

## **Description and Justification of Variance Sought:**

B&W Y-12 requests a permanent variance from certain sections of 10 CFR Part 851's occupational medicine requirements for B&W Y-12 subcontractors. The specific requirements within Appendix A.8 which B&W Y-12 seeks relief from flow down to subcontractors are 10 CFR Part 851 Appendix A.8(a) and A.8(d) through A.8(k) inclusive. If the variance is granted, B&W Y-12 will continue to place the highest priority on establishing and maintaining a safe working environment and promoting a culture that embraces safe work practices. This high expectation of effective hazard mitigation places the bar high for subcontractors who perform work at Y-12. The National Safety Council (NSC) acknowledged B&W Y-12's commitment to this excellence by recognizing B&W Y-12's performance between 2003 and 2007 with 24 Safety Awards. Since 2007, B&W Y-12 has received 41 awards from the NSC for its safety performance and merits. During this time period, B&W Y-12 received the Occupational Excellence Award each year for its recordable injury rate being less than half of the industry average, and received the NSC's prestigious Industry Leader Award in 2008. As further evidence of our commitment to safety, in 2011, B&W Y-12 began the process to obtain DOE-Voluntary Protection Program (VPP) Star status.

The ongoing safety initiatives at Y-12 ensure that Y-12 is one of the safest sites within the DOE/NNSA complex. B&W Y-12's application for this variance will not jeopardize that priority, commitment, and dedication. B&W Y-12 will continue to require subcontractors to implement OSHA health and safety standards incorporated by reference into 10 CFR Part 851, including those related to occupational medicine. B&W Y-12 will also continue requiring its Subcontract Technical Representatives to monitor their respective subcontractors routinely, and to inform them of any new or potential hazards.

The following is the language currently incorporated into B&W Y-12 subcontracts for work at Y-12:

"(1) Seller [subcontractor] shall perform work under Company's [B&W Y-12] approved 10 CFR 851 Worker Safety and Health Program, which can be found at:

### **Y73-004PD, B&W Y-12 10 CFR Part 851 Worker Safety & Health Program**

Seller shall comply with the applicable provisions of 10 CFR 851, *Worker Safety and Health Program*. Seller is subject to civil penalties for failure to comply with applicable 10 CFR 851, *Worker Safety and Health Program* requirements, or with Company's approved Program.

(2) Seller shall comply with OSHA medical surveillance requirements (29 CFR 1910) based on Seller's scope of work and the OSHA requirements for the treatment of illnesses and injuries. The 10 CFR 851 *Worker Safety and Health Program* requirements include requirements for occupational medicine. Seller shall provide a program under the direction of a licensed physician meeting the credentials requirements of 10 CFR 851, Appendix A.8(b), and personnel providing health services meeting the credentials requirements of Appendix A.8(c). A written description of Seller's occupational medicine program including proof of staff credentials is a required submittal under this Agreement. Seller's occupational medicine program contents will be determined by its Occupational Medicine Director and based on Seller's scope of work and associated hazards. Company has submitted an application for a permanent variance to exempt subcontractors from certain requirements for occupational medicine programs. Should the Company's variance for occupational medicine requirements for subcontractors be denied, Company will be required to comply with all applicable requirements of 10 CFR 851, including Appendix A.8."

For B&W Y-12 to add other occupational medicine requirements for its subcontractors is inconsistent with past practice at DOE-owned or controlled sites and industry practice, and we also are of the opinion that it is inconsistent with the Federal Employee Safety and Health (FEOSH) Program, and would impose additional costs for no added benefit.

In contrast to OSHA and FEOSH requirements, Appendix A.8 contains requirements that go beyond occupational safety and health protection. Appendix A.8 includes wellness programs, non-occupationally related examinations and records, and non-occupationally related programs to identify, manage, and prevent the causes of premature morbidity and mortality. These requirements go well beyond the goal of reducing or preventing occupational injuries, illnesses, or accidental losses by

requiring contractors to provide their employees with safe and healthful workplaces. Applying these requirements to subcontractors will be difficult, given the transient nature of the subcontractor employee population and that many employers do not provide wellness programs or non-occupationally related examinations. In addition, programs to identify, manage, and prevent the causes of premature morbidity and mortality are not typically provided by most employers, and this is especially the case with the types of small businesses that B&W Y-12 is both required and encouraged to use.

