



Current Trends in the DOE Worker Safety and Health Program Enforcement

July 21, 2016

Presented by:

Mark Bartlett, Steven Simonson, and Bill McArthur

Federal Criminal Enforcement of Worker Endangerment Violations

Mark Bartlett

Partner

Davis Wright Tremain LLP



DOJ Criminal Enforcement Against Corporations

- 1999: Deputy AG Eric Holder
- 2003: Deputy AG Larry Thompson
 - Credit for corporate cooperation conditioned on waiver of attorney/client privilege
- 2006: Deputy AG Paul McNulty
- 2008: Deputy Mark Filip
- Principles of Federal Prosecution of Business Organizations (USAM § 9-28.000)

Nine Filip Factors

- The nature and seriousness of the offense
- The pervasiveness of wrongdoing within the corporation
- The corporation's history of similar conduct
- The corporation's timely and voluntary disclosure of wrongdoing
- The existence and effectiveness of the corporation's compliance program
- The corporation's remedial actions
- Collateral consequences
- The adequacy of prosecuting individuals
- The adequacy of civil and regulatory remedies.

Yates Memo September 2015

- Corporations eligible for cooperation credit only if they provide DOJ with "all relevant facts" relating to all individuals responsible for misconduct, regardless of the level of seniority.
- Both criminal and civil DOJ investigations should focus on investigating individuals "from the inception of the investigation."
- Criminal and civil DOJ attorneys should be in "routine communication" with each other
- "Absent extraordinary circumstances," DOJ should not agree to a corporate resolution that provides immunity to potentially culpable individuals.
- Fifth, DOJ should have a "clear plan" to resolve open investigations of individuals when the case against the corporation is resolved.
- Finally, civil attorneys should focus on individuals as well, taking into account issues such as accountability and deterrence in addition to the ability to pay.

Worker Endangerment Initiative

- DOJ and Department of Labor signed MOU aimed at increasing the number and seriousness of criminal prosecutions related to worker safety violations
- Authority for criminal investigations given to Environmental Crimes Section (ECS)
- OSHA violations are normally misdemeanors, ECS will focus on using federal felony violations
 - Investigate and enforce OSHA violations under the Clean Water, Clean Air, Resource Conservation and Recovery, and Toxic Substances Control Acts
 - Emphasis will be on prosecuting responsible officers and managers, not simply the corporate entities

Worker Safety Criminal Violations

- Since passage of OSHA in 1970, there have been approximately 400,000 workplace fatalities
 - Federal government prosecuted fewer than 80 criminal cases under OSHA
 - 2005 BP Texas City refinery explosion killed 15
 - Felony Clean Air Act conviction
 - 2010 Massey Energy coal mine explosion
 - CEO Don Blankenship indicted and convicted misdemeanor

