Draft Interpretive Ruling
By the DOE Headquarters Office of the General Council
Prepared by: Dennis Kubicki
Review Comments Reflected
April 6, 2006

Preamble

Section 851.3, "Definitions" of Part 851 establishes an "Interpretive Ruling" as "a statement by the General Council 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 Council determines such action to be appropriate***" (emphasis added).

Introduction

Section 851.31 of Part 851 delineates a process for the application for, the processing of, the consideration and ultimate disposition of "variances" from the provisions of the Rule. In a number of forum that have been convened since the promulgation of the Rule, Departmental personnel have recognized the possibility that DOE may expend unnecessary resources to address through variance applications a number of existing conditions that represent no significant risk to the health and safety of its workers. Consequently, the Office of the General Council was requested to develop an Interpretive Ruling that will facilitate a more thorough understanding of Section 851.31 and reduce the potential for unnecessary effort and unjustified facility modifications. After due consideration of the issues involved and after consultation with a number of specialists representing diverse stakeholders, this Office has consented to issue this Interpretive Ruling.

Discussion

Within the realms of regulatory compliance and general industry health and safety practices are a number of concepts that have been widely and effectively applied with regard to the enforcement of consensus codes and standards, such as those promulgated by the National Fire Protection Association (NFPA) and other non-governmental standards setting organizations. Two such concepts are known by the technical terms "equivalency" and "retroactivity" (often discussed in the context of "Codes of Record"). A third concept that has applied throughout the Department in conjunction with the DOE directives system is "exemption." All three have a current impact on the issue of Part 851 compliance by contractors. Each will be discussed in turn.

<u>Equivalencies</u>

An "equivalency," as variously defined in industry codes and standards, is an alternate means of achieving compliance with the provisions of those codes and standards. The text from NFPA 101, *Life Safety Code,* is representative. It states in Paragraph 1.4.3 of the 2006 Edition: "Alternative systems, methods or devices approved as equivalent by the authority having jurisdiction shall be recognized as being in compliance with this Code."

The alternative must, by definition, provide a comparable level of safety to that achieved through literal conformance with the explicit criteria of the code or standard. With regard to Part 851, DOE contractors are confronted with two broad application issues.

The first application issue concerns the requirements delineated in Appendix A to Part 851, in which contractors are required to include in their fire protection program "applicable building codes and National Fire Protection Association codes and standards." Appendix A does not explicitly identify those codes and standards. This Office has reviewed the text of representative NFPA codes and standards and concludes that, subject to the degree or rigor and consistency described below; the NFPA equivalency process satisfies the fire protection provisions of Part 851.

This rigor and consistency must include the following. Documented requests for approval of equivalencies are expected to be developed by a qualified fire protection engineer or certified fire department officer and be submitted to the DOE Authority Having Jurisdiction (AHJ) for fire protection, as defined in DOE-HDBK-1188-2006, *GLOSSARY OF ENVIRONMENT, SAFETY AND HEALTH TERMS* (January 2006), for review and approval. Equivalency requests must identify what specific requirement cannot be met literally, the reason(s) that the requirement cannot be met, a description of the alternate configuration, and the rationale that purports to demonstrate that an equivalent level of safety will be achieved if this alternative is adopted. Where there are multiple conditions that can be resolved on the basis of an equivalency, these conditions can be grouped by individual code or standard, provided that the specific conditions are explicitly identified. It is expected that approvals of equivalencies by the DOE AHJ be documented and that related documentation be kept on file in an auditable form.

(Note: The next two paragraphs address Howard's comment on the need for a "path forward" on industry codes and standards regarding equivalent safety. The text that I am proposing represents a reasonable approach. Frankly, I can't imagine what we might say as an alternative, other than EH should consider a Part 851 amendment and that contractors should hold in abeyance conditions they identify which do not literally meet these codes and standards but that achieve equivalent safety.)

The second application issue concerns Section 851.23, in which a spectrum of industry codes and standards are explicitly delineated as being applicable to contractors. The critical requirement, as stated in Part 851, is "Contractors must comply with the following safety and health standards that are applicable to the hazards of the covered workplace." It does not state **"literally"** comply with these standards in recognition of many comments received on the draft Rule regarding the need to recognize widespread alternative approaches to literal compliance that have historically been adopted by contractors with DOE approval.

In wide-ranging discussions among the authors of the original drafts of Part 851 and those that commented on them, there was consensus that the intent of this requirement is to ensure that an acceptable level of worker health and safety was achieved and maintained. It was not the intent of the Regulation to mandate facility modifications, process changes or revisions to work practices for conditions under which both the contractors and DOE agree that there are

no significant risks to worker safety and health. The absence of significant risk is as determined by technically qualified contractor representatives and those from the DOE AHJ. Similarly, it was not the intent of the Regulation to compel contractors to submit for approval under the Variance Process of Part 851 conditions that achieve equivalent safety to the explicit provisions of the industry codes and standards listed in Section 851.23. Also, it was not the intent of the Regulation to create redundant processes (one for NFPA codes and standards in Appendix A, the other for the codes and standards in Section 851.23) governing equivalent safety.

Consequently, after careful consideration of the text in Section 851.23 and general practices in the safety and health industry and within DOE, this Office concludes that the process for requesting and approving equivalencies to NFPA codes and standards that is summarized above should similarly govern equivalent safety for the spectrum of industry codes and standards that are delineated in Section 851.23. This includes an appropriate level of documented description and justification prepared by a technically qualified representative of the contractor. This documented must be submitted to the DOE AHJ for approval and must be reviewed by a qualified member of the DOE AHJ staff. Such documentation must be kept on file in an auditable form.

