

**DEPARTMENT OF ENERGY****10 CFR Part 851****[Docket No. EH-RM-04-WSHP]****RIN 1901-AA99****Worker Safety and Health Program****AGENCY:** Office of Environment, Safety and Health, Department of Energy.**ACTION:** Supplemental notice of proposed rulemaking and opportunity for public comment.

**SUMMARY:** The Department of Energy (DOE) is issuing a supplemental proposal to implement the statutory mandate of section 3173 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 to establish worker safety and health regulations to govern contractor activities at DOE workplaces. The supplemental proposal reflects consultations with the Defense Nuclear Facilities Safety Board (DNFSB), as well as comments received from members of the public.

**DATES:** The comment period will end on April 26, 2005. Public hearings will be held on March 29 and 30, 2005 from 9 a.m. to 12 p.m. and from 1:30 p.m. to 5 p.m. Requests to speak at the hearings should be phoned in to Jacqueline D. Rogers, 202-586-4714, by March 28, 2005. Each presentation is limited to 10 minutes.

**ADDRESSES:** Written comments (three copies) should be addressed to: Jacqueline D. Rogers, U.S. Department of Energy, Docket Number EH-RM-03-WSH; Room GA-098, 1000 Independence Avenue, SW., Washington DC 20585-0270. Alternatively, comments can be filed electronically by e-mail to: [rule851.comments@hq.doe.gov](mailto:rule851.comments@hq.doe.gov) noting "Worker Safety and Health Rule Comments" in the subject line.

Copies of the public hearing transcripts, written comments received, and any other docket material may be reviewed on the Web site specially established for this proceeding. The Internet Web site is <http://www.eh.doe.gov/rulemakingwsh>.

The public hearings for this rulemaking will be held in Washington, DC at the Holiday Inn-Washington Capitol, 550 C Street, SW., Washington, DC 20024.

For more information concerning public participation in this rulemaking proceeding, see Section IV of this notice (Public Comment Procedures).

**FOR FURTHER INFORMATION CONTACT:** Jacqueline D. Rogers, U.S. Department of Energy, Room GA-089, 1000 Independence Avenue, SW.,

Washington DC 20585-0270, 202-586-4714, e-mail: [jackie.rogers@hq.doe.gov](mailto:jackie.rogers@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:**

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**I. Introduction**

DOE has broad authority to regulate worker safety and health pursuant to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801-5911, and the Department of Energy Organization Act (DOEOA), 42 U.S.C. 7101-7352. DOE currently exercises this authority in a comprehensive manner by incorporating appropriate provisions on worker safety and health into the contracts under which work is performed at DOE workplaces. During the past decade, DOE has taken steps to ensure that contractual provisions on worker safety and health are tailored to reflect particular workplace environments. In particular, the Integration of Environment, Health and Safety into Work Planning and Execution clause set forth in the DOE procurement regulations requires DOE contractors to establish an integrated safety management system. 48 CFR 952.223-71 and 970.5223-1. As part of this process, a contractor must define the work to be performed, analyze the potential hazards associated with the work, and identify a set of standards and controls that are sufficient to ensure safety and health if implemented properly. The identified standards and controls are incorporated as contractual requirements through the Laws, Regulations and DOE Directives clause set forth in the DOE procurement regulations. 48 CFR 970.0470-2 and 970.5204-2. Specifically, the Laws, Regulations and DOE Directives clause set forth in the DOE procurement regulations requires the incorporation of

applicable DOE Orders into a contract unless a contractor develops a tailored set of standards and obtains DOE approval to incorporate this tailored set in place of the applicable DOE Orders.

In 2002, Congress directed DOE to promulgate regulations on worker safety and health to govern the conduct of contractors with Price-Anderson indemnification agreements in their contracts. Specifically, section 3173 of the National Defense Authorization Act (NDAA) amended the AEA to add section 234C (codified as 42 U.S.C. 2282c) that requires DOE to promulgate worker safety and health regulations that maintain "the level of protection currently provided to \* \* \* workers." Pub. L. 107-314 (December 2, 2002). These regulations are to include "flexibility to tailor implementation \* \* \* to reflect activities and hazards associated with a particular work environment; to take into account special circumstances for facilities permanently closed, demolished, or title transferred; achieve national security missions." Section 234C also makes a DOE contractor with such an indemnification agreement that violates these regulations subject to civil penalties similar to the authority Congress granted to DOE in 1988 with respect to civil penalties. Section 234C also directed DOE to insert in such contracts a clause providing for reducing contractor fees and other payments in the event of a violation by a contractor or contractor employee of any regulation promulgated under section 234C while specifying that both sanctions may not be used for the same violation.

On December 8, 2003, DOE published a notice of proposed rulemaking to implement section 3173 of the NDAA (68 FR 68276). The December proposal was intended to codify existing DOE practices in order to ensure the worker health and safety regulations would provide DOE workers a level of protection equivalent to that currently afforded them. Specifically, under the December proposal, a contractor would comply with either a set of requirements based primarily on the provisions of DOE Order 440.1A, Worker Protection Management for DOE Federal and Contractor Employees, the current DOE Order on worker health and safety, or a tailored set of requirements approved by DOE. The contractor would implement these requirements pursuant to a worker health and safety program approved by DOE.

On January 1, 2004, DOE held a video conference to allow DOE employees, DOE contractors, contractor employees, and employee representatives to become

familiar with the December proposal. DOE held public hearings on the December proposal in Washington, DC on January 21, 2004, and in Golden, Colorado on February 4, 2004. In addition to the oral comments at the public hearings, DOE received approximately 50 written comments on the December proposal.

On February 27, 2004, after becoming aware that the DNFSB had concerns with regard to the December proposal, DOE suspended the rulemaking in order to consult with the DNFSB and to consider comments received from other stakeholders on the December proposal. (69 FR 9277) As a result of its consultation with the DNFSB and consideration of other comments, DOE is now restarting the rulemaking proceeding through the issuance of this notice that sets forth a supplemental proposal, announces additional public hearings and provides the opportunity for further written comments.

## II. Supplemental Proposal

The supplemental proposal contains several provisions that differ from those in the December proposal. These proposed provisions incorporate approaches put forth by the DNFSB during consultations, as well as by the comments on the December proposal. Specifically, the supplemental proposal contains provisions that would: (1) Codify a minimum set of safety and health requirements with which contractors must comply; (2) establish a formal exemption process which requires approval by the Secretarial Officer with line management responsibility and provides for significant involvement by the Assistant Secretary for Environment, Safety and Health; (3) delineate the role of the worker safety and health program and its relationship to integrated safety management; (4) set forth the general duties of contractors responsible for DOE workplaces; and (5) limit the scope of the regulations to contractor activities at DOE sites.

Subpart C of the supplemental proposal sets forth the proposed worker safety and health requirements with which a contractor would comply. These proposed requirements correspond, to a large extent, with the provisions set forth in Appendix A to the December proposal. These requirements include a variety of OSHA and consensus standards, and these standards would be legally binding on a contractor to the extent that a requirement is applicable to the hazards identified for a particular workplace environment. DOE invites comments on the question of whether the OSHA and

consensus standards included in today's supplemental proposal provide an appropriate basis for enforcing worker safety and health requirements at DOE facilities.

DOE does not expect that codification of these requirements will result in significant increased costs since, to a very large extent, they are based on existing provisions of DOE Order 440.1A, DOE Order 420 and DOE Notice 450.7 that have been incorporated into most existing DOE contracts through the Integration of Environment, Health and Safety into Work Planning and Execution clause and the Laws, Regulations and DOE Directives clause. Accordingly, most contractors already should be implementing the substance of the proposed requirements to the extent applicable to the hazards identified for a particular workplace environment. In addition, DOE expects that the implementation guidance for the proposed requirements would be essentially the same as the implementation guidance for the corresponding provisions in DOE Order 440.1A, DOE Order 420 and DOE Notice 450.7 and that contractors would make use of analyses, evaluations and work planning already undertaken to meet their existing contractual worker health and safety obligations. DOE requests comments from any person who believes that codification will result in significant increased costs. These comments should identify the reasons for the increased costs and potential changes to the supplemental proposal that could reduce or eliminate increased costs.

Subpart D of the supplemental proposal sets forth a proposed exemption process by which the Secretarial Officer with line management responsibility for a contractor can relieve the contractor from complying with a particular requirement with respect to a particular workplace. The Assistant Secretary for Environment, Health and Safety would have the opportunity to review and comment on an exemption prior to its issuance and, in the case of a non-NNSA contractor, would have the option to non-concur in the issuance of an exemption. Subpart D is based on the existing exemption process for nuclear safety requirements that is set forth in 10 CFR part 820. Subpart D contains specific provisions that would require any exemption to: Adequately protect the safety and health of workers; be consistent with a safe and healthful workplace free from recognized workplace hazards that are causing or are likely to cause death or serious bodily injury; not permit exposure

limits that are less protective than the limits required by subpart C; not diminish the level of protection afforded workers; and involve a special circumstance. The proposed list of special circumstances includes three situations not included in the exemption process set forth in Part 820. The additional situations would be situations where: an exemption would contribute to tailoring the requirements of this part to reflect the hazards and facilities associated with a particular work environment; a facility is to be, permanently closed and demolished, or title is expected to be transferred to another entity for reuse; or an exemption would contribute substantially to achieving a national security mission of the Department of Energy in an efficient and timely manner. The proposed addition of these three special circumstances is intended to ensure the supplemental proposal would have the regulatory flexibility mandated by the NDAA.

DOE requests comments as to whether the exemption process is the most appropriate or effective method to: Ensure sufficient regulatory flexibility to address the myriad of workplace environments across the DOE complex; maintain a level of protection equivalent to that currently afforded workers; take advantage of worker safety and health programs already implemented to meet existing contractual obligations; and minimize unnecessary costs. Comments should identify potential modifications or alternative approaches.

Subpart B of the supplemental proposal sets forth the proposed requirements for a contractor to develop, implement, and maintain a worker safety and health program and for DOE to approve the program. Subpart B would make clear that the overarching objectives for a program must be: Provision of a place of employment that is free from recognized workplace hazards that are causing or are likely to cause death or serious bodily harm to workers; and adequately protecting workers from identified hazards. These objectives are intended to ensure that the statutory standards in the AEA and the Occupational Safety and Health Act are met.

Subpart B is based on the existing process for establishing worker safety and health programs pursuant to the Integration of Environment, Health and Safety into Work Planning and Execution clause and DOE Order 440. Specifically, a contractor responsible for a covered workplace would identify existing and potential workplace hazards and assess the risk of associated workers' injuries and illnesses. To do

this, the contractor would (1) define the scope of work; (2) identify relevant features of the work environment; (3) perform activity level hazard analyses to identify hazards; and (4) assess the risk of injury and illness associated with those hazards. After identifying hazards and assessing risks, the contractor would identify appropriate hazard controls to protect workers from the identified hazards prior to initiating work activities. Selection of hazard controls would take into account all hazards to ensure the development of an integrated set of hazard controls. The contractor would prioritize and implement abatement actions for identified hazards according to risk, implement interim protective measures pending final abatement, and protect workers from imminent danger.

Subpart B provides that a DOE contractor responsible for one or more covered workplaces at a DOE site would submit to DOE, for its approval, a written worker safety and health program describing site-specific methods and provisions for complying with the program requirements. At sites with multiple contractors responsible for various workplaces at the site, the contractors would coordinate with each other to ensure that the worker safety and health programs at the site are integrated and consistent. Beginning one year after the publication of the final rule, no work could proceed at a covered DOE workplace without a safety and health program in place that had been approved by the CSO or the DOE site manager if approval authority were delegated by the CSO. To ensure consistency throughout program offices and across DOE, however, the CSO or site manager would consult with the Assistant Secretary for Environment, Safety and Health in the evaluation and approval of contractor programs. To ensure timely evaluation and processing of each contractor-submitted program and to avoid work stoppage due to unnecessary delays, the CSO or the Site Manager would be obligated to act on a contractor-submitted program within 90 days of receipt of the program. DOE requests comments as to how the efficiency of the approval process might be increased and, in particular, as to the need for separate DOE approval of sub-elements of a worker safety and health program.

A contractor would maintain the worker safety and health program for a workplace by evaluating and updating the worker safety and health program to reflect changes in the work and associated hazards. The process for defining the scope of work, analyzing the hazards associated with the work,

and identifying the applicable standards should be an iterative process performed continually to monitor changes in workplace activities and processes and to provide feedback on program performance. Through this process, a contractor would evaluate significant changes or additions to workplace activities to identify new hazards and to assess whether the existing program effectively addressed the scope and nature of the work and related hazards. This iterative process would provide the contractor with the information necessary to make changes and improvements to all aspects of the program as needed. On an annual basis, the contractor would either submit its updated worker safety and health program to DOE for approval or, if no changes are made to the program over the past year, a letter to that effect.

Most contractors already have worker safety and health programs in effect. DOE expects contractors to build on these existing programs and not to duplicate work already undertaken to meet existing contractual obligations. For example, under paragraph 9 of the DOE Order 440.1A, Contractor Requirements document, DOE contractors have for almost a decade been required to: "Identify existing and potential workplace hazards and evaluate risk of associated worker injury and illness; analyze or review: (1) Designs for new facilities and modifications to existing facilities and equipment; (2) operations and procedures; and (3) equipment, product, and services; assess worker exposure to chemical, physical, biological, or ergonomic hazards through appropriate workplace monitoring (including personal, area, wipe, and bulk sampling); biological monitoring; and observation; evaluate workplaces and activities (accomplished routinely by workers, supervisors, and managers and periodically by qualified worker protection professionals); and report and investigate accidents, injuries, and illnesses and analyze related data for trends and lessons learned." Similarly, under the Integration of Environment, Health and Safety into Work Planning and Execution clause, contractors are required to: Identify and evaluate workplace hazards, select an agreed-upon set of safety and health standards to address those specific hazards, and implement administrative and engineering controls to prevent or mitigate specific workplace hazards.

Section 851.4 of the supplemental proposal sets forth the proposed general duties of a contractor responsible for a covered workplace. Specifically, the contractor would be responsible for:

Ensuring the workplace is free from recognized workplace hazards that are causing or are likely to cause death or serious bodily harm; providing workers adequate protection from the hazards identified for the workplace; complying with the workplace safety and health requirements set forth in subpart C of the supplemental proposal that are applicable to the hazards identified for the workplace; complying with any compliance order issued by the Secretary that is applicable to the workplace; ensuring work is performed in accordance with the worker health and safety program for the covered workplace; and reporting to DOE and investigate each occurrence, including any near miss incident, that causes or gives rise to a significant likelihood of death or serious bodily harm to a worker.

