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Part II

Department of Energy

10 CFR Parts **850** and 851

**Chronic Beryllium Disease Prevention
Program; Worker Safety and Health
Program; Final Rule**

DEPARTMENT OF ENERGY

10 CFR Parts 850 and 851

[Docket No. EH-RM-04-WSPH]

RIN 1901-AA99

Chronic Beryllium Disease Prevention Program; Worker Safety and Health Program

AGENCY: Department of Energy

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is today publishing a final rule to implement the statutory mandate of section 3173 of the Bob Stump National Defense Authorization Act (NDAA) for Fiscal Year 2003 to establish worker safety and health regulations to govern contractor activities at DOE sites. This program codifies and enhances the worker protection program in operation when the NDAA was enacted.

EFFECTIVE DATE: This rule is effective February 9, 2007. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of February 9, 2007.

FOR FURTHER INFORMATION CONTACT: Jacqueline D. Rogers, U.S. Department of Energy, Office of Environment, Safety and Health, EH-52, 1000 Independence Avenue, SW., Washington, DC 20585, 202-586-4714.

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Introduction

This final rule implements a worker safety and health program for the Department of Energy (DOE or the Department). This program establishes the framework for a worker protection program that will reduce or prevent occupational injuries, illnesses, and accidental losses by requiring DOE contractors to provide their employees' with safe and healthful workplaces. Also, the program establishes procedures for investigating whether a requirement has been violated, for determining the nature and extent of such violation, and for imposing an appropriate remedy.

In December 2002, Congress directed DOE to promulgate regulations on worker safety and health regulations to cover contractors with Price-Anderson indemnification agreements in their contracts. Specifically, section 3173 of the National Defense Authorization Act (NDAA) amended the Atomic Energy Act (AEA) to add section 234C (codified as 42 U.S.C. 2282c), which requires DOE to promulgate worker safety and health regulations that maintain "the level of protection currently provided to * * * workers." See Public Law 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 or demolished, or which title is expected to be transferred; and to achieve national security missions in an efficient and timely manner (42 U.S.C. 2282c(3)). 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 for violations of nuclear safety regulations. Section 234C also directs DOE to insert in such contracts a clause providing for reducing contractor fees and other payments if the contractor or a contractor employee violates 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 (NPR) 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

safety and health regulations would give DOE workers a level of protection equivalent to that afforded them when section 3173 was enacted. 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," March 27, 1998 (the current DOE order on worker safety and health) or a tailored set of requirements approved by DOE. The contractor would implement these requirements pursuant to a worker safety and health program approved by DOE.

On January 8, 2004, DOE held a televideo conference to allow DOE employees, DOE contractors, contractor employees, and employee representatives to become familiar with the proposal. DOE held public hearings on the proposal in Washington, DC, on January 21, 2004, and in Golden, Colorado, via televideo on February 4, 2004. In addition to the oral comments at the public hearings, DOE received approximately 50 written comments on the December proposal.

After becoming aware that the Defense Nuclear Facilities Safety Board (DNFSB), which has safety oversight responsibility with regard to DOE nuclear facilities, had concerns about the proposed rule, DOE suspended the rulemaking by publishing a notice in the **Federal Register** on February 27, 2004 (69 FR 9277). DOE stated in that notice that DOE would consult with the DNFSB in order to resolve its concerns, and also that it would consider views received from other stakeholders on its proposal.

As a result of its consultation with the DNFSB and consideration of other comments, DOE published a supplemental notice of proposed rulemaking (SNOPR) in the **Federal Register** (70 FR 3812) on January 26, 2005. The SNOPR proposed to (1) codify a minimum set of safety and health requirements with which contractors would have to comply; (2) establish a formal exemption process which would require approval by the Secretarial Officer with line management responsibility and which would provide significant involvement of the Assistant Secretary for Environment, Safety and Health; (3) delineate the role of the worker health and safety 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 and DOE sites.