Where conditions are identified that do not literally meet the above-referenced codes and standards and do not achieve equivalent safety, contractors must proceed on one of two paths forward. One is through facility modifications or process changes in accordance with a DOE AHJ-approved abatement plan. The other is through approval of a Variance. Requirements for both are delineated in Part 851.

Retroactivity / Codes of Record

(Note: The text in red below addresses several comments.)

Section 851.23 and Appendix A of Part 851 require contractors to meet certain industry codes and standards to assure adequate worker safety and health. Questions have arisen with regard to the issue of retroactive application of these codes and standards to **existing** DOE facilities, processes and work activities. It is understood and expected that the provisions of these codes and standards must apply to **new** DOE facilities (and new modifications to existing facilities), processes and work activities.

DOE facilities have been constructed and modified over a span of time that exceeds fifty years using codes and standards contemporary to the time frame in which construction occurred. These codes and standards are generally known within the Department as the "codes of record." It is often difficult to ascribe specific codes of record as being applicable to individual DOE facilities and processes. Additionally, the more dated codes of record are often unavailable for use in the performance of routine safety and health assessments and related evaluations. For these and other reasons, **current** codes and standards are routinely used within DOE in such reviews and the explicit provisions of them for retroactivity to existing facilities and processes are applied. (For example, NFPA 101, *Life Safety Code*, contains provisions for both new and existing buildings.) Where such provisions exist for the

codes and standards delineated in Section 851.23 and in Appendix A, of Part 851, it is expected that their explicit retroactivity criteria apply to existing DOE facilities, processes and work activities.

Where the codes and standards delineated in Section 851.23 and in Appendix A to Part 851 do **not** contain explicit provisions related to retroactive applicability, it is expected that their provisions apply in the evaluation of worker health and safety to existing facilities, processes and work practices. Note that in the evaluation of worker health and safety a preliminary conclusion may be reached that observed conditions may achieve equivalent safety to that achieved by compliance with the literal provisions of these codes and standards. In such instances, the process for requesting approval of equivalencies that was described above should be considered. Where such an evaluation results in a conclusion that individual provisions of these codes and standards are not met and no equivalent safety exists contractors must proceed on one of two paths forward. One is through facility modifications or process changes in accordance with a Doe AHJ-approved abatement plan. The other is through approval of a Variance. Requirements for both are delineated in Part 851.

(NOTE: This next paragraph addresses Terry Krietz comment and is related to others.)

A related issue concerns the applicability of **new editions** to the codes and standards that are listed in Section 851.23 and Appendix A to Part 851 as well as **recently promulgated** codes and standards that apply to worker health and safety but are not delineated in Part 851. Consistent with the practices observed by private industry, OSHA, and DOE, this Office concludes that contractors may apply the provisions of new editions of the above-referenced codes and standards provided that their application will enhance safety and not diminish it from existing levels. Where questions arise as to whether their application represents an enhancement beyond existing, the DOE AHJ is the final arbiter.

Concerning new codes and standards that are promulgated after the publication of Part 851, contractors may be obligated to implement and maintain them in conjunction with the terms of governing contracts. Where this is the case, it is expected that contractors develop an implementation plan and submit it to the DOE AHJ for approval. Similarly, if an accidental death or injury results from the non-implementation of the provisions of new codes and standards, enforcement action may be taken under the provisions of Section 851.22, which requires contractors to "establish and implement a hazard prevention and abatement process to ensure that **all identified and potential hazards** (emphasis added) are prevented or abated in a timely manner."

Exemptions

This Office acknowledges the documented record of DOE approval of exemptions from the requirements of select DOE Orders prior to the promulgation of Part 851. Most appear to have been approved within the realm of fire protection and emergency response; although the record is far from clear in this regard. In reviewing a representative sample of these exemptions it has become clear that the conditions described generally come within the scope of Part 851 and its incorporated codes and standards. In reviewing the text of the Rule, it is

clear that Part 851 offers no mechanism for administratively accepting their continued validity without an appropriate level of review by DOE.

(NOTE: This red text in the next paragraph addresses another comment from Howard.)

In order to ensure a technically valid review, contractors that are responsible for facilities or work practices that are encompassed by these historic exemptions are advised to follow the established procedures under Section 851.31, Subpart D, for the approval of Variances. This does not require reformulation and totally new documentation of the original requests. A submittal package that transmits the original exemption requests and DOE approval memorandum to the CSO may be sufficient if it meets the requirements of Subpart D. Technically qualified subject matter experts (SME) from the CSO are expected to review this documentation and ascertain if the underlying conditions remain valid. If there is a positive determination, the CSO is expected to forward the correspondence to the DOE Assistant Secretary for Environment, Safety and Health (EH) with a recommendation for approval. If there is a negative determination, the CSO returns the correspondence to the contractor for further elaboration or remedial action. Forwarded exemptions are expected to be reviewed by technically qualified SMEs from EH, who are responsible for ascertaining the acceptability of the exemptions. If a positive determination is made, EH is expected to issue a memorandum of final approval to the CSO. If a negative determination is made, EH is expected to issue a memorandum to the CSO with its rationale and recommendations.

With regard to new applications for a Variance from the requirements of Part 851, the stipulations of Section 851.31 are expected to be followed completely. The review process for new Variance requests is expected to be more rigorous than those described above for historic exemptions. This would include, but not be limited to, site visits by CSO and EH SMEs to observe conditions directly.

Questions on this Interpretive Ruling should be directed to Ms. Robin Henderson, ESQ, who can be reached on 202-586-8706 (robin.henderson@hq.doe.gov).