May 21, 2007

Mr. Glenn S. Podonsky, Director
Office of Security and Safety Performance Assurance
U.S. Department of Energy, HS-1

Via FAX, email, and U.S. Postal Service

Subject: 10 CFR 851 IMPLEMENTATION ISSUES

Dear Mr. Podonsky:

I write on behalf of members of the Department of Energy Contractor Attorneys' Association (DOECAA), to bring to your attention the remaining key concerns of the contractor community with respect to the interpretation and implementation of 10 CFR Part 851, DOE's Worker Safety and Health Program regulation. This was a major rulemaking, so it is not surprising that - despite the best efforts of all concerned - some issues remain unresolved or are in need of clarification.

We recognize that HSS, OGC, and DOE program and field staff have spent countless hours working cooperatively with the contractor community in the effort to establish effective and efficient approaches for implementing the rule. We also appreciate the willingness to listen to our concerns demonstrated by your staff. However, significant concerns remain with regard to: (1) contractor owned or leased premises; (2) occupational medicine; and (3) treatment of commercial vendors and suppliers. These involve legal and practical problems having significant long-term cost, compliance, and enforcement implications. We believe rulemaking is necessary to address them on a consistent basis.

The DOE complex has become increasingly diverse, with contractors conducting environmental cleanup, fundamental scientific research, applied research, and classified nuclear and weapons activities at sites that do not always fit the traditional "inside the fence" paradigm. In addition, many activities performed today for DOE are not performed by management and operating contractors, but by subcontractors. Many of these activities do not always occur at DOE facilities but may often be carried out at privately-owned facilities. DOE has been variously addressing its contractors' diverse contractors' 851 concerns in informal, non-binding white papers, in the Implementation Guide, in ad hoc communications and through site-specific variance requests. While these approaches are helpful interim measures, they are an ineffective and inappropriate means of resolving issues that have such broad legal impact across the complex over the long term. Given that 10 CFR 851 is soon to be enforceable by substantial civil penalties, there is a critical need for a clear mutual understanding of the regulation's meaning in these unresolved areas, especially with regard to the standards and interpretations that

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will govern its implementation. The current process does not contribute to a predictable, stable regulatory environment.

Be assured that we are not trying to reduce the level of protection of workers. Our goal is to have consistent, workable, effective, and robust worker safety and health programs across the DOE complex. It is our hope that this letter will facilitate the forging of a path forward that leads to truly enhanced worker safety.

Statutory Mandate: Maintain the Current Level of Worker Protection

Underlying many of our concerns are requirements that go beyond the statutory direction from Congress in the National Defense Authorization Act of 2003 that DOE establish a worker safety and health system that maintains "the level of protection currently provided to workers." Sections of the rule are not entirely consistent with the statutory language and intent of the Act. In some ways the rule creates new, costly and unworkable requirements, especially those which extend responsibilities to contractors to control the actions (or insert themselves into the internal operations of) subcontractors, vendors and suppliers AND THE ACTIONS OF THEIR EMPLOYEES. Additionally, these are provisions and interpretations of the regulation that are inconsistent with current labor, employment, and contract law in many states. The new, deeply intrusive approach to private sector subcontractors' internal operations is not consistent with legal precedent or historical practices across the complex. In addition, extension of the regulation to facilities where FedOSHA or state OSHAs already have regulatory jurisdiction (e.g., non-DOE-owned facilities, such as those owned by the State of Tennessee within the ORNL campus or those owned by Stanford University within the SLAC leasehold (on privately owned rather than federal land)) exceeds the statutory grant of authority.

Three Major Areas of Concern: Contractor Owned or Leased Facilities, Occupational Medicine, and Commercial Vendors & Suppliers

I. Contractor Owned Or Leased Facilities

The regulation governs contractor activities at "DOE sites," which are defined as either being owned or leased by DOE or "controlled" by DOE. The key issue is what constitutes "control" where there may be activities in furtherance of DOE's mission being performed in facilities owned or leased (or otherwise occupied) by the contractor, not by DOE. As you are well aware, there are many of these around the complex. These facilities are not, in fact, "controlled" by DOE.

DOE's interpretation of "controlled" exceeds the statutory authority granted by Congress. The statute directed DOE to "promulgate regulations for industrial and construction health and safety at *Department of Energy facilities* that are operated by contractors… ." [Emphasis added.] The statute did not intend for

DOE to regulate those private-sector facilities already subject to FedOSHA or state OSHA jurisdiction.

Facilities owned or leased by DOE contractors off of a DOE-owned site are not controlled by DOE and are not governed by the rule. These facilities often include numerous shared buildings with non-DOE-related tenants and activities. These buildings and facilities are already subject to FedOSHA or state OSHA.

