United States Government Accountability Office

Report to Congressional Requesters

July 2016

DEPARTMENT OF ENERGY

Whistleblower Protections Need Strengthening

Accessible Version

GAO-16-618

GAO Highlights

Highlights of GAO-16-618, a report to congressional requesters

July 2016

DEPARTMENT OF ENERGY

Whistleblower Protections Need Strengthening

Why GAO Did This Study

DOE relies on contractors to manage and operate its facilities and perform its missions. Under federal laws, regulations, and DOE policies, contractors generally must maintain an open environment for raising safety or other concerns without fear of reprisal.

GAO was asked to examine whether the culture at DOE allows contractor employees to raise concerns without fear of reprisal. This report examines (1) DOE's efforts to evaluate the environment for raising concerns and what these evaluations revealed, (2) factors that may limit the use and effectiveness of mechanisms for raising concerns or seeking whistleblower protections, and (3) the extent to which DOE holds contractors accountable for unlawful retaliation and creating a chilled work environment. GAO reviewed DOE's safety culture assessments, analyzed 87 DOE whistleblower case files, and interviewed DOE officials at 10 of its largest sites and headquarters.

What GAO Recommends

GAO is making six recommendations, including that DOE conduct independent assessments of the environment for raising concerns, evaluate whether the whistleblower pilot program will mitigate challenges with the existing program, expedite timeframes for clarifying regulations, and clarify policies to hold contractors accountable. DOE agreed with five recommendations. It did not concur with the sixth, but outlined steps it would take that are consistent with an aspect of the recommendation. GAO continues to believe the recommendation should be fully implemented.

View GAO-16-618. For more information, contact David C. Trimble at (202) 512-3841 or trimbled@gao.gov.

What GAO Found

The Department of Energy (DOE) has used a combination of independent reviews and contractor self-assessments to evaluate the openness of the environment for raising safety and other concerns. The independent reviews, which were methodologically sound and consistently applied, revealed problems with the environment for raising concerns. In contrast, many self-assessments used flawed and inconsistent methodologies and overstated the openness of the environment. For example, self-assessment survey response rates were as low as about 5 percent and were not sufficient for drawing conclusions. Contractor officials told GAO that the low response rates, in some cases, reflect a concern about anonymity. Nonetheless, additional independent assessments are not planned. Instead, DOE plans to provide voluntary guidance to contractors and rely on them to conduct evaluations and take appropriate action in response to results. Consequently, DOE cannot judge the openness of its environment or ensure that appropriate action is taken in response to evaluation results.

Several factors may limit the use and effectiveness of mechanisms for contractor employees to raise concerns and seek whistleblower protections. For example, contractor employees seeking a remedy for alleged retaliation may find DOE's whistleblower program difficult to navigate without legal assistance because it includes filing motions and appeals and arguing before an administrative judge. One case GAO examined was dismissed because the complaint was too vague. On appeal, more specific information was provided but was considered a recharacterization of events and the appeal was denied. A new statutory whistleblower pilot program available to DOE and other government contractors may mitigate some of these challenges. Under the pilot program, DOE's Office of Inspector General investigates alleged retaliation, and officials with this office told GAO that legal assistance would not be necessary. The pilot program expires in January 2017, however, and DOE has not evaluated the extent of its implementation or whether it might mitigate challenges of the existing program.

DOE has infrequently used its enforcement authority to hold contractors accountable for unlawful retaliation, issuing two violation notices in the past 20 years. Additionally, in 2013, in response to proposed revisions to its enforcement guidance, DOE determined that it does not have the authority to enforce a key aspect of policies that prohibit retaliation for nuclear safety-related issues—despite having taken such enforcement actions previously. In May 2016, DOE announced tentative plans to issue regulations to resolve this issue. Also, DOE has taken limited or no action to hold contactors accountable for creating a chilled work environment—in part because DOE has not clearly defined what constitutes evidence of a chilled work environment or the steps needed to hold contractors accountable. DOE officials provided GAO with examples where (1) little or nothing was done in response to intimidation of contractor employees who report safety and other concerns; (2) a subcontractor was terminated after reporting safety concerns; and (3) a contractor employee was terminated allegedly because she cooperated with GAO. DOE's reluctance to hold contractors accountable may diminish contractor employee confidence in mechanisms for raising concerns and seeking whistleblower protection.

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Abbreviations

DOE	Department of Energy
DNFSB	Defense Nuclear Facilities Safety Board
ECP	Employee Concerns Program
NNSA	National Nuclear Security Administration
NRC	Nuclear Regulatory Commission
OSHA	Occupational Safety and Health Administration
SCWE	Safety Conscious Work Environment
WTP	Waste Treatment and Immobilization Plant

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U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

July 11, 2016

The Honorable Claire McCaskill
Ranking Member
Permanent Subcommittee on Investigations
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Edward J. Markey
United States Senate

The Honorable Ron Wyden
United States Senate

The Department of Energy (DOE) relies on contractors—including private companies and universities—to manage and operate its facilities and sites and accomplish its missions.[1] These missions include maintaining the nation's nuclear weapons stockpile and cleaning up highly radioactive wastes and other environmental damage resulting from nearly 50 years of producing nuclear weapons at DOE sites. DOE directs the work of its contractors to carry out these missions at its sites and oversees the safety and quality of operations. To provide assurance that work is accomplished effectively and efficiently while maintaining safety standards, various laws, regulations, DOE policies, and contracts provide a framework for DOE to oversee and evaluate the work of its contractors. As part of this framework, daily oversight of contractors is performed by DOE personnel at DOE sites across the country and supplemented by DOE's independent oversight program. DOE is unusual among nuclear facility operators in that it also acts as its sites' main safety regulator and, as such, is authorized to enforce its own nuclear safety standards and to penalize its contractors for failing to comply with those standards. In contrast, the Nuclear Regulatory Commission (NRC) and the Occupational Safety and Health Administration (OSHA) generally regulate

[1]The National Nuclear Security Administration (NNSA) is a semiautonomous agency within DOE that is tasked with managing the nation's nuclear security programs. Unless otherwise noted, references to DOE in this report include both DOE and NNSA.

safety of nuclear facilities outside of DOE, based on nationwide standards for nuclear safety and worker safety and health.[2]

Because contractor employees carry out the bulk of DOE's mission-related work, the Secretary of Energy and others in DOE have repeatedly recognized contractor employees' disclosures regarding safety and other concerns as a principle source of information on conditions that could negatively affect the quality or safety of DOE's operations.[3] The Secretary and others have also emphasized the importance of fostering an open environment at DOE sites, that is, one in which contractor employees feel free to raise safety concerns without fear of retaliation. However, long-standing challenges related to DOE's and contractors' abilities to provide an open environment for raising concerns and protect contractor employees from retaliation may impair DOE's ability to effectively oversee its contractors and ensure the quality and safety of its operations. During a May 2000 hearing, for example, members of a House subcommittee and witnesses noted instances of DOE contractors' alleged or confirmed retaliation against contractor employees who raised safety or other concerns.[4] The instances occurred despite "zero tolerance" policy reforms that the Secretary of Energy announced in, and reaffirmed throughout, the 1990s. These zero-tolerance reforms aimed to improve the environment for raising concerns and address retaliation against DOE contractor employees, after earlier cases of alleged retaliation by DOE contractors against whistleblowers had come to the Secretary's attention.[5]

[2]NRC regulates nuclear safety generally at commercial nuclear power plants but it does not generally have regulatory authority over DOE facilities. OSHA regulates worker safety at DOE sites where DOE does not exercise regulatory jurisdiction for worker safety and health. However, contractors at sites regulated by DOE must also adhere to OSHA standards that are incorporated by reference into DOE's regulations for worker safety and health.

[3]See, for example, the Secretary's October 5, 2012, Employee Concerns Program Statement, or the Deputy Secretary's December 9, 2014, memo on the Department of Energy Differing Professional Opinion Process.

[4]*Whistleblowers at Department of Energy Facilities: Is There Really 'Zero Tolerance' for Contractor Retaliation? Before the H.R. Subcomm. On Oversight and Investigations, Comm. On Commerce,* 106th Cong. (2000).

[5]For the purposes of this report, we use the term "whistleblower" to describe an employee who alleges unlawful retaliation through one of several formal channels including, but not limited to, DOE's 708 program, the Department of Labor, or federal or state court.

More recently, in 2011, the Defense Nuclear Facilities Safety Board (DNFSB) reported that DOE had failed to recognize, and likely contributed to, a "chilled atmosphere" and a "failed safety culture" at one of its largest and costliest cleanup facilities, the Waste Treatment and Immobilization Plant (WTP), which is being designed and constructed at DOE's Hanford Site near Richland, Washington.[6] DNFSB received an allegation in 2010 from a former WTP contractor employee and manager claiming that he had been removed from his position in retaliation for raising serious safety and technical concerns, which later became the subject of litigation. The employee also alleged that efforts by contractor and DOE managers to suppress or downplay serious concerns had become part of the work environment and safety culture and work environment of that facility. DNFSB conducted an investigation and, in June 2011, recommended to the Secretary of Energy that DOE take immediate actions to improve the safety culture and environment for raising concerns. In response to DNFSB's recommendation, DOE agreed to evaluate and improve the safety culture and environment for raising concerns at WTP, and to conduct an "extent of condition" review to determine whether the safety culture weaknesses observed at WTP extended to other defense nuclear facilities, among other things.

Under federal laws, regulations, and DOE and contractor policies, contractors generally must maintain an open environment for raising safety or other concerns without fear of retaliation and may not retaliate against contractor employees who make protected disclosures.[7] In particular, DOE's Integrated Safety Management policy and associated

[6]DNFSB provides independent analysis, advice, and recommendations to the Secretary of Energy—in the Secretary's role as operator and regulator of DOE's defense nuclear facilities—to ensure adequate protection of public health and safety at these facilities. DNFSB is not authorized to issue regulations governing DOE or to require DOE to take action apart from establishing reporting requirements. Instead, DNFSB uses both informal interactions and formal communications with DOE to ensure that DNFSB's concerns are addressed. See, GAO, *Defense Nuclear Facilities Safety Board: Improvements Needed to Strengthen Internal Control and Promote Transparency*, GAO-15-181 (Washington, D.C.: Jan. 20, 2015).

