

# 10 CFR 851 “Worker Safety and Health Program”

## Frequently Asked Questions

Updated October 19, 2010

**Please Note: The responses to the following Frequently Asked Questions are not Official interpretations, only the Office of General Counsel may issue and interpretive ruling. Please see 10 CFR 851.7 and 851.8 for more information.**

### **Subpart A—General Provisions**

[851.1 Scope and purpose.](#)

[851.2 Exclusions.](#)

[851.3 Definitions.](#)

[851.4 Compliance order.](#)

[851.5 Enforcement.](#)

[851.6 Petitions for generally applicable rulemaking.](#)

[851.7 Request for a binding interpretive ruling.](#)

[851.8 Informal requests for information.](#)

### **Subpart B—Program Requirements**

[851.10 General requirements.](#)

[851.11 Development and approval of worker safety and health program.](#)

[851.12 Implementation.](#)

[851.13 Compliance.](#)

### **Subpart C—Specific Program Requirements**

[851.20 Management responsibilities and worker rights and responsibilities.](#)

[851.21 Hazard identification and assessment.](#)

[851.22 Hazard prevention and abatement.](#)

[851.23 Safety and health standards.](#)

[851.24 Functional areas.](#)

[851.25 Training and Information.](#)

[851.26 Recordkeeping and reporting.](#)

[851.27 Reference sources.](#)

### **Subpart D—Variances**

[851.30 Consideration of variances.](#)

[851.31 Variance Process.](#)

[851.32 Action on Variance Requests.](#)

[851.33 Terms and conditions.](#)

[851.34 Requests for conferences and abatement.](#)

### **Subpart E—Enforcement Process**

[851.40 Investigations and inspections.](#)

[851.41 Settlement.](#)

[851.42 Preliminary notice of violation.](#)

[851.43 Final notice of violation.](#)

[851.44 Administrative appeal.](#)

[851.45 Direction to NNSA contractors.](#)

### [Appendix A to Part 851—Worker Safety and Health Functional Areas](#)

[1. Construction Safety](#)

[2. Fire Protection](#)

[3. Explosive Safety](#)

- [4. Pressure Safety](#)
- [5. Firearms Safety](#)
- [6. Industrial Hygiene](#)
- [7. Biological Safety](#)
- [8. Occupational Medicine](#)
- [9. Motor Vehicle Safety](#)
- [10. Electrical Safety](#)
- [11. Nanotechnology Safety](#)
- [12. Workplace Violence Prevention](#)

[Appendix B to Part 851—General Statement of Enforcement Policy](#)

## 10 CFR 851.1 Scope and Purpose

**Question:** Which DOE off-site contractors are covered by the Rule? (October 5, 2010. Originally published as a Technical Position, December 15, 2006)

**Response:** Several questions regarding which contractors are covered by 10 CFR 851 (Rule) have continued to cause concern, for example is a contractor who leases a facility located off the DOE site and performs work for DOE at this facility covered under the Rule. If the facility is leased or owned by DOE the Rule clearly applies. However, if the facility is not owned or leased by the DOR it may not be clear if the contractor is covered by the Rule or not.

In making a determination of Rule applicability DOE and the Contractor should consider two elements; 1) is the contractor performing work in furtherance of the DOE mission, and 2) is there some sort of DOE control over the space. In general any work performed by a DOE contractor is in furtherance of the mission, however, the second element may be more difficult to determine. For example, a contractor may be leasing a facility from a private source, however, the lease contract is reviewed and approved by DOE and all of the work performed at the facility is for DOE. In this case there is a level of control by the DOE and the facility would fall under 10 CFR 851.

If DOE and the Contractor have looked at these two elements and are still having difficulty in determining the Rule applicability the specific situations may need to be reviewed by the Office of General Counsel (OGC). To assist in making the determination, OGC should be provided with all the details of the specific situation regarding the Contractor's facilities (lease details, location, etc.) and type of work performed for DOE. To assure proper protection of DOE contractor employees DOE and the Contractor should assume that the contractor is covered by the rule until such time as the Office of General Counsel has made a ruling on the applicability of 851 to the contractor with the unique situation.

**Question:**(A). Who regulates worker safety and health for federal employees at DOE Strategic Petroleum Reserve facilities; and (B). What health and safety standards apply at those facilities? (October 5, 2010. Originally published as a Technical Position, May 5, 2010)

**Response:** (A). Section 19 of the Occupational Safety and Health (OSH) Act (P.L. Pub. L. 91-596), as amended, codified at 29 U.S.C. Sec. 668, provides, in pertinent part, that "[i]t shall be the responsibility of the head of each Federal agency . . . to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated [by the Occupational Health and Safety Administration (OSHA)]." In addition, Executive Order 12196, Occupational Safety and Health Programs for Federal Employees, confers certain additional authorities to the Department of Labor regarding the safety of federal employees, including the authority to inspect the facilities of other federal agencies.

Although Sec. 4(b)(1) of the OSH Act, codified at 29 U.S.C. Sec. 653(b)(1), exempts "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" and, with certain

limited exceptions, DOE has such statutory authority under the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended and the Department of Energy Organization Act, as amended, to regulate worker safety and health in furtherance of its own statutory functions, DOE and OSHA agreed in a 1992 MOU with that OSHA would regulate worker safety and health of DOE employees. [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=MOU&p\\_id=240](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=240). Thus, OSHA's regulations at 29 C.F.R. Part 1960, Basic Program Elements for Federal Employee Occupational Safety and Health Programs and Related Matters, would apply to federal employee worker safety and health at the Strategic Petroleum Reserve Facilities.

(B). Title 29 CFR Part 1960, makes, among other OSHA regulations, 29 C.F.R. Part 1910, Occupational Safety and Health Standards, applicable to federal agencies. See § 1960.16, Compliance with OSHA standards ("Each agency head shall comply with all occupational safety and health standards issued under section 6 of the Act, or with alternate standards issued pursuant to this subpart"). In addition, DOE has adopted some more stringent standards in DOE O 440.1B, Worker Protection Program for DOE (Including the National Nuclear Security Administration) Federal Employees, which would apply to federal employee worker safety and health at the Strategic Petroleum Reserve Facilities, to the extent that the more stringent standards pertain to the activities at those facilities. (Note: it is possible that the more stringent standards in DOE O 440.1B do not apply simply because there are no activities at the Strategic Petroleum Reserve Facilities to which these additional standards pertain).

**Question:**(A). Who regulates worker safety and health for DOE prime contractor employees at DOE Strategic Petroleum Reserve facilities; and (B). What health and safety standards apply at those facilities? (October 5, 2010. Originally published as a Technical Position, May 5, 2010)

**Response:** (A). As mentioned above, DOE and OSHA entered into an MOU in 1992 which delineated the two agencies' respective regulatory authorities in DOE facilities. Although the 1992 MOU has expired, the two Agencies continue to operate consistent with the terms of the MOU. Pursuant to that MOU, DOE agreed that it would periodically provide a list to OSHA indicating which DOE facilities DOE regulates which would, therefore, be exempt from OSHA regulation pursuant to Sec. 4(b)(1) of the OSH Act. See the more detailed discussion about Sec. 4(b)(1), above. However, in practice, DOE has periodically provided OSHA with a list of DOE facilities that DOE does not regulate. The Strategic Petroleum Reserve facilities are among those that DOE has listed as not regulated by DOE. Consequently, by agreement, OSHA regulates worker safety and health for DOE contractor employees at the Strategic Petroleum Reserve facilities.

(B). Since OSHA regulates worker safety and health at the Strategic Petroleum Reserve facilities, OSHA's regulations, including 29 C.F.R Part 1910, are applicable.

**Question:** (A).Who regulates worker safety and health for DOE subcontractor employees at DOE Strategic Petroleum Reserve facilities; and (B). What health and safety standards apply at those facilities? (October 5, 2010. Originally published as a Technical Position, May 5, 2010)

**Response:** (A). On June 29, 2006, OSHA issued a Federal Register Final Rule amending 29 C.F.R. Part 1952, Approved.

State Plans for Enforcement of State Standards. 71 Fed. Reg. 36988-36991. In the preamble to this Final Rule, OSHA explained that the rule was being amended to reflect the fact that certain OSHA State Plan States would be regulating private DOE contractors who are not under contract to regulate entire facilities (e.g., subcontractors to DOE GOCOs). However, the Strategic Petroleum Reserve Facilities are not among those over which any OSHA State Plan States would be exercising jurisdiction to regulate occupational safety and health. Therefore, OSHA regulates worker safety and health for DOE subcontractor employees at Strategic Petroleum Reserve Facilities.

(B). As in the case of DOE contractor employees at the Strategic Petroleum Reserve facilities, OSHA's regulations apply to worker safety and health of the DOE subcontractor employees at those facilities.

## 10 CFR 851.8 Informal Request for Information

**Question:** Will DOE use interpretive OSHA rulings?

**Response:** Yes, DOE will use OSHA Interpretation as when they are applicable and where applications are similar to general industry.