Section 851.1 of the supplemental proposal would limit its scope to contractor activities at DOE sites. Federal employees would continue to be covered by existing programs for federal employees. Section 851.1 also would exclude contractor employees at DOE sites currently regulated by OSHA. DOE believes this exclusion is appropriate since there are no defense nuclear facilities located at these sites and the contractors responsible for workplaces at these sites do not have Price-Anderson indemnification agreements in their contracts.

### III. Procedural Review Requirements

#### A. Review Under Executive Order 12866

Today's proposed regulatory action has been determined to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), as amended by Executive Order 13258 (67 FR 9385, February 26, 2002). Accordingly, DOE submitted this notice of proposed rulemaking to the Office of Information and Regulatory Affairs of the Office of Management and Budget, which has completed its review.

#### B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, "Civil Justice Reform" (61 FR 4779, February 7, 1996) imposes on Federal agencies the general duty to adhere to the following requirements: Eliminate drafting errors and needless ambiguity, write regulations to minimize litigation, provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Section 3(b)

requires Federal agencies to make every reasonable effort to ensure that a regulation, among other things: Clearly specifies the preemptive effect, if any, adequately defines key terms, and addresses other important issues affecting the clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in Section 3(a) and Section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

#### C. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions.

Today's regulatory action has been determined not to be a "policy that has federalism implications," that is, it does not have substantial direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibility among the various levels of government under Executive Order 13132 (64 FR 43255, August 10, 1999). Accordingly, no "federalism summary impact statement" was prepared or subjected to review under the Executive Order by the Director of the Office of Management and Budget.

#### D. Review Under Executive Order 13175

Under Executive Order 13175 (65 FR 67249, November 6, 2000) on "Consultation and Coordination with Indian Tribal Governments," DOE may not issue a discretionary rule that has tribal implications and imposes substantial direct compliance costs on Indian tribal governments. DOE has determined that the proposed rule would not have such effects and concluded that Executive Order 13175 does not apply to this proposed rule.

#### E. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory

flexibility analysis for any regulation which a general notice of proposed rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

Today's proposed regulation would establish DOE's requirements for worker safety and health at DOE sites. The contractors who manage and operate DOE facilities would be principally responsible for implementing the rule requirements. DOE considered whether these contractors are "small businesses," as that term is defined in the Regulatory Flexibility Act's (5 U.S.C. 601(3)). The Regulatory Flexibility Act's definition incorporates the definition of small business concerns in the Small Business Act, which the Small Business Administration (SBA) has developed through size standards in 13 CFR part 121. The DOE contractors subject to the proposed rule exceed the SBA's size standards for small businesses. In addition, DOE expects that any potential economic impact of this proposed rule on small businesses would be minimal because DOE sites perform work under contracts to DOE or the prime contractor at the site. DOE contractors are reimbursed through their contracts with DOE for the costs of complying with DOE safety and health program requirements. They would not, therefore, be adversely impacted by the requirements in this proposed rule. For these reasons, DOE certifies that today's proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities, and therefore, no regulatory flexibility analysis has been prepared. See 68 FR 7990 at III.1. and III.1.c. (February 19, 2003).

#### F. Review Under the Paperwork Reduction Act

The information collection provisions of this proposed rule are not substantially different from those contained in DOE contracts with DOE prime contractors covered by this rule and were previously approved by the Office of Management and Budget (OMB) and assigned OMB Control No. 1910-5103. That approval covered submission of a description of an integrated safety management system required by the Integration of Environment, Health and Safety into Work Planning and Execution clause set forth in the DOE procurement regulations. 48 CFR 952.223-71 and 970.5223-1, 62 FR 34842, 34859-60 (June 17, 1997). If contractors at a DOE site fulfill their contractual

responsibilities for integrated safety management properly, the worker safety and health program required by the proposed regulations should require little if any new analysis or new documents to the extent that existing analysis and documents are sufficient for purposes of the proposed regulations. Accordingly, no additional Office of Management and Budget clearance is required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act, 5 CFR 1320.1 *et seq.*

#### G. Review Under the National Environmental Policy Act

DOE currently implements its broad authority to regulate worker safety and health through internal DOE directives incorporated into contracts to manage and operate DOE facilities, contract clauses and DOE regulations. This proposed rule would implement the statutory mandate to promulgate worker safety and health regulations for DOE facilities that would provide a level of protection for workers at DOE facilities that is substantially equivalent to the level of protection currently provided to such workers and to provide procedures to ensure compliance with the rule. DOE anticipates that the contractor's work and safety programs required by this regulation would be based on existing programs and that this rule would generally not require the development of a new program. DOE has therefore concluded that promulgation of these regulations would fall into the class of actions that would not individually or cumulatively have a significant impact on the human environment as set forth in the DOE regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the rule would be covered under the categorical exclusion in paragraph A6 of Appendix A to subpart D, 10 CFR part 1021, which applies to the establishment of procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

#### H. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by states, tribal, or local governments, on the aggregate, or by the private sector, of \$100 million in

any one year. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officials of state, tribal, or local governments on a proposed significant intergovernmental mandate, and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. DOE has determined that the proposed rule published today does not contain any Federal mandates affecting small governments, so these requirements do not apply.

#### *I. Review Under Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use), 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for significant regulatory actions under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. DOE has determined that the proposed rule published today would not have a significant adverse effect on the supply, distribution, or use of energy and thus the requirement to prepare a Statement of Energy Effects does not apply.

#### *J. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a "Family Policymaking Assessment" for any proposed rule that may affect family well-being. The proposed rule has no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### *K. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most dissemination of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's notice of proposed rulemaking under the OMB and DOE

guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

### **IV. Public Comment Procedures**

#### *A. Written Comments*

Interested individuals are invited to participate in this proceeding by submitting data, views, or arguments. Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. To help DOE review the submitted comments, commenters are requested to reference the provision to which they refer where possible.

All information provided by commenters will be available for public inspection at the DOE Freedom of Information Reading Room, Room 1E-190, 1000 Independence Avenue, SW., Washington, DC 20585 between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday, except Federal Holidays. The docket file material for this rulemaking will be under EH-RM-04-WSHP.

DOE also intends to enter all written comments on a Web site specially established for this proceeding. The Internet Web site is <http://www.eh.doe.gov/rulemakingwsh>.

To assist DOE in making public comments available on a website, interested persons are to submit an electronic version of their written comments in accordance with the instructions in the **DATES** section of this notice of proposed rulemaking.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as two copies from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the Freedom of Information Act section on "Handling Information of a Private Business, Foreign Government, or an International Organization," 10 CFR 1004.11.

#### *B. Public Hearings*

Public hearings will be held at the time, date, and place indicated in the **DATES** and **ADDRESSES** sections of this notice of proposed rulemaking. Any person who is interested in making an oral presentation should, by 4:30 p.m. on the date specified, make a phone request to the number in the **DATES** section of this notice of proposed rulemaking. The person should provide a daytime phone number where he or

she may be reached. Persons requesting an opportunity to speak will be notified as to the approximate time they will be speaking. Each presentation is limited to 10 minutes. Persons making oral presentations should bring three copies of their statement to the hearing and submit them at the registration desk.

DOE reserves the right to select the persons who will speak. In the event that requests exceed the time allowed, DOE also reserves the right to schedule speakers' presentations and to establish the procedures for conducting the hearing. A DOE official will be designated to preside at each hearing, which will not be judicial or evidentiary. Only those persons conducting the hearing may ask questions. Any further procedural rules needed to conduct the hearing properly will be announced by the DOE presiding official.

A transcript of each hearing will be made available to the public. DOE will retain the record of the full hearing, including the transcript, and make it available on the Web site specially established for this proceeding. The Internet Web site is <http://www.eh.doe.gov/rulemakingwsh>. If DOE must cancel the hearing, it will make every effort to give advance notice.

#### **List of Subjects in 10 CFR Part 851**

Civil penalty, Hazardous substances, Incorporation by reference, Occupational safety and health, Safety, Reporting and recordkeeping requirements.

Issued in Washington, DC on January 14, 2005.

**John Spitaleri Shaw,**

*Assistant Secretary for Environment, Safety and Health.*

For the reasons set forth in the preamble, title 10, chapter III of the Code of Federal Regulations is proposed to be amended by adding part 851 to read as set forth below.

### **PART 851—WORKER SAFETY AND HEALTH PROGRAM**

#### **Subpart A—General Provisions**

- Sec.
- 851.1 Scope and exclusions.
  - 851.2 Purpose.
  - 851.3 Definitions.
  - 851.4 General rule.
  - 851.5 Compliance Order.
  - 851.6 Interpretations.
  - 851.7 Information and records.
  - 851.8 Compliance date.
  - 851.9 Enforcement.
  - 851.10 Workers rights.

#### **Subpart B—Worker Safety and Health Program**

- 851.100 Worker safety and health program.

851.101 Approval and maintenance of the worker safety and health program.

### Subpart C—Safety and Health Requirements

- 851.200 Worker safety and health requirements.
- 851.201 Worker safety and health standards.
- 851.202 Construction safety.
- 851.203 Fire protection.
- 851.204 Explosives safety.
- 851.205 Pressure retaining component safety.
- 851.206 Motor vehicle safety.
- 851.207 Biological safety.
- 851.208 Firearms safety.
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- 851.210 Occupational medicine.

### Subpart D—Exemption Relief

- 851.300 Exemptions.
- 851.301 Exemption criteria.
- 851.302 Terms and conditions.

### Subpart E—Enforcement Process

- 851.400 Investigations and inspections.
- 851.401 Settlement.
- 851.402 Preliminary notice of violation.
- 851.403 Final notice of violation.
- 851.404 Administrative appeal.
- 851.405 Direction to NNSA contractors.
- Appendix A To Part 851—General Statement of Enforcement Policy

**Authority:** 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 42 U.S.C. 5801 *et seq.*; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

### Subpart A—General Provisions

#### § 851.1 Scope and exclusions.

(a) The worker safety and health requirements in this part govern the conduct of contractor activities at DOE sites, with the exception of sites listed in paragraph (b) of this section.

(b) This part does not apply to a DOE site:

(1) Regulated by the Occupational Safety and Health Administration (OSHA) on [date on which final rule is issued]; or

(2) Operated under the authority of the Director, Naval Nuclear Propulsion, pursuant to Executive Order 12344, as set forth in Public Law 98–525, 42 U.S.C. 7158 note.

(c) This part does not apply to radiological hazards to the extent regulated by 10 CFR parts 820, 830 or 835.

#### § 851.2 Purpose.

This part establishes the:

(a) Safety and health requirements that a contractor responsible for a covered workplace must implement through a worker safety and health program that provides its workers with a safe and healthful workplace in which workplace hazards are abated, controlled or otherwise mitigated in a manner that provides reasonable

assurance that workers are adequately protected from identified hazards; and

(b) Procedures for investigating whether a violation of a requirement has occurred, for determining the nature and extent of any such violation, and for imposing an appropriate remedy.

#### § 851.3 Definitions.

*Activity-level hazard analysis* means an analysis of work-related hazards relating to a specific job activity, task, operation or process.

*AEA* means the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*

*Cognizant Secretarial Officer* means the Assistant Secretary, Deputy Administrator, Program Office Director, or equivalent DOE official who has primary line management responsibility for a contractor.

*Compliance Order* means an Order issued by the Secretary to a contractor that mandates a remedy, work stoppage, or other action to address a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part.

*Consent order* means any written document, signed by the Director and a contractor, containing stipulations or conclusions of fact or law and a remedy acceptable to both DOE and the contractor.

*Contractor* means any entity under contract with DOE, or a subcontractor to such an entity, and includes any affiliated entity such as a parent organization.

*Director* means a DOE Official to whom the Secretary has assigned the authority to investigate the nature and extent of compliance with the requirements of this part.

*DOE* means the United States Department of Energy, including the National Nuclear Security Administration.

*DOE site* means a DOE-owned or leased area or location where activities and operations are performed at one or more facilities or locations by a contractor.

*Final notice of violation* means a document that determines a contractor has violated or is continuing to violate a requirement of this part and includes:

- (1) A statement specifying the requirement of this part to which the violation relates;
- (2) A concise statement of the basis for the determination;
- (3) Any remedy, including the amount of any civil penalty; and
- (4) A statement explaining the reasoning behind any remedy.

*Final Order* means an order of DOE that represents final agency action and, if appropriate, imposes a remedy with

which the recipient of the order must comply.

*General Counsel* means the General Counsel of DOE.

*Hazard control* means a procedure, practice, means, method, operation, work process, or other control used to prevent, abate or mitigate workplace hazards and associated risks.

*Interpretation* means a statement by the General Counsel concerning the meaning or effect of a requirement of this part which relates to a specific factual situation but may also be a ruling of general applicability if the General Counsel determines such action to be appropriate.

*NNSA* means the National Nuclear Security Administration.

*Preliminary notice of violation* means a document that sets forth the preliminary conclusions that a contractor has violated or is continuing to violate a requirement of this part and includes:

- (1) A statement specifying the requirement of this part to which the violation relates;
- (2) A concise statement of the basis for alleging the violation;
- (3) Any remedy, including the amount of any proposed civil penalty; and
- (4) A statement explaining the reasoning behind any proposed remedy.

*Remedy* means any action (including but not limited to, the assessment of civil penalties, the reduction of fees or other payments under a contract, the requirement of specific actions, or the modification, suspension or rescission of a contract) necessary or appropriate to rectify, prevent, or penalize a violation of a requirement of this part, including a compliance order issued by the Secretary pursuant to this part.

*Secretary* means the Secretary of Energy.

*Site Manager* means the DOE official who has primary responsibility for overall management of a DOE site.

*Worker* means a person who performs work for or on behalf of DOE, including an independent contractor, a DOE contractor or subcontractor employee, or any other person who performs work at a covered workplace.

*Workplace hazard* means a physical, chemical, biological, or radiological hazard with any potential to cause illness, injury, or death to a person.

*Workplace safety and health programmatic requirements* means a set of requirements that addresses related workplace hazards in a comprehensive manner, including requirements on construction safety, fire protection, firearms safety, explosives safety, industrial hygiene, occupational

medicine, pressure safety motor vehicle safety, and biosurety.

*Workplace safety and health requirement* means a workplace safety and health standard or programmatic requirement.

*Workplace safety and health standard* means a standard which addresses a workplace hazard by establishing limits, requiring conditions, or prescribing the adoption or use of one or more practices, means, methods, operations, or processes.

#### § 851.4 General rule.

The contractor responsible for a covered workplace must:

(a) Ensure the workplace is free from recognized workplace hazards that are causing or are likely to cause death or serious bodily harm;

(b) Provide workers adequate protection from the hazards identified for the workplace;

(c) Comply with the workplace safety and health requirements set forth in subpart C of this part that are applicable to the hazards identified for the workplace;

(d) Comply with any compliance order issued by the Secretary pursuant to § 851.5 that is applicable to the workplace;

(e) Ensure work is performed in accordance with the worker health and safety program for the covered workplace; and

(f) Report to DOE and investigate each occurrence, including any near miss incident that causes or gives rise to a significant likelihood of death or serious bodily harm to a worker.