TABLE 1.—CROSSWALK OF DOE ORDER 4401.1A REQUIREMENTS AND 10 CFR 851 FINAL RULE REQUIREMENTS—Continued

DOE order 440.1A requirements	Corresponding 10 CFR 851 provisions
12.e. Title 29 CFR, Part 1926, “Safety and Health Regulations for Construction”.	.23(a)(7) Safety and health standards.
12.f. Title 29 CFR, Part 1928, “Occupational Safety and Health Standards for Agriculture”.	.23(a)(8) Safety and health standards.
12.g. American Conference of Governmental Industrial Hygienists (ACGIH), “Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices” when the ACGIH Threshold Limit Values (TLVs) are lower (more protective) than permissible exposure limits in 29 CFR 1910. When the ACGIH TLVs are used as exposure limits, contractors must nonetheless comply with the other provisions of any applicable expanded health standard found in 29 CFR 1910.	.23(a)(9) Safety and health standards.
12.h. American National Standards Institute (ANSI) Z136.1, “Safe Use of Lasers”.	.23(a)(11) Safety and health standards.
12.i. ANSI Z88.2, “American National Standard Practices for Respiratory Protection”.	.23(a)(10) Safety and health standards.
12.j. ANSI Z49.1, “Safety in Welding, Cutting and Allied Processes,” sections 4.3 and E4.3 (of the 1994 edition or equivalent sections of subsequent editions).	.23(a)(12) Safety and health standards.
12.k. National Fire Protection Association (NFPA) 70, “National Electrical Codes”.	.23(a)(14) Safety and health standards.
12.l. NFPA 70E, “Electrical Safety in the Workplace”23(a)(15) Safety and health standards.
13. Ensure that subcontractors performing work on DOE-owned or -leased facilities comply with this Contractor Requirements Document and the contractor’s own site worker protection standards (where applicable).	
14. Construction Safety	Appendix A section 1.
15. Fire Protection	Appendix A section 2.
16. Firearms Safety	Appendix A section 5.
17. Explosives Safety	Appendix A section 3.
18. Industrial Hygiene	Appendix A section 6.
19. Occupational Medicine	Appendix A section 8.
20. Pressure Safety	Appendix A section 4.
21. Motor Vehicle Safety	Appendix A section 9.
22. Suspect and Counterfeit Item (S/C) Controls	Section moved to DOE Order 414.1C, Quality Assurance (June 17, 2005).

Many provisions have been reformatted and renumbered in this final rule, creating differences between it and the published supplemental notice of proposed rulemaking. To aid in tracking the provisions of both documents, the Department has included a table comparing sections in the final rule to the corresponding sections in the supplemental notice of proposed rulemaking. See Table 2.

TABLE 2.—COMPARISON OF FINAL 10 CFR 851 RULE SECTIONS WITH THE SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING (SNOPR)

Final rule section	Corresponding supplemental proposal section
PART 850—Chronic Beryllium Disease Prevention Program	
Authority	Notice of Proposed Rulemaking December 8, 2003, N/A.
850.1 Scope	Notice of Proposed Rulemaking December 8, 2003, N/A.
850.4 Enforcement	Notice of Proposed Rulemaking December 8, 2003, N/A.
PART 851—Worker Safety and Health Program	
Subpart A—General Provisions	
851.1 Scope and purpose	851.1 Scope and exclusions.
851.2 Exclusions	851.2 Purpose.
851.3 Definitions	851.1 Scope and exclusions.
851.4 Compliance Order	851.3 Definitions.
851.5 Enforcement	851.5 Compliance Order.
851.6 Petitions for generally applicable rulemaking	851.9 Enforcement.
851.7 Requests for a binding interpretive ruling	851.6 Interpretations.
851.8 Informal requests for information	851.6 Interpretations.

detailed real-time, job-specific hazard and safety analysis to be conducted immediately prior to beginning the work. The commenter went on to state that this latter (real-time assessment) would be performed to ensure that changing worksite conditions have not impacted hazards and associated mitigation strategies since the time when the basic hazards were described in the initial assessment. DOE believes the requirements in final rule section 851.21 are appropriate, and declines to accept this commenter's suggestion. It is DOE's intent that within the framework provided in final rule section 851.21(c), the contractor must identify existing and potential workplace hazards using the prescribed methods in section 851.21(a), for new and existing facilities, operations, and procedures. The contractor must establish and implement hazard identification and risk assessment procedures initially to obtain baseline information and again as often as necessary to ensure compliance with the regulation in Subpart C. Section 851.21(a) also requires routine job activity level hazard analyses to be performed. The final rule intends for the contractor to develop and include the process for performing hazard identification in the worker safety and health program, but the contractor is not required to present the full results of the hazard assessment in the worker safety and health program.