## 10 CFR 851.11 Development and approval of the worker safety and health program

**Section (a)** requires that contractors prepare and submit to DOE a written worker safety and Health program.

**Question:** Is DOE looking for procedures or high level documents in the Worker Safety and Health Program?

**Response:** Regarding the Worker Safety & Health Program, the word 'how' [851.10(b)], means to provide a description of the overall S&H Program for the contractor. Two examples of WSHPs are provided in the Draft Implementation Guide for 851. The WSHP is a program description and intended to be a high level document that may point to other lower tiered documents where the process of compliance is described or implemented.

**Question:**How will Worker Safety and Health Program transition between prime contractors when work scope is transferred between different contracts?

**Response:** Transitioning work scope between Prime Contractors or awarding new contracts will require a transition period and submittal of a WSHP. The transition period will be defined within the Request for Proposal or work scope. Compliance with 851, enforcement and penalties would still be enacted during the time allowed to modify and submit the WSHP.

**Question:** What constitutes "significant" with respect to submitting WH&S Program updates?  
Is "annual" measured from approval date or submission date?

**Response:** Significant is elaborated on in the Draft Implementation Guide for 851. Section 3.2.2.2 of the draft guide states: A change should be submitted to DOE if a hazard associated with a change in the worksite or processes, or any newly recognized hazards, is not effectively controlled by the measures in the currently approved worker safety and health program.  
Annual is measured from the Approved date of the WSHP.

**Question:** Will worker safety and health programs be required from subcontractors?

**Response:** Yes, However the detail of the Worker safety and health program will vary depending on the type of work the contractor will perform. It may be possible to include lower tier subcontractors under the prime contractors H&S program. All workers must be covered by an approved written safety and health program.

**Question:** Integrated Safety Management (ISM) currently requires a written program, will the rule change the scope or content of these plans?

**Response:** The rule does not change any requirements for ISM descriptions; however, it is possible to use the ISM description as a starting point for the written safety and health program.

**Question:** The rule requires worker involvement in the development of the program. What are the expectations for the level and extent of this involvement?

**Response:** Worker involvement provides the means to allow workers to develop and express their own commitment to health and safety. Involvement safety and health activities such as inspections, hazard analysis, contributing to the development of safety procedures, training, and assisting in accident investigations are examples of how workers can contribute to the overall health and safety program.

**Question:** Do all changes in the worker safety and health program require DOE approval before they can be implemented?

**Response:** No, Contractors must submit an update to their program to the Head of the DOE Field Element for approval whenever a significant change or addition to the program is made. In determining whether a change is significant and an update is warranted, contractors should consider whether the change is needed to ensure the program accurately reflects actual workplace activities and related hazards and controls or approved program roles and responsibilities. Such changes would be considered “significant” and would require program update and submittal. Changes should not be implemented until approved. Other changes to the program, that do not meet the significant criteria, can be included in the annual update.

As general guidance the term “significant change,” which requires an update to the Worker Safety and Health Program (WSHP) submittal, means that if a hazard associated with a change in the worksite or processes, or any newly recognized hazards is not effectively controlled by the measures in the currently approved WSHP, a revision must be submitted. Examples may include: 1) a new contractor is awarded a contract with NNSA; 2) contractor accepts a new scope for a new toxic, reactive, flammable, or explosive chemical which was not addressed in the approved WSHP; 3) the toxicity or explosive hazard, such as chemical storage, has increased where there is a credible accident scenario that would impact the co-located workers or off-site public; or 4) a site not currently using explosives, begins a project involving explosives.

**Question:** What types of changes can be implemented without formal approval?

**Response:** (See question directly above)

**Question:** Can changes be approved by DOE through written correspondence and implemented before the worker safety and health program is revised?

**Response:** Yes

**Question:** Should proposed variances be included in the submitted worker safety and health program?

**Response:** Variances in the appropriate format and containing the required information may be submitted at anytime.

**Question:** Does each subcontractor require a written program? Does the Field Element review and approve the written program? There are many subcontractors who come on site with just a few workers for short durations of time.

**Response:** A contractor is defined as any entity, including affiliated entities such as a parent corporation, under contract with DOE, or a subcontractor at any tier, that has responsibilities for performing work at a DOE site in furtherance of a DOE mission. The scope of the rule includes the “conduct of contractor activities at DOE sites”. As such, all subcontractors are required to have a written program, however,

the scope of the subcontractors' worker safety and health program should be tailored to the hazard and complexity of their work. There are numerous approaches to meeting the requirement that subcontractors are covered by a written WSHP. Some examples are: the subcontractor can submit its own WSHP to DOE for approval, the subcontractor can be included directly in the parent contractor's WSHP, the contractor can require the subcontractor to prepare and submit a separate WSHP that the contractor includes in its submission to DOE, and the contractor can develop a templates of generic WSHPs tailored for different types of narrow-scope work that are pre-approved by DOE and require subcontractors to accept one of those WSHPs. All contractors and subcontractors must coordinate to ensure clear roles, responsibilities and procedures to achieve an integrated approach to ensuring the safety and health of the worker consistent with 10 CFR 851.11(a)(2)(ii).

The contractor's WSHP should describe the approach and process used to flow down its relevant WSHP requirements to subcontractors. If the subcontractor will work to their own WSHP, the contractor should review the subcontractor's program to verify consistency with the parent WSHP.

**Question:** What is the best approach to document your health and safety program? The regulation provides several alternatives, but what are the pros and cons of each approach? How much detail is desired? If we follow the 10CFR835 approach is that acceptable? By discussing each approach to the plan and the pros and cons, Contractors will better understand what DOE wants and what will work best. The result may still be different types of plans, but the understanding will be more uniform and consistent and the plans will be of higher quality. Most labs are starting to work on their plans soon and a delay in discussing these approaches could result in rework.

**Response:** There is no best approach to documenting a health and safety program. It was the intent of the rule to utilize existing health and safety program documentation for meeting the requirements of the rule. For example, the contractor may wish to use their ISM description, Documented Safety Analysis, or Work Smart Standards as the basis for their written S&H program. Using the existing documentation along with new additional materials, if needed, to meet the requirements of 10 CFR 851 along with a crosswalk to the 10 CFR 851 requirements will allow the contractor to easily meet this requirement. Each CSO may have specific requirements for approval of the H&S program so contractors should work closely with the DOE Head of Field Element that is responsible for their site.

**Question:** What if labs extract only necessary portions of their Integrated Safety Management System (ISMS)? For example, environmental and radiological hazards are regulated elsewhere.

**Response:** 10 CFR 851 does not cover environmental or radiological hazards. It is possible to extract portions of the sites ISMS or to provide a crosswalk of the ISMS showing how it covers the requirements in 10 CFR 851.

**Question:** What is the significance and importance of crosswalks between the 851 requirements and laboratory safety documents?

**Response:** 10 CFR 851 requires a written Safety and Health Program that describes the methods for implementing the requirements of subpart C. A crosswalk of the laboratories safety documents may fulfill this requirement.

*Section (b), discusses DOE evaluation and approval of submitted written worker safety and health programs.*

**Question:** Do the Field Elements have the latitude to provide partial approvals of the written program?

**Response:** Yes, however, the Rule states (851.11 (b)(1) “ Beginning May 25, 2007, no work may be performed at a covered workplace unless an approved worker safety and health program is in place...” . Only work that is within the scope of the facilities and activities that are covered by the approved worker safety and health program may be performed after the deadline. Other work may not be performed until it is included in the program and approved by DOE. Each CSO or Head of DOE Field Element may have



their own timelines and procedures which they will put into place for approval of the programs they will be responsible for, so the contractor should be working with the Head of DOE Field Element to determine what DOE will accept.

**Question:** For changes in the written program, can “re-approvals” be just for the changed sections, or does the entire written program require a review and approval?

**Response:** The concern for the written program is any “significant change” and just as changes to the DOE directives system those changes must be approved. If no changes are made to the written program then a letter indicating no changes have been made may be submitted to DOE

*Section (b)(3) requires that contractors furnish a copy of the approved worker safety and health program, upon written request, to the affected workers or their designated representatives.*

**Question:** Will posting the worker safety and health plan on the site's website fulfill the requirements of 851.11(b)(3) for providing a copy of the program to affected workers?

**Response:** Posting of the worker safety and health program on the site's website would fulfill the requirements of 851.11(b)(3) as long as all employees have easy access to a computer which can access the information.

*10 CFR 851.12 Implementation Section (b), states: “Nothing precludes the contractor from taking additional protective action...”*

**Question:** Could DOE expand on the meaning of this and how the Office of Enforcement foresees enforcement actions? It would be helpful to tie in the adequacy of the ten functional programs of paragraph 10 CFR 851.27 into this discussion segment.

**Response:** The purpose of the rule, as stated in 851.1 establishes “requirements for a worker safety and health program that reduces or prevents occupational injuries, illnesses, and accidental losses by providing DOE contractors and their workers with safe and healthful workplaces.” While program requirements, to include a set of standards and functional area requirements have been established in the rule, the requirements do not limit contractor responsibility. The rule does not limit contractors from adopting means, methods and practices not specifically referenced in the rule, to protect the safety and health of workers if provisions of the rule do not adequately protect workers. While each situation will be evaluated on its own merit, contractors will generally be held responsible if a condition presents a hazard to which workers are exposed, the hazard is recognized, the hazard is causing or has the potential to cause death or serious physical harm, and feasible and useful methods exist to correct the hazard.

