

EFCOG Best Practice #94

Best Practice Title: Contractor Participation in Enforcement Conferences

Facility: Idaho National Laboratory – Battelle Energy Alliance

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Brief Description of Best Practice:

Participation in a Department of Energy (DOE), Health Safety & Security, Office of Enforcement (HS-40) conference is the contractor's opportunity to provide information which will be used by DOE in the decision process for determining whether to issue an enforcement action and, if so, any potential civil penalty mitigation. The Office of Enforcement will usually send the contractor a letter inviting them to participate in an enforcement conference. The letter will have date, time and location of the conference, usually agreed to in advance, and a copy of the enforcement investigation summary attached for information. The summary will describe facts identified during the investigation and the potential regulatory violations. This summary should be carefully reviewed by the contractor from a technical and regulatory perspective. Any inaccuracies, anomalies or questions should be identified for discussion at the enforcement conference.

One of the principal objectives for the contractor is to demonstrate an understanding of the significance of the event(s) or issue(s). Senior management should demonstrate that they understand the issues, the significance of the event(s), and have dealt with them in an aggressive and thorough manner. Another objective is to show that the event or issue has been thoroughly investigated and a corrective action plan was developed and/or completed to prevent recurrence or reduce the probability of recurrence as low as possible. Discussion may include senior management level lesson learned from the event. Lastly, the contractor Enforcement Coordinator or Senior Manager should discuss those factors (actions and/or results) that the contractor wants OE to consider during their enforcement deliberations to maximize mitigation.

The contractor Enforcement Coordinator should develop a plan for presentations/discussions in the enforcement conference. The number of contractor participants should be limited to only those necessary to achieve the principal objectives. However, a senior corporate manager's presence at the conference demonstrates the corporate understanding of the seriousness and concern about the subject matter. The contractor presentations should be targeted for one hour per event or issues, where there are multiple events or issues. The purpose is not to overwhelm the DOE with information that is ancillary to the event/issue. The Enforcement Coordinator with the issue owner and senior management should draft the key points to be discussed by whom at the conference.

The presenters and observers, if any, should arrive at the DOE Germantown offices as a group in sufficient time to find the location for the conference. Leave all cell phones and Blackberries in the car or hotel room, at the very least turn them off. Use only "good" presenters, even if it means using deputy managers or alternates. The following contractor persons, or knowledgeable alternates, should participate at the enforcement conference, if needed, to discuss specific topics:

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Organization President/Senior Officer -

- Introduction of contractor personnel
- Acknowledgement of the event/issue safety significance
 - Any immediate hazard to workers or public
 - Potential hazard to workers inside and outside the facility
 - Actual exposure of workers to hazard, inside or outside
 - Potential or actual hazards to the public
- Extent of Conditions
- Senior management's view and lessons learned from the event that made the company better or safer
- Any actions taken by senior management to address management issues

Director or Senior Manager responsible for the event/issue

- Discuss any additional facts (Do not repeat known event/issue facts or scenarios)
- Discuss any substantial factual inaccuracies, anomalies, or questions concerning the investigation report. Minor inaccuracies can be provided by memorandum to be included in the case record.
- Discuss pertinent immediate and/or compensatory action, if appropriate
- Discuss the significant causal factors
 - Description of the critique, investigation, etc.
 - Root, direct & contributing causes
 - Additional follow-up actions & results
- Discuss the planned and/or completed corrective actions for the significant causal factors

Director or Senior Manager(s) of other Affected Organization(s), as needed

- Discuss any potential or actual impact(s) affecting that organization
- Discuss actions taken to reduce or eliminate impact(s)

Director or Senior Manager Providing Oversight or Quality Control, if applicable

- Discuss of any oversight or quality activities
- Discuss any changes or assurances put in place as a result of the event/issue
- Effectiveness of corrective actions, if known

Enforcement Coordinator or Senior Manager

- Discuss any regulatory considerations
- Discuss appropriate mitigating factors for HS-40 consideration
 - Self-identification
 - Timely NTS reporting
 - Contractor Responsiveness (Cause analysis, Corrective Action Plan)

The Enforcement Coordinator should develop and discuss the details of each of the attendee's information in advance with the attendee. Two or more practice sessions should be conducted with all attendees present until the presentations flow smoothly. It would be advisable to have an independent audience to critique the presentations and provide comments or observations. Adjustments, additions or deletions, should be made at the

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practice sessions, as necessary. The attendees should be counseled to stick to the prepared key points. Deviating from prepared key points could open other doors that may or may not be germane to the event/issue. The overall time target for an enforcement conference should be approximately one hour for each event or issue in the contractor's presentations/discussions.

There may be occasions where there is a desire to include an observer or aide. These are non-participants and should be counseled to remain silent and not intervene or provide information that had not been vetted with the participants prior to the enforcement conference itself. The non-participants should only speak if specifically asked or directed to answer a question by one of the participants. A person should be designated to take note of any commitments for supplying additional information. A brief meeting following the enforcement conference to talk about what went well and what could have gone better. The Enforcement Coordinator should capture these points in contractor files or documents for future use.

Why was the best practice used:

The best practice was used to provide a methodical approach to participation in a DOE enforcement conference. Organized presentations support the objectives of providing pertinent information at the conference which will be used in the DOE deliberations on the enforcement path forward. This approach meets the guidance provided in the Enforcement Process Overview document.

What are the benefits of the best practice:

This approach provides assurance to the DOE that the contractor management has taken the event/issue seriously and understands their responsibility to the DOE, as well as to contractor personnel and stakeholders. Contractor management has led the effort in recovery from the effects of the event/issue. The seriousness of the event/issue was accepted and the appropriate response was taken to correct and/or minimize the effect. This factors into DOE's consideration of "if" and "how much" mitigation should be given for each identified violation in a Preliminary Notice of Violation (PNOV) and Civil Penalty (CP).

The Major Fraud Act requires costs associated with an investigation to be segregated. This includes support for providing information in a data request, support and coordination for an investigation, enforcement conference (preparation and participation time and travel expenses), and time spent responding to an enforcement action. Eighty percent may become allowable if a notice of violation is not issued, but 100 percent would be unallowable if a notice of violation is issued. Minimizing expenses by limiting participation to only those persons necessary would reduce the potential unallowable costs.

How the success of the Best Practice was measured:

The measure of success of using this best practice is the severity of any potential violations and civil penalties. The better a contractor prepares and present their information the more

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likely to receive mitigation or even an enforcement letter in lieu of a PNOV and CP. The DOE can give up to 50% mitigation for self-identification and reporting into the Noncompliance Tracking System (NTS). They can also give up to 50% mitigation for the contractor's response to the event/issue which included a thorough cause analysis and comprehensive corrective action plan to prevent recurrence or minimize the probability of recurrence to the lowest possible level.

Description of process experience using the Best Practice:

There was a PNOV and CP issued for a significant event with 4 separate violations. There was no mitigation given for self-identification because of the event was self-disclosing. This means that the event took place and was not identified by the contractor until after it had occurred. However, because of the contractor's response actions, cause analysis and corrective actions, two of the violations had their CPs mitigated by 50 % and the other two violations had their CPs mitigated by 25%. This resulted in a significant savings of contractor earnings which would have gone to paying the CPs.