

## Department of Energy

Washington, DC 20585

April 4, 1996

John T. Conway, Chairman  
Defense Nuclear Facilities Safety  
Board  
625 Indiana Avenue, N.W.  
Suite 700  
Washington, D.C. 20004

Dear Chairman Conway:

Thank you for your letters of February 1 and 13, 1996 regarding Policy Statements 410.1 (Promulgating Nuclear Safety Requirements) and 450.2 (Identification, Implementation, and Compliance with Environment, Safety and Health Requirements). In addition to the comments provided in your letters, our staff has had some further useful consultation with your staff on several of these issues.

Attached are revised versions of the two policy statements. We have carefully considered the concerns raised by the Board. Our response to the Board's comments is outlined below.

410.1 -- Promulgating Nuclear Safety Requirements. With regard to Policy Statement 410.1, our most recent communication from the Board was a telecopy from your Office of General Counsel dated February 15 providing suggestions in two areas. We agree fully that public notice and participation in the development of nuclear safety requirements must be structured so as not to compromise protection of classified information. As you know, protection of classified material is a requirement of Chapter 12 of the Atomic Energy Act. The Policy Statement reiterates the Department's commitment to abide by procedures established by law in promulgating nuclear safety requirements, and we have previously added the Atomic Energy Act to the list of specifically referenced procedural statutes at the Board's request. We are not aware of any problems related to disclosure of classified information in connection with Department rulemakings. Thus, we do not believe that further modification to the policy statement is required.

We also agree fully that Departmental actions in response to Defense Nuclear Facilities Safety Board recommendations must conform with all applicable laws. We have added an appropriate sentence to the "Scope" section.

450.2 -- Identification, Implementation, and Compliance with Environment, Safety and Health Requirements. Your letter of February 13 letter raises a number of issues on Policy 450.2. First, the Department has made substantial progress with regard to documenting and explaining the Necessary and Sufficient Process. DOE recently issued a manual detailing the Process (Manual 450.3-1) and a notice (Notice 450.3) setting out the ground rules for its near-term use

in the DOE complex. I understand that Dr. O'Toole and representatives of the Department Standards Committee are briefing the Board on the Process. The Necessary and Sufficient Process was designed to permit integration with other elements of DOE's existing safety management system, and use of the Process as a tool in integrated safety management will be further addressed in DOE's implementation plan for Recommendation 95-2.

We agree fully that a contractor should not be permitted to unilaterally change environment, safety and health requirements in a contract by using the Necessary and Sufficient Process (or any other process). The Necessary and Sufficient Process is, by its nature, a process for reaching agreement between DOE and a contractor. The Process requires DOE participation from the outset and requires DOE approval at the end. We have dropped the language from the policy statement that seems to have caused the confusion.

We believe that guidance can provide enormously useful information and methodologies on how requirements might be implemented, although the approaches described in guidance may not be appropriate in all circumstances. DOE guidance identifies acceptable means of satisfying the substantive requirements of an order or rule, but other approaches that satisfy the substantive requirements are also acceptable. Consistent with the suggestion of the Board, we have included in the Policy Statement the language included in Order 420: "Any implementation method selected must be justified to ensure that an adequate level of safety commensurate with the identified hazard is achieved." Because of the diversity of DOE's work situations, however, we do not agree with the suggestion in your February 13 letter that contractors must show that an alternative method is technically equivalent to the method specified in guidance. Instead we believe an alternative method must satisfy the requirements it is intended to implement and must ensure an adequate level of safety.

The Department recognizes the value of employing an integrated approach to safety management. DOE now is working closely with the Board on the implementation plan for Recommendation 95-2 which will set out our approach to making integrated safety management a reality within the Department. The intent of the discussion of integrated review of safety requirements in Policy 450.2 is narrower -- it focuses on tools available to DOE line management to assure that contract changes to incorporate revised orders in lieu of "old" orders are consistent with adequate protection of workers, the public, and the environment. Where such substitution will result in significant changes in the implementation of nuclear safety requirements, an integrated review of the sufficiency of the new set of requirements is required. This review can be achieved using disciplined approaches to appropriate standards identification such as those embodied in the Necessary and Sufficient Process, the S/RID development process, or integrated safety and hazard analysis. We recognize, as your February 13 letter indicates, that the tools for identifying appropriate requirements may be only elements of a larger integrated approach to safety management.