[7]In general, protected disclosures include disclosures to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the contractor, or any higher tier contractor, and include information that the employee reasonably believe reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.

guidance state that DOE will hold itself and its contractors accountable for safety performance, which includes fostering a strong safety culture and a work environment that encourages a questioning attitude by all employees and is free of retaliation for raising safety concerns. These laws, regulations, and policies also require that various mechanisms be made available for DOE contractor employees to raise or elevate concerns or seek whistleblower protections—that is, to seek a legal remedy for alleged unlawful retaliation for making protected disclosures about serious safety hazards, violations of law, or mismanagement, among other issues.

In addition to a number of informal mechanisms for raising concerns that may be available to contractor employees at DOE sites, employee concerns programs (ECP) are available to contractor employees and serve as a primary mechanism for raising or elevating concerns outside the contractor employees' chain of command. ECPs are provided by DOE for DOE and contractor employees, and may also be provided by contractors for their employees. Both DOE and contractor ECPs offer an independent avenue for resolving employees' concerns. Because DOE's ECP is not affiliated with the contractor, it might provide additional independence for employees who fear retaliation or who may be reluctant to use their contractor-provided ECP. To seek a legal remedy for alleged unlawful retaliation for making protected disclosures, such as reinstatement in a previously held position of employment or back pay, two long-standing mechanisms are available to contractor employees: (1) the DOE Contractor Employee Protection Program, referred to as the 708 program for purposes of this report, and (2) the Whistleblower Protection Program at the Department of Labor's OSHA. In addition, in January 2013 Congress approved a new 4-year, government-wide enhanced whistleblower protection pilot program to provide employees of federal contractors a mechanism—or, in DOE's case, an additional mechanism—for seeking a legal remedy for alleged unlawful retaliation.[8] (See app. I for more information on mechanisms available to DOE contractor employees.)

You asked us to examine whether DOE has established and maintained a culture that allows contractor employees to raise concerns without fear of retaliation. This report examines (1) DOE's efforts to evaluate the

[8]41 U.S.C. §4712.

environment for raising concerns and what, if anything, the evaluations revealed about this environment's openness, (2) the factors, if any, that may limit the use and effectiveness of mechanisms for raising concerns or seeking whistleblower protections under DOE's Contractor Employee Protection Program and the enhanced whistleblower protection pilot program, and (3) the extent to which DOE holds contractors accountable for unlawful retaliation and creating a chilled work environment.

To examine DOE's efforts to evaluate the environment for raising concerns and what, if anything, the evaluations revealed about this environment's openness, we reviewed DOE and DNFSB documents associated with DNFSB's 2011 recommendation that DOE evaluate the extent of its safety culture problems. We examined DOE and industry guidance on evaluating safety culture and assessed reports from DOE- and contractor-led evaluations and independent assessments of the safety culture that were conducted in response to the DNFSB's recommendation. We also examined similar evaluations, not associated with the recommendation, of DOE's three largest defense nuclear sites—the Hanford site in Washington, Los Alamos National Laboratory in New Mexico, and Savannah River Site in South Carolina. We assessed the methodologies of these evaluations and assessments and found them to be sufficiently reliable for our purposes. Specifically, we evaluated the methodology section of these evaluations and assessments and interviewed knowledgeable officials regarding the implementation of the methodologies. We selected these three sites on the basis of their large fiscal year 2013 budgets, geographic diversity, and relatively large number of high-hazard nuclear facilities.[9] We visited the three sites and interviewed DOE ECP personnel and ECP personnel from 10 of the contractors performing work at those sites. We also interviewed DOE or contractor personnel responsible for environment, safety and health at the three sites or for providing mechanisms for raising concerns. In addition, we interviewed DOE headquarters representatives from DOE's Safety Culture Improvement Panel, and the director of DOE's Office of Environment, Safety, and Health Assessments, which—along with its

[9]The budgets in fiscal year 2013 were around $2 billion for each of the three sites. Compared with other DOE sites, the three sites have relatively large numbers of nuclear facilities with the potential for significant on-site consequences. About one-third of the approximately 150 such facilities in DOE and NNSA are located at the three sites, according to DOE data. We used the fiscal year 2013 budget because it was the most recent year for which complete data were available.

predecessor—conducted independent reviews of safety culture at WTP and other DOE locations and assessed the quality of other DOE and contractor efforts to evaluate the environment for raising concerns.[10]

To examine the factors that may limit the use and effectiveness of mechanisms for raising concerns or seeking whistleblower protections under DOE's Contractor Employee Protection Program and the enhanced whistleblower protection pilot program, we reviewed relevant laws, regulations, policies, and guidance associated with these mechanisms. We also analyzed 87 cases filed through DOE's 708 program from 10 sites, filed from fiscal year 2009 through fiscal year 2014.[11] We selected the 10 sites with the largest fiscal year 2013 budgets that also had evidence of at least one 708 case filed. These data are not generalizable to all DOE sites. To determine whether there had been any cases filed through the 708 program, we used data provided by the DOE and NNSA headquarters' ECP directors to identify the sites that had at least one whistleblower complaint filed through the 708 program in fiscal years 2012 and 2013, the only years for which complete data were available; we also contacted the sites to obtain the case files for all 708 cases filed from fiscal year 2009 through fiscal year 2014. We compared the 708 program's whistleblower protections with the protections under the 4-year enhanced whistleblower protection pilot program. We interviewed officials, including an administrative judge, from DOE's Office of Hearings and Appeals about the factors that may limit the 708 program's use and effectiveness. We also interviewed DOE's Whistleblower Protection Ombudsman in the Office of Inspector General, which is responsible for investigating and adjudicating whistleblower complaints filed by DOE contractor employees under the whistleblower protection pilot program, about the pilot program and how it compares with DOE's 708 program. In addition, we sent a structured question set to DOE ECP managers for the 10 largest sites by fiscal year 2014 budget, including the 3 sites we

[10]The Office of Environment, Safety, and Health Assessments is within DOE's Office of Enterprise Assessments, which is responsible for implementing DOE's independent oversight program. Prior to these offices' creation in June 2014, their predecessor organizations in the now-disbanded office of Health, Safety and Security had conducted the independent evaluations of safety culture at WTP and other locations and assessed the quality of DOE and contractor efforts to evaluate the environment for raising concerns.

[11]We elected to review cases falling in the 5-year period from 2009 through 2014 to ensure that we had a large number of cases to review. Also, the most current information at the time we requested the documents was for 2014.

visited. This question set gathered information on caseload and disposition of employee concerns, including data on the reasons DOE ECP managers may choose to transfer concerns to contractor organizations. It also allowed DOE ECP managers an opportunity to include additional detail on their responses. The information gathered is not generalizable to all ECP managers. At the 3 sites we visited, we interviewed DOE and contractor ECP personnel about any factors that may limit their ECPs' use and effectiveness. We also interviewed general counsel attorneys, contracting officers, and other contract-management officials at the 3 sites and at DOE headquarters about DOE's implementation of the whistleblower pilot program.

To examine the extent to which DOE holds contractors accountable for unlawful retaliation and creating a chilled work environment, we reviewed DOE's enforcement regulations and policies, interviewed DOE's Office of Enforcement about its enforcement actions, and examined documents related to these actions. We also examined NRC's whistleblower processes to learn more about how other agencies use employee concerns and allegations of retaliation as barometers for understanding the work environment and targeting their enforcement activities. We interviewed officials from NRC about their agency's policies and steps for addressing alleged or confirmed whistleblower retaliation at the nuclear sites it regulates. We interviewed the general counsel attorneys and contract-management officials at the 3 sites we visited and DOE headquarters about DOE's policies and practices for monitoring and reimbursing contractors' legal costs to defend against whistleblower retaliation complaints. Additionally, at the 3 sites we visited, we discussed instances of potentially chilled work environments with various DOE officials and contractor employees, some of whom requested anonymity.

We conducted this performance audit from June 2014 to July 2016 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

This background section discusses (1) requirements and policies for nuclear safety and worker safety and health and DOE's oversight and enforcement responsibilities and (2) mechanisms for raising concerns and seeking whistleblower protection.

Requirements and Policies for Nuclear Safety and Worker Safety and Health and DOE's Oversight and Enforcement Responsibilities

The Atomic Energy Act, as amended, and other federal laws and DOE regulations on nuclear safety management and worker safety and health establish DOE's nuclear safety and worker safety and health requirements and authorize DOE to take enforcement actions against contractors that violate these requirements (see app. II).[12] Additionally, federal whistleblower laws and regulations prohibit retaliation against DOE contractor employees who make protected disclosures. In general, protected disclosures include disclosures to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the contractor, or any higher- tier contractor, and that contain information that the employee reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.[13]

DOE policies require contractors to maintain an open environment for raising safety or other concerns. In particular, DOE's Integrated Safety Management policy and guidance articulate DOE's expectation that all contractor and DOE organizations will integrate safety into all aspects of their operations and embrace a strong safety culture, including an environment free from retribution.[14] This policy and guidance describe safety culture as "an organization's values and behaviors modeled by its leaders and internalized by its members, which serve to make safe performance of work the overriding priority to protect the workers, public, and the environment." The Integrated Safety Management policy and guidance further describe the following expectations of contractor and DOE managers:

[12]The Atomic Energy Act, as amended, authorizes DOE to issue standards and restrictions governing the design, location, and operation of nuclear facilities, in order to protect health and to minimize danger to life or property. 42 U.S.C. § 2201(i)(3). DOE's main safety-related and enforceable regulations include 10 C.F.R. part 820, Procedural Rules for DOE Nuclear Activities; Part 830, Nuclear Safety Management; part 850, Chronic Beryllium Disease Prevention Program; part 851, Worker Safety and Health Program; and part 835, Occupation Radiation Protection.

[13]10 C.F.R. § 708.5.

[14]DOE, *Integrated Safety Management Policy,* DOE P 450.4A (Washington, D.C.: Apr. 25, 2011); *Integrated Safety Management,* DOE O 450.2, (Washington, D.C.: Apr. 25, 2011); and *Integrated Safety Management System Guide,* DOE G 450.4-1C, (Washington, D.C.: Sept. 29, 2011).