It is important to keep in mind that contractors have generally agreed to programmatically apply 851 compliant WSHPs to their workforces wherever located. DOE retains its traditional contractual remedies (e.g., Conditional Payment of Fee and performance metrics) with respect to safety issues at any of these facilities. Our concern is with the broad exercise of DOE enforcement and civil penalty authority over these types of facilities.

Informal DOE interpretations to date suggest DOE "control" by virtue of its approval of contractor leases, the location of some of these facilities on or near DOE sites, or based on its overall "control" of the work performed under its contract. We do not agree. The two formal OGC interpretations on this issue – dealing with small satellite "labs" at SRS - do not add clarity to the overall issue; they are too narrow in scope and focus primarily on the extent to which work under DOE Cooperative Agreements is covered by the regulation.

The regulation, as written, covers traditional "GOCO" facilities "inside the fence" and simply does not extend to contractor owned or leased facilities – particularly those "outside the fence" where FedOSHA or the state OSHA have statutory authority to regulate workplace safety. Indeed, Part 851 specifically states that even a DOE "controlled" facility is not subject to the rule if FedOSHA is regulating work at that facility (§ 851.2(a)(1)). Recent rulemakings have given state OSHAs authority over some DOE federal facilities and operations.

We are of the opinion that facilities owned or leased by DOE contractors off of a DOE-owned site are not controlled by DOE and not governed by 10 CFR 851. These often involve numerous non-DOE-related tenants and activities, and are regulated by FedOSHA or state OSHA (e.g., commercial office space in Richland, Oak Ridge; Las Vegas; on-site, alternatively financed private facilities on privately owned land).

In addition, the mere fact that DOE "controls" the work performed under the contract does not mean it controls the "area or location" where the work is performed. This interpretation mixes the concept of work performed under contract "in furtherance of a DOE mission" with the concept of DOE control of the area or location.

This issue has not been adequately resolved. Different contractors are receiving different interpretations from different DOE offices.

Left unresolved, this issue confronts the contractor community with the potential of dual enforcement actions over accidents or inspections, inconsistencies among different sites they operate based on local interpretations, and disputes with landlords over facility compliance standards and costs.

II. Occupational Medicine

The 851 occupational medicine requirements represent a radical departure from the standards in effect before the rule was adopted. It expands a contractor's responsibilities to protect workers beyond that contemplated by current state and federal schemes. Federal and state laws require contractors (and subcontractors) to provide some level of occupational medicine coverage for their employees. Part 851 as written can be interpreted as requiring prime contractors to either provide occupational medicine services to subcontractor employees at any tier (rather than just to their own employees) or to flow down those expansive requirements to subcontractors at all levels (who must then seek medical providers who would/could comply with 851 – a daunting task). The 851 occupational medicine provisions therefore seem inconsistent with the intent of Congress to "maintain the level of protection currently provided to workers."

Many if not most states already require contractors and subcontractors to have occupational medicine programs for their employees and require reporting into statutory state Workers' Compensation programs; the related 851 requirements are redundant and may conflict with the state approach. Subcontractors typically have occupational medicine programs that meet FedOSHA requirements and most DOE prime contractors have required their subcontractors to meet those requirements via special subcontract provisions particularized to the nature and hazards of the subcontractor's work. Those that perform any work within a state at nonfederal sites already have to meet state OSHA and state Occupational Medicine requirements.

The requirement for prime contractor "approval" of subcontractor occupational medicine programs may run afoul of state regulations that permit only the state regulator to approve such plans.

There are no states requiring contractors to provide occupational medicine coverage for non-employees. It is worth noting as well that the requirement that a prime contractor provide occupational medicine services to subcontractor employees, in addition to going far beyond any existing protection, forces the prime contractor to blur the important distinction between its employees and the employees of its subcontractors, running the risk of being characterized as either a "co-employer" or a "joint employer" in certain jurisdictions (thus **also increasing DOE's liability and risk**).

Additionally, where the contractor provides such services to

subcontractors it also subjects contractor medical staff to additional medical malpractice risk; however, DOE field offices have been inconsistent with regard to whether approval of medical malpractice insurance coverage would be approved. Further, most DOE sites, being staffed to meet the needs of the site employee population, do not have the resources or infrastructure to take on such comprehensive subcontractor employee medical services.