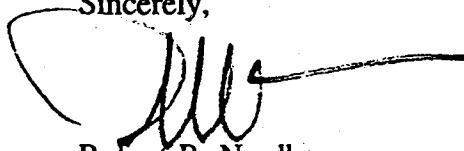
We acknowledge that some of DOE's orders are based in part on industry standards and commercial practices. The first paragraph under the heading "Implementation of Requirements"

is intended simply to emphasize our intent to provide flexibility in the implementation of requirements consistent with the strong commitment to ensure adequate protection. Increased reliance on industry standards and commercial practices is provided as one example of the possible outcomes from this tailored approach to implementation.

We recognize that the Department and the Board are engaged in discussions concerning the implementation of Recommendation 95-2. These discussions will advance our efforts on integrated safety management. We are not aware, however, of any inconsistencies between the direction of the implementation plan and Policy Statement 450.2. We also recognize that the Board has requested a revised version of the "crosswalk" for Order 440. We will not issue the revised Policy Statement 450.2 until this crosswalk has been completed, which we anticipate will occur in late April.

We appreciate your attention to and input on these important matters. We believe these Policy Statements reflect our shared concern for enhancing the conduct of the Department's activities management in a manner consistent with continued protection of workers, the public and the environment. I would be glad to speak with you about any further comments you may have.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Nordhaus', with a long horizontal stroke extending to the right.

Robert R. Nordhaus  
General Counsel

Enclosures

DRAFT -- 3/28/96

U.S. DEPARTMENT OF ENERGY  
WASHINGTON, D.C.

POLICY  
DOE P 410.1

## PROMULGATING NUCLEAR SAFETY REQUIREMENTS

### PURPOSE

This Policy sets forth the procedural framework for promulgating nuclear safety requirements of general applicability.

### SCOPE

This Policy applies to establishment of substantive requirements of general applicability adopted by the Department to protect workers, the public and the environment from radiological harm during the conduct of its nuclear activities that have the potential for significant radiological harm ("nuclear safety requirements"). This Policy does not apply to: agency actions of the Office of Naval Reactors; actions relating to nuclear safety requirements in a particular contract; or actions described in 5 U.S.C. § 553(b)(A) and (B).

This policy does not affect interactions between the Department and the Defense Nuclear Facilities Safety Board under 42 U.S.C. § 2286, and the Department's actions with regard to responding to and implementing Board recommendations will continue to be governed by the procedural requirements of all applicable law.

### PROMULGATION OF NUCLEAR SAFETY REQUIREMENTS

#### Compliance with Procedural Requirements

The Department is committed to complying fully with procedures established by law -- including the Administrative Procedure Act, the DOE Organization Act, the National Environmental Policy Act, and the Atomic Energy Act -- in developing nuclear safety requirements. Moreover, the Department is committed, as documented in DOE P 1210, PUBLIC PARTICIPATION, to make public participation a fundamental component in decision-making within the Department.

#### Use of Notice and Comment Rulemaking

The Department will use notice and comment rulemaking to promulgate new nuclear safety requirements within the scope of this policy. The Department also will use notice and comment rulemaking to promulgate requirements on nuclear safety issues

currently covered by DOE Orders, and will issue notices of proposed rulemaking with respect to important nuclear safety requirements in existing DOE Orders as expeditiously as practicable. The use of notice and comment rulemaking will give all members of the public the opportunity for meaningful participation in the development of nuclear safety requirements.

#### **Timely Completion of Rulemakings**

Although the public participation elements of notice and comment rulemaking may lengthen the policy development process, the Department is committed to managing its rulemakings to provide timely results. The Department's goal is to complete rulemakings within approximately one year of initiation. Rulemakings may take longer than one year where the subject matter is particularly complex, but the Department is committed to completing all rulemakings within two years.