- **Contractor expectations:** Contractors will be held accountable for safety performance, which includes fostering an environment that encourages a questioning attitude by all employees and that is free of retribution. These policies and guidance further define "open communication and fostering an environment free from retribution" as one of several key attributes of a strong safety culture, and encourage leaders to proactively detect situations that could result in retaliation and take effective action to prevent a chilling effect.[15]

- **DOE expectations:** DOE managers are responsible for evaluating and developing strategies to improve the safety culture as part of their overall responsibility to ensure adequate safety in contractor management of DOE facilities while meeting mission goals. This includes responsibility to ensure that appropriate requirements are incorporated into contracts; oversee compliance; assess contractor performance against established performance measures; analyze relevant trends; and obtain relevant operational information for use as feedback to improve safety.

At DOE sites, contracting officers direct the performance of DOE's contractors, while safety experts and others conduct day-to-day contractor oversight. This day-to-day oversight is supplemented by DOE's independent oversight program and by safety monitoring from outside groups, such as DNFSB, which is congressionally chartered.[16] The Office of Enterprise Assessments is responsible for implementing DOE's independent oversight program.[17] Within this office, the Office of

[15]In addition, DOE's Integrated Safety Management policies and guidance identified 15 other key attributes of a strong safety culture, such as establishing clear expectations and accountability for safety; engaging employees and workers in work planning and improvement; and encouraging reporting of errors and problems to foster organizational learning and improve safety. According to DOE's guidance, the safety culture attributes were jointly developed by DOE and contractors based on research and experience from commercial nuclear industry.

[16]The DNFSB was established by statute in 1988 to provide independent analysis and recommendations to DOE to ensure adequate protection of public health and safety at defense nuclear facilities.

[17]DOE Order 227.1A, *Independent Oversight Program*, establishes the requirements and responsibilities of DOE's Independent Oversight Program, while DOE Policy 226.1B, *Department of Energy Oversight Policy,* and the associated DOE order and guidance provide DOE's overall framework for conducting oversight, which includes "robust" assurance systems by contractors, effective oversight by DOE line management, and independent oversight.

Environment, Safety, and Health Assessments carries out independent assessments of nuclear safety, worker safety and health, and other areas, and the Office of Enforcement carries out the department's regulatory enforcement of nuclear safety and worker safety and health, as follows:

- **DOE's Office of Environment, Safety, and Health Assessments:** Assessments conducted by this office may include examining the adequacy and performance of sites' safety programs and of plans for correcting known deficiencies, as well as the effectiveness of DOE's oversight. Subject matter experts and others in the assessments office, with input from others in DOE, identify assessment needs.

- **DOE's Office of Enforcement:** The Price-Anderson Amendments Act,[18] section 3173 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, and DOE regulations[19] authorize the Office of Enforcement to take action with respect to contractor violations of DOE's nuclear safety or worker safety and health requirements.[20] Under DOE's enforcement process, the Office of Enforcement may investigate potential safety violations and pursue one of several possible enforcement outcomes, including assessing civil penalties or entering into a settlement agreement with a contractor. The enforcement office receives information about potential safety violations from multiple sources. For example, contractor self-reported information comes primarily from DOE's Noncompliance Tracking System—a centralized, web-based system that allows DOE's contractors to voluntarily self-report noncompliance with safety requirements. Contractors' self-reporting is encouraged but generally not required, according to DOE guidance.

[18]Pub. L. No. 100-408, 102 Stat. 1066 (1988).

[19]E.g., 10 C.F.R. parts 820 and 851.

[20]The National Defense Authorization Act for Fiscal Year 2000, which established the NNSA, precludes DOE employees, except the Secretary and Deputy Secretary, from issuing direction to NNSA employees or NNSA contractors when they are carrying out any function of the NNSA. Accordingly, DOE's Office of Enforcement is not authorized to take enforcement action against NNSA contractors. These responsibilities are instead exercised by the NNSA administrator. 10 C.F.R. § 851.45.

Mechanisms for Raising Concerns and Seeking Whistleblower Protection

DOE's worker safety and health regulations require DOE contractors to provide mechanisms for workers to report safety concerns without fear of retaliation.[21] Primary mechanisms for DOE contractor employees to raise concerns outside their chain of command are the ECPs that DOE and contractors provide. The primary mechanisms for DOE contractor employees to seek whistleblower protection—that is, to seek a legal remedy for alleged unlawful retaliation—are DOE's 708 Program, OHSA's Whistleblower Protection Program, and the 4-year enhanced whistleblower protection pilot program. The following provides additional information about (1) DOE and contractor ECPs and (2) mechanisms for seeking whistleblower protection:

Employee Concerns Programs: DOE's ECP—which is available to both DOE and contractor employees at DOE sites—is governed by DOE Order 442.1A and associated guidance.[22] Under DOE's ECP order, contractors must assist DOE with resolving employee concerns, but neither the ECP order nor DOE's safety regulations require contractors to provide their own ECPs. However, some contracts require contractors to provide such programs, while other DOE contractors voluntarily provide an ECP or similar program for their employees. DOE's ECP is administered by DOE's Office of the Associate Under Secretary for Environment, Health, Safety and Security, which is responsible for developing DOE's safety standards and safety-related programs. DOE's ECP was previously under the Office of Economic Impact & Diversity but was relocated to the Associate Under Secretary office, effective January 1, 2016. DOE ECP managers are located at various DOE site offices or other DOE field locations and are responsible for implementing the program locally and ensuring that concerns are processed as required by the ECP Order. These responsibilities include: (1) publicizing ECP processes, employee rights and responsibilities to report concerns through these processes, and management's intolerance for retaliation against employees who have reported concerns; (2) deciding which concerns the ECP office should seek to resolve, which warrant referral or transfer to another office, and which warrant no further action; (3) assisting in evaluation and resolution of employee concerns; (4) coordinating with DOE contracting

[21] 10 C.F.R. 851.20(a)(6).

[22] DOE, *Employee Concerns Program,* DOE G 44.21-1, (Washington, D.C.: June 6, 2011); and *Employee Concerns Program Guide,* DOE O 442.1A, (Washington D.C.: Feb. 1, 1999).

officers to determine the existence of contract requirements for the establishment of contractor ECPs and the means and criteria by which such contractor ECPs will be evaluated; and (5) advising appropriate levels of management when actions to resolve complaints or correct identified deficiencies are ineffective or untimely.

Whistleblower Protection: DOE contractor employees seeking a legal remedy for alleged unlawful retaliation under DOE's 708 Program, the OSHA Whistleblower Protection Program, or the 4-year enhanced whistleblower protection pilot program must establish that they made a protected disclosure. The details of what constitutes a protected disclosure vary among the programs. In addition, the specific processes for filing a complaint and obtaining whistleblower protections may differ for the three whistleblower programs in various ways, including as follows:

- **708 Program:** This program is governed by DOE regulations at 10 C.F.R. Part 708. Contractor employees seeking a remedy under the program generally file their complaint with DOE's ECP.[23] ECP officials are to screen the complaints and forward them to DOE's Office of Hearings and Appeals, which is responsible for investigating the complaints if the employees filing the complaints request an investigation, and adjudicating them through a hearings and appeals process. The administrative judge may determine that an act of retaliation occurred and order appropriate relief or may deny the complaint.[24] Complaints may also be dismissed on technical grounds, such as the office's lack of jurisdiction to hear the employee's complaint. The employee or the contractor can appeal adverse decisions to the Director of the Office of Hearings and Appeals. If dismissed by the Director of the Office of Hearings and Appeals, the

[23]The complaint does not need to be in any specific form, but it must contain the following: (1) A statement specifically describing the alleged retaliation and (2) the disclosure, participation, or refusal that the complainant believes gave rise to the retaliation. 10 C.F.R. § 708.12(a).

[24]The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal. 10 C.F.R. § 708.29.

dismissal may be appealed to the Secretary of Energy, in accordance with the Part 708 regulations.[25] During the 708 process, the employee can withdraw his or her complaint, can agree to participate in mediation, or enter into a settlement agreement with the contractor.

- **OSHA Whistleblower Protection Program:** Complaints filed under this program follow a hearings and appeals process before an administrative law judge. Unlike the 708 Program, however, under OSHA's process, DOE contractor employees may generally file suit in federal district court if OSHA has not ruled on or dismissed the complaint within a year of its filing.

- **Enhanced whistleblower protection pilot program:** Complaints filed under the enhanced whistleblower protection pilot program are investigated by the DOE Inspector General and, in contrast to the 708 and OSHA programs, do not involve formal administrative hearings. Under the pilot program, the Inspector General submits its investigation findings to the whistleblower, the contractor, and the Secretary of Energy. Should the Inspector General find in favor of the whistleblower, the Secretary of Energy may issue an order of remedy, which is enforceable in federal court. The contractor may appeal such an order in federal court.

In addition to these government agency programs, contractor employees may, in some circumstances, be able to challenge the alleged unlawful retaliation directly in a state or federal court or seek redress through their respective labor unions or from another nonfederal government entity.

[25]The appeals process for dismissals on technical grounds is described in 10 C.F.R. §§ 708.18 - 708.19. The appeals process for decisions on the merits is described in 10 C.F.R. §§ 708.32 - 708.35.

DOE Has Taken Steps to Evaluate the Environment for Raising Concerns, but These Evaluations Used Flawed and Inconsistent Methodologies

Fostering an environment that encourages a questioning attitude by all employees and is free of retribution is an important aspect of DOE's Integrated Safety Management policy and guidance, and DOE has taken steps to evaluate this environment. Specifically, in 2012 through 2014, DOE conducted a coordinated review of safety culture across multiple sites—known as an "extent of condition" review—as well as various ad hoc assessment surveys and independent reviews aimed at evaluating the environment for raising concerns. However, these evaluations used flawed and inconsistent methodologies and drew conclusions that may have overstated the openness of the environment for raising concerns.

Efforts to Evaluate the Environment for Raising Concerns Included a Coordinated Review of DOE's Safety Culture and Various Ad Hoc Assessments and Independent Reviews

DOE's effort to evaluate the environment for raising concerns included a coordinated review of safety culture—that is, an "extent of condition" review—to determine whether the safety culture weaknesses observed in 2011 by DNFSB at WTP extended to other defense nuclear facilities. During the same time frame, at two of the three sites we visited—Savannah River and Hanford—DOE and its contractors also conducted various independent reviews and ad hoc self-assessment surveys aimed at evaluating the environment for raising concerns.