Section 851.22—Hazard Prevention and Abatement

Final rule section 851.22 establishes the requirement for contractors to develop and implement a process for preventing, prioritizing, and abating hazards in the workplace. Under this section contractors must abate hazards using a prescribed hierarchy of controls, starting with elimination (or substitution) and ending with personal protective equipment, which is to be used only as a last resort. Hazards must also be considered when contractors purchase equipment. As a general comment on the section as a whole, three commenters (Exs. 28, 45, 51) believed that the term "adequately protected" is ambiguous in supplemental proposed section 851.100(a)(2) and implies that if an injury occurs by any means, the program would not have provided "adequate protection." The commenters believed that the program should provide an acceptable level of worker protection based upon determination of acceptable risks for identified hazards. As discussed previously, DOE believe "adequate protection" is a proper standard. However, in revising this

provision, the reference to "adequate protection" has been eliminated.

Section 851.22(a) requires contractors to establish and implement a hazard prevention and abatement process to ensure that all identified and potential hazards are prevented or abated in a timely manner. For hazards identified either in the facility design or during the development of procedures, contractors are required to incorporate controls in the appropriate facility design or procedure. For existing hazards identified in the workplace, contractors are required to (1) prioritize and implement abatement actions according to the risk to workers; (2) implement interim protective measures pending final abatement; and (3) protect workers from dangerous safety and health conditions. One commenter (Ex. 16) requested that the term "imminently dangerous conditions" in supplemental proposed section 851.100(b)(2)(iii) be defined. DOE has modified the language in final rule section 851.22(a)(2)(iii) to read "dangerous safety and health conditions." These terms are commonly understood and need not be defined in Part 851.

Section 851.22(b), which corresponds to supplemental proposed section 851.100(b)(2)(iv), requires contractors to select hazard controls based on the following hierarchy: (1) Elimination or substitution of the hazards where feasible and appropriate, (2) engineering controls where feasible and appropriate, (3) work practices and administrative controls that limit worker exposures, and (4) personal protective equipment. Two commenters (Exs. 16, 27) believed that the hierarchy of hazard controls should acknowledge appropriate economic and technical feasibility, work activity duration, and available technology constraints that are important and practical considerations in compliance. DOE acknowledges these concerns and section 851.22(b) of the final rule has expanded to clarify that substitution or elimination of hazards and the use of engineering controls should be used where feasible and appropriate, and use of work practices and administrative controls to limit worker exposures.

Section 851.22(c) requires contractors to address hazards when selecting or purchasing equipment, products, and services. Two commenters (Exs. 31, 54) expressed concern about the supplemental proposed section 851.100(b)(2)(v). One commenter (Ex. 31) believed that this provision poses a problem because it is difficult to judge the safety of services based on human performance, and that this provision would require review of safety records

for service providers to evaluate unsafe work practices. The commenter recommended that the reference to services be deleted. The other commenter (Ex. 54) recommended rewording the provision in light of the concept of inherently safer design to require "reduction in hazards to workers by ensuring that equipment purchase, lease or rental, process and equipment design and all acquired services are selected with worker safety and health as a priority." DOE believes that worker safety and health should be a primary consideration in performing work and should be considered in all aspects of the work, including the selection and purchasing of equipment, products, and services. As a result, this provision is retained in the final rule.

Section 851.23—Workplace Safety and Health Standards

Section 851.23(a) requires that contractors comply with the following standards, if applicable to the hazards at their workplace: (1) Title 10 CFR 850, "Chronic Beryllium Disease Prevention Program"; (2) Title 29 CFR Parts 1904.4 through 1904.11, 1904.29 through 1904.33; 1904.44 and 1904.46, "Recording and Reporting Occupational Injuries and Illnesses"; (3) Title 29 CFR Part 1910, "Occupational Safety and Health Standards," excluding 29 CFR 1910.1096, "Ionizing Radiation"; (4) Title 29 CFR Part 1915, "Shipyard Employment"; (5) Title 29 CFR Part 1917, "Marine Terminals"; (6) Title 29 CFR Part 1918, "Safety and Health Regulations for Longshoring"; (7) Title 29 CFR Part 1926, "Safety and Health Regulations for Construction"; (8) Title 29 CFR Part 1928, "Occupational Safety and Health Standards for Agriculture"; (9) ACGIH "Threshold Limit Values (TLV) for Chemical Substances and Physical Agents and Biological Exposure Indices," when the ACGIH TLVs are lower (more protective) than permissible exposure limits in 29 CFR part 1910 (note that when the ACGIH TLVs are used as exposure limits, contractors must nonetheless comply with the other provisions of any applicable expanded health standard found in 29 CFR Part 1910); (10) ANSI Z88.2, "American National Standard Practices for Respiratory Protection"; (11) ANSI Z136.1, "Safe Use of Lasers"; (12) ANSI Z49.1, "Safety in Welding, Cutting and Allied Processes," sections 4.3 and E4.3 (of the 1994 edition or equivalent sections of sequent editions); (13) NFPA 70, "National Electrical Code"; and (14) NFPA 70E, "Electrical Safety in the Workplace." These mandatory standards establish baseline technical safety and health requirements