Where there is a need to establish a new nuclear safety requirement immediately, the Department may invoke the good cause exemptions in the Administrative Procedure Act to issue, and make immediately effective, an interim final rule that provides for an opportunity for public comment.

**BY ORDER OF THE SECRETARY OF ENERGY:**

ROBERT R. NORDHAUS  
General Counsel

DRAFT - 3/28/96

U.S. DEPARTMENT OF ENERGY  
WASHINGTON, D.C.

POLICY  
DOE P 450.2

**IDENTIFICATION, IMPLEMENTATION AND COMPLIANCE WITH  
ENVIRONMENT, SAFETY AND HEALTH REQUIREMENTS**

**PURPOSE**

This Policy sets forth the framework for identifying, implementing and complying with environment, safety and health (ES&H) requirements so that work is performed in the DOE complex in a manner that ensures adequate protection of workers, the public and the environment. This framework is an integral part of the Department's commitment to a standards-based management system.

This Policy reaffirms the commitments in the Department Nuclear Safety Policy Statement (September 9, 1991) and the Department Environment, Safety and Health Policy Statement (July 20, 1993), including the commitments to excellence and continuous improvement in all Departmental operations.

**SCOPE**

This Policy applies to requirements that contribute directly to the protection of workers, the public and the environment during work performed in the DOE complex ("ES&H requirements").

**IDENTIFICATION OF REQUIREMENTS**

**Integrated Review of Safety Requirements**

The Department recognizes that integrated review of safety requirements can be a valuable tool for ensuring adequate protection for workers, the public and the environment. An integrated review of safety requirements starts with a disciplined analysis of the work to be performed, the potential hazards associated with that work, and the operational and administrative controls required to conduct that work safely. On the basis of this analysis, an appropriate set of ES&H requirements is identified to ensure adequate protection. This set includes all applicable statutory and regulatory requirements plus those DOE Orders and other standards that are determined to be appropriate for incorporation as contractual requirements to assure adequate protection. An integrated review of safety requirements should be conducted in a manner appropriate to the

subject of the review and should take advantage of existing reviews and analyses to the extent practicable.

### **Transition to Rules and Revised Orders**

The Department is replacing a number of its Orders with new rules and revised Orders. The resulting transition must be managed so as to ensure adequate protection throughout. Consistent with maintaining adequate protection, costs and benefits should be considered appropriately.

Even though many ES&H Orders will be canceled as corresponding rules and revised Orders are issued, cancellation of these Orders does not, by itself, modify or otherwise affect any contractual obligation based on the canceled Orders. Requirements in canceled Orders which are incorporated and implemented in a contract will remain in effect until the contract is modified to delete those requirements. If a contractor submits proposed modifications to a contract to utilize the revised ES&H Orders, Departmental line management will direct the contracting officer to approve, disapprove, or provide a conditional approval of the proposed modifications within 90 days.

Prior to changing a contract to substitute the requirements in a revised Order for requirements in one or more canceled ES&H Orders, Departmental line management responsible for approving such contract changes must confirm that the revised contract requirements will continue to ensure adequate protection of workers, the public and the environment. If such substitution will result in significant changes in the implementation of nuclear safety requirements for a Department of Energy defense nuclear facility (as that term is defined in the Atomic Energy Act of 1954), Departmental line management must consider whether its decision on the proposed contract changes should be based on an integrated review of safety requirements and, if so, what type of review is appropriate to the related hazards.

### **IMPLEMENTATION OF REQUIREMENTS**

#### **Ensuring Adequate Protection at Diverse Facilities**

Compliance with a requirement is achieved through the implementation of programs, plans, practices, procedures and other actions that are appropriate for a particular workplace. The Department will work with its contractors to tailor implementation to reflect the circumstances of a particular workplace. For some workplaces, for example, this process may result in a decision to increase reliance on industry standards and commercial practices. While implementation will vary to reflect the diversity of the DOE complex, the commitment to ensuring adequate protection will remain constant.