DOE's extent of condition review: In December 2011, the Secretary of Energy approved an implementation plan that described the department's planned actions for responding to recommendations in the 2011 DNFSB report on the safety culture at WTP—including the recommendation to conduct an extent of condition review. DNFSB accepted DOE's implementation plan in March 2012. DOE's extent of condition review was a coordinated effort involving various DOE organizations and contractors, including the Office of Environment, Safety, and Health Assessments within the Office of Enterprise Assessments. As discussed more specifically below, the extent of condition review generally consisted of four components: (1) independent reviews of safety culture; (2) safety conscious work environment (SCWE) self-assessments;[26] (3) an

[26]SCWE is the aspect of safety culture that relates to ensuring an open environment for raising concerns without fear of retaliation, according to guidance from DOE and contractors and a Nuclear Regulatory Commission policy statement.

independent review of the SCWE self-assessments; and (4) a consolidated report summarizing and assessing the results of the independent reviews and SCWE self-assessments.[27]

- **Independent reviews of safety culture:** From 2012 through 2013, the predecessor of DOE's Office of Environment, Safety, and Health Assessments conducted independent reviews of the safety culture of four construction projects at four DOE sites and, at a fifth site, conducted a site-wide independent review of safety culture.[28] The construction projects reviewed were Idaho Sodium Bearing Waste Treatment Project; Los Alamos National Laboratory's Chemistry and Metallurgy Research Replacement Project; the Savannah River Site's Salt Waste Processing Facility; and the Y-12 National Security Complex's Uranium Processing Facility Project. The site-wide review was for the Pantex Plant in Texas.[29] DOE's methodology for the independent reviews was developed in consultation with outside experts in safety culture assessment. The methodology included interviews, focus groups, document reviews, and other approaches for assessing the safety culture. The methodology also involved surveying DOE and contractor employees about various aspects of safety culture, including the employees' ability to report safety concerns without fear of retaliation.

[27]As described in DOE's implementation plan and other documents, the extent of condition review also included tasks other than evaluating DOE's safety culture, such as issuing a secretarial memo to reinforce the safety culture attributes in DOE's Integrated Safety Management policies and guidance, and developing processes and controls for sustaining a robust safety culture at sites.

[28]Prior to a reorganization in 2014, the predecessor to DOE's Office of Environment, Safety, and Health Assessments was housed within the Office of Enforcement and Oversight in the Office of Health, Safety and Security. During the reorganization, the predecessor offices were disbanded, and responsibility for independent oversight and enforcement was placed in a new organization—the Office of Enterprise Assessments—which includes the Office of Environment, Safety, and Health Assessments; the Office of Enforcement; and other sub-offices.

[29]The Pantex Plant was not originally slated for independent assessment during the extent of condition review. However, DOE's Office of Environment, Safety, and Health Assessments added the site after learning about alleged retaliation at the site related to contractor employees raising safety concerns.

- **SCWE self-assessments:** In 2013 and 2014, the DOE organizations and contractors at 12 sites conducted SCWE self-assessments, [30] using various approaches—such as employee surveys, interviews, and workplace observations. SCWE is the aspect of safety culture that relates to ensuring an open environment for raising concerns without fear of retaliation, according to guidance from DOE and contractors and a Nuclear Regulatory Commission policy statement. To guide this effort, DOE developed guidance, including lines of inquiry and self-assessment techniques.

- **Independent review of the SCWE self-assessments:** From May through December 2013, the predecessor of DOE's Office of Environment, Safety, and Health Assessments evaluated the quality of the SCWE self-assessments and, in February 2014, issued a report on its evaluation.[31]

- **Consolidated report:** In May 2014, DOE issued a consolidated report on its safety culture extent of condition review, which provides an analysis of the results of DOE's independent reviews and SCWE self-assessments and recommends actions for improving safety culture management.[32]

Ad hoc self-assessments and independent reviews: At two of the three sites we visited—Savannah River and Hanford—DOE or contractors conducted or organized various other ad hoc self-assessments and independent reviews. These reviews were generally similar in purpose to the assessments and evaluations conducted for the extent of condition review in that they aimed to assess the safety culture or the environment for raising concerns. The reviews may have also involved methodological approaches similar to those used for the extent

[30]These sites are (1) the Savannah River Site (S.C.); (2) Los Alamos National Laboratory (N.Mex.); (3)Sandia National Laboratories (N.Mex. and Calif.); (4) Lawrence Livermore National Laboratory (Calif.); (5) Nevada National Security Site; (6) Y-12 National Security Complex (Tenn.); (7) Pantex Plant (Tex.); (8) Idaho Site (Environmental Management programs); (9) Hanford Site (Wash.); (10) Waste Isolation Pilot Plant (N.Mex.); (11) Oak Ridge Reservation (Tenn.); and (12) Pacific Northwest National Laboratory (Wash.).

[31]DOE, Office of Enforcement and Oversight, *Independent Oversight Evaluation of Line Self-Assessments of Safety Conscious Work Environment* (Washington, D.C.: February 2014).

[32]DOE, *Consolidated Report for Defense Nuclear Facilities Safety Board Recommendation 2011-1, Actions 2-8 and 2-9* (Washington, D.C.: May 2014).

of condition review evaluations, including employee surveys and focus groups, and, in some cases, may have been conducted while the extent of condition review was underway. However, the ad hoc reviews were generally stand-alone efforts, separate from the extent of condition review and from one another. They included, for example, several DOE- and contractor-led reviews at the Hanford WTP, including a series of independent reviews of WTP's safety culture by the Office of Environment, Safety, and Health Assessments, or its predecessor, as well as safety culture surveys of WTP employees conducted by the WTP contractor in 2005 through 2014 (except 2010). The ad hoc reviews also included other safety culture or SCWE evaluation efforts, such as a Savannah River Site contractor's September 2011 survey to assess the ability of certain construction labor employees to raise safety concerns without fear of retaliation, and a more broadly focused "organizational climate" survey of DOE and contractor employees at the Hanford site, which—according to a report from the study and a DOE official at Hanford—was organized by DOE officials at the site and administered in June 2012 by a hired consultant.

Some Evaluations Used Flawed and Inconsistent Methodologies and Drew Conclusions That May Overstate the Openness of the Environment for Raising Concerns

Some of the evaluations conducted for DOE's extent of condition review, as well as various ad hoc self-assessments and independent reviews, used flawed or inconsistent methodologies and sometimes drew conclusions that overstated the openness of the environment for raising concerns.

DOE's Extent of Condition Review

The independent evaluation of safety culture at five sites—which, as we noted earlier, was part of DOE's extent of condition review of non-WTP facilities and sites—revealed problems with the environment for raising concerns. For example, on the electronic survey associated with four of these evaluations, 60 to 70 percent of contractor employee survey respondents agreed with the statement "management does not tolerate

retaliation of any kind for raising concerns."[33] This means that 30 to 40 percent of respondents did not agree with the statement. The response to this survey question was generally more positive for one of the five evaluations—with 65 to 78 percent of respondents agreeing with the statement.[34] The methodology and approach DOE used to perform its independent evaluations of safety culture at five sites was generally sound and consistently applied at diverse sites. In particular, the employee surveys—which were conducted and analyzed by external safety culture experts—asked consistent questions, generally achieved high response rates appropriate for drawing conclusions about employees' perceptions of the work environment, and reports from these evaluations provided detailed information on scope and methodological approaches used and the results. For example, response rates for three of the five employee surveys done in connection with DOE's independent review were between 81 and 92 percent, which, according to reports from the evaluations, were "acceptable" or "very acceptable" for drawing conclusions about the employees' perceptions and attitudes about the work environment. Response rates for the remaining two surveys were 62 and 68 percent—which, according to DOE's report summarizing the results of these assessments, was "acceptable" for drawing such conclusions but "lower than desired."

In contrast, DOE determined that the SCWE self-assessments conducted at 12 sites for the extent of condition review were flawed in many cases and may have overstated the openness of the environment for raising concerns. Specifically, in its February 2014 report on the quality of SCWE self-assessments, the predecessor to DOE's Office of Environment, Safety, and Health Assessments found that the quality of surveys and other methodologies used, and the analysis of the results, varied widely, significantly reducing confidence in the conclusions of many of the self-assessments. As a result, caution should be used in drawing firm

[33]The percentage of survey respondents agreeing with the statement for each of the four evaluations is a follows: Sodium Bearing Waste Treatment Project (60 percent); the Savannah River Site's Salt Waste Processing Facility (60 percent); and the Y-12 National Security Complex's Uranium Processing Facility Project (70 percent), and the Pantex Plant (65 percent).

[34]The survey results for Los Alamos National Laboratory's Chemistry and Metallurgy Research Replacement Project represent respondents from three contractors involved in the project (65 percent, 75 percent, and 78 percent of respondents agreed with the statement "management does not tolerate retaliation of any kind for raising concerns").

conclusions about the state of the SCWE or safety culture across the DOE complex, according to DOE's report.

While DOE's February 2014 report noted positive attributes of many of the self-assessments it examined, the report also identified widespread problems with the surveys and the other approaches used. According to DOE's report, surveys can be considered valid and reliable only if they are adequately developed and appropriately administered, with adequate measures to ensure anonymity and extensive testing to determine survey reliability and validity. [35] However, DOE's report found that the SCWE self-assessment surveys did not consistently apply assessment methodologies and were not designed to ensure valid and credible results, as illustrated by the following findings:

- Many surveys were developed by personnel with little survey experience, and surveys were frequently not validated to ensure accuracy, reliability, and repeatability.
- In some cases, survey administration methods—such as computer sign-on screens bearing a standard disclaimer that activity may be monitored—led some participants to question the anonymity of the survey.
- Some questions contained leading or biased phrases, potentially skewing the results, and contained "double-barreled" questions that asked respondents to provide a single response to a question addressing more than one concept.
- Survey participation rates were sometimes low, and several of the organizations conducting the self-assessments did not understand the significance of getting a high participation rate to increase the confidence level that the sample reflects the whole population. In one case, a 25 percent response rate was perceived as being a good response rate. However, according to the report, a response rate that low reduces confidence in the results and could produce a large

[35]According to the report, the term "reliability" relates to whether the survey yields the same answers at different times (i.e., repeatability), and whether the questions within it measure the same thing (only applicable if the team is administering a set of questions to measure a single issue). The term "validity" relates to whether the survey measures the factors it is intended to measure. If a survey is not reliable over time, it cannot be valid, because the results will vary depending on when it is administered.

nonresponse bias–particularly without additional analysis to ensure that employees participating in the survey did not differ significantly from those who did not participate.