*10 CFR 851.20 Management responsibilities and worker rights and responsibilities Section 851.20(a)(2), requires use of “qualified workers”.*

**Question:** Please expand upon how this section will be viewed and enforced.

**Response:** The idea of “qualified workers” is not new to 10 CFR 851. ISM and the DOE Acquisition Regulations (DEAR) both require personnel to possess the experience, knowledge, skills, and abilities necessary to carry out their responsibilities. The rule provides the example of certified industrial hygienists or safety professionals as qualified individuals, however, qualification may also be in the form of specialized training or work experience. DOE's Functional Area Qualification Standards (available at [www.eh.doe.gov/techstds/standard/](http://www.eh.doe.gov/techstds/standard/)) are examples of qualifications for a number of safety disciplines.

*Section (a)(7), "Prompt Response to Reports" states contractors must have a prompt response to reports of job-related fatalities, injuries, illnesses, incidents, and hazards.*

**Question:** What is the definition of "prompt response"? Is it that the worker's item has been addressed, or is it that the worker receives feedback that the item has been initially received? A Safety Log Book entry on the back shift Friday may not be seen until the following Monday, then several days before it is acted on.

**Response:** The Rule does not have a specific definition of "prompt response", however, prompt should be considered to mean that action is undertaken without delay. Each situation will have to be considered with respect to the need for action or the consequence of inaction. In the example about the Safety Log Book above, if no one will be affected by the safety concern prior to the entry being seen on Monday and the concern is acted on after it is reviewed and prior to any one being affected, then that would meet the definition.

*10 CFR 851.21 Hazard identification and assessment Section (a)(5) "Evaluate operations, procedures, and facilities" states that procedures must include methods to identify workplace hazards.*

**Question:** With respect to Closure Facility Hazards 90-day period for identification of hazards, when does the 90 days start? Is a facility that is cold & shutdown with only occasional visits required to have hazards identified within 90 days of baseline or the next visit? Can portions of facilities be classified as Closure Facilities, while a small portion contains activities or operations? Are closed burial sites considered Closure Facilities?

**Response:** Contractors must submit to the Head of the DOE Field Element a list of closure facility hazards and controls within 90 days of identifying those hazards [851.21(b)]. Contractors should include their request for approval of the closure facilities that they have already identified as part of the worker safety and health program that must be submitted to the DOE for approval by February 26, 2007. That provides the Head of the DOE Field Element the prescribed 90 days to act upon the request by the Rule's May 25, 2007 implementation date. Closure facility hazards that are identified too late to be included in the first proposed worker safety and health program should be submitted for approval within 90 days of identification of those hazards.

Closed hazardous waste burial sites are not included in the definition of closure facilities.

For existing hazards identified in closure facilities, the most common approach to controlling worker exposure to closure facility hazards in a "cold and shutdown" closure facility is to control access to the facility. With access control, the closure facility hazards only pose risks to workers who have a need for access (e.g., for surveillance, maintenance, and preparation for decontamination and decommissioning activities). The hazards of those activities must be identified and controlled by the site's work control process, and the hazards updated as often as necessary to ensure safe access for needed activities. Portions of a facility may be designated as a closure facility as long as the hazards of the closure facility portion are isolated from workers that occupy the balance of the facility.

**Question:** Baselines are not necessarily available for all facilities, particularly those judged (through professional expertise) to not warrant a baseline. What does "appropriate" mean in this situation?

**Response:** 851.21(c) initial baseline information is the compilation of information gathered for the first time to meet the requirements of 851.21(a). The resultant information should be commensurate with the hazards and risk to workers. This information could be in the form of a facility baseline hazards assessment for occupied operations or laboratories; it could be routine safety inspections of office facilities; or it could be a list of known or anticipated hazards in a locked/barred old process building. The focus is to obtain hazard information and provide controls commensurate to the work being performed and the exposure to workers. The initial baseline information may be from multiple sources and tailored to the hazards and risk to worker. The baseline information may be in the form of: IH baseline hazard assessments from DOE O 440.1A, Preliminary Hazard Analysis, Fire Hazard Analysis, Nuclear Safety categorization analysis and IH/IS inspections of the work site. These documents and



processes most likely exist for most facilities, as defined in existing site procedures or enacted by other DOE requirements and orders.

**Question:** The "Wall to Wall" baseline evaluation, as discussed in the Implementation Guide, would generate very discrete list of hazards needing correction. Is this same level of detail expected as a facility goes through D&D? Some non-compliance hazards may be present for minutes, hours, days. Would DOE need to approve contractor mitigating strategies?

**Response:** It was not the intent of this section to undertake a new "wall to wall" evaluation. Keep in mind the general duty of the rule is to "Provide a place of employment that is free from recognized hazards that are causing or have the potential to cause death or serious physical harm to workers". A baseline hazard identification and analysis should have already been undertaken as this is required by 48 CFR Federal Acquisition Regulations for the Department of Energy. The results of previous baseline evaluations remain valid for use under 10 CFR 851.

The procedures for undertaking D&D activities should describe the process which will be used to identify and analyze (assess the risk) any existing workplace hazards or those hazards which have not already been identified. The contractor should also provide information on how the worker will be protected from potential hazards that may be encountered during the work being undertaken.

The Head of DOE Field Element, in concurrence with the Cognizant Secretarial Officer, is authorized to approve a unique set of controls to be used for closure facilities that takes into account the costs and benefits of making improvements to facilities scheduled for closure.

The Head of DOE field element determinations the level of detail that DOE exercises in approving control or mitigating strategies.

**10 CFR 851.22 Hazard prevention and abatement Section (a) states:** *"Contractors must establish and implement a hazard prevention and abatement process to ensure that all identified and potential hazards are prevented or abated in a timely manner."*

**Question:** There are currently a number of weapon systems that are being approved for fielding by the Protective Forces in support of the Design Basis Threat that potentially pose significant hazards, yet there is no "standard" to evaluate what are appropriate controls or satisfactory abatement. Will military standards be acceptable?

**Response:** The use of Military Standards is an acceptable approach when there are no DOE standards in place addressing the weapon or weapon system. The requirement of this section is for, "the contractor has to address and abate the hazard" through use of approaches delineated in paragraph 851.22(b). An additional approach to use, prior to the acquisition phase, would be to follow the guidance provided in paragraph (c) of that section, and conduct an analysis of the proposed systems with the intent of determining what, if any, impact would occur on the facility. This process should provide an adequate overlay of weapons hazards that can be reviewed and address prior to acquisition.

**Question:** Regarding National Fire Protection (NFPA) codes and standards, explain the apparent incongruity in their delineation in the Rule. Specifically, two are explicitly listed in Section 851.23, Safety and Health Standards. Whereas, in Appendix A, Section 2, under "Fire Protection," a global statement is used to stipulate their applicability.

**Response:** The two NFPA standards listed in 10 CFR 851.23 are the only NFPA standards specifically required by all contractors. The text in Appendix A reflects the fact that contractors are subject to a different set of NFPA codes and standards, depending on their specific circumstances. For example, contractors that are responsible for site fire departments are subject to the provisions of NFPA Standard 1710, among others, which govern fire department-related safety and health issues. This standard would

not apply to sites which rely on off-site fire departments for site emergency services.

**Question:** How are facilities expected to address known/currently identified legacy issues? Would maintaining a list of known hazards (especially those not being actively abated) provide a shield against an enforcement action?

**Response:** It is intended that abatement actions be taken in a timely manner and in consideration of the non-abated hazards. If the condition cannot be abated in a timely manner, due to other constraints, the Contractor is expected to ensure that adequate compensatory measures are put in place to protect workers during the interim period.

The DOE Enforcement Policy gives broad discretion to the DOE Office of Enforcement when determining whether mitigation credit will be given to the contractor. Factors that positively influence the mitigation decision are timely self-identification of the noncompliances by the Contractor, prompt and completed reporting of such noncompliances to DOE, prompt correction of safety noncompliances in a manner that precludes recurrence, and identification of modifications in practices and facilities that can improve worker safety and health. However, simply identifying or listing known noncompliances will not provide a “shield” against enforcement action.

## 10 CFR 851.23 Safety and health standards

**Section (a)** states: "Contractors must comply with the following safety and health standards that are applicable to the hazards at their covered workplace".

**Question:** What safety and health standards apply to crane operations in hostile environments? (October 5, 2010. Originally published as a Technical Position, November 3, 2008)

**Response:** Title 10 C.F.R. § 851.23(a)(3) requires DOE contractors performing work at DOE sites to comply with the Occupational Safety and Health Administration's (OSHA) regulations at 29 C.F.R. Part 1910, excluding § 1910.1096, *Ionizing radiation*. Title 29 C.F.R. § 1910.179(j) requires frequent and periodic inspections of cranes, with their frequency dependent upon the nature of critical components of the crane and their exposure to wear, deterioration, or malfunction. In addition, 29 C.F.R. § 1910.179(l)(1) requires the establishment of a preventive maintenance program based on the crane manufacturer's recommendations. There have been several recent inquiries as to whether a variance from the prescribed requirements of 10 C.F.R. Part 851 is needed for crane operations in "hostile environments" as described in Chapter 5 of DOE-STD-1090-2007, *Hoisting and Rigging*.