DOE Worker Safety and Health Policy

Bill McArthur, PhD, CIH

Director, Office of Worker Safety and Health Policy

Office of Health and Safety

Office of Environment, Health, Safety,
and Security



U.S. DEPARTMENT OF
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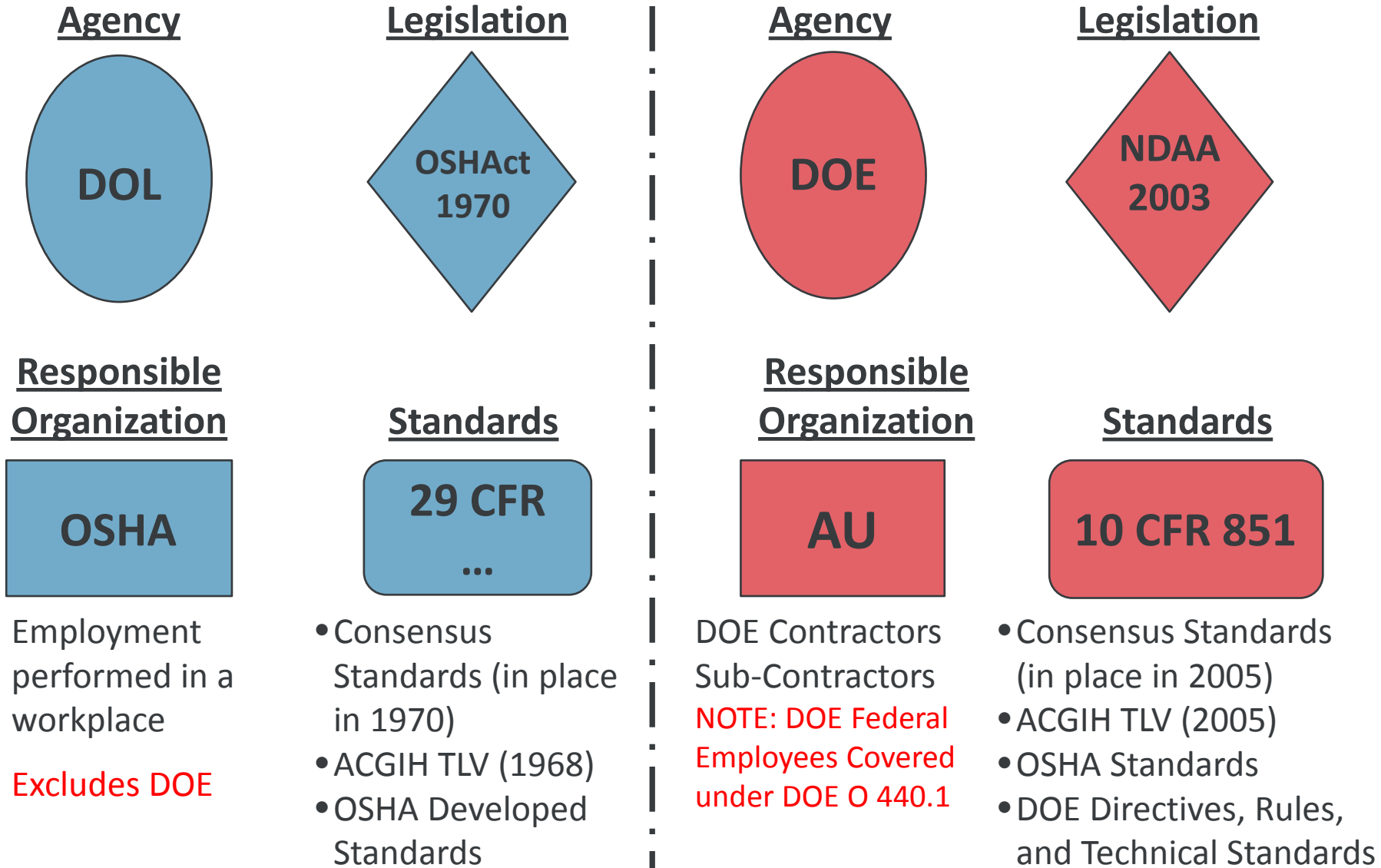
Worker Safety and Health Policies

- Department of Energy Acquisition Regulations (DEAR)
- Rules
 - 10 CFR Part XXX, 48 CFR Part XXX (DEAR)
 - Additional Rules specifically cited in 10 CFR 851
- Directives
 - Policy, Notices, Orders, Guides, (Manuals)
- Technical Standards
 - Technical Standards, Handbooks
- National Consensus Standards
 - ANSI, NFPA, etc.

Background

- Atomic Energy Act
 - Authorizes self regulation of safety and health
- Defense Authorization Act of 2003
 - Amended AEA
- 10 CFR Part 851 – *Worker Safety and Health Program Rule*
 - Based on DOE O 440.1
 - Applies to DOE Contractors Only
- *DOE Order 440.1B – Worker Protection Program for DOE (including the National Nuclear Security Administration) Federal Employees*
 - Applies to Federal Employees Only

Worker Safety and Health: OSHA vs. DOE



Worker Safety and Health Program

- Worker Safety and Health Program describes:
 - methods for implementing the requirements of Subpart C; and
 - Integrate the requirements with other related site-specific worker protection activities and with the Integrated Safety Management system.
- If Workers are Represented By a Labor Organization
 - Give the labor organization timely notice of the development and implementation of the worker safety and health program and updates; and
 - Bargain concerning implementation of this part must be consistent with the Federal laws
- Not Required by OSHA

10 CFR 851- Subpart C Requirements

- Management Responsibilities and Worker Rights and Responsibilities
- Hazard Identification and Assessment
- Hazard Prevention and Abatement
- Safety and Health Standards
- Functional Areas
- Training and Information
- Recordkeeping and Reporting

Management Responsibilities

- Establish written policy, goals and objectives for worker safety and health program
- Use qualified worker safety and health staff
- Involve workers and their representatives
- Develop procedures to report safety and health concerns without reprisal
- Prompt response to reports and recommendations
- Regular communication with workers
- Permit worker to stop or decline work
- Inform workers of their rights and relevant to safety and health program

Functional Areas – Appendix A

- Construction Safety
- Fire Protection
- Explosive Safety
- Pressure Safety
- Firearms Safety
- Industrial Hygiene
- Biological Safety
- Occupational Medicine
- Motor Vehicle Safety
- Electrical Safety
- Nanotechnology Safety (Reserved)