#### § 851.5 Compliance Order.

(a) The Secretary may issue to any contractor a Compliance Order that:

(1) Identifies a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part;

(2) Mandates a remedy, work stoppage, or other action; and,

(3) States the reasons for the remedy, work stoppage, or other action.

(b) A Compliance Order is a final order that is effective immediately unless the Order specifies a different effective date.

(c) Within 15 calendar days of the issuance of a Compliance Order, the recipient of the Order may request the Secretary to rescind or modify the Order. A request does not stay the effectiveness of a Compliance Order unless the Secretary issues an order to that effect.

#### § 851.6 Interpretations.

(a) The Office of the General Counsel is responsible for formulating and

issuing any interpretation concerning a requirement in this part.

(b) Any written or oral response to any written or oral question which is not provided pursuant to paragraph (a) of this section does not constitute an interpretation and does not provide any basis for action inconsistent with a requirement of this part.

#### § 851.7 Information and records.

(a) A contractor must maintain complete and accurate records as necessary to substantiate compliance with the requirements of this part, including but not limited to records on inventory information, hazard assessment, exposure measurements, exposure controls, and worker injuries and illnesses.

(b) A contractor may neither conceal nor destroy any information concerning non-compliance or potential non-compliance with the requirements of this part.

(c) Any information pertaining to a requirement in this part provided to DOE by any contractor or maintained by any contractor for inspection by DOE shall be complete and accurate in all material respects.

(d) Nothing in this part shall relieve any contractor from safeguarding classified, confidential, and controlled information, including Restricted Data or national security information, in accordance with the applicable provisions of federal statutes and the rules, regulations, and orders of any federal agency.

#### § 851.8 Compliance date.

Contractors must achieve compliance with the requirements of this part no later than [Insert date 1 year from effective date of the rule], unless an exemption granted pursuant to subpart D of this part provides otherwise.

#### § 851.9 Enforcement.

(a) A contractor that has entered into an agreement of indemnification under section 170d. of the AEA (or any subcontractor or supplier thereto) and that violates (or whose employee violates) any requirement of this part is subject to a civil penalty of up to \$70,000 for each such violation. If any violation under this subsection is a continuing violation, each day of the violation shall constitute a separate violation for the purpose of computing the civil penalty.

(b) A contractor that violates any requirement of this part is subject to a reduction in fees or other payments under a contract with DOE, pursuant to the contract's Conditional Payment of Fee clause.

(c) DOE may not penalize a contractor under both paragraphs (a) and (b) of this section for the same violation of a requirement of this part.

(d) For contractors listed in subsection d. of section 234A of the AEA, 42 U.S.C. 2282a(d), the total amount of civil penalties under paragraph (a) and contract penalties under paragraph (b) of this section may not exceed the total amount of fees paid by DOE to the contractor in that fiscal year.

(e) DOE may not penalize a contractor under both sections 234A and 234C of the AEA for the same violation.

#### § 851.10 Workers rights.

(a) Workers at a covered workplace have the right, without reprisal, to participate in activities described in this section on official time;

(b) Workers at a covered workplace also have the right, without reprisal to:

(1) Have access to:

(i) DOE safety and health publications;

(ii) The worker safety and health program for the covered workplace;

(iii) The standards, controls, and procedures applicable to the covered workplace;

(iv) The safety and health poster that informs the worker of relevant rights and responsibilities.

(2) Be notified when monitoring results indicate the worker was overexposed to hazardous materials;

(3) Observe monitoring or measuring of hazardous agents and have the results of his or her own exposure monitoring;

(4) Accompany DOE personnel during an inspection of the workplace;

(5) Request and receive results of inspections and accident investigations;

(6) Express concerns related to worker safety and health;

(7) Decline to perform an assigned task because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious bodily harm to the worker coupled with a reasonable belief that there is insufficient time to seek effective redress through the normal hazard reporting and abatement procedures; and

(8) Stop work when the worker discovers employee exposures to imminently dangerous conditions or other serious hazards; provided that any stop work authority must be exercised in a justifiable and responsible manner in accordance with established procedures.



## Subpart B—Worker Safety and Health Program

### § 851.100 Worker safety and health program.

(a) A contractor responsible for one or more workplaces at a DOE site must establish and maintain a worker safety and health program that ensures:

(1) Workplaces are free from recognized workplace hazards that are causing or are likely to cause death or serious bodily harm; and  
(2) Workers are adequately protected from identified hazards.

(b) A worker safety and health program must:

(1) Include provisions for:  
(i) Defining the scope of the work to be performed prior to its initiation;  
(ii) Identifying relevant features of the work environment, including designs and features of facilities, equipment, operations and procedures important to a safe and healthful workplace prior to the initiation of work activities;  
(iii) Identifying and evaluating general workplace hazards, specific job hazards, and potential hazards that may arise from unforeseeable conditions;

(iv) Undertaking routine activity-level hazard analyses to:

(A) Evaluate designs of new facilities and modifications to existing facilities and equipment for potential workplace hazards; and

(B) Evaluate operations and procedures to identify workplace hazards;

(v) Considering all hazards, including radiological hazards, in order to ensure development of an integrated set of hazard controls to protect workers;

(vi) Assessing the risk of associated injury and illness to workers from the identified hazards;

(vii) Assessing worker exposure to chemical, physical, biological, radiological, or safety workplace hazards through appropriate workplace monitoring;

(viii) Documenting assessments for chemical, physical, biological, and safety workplace hazards using recognized exposure assessment and testing methodologies and use of accredited and certified laboratories;

(ix) Recording observations, testing and monitoring results; and

(x) Reviewing safety and health information.

(2) Provide for the prevention, abatement and mitigation of identified workplace hazards through:

(i) Prioritization and implementation of actions according to the potential hazard to workers;

(ii) Implementation of interim protective measures pending final action;

(iii) Protection of workers from imminently dangerous conditions;

(iv) Selection of hazard controls based on the following hierarchy:

(A) Elimination of the hazard;

(B) Engineered controls;

(C) Work practices and administrative controls; and

(D) Personal protective equipment; and

(v) Emphasis on reducing hazards to workers when purchasing equipment and services.

(3) Provide for the effective implementation of the worker safety and health requirements of subpart C of this part in a manner tailored to:

(i) Reflect activities and hazards associated with a particular work environment;

(ii) Take into account special circumstances at a covered workplace that is, or is expected to be, permanently closed and that is expected to be demolished, or title to which is expected to be transferred to another entity for reuse on behalf of an entity other than DOE; and

(iii) Achieve national security missions of the Department of Energy in an efficient and timely manner.

(4) Identify the hazard controls to be used to provide adequate protection from identified hazards at the activity level in a tailored manner for a particular work environment or the process for selecting and identifying such controls in the future prior to the initiation of work activities;

(5) Identify situations for which the contractor has concluded an exemption pursuant to subpart D is needed and the process for identifying other such situations in the future;

(6) Provide for feedback on the worker safety and health program and for its continuous improvement;

(7) Ensure that all workers are provided with information and training needed to perform their duties in a safe and healthful manner;

(8) Ensure the worker safety and health program is consistent and integrated with other safety activities at the workplace;

(9) Contain provisions to ensure compliance by subcontractors; and

(10) Document the process of developing and maintaining the worker safety and health program at a level commensurate with the complexity and hazards associated with the workplace.

### § 851.101 Approval and maintenance of the worker safety and health program.

(a) By July 25, 2005, contractors must submit for DOE approval a written worker safety and health program that meets the requirements of § 851.100.

(1) If a contractor is responsible for more than one covered workplace at a DOE site, the contractor must establish and maintain a single worker safety and health program for the workplaces at the site for which the contractor is responsible.

(2) If more than one contractor is responsible for covered workplaces at a DOE site, each contractor must:

(i) Establish and maintain a worker safety and health program for the workplaces for which the contractor is responsible; and

(ii) Coordinate with the other contractors responsible for covered workplaces at the site to ensure that the worker safety and health programs at the site are integrated and consistent.

(b) The Cognizant Secretarial Officer or, if approval authority is delegated by the Cognizant Secretarial Officer, the Site Manager must review and approve the contractor's worker safety and health program, in consultation with the Assistant Secretary for Environment, Safety and Health, within 90 days after receipt from the contractor. Beginning January 26, 2006, no work may be performed at a covered workplace unless the Cognizant Secretarial Officer or the Site Manager has approved the worker safety and health program for the workplace.

(c) A contractor must maintain its worker safety and health program by:

(1) Evaluating and updating the worker safety and health program at least annually to reflect when significant changes or additions in the activities and hazards are made, or a change in contractors occurs;

(2) Annually submitting to the Cognizant Secretarial Officer or, if approval authority is delegated by the Cognizant Secretarial Officer, the DOE Site Manager either an updated worker safety and health program for approval or a letter stating that no changes are necessary in the currently approved worker safety and health program;

(3) Performing an internal audit of its worker safety and health program no less frequently than every 36 months and transmitting the results of the audit to the DOE Site Manager, the Cognizant Secretarial Officer, the Assistant Secretary for Environment, Safety and Health, and the Director; and

(4) Incorporating in the worker safety and health program any changes, conditions, or workplace safety and health standards directed by DOE.



**Subpart C—Safety and Health Requirements**

**§ 851.200 Worker safety and health requirements.**

(a) A contractor responsible for a covered workplace must comply with the worker safety and health requirements set forth in this subpart as applicable to the workplace hazards identified for facilities and activities under its control.

(b) Nothing in this subpart shall be construed to limit the authority of DOE

to impose additional requirements on a contractor.

**§ 851.201 Worker safety and health standards.**

(a) The following regulations of the Occupational Safety and Health Administration (OSHA) in effect as of [Insert Effective Date of Final Rule]:

(1) 29 CFR part 1910, Occupational Safety and Health Standards, except 29 CFR part 1910.109;

(2) 29 CFR part 1915, Occupational Safety and Health Standards for Shipyard Employment;

(3) 29 CFR part 1917, Marine Terminals;

(4) 29 CFR part 1918, Safety and Health Regulations for Longshoring;

(5) 29 CFR part 1926, Safety and Health Regulations for Construction; and

(6) 29 CFR part 1928, Occupational Safety and Health Standards for Agriculture.

(b) The National Fire Protection Association (NFPA) codes and standards listed in Table 1 below.

TABLE 1.—NATIONAL FIRE PROTECTION ASSOCIATION CODES AND STANDARDS

NFPA No.	Title	Edition
1	Uniform Fire Code	2003
10	Standard for Portable Fire Extinguishers	2002
11A	Standard for Medium- and High-Expansion Foam Systems	1999
11	Standard for Low-, Medium-, and High-Expansion Foam	2002
12	Standard on Carbon Dioxide Extinguishing Systems	2000
12A	Standard on Halon 1301 Fire Extinguishing Systems	1997
13	Standard for the Installation of Sprinkler Systems	2002
14	Standard for the Installation of Standpipe and Hose Systems	2003
15	Standard for Water Spray Fixed Systems for Fire Protection	2001
16	Standard for the Installation of Foam-Water Sprinkler Foam-Water Spray Systems	2003
17A	Standard for Wet Chemical Extinguishing Systems	2002
17	Standard for Dry Chemical Extinguishing Systems	2002
20	Standard for the Installation of Stationary Pumps for Fire Protection	2003
22	Standard for Water Tanks for Private Fire Protection	2003
24	Standard for the Installation of Private Fire Service Mains and Their Appurtenances	2002
25	Standard for Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems	2002
30A	Codes for Motor Fuel Dispensing Facilities and Repair Garages	2003
30	Flammable and Combustible Liquids Code	2003
31	Standard for the Installation of Oil-Burning Equipment	2001
33	Standard for Spray Application Using Flammable or Combustible Materials	2003
37	Standard for the Installation and Use of Stationary Combustion Engines and Gas	2002
45	Standard on Fire Protection for Laboratories Using Chemicals	2000
50A	Standard for Gaseous Hydrogen Systems at Consumer sites	1999
50B	Standard for Liquefied Hydrogen Systems at Consumer Sites	1999
50	Standard for Bulk Oxygen Systems at Consumer Sites	2001
51	Standard for the Design and Installation of Oxygen Fuel Gas Systems for Welding, Cutting, and Allied Processes.	2002
51B	Standard for Fire Prevention During Welding, Cutting, and Other Hot Work	2003
52	Compressed Natural Gas (CNG) Vehicular Fuel Systems Code	2002
54	ANSI Z223.1, 2002 National Fuel Gas Code	2002
55	Standard for Storage, Use and Handling of Compressed Gases and Cryogenic Fluids in Portable and Stationary Containers, Cylinders and Tanks.	2003
57	Liquefied Natural Gas (LNG) Vehicular Fuel Systems Codes	2002
58	Liquefied Petroleum Gas Code	2001
59A	Standard for the Production, Storage, and Handling of Liquefied Natural Gas (LNG)	2001
59	Utility LP-Gas Plant Code	2001
69	Standard on Explosion Prevention Systems	2002
70	National Electrical Code	2002
70E	Standard for Electrical Safety Requirements for Employee Workplaces	2002
72	National Fire Alarm Code	2002
73	Electrical Inspection Code for Existing Dwellings	2000
75	Standard for the Protection of Information Technology Equipment	2003
80	Standard for Fire Doors and Fire Windows	1999
82	Standard on incinerators and Waste and Linen Handling Systems and Equipment	1999
85	Boiler and Combustion Systems Hazards Code	2001
86	Standard for Ovens and Furnaces	2003
88A	Standard for Parking Structures	2002
90A	Standard for the Installation of Air-Conditioning and Ventilating Systems	2002
90B	Standard for the Installation of Warm Air Heating and Air-Conditioning Systems	2002
91	Standard for Exhaust Systems for Air Conveying of Vapors, Gases, Mists, and Noncombustible Particulate Solids.	1999
96	Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations	2001
97	Standard glossary of terms Relating to Chimneys, Vents, and Heat-Producing Appliances	2003
99	Standard for Health Care Facilities	2002
99C	Standard on Gas and Vacuum Systems	2002