As explained in § 5.1 of DOE-STD-1090-2007, "hostile environments [exist] where standard operating, maintenance, inspection, or test procedures cannot be followed as a result of radiation or radioactive contamination, toxic/hazardous chemicals or gases, or temperature extremes. Hostile environments are environments that have been rendered inaccessible to workers during hoisting or rigging operations due to these health hazards." Title 10 CFR § 851.32(d)(1) provides for treatment of violations of Part 851 safety and health standards as *de minimis* and, therefore, not requiring a variance, where the "deviation from the requirement of a standard [] has no direct or immediate relationship to safety or health and no enforcement action will be taken." In the event of crane operations in hostile environments, compliance with the DOE-STD-1090-2007 Chapter 5 methodology, including conformance with an approved Hostile Environment Plan in lieu of the 29 C.F.R. § 1910.176(j),(l) requirements, will be deemed "*de minimis*" violations of Part 851 and, therefore, variances will not be required. (See 10 CFR 851.32(d)(1)).

The Hostile Environment Plan must provide for compensatory measures to address those specific inspection and maintenance requirements that cannot be achieved due to the hoisting equipment's operating environment. These compensatory measures must account for any increased operational risk

associated with deviations from prescribed inspection and maintenance requirements. For example, to address environmental conditions that effectively preclude frequent inspections of slings, hooks or rigging hardware or periodic maintenance of certain crane components due to the likelihood of excessive employee radiation exposure, these items might be subject to increased scrutiny or possible replacement each time a crane is removed from the hostile environment for a periodic inspection.

A Hostile Environment Plan applies only to those hoisting and rigging activities that are deemed unreasonable or impossible by virtue of hazardous environmental conditions. All other operational requirements that are feasible in such environments must be performed in strict accordance with applicable OSHA standards. In all such cases, the hostile work environment must be rendered inaccessible to employees during crane operations.

Hostile Environment Plans must be reviewed and approved in accordance with the applicable provisions of Chapter 5 of DOE-STD-1090. Approved plans must also be furnished to the DOE Site Office as well as employees and other site organizations affected by the plan.

**Question:** Subparagraph (9) cites the "American Conference of Governmental Industrial Hygienists (ACGIH) 'Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices,' (2005)" which implies that noise exposures above 140 dB are prohibited. A number of the weapons or pyrotechnic devices employed by Protective Forces provide impact noise significantly above 140 dB (at least 175 dB). How can Protective Force personnel be provided with protection that would allow them to follow the standard?

**Response:** The 2005 TLV for Noise indicates that the MIL-STD-1474C provides hearing protection guidance for situations where impulses above a C-weighted peak of 140 dB occur.

## ***10 CFR 851.25 Training and Information***

**Question:** Does the contractor have the responsibility to train subcontractors or to assure that they have the appropriate training?

**Response:** The worker safety and health training and information program (851.25) is an integral component of the WSHP. If a subcontractor works under the contractor's WSHP, then the contractor's WSHP should describe the approach and process used to flow down the training program requirements to the subcontractor. The training program requirements that flow-down should be consistent with the scope and complexity of the work to be performed by the subcontractor. If the subcontractor will work to their own WSHP, the contractor should review the subcontractor's training program to verify consistency with the contractor's program. One acceptable approach would be to require that subcontractor employees be trained through the contractor's training program. Alternatively, the subcontractor's own training program should be acceptable once it is verified that it is consistent with the contractor's program.

## ***10 CFR 851.26 Recordkeeping and Reporting***

**Section (a),** specifies Contractor recordkeeping requirements.

**Question:** Could DOE expand upon the recordkeeping expectations, including the complete hazard inventory, assessment, measurement and control?

**Response:** Contractors must establish and keep accurate records of all exposure monitoring data as well as the objective data.

Exposure Monitoring data should include:

- Exposure levels;

- The date(s), number, duration, location and results of each of the samples taken, including a description of the sampling procedure used to determine representative employee exposure where applicable;
- A description of the sampling and analytical methods used and evidence of their accuracy;
- The type of PPE worn, if any;
- Name, social security number, and job classification of the employee monitored and of all other employees whose exposure the measurement is intended to represent; and
- The environmental variables that could affect the measurement of employee exposure.

Where it has been determined that no monitoring is required, a record of the objective data relied upon to support the determination that no employee is exposed at or above the action level should be maintained.

Contractors must keep exposure monitoring records for 75 years which is consistent with the recordkeeping requirements of 10 CFR 850 “Chronic Beryllium Disease Prevention Program” and the need to maintain records for epidemiological studies.

### **Other Objective Data:**

Objective data records should be kept as long as the employer relies on this data.

**Question:** Can you clarify 851.26(a)1 hazard inventory requirement? Is it a list of non-compliances, an inventory of hazards identified in Job Hazard Analysis, Preliminary Job Hazard Analysis or facility baseline hazard assessments?

**Response:** The 851.26 (a)1 requirement to maintain records of hazard inventory information refers to the compilation of information, materials and documents generated from the contractor’s activities under 851.21(a), (b) and (c).

### ***10 CFR 851.27 Reference sources***

**Section (b)** lists standards incorporated by reference, including several American Society of Mechanical Engineers (ASME) standards, some of the referenced standards are dated as late as 2003.

**Question:** For older buildings (which meet obsolete building codes), how will their infractions be viewed? Is it acceptable to comply with ASME codes from the original design specifications, or does DOE expect contractors to use updated ASME codes? What about buildings that are built to meet state life safety codes?

**Response:** DOE agrees with the “code of record” concept if it is contained in the specific standards. ASME codes, in general, refer to new construction. Existing buildings which met the original design specifications do not need to be re-built. However, if systems are replaced or new construction takes place they must meet the requirements of the codes listed in 10 CFR 851. NOTE: this issue is being discussed with the Office of General Counsel and new guidance may be issued.

**Question:** Many of the standards incorporated by reference in the Rule provide for a local “Authority Having Jurisdiction (AHJ)” type of officer who has the discretion to determine “equivalencies” to the standards. For some of these standards, such as the National Fire Protection Association (NFPA) standards, DOE directives provide for local determinations at the Site Office or Contractor level. The rule is silent on equivalencies and related determinations. How will DOE address local discretion on equivalencies, and what will be DOE’s expectations for Field Offices?

**Response:** The DOE Fire Protection Design Criteria (DOE-STD-1066-99) and the DOE Glossary of Environment, Safety and Health Terms (DOE-HDBK-1188-2006) define the AHJ as the Head of the DOE Field Element or designee unless otherwise directed by the Cognizant Secretarial Officer. Section 1.3 of the DOE Electrical Safety Handbook (DOE-HDBK-1092-2004) indicates that the AHJ for

electrical safety can be any DOE person having the requisite knowledge and abilities that is designated to be the AHJ by DOE management. Furthermore, the preamble to the Rule on Page 6912 states: “The recommendation made by two commenters (Exs. 36, 42) that the Authority Having Jurisdiction (AHJ) be responsible for approving fire safety codes and standards equivalencies (as required by DOE Order 420.1A) instead of the DOE site manager (as would be required by the proposed rule) is acceptable to DOE.”

For implementation of the Rule, the AHJ should be a DOE person that has the requisite knowledge and abilities or has access to someone else that has the knowledge and abilities

Certain NFPA standards, as well as certain applicable DOE fire safety guidelines, include provisions for the approval of “equivalencies,” which would be applicable in the implementation of the respective NFPA standards. NFPA standards in the Rule should be implemented in accordance with their embedded equivalency provisions. Existing equivalencies that were granted in accordance with the provisions of an NFPA standard in the Rule should continue to be acceptable to DOE and not require a variance. The equivalency process is separate from the variance process outlined in subpart D of the Rule.

**Question:** Are the standards listed in 851.27 enforceable?

**Response:** Yes, 851.23 lists a set of specific Safety and Health Standards (by number, title, and date) that Contractors are required to comply with as part of 851. However, other portions of 851 (e.g., Appendix A, Section 4, Pressure Safety) include additional national consensus codes and standards that must be complied with by Contractors. 851.27 provides the compiled list of all of the codes and standards incorporated by reference throughout 851. The mandatory provisions (i.e., provisions containing the word “shall” or other mandatory language) of the codes and standards incorporated by reference and listed in 851.27 have the same force and effect as other requirements specified throughout 851.

**Question:** Section 10 CFR 851.27 refers to NFPA 70 and 70E what other NFPA codes are required?

**Response:** NFPA 70 and 70E are specific to Electrical Installation and Worker Electrical Safety they are called out from other NFPA codes because they have direct application to all sites in the DOE Complex. 851 Appendix A, 2-Fire Protection address remaining NFPA codes as applicable to fire protection, life safety, structures, fire and emergency response.

### ***10 CFR 851.31 Variance process***

**Section (d)(3)** National defense variance, appears to have a typographical error in paragraph (i) where it states "...in addition to the content required in paragraph (b) of this section, include:"

**Question:** Should the correct reference should be paragraph (c).

**Response:** Yes, that is a typographical error. The reference should be paragraph (c).

**Question:** Are these types of Variances only for NNSA sites, or would the criteria apply for the Protective Force in Safety Guards & Security, and in Fire Rescue operations at other DOE sites?