Prior to the promulgation of 10 CFR 851, B&W Y-12 and its subcontractors complied with DOE Order 440.1A, *Worker Protection Management for DOE Federal and Contractor Employees*. In accordance with Order 440.1A and DOE G 440.1-4, B&W Y-12 implemented an effective, comprehensive occupational medicine program, and this program is currently accredited by the Accreditation Association for Ambulatory Health Care through January 2013. According to statements contained in the preamble to the final 10 CFR 851 rule, DOE Order 440.1A was intended to form the basis for 10 CFR 851's substantive requirements, and 10 CFR 851 "codifies the Department's worker protection program requirements established in DOE Order 440.1A." 71 Fed. Reg. 6857, 6860 (Feb. 9, 2006). However, B&W Y-12's written occupational medical program did not apply the occupational medicine program requirements for subcontractor employees beyond those found in OSHA. In addition, Order 440.1A did not contain the 30 day/12 month applicability requirement at Appendix 8(a). Further, the enabling legislation for 10 CFR 851 provides that the rule will "provide a level of protection that is substantially equivalent to the level of protection" provided in 2002.

While we now understand that there are those within DOE who expected occupational medicine programs encompassed by Order 440.1A to flow down all of the Order provisions to subcontractor employees, we are unaware of any actions taken to ensure that this happened, such as providing funding and approving the purchase of insurance for such programs. If this had been the understanding generally within the prime contractor community, we would have expected that the costs of providing the additional services to subcontractor employees would have been identified in assessments of the cost impact of the Order, including the cost of purchasing insurance. We would also expect to receive direction requiring B&W Y-12's purchasing system to include terms and conditions flowing down the requirements to subcontractors. The B&W Y-12 purchasing system, including its terms and conditions, are approved by DOE, and have never included provisions requiring the flow down of all of the occupational medicine program provisions of Order 440.1A to subcontractors. While B&W Y-12 has obtained Contracting Officer approval to provide limited medical services for some NNSA Y-12 Site Office employees, B&W Y-12 is not currently provided funding to provide all of the 10 CFR 851 occupational medicine provisions to either its own subcontractors or to provide these services to other contractors to the Y-12 Site Office, nor has B&W Y-12 required its subcontractors to provide all of the occupational medical services set forth in the rule, as that would increase the costs of our subcontracts.

Further, to our knowledge, the FEOSH program contained at 29 CFR 1960 does not encompass all of the requirements of Appendix A.8, such as the requirements for wellness programs, or for physicals based upon presence at a DOE site, and it is our understanding that some DOE contractors have agreed to follow FEOSH to comply with 10 CFR 851. Since FEOSH and OSHA regulations are equally safe and protective as what is required under Appendix A.8, and B&W Y-12 subcontractors are required to follow OSHA regulations, B&W Y-12's program should also be considered equally safe and protective.

As is described in detail below, B&W Y-12 seeks this variance to the extent that 10 CFR 851 Appendix A.8 goes beyond the level of protection formerly provided by DOE Order 440.1A as implemented by B&W Y-12 in 2002. B&W Y-12 will continue to implement an effective, comprehensive occupational medicine program that complies with former DOE Order 440.1A requirements and 10 CFR 851 in accordance with B&W Y-12's approved Worker Safety and Health Program for B&W Y-12 employees. B&W Y-12's occupational medicine program has not extended generally to subcontractor employees, with the exception of providing emergency medical services to subcontractor employees as required before they are transported to an off-site medical facility. B&W Y-12 requires subcontractors to comply with OSHA medical surveillance regulations and the OSHA regulations for the treatment of illnesses and injuries, and subcontractors must comply with the OSHA recordkeeping and reporting regulations for occupational illnesses and injuries, even for those illnesses and injuries arising from

work at Y-12. B&W Y-12 subcontractor employees who are beryllium workers also receive medical surveillance in accordance with B&W Y-12's approved 10 CFR 850 Chronic Beryllium Disease Prevention Program.