for DOE workplace operations. These standards are already required by DOE Order 440.1A, and are enforced through contract mechanisms. Section 851.23(b) provides that Part 851 may not be construed as relieving a contractor from the obligation to comply with any additional specific safety and health requirement that the contractor determines is necessary for worker protection.

DOE received a substantial number of comments on this section, many of which applied to the section as a whole. One commenter (Ex. 28) noted that supplemental proposed sections 851.201 through 851.210 did not include requirements for chemical or radiological protection, and recommended that DOE specifically define "recognized areas of protection." DOE has clarified in final rule section 851.2(b) that Part 851 does not apply to radiological hazards to the extent regulated by 10 CFR 820, 830, or 835. Further, Subparts B and C establish general and specific worker safety and health program requirements that contractors must implement to protect workers from workplace hazards, which as defined in section 851.3 of the final rule include physical, chemical, biological, or safety hazards with any potential to cause illness, injury, or death to a person.

Numerous commenters (Exs. 6, 15, 16, 20, 28, 29, 33, 37, 45, 47, 48, 51) argued that compliance with the DOE-approved contractor worker safety and health program, Work Smart Standards, or Contractors Requirements Document should constitute compliance with this regulation. Three of these commenters (Exs. 6, 15, 28) alternatively suggested that DOE should include in the final rule DOE directives or standards that have already been identified through various DOE approved processes and incorporated into existing contracts, and then define their relationship or functionality within the rule. Two other commenters (Ex. 12, 42) requested that the rule clarify how DOE orders other than DOE Order 440.1A in prime contracts should be addressed in regard to the worker safety and health requirements. DOE has incorporated relevant DOE directives into the appropriate sections of the final rule. As discussed in the section-by-section discussion for Subpart B of the final rule, DOE has also included provisions in section 851.13(b) to allow contractors to use existing worker safety and health programs established under the Integrated Safety Management System, Work Smart Standards process, or other worker safety and health process provided that such programs meet the

requirements of this rule and are approved by the appropriate Head of the DOE Field element. Furthermore, DOE notes that the standards included in final rule section 851.23(a) have in fact been reviewed and approved by an existing DOE safety and health process. Specifically, these standards were included in DOE Order 440.1A which was the result of extensive coordination among safety and health professionals throughout the entire DOE community and was concurred on by all DOE Secretarial Officers and approved by the Secretary of Energy.

Several commenters (Exs. 30, 60, 62) believed that 10 CFR Part 850, Chronic Beryllium Disease Prevention Program (CBDPP), should be included as an enforceable standard under the rule or, and another commenter (Ex. 49) asked DOE to clarify its intent in that regard. The latter commenter (Ex. 49) argued that 10 CFR part 850 is a performance-based standard and did not provide an adequate technical basis to ensure consistent enforcement, and believes that DOE should provide implementation guidance for 10 CFR part 850 if the Department intends to enforce that rule under 10 CFR part 851. Another commenter (Ex. 30) asked that DOE expand the scope of 10 CFR part 850 to cover the United States Enrichment Corporation (USEC) facilities in Portsmouth, Ohio and Paducah, Kentucky. DOE has considered these comments and agrees that 10 CFR Part 850 should be enforceable under Part 851. Accordingly, final rule section 851.23(a)(1) requires contractor compliance with 10 CFR part 850. In addition, DOE has included a modification to 10 CFR part 850 as a part of this rulemaking effort to clarify that a contractor's CBDPP should supplement and be an integral part of the worker safety and health program required under 10 CFR part 851. This rulemaking effort does not, however, expand the scope of 10 CFR part 850. DOE's intent with this rulemaking effort, as clarified in final rule section 851.2, is to establish worker safety and health program provisions for contractor workplaces under DOE's jurisdiction, not for those under OSHA's jurisdiction as are the USEC facilities mentioned above. DOE also notes in regards to the commenter's (Ex. 49) request for CBDPP guidance material, that DOE has already published such guidance in DOE G 440.7A. DOE further notes that 10 CFR part 850 is already enforceable through contract mechanisms on DOE sites, and has been since its original promulgation in January, 2001.

