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APPENDIX A TO PART 851—WORKER SAFETY AND HEALTH FUNCTIONAL AREAS

APPENDIX B 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.*

SOURCE: 71 FR 6931, Feb. 9, 2006, unless otherwise noted.

Subpart A—General Provisions

§ 851.1 Scope and purpose.

(a) The worker safety and health requirements in this part govern the conduct of contractor activities at DOE sites.

(b) This part establishes the:

(1) Requirements for a worker safety and health program that reduces or prevents occupational injuries, illnesses, and accidental losses by pro-

viding DOE contractors and their workers with safe and healthful workplaces at DOE sites; and

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

§ 851.2 Exclusions.

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

(1) Regulated by the Occupational Safety and Health Administration; 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.

(b) This part does not apply to radiological hazards or nuclear explosives operations to the extent regulated by 10 CFR Parts 20, 820, 830 or 835.

(c) This part does not apply to transportation to or from a DOE site.

§ 851.3 Definitions.

(a) As used in this part:

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

Affected worker means a worker who would be affected by the granting or denial of a variance, or any authorized representative of the worker, such as a collective bargaining agent.

Closure facility means a facility that is non-operational and is, or is expected to be permanently closed and/or demolished, or title to which is expected to be transferred to another entity for reuse.

Closure facility hazard means a facility-related condition within a closure facility involving deviations from the technical requirements of § 851.23 of this part that would require costly and extensive structural/engineering modifications to be in compliance.

Cognizant Secretarial Officer means, with respect to a particular situation, the Assistant Secretary, Deputy Administrator, Program Office Director, or equivalent DOE official who has primary line management responsibility for a contractor, or any other official to whom the CSO delegates in writing a particular function under this part.

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.

Construction means combination of erection, installation, assembly, demolition, or fabrication activities involved to create a new facility or to alter, add to, rehabilitate, dismantle, or remove an existing facility. It also includes the alteration and repair (including dredging, excavating, and painting) of buildings, structures, or other real property, as well as any construction, demolition, and excavation activities conducted as part of environmental restoration or remediation efforts.

Construction contractor means the lowest tiered contractor with primary responsibility for the execution of all construction work described within a construction procurement or authorization document (e.g., construction contract, work order).

Construction manager means the individual or firm responsible to DOE for the supervision and administration of a construction project to ensure the construction contractor's compliance with construction project requirements.

Construction project means the full scope of activities required on a construction worksite to fulfill the requirements of the construction procurement or authorization document.

Construction worksite is the area within the limits necessary to perform the work described in the construction procurement or authorization document. It includes the facility being constructed or renovated along with all necessary staging and storage areas as well as adjacent areas subject to project hazards.

Contractor means any entity, including affiliated entities, such as a parent corporation, under contract with DOE, or a subcontractor at any tier, that has responsibilities for performing work at

a DOE site in furtherance of a DOE mission.

Covered workplace means a place at a DOE site where a contractor is responsible for performing work in furtherance of a DOE mission.

Director means a DOE Official to whom the Secretary assigns 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 Enforcement Officer means a DOE official to whom the Director assigns the authority to investigate the nature and extent of compliance with the requirements of this part.

DOE site means a DOE-owned or -leased area or location or other area or location controlled by DOE where activities and operations are performed at one or more facilities or places by a contractor in furtherance of a DOE mission.

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.

Head of DOE Field Element means an individual who is the manager or head of the DOE operations office or field office.

Interpretative ruling 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.

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National defense variance means relief from a safety and health standard, or portion thereof, to avoid serious impairment of a national defense mission.

NNSA means the National Nuclear Security Administration.

Nuclear explosive means an assembly containing fissionable and/or fusionable materials and main charge high-explosive parts or propellants capable of producing a nuclear detonation (e.g., a nuclear weapon or test device).

Nuclear explosive operation means any activity involving a nuclear explosive, including activities in which main charge high-explosive parts and pit are collocated.

Occupational medicine provider means the designated site occupational medicine director (SOMD) or the individual providing medical services.

Permanent variance means relief from a safety and health standard, or portion thereof, to contractors who can prove that their methods, conditions, practices, operations, or processes provide workplaces that are as safe and healthful as those that follow the workplace safety and health standard required by this part.

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.

Pressure systems means all pressure vessels, and pressure sources including cryogenics, pneumatic, hydraulic, and vacuum. Vacuum systems should be considered pressure systems due to their potential for catastrophic failure due to backfill pressurization. Associated hardware (e.g., gauges and regulators), fittings, piping, pumps, and pressure relief devices are also integral parts of the pressure system.

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.

Safety and health standard means a standard that 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, reasonably necessary or appropriate to provide safe and healthful workplaces.

Secretary means the Secretary of Energy.

Temporary variance means a short-term relief for a new safety and health standard when the contractor cannot comply with the requirements by the prescribed date because the necessary construction or alteration of the facility cannot be completed in time or when technical personnel, materials, or equipment are temporarily unavailable.

Unauthorized discharge means the discharge of a firearm under circumstances other than: (1) during firearms training with the firearm properly pointed down range (or toward a target), or (2) the intentional firing at hostile parties when deadly force is authorized.

Under Secretary means, with respect to a particular situation, the DOE official who serves as the Under Secretary for Energy and Environment, or the Under Secretary for Science, or the Under Secretary for Nuclear Security/Administrator for National Nuclear Security Administration who has primary line management responsibility for a contractor.

Variance means an exception to compliance with some part of a safety and health standard granted by the Under Secretary to a contractor.

Worker means an employee of a DOE contractor person who performs work in furtherance of a DOE mission at a covered workplace.

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

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(b) Terms undefined in this part that are defined in the Atomic Energy Act of 1954 must have the same meaning as under that Act.

§ 851.4 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.

(d) A copy of the Compliance Order must be prominently posted, once issued, at or near the location where the violation, potential violation, or inconsistency occurred until it is corrected.

§ 851.5 Enforcement.

(a) A contractor that is indemnified under section 170d. of the AEA (or any subcontractor or supplier thereto) and that violates (or whose employee violates) any requirement of this part shall be subject to a civil penalty of up to \$75,000 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 may be subject to a reduction in fees or other payments under a contract with DOE, pursuant to the contract's *Conditional Payment of Fee* clause, or other contract clause providing for such reductions.

(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.

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(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 shall not penalize a contractor under both sections 234A and 234C of the AEA for the same violation.

(f) DOE enforcement actions through civil penalties under paragraph (a) of this section, start on February 9, 2007.

[71 FR 6931, Feb. 9, 2006, as amended at 74 FR 66033, Dec. 14, 2009]

§ 851.6 Petitions for generally applicable rulemaking.

(a) *Right to file.* Any person may file a petition for generally applicable rulemaking to amend or interpret provisions of this part.

(b) *How to file.* Any person who wants to file a petition for generally applicable rulemaking pursuant to this section must file by mail or messenger in an envelope addressed to the Office of General Counsel, GC-1, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *Content of rulemaking petitions.* A petition under this section must:

(1) Be labeled "Petition for Rulemaking Under 10 CFR 851;"

(2) Describe with particularity the provision of this part to be amended and the text of regulatory language to be added; and

(3) Explain why, if relevant, DOE should not choose to make policy by precedent through adjudication of petitions for assessment of civil penalty.

(d) *Determinations upon rulemaking petitions.* After considering the petition and other information DOE deems relevant, DOE may grant the petition and issue an appropriate rulemaking notice, or deny the petition because the rule being sought:

(1) Would be inconsistent with statutory law;

(2) Would establish a generally applicable policy in a subject matter area that should be left to case-by-case determinations; or

(3) For other good cause.