DOE cited similar problems with the other methodological approaches used in the self-assessments, including, for example, leading or biased interview questions and problems assuring confidentiality during interviews or providing an adequately "safe space" for employees to give candid responses during focus groups.

In addition, many reports from the self-assessments provided limited information about the survey response rates achieved or the data and analysis used to support the results, according to the February 2014 report and our analysis. Moreover, the overall conclusions in many of the self-assessment reports did not accurately reflect the information in the data and analysis sections of the assessments, according to DOE's report. In some cases, negative results were presented with a statement rationalizing or minimizing the issue, rather than indicating a need to find out more about the issue and resolve it. In other cases, problems were not mentioned in the conclusions or executive summaries, which, according to the report, are sections that senior management is most likely to read. In particular, for several of the self-assessment reports, discussions in these sections minimized or did not take into account interview comments or other data, which reflected employee concerns about retaliation or provided evidence of possible chilled work environments. In doing so, these self-assessment reports may have drawn overly positive conclusions about the SCWE or safety culture and did not fully address the potential concerns identified during the self-assessments, according to DOE.

Several statements in the February 2014 report attributed some of the methodological or reporting problems to weaknesses in DOE headquarters communications about the self-assessment process and weaknesses in the SCWE self-assessment guidance document,[36] which DOE had developed as part of the extent of condition review. The report also attributed problems to the DOE and contractor organizations' inexperience with conducting SCWE self-assessments. As a result, the February 2014 report recommended that DOE take additional actions to

[36]DOE, *Safety Conscious Work Environment Self-Assessment Guidance*, revision G (undated).

ensure that future self-assessments will provide an unbiased and accurate assessment of the status of the SCWE at DOE sites and organizations, with a particular focus on improving headquarters communication and the guidance and tools that are used at the site level. In line with the report's recommendation to improve DOE's self-assessment guidance, DOE officials we interviewed from the Office of the Associate Under Secretary for Environment, Health, Safety and Security told us that a DOE working group is developing metrics for monitoring DOE's SCWE and safety culture. The officials also said that a report on the effort will include guidance for DOE officials and contractors at sites for conducting SCWE and safety culture evaluations locally. However, these officials said that contractors will likely not be required to follow the guidance.

Notwithstanding the problems DOE identified in its February 2014 report, 3 months later, DOE downplayed the significance of the flawed SCWE self-assessments. Specifically, in May 2014, DOE issued a consolidated report on the results of its extent of condition review, which analyzed the results of the DOE independent review of safety culture and the SCWE self-assessments. The consolidated report noted that there was considerable variability in the SCWE self-assessments' methodologies, reporting, and quality, but it did not disclose the significance of these differences. For example, unlike the February 2014 report, the consolidated report did not advise caution in drawing firm conclusions from the self-assessments about the state of SCWE or safety culture across the entire DOE complex. Instead, the consolidated report said that "the self-assessments provided valuable insights about the current state of SCWE within the assessed organizations" and that the SCWE self-assessments and the independent reviews at safety culture at the five sites "yielded information on the status of SCWE and safety culture in general."

Notably, the report did not recommend that DOE assume responsibility for conducting independent reviews or ensuring that contractors take appropriate action in response to evaluation results. Instead, DOE's May 2014 report recommended that, among other things, DOE (1) establish a Safety Culture Improvement Panel and (2) evaluate the language on safety culture and SCWE in its contracts for consistency, and revise DOE's existing contract language on Integrated Safety Management so that it clearly references safety culture. In implementing these recommendations, DOE plans to issue guidance, give advice, and encourage contractors to initiate programs to monitor and improve the environment for raising concerns. In doing so, DOE plans to rely on its

contractors to conduct evaluations and take appropriate action in response to evaluation results. Specifically, in response to the May 2014 report, DOE has taken the following steps:

- In May 2015, DOE approved a new Safety Culture Improvement Panel, which began meeting in July 2015. According to its charter, the new panel establishes a permanent, high-level organization devoted to promoting safety culture and will develop a means for monitoring DOE's safety culture, among other activities. In February and April 2016, DOE officials from the panel, including the co-chair, told us that the panel has been evaluating DOE and industry sources for possible metrics that could be used at DOE sites to monitor safety culture. The officials said that indicators, such as response times to carry out corrective actions or trends in employee concerns, were among the possible metrics being considered. Also, the officials said that information from surveys and other evaluations would be used to help monitor safety culture but that this information would likely come from periodic self-assessments at sites—possibly similar to those conducted for the extent of condition review—rather than independent assessments.

- In addition, the panel has been evaluating DOE's contracts and is developing contract language aimed at encouraging contractors to initiate programs for monitoring and improving their safety culture and SCWE or to maintain existing efforts, according to the officials and the panel's meeting minutes. However, panel officials told us that the panel serves in an advisory role and does not have authority to require sites to adopt practices or use information that it generates. For example, they said that DOE contracting officers will not be required to include the contract language the panel develops into new or existing contracts.

As of April 2016, the panel's assessments of possible metrics and contract language were still under development or being reviewed, according to the panel officials.

Moreover, it is unclear that these efforts will address the concerns raised by DNFSB in its March 2012 letter to the Secretary of Energy accepting DOE's implementation plan for the extent of condition review. In its letter, DNFSB stressed the need for independent viewpoints and specialized expertise in safety culture assessments and stated that—if the SCWE self-assessments did not prove to be a reliable indicator of the safety culture's status—DOE must be prepared to perform a broader suite of independent safety culture reviews. However, officials from the Office of

Environment, Safety, and Health Assessments and the Office of Enterprise Assessments told us that they had no plans to conduct such reviews and determined it would be more appropriate for contractors to evaluate the safety culture locally. These officials also told us that they believed the self-assessments would improve over time, as contractors became more comfortable with the concepts of SCWE and safety culture, which the officials said were relatively new in DOE and, unlike other safety-related assessments, involved measuring "soft" management concepts, such as employee satisfaction and organizational culture.

Ad Hoc Self-Assessments and Independent Reviews

The ad hoc contractor self-assessments and DOE independent reviews conducted at the Hanford and Savannah River sites did not use a consistent or rigorous approach and may have overstated the openness of the environment for raising concerns. As noted above, these reviews were similar in purpose and methodology to evaluations conducted for the extent of condition review but were separate from that review and from one another. As with the SCWE self-assessments conducted for the extent of condition review, the ad hoc and independent reviews also had flaws, including the following:

- The execution of some of the self-assessment surveys may not have had high enough response rates to draw conclusions about the openness of DOE's environment for raising concerns—in part because DOE's self-assessment guidance does not establish an acceptable response rate. In particular, while reports from some ad hoc or independent reviews identified response rates of 67 percent or even 80 percent, others reported response rates as low as 19 percent or as low as about 5 percent, which may not be sufficient for drawing valid conclusions about openness of the environment for raising concerns. In a report summarizing the results of a self-assessment survey at the Savannah River Site, the contractor noted that concerns over anonymity may have contributed to what it characterized as a low response rate of 18 out of 97 employees (19 percent). According to the report, within hours of initiating the survey, the response rate dropped after an employee questioned whether the electronic folder used to store the completed surveys would protect participants' anonymity.

- DOE officials and a contractor employee at the Hanford Site told us that concerns about anonymity and other issues may have also lowered the response rate or reduced the quality of the data collected during that site's 2012 organizational climate survey. A contractor employee involved with designing the survey told us that DOE's first

attempt to deploy the survey was aborted after it was discovered that participant identities could be linked to their responses. When the survey was redeployed, the contractor employee heard from participants that some managers were pressuring employees to give favorable responses, among other issues. In addition, DOE officials at the Hanford site and the contractor employee involved with the survey effort told us that a significant portion of the responses had been deleted before they could be fully analyzed. According to the DOE officials and the contractor employee, the consultant that DOE hired to administer the survey destroyed the narrative comment responses, possibly in an effort to respond to concerns raised about maintaining anonymity. Although the consultant provided DOE a summary of the narrative responses, the DOE officials said the summary was not very useful for evaluating the environment for raising concerns.

Further complicating DOE's ability to evaluate the environment for raising concerns, DOE has not provided clear instructions to its site officials or contractors regarding what constitutes a positive or negative result and has changed the wording of a key survey question on one of its independent assessments, as discussed below:

- In some cases, DOE's or contractors' reports that summarized their evaluation efforts may have overstated the openness of the environment for raising concerns—in part, because DOE did not provide its site officials or contractors with clear instructions to define what constitutes a positive or negative result. For example, in its 2012, 2013, and 2014 surveys of WTP employees, the WTP contractor drew positive conclusions about the environment for raising concerns, based on survey results that indicated that 63 to 74 percent of respondents agreed with the statement that "I feel I can raise concerns and/or challenge people at any level in my organization without fear of the consequences." In contrast, a June 2014 report from an independent review of WTP's safety culture drew less positive conclusions based on similar results. Specifically, 72 to 80 percent of the WTP contractor employees participating in the survey agreed that "Management does not tolerate retaliation of any kind for raising concerns." On the basis of these results, the Office of Environment, Safety and Health Assessments designated this area as "in need of attention."

- During its most recent independent review of safety culture at WTP in 2015, DOE's Office of Environment, Safety, and Health Assessments changed the wording of a key survey question about contractor employees' ability to raise concerns without fear of retaliation from the

wording it used in its 2014 survey. According to DOE's report from the independent review, the 2014 survey asked WTP contractor employees the question "Does management tolerate retaliation of any kind for raising concerns?"—with possible responses on a 5-point scale ranging from 1 ("not at all") to 5 ("to a great extent"). The 2015 survey used the same scale for the responses but reworded the question in the form of a statement, as follows: "Retaliation for raising concerns is not tolerated by management." The wording change, which DOE officials said was inadvertent, conveyed the opposite meaning of the 2014 question, making it difficult to compare the 2015 responses to the responses received in the previous year. Consequently, in order to compare 2014 results to 2015 results, the Office of Environment, Safety, and Health Assessments had to reverse and recalculate the scoring of the 2014 question to attempt to make the two years' results comparable. The report also notes that the office "must be very cautious in interpreting any changes in responses" because employees may not have interpreted the question in the same way that they had in prior years.