DOE has noted two possible options for complying with the rule requirements in its *Draft revision of Occupational Medicine section G of 440.1-8 "Implementation Guide for use with 10 CFR 851 Worker Safety and Health Program"*, 12-27-06 (Draft updated November 16, 2007), found at:

<http://www.hss.energy.gov/HealthSafety/WSHP/rule851/dave.pdf>

The two options outlined by DOE in this draft guidance are:

1. Single provider approach: "One single provider approach is when all (or at least most) contractors and subcontractors performing DOE mission work at a DOE site obtain their occupational medicine services from the same occupational medicine provider. This approach would minimize the cost to each contractor and subcontractor for any of the occupational medicine provider's efforts needed to prepare to perform the activities required by the Rule, to remain knowledgeable of the site hazards, and to perform the on-going coordination and communication activities required by the Rule. ... Another single provider approach is for the DOE Field Element to require in its contracts that all prime contractors performing DOE mission work at a DOE site use a single occupational medicine provider to which DOE has issued a contract. DOE would fund the occupational medicine services directly through this occupational medicine contract and pay for each worker's medical services. Contractors would be directed to require their subcontractors to obtain the services from the DOE occupational medicine provider. No contract would exist between the contractors or their subcontractors that are performing DOE mission work at a DOE site and the occupational medicine provider performing the medical services under direct contract to DOE."

For B&W Y-12 to implement the single provider approach, B&W Y-12 could expand its current occupational medicine program, plus purchase insurance. Another option available to NNSA is to assign the responsibility for occupational health services at Y-12 to a separate prime contractor to provide all occupational medicine program requirements to all Y-12 workers. We expect that either option will require additional funding.

2. Multiple providers approach: "Yet another approach is having contractors and subcontractors that perform DOE mission work at a DOE site act independently to obtain the required services from entities available in the communities around the site that are qualified to perform the occupational medicine services required by the Rule."

To use this approach, B&W Y-12 could state in its subcontracts and in its 10 CFR 851 Program that subcontractors must provide their own occupational medicine programs. This approach would present some logistical issues; for example, it may not be practical for subcontractor medical providers to have access to workplaces at Y-12 (see Appendix 8(d)(4)), and it may not add value for a subcontractor medical provider to "review medical emergency response procedures included in site emergency and disaster preparedness plans." (Appendix 8(k)(5)). We would expect that the requirements for pre-employment physicals, return-to-work evaluations, and other rule requirements would increase the costs of subcontracting, and those costs can be expected to be passed on to B&W Y-12 and to NNSA.

However, as is discussed below in our support for this variance request, we do not believe that either approach is necessary to achieve equivalent safety and health for work at Y-12. The safety benefits obtained from following OSHA regulations or that flow to subcontractor employees from B&W Y-12's program would continue even under the requested variance, especially for those subcontractor employees performing work that requires medical monitoring. By contrast, there is little that the occupational medicine regulations do to promote a safe working environment for the subcontractor employees above the benefits OSHA regulations provide, given the involvement of B&W Y-12's occupational medicine program to address site hazards for all site occupants. B&W Y-12 has concluded that the continued application of the general industry occupational medicine regulations for all subcontractors, in lieu of additional provisions required by 10 CFR 851, would not result in a degradation of safety at Y-12 or in subcontractor employee occupational safety and health. For

example, while wellness programs are beneficial for the overall health of employees using them, they are not required by OSHA or FEOSH to provide occupational safety or health protection. For these reasons, all subcontractors are included in the application of this variance request.

**A description of the steps that the contractor has taken to inform the affected workers of the application, which must include giving a copy thereof to their authorized representative, posting a statement, giving a summary of the application and specifying where a copy may be examined at the place or places where notices to workers are normally posted (851.31(c)(4)):**

B&W Y-12 does not have direct communication links with current or future individual subcontractor employees. Certain subcontractor employees may provide only limited support for B&W Y-12 activities. Certain other subcontractor employees may provide work support for more than one site contractor and off-site jobs, sometimes in the same day. Therefore, it is not possible for B&W Y-12 and difficult for subcontractors to know what subcontract employees will be working in support of B&W Y-12 at any given time. The result is that affected subcontractor workers and potential future workers cannot be directly contacted concerning this variance request. When the rule first became effective, we issued a letter notifying subcontractors about the 10 CFR 851 Worker Safety and Health Program requirement. The letter indicated that B&W Y-12 would seek a permanent variance from Appendix A.8(a) and (d) through (k). We asked that the subcontractors make this information available to their employees. We now insert language into our subcontracts notifying subcontractors of this variance request. The variance request is posted on the Y-12 public website, making it accessible to current or future subcontractor employees.

