety and Security Enforcement Process Overview*, September 2017)

A Consent Order or settlement agreement is a document, signed by the Director and a duly authorized representative of the contractor, containing stipulations or conclusions of fact or law and a remedy (e.g., monetary, specific corrective actions, or both) acceptable to DOE and the contractor.

Contractors are given opportunities to seek settlement with DOE through Consent Orders (worker safety and health and nuclear safety) or settlement agreements (classified information security) for noncompliances that could have proceeded to investigations, have already been investigated, and/or undergone a possible enforcement action through the issuance of a PNOV (reference 10 C.F.R. Sections 851.41, Settlement; 820.23, Consent Order; and 824.4(e), respectively).

The contractor usually initiates the request for settlement; however, in some circumstances, after first considering DOE line management perspectives, the Office of Enforcement may indicate to the contractor early in the proceeding that settlement is a preferred outcome.

## **Considerations for requesting a Consent Order / Settlement Agreement**

The consent order/settlement agreement is one of the most desirable methods of dealing with a potential Office of Enforcement (EA-10) enforcement action; the following is a list of things to consider when requesting a consent order or settlement.

- Contractor is not required to admit that a violation occurred; Violation not a recorded violation on the Contractor record; Not required to disclose in future bids
- Reduce the amount of time and resources that the contractor must spend to resolve an enforcement proceeding; duration of case closure shortened
- Official press releases are not required for Consent Orders and Settlement Agreements, they are however posted on the Office of Enforcement's publicly accessible website
- Allows Contractor to focus its attention on fixing the problem
- Relatively small cost to prepare a consent order request
- Minimizes unallowable costs associated with an enforcement proceeding/action
- Monetary remedies possible — made in lieu of civil penalties
- Reduced cost to contractor – monetary remedies associated with Consent Orders and Settlement Agreement are generally less than would be incurred under a Notice of Violation with civil penalty
- Terms can be negotiated with the Office of Enforcement, including monetary remedy
- Most consent order/settlement agreements come with terms and conditions that could require additional actions by the contractor and added oversight by DOE
- Failure to comply with the terms and condition is likely to cause Office of Enforcement to reopen the investigation
- Additionally, a recurrence of issues for which a Consent Order or Settlement was issued could also result in re-opening the investigation

### **Timing for Request**

The Contractor can meet with Office of Enforcement at any stage of the process and reach a settlement (in the form of a Consent Order or settlement agreement).

- Consider requesting the Consent Order or Settlement in advance of NOI for issues that are likely to generate Office of Enforcement interest. This will indicate recognition of severity and desire to implement corrective actions as soon as possible.
- Submit request as soon as possible after the Notice of Investigation (NOI) letter is issued this can substantially reduce unallowable costs associated with enforcement.
- When considering a Consent Order or settlement agreement, consult with DOE local site office and the Office of Enforcement.
- Greatest benefits accrue when settlement negotiations begin early in the enforcement proceeding.
- The Office of Enforcement may still consider settlement appropriate (albeit of reduced value) if an agreement is reached later in the proceeding.

A contractor usually initiates requests for settlement; however, in some circumstances, after first considering DOE line management perspectives, the Office of Enforcement may indicate to the contractor early in the proceeding that settlement is a preferred outcome.

### **Criteria for Consideration by Office of Enforcement**

The appropriateness of settlement depends on the facts and circumstances of each case. It is generally very beneficial if the DOE local site office is in agreement with Contractor regarding settlement approach; therefore, the Contractor should consult with the local site office before proceeding with a request.

The Office of Enforcement considers the following criteria when deciding whether to pursue a settlement with contractors:

- Confidence that the contractor's specific internal investigation into the noncompliance(s) is credible and thorough;
- All of the noncompliance(s) associated with the event or condition were promptly and accurately reported to DOE;
- Corrective Actions are comprehensive in scope and appear adequate to address the issue and prevent recurrence; and
- The benefit to DOE and the Office of Enforcement is achieved such as a reduction in the resources needed to investigate and/or expedition of the enforcement process.

### **When Not to Request a Consent Order**

Given the safety/security significance of the event or condition, settlement may not be appropriate, even if requested early in an enforcement proceeding.

As noted in the DOE Enforcement Process Overview, the Office of Enforcement will generally not grant any request for a settlement that involves violations of the worker safety and health,

nuclear safety, or classified information security rules involving one or more of the following situations. Note: This list is not all-inclusive:

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

### **Preparing a Consent Order / Settlement Agreement**

Settlement requests must be made in writing to the Director of Enforcement and include the contractor's justification as to why a Consent Order / Settlement Agreement is appropriate in the particular instance.

When preparing a Consent Order / Settlement Agreement request, do the following:

- Consult local DOE Site Office to determine if they will support the request.
- Consult with the Office of Enforcement on intent and solicit their input on content.