TABLE 1.—NATIONAL FIRE PROTECTION ASSOCIATION CODES AND STANDARDS—Continued

NFPA No.	Title	Edition
101B	Code for Means of Egress for Buildings and Structures	2002
101	Life Safety Code	2003
102	Standard for Grandstands, Folding and Telescopic Seating, Tents, and Membrane Structures	1995
105	Standard for the Installation of Smoke Door Assemblies	2003
110	Standard for Emergency and Standby Power Systems	2002
111	Standard on Stored Electrical Energy Emergency and Standby Power Plants	2001
115	Standard for Laser Fire Protection	2003
204	Standard for Smoke and Heat Venting	2002
211	Standard for Chimneys, Fireplaces, Vents, and Solid Fuel-Burning Appliances	2003
214	Standard on Water-Cooling Towers	2000
220	Standard on Types of Building Construction	1999
221	Standard for Fire Walls and Fire Barrier Walls	2000
230	Standard for the Fire Protection of Storage	2003
232	Standard for the Protection of records	2000
241	Standard for Safeguarding Construction, Alteration, and Demolition Operations	2000
307	Standard for the Construction and Fire Protection of Marine Terminals, Piers, and Wharves	2000
318	Standard for the Protection of Semiconductors Fabrication Facilities	2002
326	Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair	1999
385	Standard for Tank Vehicles for Flammable and Combustible Liquids	2000
407	Standard for Aircraft Fuel Servicing	2001
408	Standard for Aircraft Hand Portable Fire Extinguishers	1999
409	Standard on Aircraft Hangers	2001
415	Standard on Airport terminal Building, Fueling Ramp Drainage, and Loading Walkways	2002
418	Standard for Heliports	2001
430	Code for the Storage of Liquid and Solid Oxidizers	2000
432	Code for the Storage of Organic Peroxide Formulations	2002
434	Code for the Storage of Pesticides	2002
472	Standard for Professional Competence of Responders to Hazardous Materials Incidents	2002
473	Standard for Competencies for EMS Personnel Responding to Hazardous Materials Incidents	2002
484	Standard for Combustible Metals, Metal Powders, and Metal Dusts	2002
490	Code for the Storage of Ammonium Nitrate	2002
495	Explosive Materials Code	2001
496	Standard for Purged and Pressurized Enclosures for Electrical Equipment	2003
498	Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives	2001
502	Standard for Road Tunnels, Bridges, and Other Limited Access Highways	2001
505	Fire Safety Standard for Powered Industrial Trucks Including Type Designations, Areas of Use, Conversions, Maintenance, and Operations.	2002
520	Standard on Subterranean Spaces	1999
560	Standard for the Storage, Handling, and Use of Ethylene Oxide for Sterilization and Fumigation	2002
600	Standard on Industrial Fire Brigades	2000
601	Standard for Security Services in Fire Loss Prevention	2000
654	Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids.	2000
655	Standard for Prevention of Sulfur Fires and Explosions	2001
664	Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities	2002
704	Standard System for the Identification of the Hazards of Materials for Emergency Response	2001
750	Standard on Water Mist Fire Protection Systems	2003
780	Standard for the Installation of Lighting Protection Systems	2000
801	Standard for Fire Protection for Facilities Handling Radioactive Materials	2003
820	Standard for Fire Protection in Wastewater Treatment and Collective Facilities	2003
853	Standard for the Installation of Stationary Fuel Cell Power System	2003
909	Code for the Protection of Cultural Resources	2001
914	Code for Fire Protection of Historic Structures	2001
1000	Standard for Fire Service Professional Qualifications Accreditation and Certification Systems	2000
1001	Standard for Fire Fighter Professional Qualifications	2002
1002	Standard on Fire Apparatus Drivers/Operator Professional Qualifications	2003
1003	Standard for Airport Fire Fighter Professional Qualifications	2000
1006	Standard for Rescue Technician Professional Qualifications	2003
1021	Standard for Fire Officer Professional Qualifications	2003
1041	Standard for Fire Service Instructor Professional Qualifications	2002
1051	Standard for Wildland Fire Fighter Professional Qualifications	2002
1061	Standard for Professional Qualifications for Public Safety Telecommunicator	2002
1071	Standard for Emergency Vehicle Technician Professional Qualifications	2000
1141	Standard for Fire Protection in Planned Building Groups	2003
1142	Standard on Water Supplies for Suburban and Rural Fire Fighting	2001
1143	Standard for Wildland Fire Management	2003
1144	Standard for Protection of Life and Property from Wildfire	2002
1221	Standard for the Installation, Maintenance, and Use of Emergency Services Communications Systems	2002
1403	Standard on Live Fire Training Evolutions	2002
1404	Standard for Fire Service Respiratory Protection Training	2002
1410	Standard on Training for Initial Emergency Scene Operations	2000
1451	Standard for a Fire Service Vehicle Operations Training Program	2002

TABLE 1.—NATIONAL FIRE PROTECTION ASSOCIATION CODES AND STANDARDS—Continued

NFPA No.	Title	Edition
1500	Standard on Fire Department Occupational Safety and Health Program	2002
1521	Standard for Fire Department Safety Officer	2002
1561	Standard on Emergency Services Incident Management System	2002
1581	Standard on Fire Department Infection Control Program	2000
1582	Standard on Comprehensive Occupational Medical Program for Fire Departments	2003
1583	Standard on Health-Related Fitness Programs for Fire Fighters	2000
1670	Standard on Operations and Training for Technical Rescue Incidents	1999
1710	Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Career Fire Departments.	2001
1851	Standard on Selection, Care and Maintenance of Structural Fire Fighting Protective Ensembles	2001
1852	Standard on Selection, Care, and Maintenance of Open-Circuit Self-Contained Breathing Apparatus (SCBA).	2002
1901	Standard for Automotive Fire Apparatus	2003
1906	Standard for Wildland Fire Apparatus	2001
1911	Standard for Service Test of Fire pump Systems on Fire Apparatus	2002
1912	Standard for Fire Apparatus Refurbishing	2001
1914	Standard for Testing Fire Department Aerial Devices	2002
1915	Standard for Fire Apparatus Preventive Maintenance Program	2000
1925	Standard on Marine Fire-Fighting Vessels	1998
1931	Standard on design of and Design Verification Tests for the Fire Department Ground Ladders	1999
1932	Standard on Use, Maintenance, and Service Testing of Fire Department Ground Ladders	1999
1936	Standard on Powered Rescue Tool Systems	1999
1951	Standard on Protective Ensemble for USAR Operations	2001
1961	Standard on Fire Hose	2002
1962	Standard for the Inspection, Care, and Use of Fire Hose, Couplings, and Nozzles	2003
1963	Standard for Fire Hose Connections	2003
1964	Standard for Spray Nozzles	2003
1965	Standard for Hose Appliances	2003
1971	Standard on Protective Ensembles for Structural Fire Fighting	2000
1975	Standard on Station/Work Uniforms for Fire and Emergency Services	1999
1976	Standard on Protective Ensemble for Proximity Fire Fighting	2000
1977	Standard on Protective Clothing and Equipment for Wildland Fire Fighting	1998
1981	Standard on Open-Circuit Self-Contained Breathing Apparatus for Fire and Emergency Services	2002
1982	Standard on Personal Alert Safety Systems (PASS)	1998
1983	Standard on Fire Service Life Safety Rope and System Components	2001
1989	Standard on Breathing Air Quality for Fire and Emergency Services Respiratory Protection	2003
1991	Standard on Vapor-Protective Ensembles for Hazardous Materials Emergencies	2000
1992	Standard on Liquid Splash-Protective Ensembles and Clothing for Hazardous Materials Emergencies	2000
1994	Standard on Protective Ensembles for Chemical/Biological Terrorism Incidents	2001
1999	Standard on Protective Clothing for Emergency Medical Operations	2003
2001	Standard on Clean Agent Fire Extinguishing Systems	2000
2112	Standard on Flame-Resistant Garments for Protection of Industrial Personnel Against Flash Fire	2001
2113	Standard on Selection, Care, Use, and Maintenance of Flame-Resistant Garments for Protection of Industrial Personnel Against Flash Fire.	2001
5000	Building Construction and Safety Code	2003

(c) The codes listed in Tables 2 through 5 published by the American Society of Mechanical Engineers (ASME), the American National

Standards Institute (ANSI), the American Petroleum Institute (API), the American Water Works Association (AWWA), and Underwriters

Laboratories (UL) as applicable to pressure retaining components including pressure vessels, piping, valves, fittings, flanges and gaskets.

TABLE 2.—ASME BOILER AND PRESSURE VESSEL CODE (2004)

Section	Title
I	Power Boilers.
II	Materials.
III	Rules for Construction of Nuclear Facility Components.
IV	Heating Boilers.
V	Non Destructive Examination.
VI	Recommended Rules for Care and Operation of Heating Boilers.
VII	Recommended Guidelines for the Care of Power Boilers.
VIII	Pressure Vessels.
IX	Welding and Brazing Qualifications.
X	Fiber-Reinforced Plastic Pressure Vessels.
XI	Rules for In-Service Inspection of Nuclear Power Plant Components.

TABLE 3.—ANSI/ASME PIPING CODES

Section	Title	Edition
B31.1	Power Piping	2001
B31.2	Fuel Gas Piping	1968
B31.3	Process Piping	2002
B31.4	Pipeline Transportation Systems, Liquid Hydrocarbon, Other Liquids	2002
B31.5	Refrigeration Piping and Heat Transfer Components	2001
B31.8	Gas Transmission and Distribution Piping Systems	2004
B31.9	Building Services Piping	1996
B31.11	Slurry Transportation Piping Systems	2003

TABLE 4.—ASME CODES FOR VALVES, FITTINGS, FLANGES AND GASKETS

Section	Title	Edition
B16.1	Cast Iron Pipe Flanges and Fittings	1998
B16.3	Malleable Iron Threaded Fittings	1998
B16.4	Gray Iron Threaded Fittings	1998
B16.5	Pipe Flanges and Flanged Fittings	1996
B16.9	Factory-Made Wrought Buttwelding Fitting	2001
B16.10	Face-to-Face and End-to-End Dimensions of Valves	2000
B16.11	Forged Fittings Socket-Welding and Threaded	2001
B16.12	Cast Iron Threaded Drainage Fittings	1998
B16.14	Ferrous Pipe Plugs, Bushings and Locknuts with Pipe Threads	1991
B16.15	Cast Iron Bronze Threaded Fittings	1985
B16.18	Cast Copper Alloy Solder Joint Pressure Fittings	2001
B16.20	Metallic Gasket for Pipe Flanges: Ring-Joint Spiral-Wound and Jacketed	1998
B16.21	Nonmetallic Flat Gaskets for Pipe Flanges	1992
B16.22	Wrought Copper and Copper Alloy Solder Joint Pressure Fittings	2001
B16.23	Cast Copper Alloy Solder Joint Drainage Fittings	2002
B16.25	Buttwelding Ends	1997
B16.26	Cast Copper Alloy Fittings for Flared Copper Tubes	1998
B16.28	Wrought Steel Buttwelding Short Radius Elbows and Returns	1994
B16.29	Wrought Copper and Wrought Copper Alloy Solder Joint Drainage Fittings	2001
B16.33	Manually Operated Metallic Gas Valves for Use in Gas Piping Systems up to 125psi	2001
B16.34	Valves-Flanged, Threaded and Welding End	1996
B16.36	Orifice Flanges	1996
B16.38	Large Metallic Valves for Gas Distribution (manually operated NPS 2½ to 12, 125 psig)	1985
B16.39	Malleable Iron Threaded Pipe Unions	2003
B16.40	Manually Operated Thermoplastic Gas Shutoffs and Valves in Gas Distribution Systems	2002
B16.42	Ductile Iron Pipe Flanges and Fittings: Classes 150 and 300	2001
B16.44	Manually Operated Metallic Gas Valves for Use in Above Ground Piping Systems up to 5psi	1968
B16.45	Cast Iron Fittings for Solvent Drainage Systems	2002
B16.47	Large diameter Steel Flanges: NPS26 through NPS60	1999
B16.48	Steel Line Blanks	2002
B16.49	Factory-Made Wrought Steel Buttwelding Induction Bends	2001
B16.50	Wrought Copper and Copper Alloy Braze-Joint Pressure Fittings	1992

TABLE 5.—CODES AND STANDARDS FOR ADDITIONAL PRESSURE RETAINING COMPONENTS

Section	Title	Edition
Compressors:		
ASME B19.1	Safety Standard for Air Compressor Systems	1995
ASME B19.3	Safety Standard for Compressor for Process Industries	1991
Pumps:		
API-610	Centrifugal Pump for General Refinery Service, American Petroleum Institute	2003
Tanks:		
ASME B96.1	Welder Aluminum Alloy Storage Tanks	1991
API-620	Design and Construction of Large Welded Low Pressure Storage	2002
API-650	Atmospheric Welded Steel Tanks for Oil Storage, American Petroleum Institute	1996
AWWA-D100	Welded Steel Tanks for Water Storage, American Water Works Association	1996
API-2000	Venting Atmospheric and Low Pressure Storage Tanks	1998
API-2510	Design and Construction of Liquid Petroleum Gas (LPG) Installations	2001
UL-58	Steel Underground Tanks for Flammable and Combustible Liquids, Underwriters Valve Laboratories	1998
UL-142	Steel Aboveground Tanks for Flammable and Combustible Liquids, Underwriters Laboratories	2003
API-653	Tank Inspection, Repair, and Reconstruction, American Petroleum Institute	2001
Pressure Vessel:		
API-660	Shell and Tube Heat Exchange to General Refinery Service, American Petroleum Institute	2001

(d) Exposure limits and technical requirements of the American National Standards Institute (ANSI) contained in the following standards:

- (1) Z136.1, Safe Use of Lasers (2000);
- (2) Z88.2, Practices for Respiratory Protection (2004); and
- (3) Z49.1, Safety in Welding, Cutting and Allied Processes, Sections 4.3 and E4.3 (1999).

(e) American Conference of Governmental Industrial Hygienists (ACGIH) standard, Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices, in effect as of [Insert Effective Date of The Final Rule]. This standard shall be used in lieu of OSHA Permissible Exposure Limits in the event that the ACGIH Threshold Limit Values are lower (more protective) than the comparable OSHA limit.

#### **§ 851.202 Construction safety.**

(a) A contractor responsible for a workplace with a construction project must:

(1) Prepare an activity-level hazard analysis prior to commencement of affected work. Such an analysis shall:

- (i) Identify foreseeable hazards and planned protective and mitigative measures;
- (ii) Provide drawings and/or other documentation of protective measures that a Professional Engineer or other competent person is required to prepare; and
- (iii) Define the qualifications of competent persons required for workplace inspections.

(2) Inform workers of foreseeable hazards and the protective and mitigative measures described within the activity-level hazard analysis prior to beginning work on the affected construction operation.

(3) Require workers to utilize protective or mitigative measures as a condition of employment as well as acknowledge being informed of the hazards and protective and mitigative measures.

(4) During periods of active construction, have a designated representative, who has received specific training and is knowledgeable about the hazards of construction, on site at all times to conduct and document daily inspections of the workplace, and to identify and correct hazards and instances of noncompliance with project safety and health requirements. Workers must be instructed to report to the designated representative unforeseen hazards not previously identified or evaluated. If immediate corrective action is not possible or the hazard falls outside of

project scope, the contractor must immediately notify affected workers, post appropriate warning signs, implement needed interim control measures, and notify DOE of the action taken. The contractor or the designated representative must stop work in the affected area until protective or mitigative measures are established.