**How workers have been informed of their right to request a conference (851.31(c)(5)):**

As described above, B&W Y-12 issued a letter that notified subcontractors of the pending variance request. The letter asked that subcontractor employers notify their workers that "they have the right to petition the Chief Health, Safety, and Security Officer in accordance with 10 CFR 851 regarding this [occupational medicine] request." Subcontractor employees and potential future employees have not been directly contacted because B&W Y-12 does not have direct communication links with these individuals. The link to the variance request posted on the Y-12 public website states that workers have a right to request a conference.

**Give a description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the contractor (851.31(d)(2)(i)):**

After approval of this variance request, B&W Y-12 will continue to require, through contract terms, conditions and special requirements, that all subcontractors performing work at Y-12 at any tier have an occupational medicine program under the direction of a licensed physician meeting the credential requirements of Appendix A.8(b) and personnel providing health services meeting the credential requirements of Appendix A.8(c). A written description of the subcontractor's occupational medicine program including proof of staff credentials is a required submittal under the each subcontract for work at Y-12. Each subcontractor's occupational medicine program contents will be determined by its Occupational Medical Director and based on the subcontractor's scope of work and associated hazards.

The other conditions, practices, means, methods, operations, or processes used or proposed to be used by B&W Y-12 are described following each requirement statement set forth in the remainder of this variance application.

**Give a statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide workers a place of employment which is as safe and healthful as would result from compliance with the standard from which a variance is sought (851.31(d)(2)(ii)).**

**Requirement:** (a) Contractors must establish and provide comprehensive occupational medicine services to workers employed at a covered work place who:

(i) Work on a DOE site for more than 30 days in a 12-month period; or

*(ii) Are enrolled for any length of time in a medical or exposure monitoring program required by this rule and/or any other applicable Federal, State or local regulation, or other obligation. Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas – Section 8., Occupational Medicine.*

B&W Y-12 requests a variance from this requirement for subcontractor employees because occupational medicine services for subcontractor employees meeting the above description are provided in accordance with OSHA regulations, and the full panoply of occupational medicine services (pre-employment physicals, wellness programs, post-employment physicals, etc.) have not been provided for subcontractor employees unless indicated by some other program requirement. We assume that “comprehensive occupational medicine services” are those set forth in the remaining sections of Appendix A.8, and we will discuss each one of these requirements separately below. In making this variance request, we note that the Final Rule created mandatory criteria for establishing a program to include length of time on a “covered worksite” without providing any explanation or legislative justification, and the requirement for establishing an Occupational Medicine Program for many employees is due to length of residence at a covered workplace without respect to occupational hazard.

Further, these enrollment criteria did not exist in DOE Order 440.1A, and they create significant logistical issues in implementation. Tracking a transient work force as it moves from contractor to contractor at Y-12 to meet all elements of Appendix A.8 is not practical or cost effective. There are multiple DOE NNSA prime contractors at Y-12, and at least two other DOE programs are represented in the area (DOE Environmental Management for environmental restoration work on the Oak Ridge Reservation, including Y-12, and DOE Office of Science for the Oak Ridge National Laboratory and Oak Ridge Associated Universities). All of these entities use the same subcontractors and the transient work force to perform work. So, B&W Y-12 would not only have to track subcontractors for B&W Y-12 at Y-12, but would also have to know how many days the subcontractor employees worked under other DOE contracts at other DOE sites.

B&W Y-12 proposes the continuation of its current practice of requiring subcontractors to follow OSHA regulations. The OSHA regulations, which are hazard based, provide for the protection of the workers, meet the statutory requirements, and are equally safe and protective as what is required by this rule. Subcontractor employees enrolled in medical or exposure monitoring programs will continue to receive the medical reviews appropriate for the respective hazards. If this variance request is granted, it will not impact the process for subcontractors to supply the necessary occupational medical services as specified in OSHA regulations and flowed down through the subcontracts.

