

**DEPARTMENT OF ENERGY OFFICE OF GENERAL COUNSEL INTERPRETATION
REGARDING THE APPLICABILITY OF 10 C.F.R. PART 850, CHRONIC
BERYLLIUM DISEASE PREVENTION PROGRAM, TO ENTITIES THAT ARE NOT
DOE CONTRACTORS AT A FACILITY OPERATED FOR
THE DEPARTMENT OF ENERGY**

The Department of Energy's (DOE's) Office of General Counsel (OGC), in response to a question posed to DOE provides this legal interpretation of the regulations regarding the Chronic Beryllium Disease Prevention Program (CBDPP) under 10 CFR Part 850.¹ This interpretation addresses the following question:

[A DOE contractor operates the Kansas City National Security Campus (KCNSC)] in a [General Services Administration (GSA)]-leased facility and the property owner is not under any contract with DOE. Given that the property owner's employees are not contractors or subcontractors of DOE, they are not covered by or subject to 10 CFR Part 851 . . . However, 10 CFR Part 850 states that "anybody" performing work on a DOE site should follow the [Chronic Beryllium Disease Prevention Program (CBDPP)].

Are the building owner's employees subject to 10 CFR Part 850? If so, [are] the building owner's employees [required to] be enrolled in the same medical surveillance program as the DOE [Management and Operating (M&O)] contractor employees?

As additional background to this question, OGC was informed that the building owner's employees were only at the site from time to time to perform maintenance work on the building on behalf of the building owner. The DOE site was not their regular place of employment.

Response to the Question:

We address the question in its two parts based on the facts presented: 1) are the building owner's employees covered by or subject to 10 CFR Part 850; and 2) if so, [are] the building owner's employees [required to] be enrolled in the same medical surveillance program as the DOE [Management and Operating (M&O)] contractor employees.

With regard to the first part of the question, we start with the regulation's Scope and Applicability provisions to determine what entities are subject to the requirements of Part 850. Under § 850.1, *Scope*, the regulation "provides for establishment of a chronic beryllium disease prevention program (CBDPP) that supplements and is deemed an integral part of the worker safety and health program under part 851 of this chapter."

Accordingly, Part 850's scope should be interpreted within the context of the scope of Part 851². Title 10 CFR § 851.1, *Scope and purpose*, provides, in pertinent part, that:

(a) The worker safety and health requirements in this part govern the conduct of ***contractor activities*** at DOE sites.

¹ 10 C.F.R. Part 850, *Chronic Beryllium Disease Prevention Program* (Part 850).

² 10 C.F.R. Part 851, *Worker Safety and Health Program* (Part 851).

(b) This part establishes the:

(1) Requirements for a worker safety and health program that reduces or prevents occupational injuries, illnesses, and accidental losses by providing **DOE contractors and their workers** with safe and healthful workplaces at DOE sites; ^[3]

* * *

Note that both rules primarily pertain to DOE **contractors'** worker safety and health activities⁴ at DOE sites and do not address a building's owner or their workers where the owner is not DOE or a DOE contractor. Accordingly, in this situation the building's owner is not subject to Part 851. In addition, as explained below, the building's owner is not subject to Part 850. Notwithstanding that fact, under Part 850, DOE or DOE contractor(s) operating in that leased building are obligated to conduct their activities in a manner that is protective of their own workers and other workers who may be present.⁵

According to the pertinent parts of 10 C.F.R. § 850.2, *Applicability*,

(a) This part applies to:

- (1) DOE offices responsible for operations or activities that involve present or past exposure, or the potential for exposure, to beryllium at DOE facilities;
- (2) DOE contractors with operations or activities that involve present or past exposure, or the potential for exposure, to beryllium at DOE facilities; and
- (3) Any current DOE employee, DOE contractor employee, **or other worker** at a DOE facility who is or was exposed or potentially exposed to beryllium at a DOE facility.

* * * [6]

Section 850.3(a) defines "worker" as "a person who performs work for or on behalf of DOE, including a DOE employee, an independent contractor, a DOE contractor or subcontractor employee, **or any other person who performs work at a DOE beryllium facility.**" [emphasis added]. A DOE facility is defined in § 850.3(a) as "any facility operated by or for DOE."

Therefore, if the building owner has workers performing work at a DOE beryllium facility, Part 850 requires that they be treated as "workers" while they are performing work at the DOE facility, even though they are not employed by DOE or a DOE contractor. Further, as explained below,

³ Emphasis added. A DOE site is defined in Part 851 as "a DOE-owned or -leased area or location or other area or location controlled by DOE where activities and operations are performed at one or more facilities or places by a contractor in furtherance of a DOE mission." 10 C.F.R. § 851.3(a).

⁴ The applicability of the two regulations is distinguishable in that, unlike Part 851, which applies to employees of DOE contractors while performing work on DOE sites (see §§ 851.1, 851.3), Part 850 applies to any current DOE employee, DOE contractor employee, or other worker at a DOE facility who is or was exposed or potentially exposed to beryllium at a DOE facility (§ 850.2(a)(3)). However, this distinction is not dispositive regarding whether employees of the property owner are required to be included in the contractor's Part 850 surveillance program.

⁵ See, for instance, 10 C.F.R. §§ 850.22, 850.26.

