



Department of Energy
Washington, DC

February 1, 2007

Mr. Mark J. Brooks
Program Manager
Savannah River Archaeological Research Program
South Carolina Institute of Archaeology and Anthropology
University of South Carolina
PO Box 400
New Ellenton, SC 29809
SRS – Building 760-11G

Re: Savannah River Archaeological Research Program's Request for Interpretive Ruling under 10 CFR 851

Dear Mr. Brooks:

This is in response to your letter requesting a binding interpretive ruling as to whether SRARP is subject to the Department of Energy's (DOE's) Worker Safety and Health Program Regulation, 10 CFR 851 (Part 851).

ISSUE

Is SRARP a DOE contractor such that it is subject to DOE's Worker Safety and Health Program Regulation, 10 CFR 851 (Part 851)?

BRIEF ANSWER

Yes, SRARP is a contractor as defined by 10 CFR § 851.3 and, as such, is subject to the provisions of Part 851.¹ SRARP must prepare and submit a Worker Safety and Health Program (WSHP) by February 26, 2007, pursuant to Section 851.11.

BACKGROUND

On February 9, 2006, DOE promulgated Part 851, which, in large part, codified DOE Order 440.1A, an Order that set forth comprehensive worker safety and health program requirements and was implemented through contractual agreements with DOE contractors. Part 851 provides DOE with enforcement tools that were not previously available through Order 440.1A.

¹ See § 851.1 (scope and purpose)



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Part 851 applies only to contractors, who are defined as any entity under contract with DOE “that has responsibilities for performing work at a DOE site in furtherance of a DOE mission.” Section 851.3(a).

In compliance guidance, DOE has explained that recipients of financial assistance through cooperative agreements with DOE are generally not contractors, except when the cooperative agreements contain some procurement contract terms,² in which case the agreement “should be referred to OGC for a case-by-case review to determine whether Part 851 applies.”³

SRARP is part of the University of South Carolina’s (USC’s) State of South Carolina Institute of Archaeology and Anthropology (SCIAA) that conducts “prehistoric and historic archaeological research investigations on the Savannah River Site (SRS) for the benefit of the State of South Carolina, the Department of Energy (DOE) and the general public.”⁴ One of SRARP’s principal missions is to assist DOE with complying with archaeological laws and statutes and assist DOE with managing and using the SRS in a manner that appropriately considers archaeological resources. SRARP also conducts archaeological research and implements an educational outreach program in the SRS area.

SRARP currently receives financial assistance from DOE in accordance with a cooperative agreement (Cooperative Agreement), executed on January 10, 1998.⁵ The Cooperative Agreement, whose original expiration date was February 20, 2003, has been extended by mutual agreement of the parties to November 5, 2008. The renewal was effected by a Notice of Financial Assistance Award (Form DOE F 4600.1) dated January 15, 2003.

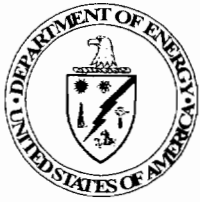
In an October 23, 2006, letter, DOE’s Manager for the SRS stated that SRARP is subject to Part 851 and, according to Part 851’s provisions, must prepare and submit for approval a WSHP by February 26, 2007. The Manager further requested that SRARP submit a draft WSHP by the end of 2006. The letter points SRARP to the “binding interpretive rule” provisions of Part 851, which allow potentially regulated entities to request that DOE make a binding determination of whether Part 851 applies to them.

² “[I]t is possible that there are cooperative agreements that have some procurement contract terms. Those particular agreements (if they involve work at a DOE site) should be referred to OGC for a case-by-case review to determine whether Part 851 applies.” *Guidance on Who Must Comply with Part 851*, Q. 7.

³ *Guidance on Who Must Comply With 10 CFR Part 851*, Question 7 (Guidance).

⁴ Cooperative Agreement between South Carolina Institute of Archaeology and Anthropology (SCIAA) and the Department of Energy (DOE) (DE-FC09-98SR18931)(January 10, 1998).

⁵ *See id.* Although the Cooperative Agreement is between SCIAA and DOE, the funding at issue is for SRARP in particular and, in certain sections of the Cooperative Agreement, SRARP is referred to as a party to the Cooperative Agreement (e.g., Cooperative Agreement, Appendix A.1.A). For these reasons and because the request for a binding interpretive ruling was made by SRARP, this memorandum refers only to SRARP and DOE as parties to the Cooperative Agreement.