DOE received a few comments that recommended additional codes or standards that should be incorporated into this rule. A commenter (Ex. 24) suggested that DOE should adopt by reference the International Code Council (ICC) International Codes as the foundation for DOE rules on facility design, construction, renovation, and worker safety, based on the premise that these codes are consistent with DOE Orders 420.1 and 440.1A and have been widely adopted throughout the United States by other federal facilities, state and local facilities, and the private sector. The commenter believed that to do otherwise would foster non-uniformity and would likely result in increased costs and decreased worker safety. DOE acknowledges the commenter's concern but notes that the final rule only includes those consensus standards originally required by DOE Order 440.1A. DOE believes that this change is consistent with intent of Section 3173 of the NDAA and is appropriate in this regulatory context. DOE will continue to encourage contractors to comply with applicable consensus standards where appropriate and will require compliance with selected standards through DOE directives such as DOE Order 420.1 and DOE contracts where needed. DOE also notes that final rule section 851.23(b) requires contractors to comply with any additional safety and health requirement that they determine to be necessary to protect the safety and health of workers.

Another commenter (Ex. 30) recommended that an indoor air quality standard and an ergonomics standard be included in the rule and made enforceable. DOE notes, however, that both indoor air quality and ergonomic hazards fall within the purview of an industrial hygiene program. Accordingly, DOE expects that contractors will address such hazards through the implementation of their industrial hygiene program established in accordance with Appendix A, section 6 of the final rule. DOE expects to develop guidance material to assist contractors in implementing these and other requirements of the final rule.

Another commenter (Ex. 29) indicated that much of the detailed codes listed in the supplemental proposal should be replaced by reference to the major design codes. As noted above, however, DOE has eliminated all but a handful of consensus standards from the final rule consistent with the standards originally mandated under DOE Order 440.1A. Along similar lines, several commenters (Exs. 2, 16, 20, 24, 31, 33, 37) specifically requested that the

OSHA guidance. Furthermore, under final rule section 851.6, DOE will continue to issue technical positions that will be based in large measure on the existing body of OSHA interpretations.

Several commenters were concerned by the potential costs of compliance with supplemental proposed section 851.23(a). These commenters (Exs. 14, 16, 20, 27, 29, 31, 34, 36, 37, 38, 42, 48, 49, 57, 58) surmised that implementation of the proposed rule would result in increased costs associated with the increased amount of resources needed to comply with the large number of consensus standards. Further, commenters believed that these costs would divert funds normally spent on safety, which would negatively impact worker safety and health. Two commenters (Exs. 15, 38) also argued that the costs would divert funds from research. One commenter (Ex. 11) felt that DOE should perform an economic impact analysis for the rule. DOE again notes that in the final rule many of the consensus standards listed under the supplemental proposal are eliminated and the remaining standards in final rule section 851.23(a) are those required by the existing DOE Order 440.1A. Most facilities should already be in compliance with these standards and, therefore, DOE does not anticipate increased costs.

DOE received a number of comments on specific standards (or blocks of standards from the same standard-setting organization). Many commenters (Exs. 1, 2, 3, 4, 5, 7, 8, 16, 19, 20, 24, 22, 29, 31, 33, 37, 39, 45, 47, 49, 54, 55, 58, 59, 61) raised concerns about the NFPA codes found in supplemental proposed section 851.201(b), Table 1. The commenters recommended that these codes be eliminated or clarified based on various compliance concerns, including applicability to facilities, increased costs, and excessive variance requests. One commenter (Ex. 61) observed that while the supplemental proposed rule preamble and purpose indicated that the purpose of the rule was worker safety and health, many of the National Fire Protection Association (NFPA) requirements referenced in supplemental proposed rule section 851.201 from DOE Order 420.1A are directed at limiting property damage, not improving worker safety. The commenter inquired if it was the intent of the rule to address property protection in addition to worker safety or whether enforcement of the NFPA standards would be limited to those issues and provisions that specifically affect worker safety. Furthermore, if the latter was the case, the commenter