The federal standards for internal control state that management should establish and operate monitoring activities to monitor the internal control system and evaluate the results.[37] Because DOE relies on contractors to carry out its missions—to include activities that support DOE's policy for fostering an environment that is free of retaliation for raising safety concerns—the effectiveness of DOE's internal control system partly depends on the effectiveness of the activities and control environments established by its contractors. According to DOE's Integrated Safety Management policy, DOE expects all organizations to embrace a strong safety culture and create a work environment that encourages a questioning attitude by all employees. To help monitor the effectiveness of this policy, DOE has relied on contractor self-assessments and independent assessments. However, given that contractor self-assessments proved to be an unreliable measure of contractor employees' willingness to raise concerns, according to the DNFSB, a broader suite of independent safety culture reviews is needed. Without this, DOE does not have a reliable basis to judge whether policies and

[37]GAO, *Standards for Internal Control in the Federal Government,* GAO/AIMD-00-21.3.1 (Washington, D.C.: Nov. 1, 1999). GAO has revised and reissued *Standards for Internal Control in the Federal Government*, with the new revision effective as of October 1, 2015. GAO-14-704G (Washington, D.C.: Sept. 2014).

controls that are intended to create an open environment for raising safety or other concerns are effective.

Several Factors May Limit the Use and Effectiveness of Mechanisms for Raising Concerns or Seeking Whistleblower Protection

The organizational placement and practices of some ECPs may compromise their independence, which may limit their use and effectiveness as mechanisms for raising concerns. In addition, DOE's whistleblower protection program does not cover certain types of employees and disclosures, and procedural aspects of the program may be challenging for whistleblowers to navigate. The new statutory whistleblower protection pilot program passed by Congress in 2013 authorizes the creation of another avenue for contractor employees to seek whistleblower protection and may mitigate some of the challenges of DOE's existing program; however, DOE does not have complete information on the extent to which the pilot program has been implemented.

Organizational Placement and Practices of Some Employee Concerns Programs May Limit Their Effectiveness and Discourage Contractor Employees from Raising Concerns

The organizational placement of some contractor ECPs, as well as some practices employed by both contractor and DOE ECPs, may compromise the programs' independence, which, in turn, may discourage contractor employees from raising concerns. According to DOE's ECP order and contractor ECP guidance, DOE and contractor ECPs are to provide employees with an independent avenue for reporting concerns. However, the order and guidance that govern ECPs do not address how DOE or contractor ECPs should be structured or operated to ensure their independence, and do not include provisions for DOE to assess or verify the independence of contractor-provided ECPs.

DOE policies do not prohibit contractor-provided ECPs from being placed within organizations that potentially limit the independence and effectiveness of the ECPs, and some are not organizationally aligned to achieve the degree of independence necessary to effectively carry out their responsibilities. Some contractor ECPs we examined were part of the contractors' human resource office or office of general counsel. These offices are also typically responsible for managing reductions in force and defending management against wrongful termination and unlawful retaliation lawsuits—responsibilities that can run counter to the contractor employees' interests and could affect the ECPs' independence or cause employees to distrust the programs. Another contractor ECP we examined reported to a vice president within the part of the company responsible for engineering and quality assurance, rather than reporting above this line organization to an executive in an independent leadership

position. Placement of an ECP within a line organization, such as engineering and quality assurance, may create a conflict of interest should employees raise concerns about that line organization's management or practices. According to contractor officials, this ECP was relocated twice during the course of our audit: in November 2015, this ECP was briefly relocated to report to the company president, and, according to the DOE ECP manager at the site, later relocated again to report to the executive vice president and CEO. While the current location of the ECP may improve the ECP's independence, nothing in DOE policies prohibits this contractor from moving the ECP back to a line organization with potentially conflicting interests.

The practices of some contractors also impair the independence of the contractor-provided ECPs. For example, the manager of a contractor-provided ECP we reviewed also performed management functions, which may impair or create the appearance of impaired independence. Specifically, this contractor ECP manager investigated an employee of another affiliated contractor at the site on behalf of management. While the ECP manager said he could not recall the exact reason for the investigation, he told us it was a management investigation and was not performed in response to an employee concern. At the time of the investigation, the employee being investigated had raised safety concerns about WTP and later sought whistleblower protections from OSHA and in federal court. When we asked the ECP manager and his general counsel if they were concerned about any potential conflict of interest, they told us that the investigation was appropriate because the ECP manager and the employee being investigated were from different, albeit affiliated, companies. DOE policies do not address the issue of ECP managers performing management functions as a possible conflict of interest that may impair or create the appearance of impaired independence. In addition, DOE and contractor ECP managers told us that some contractors have managers that have attempted to interfere with ECP investigations or outcomes. For example, a contractor ECP manager told us that after she had investigated and substantiated an employee's allegation of safety violations by his management team, the contractor's general counsel attempted to pressure the contractor ECP manager to change her conclusion to indicate that the safety concerns were unsubstantiated.

DOE's ECP order requires that DOE site ECP managers work with contracting officers to determine whether a contractor-provided ECP is contractually required and, if so, establish the means and criteria by which such contractor ECPs will be evaluated. However, neither the DOE

ECP order nor its guidance provides information on the criteria to be used or factors to be considered when evaluating a contractor's ECP—such as whether the ECP is independent or ensures anonymity when appropriate. For the 10 contractors we examined at the three sites we visited, DOE's evaluations were conducted inconsistently and generally focused on ECP processes rather than the overall effectiveness or independence issues. For example, the frequency and scope of the oversight reviews varied at the three sites, and—in general—the evaluation included measures of ECP resources, document management, whether the ECP was appropriately advertised, whether an ECP hotline existed, and other similar factors. The independence of contractor-provided ECPs either was generally not addressed or was addressed in a limited fashion in ECP oversight reviews, and none of the independence issues we describe above were included in oversight review reports. DOE officials told us they believe changes to the ECP order are needed to address contractor-provided ECP oversight, among other things. However, according to DOE officials, efforts to revise the order have been ongoing since 2008 and, as of April 2016, no revisions to the order have been finalized.

DOE's practice of transferring or referring contractor employee concerns back to the contractor may compromise the ECP's independence, which, in turn, may discourage contractor employees from raising concerns. DOE's ECP order and guidance allow for concerns to be referred or transferred to another DOE or contractor organization depending on the jurisdiction and resources of the DOE ECP office; however, DOE's practice of routing concerns back to the contractor could potentially jeopardize an employee's anonymity, impair the independence of the investigation, or create the appearance of impaired independence. According to DOE and contractor ECP guidance documents, both DOE and contractor ECPs are intended to provide an independent avenue for resolving employees' concerns. DOE's ECP is not affiliated with the contractors' organization and, therefore provides an avenue for employees that may fear retribution or are otherwise reluctant to use their contractor-provided ECP. The existing DOE ECP guidance states that individuals or organizations should not be selected to conduct investigations where their involvement presents a conflict of interest, but it does not address potential issues related to broad distrust of a contractor, which is an issue that may have lead the individual to file a concern with DOE's ECP instead of the contractor's. Notably, the ECP guidance does not require DOE's ECP managers to notify or obtain approval from the concerned individual before transferring or referring the concern, or to specify conditions under which such a transfer or referral would be inappropriate. The extent to which DOE ECP managers referred and

transferred complaints to contractor organizations varied among the ECP managers at the 10 sites we examined. For example, from fiscal year 2009 through 2014, one site's DOE ECP manager transferred 14 percent of concerns received and referred 26 percent, whereas another site's ECP manager rarely transferred or referred more than one concern a year. When concerns were transferred or referred, the most common reason DOE ECP managers gave was that the concern was better suited to investigation by the contractor ECP or a comparable program. The practice of transferring or referring concerns back to the contractor, without additional restrictions or guidance, may compromise the perceived independence of DOE's ECP and inhibit contractor employees from reporting concerns.

DOE's Whistleblower Protection Program Does Not Cover Certain Types of Employees and Disclosures, and Some Aspects of the Program May Be Challenging to Navigate

DOE's whistleblower protection program—the 708 program—does not cover certain types of employees and disclosures. Specifically, employees of DOE grantees are not covered by the 708 program. DOE awards grants to various recipients—including universities, nonprofits, and small businesses—and these grantees have employees that perform work that supports energy-related research and other activities. For example, if an employee of a grantee alleges retaliation for reporting a safety concern that would otherwise be protected under 708, they are not eligible to use the 708 program to seek remedy for the alleged retaliation. Also, DOE's 708 program does not specifically cover disclosures made to GAO, Department of Justice officials, courts, or grand juries.

In addition, for those employees who are covered under DOE's 708 program, certain procedural aspects of the program can present challenges for some whistleblowers to navigate. Some procedural aspects of the 708 program are analogous to judicial proceedings, including preparing and filing a complaint, filing motions and appeals, and arguing before a judge.[38] Consequently, without legal assistance or legal skills and experience, some employees may find navigating the process challenging.

In our review of 87 cases filed under the 708 program from fiscal years 2009 through 2014, we found that some whistleblowers faced challenges forming their arguments and navigating the hearings and appeals

[38]Hearings in the 708 program occur before an administrative judge. 10 C.F.R. 708.25(a)

process, especially those that filed without the assistance of legal counsel.[39] For example, one 708 case we examined was dismissed because the Office of Hearings and Appeals investigator found that the complaint was too vague to meet the regulatory definitions of a protected disclosure. The whistleblower then filed an appeal with Office of Hearings and Appeals that provided more specific information; however, the appeal was denied because the investigator found that the new, more specific information was a recharacterization of the story and was not consistent with her original testimony. In another example, it appears that the whistleblower may not have framed his argument as effectively as possible. The whistleblower's appeal was dismissed even though the DOE Inspector General later substantiated the underlying concern. The Office of Hearings and Appeals opinion found that, "even assuming the truth of the complainant's allegations as to the relevant facts of this case, those allegations do not support a plausible claim that the whistleblower disclosed information that he reasonably believed revealed fraud, gross mismanagement, or a substantial violation of a law, rule or regulation." In this case, the DOE Inspector General later found—just as the whistleblower had claimed—that the contractor had allowed changes to classified nuclear weapons drawings without using an approved change notice—a practice that could permit unauthorized changes to weapons drawings.[40]

DOE ECP managers serve as a focal point for processing the paperwork associated with 708 claims, but they are not responsible for helping whistleblowers to form their arguments and navigate the hearings and appeals process. According to DOE's ECP guidance, DOE ECP personnel are not expected to advise employees concerning judicial or legal remedies available outside the ECP, beyond indicating that certain statutes may apply to the situation. In the 708 case files we reviewed, many whistleblowers did not appear to retain legal counsel—which may

[39]Office of Hearings and Appeals officials told us that their office is guided by the Part 708 regulations as well as its own case law interpreting the Part 708 regulations and case law from the Merit Systems Protection Board and the federal courts. In April 2016, Office of Hearings and Appeals officials noted that, as the assigned neutral adjudicators under the Part 708 program, it would be inappropriate and a violation of due process for the office to advocate for one party or the other by disregarding case authority to achieve a specific policy goal.