**Requirement:** *(b) The occupational medicine services must be under the direction of a graduate of a school of medicine or osteopathy and licensed for the practice of medicine in the state in which the site is located. Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas – Section 8., Occupational Medicine.*

**This variance request does not apply to this requirement.** B&W Y-12 proposes to require that all subcontractors have occupational medicine providers meeting this requirement, and that these providers will determine the necessary program for that subcontractor’s employees.

**Requirement:** *(c) Occupational medical physicians, occupational health nurses, physician’s assistants, nurse practitioners, psychologists, employee assistance counselors, and other occupational health personnel providing occupational medicine services must be licensed, registered, or certified as required by Federal or State law where employed. Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas – Section 8., Occupational Medicine.*

**This variance request does not apply to this requirement.** B&W Y-12 proposes to require that such personnel employed by subcontractors meet this requirement.

**Requirement:** *(d) Contractors must provide the occupational medicine providers access to hazard information by promoting its communication, coordination, and sharing among operating and environment, safety, and health protection organizations.*

*(1) Contractors must provide the occupational medicine providers with access to information on the following:*

- (i) Current information about actual or potential work-related site hazards (chemical, radiological, physical, biological, or ergonomic);*
  - (ii) Employee job-task and hazard analysis information, including essential job functions;*
  - (iii) Actual or potential work-site exposures of each employee; and*
  - (iv) Personnel actions resulting in a change of job functions, hazards or exposures.*
- (2) Contractors must notify the occupational medicine providers when an employee has been absent because of an injury or illness for more than 5 consecutive workdays (or an equivalent time period for those individuals on an alternative work schedule);*
- (3) Contractors must provide the occupational medicine provider information on, and the opportunity to participate in, worker safety and health team meetings and committees;*
- (4) Contractors must provide occupational medicine providers access to the workplace for evaluation of job conditions and issues relating to workers' health. Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas – Section 8., Occupational Medicine.*

With respect to (d)(1)(i) through (iii), the B&W Y-12 Site Occupational Medical Director (OMD) already has, and will continue to have, the information required for work performed pursuant to B&W Y-12's prime contract at DOE owned or controlled sites, without regard to whether the work is performed by a B&W Y-12 employee or by a subcontractor employee. This information is used for the job planning process for all work at Y-12, regardless of whether the actual performer is a B&W Y-12 employee or a subcontractor employee. We believe that having the on-site OMD provided with this information is more beneficial than routinely providing such information as a matter of course to off-site OMDs, as the on-site OMD has more experience and knowledge in addressing the hazards at Y-12. As an alternative measure, we agree to provide this information to the subcontractor OMDs if requested by those subcontractors, or if B&W Y-12 needs to provide this information to obtain subcontractor employees who must meet specific fit-for-duty criteria, such as a respirator fit-test. In addition, the subcontractor OMDs will receive this information to the extent necessary to establish fitness-for-work under OSHA, including medical surveillance programs.

With respect to section (d)(1)(iv), regulations apply to subcontractor employers if a change of job functions, hazards, or exposures requires employee placement in a medical surveillance program. For (d)(2), B&W Y-12 requires that its employees report to Occupational Health Services after an absence of 4 or 5 consecutive work days, depending on the individual's work schedule. We do not propose to flow this requirement to subcontractors as it is beyond the regulations promulgated by OSHA. OSHA regulations are equally safe and protective as what is required under this provision; therefore, B&W Y-12's program is also equally safe and protective.

For (d)(3), the B&W Y-12 Site OMD, or his designees, receives information on, and has the opportunity to participate in, worker safety and health team meetings and committees impacting all work performed by or for B&W Y-12 at Y-12. Therefore, B&W Y-12's program is equally safe and protective as what is required under this provision.

For (d)(4), the B&W Y-12 Site OMD has access to all Y-12 workplaces for evaluation of job conditions and issues relating to workers' health, including those workplaces and conditions occupied by subcontractor employees, and issues impacting subcontractor employees. Further, because many areas of Y-12 are not accessible to persons without a Q-clearance, imposing this requirement upon subcontractor OMDs is unduly burdensome, particularly given that the Site OMD has full access to Y-12. Because the Site OMD has the access required by (d)(4), the current practice is equally safe and protective as what is required under this provision.