Variations from Policy

- Exemptions
 - 10 CFR 820, *Procedural Rules for DOE Nuclear Activities*
 - 10 CFR 835, *Radiological Safety Issued by AU*
 - DOE O 251.1C, *Departmental Directives Program*
 - DOE Directives
- Variances (Subpart D)
 - 10 CFR 851, *Worker Safety and Health Program*
 - Approved by Under Secretary Following Recommendation by AU
- Interpretations – Only issued by GC
- Technical Clarifications
 - SME Review Issued by AU
 - Worker Safety and Health Response Line
- SME Opinions

Consensus Standards – Which Version?

International Building Code (IBC) of the ICC International Codes replace NFPA 5000 since several contractors currently adhere to IBC. DOE agrees and has removed NFPA 5000 from the final rule.

DOE received multiple general comments regarding the inclusion of document edition dates in this section. Many commenters (Exs. 1, 3, 4, 12, 14, 15, 16, 20, 22, 28, 31, 36, 37, 39, 42, 48, 49, 50, 51, 54, 55, 61) expressed concern that supplemental proposed section 851.201 included specific edition dates for standards and codes. The commenters note that many existing facilities are unlikely to be in compliance with these recent editions (presumably because they were constructed to meet earlier standards). Several commenters (Exs. 3, 4, 14, 16, 31, 36, 39, 50, 51) believed that including such dates would result in excess costs, delays and increased costs.

Some of these commenters (Exs. 14, 16, 31, 36, 50, 51) recommended eliminating the specific edition dates of the consensus standards, while others (Exs. 14, 16, 31, 36) offered an alternative recommendation that DOE indicate "latest revision" in lieu of the specific year. These commenters (Exs. 15, 31, 37) agreed, but suggested that DOE include a mechanism within the rule that updates these dates to ensure consistency with the changing knowledge and needs of the industries they address. Two other commenters (Exs. 28, 49) indicated that the edition dates go beyond the statutory authority given to DOE by Congress. DOE has carefully considered the foregoing comments about the potential effects of incorporating specified editions of consensus standards. Regulatory requirements must be specific and include the editions of incorporated standards. Therefore, DOE cannot accept the suggestion of requiring compliance with the "latest revision" of standards that are incorporated by reference. However, DOE has reviewed the standards listed in section 851.23(a) to determine if they are appropriate. As a result of this review, DOE has eliminated from the final rule many of the consensus standards that were listed in the supplemental proposal. The standards included in this final rule are consistent with those mandated under DOE Order 440.1A. While contractors must meet the standards listed in section 851.23(a), they are free to comply with more recent editions of the standards as long as the provisions of the more recent standards are at least protective as the edition specified in the final rule. In future rulemakings, DOE

will consider the need for updating the referenced standards.

Other comments specifically address the problems associated with updating older facilities and systems that were constructed according to previous, rather than current standards. Many of these commenters (Exs. 8, 15, 29, 31, 35, 36, 37, 42, 46, 49) expressed concern that the rule does not include the "grandfathering" of existing facilities (i.e., allowing facilities to meet only the code requirements in effect at the time the facility was built). The commenters believe that it is not feasible to bring older facilities up to the new codes and that attempting to do so would present innumerable problems for most facilities. Commenters also believe that failure to allow grandfathering would result in significant costs associated with evaluation, modification, reporting requirements, and the need for exemptions, as well as costs from fines or penalties associated with noncompliance. Some of these commenters requested grandfathering under the Code of Record concept, in which a contractor is not required to implement current editions of codes or standards unless the facility undergoes substantial modifications. The commenters suggested that DOE require modification only in the presence of a significant hazard, in which case the facility would be upgraded to the requirements of the current edition of the code or standard. Another commenter (Ex. 14) also expressed concern that no provision in the proposed rule recognizes DOE's use of the risk-based "graded approach" to upgrading older facilities and correcting deficiencies under current industry codes, regulations, and guidance. This commenter believes that shifting to the proposed compliance-based approach will incur excessive costs at the expense of the DOE program office due to the funds required to bring all facilities into compliance at the same time, to pay civil penalties, or to process exemption requests. The commenter suggested that a possible resolution could be to grandfather known deficiencies with an approved plan for resolution. Another commenter (Ex. 35) recommended that DOE add a provision that allows contractors to use an optional consensus standard equivalent to those listed in supplemental proposed section 851.201. It was the commenter's opinion that including the provision would help contractors avoid having to use the exemption relief described in Subpart D. As mentioned previously, DOE has eliminated many of the consensus

standards listed in the supplemental proposed rule. The standards mandated in final rule section 851.23(a) are consistent with those required under the existing DOE Order 440.1A, which has been successfully implemented for more than 10 years. Thus, most facilities will be in compliance with the new standards and grandfathering is not necessary. Therefore, DOE does not anticipate a large number of requests for variances, nor does DOE believe that compliance would result in excessive costs.