[40]NNSA standards require that once a drawing has been approved and is ready for production, the drawing is "read only" and cannot be modified without a proper change order, in essence confirming that all changes to the drawings have been approved.

have hampered their ability to navigate the 708 process. In contrast, the arguments and responses to cases filed by contractors were almost always prepared by either the contractors' attorneys or outside counsel hired for the purpose of defending the case.[41] Officials from all 10 contractors with which we spoke told us that they employ legal counsel for managing cases filed under the 708 program. Further, a DOE official at one site we visited told us that the contractors sometimes involve legal counsel from the very early stages of a complaint. For example, this official told us that one contractor at the site brings the company general counsel to informal mediation meetings designed to resolve a concern before proceeding with the 708 process. This ECP manager said that he believes this practice may be intimidating to employees. In addition, contractor attorney fees and settlement costs are generally reimbursable expenses paid by DOE,[42] while the whistleblower may need to pay attorney fees if he or she decides to retain counsel.[43] DOE may provide contractors with a provisional reimbursement of legal costs, and officials told us that they do so in most cases. According to DOE, the ultimate decision regarding whether the legal costs are allowable is made once the Office of Hearings and Appeals (the office responsible for adjudicating cases filed under the 708 program) has made a final decision regarding the case after all appeals have been exhausted, or a settlement agreement is reached.

[41]In a randomly-selected, nongeneralizeable sample of 30 cases with complete casefiles, 22 whistleblowers did not appear to have hired legal counsel, whereas 26 of 30 responses filed by contractors were submitted by either in-house or retained legal counsel for the company. We assessed this by examining who prepared the complaints, responses, and supporting documents for 708 filings. Additionally, in many cases, the whistleblowers were asked as part of the filing process whether they had hired counsel.

[42]According to DOE, contracts that include cost reimbursable elements generally allow reimbursement of legal costs, including the costs of litigation, if the costs are reasonable and incurred in accordance with the applicable cost principles and contract clauses. However, DOE is generally prohibited from reimbursing contractors or subcontractors for legal fees or expenses incurred in whistleblower cases subsequent to an adverse administrative or judicial determination on the merits. 42 U.S.C. 5853. Settlement costs are reimbursable to the same extent as other legal costs, but under the whistleblower pilot program, reimbursement for such costs is limited to those situations where there was "very little likelihood" the whistleblower would prevail. See 48 C.F.R. 31.205-47(c)(2)(ii).

[43]A DOE official stated that most attorneys take whistleblower cases on a contingency fee basis, meaning that the attorney collects a percentage of the amount obtained through litigation or settlement. Assessing the prevalence of this practice was beyond the scope of our review, but even under these circumstances, the whistleblower is still paying the attorney in at least some instances.

Even when employees successfully navigate the 708 program, and DOE's Office of Hearings and Appeals finds that retaliation has occurred, employees may face challenges obtaining the legal remedy they are seeking. If the Office of Hearings and Appeals determines that an act of retaliation has occurred, DOE may order the contractor to carry out certain actions, including awarding the employee reinstatement, back pay, attorney fees, or other remedies necessary to abate the violation.[44] DOE is not, however, required to order any specific action, and the whistleblower has no way to enforce such an order even if issued. In interpreting a now superseded version of the regulation that establishes the 708 program, a federal district court dismissed a suit by a whistleblower seeking to compel DOE to enforce an agency order awarding $300,000 to the whistleblower as compensation for a contractor's unlawful retaliation.[45] The court held that the 708 program did not require DOE to take any enforcement action against the contractor, and therefore the whistleblower's suit failed.[46] While dismissing the complaint, the court criticized the 708 program stating that "because DOE has supported its promises with a mere milquetoast of a regulation, essentially unenforceable in court, persons like the plaintiff are left with little more than the promises of politicians, and are held captive to the whim of an agency that may have far more tolerance for retaliation than it claims."[47] DOE revised the 708 regulation the following year, but the revised version of the regulation does not address the issue of enforceability raised in the 1998 case. The revision to the regulation requires DOE to forward the adverse DOE decision to the contractor[48] and authorizes DOE to disallow certain contract costs or terminate the contract for default.[49] However, the revised regulation does not require DOE to take action against a contractor, and whistleblowers still cannot compel DOE to enforce an agency order.

[44]10 C.F.R. § 708.36(a).

[45]Cornett v. DOE, Civ. No. 98-1124, 1998 U.S. Dist. LEXIS 9767 (D.D.C. 1998).

[46]Id. at *6-8.

[47]Id. at *9

[48]10 C.F.R. 708.38(a).

[49]10 C.F.R. 708.38(b). The original regulation directed the head of the relevant DOE field office to "take all necessary steps to implement the final decision," 10 C.F.R. 708.12(a) (1998).

The Whistleblower Protection Pilot Program May Mitigate Some Challenges of DOE's Existing Program, but DOE Does Not Have Complete Information on the Extent to Which It Has Been Implemented and Has Not Evaluated the Effectiveness of Either Program

The whistleblower protection pilot program may mitigate some of the challenges associated with the existing 708 program, in part because it generally covers more types of employees and disclosures to more types of entities than the 708 program. It also contains certain procedural benefits for the whistleblower that are unavailable under the 708 program. We identified the following aspects of the pilot program that may mitigate challenges associated with DOE's 708 program:

- **Covered employees:** The pilot program covers a wider range of employees. Specifically, while the 708 program covers contractor and subcontractor employees, the pilot program covers these employees as well as employees of DOE grantees.
- **To whom disclosures can be made:** The pilot program expands the list of organizations and agencies to which protected disclosures can be made—to specifically include GAO, authorized officials of the Department of Justice, courts, and grand juries.
- **Procedural benefits:**
  - Significance of disclosures related to legal violations: Under the pilot program, the complainant must reasonably believe that his or her disclosure reveals evidence of a violation of law, rule, or regulation. Under the 708 program, the complainant must reasonably believe that his or her disclosure reveals a "substantial violation" of law, rule, or regulation.
  - Statute of limitations: The pilot program provides a 3-year statute of limitations for filing a complaint about unlawful retaliation, whereas the 708 program has a 90-day limitations period.[50]
  - Appeals and judicial review: The pilot program statute clearly specifies the circumstances under which a whistleblower can sue the contractor directly and obtain a jury trial.[51] The 708 program

[50]The 90 days does not include the time taken to engage in internal contractor grievance or arbitration procedures, or the time taken to resolve certain jurisdictional issues. 10 C.F.R. § 708.14(b), (c). DOE may accept a complaint filed after the 90-day period if the complainant demonstrates a good reason for not filing within that period. 10 C.F.R. § 708.14(d).

[51]The employee may generally pursue action in court if DOE issues an order denying relief or has not issued an order within 210 days after the submission of the complaint. 41 U.S.C. § 4712(c)(2).

does not clearly delineate when the employee can seek redress in court.

- Enforceability: Under the pilot program, if DOE concludes that the contractor subjected the whistleblower to unlawful retaliation, the agency must order the contractor to take one or more of the following actions: (a) abate the retaliation; (b) reinstate the whistleblower with back pay; or (c) pay the whistleblower's attorney's fees. The whistleblower may sue the contractor to enforce such an order. Under the 708 program, in contrast, and as noted above, DOE is not required to order any specific action in the event it finds that impermissible retaliation has occurred, and the employee has no way to enforce such an order even if issued.

In our review of case files, we found examples of cases in which some aspects of the case might have turned out differently had the whistleblower's case been covered by the whistleblower pilot program. For example, we reviewed multiple cases where the 708 program's limitations period within which a claim must be filed was a factor identified by Office of Hearings and Appeals hearings officers as a reason for dismissal. In one case, the complaint was not filed within 90 days of the alleged retaliatory acts; however, the filing did occur within 3 years of the alleged retaliatory acts, and thus the whistleblower's case would not have been dismissed as untimely under the pilot program. In another case, the whistleblower did not want to proceed with the hearing until the publication of documents from the Inspector General that he believed would support his claim. The Office of Hearings and Appeals was unwilling to grant an extension to allow this, and the whistleblower's case was dismissed because of his refusal to comply with the office's requests for, among other things, specific information regarding his protected disclosures and alleged unlawful retaliation. However, had this case been covered by the whistleblower pilot program, the whistleblower would have had additional time to wait for the ongoing Inspector General investigation to conclude before filing his complaint.

In addition to potentially expanding the scope of employees and types of disclosures covered, the pilot program may be easier to navigate than the 708 process. As discussed above, under the 708 program, some whistleblowers faced challenges forming their arguments and navigating the hearings and appeals process. The pilot program, however, is an alternative process that designates the Inspector General as responsible for investigating alleged unlawful retaliation, rather than providing a formal administrative hearing, as offered by the 708 process. Under the pilot

program, the Inspector General investigates the alleged retaliation, and submits its findings to the whistleblower, the contractor, and the Secretary of Energy. Should the Secretary of Energy determine, based on the Inspector General's report, that impermissible retaliation occurred, the Secretary must issue an order of remedy. Officials with the Office of Inspector General told us that it was not necessary for the complainant to have a lawyer because they would spend enough time talking with the whistleblower to identify and describe the protected disclosure and alleged retaliation. Consequently, some whistleblowers—particularly those who do not have the necessary skills to navigate the 708 process or resources to hire an attorney—may fare better under the pilot program. Also, under the pilot program, greater legal restrictions are put on DOE's reimbursement of settlement costs incurred by the contractor. Specifically, contractor settlement costs are not allowable in whistleblower cases unless the contracting officer determines, in conjunction with the relevant legal advisor, that "there was very little likelihood that the claimant would have been successful on the merits."