- Establish a team, including Legal Counsel, the appropriate Subject Matter Experts, and the organization owning the issue
- Develop a strategy for the request (i.e., content of the request, short or long request letter, timing, etc.)
- Gather accurate information to include in the request, including items such as event details, immediate/compensatory actions, causal analysis, corrective action plan
- Identify any improvements already achieved as a result of completed actions.
- Describe Management involvement in the issue/event, the recovery actions, and their endorsement of the corrective action plan.
- Identify safety or security performance improvements the organization has achieved over time, as applicable.
- Engage DOE local site office on the content of the request.
- Designate a lead to draft the Consent Order / Settlement Agreement request letter (e.g., Legal Counsel, Enforcement Coordinator, or Enforcement Program Manager)
- Request letter should come from the Laboratory Director or Contractor CEO (i.e., same level that the Notice of Intent to Investigate was issued)
- Engage DOE local site office to review request letter draft

Refer to Attachment A for an example of a Consent Order / Settlement Agreement request.

**NOTE: Understand that each contractor and situation is different, a request would be unique to your situation, and the attachment is offered only as a basic example and does not represent nor is it expected to be a template.**

### **Office of Enforcement Consideration / Deliberation of Request**

OE may decide not to perform an investigation when a Consent Order / Settlement Agreement request is received; therefore, the unallowable cost of having to prepare for and support an investigation and an enforcement conference could be saved. The Office of Enforcement may request additional documentation to aid in deliberations.

Alternatively, Office of Enforcement may decide to continue to perform an investigation to independently determine the relevant facts and circumstances and not immediately grant the request. The Contractor should continue to solicit the use of Consent Order / Settlement Agreement throughout the duration of the enforcement activities. In the past, Contractors have received Consent Orders even after an investigation was completed.

### **References**

*Safety and Security Enforcement Process Overview, September 2017*

**Attachment A – Example of Short Request Letter**

[Company Name] Letterhead

[Date]

[Name], Director

Office of Enforcement/EA-10

Office of Enterprise Assessments

U.S. Department of Energy

19901 Germantown Road

Germantown, MD 20874-1290

**Subject: Settlement Proposal re: [Report Name, Number and Date]**

Dear [Name]:

On [Date], the Office of Assessments' Office of Enforcement notified [Company Name] of its decision to investigate the circumstances associated with [event name and/or short description]. As explained in more detail below, [Company Name] believes that based on its thorough investigation, management review, prompt reporting to the Office of Enforcement and the comprehensive scope of its corrective actions that this matter is appropriate for settlement.

The circumstances surrounding the [event name and/or date] events are explained in detail in analyses performed by [Company Name] and in documents provided to the Office of Enforcement. [Provide a short description of the event occurrence]. Subsequent to these events [Company Name] performed a detailed causal analysis, which recommended numerous corrective actions that include [list types of corrective actions – e.g., engineered controls, operations improvements, radiological control improvements and management systems improvements]. These corrective actions are [in process, complete, or are nearing completion]. Specifically, [Company Name] has engaged in the following actions:

- [Company Name] submitted a noncompliance report in the DOE Noncompliance Tracking System on [Date].
- [Company Name] performed a thorough causal analysis, which identified the technical and programmatic causes that resulted in the noncompliances and [list other factors].
- In response to the causal analysis, [Company Name] conducted an extent of condition review and paused operations based on common concerns. [Company Name] conducted an independent management effectiveness review to ensure applicable issues were resolved before resumption of those activities.
- [Company Name] developed a broad corrective action plan to address the causes identified in the causal analysis and management effectiveness review. This comprehensive plan included actions to strengthen [list types of corrective actions – e.g.,

management practices, contamination control practices, measures to maintain worker exposures as low as reasonably achievable (ALARA), surveys and trending, decontamination procedures, bioassay requirements, and roles and responsibilities that apply to operations.]

- [Describe immediate actions / compensatory measures taken.]
- [Describe improvements already completed and how long they have been in place].
- [Describe any effectiveness evaluations/reviews/readiness assessments that have been conducted to validate improvements implemented.]

Pursuant to 10 C.F.R. § 820.23, DOE “encourages settlement of an enforcement proceeding at any time if the settlement is consistent with the objectives of the [Atomic Energy Act] and the DOE Nuclear Safety Requirements.” Similarly, the *Enforcement Process Overview* states the primary purpose of settlement “is to reduce the amount of time and staff resources necessary on the part of both DOE and the contractor to bring an enforcement proceeding to a close.” A settlement of this proceeding would meet these objectives.

[If the investigation is already started] Documents supporting this proposal have been provided to the Office of Enforcement in response to its recent document request. [Company Name] will, of course, provide any additional information you may require to reach a decision.

Thank you for considering this proposal, and please feel free to contact me with any questions.

Sincerely,

[Name]

[Title]