Example: During training and in actual emergency or security incidents these workers could be placed at elevated heights in excess of 6 or 10 feet with no fall protection, could lack eye and ear protection, etc. This is required due to the nature of the profession, and must be trained to as well as conducted in actual emergencies.

**Response:** **Response:** Variances granted for National Defense under 851.31(d)(3), are not specific to NNSA sites. Regarding your example: Training and actual emergency incidents involving protective



forces or fire responders are recognized to involve certain types of unmitigated hazards. During training exercises it would be expected that those hazards are identified through a hazard analysis process and that the risk be controlled to the extent possible-while providing the necessary ‘real life’ training. A variance would not have to be submitted for approval of these types of protective force or fire response type training and events; but the standards and guidance of the industry for risk evaluation and mitigation during drills and training would need to be met.

### ***10 CFR 851.32 Action on Variance Request***

**Question:** This section indicates that a variance may be denied “if enforcement of the violation would be handled as a de minimis violation”. This doesn’t appear to present a clean process for the Contractor to gain approval to continue operations with a de minimis noncompliance. Would this set up the Contractor for a “willful” violation? (Per Appendix A, DOE indicates that “a Notice of Violation will virtually always be issued for a willful violation”.)

**Response:** No. As stated in 10CFR851.32, no enforcement actions will be taken for de minimis violations. Therefore, regardless of the reason for the de minimis violation, it will not be subject to enforcement action.

**Question:** Is there any thought to defining the de minimis process (i.e., the process that Contractors should use to gain DOE acceptance of de minimis noncompliances) in the Implementation Guide? Definition of de minimis seems to need clarification. What is the possibility of using the OSHA interpretations for de minimis? What is the possibility of allowing the Site Office to be the approver for de minimis violation classifications (OSHA or defined process)?

**Response:** As stated in 10 CFR 851.32, a de minimis violation (or noncompliance) is a deviation from a requirement of a standard that has no direct or immediate relationship to safety or health. This section further states that no enforcement action will be taken for de minimis violations. This definition and enforcement position are fully consistent with long standing OSHA precedents and OSHA has further defined a number of example de minimis violations as discussed in the preamble to 10 CFR 851.

While 10 CFR 851 does not require any particular actions or processes to be utilized by Contractors in relation to de minimis noncompliances, Contractors may choose to describe their processes for disposition of de minimis noncompliances as part of their WS&H Program description document. For those requirements that include provisions for local authorities to approve equivalencies, etc., approvals by such local authorities can eliminate the noncompliance. For those requirements that do not include provisions for local authority approval, the Contractor could seek DOE approval (if determine to be cost-effective and the noncompliance is intended to be permanent) through discussion in their WS&H Program description document. If the contractor intends to correct a de minimis noncompliance, it should be managed in the Contractor’s corrective action program.

### ***10 CFR 851.40 Investigations and Inspections***

**Section (a)** states that the Director may initiate and conduct investigations and inspections.

**Question:** How will the Office of Enforcement conduct on-site audits? Will they perform strict compliance inspections, or programmatic reviews?

**Response:** Subpart E – Enforcement Process, which includes 851.40, Investigations and Inspections, outlines the scope of the enforcement process. The Director has discretion in using the means outlined in this section to affect improvements in contractor safety and health. Prototype inspections conducted during the summer of 2006 provided insight for future enforcement activities. Since 851 encompasses both program and standard requirements, a violation of a standard may also involve violations of

program requirements and vice versa. Therefore, an inspection may not be limited to compliance with standards. The Office of Enforcement plans to conduct investigations, inspections and program reviews, which require on-site enforcement activity. While little or no notice may be given prior to an inspection, inspections may be conducted separately, but will more likely be performed in conjunction with an investigation or program review.

## ***10 CFR 851 Appendix A - Worker Safety and Health Functional Areas***

### **1. Construction Safety**

**Section 1 (d)**, states that construction contractors are required to prepare a written construction project safety and health plan.

**Question:** How are these plans approved? Do construction contractors also prepare a written program? Are they separate from the laboratory written program?

**Response** Per Appendix A, Section 1(d), the construction contractor must obtain approval of the plan from the construction manager prior to commencement of any work covered by the plan. This section further states, that the construction project safety and health plan need not duplicate those provisions that were previously submitted and approved as required by Section 851.11 of the rule.

**Question:** Does designated Construction Contractor Representative (CCR) have to be available at all times during active construction? Can same individual check multiple construction sites each day or be on one site only? Can these people be designated by title –vs. name?

**Response:** The Construction Contractor Representative (CCR) should be named in the Construction Project Safety and Health Plan (851, App A, 1(d)). The qualifications for the CCR must be included in the Construction Project Safety and Health Plan. Details of the CCR's duties and coverage (individual or multiple job sites) should be defined by the contractor in the Construction Project Safety and Health Plan. Details of designating the CCR by name or by job title are left to the contractor to define in the Construction Project Safety and Health Plan.

### **2. Fire Protection**

**Question:** As a contractor fire protection program manager or fire chief, what should be one of my first steps now that the Rule has been published?

**Response:** Consider that within 380 days from the publication of the Rule contractors are required to submit for evaluation a Worker Health and Safety Program document. Contractor fire protection program managers and fire chiefs should initiate an (informal) review to determine if existing documentation is sufficient to define a “comprehensive, multi-faceted fire protection and emergency response program” as required by the Rule. Such documents should address the “applicable National Fire Protection Association (NFPA) codes and standards” that define the program. This effort should be initiated after consultation with the DOE Authority Having Jurisdiction (AHJ) for fire protection. And this effort should be coordinated with other contractor representatives that are developing the official response to this requirement of the Rule. Perceived weaknesses in fire protection and emergency services program documentation should be addressed with appropriate enhancements.

**Question:** Where might a contractor fire protection program manager or fire chief find guidance on the development of comprehensive, multi-faceted fire protection and emergency response program documentation?

**Response:** A “model” fire safety program document that can be downloaded and edited is available off

of the DOE Fire Protection Program Web Site located at:  
<http://www.hss.energy.gov/nuclearsafety/ns/fire/models/models.html>

It has been reviewed and approved by the DOE Fire Safety Committee. The model was developed by Howard M. (Bud) Bucci of Fluor-Daniel Hanford Company, Inc. under a contract with the DOE Office of Environment, Safety and Health. Note that references in it may need to be updated and that all of the elements contained therein may not be applicable to individual contractors.

**Question:** Regarding NFPA codes and standards, explain the apparent incongruity in their delineation in the Rule. Specifically, two are explicitly listed in Section 851.23, Safety and Health Standards. Whereas, in Appendix A, Section 2, under “Fire Protection,” a global statement is used to stipulate their applicability.

**Response:** The text in Appendix A reflects the fact that contractors are subject to a different set of NFPA codes and standards, depending on circumstances. For example, contractors that are responsible for site fire departments are subject to the provisions of NFPA Standard 1710, among others, which govern fire department-related safety and health issues. This standard would not apply to Honeywell FM&T, which is responsible for the Kansas City site fire brigade. (NFPA 600, among others, is applicable). Similarly, neither of these standards applies to contractors who rely on off-site fire departments for site emergency services.

**Question:** How should contractors interpret the adjective “applicable” that is used in conjunction with NFPA codes and standards that are made mandatory in Appendix A, Section 2, under the Fire Protection functional area of the Rule?

**Response:** Applicability can be considered from at least two perspectives. The first relates to the entire code or standard. For example, NFPA Standard 115, “Standard for Laser Fire Protection” would not be applicable in its entirety to a contractor that conducts no work that involves lasers or in an area containing lasers. The second refers to specific sections or paragraphs. For example, those sections and paragraphs of NFPA 101, “Life Safety Code” that govern hospitals would apply to no DOE contractors because there are no DOE hospitals. Those sections and paragraphs of NFPA 101 that relate to “Business Occupancies” (such as an office) would be applicable to all DOE contractors that occupy on-site and off-site (leased) office areas or buildings or conduct DOE-related work in such offices.

**Question:** Considering the fact that DOE facilities have been constructed over a 50(+) span of time under different codes and standards, how should the “code of record” concept be applied when considering the two NFPA codes (70 and 70E) listed in Section 851.23, Safety and Health Standards, and the global requirement to comply with “applicable NFPA codes and standards” in Appendix A, Section 2, under “Fire Protection?”

**Response:** The specific editions of NFPA 70 and 70E that are delineated in Section 851.23 are applicable to all DOE contractors, regardless of the “code of record.” Contractors must either: comply literally with the provisions of these editions; must demonstrate “equivalent” safety under the equivalency provisions of these standards, or contractors can pursue a “Variance” under the Rule’s procedures for requesting approval of variances.

Excluding the above two NFPA codes, the remaining NFPA codes and standards that are applicable to any contractor are subject to “code of record” provisions. There is a distinction because the Rule differentiates between the two above-referenced codes and the remaining NFPA codes and standards that are applicable under the provisions of Appendix A to individual contractors. Additional guidance on the “code of record” concept can be found in DOE-G-440.1/E / DOE-G-420.1/B, “Fire Safety Program” or its successor Guide.