## **Continuity of Ongoing Efforts**

During the transition to requirements in new rules and revised DOE Orders, the Department and its contractors should take advantage of implementation efforts already completed or underway, especially where these past efforts reflect integrated approaches to safety management, such as the development of S/RIDs or the Necessary and Sufficient Process. Implementation of new rules and revised orders need not trigger major revision to existing programs, plans, practices and procedures. Contractors can "stay the course" and use existing programs, plans, practices and procedures developed under canceled Orders if they meet the requirements in new rules and revised Orders and if continuation of these programs, plans, practices and procedures makes sense.

## **Implementation Plans**

Certain rules and Orders require development and approval of implementation plans. An implementation plan has two purposes. First, it identifies the programs, plans, practices, procedures and other actions to be used in complying with a requirement in a manner commensurate with the hazards associated with a particular workplace. Second, where compliance with a requirement cannot be achieved in the time specified by rule or order, an implementation plan will (1) identify those compensatory measures deemed necessary to provide adequate protection during a period of noncompliance, (2) establish a schedule for future actions for achieving compliance, and (3) identify needed resources.

## **Guidance**

Guidance documents, including technical standards, can assist contractors in implementing requirements. Because of the importance of guidance documents to implementation, the Department will endeavor to develop and issue guidance documents concurrently with the development of requirements.

Guidance documents are intended to provide useful information and methodologies on how a requirement might be implemented. They include background information regarding the intent of the requirement and its technical underpinnings.

Unlike the requirements specifically set forth in a rule or Order, the provisions in guidance documents are not mandatory. Failure to follow a guidance document does not in itself indicate noncompliance with a specific requirement -- a finding of noncompliance must be based on a failure to satisfy the requirement. The guidance provided in implementation guides and standards referenced therein are considered acceptable methods to satisfy requirements. Alternative methods that satisfy the



requirements of a rule or Order are also acceptable. Any implementation method selected must be justified to ensure that an adequate level of safety commensurate with the identified hazards is achieved.

In order to provide appropriate opportunities for public input on guidance relating to nuclear safety rules, the Department will: (1) make such guidance documents developed by DOE readily available to the public when issued; (2) publish notice of their availability in the **Federal Register**; and (3) accept comments from the public concerning guidance documents.

#### **COMPLIANCE WITH REQUIREMENTS**

The Department is committed to working with its contractors to achieve compliance with requirements. If cooperative efforts do not result in contractor performance that satisfies ES&H requirements, the Department will not hesitate to seek compliance through the use of statutory, regulatory, and contractual enforcement tools.

#### **Contractual Mechanisms**

A contractor's performance in implementing ES&H requirements will be a major factor in determinations relating to the award of discretionary fees under DOE contracts. Moreover, the extent to which a contractor complies with ES&H requirements will be a major factor in determining whether circumstances warrant competition rather than extending a contract and, in egregious cases, may be a basis for terminating a contract.

#### **Nuclear Safety Requirements**

With respect to ES&H requirements that are also nuclear safety requirements, the Department has additional enforcement tools. Where appropriate, the Department will issue Compliance Orders, as authorized by Subpart C of 10 C.F.R. Part 820, to prevent or rectify any violation of any nuclear safety requirement. The Department will evaluate violations of nuclear safety requirements that have been adopted by rulemaking or imposed by Compliance Order to determine whether the violation warrants the issuance of a Notice of Violation pursuant to Subpart B of 10 C.F.R. Part 820 and, if so, whether the Department should impose civil penalties or another appropriate sanction. In evaluating the severity of violations, the Department will be guided by the Enforcement Policy Statement, which is an appendix to 10 C.F.R. Part 820. Whenever the Department discovers any potential

criminal violation, the Department will refer the matter to the Department of Justice.

**BY ORDER OF THE SECRETARY OF ENERGY:**

ROBERT R. NORDHAUS  
General Counsel