Several commenters (Exs. 15, 16, 20, 28, 29, 33, 36, 37, 45, 48, 51) noted that conflict exists between many of the consensus standards and codes (e.g., OSHA, NFPA, ASME, and ANSI codes) cited in the supplemental proposal and the codes and standards incorporated into the contracts of many prime contractors and other DOE requirements. Most of these commenters (Exs. 15, 16, 20, 28, 29, 33, 36, 37, 48, 51) suggested that all cited regulations should be reviewed for unintended implications. In the final rule, DOE has aligned the standards in final rule section 851.23(a) with those required under DOE Order 440.1A. Thus, DOE does not anticipate conflict between the standards in the final rule and those in existing contracts and other DOE directives.

Several commenters (Exs. 15, 28, 29, 36, 37, 38, 42, 45, 47, 49, 50, 57) recommended that DOE adopt OSHA standards as the minimum set of requirements, and expressed the opinion that the national consensus standards in the supplemental proposed rule do not provide an appropriate basis for enforcing worker safety and health requirements at DOE facilities. Two of these commenters (Exs. 15, 38) suggested that DOE also adopt other elements of OSHA's regulations, such as interpretation, penalty policies, and appeals mechanism. As previously discussed, DOE has revised the list of standards in response to comments on the supplemental proposal. The standards mandated in final rule section 851.23(a) are consistent with those mandated under the existing DOE Order 440.1A. These standards include OSHA standards as well other consensus standards that have been evaluated by the DOE health and safety community and deemed necessary to address gaps in the OSHA standards and to provide adequate protection to the DOE workforce. DOE also intends to prepare enforcement guidance supplements (EGSs) that will provide enforcement guidance. DOE anticipates that these EGSs will be consistent with and to a great extent based on the equivalent

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The standards included in this final rule are consistent with those mandated under DOE Order 440.1A. While contractors must meet the standards listed in section 851.23(a), they are free to comply with more recent editions of the standards as long as the provisions of the more recent standards are at least protective as the edition specified

Enforcement Program Overview and Implementation Philosophy

Steven Simonson

Director

Office of Enforcement

Office of Enterprise Assessments



U.S. DEPARTMENT OF
ENERGY

Enforcement Program Authorities and Procedural Rules

- 10 C.F.R. Part 820, *Procedural Rules for DOE Nuclear Activities* [AEA Section 234A]
- 10 C.F.R. Part 824, *Procedural Rules for the Assessment of Civil Penalties for Classified Information Security Violations* [AEA Section 234B]
- 10 C.F.R. Part 851, *Worker Safety and Health Program* (contains procedural rules and program requirements) [AEA Section 234C]

Why Enforce?

- Part of the 1988 PAAA framework - Federal Government provides \$12.7 billion coverage for nuclear indemnification in exchange for enforcement authority.
- Helps ensure that contractors meet their obligations to provide a safe and healthful workplace and appropriately guard classified matter and information.
- Serves as a deterrent to contractors that may seek to avoid regulatory compliance.
- Demonstrates to Congress and the public that DOE is capable of effective self-regulation.

Enforcement Philosophy

- DOE contractors viewed as being in best position to identify and promptly correct noncompliances.
- Provide incentives to promote contractor identification, evaluation, reporting, and resolution of noncompliances before events occur.
- Best if noncompliances are proactively self-identified through contractor assessment processes.

Program Implementation

- Tenets:
 - Implement a framework designed to promote compliance with enforceable regulations
 - Devote limited resources to the most significant events/conditions
 - Adhere to the principles of transparency, consistency, and fairness
 - Collaborate with DOE line management

Enforcement Approach

- Incentives include:
 - Discretion
 - Mitigation
- Mitigation for timely identification/reporting and corrective actions
 - Corrective actions are not considered a substitute for enforcement

Site Challenges

- Subcontractor oversight
- Hierarchy of controls
- Disciplined Conduct of Operations
- Obtaining Requisite Classification Reviews
- Safeguards and Security (Classification) Program Involvement in Work Planning and Control Activities

Changes to Enforcement Protocols

- NLCOO Visits
- Contractor Review of Draft Enforcement Letters
- Advisory Notes
- Interview Attendance