## 4. Pressure Safety

**Question:** The 10CFR851 Final Rule Supplementary Information material published in the Federal Register,

Volume 71 Number 27 contains DOE analysis and response to comments on the proposed rule. In the section addressing comments on Appendix A, Section 4, Pressure Safety, DOE's response (Pages 6913, 6914) to a request for definition of "pressure systems" has expanded the universe of piping and components covered under the Rule. Specifically, DOE notes that the DOE Pressure Safety Committee has, in the draft Implementation Guide to DOE O 440.1A, defined pressure systems to include vacuum systems. The comment resolution discussion provides the rationale that vacuum systems should be designed to ASME pressure system and component codes due to potential for catastrophic failure due to backfill pressurization. What Pressure Safety standards apply?

**Response:** **Response:** As the Final Rule is currently written, components and systems must conform to the ASME codes referenced in Appendix A, Section 4 and incorporated by reference in Section 851.27. If vacuum systems are not specifically covered in the codes, they are not included in the applicability of the Final Rule.

## 5. Firearms Safety

**Section 5 (c)**, states: "Contractors must ensure that firearms instructors and armorers have been certified by the Safeguards and Security National Training Center to conduct the level of activity provided. Personnel must not be allowed to conduct activities for which they have not been certified."

**Question:** Currently Protective Forces throughout the DOE complex are fielding weapon systems that the National Training Center does not have the qualified personnel or the facilities to provide this training/certification. Currently contractors are using the weapon manufacturer for training/certification, and obtaining additional training via the military with the concurrence of their local DOE. Will this be acceptable?

**Response:** Yes, in the situation where National Training Center does not have the qualified personnel or the facilities to provide training/certification of firearm instructors and armorers, contractors are allowed to use the weapon manufacturers for training/certification, and obtaining additional training via the military with the approval of the local DOE Official. Documentations of the weapon manufacturers certifications are still required in the instructors/armorer's training file defining the system certified on. Information should be made available for future assessment or audits.

## 6. Industrial Hygiene

## 7. Biological Safety

### Question:

Question: Biological Safety, paragraphs (a)(1)(i) and (a)(2) require contractors to "Review any work with..." and "Maintain an inventory and status of..." biological etiologic agents. Must all biological agents be inventoried and submitted to DOE in an annual report?

**Response:** It is good laboratory practice to maintain an inventory of all biological agents in use in a laboratory. However, it is not necessary to report the complete inventory of all biological agents to the DOE. The Rule states that an annual status report describing the status and inventory should be submitted. This can be accomplished by providing information on all select agents and information on how and where inventories of non-select agents are maintained for each laboratory.

## 8. Occupational Medicine

**Question:** What constitutes "comprehensive occupational medicine services?" (Revised October 31, 2008)

**Response:** The term "comprehensive" in Section 8(a) refers to the specific services that the occupational medicine provider determines are appropriate, considering the specific work activities performed by the worker under the contract and are necessary for the occupational medicine program to be consistent with DOE requirements, e.g. Hazwoper, respiratory protection, and substance-specific standards. All possible services identified in the Rule are not necessary for all workers. Unless there are other applicable specific requirements concerning the content of workers' medical evaluations (see, for instance, 10 CFR § 712.11), the occupational medicine provider determines the content of the medical evaluations which can range from a "paper" review of a worker's essential job functions and completed medical history questionnaire to a hands-on physical examination and batteries of diagnostic tests.

**Question:** What is a contractor's obligation to provide occupational medicine services to transient and short-term workers? (Revised October 31, 2008)

**Response:** The intent of the provision in Section 8(a)(1) requiring occupational medicine services for workers who work on a DOE site for more than 30 days in a 12 month period is to address DOE's population of transient and short-term workers such as crafts and laborers that are accessed from union halls, work for multiple contractors, or frequently cycle in and out of DOE sites for short duration tasks. This provision makes it clear that a contractor must establish and provide occupational medicine services to their workers who work on site for 30 days in a 12-month period. Title 10 CFR § 851.10 requires that contractors' worker safety and health programs describe how the contractors will comply with the requirements of the regulation, including the occupational medicine requirements, that are applicable to hazards within their scope of work. In addition, § 851.11(a)(2)(ii) requires contractors to coordinate with other contractors at the covered workplaces to ensure that there are clear roles, responsibilities and procedures to assure the safety and health at multi-contractor workplaces. Therefore, the prime contractors and subcontractors should reach agreement on the content of the subcontractor occupational medicine program prior to beginning work under the contract.

DOE expects that contractors that are on site for more than 30 days in a 12 month period will establish an occupational medicine program based on the hazards associated with the contractors' scopes of work and exercise reasonable judgment on enrolling their workers on a case-by-case basis. It would be reasonable for contractors immediately to enroll workers that are scheduled to work for more than 30 days in a 12 month period in the occupational medicine program; to not enroll workers scheduled to work for less than 30 days in a 12 month period; and to keep track of the time that their other workers work on site so that the contractor can identify for enrollment those approaching the 30-day threshold.

Contractors are not required to determine how much time a worker has worked for other contractors on site. Contractors are not required to provide occupational medicine services for those "less than 30-day" workers, as long as the Appendix A, Section 8(a)(2) enrollment provision, concerning workers enrolled in a medical or exposure monitoring program (see FAQ 3 below), also does not apply to those workers.

**Question:** What constitutes enrollment in exposure monitoring programs for which the contractor must provide occupational medicine services? (Revised October 31, 2008)

**Response:** Appendix A, Section 8(a)(2) requires contractors to establish and provide comprehensive occupational medicine services to workers who are enrolled for any length of time in a medical or exposure monitoring program required by the Rule, other applicable regulation, or other obligation. Medical monitoring is a component of occupational medicine so it is clear that the contractor must provide occupational medicine services to workers enrolled in a medical monitoring program. However, limited exposure monitoring conducted to quantify hazard assessment exposure estimates may not constitute an exposure monitoring program for which the contractor must provide occupational medicine services to the monitored workers.

Appendix A, Section 8(a)(2) does not say "all exposure monitoring." The term "enrolled . . . in a(n) exposure monitoring program" in 8(a)(2) refers to a consistent regimen of monitoring the exposure that



workers receive while performing specific tasks. A contractor's hazard assessment required by 851.21(a)(1) that includes worker exposure monitoring may or may not constitute an exposure monitoring program.

Exposure monitoring that is not enrollment in a program. Monitoring performed to characterize the exposure resulting from a new activity or to validate an industrial hygienist's judgment that exposures are likely to be minimal does not constitute enrollment in an exposure monitoring program. For example, a week of monitoring the airborne silica levels experienced by workers spending many hours outdoors on windy days near a tunneling activity in a desert area to determine whether a hazard exists is not enrollment in a monitoring program. A worker receiving this monitoring would not meet the criteria in Appendix A, Section 8(a)(2) for requiring occupational medicine services.

Exposure monitoring that is enrollment in a program. Routinely monitoring the airborne beryllium levels experienced by machinists that periodically machine items that contain beryllium in areas where concentrations of beryllium are at or above the action level is an example of enrollment in an exposure monitoring program. Appendix A, Section 8(a)(2) also requires contractors to establish and provide occupational medicine services to workers who are enrolled for any length of time in an exposure monitoring program required by any other applicable Federal, State or local regulation or other obligation. For example, the Rule requires that contractors provide occupational medicine services to workers where there is a possibility of any employee exposure to lead at or above the OSHA action level because OSHA's regulation 29 CFR 1910.1025, "Lead," requires medical monitoring of workers whose airborne exposure to lead is at or above the 29 CFR 1910.1025 exposure action level. See 29 CFR § 1910.1025(d)(4).

**Question:** What are DOE's expectations for contractors providing information and access to areas to occupational medicine providers for which the information or areas are restricted due to national security concerns? (Revised October 31, 2008)

**Response:** Appendix A, Section 8(d) requires contractors to provide access to information about site hazards and employee exposures and any changes to those parameters so that occupational medicine providers can offer the appropriate services. The occupational medicine provider should become familiar with the exposure data and other hazards and make requests for hazard information to the appropriate sources of the data.

Contractors must provide their occupational medicine providers with the information that is necessary to make sound medical judgments. Logistics for providing workplace access to occupational medicine providers can be challenging especially for sites with many providers, hazards that vary in type and duration over time, and workplaces that require security clearance for access. The necessary information may be provided to the occupational medicine provider in many ways and need not necessarily include an on-site visit by the provider unless it is necessary for "evaluation of job conditions and issues relating to workers' health." See 10 CFR Part 851 Appendix A § 8(d)(4).

If there is a specific issue for which the occupational medicine provider needs to see the workplace environment, then arrangements should be made to allow this visit to take place. Providing escorts for the occupational medicine providers may reduce some of the logistical hurdles to providing site access. Security restrictions may pose the most difficult obstacles to providing access to the workplace or even information about the workplace. Occupational medicine provider may have to rely on security-cleared safety and health personnel, and security classification personnel, to assemble and provide workplace hazard information that is sufficiently complete for the occupational medicine provider to understand the hazards but does not reveal information that poses a security risk. Contractors may apply for a national defense variance by following the provisions of subpart D of the Rule and specifically following the provisions of 10 CFR 851.31(d)(3) "National defense variance." For certain situations, it may be necessary for DOE to provide the occupational medicine providers with security clearances.