questioned how DOE would document which provisions specifically applied to worker safety and which applied to property protection. DOE acknowledges these concerns and notes that the intent of the rule is worker safety and health. Accordingly, DOE has removed the majority of the specific NFPA standards in the interest of reducing the contractor and site compliance burdens. NFPA 70 and 70E remain in the final rule because they are important for protecting worker safety and health on DOE sites. DOE notes, however, several deleted NFPA standards may be applicable to DOE facilities through DOE fire protection directives, such as DOE Order 420.1A or by contract.

Several of these commenters (Exs. 2, 8, 16, 19, 29, 37, 45, 49) also objected to the American Society of Mechanical Engineers (ASME), ANSI, American Petroleum Institute (API), American Water Works Association (AWWA), and Underwriters Laboratories (UL) codes found in supplemental proposed section 851.201(c), Tables 2 through 5. Commenter concerns related to these codes included increased costs if the codes were retained, compliance issues, legacy construction issues, lack of rationale for omission and inclusion of the codes appearing in the tables (*i.e.*, the included codes were too prescriptive but with numerous gaps in coverage), lack of applicability to DOE sites, potential increase in exemption requests, conflict with cited OSHA regulations in the supplemental proposal, level of specificity not appropriate to a rule of this type, the fact that specified code editions can become quickly outdated, and problems associated with revision of edition dates through rulemaking procedures. Many of these commenters (Exs. 8, 16, 19, 45) suggested that DOE eliminate the specific codes and editions. Finding several of these concerns to be valid, DOE has modified final rule section 851.23(a) by eliminating Tables 2 through 5 and associated codes (*i.e.*, ASME, API, AWWA, UL, and ANSI pressure-related codes).

DOE also received numerous comments related to the standard on TLVs. Many commenters (Exs. 12, 16, 28, 31, 36, 37, 38, 42, 45, 47, 49, 51, 54, 56) expressed concern over supplemental proposed section 851.201(e), which required compliance with the ACGIH standard for TLVs. Several of these commenters (Exs. 16, 28, 31, 36, 37, 42, 45, 51, 56) expressed the opinion that these values are inappropriate and recommended that they be eliminated from the rule or adopted only partially, since they do not take into account economic or technical

feasibility. One commenter (Ex. 38) asserted that this provision goes beyond OSHA requirements and creates an unreasonable obligation for contractors to keep employee exposure levels below both OSHA PELs and the ACGIH exposure limits (depending on which value is lower). Conversely, another commenter (Ex. 54) recommended that, to ensure greater worker protection, DOE continue to require contractors to follow ACGIH TLVs where they are more protective than OSHA PELs. DOE agrees with the latter comment on inclusion of ACGIH TLVs. In final rule section 851.23(a)(9), DOE continues to require the use of ACGIH TLVs exposure limits where they are lower and more protective than OSHA PELs. As mentioned earlier in the discussion of this section, this approach is consistent with DOE Order 440.1A, which has been in place and implemented by DOE contractors on DOE worksites for a decade.

Two commenters were concerned about beryllium exposure levels. One commenter (Ex. 49) recommended that the ACGIH TLV for beryllium be excluded from the rule on the basis that DOE has a separate rule 10 CFR 850 that specifically addresses beryllium exposure limits. In contrast, another commenter (Ex. 62) believed that DOE should adopt the ACGIH TLV for beryllium in the rule; the more protective limit currently under consideration by ACGIH would be applicable under this rule upon ACGIH's approval. In 851.23(a)(1) of the final rule, DOE requires contractors to comply with 10 CFR 850, "Chronic Beryllium Disease Prevention Program" (Part 850 CBDPP). In addition, Part 850 CBDPP has been revised to state that it supplements, and is deemed an integral part of, the worker safety and health program under Part 851. Section 851.23(a)(9) adopts the ACGIH TLVs, however, DOE notes that the rule adopts a specific version of the ACGIH standards. Incorporation of any future changes to those standards into 10 CFR 851 could only be accomplished through appropriate rulemaking procedures.