⁶ Emphasis added.

regardless of a worker's employer, Part 850 requires the "responsible employers" to comply with the requirements pertaining to protecting workers from exposure to beryllium.⁷

The persons or entities required to establish and maintain a chronic beryllium disease prevention program (CBDPP) to protect "workers" under Part 850 are the "responsible employers," which is a term defined in Section 850.3(a) as

- (1) For DOE contractor employees, *the DOE contractor office* that is directly responsible for the safety and health of DOE contractor employees while performing a beryllium activity or other activity at a DOE facility; or
- (2) For DOE employees, *the DOE office* that is directly responsible for the safety and health of DOE Federal employees while performing a beryllium activity or other activity at a DOE facility; and
- (3) Any *person acting directly or indirectly for such office* with respect to terms and conditions of employment of beryllium-associated workers.^[8]

If the building owner is not a DOE office, a DOE contractor office, nor acting directly or indirectly for a DOE or DOE contractor office, then the building owner is not a "responsible employer" for the purposes of Part 850. Part 850 does not expressly define or identify who would be the "responsible employer" in the situation where a worker is not employed by DOE or a DOE contractor or directly or indirectly acting for DOE or a DOE contractor. Nevertheless, Part 850 provides protection from exposure to beryllium broadly to "workers", as defined by 10 C.F.R. 850.3, meaning the protection extends to any worker performing work at a DOE beryllium facility, regardless of who their employer is. Consequently, if a worker is performing work at a DOE beryllium facility on a transient basis, e.g., the building owner's employee, the DOE or DOE contractor(s) that are the responsible employers at the DOE site must provide the protective measures required under Part 850 while the worker is performing work at the DOE beryllium facility.

It is also important to point out that, contrary to the question posed, Part 850 does *not* say "that 'anybody' performing work on a DOE site should follow the" CBDPP. Rather, the regulation says, in pertinent part, at 10 C.F.R. § 850.12, *Implementation*, that

- (a) The *responsible employer* must manage and control beryllium exposures in all DOE beryllium activities consistent with the approved CBDPP.
- (b) No *person employed by DOE or a DOE contractor* may take or cause any action inconsistent with the requirements of:
 - (1) This part,
 - (2) An approved CBDPP, and

⁷ See 10 C.F.R. Part 850, Subpart B and §§ 850.22-850.29.

⁸ Emphasis added.

(3) Any other Federal statute or regulation concerning the exposure of workers to beryllium at DOE facilities.

* * *[9]

Therefore, the requirement to comply with the CBDPP only applies to “responsible employers” and persons employed by DOE or a DOE contractor.¹⁰

Regarding the second part of the question, whether the building owner’s employees must be enrolled in the medical surveillance program provided to DOE and DOE contractors’ employees, 10 C.F.R. § 850.34(a)(1) provides that “responsible employers” are required to “establish and implement a medical surveillance program for *beryllium-associated workers* who voluntarily participate in the program.”¹¹ When the building’s owner is not a responsible employer (see definition, above), the building’s owner is not required to provide medical surveillance to the owner’s employees under Part 850.¹² Moreover, once they are no longer performing work at a DOE beryllium facility, the owner’s employees are unlikely to be “beryllium-associated workers,” which is defined in § 850.3(a) as

[A] **current** worker^[13] who is or was exposed or potentially exposed to airborne concentrations of beryllium at a DOE facility, including:

- (1) A beryllium worker^[14].
- (2) A **current** worker whose work history shows that the worker may have been exposed to airborne concentrations of beryllium at a DOE facility^[15];
- (3) A **current** worker who exhibits signs or symptoms of beryllium exposure; and
- (4) A **current** worker who is receiving medical removal protection benefits.^[16]

There is no obligation under Part 850 for any “responsible employer” to provide medical surveillance to persons who are not “current workers.”

Conclusion:

1. Part 850 applies to DOE Offices and DOE contractors;

⁹ Emphasis added.

¹⁰ While the building owner’s employee is not required by Part 850 to comply with the CBDPP, the owner’s employee is protected under the CBDPP as a “worker” while performing work at a DOE facility.

¹¹ Emphasis added.

¹² However, the owner should refer to the applicable worker safety requirements of the Occupational Safety and Health Administration (OSHA) or OSHA Agreement State, as applicable.

¹³ Refer to definition of “worker,” above.

¹⁴ “Beryllium worker” is defined in 10 CFR § 851.3(a) as “a **current** worker who is regularly employed in a DOE beryllium activity.” [emphasis added].

¹⁵ It is important to note that, in some cases, a worker may leave a DOE beryllium facility to work at another DOE site, in which case, they are still current workers and may be entitled to voluntarily participate in medical surveillance provided by the current responsible employer.

¹⁶ Emphasis added.

2. The term “worker,” as defined in Part 850, includes any person who performs work at a DOE facility¹⁷. Workers must be protected from exposure to airborne beryllium at DOE sites where beryllium activities take place;
3. Only responsible employers and employees of DOE and DOE contractors are required by Part 850 to comply with the CBDPP¹⁸; and
4. Only “responsible employers” are required to develop and implement medical surveillance programs for “beryllium-associated workers,” who must be current workers at DOE sites and their participation in the surveillance program must be voluntary.

February 1, 2024

¹⁷ 10 CFR § 850.3(a).

¹⁸ However, DOE contractors may make take additional protective actions that are necessary to protect the health and safety of workers (10 C.F.R. § 850.12(d)), including requiring other persons present on the site to comply with provisions of the CBDPP.