**Requirement:** *(e) A designated occupational medicine provider must:*

- (1) Plan and implement the occupation medicine services; and*
- (2) Participate in worker protection teams to build and maintain necessary partnerships among workers, their representatives, managers, and safety and health protection specialists in establishing and maintaining a safe and healthful workplace. Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas – Section 8. Occupational Medicine.*

For (e)(1), the B&W Y-12 Site OMD performs this service for all B&W Y-12 employees. Subcontractor designated occupational medicine providers also plan and implement the occupational medicine services for subcontractor employees. However, to the extent that Appendix A has requirements for

OMDs that are in addition to the OSHA regulations, we request a variance from this requirement. This element of the program does not provide any additional health and safety benefits to work at Y-12 by subcontractor employees. Further, it is our understanding that this is not a requirement of FEOSH, and that not all DOE contractors following FEOSH to meet 10 CFR 851 have designated occupational medicine providers performing the functions set forth in this provision. Since OSHA and FEOSH requirements are equally safe and protective as what is required under this provision, B&W Y-12's program is also equally safe and protective.

For (e)(2), the B&W Y-12 Site OMD participates in worker protection teams to build and maintain the required partnerships at Y-12 to establish and maintain a safe and healthful workplace, and this applies to subcontractor workplaces at Y-12 as well. Therefore, the processes used by B&W Y-12 are equally safe and protective as what is required under this provision.

**Requirement:** *(f) A record, containing any medical, health history, exposure history, and demographic data collected for the occupational medicine purposes, must be developed and maintained for each employee for whom medical services are provided. All occupational medical records must be maintained in accordance with Executive Order 13335, Incentives for the Use of Health Information Technology.*

*(1) Employee medical, psychological, and employee assistance program (EAP) records must be kept confidential, protected from unauthorized access, and stored under conditions that ensure their long-term preservation. Psychological records must be maintained separately from medical records and in the custody of the designated psychologist in accordance with 10 CFR 712.38(b)(2).*

*(2) Access to these records must be provided in accordance with DOE regulations implementing the Privacy Act and the Energy Employees Occupational Illness Compensation Program Act. Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas - Section 8., Occupational Medicine.*

The B&W Y-12 Site OMD develops and maintains these records for all B&W Y-12 employees as specified by this requirement and in accordance with Privacy Act Systems of Records DOE-33, Personnel Medical Records. The health care providers for subcontractor employees are subject to professional requirements for developing, maintaining, and providing access to these records. These requirements may vary from state to state, and may include the requirements of the Health Insurance Portability and Assurance Act (HIPAA), which specifies recordkeeping requirements for certain records. Imposing additional recordkeeping requirements upon subcontractor OMDs does not contribute to additional safety and health at Y-12. In addition, if a subcontractor employee files a claim under the Energy Employees Occupational Illness Compensation Program Act, that employee will be required to provide access to his or her medical records. To the extent that B&W Y-12 has any subcontractor records within its DOE Privacy Act System of Records, access to such records shall be provided in accordance with applicable Privacy Act regulations. Thus, current practices are equally safe and protective as what is required under this provision.

**Requirement:** *(g) The occupational medicine services provider must determine the content of the worker health evaluations, which must be conducted under the direction of a licensed physician, in accordance with current sound and acceptable medical practices and all pertinent statutory and regulatory requirements, such as the Americans with Disabilities Act.*

*(1) Workers must be informed of the purpose and nature of the medical evaluations and tests offered by the occupational medicine provider.*

*(i) The purpose, nature and results of evaluations and tests must be clearly communicated verbally and in writing to each worker provided testing;*

*(ii) The communication must be documented in the worker's medical record; and*

*(2) The following health evaluations must be conducted when determined necessary by the occupational medicine provider for the purpose of providing initial and continuing assessment of employee fitness for duty.*

*(i) At the time of employment entrance or transfer to a job with new functions and hazards, a medical placement evaluation of the individual's general health and physical and psychological capacity to perform work will establish a baseline record of physical condition and assure fitness for duty.*

*(ii) Periodic, hazard-based medical monitoring or qualification-based fitness for duty evaluations required by regulations and standards, or as recommended by the occupational medicine services provider, will be provided on the frequency required.*