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In an undated letter, SRARP requested a binding interpretive ruling under 10 CFR § 851.7. SRARP contends that, through a Memorandum of Agreement with Westinghouse Savannah River Company (Westinghouse),⁶ DOE's management and operating contractor for SRS, SRARP is covered by Westinghouse's WSHP, which SRARP expects will comply with 10 CFR 851. SRARP further notes that it has written its own safety manual "on the proper methods of day-to-day SRARP/SRS activities" and is working with DOE, Westinghouse, and the University of South Carolina such that it has a "significant infrastructure in place for dealing with safety issues that arise."⁷

ANALYSIS

SRARP's mission and organization render SRARP a contractor for the purposes of Part 851. In the SRARP's Project Management Plan, which is appended to the Cooperative Agreement, SRARP and DOE acknowledge that "[SRARP] will assist DOE in complying with historical and archaeological laws and regulations, provide cultural resource management assistance, and provide collections curation management."⁸ The Project Management Plan proceeds to establish, through an enumerated list of responsibilities, that SRARP assists DOE and its contractors with "site use planning and coordination efforts" and providing "management guidance to DOE for the protection and preservation of the archaeological resources of SRS."⁹ Even though SRARP does conduct some research and educational programs for the public, SRARP's significant role in providing DOE with compliance and management support services render SRARP a contractor for Part 851 purposes because SRARP performs work at a DOE site in furtherance of a DOE mission.¹⁰

It is true that SRARP does receive financial assistance through its Cooperative Agreement, not fees through a contract. The Cooperative Agreement does also reference in a general fashion some of the cost sharing and financial management provisions of 10 CFR Part 600, the *Financial Management Rules*. However, these provisions do not alter the fact that SRARP's principal purpose, for the reasons stated above, is to provide a service "for the direct benefit or use of the Federal Government" not to "accomplish a public purpose of support or stimulation authorized by Federal statute."¹¹ Thus, because SRARP is providing services for the direct benefit of DOE at a DOE site, SRARP is party to a contract for the purposes of Part 851 even though the contract is styled as a Cooperative Agreement. SRARP is not principally educating, informing or otherwise supporting or stimulating the general public; as such, the mere fact that SRARP is party to a Cooperative Agreement does not place SRARP outside the scope of Part 851.

⁶ *Memorandum of Agreement with SRARP for the Provision of Support Services by the Westinghouse Savannah River Company* (September 1990).

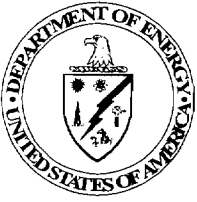
⁷ Letter from SRARP to DOE re: binding interpretive ruling (undated) at 2.

⁸ Cooperative Agreement, Appendix A, I.A.

⁹ *See id.*

¹⁰ *See* 10 CFR § 851.3 (defining contractor)

¹¹ 10 CFR § 600.5 (defining when a cooperative agreement is an appropriate instrument).



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The fact that SRARP has entered into a MOA for services with Westinghouse does not mean that SRARP can rely on Westinghouse's WSHP for compliance with Part 851. As an initial matter, the MOA is dated September 1990 and only applies to Westinghouse's expressly limited support for SRARP's compliance with DOE's 5400 series of Directives, not with Part 851 or with Directive 440.1A on which Part 851 is heavily based. Further, SRARP receives funds directly from DOE, pursuant to an agreement, for support services that SRARP provides directly to DOE at SRS. SRARP is not a subcontractor to Westinghouse, nor does Westinghouse act as any sort of intermediary between SRARP and DOE. As such SRARP has an independent legal obligation to submit a WSHP and otherwise comply with Part 851.

If SRARP believes that its current Safety Plan complies with Part 851, SRARP may submit the plan by February 26, 2007, which is the deadline for SRARP to submit a written WSHP that implements the substantive provisions of Part 851.

CONCLUSION

For the reasons given above and pursuant to its authority under 10 CFR § 851.7, the DOE hereby issues an interpretive ruling that SRARP is a contractor subject to Part 851. DOE issues this binding interpretive ruling based on the facts specific to the relationship between SRARP and DOE. This ruling is applicable to no party other than SRARP.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Diamond", written over a horizontal line.

Bruce Diamond
Assistant General Counsel for Environment

Cc: Jeffrey Allison, Manager, Department of Energy, Savannah River Site
Lucy Knowles, Chief Counsel, Department of Energy, Savannah River Site
Jeff Galan, Attorney-Adviser, Department of Energy, Savannah River Site
Tony Weadock, Acting Director, Office of Enforcement, Office of Health, Safety and Security
William McArthur, Supervisory Industrial Hygienist, Office of Worker, Safety and Health