**Question:** Does DOE expect small contractors to conduct a cost-benefit analysis to determine whether they must establish programs to manage preventable causes of morbidity and mortality? (Revised October 31, 2008)

**Response:** Appendix A, Section 8(j) requires that occupational medicine providers identify and manage the principal preventable causes of premature morbidity and mortality affecting worker health and productivity. Section 8(j)(1) requires contractors to include programs to manage these causes when evaluations demonstrate their cost effectiveness.

DOE recognizes that occupational medicine providers for small contractors will not have enough workers with which to identify the principal preventable causes of premature morbidity and mortality affecting worker health and productivity and, even if such causes could be identified, the small numbers of workers will prevent small contractors from being able to determine the cost-effectiveness of such prevention and management programs. Small contractors comply with Appendix A, Section 8(j) and 8(j)(1) if their occupational medicine providers determine that not enough information is available to 1) allow an evaluation of the contractors' workers for these preventable causes; or 2) demonstrate the cost effectiveness of instituting such programs. DOE will utilize Small Business Administration guidance when designating a contractor as a small business.

The occupational medicine provider should seek to manage causes identified by available evidence, published medical studies, demonstration projects at other institutions, or internal analyses indicating that these services are likely to be cost-effective. Medical conditions arising outside of the workplace, as well as those arising within the workplace, can affect workers' physical ability to perform their jobs and, therefore, should be included in the identification process.

**Question:** What are DOE's expectations for contractors making available to occupational medicine providers information from health, disability, and other insurance plans? (Revised October 31, 2008)

**Response:** Appendix A, Sections 8(j)(2) requires that "contractors must make available to the occupational medicine provider appropriate access to information from health, disability, and other insurance plans (de-identified as necessary) in order to facilitate [the] process [of evaluating the cost effectiveness of programs to manage the principal preventable causes of premature morbidity and mortality affecting worker health and productivity]."

Contractors should work with their health, disability, and other insurance plans to provide to the occupational medicine provider this information, or access to this information, to the extent practicable given the restrictions on the release of this information. For example, contractors can request workers to provide signed release forms to allow the occupational medicine provider access to protected records containing medical information. The contractor also should provide the occupational medicine provider with relevant information from voluntary employee surveys, disability reports, return-to-work data and other available sources.

## ***10 CFR 851 Appendix B General Statement of Enforcement Policy***

### ***VII. Enforcement Conferences***

**Question:** What are the roles of the DOE Headquarters Primary Secretarial Office and the DOE Field Offices for (a) NOV hearings, (b) enforcement at the site, (c) other enforcement or rule responsibilities?

**Response:** Over the past 13 years the Office of Enforcement has worked closely with its DOE counterparts at the Program, Field and Site Office levels in the nuclear safety enforcement. The Office of Enforcement works through the Program, Field and Site Offices when an enforcement action is contemplated. They participate in enforcement proceedings and review and comment on many enforcement documents. These close working relationships and protocols will be similarly exercised in worker safety and health enforcement. In addition to site-specific and program-specific DOE assessment and oversight responsibilities, 10 CFR 851 outlines specific responsibilities, e.g., coordinating on the

selection of either a civil or contract penalty when an enforcement action is planned, and reviewing and approving contractor worker safety and health programs and variances.

## ***IX. Enforcement Actions***

***1. Notice of Violation:*** *In part (d) the regulation discusses DOE's expectation for contractors to have proper management and supervisory systems in place to assure that all activities at covered workplaces are carried out in compliance with the Rule.*

**Question:** When a violation is of a subcontractor to the M&O, what are the enforcement expectations of the contractor and DOE? Is the prime contractor issued fines or expected to provide input to the NOV hearings, for example?

**Response:** Whenever an employee or employees are exposed to conditions that violate 10 CFR 851 requirements, the Office of Enforcement may conduct an investigation and take enforcement action if necessary. The Office of Enforcement will make every effort to determine which parties were responsible for the violation. The DOE Enforcement Program Plan contains the Multiple Employer Worksite policy which describes the enforcement activities carried out pursuant to this policy. The Office of Enforcement will focus on determining which contractor(s) had responsibility for controlling the worksite, creating the hazard and correcting the hazard, and who exposed employees to the hazard. If it is determined that both the prime and the subcontractor are subject to enforcement action, the enforcement process will be followed for each party. If the subcontractor is the only party subject to an enforcement action, the subcontractor may request prime contractor support or testimony at their enforcement proceeding, but this decision is up to the prime and subcontractor to decide. [DOE's role was addressed in a previous question.]

***4. Identification and Reporting:*** *The regulation and guide discuss reporting Severity Level I and II non-compliances. Interpreting how to categorize the non-compliances into Severity Level I or II or de minimus could vary greatly between labs.*

**Question:** What guidance can DOE provide to minimize categorization differences between facilities? One possible discussion topic might be to have each lab contribute 3-5 non-compliance scenarios, and then put this together into a 1-2 hour workshop. The workshop would be: How to categorize your non-compliances. By discussing the logic used we could obtain a degree of consistency in our approach. Example: employee is observed wearing a dust mask in a work environment that requires a full-face respirator, the potential exposure exceeds the PEL. This is a serious violation, but is it likely to result in death or serious injury? What is the severity level of this example?

**Response:** It is important to distinguish between severity levels as defined in the rule and relative risk. Appendix B to the rule defines a Severity Level I violation as a "serious" violation – where there is a potential that death or serious physical harm could result from a condition, practice, mean, method, operation, or process. A Severity Level II violation is an "other-than-serious" violation - where the most serious injury or illness that would potentially result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm, but does have a direct relationship to safety and health. Generally, Severity Level II violations involve injuries/illnesses not resulting in hospitalization, or temporary, reversible illnesses requiring only minor supportive treatment. Once the severity level has been determined, the relative risk can be evaluated by assessing the severity of injuries/illnesses and the probability that the injuries/illnesses could occur. The 851 Implementation Guide suggests several methods that can be employed to assess relative risk.

**Question:** What are the thresholds and criteria for self reporting into the Noncompliance Tracking System (NTS)?

**Response:** In April 2006, the draft Worker Safety and Health NTS Reporting Thresholds were posted on

the Office of Enforcement web page at:

[http://www.eh.doe.gov/enforce/2006presentations/day2/WSH\\_NTS\\_Thresholds\\_Trial\\_Period.pdf](http://www.eh.doe.gov/enforce/2006presentations/day2/WSH_NTS_Thresholds_Trial_Period.pdf). A 6-month trial reporting period is underway. From this experience the reporting thresholds will be revised as necessary in advance of the effective date of the rule.

**Question:** Could DOE describe in more detail, with examples, the three levels of violation severity, Level 1, Level 2 and de minimus?

**Response:** A Severity Level I violation is a “serious” violation – where there is a potential that death or serious physical harm could result from a condition, practice, mean, method, operation, or process.

Example 1: An employer does not evaluate the workplace to determine if any spaces are permit-required confined spaces (29 CFR 1910.146(c)). An employee could enter a confined space and succumb to hazardous environmental conditions, resulting in death.

Example 2: An employer fails to ensure that employees wear proper eye protection during heavy grinding (29 CFR 1926.102). Employees could get flying particles in their eyes, requiring hospitalization with a limited period of disability.

Severity Level II violations are “other-than-serious” violations - where the most serious injury or illness that would potentially result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm, but does have a direct relationship to safety and health. Generally, Severity Level II violations involve injuries/illnesses not resulting in hospitalization, or temporary, reversible illnesses requiring only minor supportive treatment.

Example 1: Material Safety Data Sheets (MSDS) are not in the workplace even though chemical manufacturers and importers are required to obtain or develop a material safety data sheet for each hazardous chemical they produce or import. (1910.1200(g)(1) or 1926.59) Employees could be properly protected from exposure to hazardous chemicals if MSDSs were made available and as a result, employees were able to implement the proper hazard controls.

Example 2: First aid kits are not available or are incomplete, where the standard requires that in the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available (29 CFR 1910.151(b)). Employees would not be afforded immediate first aid, if needed.

Example 3: Workers dip their cups into a container to draw drinking water, where the standard strictly prohibits such facilities and practices (1926.51 and 1910.141). Workers could communicate an infection from this practice and incur loss work days on account of sickness.

De minimis violations are a deviation from the requirement of a standard that has no direct or immediate relationship to safety and health. The term is only used in conjunction with violations of the 29 CFR series of standards listed in 10 CFR 851.

The term de minimis is often misused. It should not be used to describe a low risk hazard. It also should not be used to describe a hazard that is controlled using equivalent methods allowed by the applicable standard. Also, it should not be used to describe hazard controls that are implemented that are not in accordance with the hierarchy of controls.

A de minimis condition exists when an employer complies with the clear intent of the standard but deviates from its particular requirements in a manner that has no direct or immediate relationship to employee safety or health. These deviations may involve distance specifications, construction material

requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations, or the like.

Example 1: 29 CFR 1910.27(b)(1)(ii) allows 12 inches (30 centimeters) as the maximum distance between ladder rungs. Where the rungs are 13 inches (33 centimeters) apart, the condition is de minimis.

