

**DEPARTMENT OF ENERGY OFFICE OF GENERAL COUNSEL
INTERPRETATION REGARDING EXEMPTION RELIEF PURSUANT TO
10 C.F.R. PART 820, *PROCEDURAL RULES FOR DOE NUCLEAR
ACTIVITIES*, SUBPART E, *EXEMPTION RELIEF*, AND NON-COMPLIANT
“DOCUMENTED SAFETY ANALYSES” SUBJECT TO 10 C.F.R. PART 830,
NUCLEAR SAFETY MANAGEMENT, SUBPART B,
*SAFETY BASIS REQUIREMENTS***

Subpart D to 10 C.F.R Part 820 provides that the Department of Energy’s (DOE) General Counsel (GC) shall be responsible for interpreting the DOE Nuclear Safety Requirements. Pursuant to that authority, the GC here responds to two questions received regarding contractor compliance with safety basis requirements:

1. Does 10 C.F.R. Part 820, *Procedural Rules for DOE Nuclear Activities*, allow DOE to explicitly or implicitly exempt a contractor from a DOE nuclear safety requirement in 10 C.F.R. Part 830, *Nuclear Safety Management*, Subpart B, *Safety Basis Requirements*, when the contractor did not obtain an exemption pursuant to the provisions in 10 C.F.R. Part 820, Subpart E, *Exemption Relief*?

Answer: Title 10 C.F.R Part 820, Subpart E, *Exemption Relief*, provides the only procedural mechanism through which DOE may exempt a contractor from the application of DOE Nuclear Safety Requirements.¹ DOE may not exempt a contractor from compliance with the DOE Nuclear Safety Requirements except in accordance with the procedures in 10 C.F.R Part 820, Subpart E.

Where a contractor has identified an unexpected situation that is inconsistent with its approved safety basis or otherwise puts the contractor out of compliance with the requirements of 10 C.F.R. Part 830, Subpart B, the contractor may receive approval from DOE to continue operations under a Justification of Continuing Operations (JCO) for a limited, pre-defined period approved by DOE. The JCO, however, does not constitute an exemption to the applicability of any DOE Nuclear Safety Requirement or relieve the contractor of its duty to comply. Rather, the JCO allows continued operations during the period when the contractor seeks to identify and implement corrective actions and to

¹ Title 10 C.F.R. § 820.2 defines “DOE Nuclear Safety Requirements” as

[T]he set of enforceable rules, regulations, or orders relating to nuclear safety adopted by DOE (or by another Agency if DOE specifically identifies the rule, regulation, or order) to govern the conduct of persons in connection with any DOE nuclear activity and includes any programs, plans, or other provisions intended to implement these rules, regulations, orders, a Nuclear Statute or the [Atomic Energy Act of 1954, as amended], including technical specifications and operational safety requirements for DOE nuclear facilities. For purposes of the assessment of civil penalties, the definition of DOE Nuclear Safety Requirements is limited to those identified in 10 CFR 820.20(b).

update the safety basis documents on a permanent basis, or to apply for and obtain an exemption. *See, e.g.*, 10 C.F.R. Part 820 Appx. A IX.1.c. (requiring submission of a JCO “for the period during which the exemption request is being considered” and stating that where a contractor lacks funding to comply with a DOE Nuclear Safety Requirement and circumstances do not warrant an exemption, the contractor must “modify, curtail, suspend or cease the activities which cannot be conducted in compliance with the DOE Nuclear Safety Requirement(s) in question.”).

In the recent past there has been confusion across the DOE nuclear complex regarding the proper use of JCOs. In 2007, DOE received a letter from the Defense Nuclear Facility Safety Board drawing attention to the use of JCOs beyond their intended purpose. The Department responded by addressing JCOs in the *Implementation Guide for Use in Addressing Unreviewed Safety Question Requirements*, DOE G 424.1-1B (the Guide). The Guide explains that JCOs should have a pre-defined duration that, in the ordinary course, should not last beyond a year:

A JCO should have a predefined, limited life as necessary to perform the safety analysis of the unexpected situation, to identify and implement corrective actions, and to update the safety basis documents on a permanent basis. The JCO should define the termination point of the life of the JCO. In most cases, this would take the form of a functional point, such as the completion of turnover of a physical modification for routine operations, which would occur after implementing the modification, post-modification testing, updating critical documentation, and training of the operations staff. The contractor should take actions to resolve the conditions that require the JCO or modify the safety basis during the next annual update to make the JCO no longer necessary. JCOs should not continue past a required annual DSA update unless the JCO was submitted within three months of the submittal date of the annual update. In some rare cases, it may not be practical to achieve this goal of being within three months of the submittal date of the annual update. It is recommended that those changes be handled as soon as practicable. If this cannot be accomplished, the contractor should formally notify DOE of the reasons.

Finally, it should be emphasized that when a contractor identifies a potential inadequacy of its documented safety analysis, the contractor’s first obligation is to place or maintain the facility in a safe condition. Title 10 C.F.R. § 830.203(g)(1) instructs the contractor to take such action and does not require prior approval from DOE to do so. Moreover, nothing in DOE’s regulations or the Guide prevents a contractor from taking expeditious action to safeguard a facility while it prepares documentation for or awaits approval of a JCO, a request for exemption relief, or a revision to its safety basis documents.

2. After April 10, 2003, do the provisions in 10 C.F.R. §830.207, *DOE Approval of Safety Basis*, allow DOE to approve a safety basis that contains a documented safety analysis (DSA) that does not meet 10 C.F.R. §830.204(a)?

Answer: DOE may not approve a safety basis that does not meet the requirements in 10 C.F.R. Part 830, Subpart B, *Safety Basis Requirements*. Among the requirements of a compliant safety basis is a DSA that complies with 10 C.F.R. § 830.204. For a DSA to be compliant, the contractor preparing the DSA must either use the methodology contained in appendix A to Part 830 or obtain DOE approval to use an alternative methodology. 10 C.F.R. § 830.204(a).

Should a contractor identify a defect in its DSA, the contractor may seek a JCO to continue operating during the period when DSA is being amended. As explained above, the JCO should have a pre-defined limited duration and does not constitute an exemption from the duty to comply with 10 C.F.R. Part 830, including the requirements of 10 C.F.R. § 830.204.

September 28, 2011