*(iii) Diagnostic examinations will evaluate employee's injuries and illnesses to determine work-relatedness, the applicability of medical restrictions, and referral for definitive care, as appropriate.*  
*(iv) After a work-related injury or illness or an absence due to any injury or illness lasting 5 or more consecutive workdays (or an equivalent time period for those individuals on an alternative work schedule), a return to work evaluation will determine the individual's physical and psychological capacity to perform work and return to duty.*  
*(v) At the time of separation from employment, individuals shall be offered a general health evaluation to establish a record of physical condition.* Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas – Section 8. Occupational Medicine.

B&W Y-12 meets these requirements for B&W Y-12 employees. For subcontractor employees, the requirements are met to the extent they are included in OSHA regulations, which are tailored to the type of occupational hazards involved, and thus the current practice is equally protective of safety and health as what is required under this provision.

For (g)(1)(i) and (ii), if a subcontractor employer has an occupational medicine provider for its employees, that provider is already subject to professional requirements for patient consent and communication.

For (g)(2)(i) and (ii), the B&W Y-12 Site OMD performs these evaluations for B&W Y-12 employees, but exercises discretion in determining the extent and frequency of these evaluations based upon the job requirements. Subcontractor employees are subject to these types of evaluations only when the job has hazards that indicate a need for fitness-for-duty evaluations required by regulations and standards. To the extent that (g)(2)(i) requires a pre-employment physical establish a baseline record of physical condition, it is providing a "wellness" benefit, but does not contribute to the safety of the Y-12 workplace. Further, if the health evaluation in (g)(2)(ii) is required by a regulation or a standard incorporated into 10 CFR 851, then that requirement would be met for that subcontractor's employees.

For (g)(2)(iii) and (iv), subcontractors are subject to worker compensation requirements for work-related injuries and illnesses, and therefore meet these requirements to the extent required by Tennessee law.

For (g)(2)(v), while the offering of a general health evaluation at the time of separation could be considered a wellness benefit to the employee, it does not add to the safety of the Y-12 workplace, as it is voluntary for the employee.

**Requirement:** *(h) The occupational medicine provider must monitor ill and injured workers to facilitate their rehabilitation and safe return to work and to minimize lost time and its associated costs. (1) The occupational medicine provider must place an individual under medical restrictions when health evaluations indicate that the worker should not perform certain job tasks. The occupational medicine provider must notify the worker and contractor management when employee work restrictions are imposed or removed.* Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas – Section 8., Occupational Medicine.

B&W Y-12 meets these requirements for B&W Y-12 employees at Y-12. Subcontractor employees are typically only paid for actual work time or for completion of work, depending upon the type of contract. B&W Y-12 does not directly pay for subcontractor employee medical leave or sick days. If subcontractor employees cannot perform their job tasks, any compensation is determined by their employer, not B&W Y-12. For positions that have regulatory fitness-for-duty requirements, the subcontractor is contractually responsible for providing employees who qualify to perform the work. Thus the current practice is equally protective of safety and health as what is required under this provision.

**Requirement:** *(i) Occupational medicine provider physician and medical staff must, on a timely basis, communicate results of health evaluations to management and safety and health protection specialists to facilitate the mitigation of worksite hazards.* Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas – Section 8., Occupational Medicine.

The B&W Y-12 Site OMD performs this function for all work for B&W Y-12, including work performed by subcontractor employees. The B&W Y-12 safety and health protection specialists use this information to facilitate the mitigation of worksite hazards for both B&W Y-12 employees and its subcontractors while performing work at Y-12. Thus current practices are equally protective of safety and health as what is required under this provision.