Example 2: 29 CFR 1910.28(a)(3) requires guarding on all open sides of scaffolds. Where employees are tied off with safety belts in lieu of guarding, often the intent of the standard will be met, and the absence of guarding may be de minimis.

Example 3: 29 CFR 1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

Example 4: 29 CFR 1910.23 (e)(1) establishes a nominal vertical height of 42 inches for top rails of standard railings that guard floor and wall openings and hoes. But OSHA Compliance Directive STD 01-01-010 - STD 1-1.10 - Height of Guardrails in General Industry Applications, provides that existing guardrailings shall consist of a top rail, intermediate rail, and posts, or equivalent, and shall have a minimum vertical height of 36 inches to 44 inches from the upper surface of the top rail to the floor, platform, runway or ramp level. 2. Guardrailings with heights greater than 44 inches are permissible provided the extra height does not create a dangerous situation for employees. Openings beneath the top rail that would permit the passage of a 19 inch or larger spherical object would create an unsafe condition, therefore, additional mid-rails may be necessary. Where the employer has provided guardrails which meet the specifications above, it will be classified as de minimis.

**Question:** In 2003 the Occupational Safety and Health Administration (OSHA) audited several DOE laboratories and identified over 15,000 instances that OSHA could interpret as serious violations. (Currently, DOE is on pace to address all these instances by May 2006.) If the rule had been in place during these OSHA audits, what would be DOE's expectations for reporting into the NTS and for corrective actions?

**Response:** Contractors are always expected to implement hazard controls for identified noncompliances in order to protect their employees from uncontrolled hazards. It does not matter who identifies noncompliances. Those noncompliances that meet or exceed Worker Safety and Health NTS Reporting Thresholds should be reported into NTS.

**Question:** When the DOE identifies a violation, who submits the finding to the NTS, DOE or contractor?

**Response:** Contractors are expected to file NTS reports. In the rare event that a contractor refuses to submit a report, DOE can file the report.

**Question:** What are the legal obligations for DOE employees, if they observe a noncompliance while touring a site?

**Response:** DOE employees have no stated legal obligations in 10 CFR 851.

*Near Miss Occurrence Reporting: The draft guide criteria proposes using categories 1 through 4 for near misses. Occurrence Reporting Category 4 events do not require causal analyses, however, the Noncompliance Tracking System (NTS) system would. This essentially turns the Category 4 events into Category 3 events.*

**Question:** What is the rationale for including Category 4 events, and what are DOE's expectations for Category 4 events entered into NTS?

**Response:** The 6-month Worker Safety and Health NTS trial reporting period gives the Office of



Enforcement a time to experiment with reporting threshold levels. Near miss events are of special concern since a serious event could have occurred if circumstances were different. It is also possible that some category 4 ORPS near miss events could have alternatively be reported as category 3 near miss events. So, we are taking a closer look at reports in this category. The 6-month trial reporting period should enable the Office of Enforcement to determine whether the NTS reporting criteria can be adjusted.

*NTS Trial Period:* During the trial period of using the NTS prior to February 9, 2007, we may find that reporting exceeds the level of expectations.

**Question:** What will the expectations be for providing all the documentation that is possible for an NTS entry? Will the labs need to recreate an NTS entry for issues identified during open reporting? What circumstances could require maintaining an NTS entry from the trial period?

**Response:** When enforcement begins, noncompliances that exist and meet or exceed NTS reporting thresholds should be reported into NTS. NTS reports filed during the trial reporting period should be carried forward if hazard controls have not been implemented prior to the beginning of enforcement.

**Question:** Will there be a ‘dry run’ period to ‘test’ the NTS system? How will the ‘test’ entries be handled by the DOE Office of Enforcement?

**Response:** When enforcement begins, noncompliances that exist and meet or exceed NTS reporting thresholds should be reported into NTS. NTS reports filed during the trial reporting period should be carried forward if hazard controls have not been implemented prior to the beginning of enforcement.

**Question:** Are occurrences prior to February 9, 2007 enforceable? If a hazard is created before February 9, 2007 but still exists after February 9, 2007, is that hazard/occurrence enforceable?

**Response:** When enforcement begins, noncompliances that exist and meet or exceed NTS reporting thresholds should be reported into NTS. NTS reports filed during the trial reporting period can be carried forward if hazard controls have not been implemented prior to the beginning of enforcement. Noncompliances that exist when enforcement begins are enforceable.

**Question:** Will the draft enforcement guide be available before June 1, 2006, when the NTS trial period begins? Will it be available prior to the May 11-12, 2006, Implementation meeting at ANL

**Response:** The Enforcement Program Plan was available on the internet on August 13, 2006. It can be accessed at: [http://www.eh.doe.gov/enforce/programplan/EPP\\_August2006\\_masterv4.pdf](http://www.eh.doe.gov/enforce/programplan/EPP_August2006_masterv4.pdf)

**Question:** It appears that the Office of Enforcement will be interacting with the EFCOG Las Vegas meeting during the April 24-28, 2006 meeting. Will there be a compilation of information and outputs from this working meeting that can be shared with the DOE complex?

**Response:** Information from the April EFCOG meeting in Las Vegas was compiled and shared during Program Office workshops and formed the initial basis to resolve 10 CFR 851 issues.

*Near Miss Occurrence Reporting:* The draft criteria proposes using categories 1 through 4 for near misses. Occurrence Reporting Category 4 events do not require causal analyses, however, the Noncompliance Tracking System (NTS) system would. This essentially turns the Category 4 events into Category 3 events.

**Question:** What is the rationale for including Category 4 events, and what are DOE’s expectations for Category 4 events entered into NTS?

**Response:** See discussed above.

**5. Self-Identification and Tracking Systems:** *The regulation discusses use of internal tracking systems.*

**Question:** What are the expectations for contractors' internal tracking systems? What elements does DOE expect to see? What would DOE consider as deficiencies in an internal tracking system?

**Response:** Contractor internal tracking systems should: in some form annotate those noncompliances that are 851 noncompliances, enable retrieval of 851 noncompliances for review by DOE, be readily accessible by DOE Field and Program Office Coordinators, as well as Office of Enforcement staff when they are on-site, and enable contractor trending for potential reporting into the Noncompliance Tracking System.

**Question:** What is the best approach (or alternatively several good approaches) for maintaining an internal log of non-compliances? Labs may take different approaches to this log. Should it document every non-compliance? What about non-compliances that are corrected on the spot? Are multiple tracking systems expected? Who reviews the log to ensure the proper regulatory citation and the proper risk categorization (Severity Level)? What guidance can DOE provide to lead to a more consistent approach?

**Response:** 10 CFR 851, Appendix B establishes the definitions for Severity Levels I and II and de minimis noncompliances. Contractors most likely have existing systems for tracking issues/noncompliances. These systems probably differ from site to site - a contractor must do what works best for them. See the answer to the above question for general guidelines for internal tracking systems. Without regard for the severity level of a noncompliance, if a series of similar noncompliances were corrected on-the-spot and not documented, contractor management would not be aware of a programmatic or repetitive trend requiring management attention and reporting into NTS. For example, if a Severity Level I noncompliance that poses an imminent danger was corrected on-the-spot, it should be documented. On the other hand, a noncompliance that is correctly classified as de minimis, might not need to be documented.

**7. Corrective Action to Prevent Recurrence:** *The regulation discusses evaluation of DOE contractor corrective actions.*

**Question:** How are the corrective action and their completion viewed for different levels of hazards, and who sets the milestones?

**Response:** It is assumed that technically and economically feasible means are available to comply with the standards contained in 851. Each condition of noncompliance is unique and should be evaluated on its own merit.

For example, if a fixed ladder is out of compliance with 29 CFR 1910.27, several alternative corrective actions might be feasible, depending on the circumstances. For instance, if the ladder is in disrepair, it may be prudent to tag and remove the ladder from service. On the other hand, a loose cage at the top of a fixed ladder may need to be welded.

Frequency of use may be another factor to consider when deciding on abatement options. For example, if one employee uses the ladder once a month to access the roof for maintenance purposes, it may be safer and more efficient to access the roof by installing a fixed ladder.

These examples illustrate only a few factors to be considered. There are many other factors that may need to be considered in determining appropriate abatement actions.

Abatement plans should identify appropriate interim protective measures and a reasonable amount of time to implement corrective actions. An abatement plan would not be deemed acceptable if corrective actions can reasonably be implemented within three weeks, but the abatement plan identifies an abatement period of three years.

In summary, since each situation is unique. Reasonable decisions must be made concerning corrective actions.

**8. DOE's Contribution to a Violation:** *The regulation discusses circumstances in which a violation results from a*

direction from DOE.

**Question:** The penalty determination has dependency on the DOE’s ‘contribution to the violation.’ Can you describe this in more detail?

**Response:** There may be circumstances in which a violation of a DOE worker safety and health requirement results from direction given by DOE to a DOE contractor. In such cases, DOE may refrain from issuing an NOV, or may mitigate any proposed penalty, provided 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 851.7, interpretative ruling of a requirement of 10 CFR 851 must be issued in accordance with the provisions of 851.7 to be binding.