(b) With respect to a construction project above the monetary threshold established by the Davis-Bacon Act (40 U.S.C. 276a), a contractor must prepare a written construction project safety and health plan to implement the requirements of paragraph (a) of this section and obtain approval of the plan by DOE prior to commencement of any work covered by the plan. In the plan, the contractor shall designate the individual(s) responsible for on-site implementation of the plan, specify qualifications for those individuals, and provide a list of those project operations to which the health and safety plan applies.

#### **§ 851.203 Fire protection.**

(a) A contractor responsible for a workplace must establish and implement a comprehensive fire protection and response program. This program must contain, at a minimum, the following elements:

(1) A current policy statement that describes specific management commitments to support a level of fire protection and response capability sufficient to minimize the potential for losses from fire and related hazards consistent with the best class of protected property in private industry.

(2) Comprehensive, written fire protection criteria that incorporate the requirements of this section, the provisions of the standards delineated in § 851.201, and additional site-specific aspects of the fire protection program. Site-specific aspects include the organization, training, and responsibilities of the fire protection staff, administrative aspects of the fire protection program, and requirements for the design, installation, operability, inspection, maintenance, and testing of fire protection systems.

(3) Written fire safety procedures governing the use and storage of combustible, flammable, radioactive, and hazardous materials so as to minimize the risk from fire. Such procedures must also exist for fire protection system impairments and for activities such as smoking, hot work, safe operation of process equipment, and other fire prevention measures that contribute to the decrease in fire risk.

(4) A requirement to incorporate the DOE fire protection program in the

plans and specifications for all new facilities and for significant modifications of existing facilities, including a written review by a qualified fire protection engineer of plans, specifications, procedures, and acceptance tests.

(5) Fire hazards analyses (FHAs), developed using a graded approach, for all nuclear facilities, significant new facilities, and facilities that represent unique or significant fire safety risks.

(6) Access to a qualified and trained fire protection staff, including a fire protection engineers, technicians, and fire-fighting personnel.

(7) A current Baseline Needs Assessment that establishes the minimum required capabilities of site fire-fighting forces needed to assure worker safety and health. This includes minimum staffing, apparatus, facilities, equipment, training, fire pre-plans, off-site assistance requirements, and procedures. Information from this assessment must be incorporated into the site Emergency Plan. Such assessments shall be updated as needed but at least every three years.

(8) Written pre-fire strategies, plans, and standard operating procedures for special hazards to enhance the effectiveness of any site fire-fighting forces.

(9) A comprehensive, documented fire protection self-assessment program, which includes all aspects (program and facility) of the fire protection program. Assessments must be performed on a regular basis, but at least every three years.

(10) A program to identify, prioritize, and monitor the status of fire protection-related appraisal findings/recommendations until final resolution is achieved.

(11) Provision for interim compensatory measures to minimize fire risk if final resolution under paragraph (a)(10) will be significantly delayed.

(12) A process for reviewing and recommending approval of fire safety code and standard equivalencies to the Site Manager.

(13) Fire safety performance measures, approved by the Site Manager, that provide a basis for evaluating the success or failure of all major elements of the site fire protection and response program.

(b) The contractor must review in-depth, and if appropriate, perform or update any analysis or assessment required under paragraphs (a)(5), (a)(7), and (a)(9) of this section at least once every three years. With respect to non-nuclear facilities, the Site Manager may approve a longer period for updating the

document via a written memorandum to the contractor.

(c) A contractor responsible for the design of a new DOE facility or major modification to an existing DOE facility must ensure that the design provides:

(1) A reliable water supply of adequate capacity for fire suppression.

(2) Noncombustible or fire-resistive construction, where appropriate, including complete fire-rated barriers, that is commensurate with the fire hazard to isolate hazardous occupancies and to minimize fire spread.

(3) Automatic fire extinguishing systems throughout all nuclear and other significant facilities and in all areas subject to significant life safety hazards.

(4) A means to summon the fire department in the event of a fire, such as a fire alarm signaling system.

(5) A means to notify and evacuate building occupants in the event of a fire, such as a fire detection or fire alarm system and illuminated, protected egress paths.

(6) Physical access and appropriate equipment to facilitate effective intervention by the fire department, such as an interior standpipe system(s) in multi-story or large facilities with complex configurations.

(7) Fire and related hazards that are unique to DOE and are not addressed by industry codes and standards shall be protected by isolation, segregation, or use of special fire control systems, such as inert gas or explosion suppression, as determined by the FHA.

#### § 851.204 Explosives safety.

A contractor responsible for a workplace involving the use of explosive materials (except materials used only for routine construction, demolition, and tunnel blasting) must establish and implement a comprehensive explosives safety program. This program must contain, at a minimum, the following elements:

(a) The Contractor must establish plans and procedures to achieve:

(1) Protection of explosives from abnormal stimuli and adverse environments;

(2) Proper hazard identification, analysis, controls and communication;

(3) Safe work environment, including proper personnel protection, safe equipment, processing, testing, and material handling, and

(4) Effective measures for security and emergency control.

(b) The contractor must maintain limits and controls on the maximum number of personnel permitted in the workplace, commensurate with personnel protection and work efficiency.

(c) The contractor must require use of personal protective equipment in order to protect personnel from the specific hazards of the operations.

(d) Pursuant to an approved training and certification program, the contractor must properly train personnel before they are assigned to explosive operations or to operate any explosive transport vehicle. Each contractor must have an approved training and certification program.

(e) Quantity-distance criteria must account for:

(1) The types and severity of hazards each explosive material present;

(2) The construction and orientation of facilities to which the criteria are applied; and

(3) The degree of protection desired for personnel and facilities adjacent to the explosives operations.

(f) The contractor must base the level of protection required for an explosives activity on the hazard class (accident potential) for the explosive activity involved, as follows:

(1) Bays for Class IV (negligible probability of accidental initiation) activities must provide protection from fire hazard effects.

(2) Bays for Class III (low accident potential) activities must provide protection from explosion propagation from bay-to-bay within buildings and between buildings located at intra-line or magazine distance.

(3) Bays for Class II (moderate accident potential) activities must comply with the requirements of Class III bays, and in addition provide protection to prevent fatalities and severe personnel injuries in all occupied areas other than the bay of occurrence.

(4) Bays for Class I (high accident potential) activities must comply with the requirements of Class II bays, and in addition provide protection to prevent serious injuries to all personnel, including personnel performing the activity, persons in other occupied areas, and transients.

(5) Bays for joint explosives-plutonium activities must also comply with the following:

(i) Bays for Uncased Explosives Plutonium Activities. Where it is necessary to store, handle, or process uncased explosives components and plutonium in the same bay, the enclosing structure and its ventilation, electrical, fire protection, and utility systems must be designed to assure that, if all the explosives present should detonate, radiation exposures are within applicable limits for hypothesized accidental releases. The documented safety analysis governs the quantity of plutonium allowed in such a bay.

Activities may be performed in Class IV bays if only insensitive high explosives (IHE), IHE subassemblies, or IHE weapons are present; however, criticality considerations must govern the quantity of plutonium allowed.

(ii) Bays for Cased Explosives Plutonium Activities. When handling or processing cased high explosive components that contain plutonium, the enclosing structure must be designed as a Class II (moderate accident potential) explosives bay. Storage must conform to Class III (low accident potential) requirements. The plutonium quantity must be limited to 55 lbs (25 kg) per bay. Activities may be performed in Class IV bays if only IHE, IHE subassemblies, or IHE weapons are present; however, criticality considerations govern the quantity of plutonium allowed.

(f) *Fire protection.* A comprehensive operational safety plan shall be developed to control personnel and facility design. Automatic fire suppression systems must be installed in all buildings containing high explosives and plutonium, with the exception of storage magazines. The fire protection system design must ensure that the system in any bay remains operable should detonation occur in any other bay. Firebreaks shall be established around all explosives handling facilities.

(g) *Explosive facility siting and design criteria references.* Blast-resistant design for personnel and facility protection must be based on the TNT equivalency of the maximum quantity of explosives and propellants, plus 20 per cent. The technical basis for location, engineering, design, and operation (under normal and potential design basis accident conditions) of buildings must comply with approved guidelines to achieve the most conservative design for the protection of workers.

(h) *Electrical storms and lightning protection.* The contractor must provide protection to personnel working in explosive areas, and personnel near those areas, from the consequences of an explosive incident resulting from a lightning strike by developing and implementing a Lightning Detection and Warning Plan that includes as a minimum:

(1) Evaluation of lightning risk;

(2) Lightning protection system installation, employing Mast, Catenary, Integral Air Terminal, surge suppressor, bonding, Faraday cage, or partial Faraday cage;

(3) Techniques and procedures for initial installation of each approved lightning protection system;

(4) Techniques and procedures for retrofitting structures to a partial Faraday cage type of lightning protection, if a decision is made to retrofit the structure; and

(5) Administrative control such as stopping of work and evacuation of personnel in the event of a lightning warning.

**§ 851.205 Pressure retaining component safety.**

(a) A contractor responsible for a workplace must establish safety policies and procedures to ensure that pressure systems are designed, fabricated, tested, inspected, maintained, repaired, and operated by trained and qualified personnel in accordance with applicable and sound engineering principles.

(b) If national consensus codes and standards in § 851.201 are determined not to be applicable following an independent peer review process, the contractor must implement DOE-approved measures (if allowed by the governing provisions of the code or consensus standard) based upon a reasonable interpretation of the intent of existing standards. If the applicable provisions of the code or consensus standard do not permit clarification or interpretation, the contractor must provide equivalent protection and ensure safety equal to or superior to the intent of the closest applicable code or standard following an independent peer review process, subject to DOE approval.

**§ 851.206 Motor vehicle safety.**

(a) A contractor responsible for a workplace must implement a motor vehicle safety program to protect the safety and health of all drivers and passengers in Government-owned or -leased motor vehicles and powered industrial equipment (*i.e.*, fork trucks, tractors, platform lift trucks, and other similar specialized equipment powered by an electric motor or an internal combustion engine).

(b) The contractor must tailor the motor vehicle safety program to the individual DOE site or facility, based on an analysis of the needs of that particular site or facility.

(c) The motor vehicle safety program must include:

(1) Minimum licensing requirements (including appropriate testing and medical qualification) for personnel operating motor vehicles and powered industrial equipment;

(2) Requirements for the use of seat belts and provision of other safety devices.

(3) Training for specialty vehicle operators;

(4) Requirements for motor vehicle maintenance and inspection;

(5) Uniform traffic and pedestrian control devices and road signs;

(6) On-site speed limits and other traffic rules;

(7) Awareness campaigns and incentive programs to encourage safe driving; and

(8) Enforcement provisions.

**§ 851.207 Biological safety.**

A contractor responsible for a workplace must establish and implement a biological safety program that:

(a) Establishes an Institutional Biosafety Committee (IBC) or equivalent. The IBC shall:

(1) Review any work with biological etiologic agents for compliance with appropriate CDC, NIH, WHO, and other international, Federal, State, and local guidelines and assess the containment level, facilities, procedures, practices, and training and expertise of personnel; and

(2) Review for compliance the site security, safeguards, and emergency management plans and procedures, as related to work with biological etiologic agents.

(b) Maintains a readily retrievable inventory and status of biological etiologic agents, and provides to the responsible field and area office, through the laboratory IBC (or its equivalent), an annual status report describing the status and inventory of biological etiologic and program.

(c) Provides for submission to the head of the appropriate DOE field element, for review and concurrence before transmittal to the Center for Disease Control (CDC), each Laboratory Registration/Select Agent Program registration application package requesting registration of a laboratory facility at Biosafety Level 2, 3, or 4, for the purpose of transferring, receiving, or handling biological select agents.

(d) Provides for submission to the head of the appropriate DOE field element a copy of each CDC Form EA-101, Transfer of Select Agents, upon initial submission of the Form EA-101 to a vendor or other supplier requesting or ordering a biological select agent for transfer, receipt, and handling in the registered facility. Submit the completed copy of the Form EA-101, documenting final disposition and/or destruction of the select agent, within 10 days of completion of the Form EA-101.

(e) Confirms that the site safeguards and security plans and emergency management programs address biological etiologic agents, with

particular emphasis on biological select agents.

(f) Establishes an immunization policy for personnel working with biological etiologic agents based on the DOE facility evaluation of risk and benefit of immunization.

**§ 851.208 Firearms safety.**

(a) A contractor responsible for a workplace must establish firearms safety policies and procedures for security operations and training to ensure proper accident prevention controls are in place.

(1) Written procedures must address firearms safety, engineering and administrative controls, as well as personal protective equipment requirements. For security operations conducted in accordance with policy on counter terrorism, use of Department of Defense military type masks for respiratory protection by security personnel is acceptable.

(2) As a minimum, procedures must be established for:

(i) Storage, handling, cleaning, inventory, and maintenance of firearms and associated ammunition;

(ii) Activities such as loading, unloading, and exchanging firearms. These procedures must address use of bullet containment devices and those techniques to be used when no bullet containment device is available;

(iii) Use and storage of pyrotechnics, explosives, and/or explosive projectiles;

(iv) Handling misfires, duds, and unauthorized discharges;

(v) Live fire training, qualification, and evaluation activities;

(vi) Training and exercises using engagement simulation systems;

(vii) Medical response at firearms training facilities; and

(viii) Use of firing ranges by personnel other than DOE or DOE contractor protective forces personnel.

(b) A contractor must ensure that personnel responsible for the direction and operation of the firearms safety program are professionally qualified and have sufficient time and authority to implement the procedures under this section.

(c) A contractor 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.

(d) A contractor must conduct formal appraisals assessing implementation of procedures, personnel responsibilities, and duty assignments to ensure overall policy objectives and performance



criteria are being met by qualified, responsible personnel.

(e) A contractor must implement procedures related to firearms training, live fire range safety, qualification, and evaluation activities, including procedures requiring that:

(1) Personnel must successfully complete initial firearms safety training before being issued any firearms. Authorization to remain in armed status will continue only if the employee demonstrates the technical and practical knowledge of firearms safety semi-annually;

(2) Authorized armed personnel must demonstrate through documented limited scope performance tests both technical and practical knowledge of firearms handling and safety on a semi-annual basis;

(3) All firearms training lesson plans must incorporate safety for all aspects of firearms training task performance standards. The lesson plans must follow the standards set forth by the Safeguards and Security Central Training Academy's standard training programs;

(4) Firearms safety briefings must immediately precede training, qualifications, and evaluation activities involving live fire and/or engagement simulation systems;

(5) A safety analysis approved by DOE line management must be developed for the facilities and operation of each live fire range prior to implementation of any new training, qualification, or evaluation activity. Results of these analyses must be incorporated into procedures, lesson plans, exercise plans, and limited scope performance tests;

(6) Firing range safety procedures must be conspicuously posted at all primary range facilities;

(7) Live fire ranges, approved by the Site Manager, must be properly sited to protect personnel on the range, as well as personnel and property not associated with the range.