Part 851's extensive set of occupational medicine requirements, imposed on both the contractor and the occupational medicine services provider, also go well beyond DOE Order 440.1A requirements. Two examples:

- Requirements that the occupational medicine services provider monitor ill and injured "workers" (not limited to employees), communicate health evaluations to management and health and safety staff, and establish programs to manage preventable causes of morbidity/mortality; this level of involvement and extent of responsibilities is an unusual expansion of the Occupational Medicine providers' role vis-à-vis an employer (and certainly most remarkable if extended to capture subcontractor employees).

- Requirement that subcontractors track and monitor highly transient workers (exacerbated at multi-contractor sites), personnel dispatched from union halls for differing jobs with differing employers, and office workers engaged in clerical, non-hazardous activities.

By and large, the prime contractor community has established effective programs that satisfy these requirements for their own employees, because most of Part 851's requirements are essentially the same as those in the DOE Order 440.1A Contractor Requirements Document in effect since 1998, or because it is a good corporate business practice (often implemented through the equivalent of a "risk manager"), and/or because these criteria are very similar to state law requirements with which they are already compliant.

However, Order 440.1A has not been interpreted to require the prime contractors to extend or flow down those requirements to subcontractors at any tier. We are unaware of any state law requirements that impose such a flowdown.

Assuming for the moment that 851 does not "legally" require the prime to provide Occupational Medical coverage of the type described by the regulation to subcontractor employees, to a certain extent 851 "practically" requires that the prime do so because few subcontractors have the resources to establish and maintain the type of program the regulation mandates. That is, if the prime does not assist the subcontractors, there may be no 851-qualified subcontractors available to the site. However, this begs the question of how the costs of such an Occupational Medicine program will be borne.

The expanded Occupational Medicine requirements of 10 CFR 851 exceed any existing worker safety protection and thus go beyond statutory direction given to DOE to guide promulgation of the regulation.

A final concern with regard to the Occupational Medicine provisions: The fact that many small subcontractors have neither the resources nor expertise to pursue and implement an 851 compliant occupational medicine program of the type described by the regulation, is likely to have an impact on the DOE small business subcontracting goals.

This is an ideal area for a clarifying rulemaking.

III. Vendors And Suppliers

This is an area where progress has been made in approaching a consensus. However, the general consensus is embodied only in non-binding, informal guidance, and DOE has been unclear whether it would actually follow the recent White Paper on the subject. *We think this too is an ideal area for a clarifying rulemaking, since it impacts the national DOE supplier community.*

DOE's informal position papers already state that vendors or suppliers that are not providing "services" to DOE are excluded from the rule; however, the contractor community has been informed that it should not rely upon this guidance. In addition, the preamble to the rule and the non-binding Implementation Guide already state that contractors or vendors that provide "commercial items," as defined in the FAR, are excluded. However, there has been considerable debate about the scope of application of the "commercial items" exception (e.g., whether or not to exclude from Part 851warranty or service work performed by the vendor or other subcontractors related to commercial items). We are of the opinion that the preamble to the regulation, like the statements in the FAR itself concerning "commercial items" and the providers of commercial items and commercial services, should be construed in accordance with the rules of statutory construction to take the meaning accorded to the plain meaning of the words. This is not, however, universally accepted by DOE Field Offices. This uncertainty again demonstrates the need for a rulemaking.

IV. Conclusion And Recommendation

There continue to be significant legal and practical issues associated with implementation of Part 851 that are being felt all across the complex and which are not being uniformly and satisfactorily addressed. These have come to light as the contractors have "rolled up their sleeves" to prepare and submit WSHPs and achieve compliance. Clarifying changes and enhancements to this major rulemaking are needed to ensure the efficient and effective implementation of the rule.

It is our mutual goal to ensure robust implementation of

practical and effective worker safety and health programs across the DOE Complex. To do this, it may be necessary to address these issues formally, through a clarifying rulemaking. We are aware that your office has under consideration a possible rulemaking to amend the occupational medicine provisions of the rule. We strongly endorse that type of a formal approach to issue resolution, but think that the other issues discussed above require a similar approach.

If it would be helpful, we would be happy to provide you or your staff with our specific recommendations for regulatory changes – informally if that is appropriate, or if a formal rulemaking petition would be helpful or necessary, we would seek the support of our members to submit such a petition.

In addition, in areas where DOE recognizes that changes should be made in the rule or significant practical implementation problems exist, DOE should consider exercising enforcement discretion on a temporary basis until such issues are resolved, mutual understanding is achieved, and contractors have been given sufficient time to achieve compliance.

Thank you again for your time and attention. I look forward to hearing from you concerning these issues and would welcome an opportunity to discuss them further. Please do not hesitate to contact me by email or telephone.

Respectfully,

Rachel Claus

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