**Requirement:** *(j) The occupational medicine provider must include measures to identify and manage the principal preventable causes of premature morbidity and mortality affecting worker health and productivity.*

*(1) The contractor must include programs to prevent and manage these causes of morbidity when evaluations demonstrate their cost effectiveness.*

*(2) Contractors must make available to the occupational medicine provider appropriate access to information from health, disability, and other insurance plans (de-identified as necessary) in order to facilitate this process. Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas - Section 8., Occupational Medicine.*

B&W Y-12 performs (j) and (j)(1) with respect to all work performed for B&W Y-12, without regard to whether the work is performed by a subcontractor or a B&W Y-12 employee while at Y-12. With respect to (j)(2), the B&W Y-12 Site OMD has access to this information to facilitate the process described in (j) and (j)(1). All workers at Y-12 benefit from these measures regardless of their employer to the extent that the causes are work-related. B&W Y-12 does not require subcontractors to provide access to their information from health, disability, and other insurance plans, nor do we require that subcontractors offer such insurance to their employees. We are not aware of a corresponding requirement upon employers in the private sector to identify and manage the "principal preventable causes of premature morbidity and mortality affecting worker health and productivity", and note that subcontractor employees work in a variety of environments, whereas the rule only applies to work at DOE sites. Therefore, B&W Y-12 believes that compliance with this requirement for B&W Y-12 employees is sufficient to address premature morbidity and mortality causes, and the imposition of this requirement upon subcontractors would not provide any safety and health benefit. If B&W Y-12's OMD needs this type of information in the future for subcontractor employees while at Y-12 for a specific concern, we can require subcontractors to provide this information to the B&W Y-12 OMD. Because the B&W Y-12 OMD performs these tasks for all work under the contract at Y-12, our current practice is equally protective of safety and health as what is required under this provision.

B&W Y-12 may be reading this provision too broadly. The section requiring "measures to identify and manage the principal preventable causes of premature morbidity and mortality affecting worker health and productivity" was not contained in Order 440.1A or the Proposed Rule, and the Preamble to the Final Rule does not provide any legislative justification or rationale for including this section. It is possible that it is meant to be limited to DOE work-related concerns. It is our understanding that our insurance plans identify non-occupational risk factors as the principal preventable causes of premature morbidity and mortality affecting worker health and safety, and as such, are outside the scope of the 10 CFR 851.

**Requirement:** *(k) The occupational medicine services provider must review and approve the medical and behavioral aspects of employee counseling and health promotional programs, including the following types:*

*(1) Contractor-sponsored or contractor-supported EAPs;*

*(2) Contractor-sponsored or contractor-supported alcohol and other substance abuse rehabilitation programs; and*

*(3) Contractor-sponsored or contractor-supported wellness programs.*

*(4) The occupational medicine services provider must review the medical aspects of immunization programs, blood-borne pathogens programs, and bio-hazardous waste programs to evaluate their conformance to applicable guidelines.*

*(5) The occupational medicine services provider must develop and periodically review medical emergency response procedures included in site emergency and disaster preparedness plans. The medical emergency responses must be integrated with nearby community emergency and disaster plans. Appendix A to 10 CFR 851 - Worker Safety and Health Functional Areas - Section 8. Occupational Medicine.*

For (k)(1) through (k)(4), while B&W Y-12 recognizes the benefit to having these programs for its employees, these programs do not directly support work at Y-12, nor are they necessary to provide a healthy and safe working environment at Y-12. Further, we are concerned that the above provision will be read to require subcontractors to provide these benefits to their employees, and if that is the case, they would have to provide them to all of their employees, not just the ones working at a DOE site, since they have to treat all of their employees equally. It is reasonable to expect that any subcontractor having such programs for its employees will have some health professional involvement in their development. Therefore, current practices are equally protective of safety and health as is what is required under this provision.

For (k)(4), the B&W Y-12 Site OMD has reviewed the blood-borne pathogen program and the bio-hazardous waste program applicable to all B&W Y-12 work, including work performed by subcontractors at Y-12. Therefore, the requirement has been met, and there is no benefit to having subcontractor occupational medicine service providers review the Y-12 programs. Thus, current practices are equally protective of safety and health as is what is required under this provision.

For (k)(5), the B&W Y-12 Site OMD works with the B&W Y-12 Emergency Management organization to develop and implement medical emergency response procedures included in site emergency and disaster preparedness plans, and the medical emergency responses are integrated with community emergency and disaster plans, for any emergency within the Y-12 Emergency Response Boundary. B&W Y-12 is responsible for emergency response within this Boundary, including emergency response for subcontractor employees. Therefore, there is no benefit to subcontractor employees to have subcontractor occupational medicine service providers included in this process. Current practices are equally protective of safety and health as is what is required under this provision.