(f) Contractors must develop a safety or risk analysis for all facilities or areas in which firearms will be introduced in accordance with the local protection strategy. Such analyses must be approved by DOE line management.

(g) Contractors must ensure that the transportation, handling, placarding, and storage of munitions conform to the applicable requirements of DOE policy directives.

#### **§ 851.209 Industrial hygiene.**

(a) A contractor responsible for a covered workplace must implement a comprehensive and effective industrial hygiene program to reduce the risk of work-related disease or illness.

(b) The industrial hygiene program must include the following elements:

(1) Initial or baseline surveys of all work areas or operations to identify and evaluate potential worker health risks;

(2) Coordination with planning and design personnel to anticipate and control health hazards that proposed facilities and operations would introduce;

(3) Coordination with cognizant occupational medical, environmental, health physics, and work planning professionals;

(4) Policies and procedures to mitigate the risk from identified and potential occupational carcinogens; and

(5) Professionally and technically qualified industrial hygienists to manage and implement the industrial hygiene program.

#### **§ 851.210 Occupational medicine.**

(a) A contractor responsible for a covered workplace must establish and maintain an Occupational Medical Program (OMP) to provide comprehensive occupational health services to contractor employees. At sites with operations performed by more than one contractor, several contractors may agree to use services provided under a single contractor's OMP. A contractor having no employees who work on the DOE site for 30 or more days in a year and who has no workers enrolled in a medical surveillance program, regardless of length of employment, is not required to have an OMP.

(b) The OMP must be directed by a site occupational medical director (SOMD) who must be a graduate of a school of medicine or osteopathy and licensed for the practice of medicine in the state in which the site is located.

(c) Occupational medical physicians, occupational health nurses, physician's assistants, nurse practitioners, psychologists, and other occupational health personnel on the OMP staff must be licensed, registered, or certified as required by Federal or State law where employed.

(d) A contractor must promote communication and coordination between all environmental, safety, and health groups and specifically provide the SOMD with the following:

(1) Current information about actual or potential work-related site hazards (chemical, physical, biological, or ergonomic);

(2) Employee job-task and hazard-analysis information, including essential job functions;

(3) Actual or potential work-site exposures of each employee prior to

medical placement or surveillance evaluations;

(4) Notification of employee job transfers;

(5) Notification when an employee has been absent because of an injury or illness for more than 5 consecutive workdays (or an equivalent time period for those individuals on an alternative work schedule);

(6) Information on, and the opportunity to participate in, worker health protection team meetings and committees;

(7) Access to the workplace for evaluation of job conditions and issues relating to workers' health;

(e) The SOMD, or designated OMP staff, must:

(1) Plan and implement the OMP;

(2) Prepare, review and update annually a formal written plan detailing the methods and procedures implementing the OMP and documenting the contractor's compliance with this subsection; and

(3) Participate in worker protection teams to build and maintain necessary partnership among workers, managers, and safety and health professionals in establishing and maintaining a safe and healthful workplace.

(f) A record, containing any medical, clinical, health history, exposure history, and demographic data collected under the OMP, must be developed and maintained for each employee for whom medical services are provided. Beginning January 2007, all OMP medical records should be kept in an electronic format.

(1) Employee medical, psychological, and assistance records must be kept confidential, protected from unauthorized access, and stored under conditions that ensure their long-term preservation. Access to these records shall be provided in accordance with DOE Privacy Act implementing regulations.

(2) The SOMD must determine the content of the worker health evaluations, which must be conducted under the direction of a licensed physician, in accordance with current sound and acceptable medical practices and all pertinent statutory and regulatory requirements, such as the Americans with Disabilities Act.

(3) Each SOMD must maintain an up-to-date list of all evaluations and tests that are offered, submit the list annually through the cognizant Field Element to the Office of Environment, Safety and Health, and make this list openly available to all site workers.

(4) The purpose and nature of these medical tests and their results must be

clearly communicated verbally and in writing to each worker offered testing;

(5) The communication must be documented in the medical chart by the signature of the occupational health examiner and the worker.

(6) The following health evaluations must be conducted when determined necessary by the SOMD for the purpose of providing initial and continuing assessment of employee fitness for duty:

(i) At the time of employment entrance or job transfer, a Medical Placement examination will evaluate the individual's general health and physical and emotional capacity to perform work to establish a baseline record of physical condition and assure fitness for duty.

(ii) Periodic hazard-based medical monitoring or qualification-based fitness for duty evaluations required by regulations and standards, or as recommended by the SOMD, will be provided on the frequency required.

(iii) Diagnostic examinations will evaluate employee's injuries and illnesses to determine work-relatedness, the degree of disability, and if needed, referral for definitive care.

(iv) After a work-related absence or an absence of 5 or more consecutive workdays (or an equivalent time period for those individuals on an alternative work schedule), a return to work evaluation will determine the individual's physical and emotional capacity to perform work and return to duty.

(v) At the time of separation from employment, the individual's general health will be evaluated to establish a record of physical condition.

(g) The SOMD must place an individual under medical restrictions when health evaluations so indicate that the worker should not perform certain job tasks.

(1) The SOMD or designee must notify the worker and contractor management when employee work restrictions are imposed or removed.

(2) The OMP must monitor ill and injured workers to facilitate their rehabilitation and safe return to work and to minimize lost time and its associated costs.

(3) Occupational medical physicians and medical staff must, on a timely basis, communicate results of health trend evaluations to management and site worker health protection professionals responsible for mitigating worksite hazards.

(h) The SOMD must review and approve the medical and behavioral aspects of employee counseling and health promotional programs, including the following types:

(1) Contractor-sponsored or contractor-supported employee assistance programs;

(2) Contractor-sponsored or contractor-supported alcohol and other substance abuse rehabilitation programs; and

(3) Contractor-sponsored or contractor-supported wellness programs.

(4) The SOMD must review the medical aspects of immunization programs, blood-borne pathogens programs, and bio-hazardous waste programs to evaluate their conformance to applicable guidelines.

(i)(1) The SOMD must review and develop procedures consistent with the medical portion of the site emergency and disaster preparedness plans.

(2) The SOMD and staff must integrate the medical portion with nearby community emergency and disaster plans.

#### Subpart D—Exemption Relief

##### § 851.300 Exemptions.

(a) The Cognizant Secretarial Officer who is primarily responsible for the contractor activity to which a worker safety and health requirement applies may grant a temporary or permanent exemption from that requirement.

(b) The Cognizant Secretarial Officer:

(1) Must provide a copy of the exemption request and supporting documentation to the Assistant Secretary for Environment, Safety and Health for a thirty day review;

(2) May not grant the exemption prior to the conclusion of the thirty day review period unless the Assistant Secretary for Environment, Safety and Health comments earlier; and

(3) If the Cognizant Secretarial Officer is not part of NNSA, may not grant the exemption if the Assistant Secretary for Environment, Safety and Health non-concurs during the thirty day review period.

(c) An exemption must set forth in writing:

(1) The requirement for which the exemption is granted;

(2) The basis for the determination that the criteria in § 851.301 have been met;

(3) The workplaces to which and the circumstances under which the exemption applies; and

(4) Any terms and conditions to which the exemption is subject.

(d) The authority to grant or deny exemptions may not be delegated.

##### § 851.301 Exemption criteria.

(a) An exemption to a worker safety and health requirement must:

(1) Be consistent with law;

(2) Adequately protect the health and safety of workers;

(3) Be consistent with a safe and healthful workplace free from recognized hazards that are causing or are likely to cause death or serious bodily injury;

(4) Not permit exposure limits that are less protective than the limits required by this part or not otherwise diminish the level of protection afforded workers; and

(5) Involve one of the "special circumstances" as set forth in paragraph (b) of this section.

(b) With respect to a particular work environment, "special circumstances" means a situation in which:

(1) Application of the requirement leads to a conflict with another applicable statutory, regulatory or contractual requirement; or

(2) Application of the requirement would not serve its underlying purpose;

(3) Application of the requirement is not necessary to achieve its underlying purpose and results in resource impacts that are not justified by the safety improvements; or

(4) Application of the requirement would result in a situation significantly different than that contemplated when the requirement was adopted, or significantly different than that encountered by others similarly situated; or

(5) The exemption would result in benefit to worker safety and health that compensates for any detriment that may result from the grant of the exemption; or

(6) Circumstances exist that would justify temporary relief from application of the requirement while taking good faith action to achieve compliance; or

(7) There is present any other material circumstance not considered when the requirement was adopted for which it would be in the public interest to grant an exemption; or

(8) An exemption would contribute to tailoring the requirements of this part to reflect the hazards and facilities associated with a particular work environment; or

(9) The facility is to be permanently closed and demolished, or title is expected to be transferred to another entity for reuse; or

(10) An exemption would contribute substantially to achieving a national security mission of the Department of Energy in an efficient and timely manner.

##### § 851.302 Terms and conditions.

An exemption may contain terms and conditions including provisions that:

- (a) Limit its duration;
- (b) Require alternative action;
- (c) Require partial compliance; or
- (d) Establish a schedule for full or partial compliance.

### Subpart E—Enforcement Process

#### § 851.400 Investigations and inspections.

(a) The Director may initiate and conduct investigations and inspections relating to the scope, nature and extent of compliance by a contractor with the requirements of this part and take such action as the Director deems necessary and appropriate to the conduct of the investigation or inspection.

(b) Contractors must fully cooperate with the Director during all phases of the enforcement process and provide complete and accurate records and documentation as requested by the Director during investigation or inspection activities. Contractors who attempt to falsify records or documentation or otherwise mislead the Director during the enforcement process will be subject to full and unmitigated enforcement of this part, and such cases may be referred to the Department of Justice by the Director for potential criminal investigation.

(c) Any person may request the Director to initiate an investigation or inspection pursuant to paragraph (a) of this section. A request for an investigation or inspection sets forth the subject matter or activity to be investigated or inspected as fully as possible and includes supporting documentation and information.

(d) The Director must inform any contractor that is the subject of an investigation or inspection in writing at the initiation of the investigation or inspection of the general purpose of the investigation or inspection. However, no prior notice of an inspection need be provided to a contractor.

(e) DOE shall not disclose information or documents that are obtained during any investigation or inspection unless the Director directs or authorizes the public disclosure of the investigation. Upon such authorization, the information or documents are a matter of public record and disclosure is not precluded by the Freedom of Information Act, 5 U.S.C. 552 and part 1004 of this title.

(f) A request for confidential treatment of information for purposes of the Freedom of Information Act does not prevent disclosure by the Director if the Director determines disclosure to be in the public interest and otherwise permitted or required by law.

(g) During the course of an investigation or inspection, any

contractor may submit any document, statement of facts, or memorandum of law for the purpose of explaining the contractor's position or furnish information which the contractor considers relevant to a matter or activity under investigation or inspection.

(h) The Director may convene an informal conference to discuss any situation that might be a violation of a requirement of this part, its significance and cause, any correction taken or not taken by the contractor, any mitigating or aggravating circumstances, and any other useful information. A conference is not normally open to the public and DOE does not make a transcript of the conference. The Director may compel a contractor to attend the conference.

(i) If facts disclosed by an investigation or inspection indicate that further action is unnecessary or unwarranted, the Director may close the investigation without prejudice to further investigation or inspection at any time that circumstances so warrant.

(j) The Director may issue enforcement letters that communicate DOE's expectations with respect to any aspect of the requirements of this part, including identification and reporting of issues, corrective actions, and implementation of the contractor's safety and health program; provided that an enforcement letter may not create the basis for any legally enforceable requirement pursuant to this part.

(k) The Director may sign, issue and serve subpoenas.

#### § 851.401 Settlement.

(a) DOE encourages settlement of a proceeding under this subpart at any time if the settlement is consistent with this part. The Director and a contractor may confer at any time concerning settlement. A settlement conference is not open to the public and DOE does not make a transcript of the conference.

(b) Notwithstanding any other provision of this part, the Director may resolve any issues in an outstanding proceeding under this subpart with a consent order.

(1) The Director and the contractor, or a duly authorized representative, must sign the consent order and indicate agreement to the terms contained therein.

(2) A contractor is not required to admit in a consent order that a requirement of this part has been violated.

(3) DOE is not required to make a finding in a consent order that a contractor has violated a requirement of this part.

(4) A consent order must set forth the relevant facts which form the basis for the order and what remedy, if any, is imposed.

(5) A consent order shall constitute a final order.

#### § 851.402 Preliminary notice of violation.

(a) Based on a determination by the Director that there is a reasonable basis to believe a contractor has violated or is continuing to violate a requirement of this part, the Director may issue a preliminary notice of violation to the contractor.

(b) The Director must send a preliminary notice of violation by certified mail, return receipt requested.

(c) A preliminary notice of violation must indicate:

(1) The date, facts, and nature of each act or omission upon which each alleged violation is based;

(2) The particular requirement involved in each alleged violation;

(3) The proposed remedy for each alleged violation, including the amount of any civil penalty; and

(4) The right of the contractor to submit a written reply to the Director within 30 calendar days of receipt of the preliminary notice of violation.

(d) A reply to a preliminary notice of violation must contain a statement of all relevant facts pertaining to an alleged violation.

(1) The reply must:

(i) State any facts, explanations and arguments which support a denial of the alleged violation;

(ii) Demonstrate any extenuating circumstances or other reason why a proposed remedy should not be imposed or should be mitigated;

(iii) Discuss the relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE; and

(iv) Furnish full and complete answers to any questions set forth in the preliminary notice.

(2) Copies of all relevant documents must be submitted with the reply.

(e) If a contractor fails to submit a written reply within 30 calendar days of receipt of a preliminary notice of violation:

(1) The contractor relinquishes any right to appeal any matter in the preliminary notice; and

(2) The preliminary notice, including any proposed remedies therein, constitutes a final order.

#### § 851.403 Final notice of violation.

(a) If a contractor submits a written reply within 30 calendar days of receipt of a preliminary notice of violation, the

Director must review the submitted reply and make a final determination whether the contractor violated or is continuing to violate a requirement of this part.

(b) Based on a determination by the Director that a contractor has violated or is continuing to violate a requirement of this part, the Director may issue to the contractor a final notice of violation that states concisely the determined violation and any remedy, including the amount of any civil penalty imposed on the contractor. The final notice of violation must state that the contractor may petition the Office of Hearings and Appeals for review of the final notice in accordance with 10 CFR part 1003, subpart G.

(c) The Director must send a final notice of violation by certified mail, return receipt requested.

(d) If a contractor fails to submit a petition for review to the Office of Hearings and Appeals within 30 calendar days of receipt of a final notice of violation pursuant to § 851.45:

(1) The contractor relinquishes any right to appeal any matter in the final notice; and

(2) The final notice, including any remedies therein, constitutes a final order.