DOE received a few requests for additional specific standards to be included in the rule. One commenter (Ex. 49) recommended that DOE specifically list parts of the referenced ANSI standards that are considered exposure limits and technical requirements and, thus, applicable under the rule. DOE agrees that specificity is helpful and has included 851.23(a)(10), (11), and (12) in the final rule; these list the three specific ANSI standards adopted under the rule.

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 rule published today does 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 rule that may affect family well-being. This 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 final rule under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(2).

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

10 CFR Part 850

Beryllium, Chronic beryllium disease, Hazardous substances, Lung diseases, Occupational safety and health, Reporting and recordkeeping requirements.

10 CFR Part 851

Civil penalty, Federal buildings and facilities, Incorporation by reference, Occupational safety and health, Safety, Reporting and recordkeeping requirements.

Issued in Washington, DC, on January 20, 2006.

John Spitaleri Shaw,

Assistant Secretary for Environment, Safety and Health.

■ For the reasons set forth in the preamble, the Department of Energy is amending chapter III of title 10 of the Code of Federal Regulations as follows:

PART 850—CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM

■ 1. The authority citation for part 850 is revised to read as follows:

Authority: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 29 U.S.C. 668; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*, E.O. 12196, 3 CFR 1981 comp., at 145 as amended.

■ 2. Section 850.1 is revised to read as follows:

§ 850.1 Scope.

This part provides for establishment of a chronic beryllium disease prevention program (CBDPP) that supplements and is deemed an integral part of the worker safety and health program under part 851 of this chapter.

■ 3. Section 850.4 is revised to read as follows:

§ 850.4 Enforcement.

DOE may take appropriate steps pursuant to part 851 of this chapter to enforce compliance by contractors with this part and any DOE-approved CBDPP.

■ 4. A new part 851 is added to Chapter III to read as follows:

PART 851—WORKER SAFETY AND HEALTH PROGRAM

Subpart A—General Provisions

Sec.

- 851.1 Scope and purpose.
- 851.2 Exclusions.
- 851.3 Definitions.
- 851.4 Compliance order.

851.5 Enforcement.

851.6 Petitions for generally applicable rulemaking.

851.7 Request for a binding interpretive ruling.

851.8 Informal requests for information.

Subpart B—Program Requirements

851.10 General requirements.

851.11 Development and approval of worker safety and health program.

851.12 Implementation.

851.13 Compliance.

Subpart C—Specific Program Requirements

851.20 Management responsibilities and worker rights and responsibilities.

851.21 Hazard identification and assessment.

851.22 Hazard prevention and abatement.

851.23 Safety and health standards.

851.24 Functional areas.

851.25 Training and information.

851.26 Recordkeeping and reporting.

851.27 Reference sources.

Subpart D—Variances

851.30 Consideration of variances.

851.31 Variance process.

851.32 Action on variance requests.

851.33 Terms and conditions.

851.34 Requests for conferences.

Subpart E—Enforcement Process

851.40 Investigations and inspections.

851.41 Settlement.

851.42 Preliminary notice of violation.

851.43 Final notice of violation.

851.44 Administrative appeal.

851.45 Direction to NNSA contractors.

Appendix A to Part 851—Worker Safety and Health Functional Areas

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.*

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 providing 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:

(9) 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 procedures established in the approved worker safety and health program.

§ 851.21 Hazard identification and assessment.

(a) Contractors must establish procedures to identify existing and potential workplace hazards and assess the risk of associated workers injury and illness. Procedures must include methods to:

(1) Assess worker exposure to chemical, physical, biological, or safety workplace hazards through appropriate workplace monitoring;

(2) Document assessment for chemical, physical, biological, and safety workplace hazards using recognized exposure assessment and testing methodologies and using of accredited and certified laboratories;

(3) Record observations, testing and monitoring results;

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

(5) Evaluate operations, procedures, and facilities to identify workplace hazards;

(6) Perform routine job activity-level hazard analyses;

(7) Review site safety and health experience information; and

(8) Consider interaction between workplace hazards and other hazards such as radiological hazards.

(b) Contractors must submit to the Head of DOE Field Element a list of closure facility hazards and the established controls within 90 days after identifying such hazards. The Head of DOE Field Element, with concurrence by the Cognizant Secretarial Officer, has 90 days to accept the closure facility hazard controls or direct additional actions to either:

(1) Achieve technical compliance; or

(2) Provide additional controls to protect the workers.

