



**Department of Energy**  
Washington, DC

January 24, 2007

Mr. Bertsch  
Director and Professor  
Savannah River Ecology Laboratory  
Drawer E  
Aiken, SC 29802

**Re: Savannah River Ecology Laboratory's Request for Interpretive Ruling under 10 CFR 851**

Dear Mr. Bertsch:

This is in response to your December 4, 2006, letter requesting a binding interpretive ruling that Savannah River Ecology Laboratory (SREL) is not subject to the Department of Energy's (DOE's) Worker Safety and Health Program Regulation, 10 CFR 851 (Part 851).

**ISSUE**

Is SREL a DOE contractor such that it is subject to Part 851?

**BRIEF ANSWER**

No, SREL is not subject to Part 851. SREL is subject instead to the provisions of its DOE approved safety plan which is incorporated into its Cooperative Agreement with DOE.

**BACKGROUND**

On February 9, 2006, DOE promulgated Part 851, which, in large part, codified DOE Order 440.1A, an Order that set forth comprehensive worker safety and health program requirements and was implemented through contractual agreements with DOE contractors. Part 851 provides DOE with enforcement tools that were not previously available through Order 440.1A.

Part 851 applies only to contractors, who are defined as any entity under contract with DOE "that has responsibilities for performing work at a DOE site in furtherance of a DOE mission." Section 851.3(a).



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In compliance guidance, DOE has explained that recipients of financial assistance through cooperative agreements with DOE are generally not contractors, except when the cooperative agreements contain some procurement contract terms,<sup>1</sup> in which case the agreement "should be referred to OGC for a case-by-case review to determine whether Part 851 applies." *Guidance on Who Must Comply With 10 CFR Part 851*, Question 7 (Guidance).

SREL is a unit of the University of Georgia that performs ecological research at DOE's Savannah River Site. Their work concentrates on characterizing the impacts of near surface contamination on the environment and human health. Although some of SREL's research has been used by DOE and DOE's contractors for compliance, SREL also provides the results of its research to public interest groups, professional organizations and the general public. SREL educates and trains undergraduate and graduate students through its research, education and outreach programs.<sup>2</sup>

SREL currently receives financial assistance from DOE in accordance with a cooperative agreement (Cooperative Agreement), executed on November 30, 2006, and entered into by the parties pursuant to 10 CFR Part 600, *Financial Assistance Rules*, which governs cooperative agreements with institutions of higher learning. SREL also receives some funding from the University of Georgia. DOE exercises very little control over the substance of SREL's work. See *Cooperative Agreement* at Appendix A.

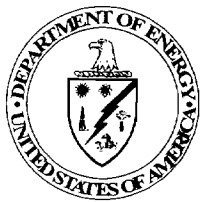
SREL was once a Management and Operation (M & O) Contractor for DOE at the Savannah River Site. At that time, much of SREL's work was performed to assist DOE with regulatory compliance. However, 10 years ago, DOE entered into a cooperative agreement with SREL (officially through the University of Georgia Research Foundation) rather than a contract and began to treat SREL as a recipient of financial assistance. Although the initial cooperative agreements contained procurement contract terms (mainly drawn from prior M & O contracts), the current Cooperative Agreement cites extensively to 10 CFR 600 and has few terms that are exclusively associated with procurement contracts.

In an October 23, 2006, letter, DOE's Manager for the Savannah River Site stated that SREL is subject to Part 851 and, according to Part 851's provisions, must prepare and submit a Worker Safety and Health Program (WSHP) for approval by February 26, 2007. The Manager further requested that SREL submit a draft WSHP by the end of 2006. The letter points SREL to the "binding interpretive rule" provisions of Part 851, which allow potentially regulated entities to request that DOE make a binding determination of whether Part 851 applies to them.

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<sup>1</sup> "[I]t is possible that there are cooperative agreements that have some procurement contract terms. Those particular agreements (if they involve work at a DOE site) should be referred to OGC for a case-by-case review to determine whether Part 851 applies." *Guidance on Who Must Comply with Part 851*, Q. 7.

<sup>2</sup> See SREL web-site at <http://www.uga.edu/~srel/FY06-SREL-research-plan.pdf>.



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In a December 4, 2006 letter, SREL requested an interpretive ruling. SREL argued that it should not be subject to Part 851 because SREL is party to a cooperative agreement not a contract; was never subject to Order 440.1A; must comply with a DOE approved safety plan; and would suffer significant hardship if required to comply with Part 851.

### **ANALYSIS**

The Cooperative Agreement contains almost no procurement contract terms. It is true that the Cooperative Agreement's real estate terms are similar to those found in procurement contracts: DOE holds the title to property used by SREL.<sup>3</sup> However, SREL remains independent from DOE in the substance of SREL's work; SREL's mission is not to manage or operate DOE's property. The real estate provisions, therefore, do not support a conclusion that the Cooperative Agreement is in fact a procurement agreement.

The contracting history between DOE and SREL is additional evidence that the Cooperative Agreement is not a procurement contract. DOE has deliberately shifted SREL's status from contractor to recipient of financial assistance through consecutive cooperative agreements that have progressively shed their procurement contract terms. The current Cooperative Agreement's provisions effectively incorporate relevant parts of 10 CFR Part 600 which govern university cooperative agreements. Thus, the contracting history clarifies that DOE has by design developed a financial assistance relationship with SREL.

Additionally, SREL's mission and organization makes it a classic recipient of financial assistance. Such recipients are distinct from contractors in that they "accomplish a public purpose of support or stimulation . . ." rather than provide a service or property "for the direct benefit or use of the Federal Government." 10 CFR § 600.111. SREL conducts research independent of DOE control, primarily for the public, the University of Georgia and professional and public interest organizations. SREL manages educational and research programs for students. Its role has evolved from that of a contractor serving DOE's cleanup mission to that of a largely independent research program that receives some financial assistance from DOE.<sup>4</sup>

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<sup>3</sup> Recipients of financial assistance typically hold title in real property that they receive from DOE as long as they use the property for authorized purposes. See 10 CFR § 600.132.

<sup>4</sup> A determination that SREL is not subject to Part 851 does not give rise to serious concerns that SREL will escape worker health and safety plan requirements. Even though SREL is not subject to Part 851, Order 440.1A and OSHA has decided not to regulate employers at the Savannah River Site and Georgia is not an "OSHA state," SREL must nonetheless comply with a comprehensive, DOE-approved Safety Plan that contains numerous terms pulled directly from the "Necessary and Sufficient" plans that DOE has historically offered as alternatives to Order 440.1A plans. The Safety Plan is incorporated into the Cooperative Agreement through Appendix E.



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**CONCLUSION**

For the reasons given above and pursuant to its authority under 10 CFR § 851.7, the DOE hereby rules that SREL is not a contractor subject to Part 851. DOE issues this binding interpretive ruling based on the facts specific to the Cooperative Agreement between SREL and DOE. This ruling is applicable to no party other than SREL.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Diamond", is written over the word "Sincerely,".

Bruce Diamond  
Assistant General Counsel for Environment

Cc: Lucy Knowles, Chief Counsel, Department of Energy, Savannah River Site  
Jeff Galan, Attorney-Adviser, Department of Energy, Savannah River Site  
Tony Weadock, Acting Director, Office of Enforcement, Office of Health, Safety and Security  
William McArthur, Supervisory Industrial Hygienist, Office of Worker, Safety and Health