#### **§ 851.404 Administrative appeal.**

(a) Any contractor that receives a final notice of violation may petition the Office of Hearings and Appeals for review of the final notice in accordance with part 1003, subpart G of this title, within 30 calendar days from receipt of the final notice.

(b) In order to exhaust administrative remedies with respect to a final notice of violation, the contractor must petition the Office of Hearings and Appeals for review in accordance with paragraph (a) of this section.

#### **§ 851.405 Direction to NNSA contractors.**

(a) Notwithstanding any other provision of this part, the NNSA Administrator, rather than the Director, signs, issues and serves the following actions that direct NNSA contractors:

- (1) Subpoenas;
- (2) Orders to compel attendance;
- (3) Disclosures of information or documents obtained during an investigation or inspection;
- (4) Preliminary notices of violations; and
- (5) Final notices of violations.

(b) The NNSA Administrator shall act after consideration of the Director's recommendation.

### **Appendix A to Part 851.—General Statement of Enforcement Policy**

#### **I. Introduction**

(a) This policy statement sets forth the general framework through which the U.S. Department of Energy (DOE) will seek to ensure compliance with its worker safety and health regulations, and, in particular, exercise the civil penalty authority provided to DOE in section 3173 of Public Law 107–314, Bob Stump National Defense Authorization Act for Fiscal Year 2003 (December 2, 2002) (“NDAA”), amending the Atomic Energy Act (“AEA”) to add section 234C. The policy set forth herein is applicable to violations of safety and health regulations in this part by DOE contractors, including DOE contractors who are indemnified under the Price Anderson Act, 42 U.S.C. 2210(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to the regulations in this part. It is not intended to establish a “cookbook” approach to the initiation and resolution of situations involving noncompliance with the regulations in this part. Rather, DOE intends to consider the particular facts of each noncompliance situation in determining whether enforcement sanctions are appropriate and, if so, the appropriate magnitude of those sanctions. DOE may well deviate from this policy statement when appropriate in the circumstances of particular cases. This policy statement is not applicable to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval Nuclear Propulsion, or otherwise excluded from the scope of the rule.

(b) The DOE goal in the compliance arena is to enhance and protect the safety and health of workers at DOE facilities by fostering a culture among both the DOE line organizations and the contractors that actively seeks to attain and sustain compliance with the regulations in this part. The enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for the open and prompt identification and reporting of noncompliances, performance of effective root cause analysis, and initiation of comprehensive corrective actions to resolve both noncompliance conditions and program or process deficiencies that led to noncompliance.

(c) In the development of the DOE enforcement policy, DOE recognizes that the reasonable exercise of its enforcement authority can help to reduce the likelihood of serious incidents. This can be accomplished by providing greater emphasis on a culture of safety in existing DOE operations, and strong incentives for contractors to identify and correct noncompliance conditions and processes in order to protect human health and the environment. DOE wants to facilitate, encourage, and support contractor initiatives

for the prompt identification and correction of problems. DOE will give due consideration to such initiatives and activities in exercising its enforcement discretion.

(d) DOE may modify or remit civil penalties in a manner consistent with the mitigation and adjustment factors set forth in this policy with or without conditions. DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate discretion in taking any enforcement action. Part of the function of a sound enforcement program is to assure a proper and continuing level of safety vigilance. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of safety requirements to DOE facilities and by promoting and coordinating the proper contractor and DOE safety compliance attitude toward those requirements.

#### **II. Purpose**

The purpose of the DOE enforcement program is to promote and protect the safety and health of workers at DOE facilities by:

(a) Ensuring compliance by DOE contractors with the regulations in this part.

(b) Providing positive incentives for DOE contractors:

- (1) Timely self-identification of worker safety deficiencies;
  - (2) Prompt and complete reporting of such deficiencies to DOE;
  - (3) Prompt correction of safety deficiencies in a manner that precludes recurrence; and,
  - (4) Identification of modifications in practices or facilities that can improve worker safety and health.
- (c) Deterring future violations of DOE requirements by a DOE contractor.
- (d) Encouraging the continuous overall improvement of operations at DOE facilities.

#### **III. Statutory Authority**

The Department of Energy Organization Act, 42 U.S.C. 7101–7385o, the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801–5911, and the Atomic Energy Act of 1954, as amended, (AEA) 42 U.S.C. 2011, require DOE to protect the public safety and health, as well as the safety of workers at DOE facilities, in conducting its activities, and grant DOE broad authority to achieve this goal. Section 234C of the AEA makes DOE contractors covered by the DOE Price-Anderson indemnification system, and it makes their subcontractors and suppliers subject to civil penalties for violations of the worker safety and health requirements promulgated in this part. 42 U.S.C. 2282c.

#### **IV. Responsibilities**

(a) The Director, as the principal enforcement officer of the DOE, has been delegated the authority to: (1) Conduct enforcement inspections, investigations, and conferences; (2) issue Notices of Violations and proposed civil penalties, Enforcement Letters, Consent Orders, and subpoenas; and (3) issue orders to compel attendance and disclosure of information or documents obtained during an investigation or inspection. The Secretary issues Compliance Orders.

(b) The NNSA Administrator, rather than the Director, signs, issues and serves the

following actions that direct NNSA contractors: (1) Subpoenas; (2) Orders to compel attendance; (3) Disclosure of information or documents obtained during an investigation or inspection; (4) Preliminary Notices of Violations; and (5) Final Notices of Violations. The NNSA Administrator acts after consideration of the Director's recommendation.

#### V. Procedural Framework

(a) Title 10 CFR part 851 sets forth the procedures DOE will use in exercising its enforcement authority, including the issuance of Notices of Violation and the resolution of an administrative appeal in the event a DOE contractor elects to petition the Office of Hearings and Appeals for review.

(b) Pursuant to 10 CFR part 851 subpart E, the Director initiates the enforcement process by initiating and conducting investigations and inspections and issuing a Preliminary Notice of Violation (PNOV) with or without a proposed civil penalty. The DOE contractor is required to respond in writing to the PNOV within 30 days, either: (1) Admitting the violation and waiving its right to contest the proposed civil penalty and paying it; (2) admitting the violation but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty; or (3) denying that the violation has occurred and providing the basis for its belief that the PNOV is incorrect. After evaluation of the DOE contractor's response, the Director may determine: (1) that no violation has occurred; (2) that the violation occurred as alleged in the PNOV but that the proposed civil penalty should be remitted in whole or in part, or; (3) that the violation occurred as alleged in the PNOV and that the proposed civil penalty is appropriate, notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a Final Notice of Violation (FNOV) or an FNOV and proposed civil penalty.

(c) An opportunity to challenge an FNOV is provided in administrative appeal provisions. 10 CFR 851.45. Any contractor that receives an FNOV may petition the Office of Hearings and Appeals for review of the final notice in accordance with 10 CFR part 1003, Subpart G, within 30 calendar days from receipt of the final notice. An administrative appeal proceeding is not initiated until the DOE contractor against which an FNOV has been issued requests an administrative hearing rather than waiving its right to contest the FNOV and proposed civil penalty, if any, and paying the civil penalty. However, it should be emphasized that DOE encourages the voluntary resolution of a noncompliance situation at any time, either informally prior to the initiation of the enforcement process or by consent order before or after any formal proceeding has begun.

#### VI. Severity of Violations

(a) Violations of the worker safety and health requirements in this part have varying degrees of safety and health significance. Therefore, the relative importance of each violation must be identified as the first step in the enforcement process. Violations of the

worker safety and health requirements are categorized in two levels of severity to identify their relative seriousness. Notices of Violation issued for noncompliance when appropriate, propose civil penalties commensurate with the severity level of the violations involved.

(b) To assess the potential safety and health impact of a particular violation, DOE will categorize violations of worker safety and health requirements as follows:

(1) A Severity Level I violation is a serious violation. A serious violation shall be deemed to exist in a place of employment if there is a potential that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. A Severity Level I violation would be subject to a base civil penalty of up to 100% of the maximum base civil penalty of \$70,000.

(2) A Severity Level II violation is an other-than-serious violation. An other-than-serious violation occurs 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 to employees but does have a direct relationship to their safety and health. A Severity Level II violation would be subject to a base civil penalty up to 50% of the maximum base civil penalty (\$35,000).

(c) *De minimis* violations, defined as a deviation from the requirement of a standard that has no direct or immediate relationship to safety or health, will not be the subject of formal enforcement action through the issuance of a Notice of Violation.

(d) The severity level of a violation will be dependent, in part, on the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent or negligent violations will be viewed differently from those in which there is gross negligence, deception, or willfulness. In addition to the significance of the underlying violation and level of culpability involved, DOE will also consider the position, training and experience of the person involved in the violation. Thus, for example, a violation may be deemed to be more significant if a senior manager of an organization is involved rather than a foreman or non-supervisory employee. In this regard, while management involvement, direct or indirect, in a violation may lead to an increase in the severity level of a violation and proposed civil penalty, the lack of such involvement will not constitute grounds to reduce the severity level of a violation or mitigate a civil penalty. Allowance of mitigation in such circumstances could encourage lack of management involvement in DOE contractor activities and a decrease in protection of worker safety and health.

(e) Other factors which will be considered by DOE in determining the appropriate severity level of a violation are the duration of the violation, the past performance of the DOE contractor in the particular activity area involved, whether the DOE contractor had prior notice of a potential problem, and whether there are multiple examples of the violation in the same time frame rather than

an isolated occurrence. The relative weight given to each of these factors in arriving at the appropriate severity level will be dependent on the circumstances of each case.

(f) DOE expects contractors to provide full, complete, timely, and accurate information and reports. Accordingly, the severity level of a violation involving either failure to make a required report or notification to the DOE or an untimely report or notification will be based upon the significance of, and the circumstances surrounding, the matter that should have been reported. A contractor will not normally be cited for a failure to report a condition or event unless the contractor was actually aware or should have been aware of the condition or event which it failed to report.

(g) The Director may consider the extent to which facility-related and legacy hazards have been mitigated through the use of administrative controls and/or personal protective equipment in determining whether a citation will be issued.

#### VII. Enforcement Conferences

(a) Should DOE determine, after completion of all assessment and investigation activities associated with a potential or alleged violation of the worker safety and health requirements, that there is a reasonable basis to believe that a violation has actually occurred, and the violation may warrant a civil penalty or issuance of an enforcement action, DOE will normally hold an enforcement conference with the DOE contractor involved prior to taking final enforcement action. The enforcement conference may be conducted onsite at the conclusion of a field investigation/inspection. DOE may also elect to hold an enforcement conference for potential violations which would not ordinarily warrant a civil penalty or enforcement action but which could, if repeated, lead to such action. The purpose of the enforcement conference is to: (1) Assure the accuracy of the facts upon which the preliminary determination to consider enforcement action is based; (2) discuss the potential or alleged violations, their significance and causes, and the nature of and schedule for the DOE contractor's corrective actions; (3) determine whether there are any aggravating or mitigating circumstances; and (4) obtain other information which will help determine whether enforcement action is appropriate and, if so, the extent of that enforcement action.

(b) DOE contractors will be informed prior to a meeting when that meeting is considered to be an enforcement conference. Such conferences are informal mechanisms for candid pre-decisional discussions regarding potential or alleged violations and will not normally be open to the public. In circumstances for which immediate enforcement action is necessary in the interest of worker safety and health, such action will be taken prior to the enforcement conference, which may still be held after the necessary DOE action has been taken.

#### VIII. Enforcement Letter

(a) In cases where DOE has decided not to conduct an investigation or inspection or

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

(b) In general, Enforcement Letters communicate DOE's expectations with respect to any aspect of the requirements of this part, including identification and reporting of issues, corrective actions, and implementation of the contractor's safety and health program. DOE might, for example, wish to recognize some action of the contractor that is of particular benefit to worker safety and health that is a candidate for emulation by other contractors. On the other hand, DOE may wish to bring a program shortcoming to the attention of the contractor that, but for the lack of worker safety and health significance of the immediate issue, might have resulted in the issuance of a PNOV. An Enforcement Letter is not an enforcement action.

(c) With respect to many noncompliances, an Enforcement Letter may not be required. When DOE decides that a contractor has appropriately corrected a noncompliance or that the significance of the noncompliance is sufficiently low, it may close out its review simply through an annotation in the DOE Noncompliance Tracking System (NTS). A closeout of a noncompliance with or without an Enforcement Letter may only take place after DOE has confirmed that corrective actions have been completed.

## IX. Enforcement Actions

(a) This section describes the enforcement sanctions available to DOE and specifies the conditions under which each may be used. The basic sanctions are Notices of Violation and civil penalties.

(b) The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. For the vast majority of violations for which DOE assigns severity levels as described previously, a Notice of Violation will be issued, requiring a formal response from the recipient describing the nature of and schedule for corrective actions it intends to take regarding the violation.

### 1. Notice of Violation

(a) A Notice of Violation (either a Preliminary or Final Notice) is a document

setting forth the conclusion of DOE that one or more violations of the worker safety and health requirements have occurred. Such a notice normally requires the recipient to provide a written response which may take one of several positions described in section V of this policy statement. In the event that the recipient concedes the occurrence of the violation, it is required to describe corrective steps which have been taken and the results achieved; remedial actions which will be taken to prevent recurrence; and the date by which full compliance will be achieved.

(b) DOE will use the Notice of Violation as the standard method for formalizing the existence of a violation and, in appropriate cases as described in this section, the Notice of Violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in this section, DOE may refrain from the issuance of an otherwise appropriate Notice of Violation. However, a Notice of Violation will virtually always be issued for willful violations, or if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances, or if the circumstances otherwise warrant increasing lower severity level violations to a higher severity level.

(c) DOE contractors are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for noncompliance with the worker safety and health requirements.

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

(e) The limitations on remedies under Sec. 234C will be implemented as follows:

(1) DOE may assess civil penalties of up to \$70,000 per violation per day on contractors (and their subcontractors and suppliers) that are indemnified by the Price-Anderson Act, 42 U.S.C. 2210(d). 10 CFR 851.4(c). DOE will not assess civil penalties on contractors (and their subcontractors and suppliers) that are not indemnified under the Price-Anderson Act.

(2) DOE may seek contract fee reductions through the contract's Conditional Payment of Fee Clause in the Department of Energy Acquisition Regulation (DEAR). See 10 CFR 851.4(b); 48 CFR parts 923, 952, 970. Policies for contract fee reductions are not established by this policy statement. The contracting officer must coordinate with the Director, the DOE Official to whom the Secretary has assigned the authority to investigate the

nature and extent of compliance with the requirements of this part, before pursuing contract fee reduction in the event of a violation relating to the enforcement of worker safety and health concerns. Likewise, the Director must coordinate with the contracting officer when conducting investigations and pursuing an enforcement action.

(3) For the same violation of a worker safety and health requirement in this part, DOE may pursue either civil penalties (for indemnified contractors and their subcontractors and suppliers) or a contract fee reduction, but not both. 10 CFR 851.4(d).