(c) Contractors must perform the activities identified in paragraph (a) of this section, initially to obtain baseline information and as often thereafter as necessary to ensure compliance with the requirements in this Subpart.

§ 851.22 Hazard prevention and abatement.

(a) Contractors must establish and implement a hazard prevention and abatement process to ensure that all

identified and potential hazards are prevented or abated in a timely manner.

(1) For hazards identified either in the facility design or during the development of procedures, controls must be incorporated in the appropriate facility design or procedure.

(2) For existing hazards identified in the workplace, contractors must:

(i) Prioritize and implement abatement actions according to the risk to workers;

(ii) Implement interim protective measures pending final abatement; and

(iii) Protect workers from dangerous safety and health conditions;

(b) Contractors must select hazard controls based on the following hierarchy:

(1) Elimination or substitution of the hazards where feasible and appropriate;

(2) Engineering controls where feasible and appropriate;

(3) Work practices and administrative controls that limit worker exposures; and

(4) Personal protective equipment.

(c) Contractors must address hazards when selecting or purchasing equipment, products, and services.

§ 851.23 Safety and health standards.

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

(1) Title 10 Code of Federal Regulations (CFR) 850, "Chronic Beryllium Disease Prevention Program."

(2) Title 29 CFR, Parts 1904.4 through 1904.11, 1904.29 through 1904.33; 1904.44, and 1904.46, "Recording and Reporting Occupational Injuries and Illnesses."

(3) Title 29 CFR, Part 1910, "Occupational Safety and Health Standards," excluding 29 CFR 1910.1096, "Ionizing Radiation."

(4) Title 29 CFR, Part 1915, "Shipyards Employment."

(5) Title 29 CFR, Part 1917, "Marine Terminals."

(6) Title 29 CFR, Part 1918, "Safety and Health Regulations for Longshoring."

(7) Title 29 CFR, Part 1926, "Safety and Health Regulations for Construction."

(8) Title 29 CFR, Part 1928, "Occupational Safety and Health Standards for Agriculture."

(9) American Conference of Governmental Industrial Hygienists (ACGIH), "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices," (2005) (incorporated by reference, see § 851.27) when the ACGIH Threshold Limit Values (TLVs)

are lower (more protective) than permissible exposure limits in 29 CFR 1910. When the ACGIH TLVs are used as exposure limits, contractors must nonetheless comply with the other provisions of any applicable expanded health standard found in 29 CFR 1910.

(10) American National Standards Institute (ANSI) Z88.2, "American National Standard for Respiratory Protection," (1992) (incorporated by reference, see § 851.27).

(11) ANSI Z136.1, "Safe Use of Lasers," (2000) (incorporated by reference, see § 851.27).

(12) ANSI Z49.1, "Safety in Welding, Cutting and Allied Processes," sections 4.3 and E4.3 (1999) (incorporated by reference, see § 851.27).

(13) National Fire Protection Association (NFPA) 70, "National Electrical Code," (2005) (incorporated by reference, see § 851.27).

(14) NFPA 70E, "Standard for Electrical Safety in the Workplace," (2004) (incorporated by reference, see § 851.27).

(b) Nothing in this part must be construed as relieving a contractor from complying with any additional specific safety and health requirement that it determines to be necessary to protect the safety and health of workers.

§ 851.24 Functional areas.

(a) Contractors must have a structured approach to their worker safety and health program which at a minimum, include provisions for the following applicable functional areas in their worker safety and health program: construction safety; fire protection; firearms safety; explosives safety; pressure safety; electrical safety; industrial hygiene; occupational medicine; biological safety; and motor vehicle safety.

(b) In implementing the structured approach required by paragraph (a) of this section, contractors must comply with the applicable standards and provisions in Appendix A of this part, entitled "Worker Safety and Health Functional Areas."

§ 851.25 Training and information.

(a) Contractors must develop and implement a worker safety and health training and information program to ensure that all workers exposed or potentially exposed to hazards are provided with the training and information on that hazard in order to perform their duties in a safe and healthful manner.

(b) The contractor must provide:

(1) Training and information for new workers, before or at the time of initial assignment to a job involving exposure to a hazard;