

not be obligated to use them. Rather, contractors' only obligation would be to comply with the regulations themselves.

Proposed § 851.8 would broadly define the term "guidance document" to include any document that sets forth information related to implementing or otherwise complying with a requirement set forth in the proposed regulations and that DOE has not adopted as a legally binding requirement through notice and comment rulemaking under the Administrative Procedure Act (5 U.S.C. 553). This definition would include proposed Appendices A and B, DOE and industry standards, and any document in the DOE directive system or other informal statement of policy regardless of which DOE official approved or signed the document. Use of the terms "shall" or "must" in a guidance document does not change the non-mandatory character and effect of the document.

Proposed § 851.8(a) would make clear to contractors and DOE officials that guidance documents do not create legally enforceable requirements. Proposed § 851.8(b) would prohibit DOE officials from inspecting or investigating a DOE site to identify violations of the proposed regulations by determining whether a contractor's actions or omissions were consistent with a guidance document. DOE intends that such inspections and investigations will, ordinarily, focus on whether a contractor's actions or omissions comply with the requirements under its worker safety and health program, or on rare occasions, on whether such actions or omissions comply with requirements of a compliance order issued for cause by the Secretary under § 851.6. Proposed § 851.8(c) would identify the limited circumstances in which a guidance document can give rise to an enforceable requirement. Specifically, a guidance document can give rise to an enforceable requirement only to the extent it is explicitly: (1) included by a contractor in the set of workplace safety and health standards identified pursuant to § 851.101(c)(3)(B) of the proposed regulations; or (2) selected or used by a contractor as a procedure, control, or work process to perform work in a tailored manner for particular covered workplaces in accordance with § 851.101(c)(4) of the proposed regulations. Only in these circumstances may DOE pursue an enforcement action on the basis of action inconsistent with a guidance document and, in these circumstances, DOE would base the enforcement action on a provision of the contractor's plan and not the guidance document itself.

Proposed § 851.8 would serve two purposes. First, by precluding imposition of a *de facto* set of requirements in the guise of guidance, it would ensure that, as required by section 234C(a)(3) of the AEA, DOE's implementing regulations include flexibility to tailor implementation of such regulations to reflect activities and hazards associated with a particular work environment. Put more succinctly, proposed § 851.8 would reinforce site-specific integrated safety management as the guiding principle for the proposed regulations. Second, proposed § 851.8 is responsive to potential contractor criticism that reliance on generally applicable, informal policy directives in the area of worker safety and health instead of duly promulgated rules under the Administrative Procedure Act promotes regulatory instability across the DOE complex which is antithetical to effective integrated safety management and to accomplishment of DOE's national security and research missions. Proposed § 851.8 would thus reinforce the shift from a DOE directive-driven regime characterized by informal DOE policies to a regulatory regime characterized by generally applicable rules that have the force and effect of law with respect to DOE officials, as well as with respect to regulated contractors. Moreover, proposed § 851.8 recognizes the responsibility and obligation of a contractor, in the first instance, to select the procedures, controls, and work processes to use in achieving safe and healthy workplaces and implementing its worker safety and health program.

H. Workers Rights

Workers at DOE sites currently have a number of rights related to assuring a safe and healthy workplace. Proposed § 851.103 would list these rights and make clear that workers may exercise these rights without fear of reprisal. Specifically, the proposed regulations would maintain the rights of workers to: (1) Participate in activities described in this section on official time; (2) have access to DOE safety and health publications, the DOE-approved worker safety and health program for the DOE site and the standards, controls and procedures applicable to the covered workplace; (3) observe monitoring or measuring of hazardous agents; (4) have access to monitoring and measuring results and be notified when such results indicate the worker was overexposed to hazardous materials; (5) accompany DOE personnel during an inspection of the workplace; (6) request and receive results of inspections and

accident investigations; (7) express concerns related to worker safety and health; (8) decline to perform an assigned task because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious bodily harm to the worker coupled with a reasonable belief that there is insufficient time to seek effective redress through the normal hazard reporting and abatement procedures; (9) stop work, through the worker's supervisor, when the worker discovers employee exposures to imminent danger conditions or other serious hazards, provided that any stop work authority must be exercised in a justifiable and responsible manner in accordance with established procedures; and (10) have access to an appropriate safety and health poster that informs the worker of relevant rights and responsibilities.

I. Enforcement

1. Civil Penalties

Section 234Cb. of the AEA provides that "a person (or any subcontractor or supplier of the person) who has entered into an agreement of indemnification under section 170d. (or any subcontractor or supplier of the person) that violates (or is the employer of a person that violates) any regulation promulgated under [section 234C] shall be subject to a civil penalty of not more than \$70,000 for each such violation." For continuing violations, section 234C provides that each day of the violation shall constitute a separate violation for the purposes of computing the civil penalty to be imposed.

Proposed § 851.4(c) would implement this statutory provision by making a contractor whose contract with DOE contains an indemnification agreement (or any subcontractor or supplier thereto) and who violates (or whose employee violates) any requirement of the proposed regulations subject to a civil penalty of not more than \$70,000 for each such violation. In the case of a continuing violation, each day of the violation would constitute a separate violation for the purpose of computing the amount of the civil penalty.

2. Contract Fee Reductions

Section 234Cc. of the AEA requires DOE to include provisions in DOE contracts for an appropriate reduction in the fees or amounts paid to the contractor if the contractor or a contractor employee violates the regulations required by section 234C. The Act requires these provisions to be included in each DOE contract with a contractor who has entered into an