(4) An upper ceiling applies to civil penalties assessed on certain contractors specifically listed in 170d. of the Atomic Energy Act, 42 U.S.C. 2282a(d), for activities conducted at specified facilities. For these contractors, the total amount of civil penalties and contract penalties in a fiscal year may not exceed the total amount of fees paid by DOE to that entity in that fiscal year. 10 CFR 851.4(e).

(5) DOE will not issue civil penalties under both this part and under the nuclear safety procedural regulations in 10 CFR part 820 for the same violation. 10 CFR 851.4(f).

(f) The Director will coordinate all violations with the appropriate DOE official responsible for administering the Conditional Payment of Fee clause to consider invoking the provisions for reducing contract fees if the violation: (1) Is especially egregious; (2) indicates a general failure to perform under the contract with respect to worker safety and health; or (3) where the responsible DOE line management believes a violation requires swift enforcement and corrective action. The responsible DOE line management would focus on factors such as willfulness, repeated violations, death, serious injury, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls. Such factors involved in a violation would call into question a contractor's commitment and ability to achieve the fundamental obligation of providing safe and healthy workplaces for workers. A notice of violation may still be issued should the election of a contract fee reduction be made. In such cases, the notice of violation will not include a civil penalty. The notice of violation will indicate that no civil penalty is being imposed because DOE has elected a contract fee reduction as the remedy.

### 2. Civil Penalty

(a) A civil penalty is a monetary penalty that may be imposed for violations of requirements of this part. See 10 CFR 851.4(b). Civil penalties are designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of DOE contractor self-identification, reporting, and correction of violations of the worker safety and health requirements in this part.

(b) Absent mitigating circumstances as described below, or circumstances otherwise warranting the exercise of enforcement discretion by DOE as described in this section, civil penalties will be proposed for Severity Level I and II violations.

(c) DOE will impose different base level penalties considering the severity level of the violation by Price-Anderson indemnified contractors. Table A-1 shows the daily base civil penalties for the various categories of severity levels. However, as described above in section IV, the imposition of civil penalties will also take into account the gravity, circumstances, and extent of the violation or violations and, with respect to the violator, any history of prior similar violations and the degree of culpability and knowledge.

(d) Enforcement personnel will utilize risk-based criteria to assist the Director in determining appropriate civil penalties for violations found during investigations and inspections.

(e) Regarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty be such that it puts a DOE contractor out of business. Contract termination, rather than civil penalties, is used when the intent is to terminate these activities. The deterrent effect of civil penalties is best served when the amount of such penalties takes this factor into account. However, DOE will evaluate the relationship of affiliated entities to the contractor (such as parent corporations) when the contractor asserts that it cannot pay the proposed penalty.

(f) DOE will review each case involving a proposed civil penalty on its own merits and adjust the base civil penalty values upward or downward appropriately. As indicated above, Table A-1 identifies the daily base civil penalty values for different severity levels. After considering all relevant circumstances, civil penalties may be raised or lowered based upon the adjustment factors described below in this section. In no instance will a civil penalty for any one violation exceed the statutory limit of \$70,000. However, it should be emphasized that if the DOE contractor is or should have been aware of a violation and has not reported it to DOE and taken corrective action despite an opportunity to do so, each day the condition existed may be considered a separate violation and, as such, subject to a separate civil penalty. Further, as described in this section, the duration of a violation will be taken into account in determining the appropriate severity level of the base civil penalty.

TABLE A-1.—SEVERITY LEVEL BASE CIVIL PENALTIES

Severity level	Base civil penalty amount (Percentage of maximum per violation per day)
I .....	100
II .....	50

3. Adjustment Factors

(a) DOE's enforcement program is not an end in itself, but a means to achieve compliance with the worker safety and

health requirements in this part, and civil penalties are intended to emphasize the importance of compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of worker protection deficiencies and violations of the worker safety and health requirements in this part by the DOE contractors themselves rather than by DOE, and the prompt correction of any deficiencies and violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance with the worker safety and health requirements in this part. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting, and prompt correction of worker protection-related problems that may constitute, or lead to, violations of the worker safety and health requirements in this part, before, rather than after, DOE has identified such violations. Thus, DOE contractors will almost always be aware of worker safety and health problems before they are discovered by DOE. Obviously, worker safety and health is enhanced if deficiencies are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a deficiency until later on, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of worker safety and health-related problems by DOE contractors has the added benefit of allowing information which could prevent such problems at other facilities in the DOE complex to be shared with all appropriate DOE contractors.

(b) Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting, and prompt correction of problems which constitute, or could lead to, violations of the worker safety and health requirements. Thus, application of the adjustment factors set forth below may result in a reduced or no civil penalty being assessed for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

(c) On the other hand, ineffective programs for problem identification and correction are unacceptable. Thus, for example, where a contractor fails to disclose and promptly correct violations of which it was aware or should have been aware, substantial civil penalties are warranted and may be sought, including the assessment of civil penalties for continuing violations on a per day basis.

(d) Further, in cases involving factors of willfulness, repeated violations, death, serious injury, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls, DOE intends to apply its full statutory enforcement authority where such action is warranted.

4. Identification and Reporting

Reduction of up to 50% of the base civil penalty shown in Table A-1 may be given when a DOE contractor identifies the

violation and promptly reports the violation to the DOE. In weighing this factor, consideration will be given to, among other things, the opportunity available to discover the violation, the ease of discovery and the promptness and completeness of any required report. No consideration will be given to a reduction in penalty if the DOE contractor does not take prompt action to report the problem to DOE upon discovery, or if the immediate actions necessary to restore compliance with the worker safety and health requirements are not taken.

5. Self-Identification and Tracking Systems

(a) DOE strongly encourages contractors to self-identify noncompliances with the worker safety and health requirements before the noncompliances lead to a string of similar and potentially more significant events or consequences. When a contractor identifies a noncompliance through its own self-monitoring activity, DOE will normally allow a reduction in the amount of civil penalties, unless prior opportunities existed for contractors to identify the noncompliance. DOE will normally not allow a reduction in civil penalties for self-identification if significant DOE intervention was required to induce the contractor to report a noncompliance.

(b) Self-identification of a noncompliance is possibly the single most important factor in considering a reduction in the civil penalty amount. Consideration of self-identification is linked to, among other things, whether prior opportunities existed to discover the violation, and if so, the age and number of such opportunities; the extent to which proper contractor controls should have identified or prevented the violation; whether discovery of the violation resulted from a contractor's self-monitoring activity; the extent of DOE involvement in discovering the violation or in prompting the contractor to identify the violation; and the promptness and completeness of any required report. Self-identification is also considered by DOE in deciding whether to pursue an investigation.

(c) DOE will use the voluntary Noncompliance Tracking System (NTS) which allows contractors to elect to report noncompliances. In the guidance document supporting the NTS, DOE will establish reporting thresholds for reporting items of noncompliance of potentially greater worker safety and health significance into the NTS. Contractors are expected, however, to use their own self-tracking systems to track noncompliances below the reporting threshold. This self-tracking is considered to be acceptable self-reporting as long as DOE has access to the contractor's system and the contractor's system notes the item as a noncompliance with a DOE safety and health requirement. For noncompliances that are below the reportability thresholds, DOE will credit contractor self-tracking as representing self-reporting. If an item is not reported in NTS but only tracked in the contractor's system and DOE subsequently finds the facts and their worker safety and health significance have been significantly mischaracterized, DOE will not credit the internal tracking as representing appropriate self-reporting.



### 6. Self-Disclosing Events

(a) DOE expects contractors to demonstrate acceptance of responsibility for worker safety and health by proactively identifying noncompliance conditions in their programs and processes. When the occurrence of an event discloses noncompliances that the contractor could have or should have identified before the event, DOE will not generally allow a reduction in civil penalties for self-identification, even if the underlying noncompliances were reported to DOE. In deciding whether to reduce any civil penalty proposed for violations revealed by the occurrence of a self-disclosing event, DOE will consider the ease with which a contractor could have discovered the noncompliance and the prior opportunities that existed to discover the noncompliance. If a contractor simply reacts to events that disclose potentially significant consequences or downplays noncompliances which did not result in significant consequences to worker safety and health, such contractor actions do not constitute the type of proactive behavior necessary to prevent significant events from occurring and thereby to the improvement in worker safety and health.

(b) The key test is whether the contractor reasonably could have detected any of the underlying noncompliances that contributed to the event. Examples of events that provide opportunities to identify noncompliances include, but are not limited to:

(1) Prior notifications of potential problems such as those from DOE operational experience publications or vendor equipment deficiency reports;

(2) Normal surveillance, quality assurance performance assessments, and post-maintenance testing;

(3) Readily observable parameter trends; and

(4) Contractor employee or DOE observations of potential worker safety and health problems.

(c) Failure to utilize these types of events and activities to address noncompliances may result in higher civil penalty assessments or a DOE decision not to reduce civil penalty amounts.

(d) Alternatively, if, following a self-disclosing event, DOE finds that the contractor's processes and procedures were adequate and the contractor's personnel generally behaved in a manner consistent with the contractor's processes and procedures, DOE could conclude that the contractor could not have been reasonably expected to find the single procedural noncompliance that led to the event and thus, might allow a reduction in civil penalties.

### 7. Corrective Action To Prevent Recurrence

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to identify root cause and prevent recurrence, may result in an increase or decrease in the base civil penalty shown in Table A-1. For example, very extensive corrective action may result in DOE's reducing the proposed civil penalty up to 50% from the base value shown in Table A-1. On the other hand, the civil penalty may be increased if initiation of

corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor, consideration will be given to, among other things, the appropriateness, timeliness and degree of initiative associated with the corrective action. The comprehensiveness of the corrective action will also be considered, taking into account factors such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

### 8. DOE's Contribution to a Violation

There may be circumstances in which a violation of a DOE worker safety and health requirement results, in part or entirely, from a direction given by DOE personnel to a DOE contractor to either take or forbear from taking an action at a DOE facility. In such cases, DOE may refrain from issuing an NOV, or may mitigate, either partially or entirely, any proposed civil penalty, provided that the direction upon which the DOE contractor relied is documented in writing, contemporaneously with the direction. It should be emphasized, however, that pursuant to 10 CFR 851.5, no interpretation of a requirement of this part is binding upon DOE unless issued in writing by the Office of the General Counsel. Further, as discussed above in this policy statement, lack of funding by itself will not be considered as a mitigating factor in enforcement actions.

### 9. Exercise of Discretion

Because DOE wants to encourage and support DOE contractor initiative for prompt self-identification, reporting and correction of problems, DOE may exercise discretion as follows:

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

(1) The violation is promptly identified and reported to DOE before DOE learns of it or the violation is identified by a DOE independent assessment, inspection or other formal program effort.

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

(3) The DOE contractor, upon discovery of the violation, has taken or begun to take prompt and appropriate action to correct the violation.

(4) The DOE contractor has taken, or has agreed to take, remedial action satisfactory to DOE to preclude recurrence of the violation and the underlying conditions which caused it.

(b) DOE will not issue a Notice of Violation for cases in which the violation discovered by the DOE contractor cannot reasonably be linked to the conduct of that contractor in the design, construction or operation of the DOE facility involved, provided that prompt and appropriate action is taken by the DOE contractor upon identification of the past violation to report to DOE and remedy the problem.

(c) In situations where corrective actions have been completed before termination of

an inspection or assessment, a formal response from the contractor is not required and the inspection or integrated performance assessment report serves to document the violation and the corrective action. However, in all instances, the contractor is required to report the noncompliance through established reporting mechanisms so the noncompliance issue and any corrective actions can be properly tracked and monitored.

(d) If DOE initiates an enforcement action for a violation, and as part of the corrective action for that violation, the DOE contractor identifies other examples of the violation with the same root cause, DOE may refrain from initiating an additional enforcement action. In determining whether to exercise this discretion, DOE will consider whether the DOE contractor acted reasonably and in a timely manner appropriate to the safety significance of the initial violation, the comprehensiveness of the corrective action, whether the matter was reported, and whether the additional violation(s) substantially change the safety significance or character of the concern arising out of the initial violation.

(e) It should be emphasized that the preceding paragraphs are solely intended to be examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or Notice of Violation issued when, in DOE's judgment, such action is warranted on the basis of the circumstances of an individual case.

### X. Inaccurate and Incomplete Information

(a) A violation of the worker safety and health requirements to provide complete and accurate information to DOE, 10 CFR 851.7, can result in the full range of enforcement sanctions, depending upon the circumstances of the particular case and consideration of the factors discussed in this section. Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a DOE contractor normally will be categorized based on the guidance in section VI, "Severity of Violations."

(b) DOE recognizes that oral information may in some situations be inherently less reliable than written submittals because of the absence of an opportunity for reflection and management review. However, DOE must be able to rely on oral communications from officials of DOE contractors concerning significant information. In determining whether to take enforcement action for an oral statement, consideration will be given to such factors as:

(1) The degree of knowledge that the communicator should have had regarding the matter in view of his or her position, training, and experience;

(2) The opportunity and time available prior to the communication to assure the accuracy or completeness of the information;

(3) The degree of intent or negligence, if any, involved;

(4) The formality of the communication;

(5) The reasonableness of DOE reliance on the information;

(6) The importance of the information that was wrong or not provided; and

(7) The reasonableness of the explanation for not providing complete and accurate information.

(c) Absent gross negligence or willfulness, an incomplete or inaccurate oral statement normally will not be subject to enforcement action unless it involves significant information provided by an official of a DOE contractor. However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to DOE by an official of a DOE contractor or others on behalf of the DOE contractor, if a record was made of the oral information and provided to the DOE contractor, thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the DOE contractor and was not subsequently corrected in a timely manner.

(d) When a DOE contractor has corrected inaccurate or incomplete information, the decision to issue a citation for the initial inaccurate or incomplete information

normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether DOE or the DOE contractor identified the problem with the communication, and whether DOE relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the DOE contractor prior to reliance by DOE, or before DOE raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after DOE relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected.

(e) If the initial submission was accurate when made but later turns out to be erroneous because of newly discovered information or advances in technology, a citation normally would not be appropriate if, when the new information became available, the initial submission was promptly corrected.

(f) The failure to correct inaccurate or incomplete information that the DOE

contractor does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, an unintentionally inaccurate or incomplete submission may be treated as a more severe matter if a DOE contractor later determines that the initial submission was in error and does not promptly correct it or if there were clear opportunities to identify the error.

#### **XI. Secretarial Notification and Consultation**

The Secretary will be provided written notification of all enforcement actions involving proposed civil penalties. The Secretary will be consulted prior to taking action in the following situations:

(a) Any action the Director, or the NNSA Administrator concerning actions involving NNSA contractors, believes warrants the Secretary's involvement; or

(b) Any proposed enforcement action for which the Secretary asks to be consulted.

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