The Secretary of Energy
Washington, D.C. 20585

September 19, 2008

Mr. Joseph N. Herndon
Director
Environment, Safety, Health and Quality
UT-Battelle, LLC
Oak Ridge National Laboratory
P.O. Box 2008
Oak Ridge, Tennessee 37831-6244

Dear Mr. Herndon:

This is in response to your April 4, 2008, request for an interpretive ruling pursuant to 10 C.F.R. § 851.7. In that request, you ask whether "health and safety standards, including reference standards and codes, that existed prior to the promulgation of 10 C.F.R. [Part] 851 constitute new safety and health standards for purposes of considering whether a temporary variance request may be granted under Section 851.31?"

Section 851.31(d) (1) provides, in pertinent part that: "Applications for a temporary variance pursuant to paragraph (a) of this section must be submitted at least 30 days before the effective date of a *new* safety and health standard." [emphasis supplied]. In order to qualify for a temporary variance from a requirement in Part 851, the requester must, among other things, establish that "[t]he contractor is unable to comply with the standard by its effective date because of unavailability of professional or technical personnel or materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date." Although preamble language does not control the interpretation of the rule, it may be useful to refer to it. The preamble to the Final Rule for Parts 850 and 851 states:

> A temporary variance allows contractors a short-term exemption from a workplace safety and health standard when they cannot comply with the requirements by the prescribed date because the necessary construction or alteration of the facility cannot be completed in time or because technical personnel, materials, or equipment are temporarily unavailable. To be eligible for a temporary variance, a contractor must implement an effective compliance program as quickly as possible. In the meantime, the contractor must demonstrate to the appropriate Under Secretary and the Assistant Secretary for Environment, Safety and Health, that all available steps are being taken to safeguard workers. DOE does not consider the inability to afford compliance costs to be a valid reason for requesting a temporary variance.

71 Fed. Reg. p. 6902 (February 9, 2006).

The issue presented is how to interpret the word "new" in the context of the Part 851 temporary variance provision. Under one possible interpretation, "new" would refer solely to whether the health and safety standard is itself new, *i.e.*, recently established. Under this interpretation, a contractor could only apply for a temporary variance from a newly created standard, and could not apply for a temporary variance from a previously issued standard, even if that standard

had never before been applicable to the contractor. [1] Alternatively, the word "new" could be interpreted as referring to a health and safety standard that had not previously applied to the contractor, regardless of whether or not the standard is itself new.

The language of Part 851 does not address this question and, nothing in the preambles to the proposed and final versions of Part 851 directly addresses the issue presented. Nevertheless, the rationale for the temporary variance provision supports the interpretation that "new" refers to "new to the contractor." This is because the hardship presented that the temporary variance provision is meant to address is not a function of when the standard is established, but of when the contractor knows, or should have known, that the standard would apply to it. Of course, in many situations a pre-existing standard will be one that the contractor knows, or should know, is applicable to it and thus there will be no basis for a temporary variance. However, if the contractor can show circumstances where a pre-existing health and safety standard is new to the contractor's situation, as discussed above, the mere fact that the standard is pre-existing should not bar a temporary variance. This is particularly true since, prior to the promulgation of Part 851, the worker safety and health standards applicable to DOE contractors were highly variable because DOE allowed negotiated "work smart standards" as alternatives to the Contracts Requirement Document attached to DOE Order 440.1A, *Worker Protection Management for DOE Federal and Contractor Employees*. Thus, some of the standards included in Part 851, which largely adopted the standards from DOE O 440.1A, were "new" to those contractors.[2]

This interpretive ruling is intended only to address the threshold question of how to interpret the word "new" in this context. Even if the health and safety standard is "new to the contractor," a contractor may only receive a temporary variance if it can also establish that it meets the criteria set forth in 10 C.F.R. section 851.31(d)(1)(i)-(iv). Moreover, the duration of the variance should be limited to the minimum amount of time reasonably necessary to allow the contractor to comply with the "new" requirements.

Sincerely,

Bruce M. Diamond
Assistant General Counsel for Environment

cc: Michael L. Baker

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[1] It is possible that a pre-existing health and safety standard is "new" to a contractor but previously applied to a project for which the contractor has assumed responsibility from another contractor. This issue is not presented in the request for an interpretive ruling and is beyond the scope of this interpretive ruling.

[2] Although this issue was not addressed directly in the preamble to the final rule, there were numerous comments regarding the treatment of legacy issues at DOE sites that pertain to this particular issue. In response to one such comment, DOE responded that "DOE believes the provisions on 'closure facilities' and 'variances' provide sufficient flexibility to deal with legacy issues." 71 FR 6858, 6874 (Feb. 9, 2006). Therefore, at the time the rule was promulgated, DOE indicated that variances were appropriate to deal with contractors at sites with legacy issues, *i.e.*, sites that were not in full compliance with the "new" regulatory standards because alternative standards were allowed at those facilities.