DOE, however, does not have complete information on the extent to which contractors have adopted the whistleblower protection pilot program, which will sunset in 2017. The whistleblower protection pilot program statute, enacted in January 2013, requires DOE to make its "best efforts" to include a contract clause providing for the pilot program at the time of any "major modification" to a contract.[52] Officials in DOE's Office of General Counsel told us that the Department made several efforts to encourage the inclusion of the pilot program clause in existing contracts, including issuing an October 2013 "policy flash," or notice about the pilot program, to site contracting officers, and following up with contracting officers to inquire into progress implementing the pilot program. However, DOE could not provide us with comprehensive or complete information on the extent to which contracts had been modified to include the whistleblower pilot program, as shown by the following instances:

- When we asked in August 2015 for information regarding the extent to which contracts had been modified to include the pilot, DOE officials said that they did not know how many and which contracts included

[52]The statute does not define major modification or best effort.

the pilot program because the department is not tracking the progress of the pilot program's implementation.

- Later, in April 2016, DOE provided a list of management and operating contracts that officials said had been modified to include the pilot program.[53] According to DOE's list, 19 of its 22 management and operating contracts had been modified to include the pilot program, and 3 had not. However, DOE's list was missing key information the following key information:

  - DOE's list did not include the date the contracts were modified—making it difficult to determine when the pilot provision had been included or evaluate the timeliness of DOE's implementation of the pilot program. DOE officials said that this information would be difficult to obtain.

  - DOE's list also did not include the status of at least 19 other prime contracts. As a result, DOE does not know the extent to which these contractors have adopted the pilot program and, for those contractors that have not adopted the pilot program, does not have an explanation why not.

Because DOE officials told us in August 2015 that the department was not tracking the progress of the pilot program's implementation, we obtained information regarding the status of the pilot program for each of the 10 contractors we interviewed at the three sites we visited. Of these 10 contractors, 4 contractors had adopted the pilot program—2 in 2014 and 2 in 2015.[54] The remaining 6 contractors had not adopted the pilot program. Notably, the 5 contractors we visited at DOE's Hanford site had not adopted the pilot program nor had a prime contractor responsible for

[53]Management and operating contracts are agreements under which the federal government contracts for the operation, maintenance, or support, on its behalf, of a government-owned or –controlled research, development, special production, or testing establishment wholly or principally devoted to one or more of the major programs of the contracting federal agency. Federal Acquisition Regulation § 17.601.

[54]DOE modified contracts for (1) Savannah River Nuclear Solutions, LLC in October 2014, (2) Parsons Government Services Inc. in December 2014, (3) Los Alamos National Security, LLC in May 2015, and (4) CB&I AREVA MOX Services, LLC in September 2015.

the Savannah River site radioactive liquid waste facility.[55] Together, these contractors employ over 8,000 people.

DOE officials told us that, in some instances, especially where there is limited time before contract expiration, the contractor indicated that implementation would require outsized costs or effort. They also said that contracts are modified at varying frequencies and that implementation efforts are ongoing. However, we note that for five of the six contractors that had not adopted the pilot at the three sites we visited, DOE had the opportunity to include the pilot provision as part of contract modifications that occurred for other purposes. Specifically, each of these five contracts has been modified for various purposes since the whistleblower pilot program statute was enacted in 2013, but DOE did not include the pilot program provision as part of the modification. DOE was unable to provide us with information on modifications to one of the six contracts: the URS Corporation contract at Hanford. Moreover, in the case of at least one of these contracts, DOE officials told us that there have been three "major" modifications that have been signed since 2013. Nonetheless, DOE did not incorporate the contract clause requiring the pilot as part of any of these contract modifications.

Information on the pilot program's effectiveness could inform Congress' decision on whether to extend the pilot program or make it permanent, and if so, whether to make other changes to the pilot program provisions.[56] The federal standards for internal control state that management should establish and operate monitoring activities to monitor the internal control system and evaluate the results.[57] Because DOE relies on contractors to carry out its missions, the effectiveness of DOE's internal control system partly depends on the effectiveness of the mechanisms for contractor employees to seek a legal remedy for alleged

[55]The five Hanford site contractors are (1) Bechtel National, Inc., (2) Washington River Protection Solutions, LLC, (3) CH2M Hill Plateau Remediation Company, (4) Washington Closure Hanford, and (5) URS Corporation. The Savannah River site contractor is Savannah River Remediation, LLC.

[56]In a separate effort, GAO is evaluating the pilot program's implementation at 14 federal executive agencies, including DOE. Specifically, the National Defense Authorization Act for Fiscal Year 2013 includes a mandate provision for GAO to evaluate the implementation of the pilot program and report on any findings and recommendations by January 2, 2017.

[57]GAO/AIMD-00-21.3.1 and GAO-14-704G.

unlawful retaliation. DOE, however, has not evaluated the effectiveness of the pilot program or the 708 program. DOE officials told us that the only effort to assess the 708 program was a 2006 DOE Inspector General investigation that was initiated but never resulted in a report. In addition, Office of Hearings and Appeals officials told us they track certain performance measures related to the 708 program, such as the timeliness of case processing and the quality of written decisions as judged by a peer-review process, but they have not assessed whether the program offers effective whistleblower protection. As of May 2016, one case has been filed under the whistleblower pilot program: a DOE official told us the case was initiated in late March 2016, and that investigations are ongoing. DOE officials told us that because the existing 708 program is robust, the pilot program does not add much to the whistleblower protections at the department. However, given that no cases have been decided under the pilot program and DOE has not evaluated whether the pilot program mitigates challenges whistleblowers may face under the 708 program, it is unclear how DOE reached this conclusion.

DOE Has Infrequently Used Its Authority or Taken Action to Hold Contractors Accountable for Unlawful Retaliation and Creating a Chilled Work Environment

DOE has infrequently used its enforcement authority to hold contractors accountable for unlawful retaliation and in 2013 determined that it did not have the authority to enforce certain policies. In addition, DOE has taken little or no action against contractors that create a chilled work environment and has not developed effective policies for doing so.

DOE Has Infrequently Used Its Enforcement Authority to Hold Contractors Accountable for Unlawful Retaliation Related to Nuclear Safety, and Reports Its Authority to Do So Is Limited

Over the past 20 years, DOE has infrequently used its enforcement authority to hold contractors accountable for unlawful retaliation. DOE's Office of Enforcement is responsible for enforcing DOE's nuclear safety programs and worker safety and health programs at DOE sites—including enforcing policies that prohibit unlawful retaliation against employees that disclose nuclear safety-related or worker safety and health-related issues. DOE has used this authority three times in the last 20 years—taking two enforcement actions and issuing one enforcement letter against contractors for unlawful retaliation.[58] The two enforcement actions were taken in 2005 and 2008 in response to rulings by the Office of Hearings and Appeals. Both enforcement actions involved retaliation for nuclear safety-related disclosures, and in both cases DOE concluded that the retaliatory acts constituted nuclear safety violations.[59] This finding is consistent with DOE's whistleblower enforcement policy.[60] The

[58]Enforcement actions, or notices of violations, which can carry civil penalties (fines), are used to enforce the nuclear safety and worker safety and health rules and requirements. Enforcement letters are used to notify contractors of significant concerns that, if not addressed, could lead to a notice of violation. DOE issued the regulations governing contractor retaliation against employees who reported worker safety and health concerns (10 C.F.R. part 851) in 2006, and these regulations took effect in 2007.

[59]Nuclear safety violations are subject to higher maximum penalties than other work safety and health violations.

[60]10 C.F.R. part 820 App. A, paragraph XIII.b Specifically, this paragraph in DOE's "Whistleblower Enforcement Policy" for nuclear safety violations says: "An act of retaliation by a DOE contractor, proscribed under 10 C.F.R. 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 C.F.R. 708.5(a)–(c) concerning nuclear safety in connection with a DOE nuclear activity, *may constitute a violation of a DOE Nuclear Safety Requirement under 10 C.F.R. part 820* (Part 820) (emphasis added). In addition, in a 1992 notice clarifying the relationship between 708 and 820, DOE stated: "Nuclear Safety Requirements would not be limited to regulations that appear in C.F.R. parts dealing primarily with DOE nuclear activities. Any DOE regulation, to the extent it is directly related to nuclear safety, would be a DOE Nuclear Safety Requirement. For example, the provisions of the recently adopted Whistleblower Rule concerning protection of workers against reprisals would constitute DOE Nuclear Safety Requirements if a reprisal were found to be in response to raising or disclosing nuclear safety related information or refusing to engage in an illegal or dangerous nuclear activity." 57 Fed. Reg, 20796 (May 15, 1992).

enforcement letter, sent in 2004, was in response to a contractor self-reporting retaliation through DOE's Noncompliance Tracking System.[61]

DOE determined in 2013, however, that it does not have the authority to enforce a key aspect of its nuclear safety whistleblower policy—despite having taken enforcement actions in 2005 and 2008. According to the director of DOE's Office of Enforcement, DOE made this determination as part of its effort to revise guidance documents aimed at improving the understanding of DOE's safety and security enforcement program. Specifically, DOE's nuclear safety enforcement policy states that unlawful retaliation for nuclear safety-related disclosures may itself be punishable as a nuclear safety violation. DOE first announced this position in the Federal Register in 1992. However, DOE officials we interviewed told us that the policy statement by itself is unenforceable unless and until it is codified in regulatory language that has been subject to standard rulemaking procedures, which include public notice and an opportunity for comment. Nothing in the policy statement itself specifically refers to this—making it difficult for anyone reading the policy to know that it is not enforceable,[62] and DOE officials did not explain why the agency considered the policy enforceable in 2005 and 2008 but not enforceable in 2013. DOE officials told us in August 2015 that they had initiated efforts to revise the agency's nuclear safety regulations and that one of the revisions under consideration is to specify that unlawful retaliation is a nuclear safety violation. However, DOE has yet to issue a notice of proposed rulemaking or advanced notice of proposed rulemaking—which

[61]According to the enforcement letter, on October 13, 2003, the management and operating contractor at the Savannah River Site self-reported in the Noncompliance Tracking System an instance of unlawful retaliation against an employee who was terminated after raising safety-related issues. The matter was investigated as an employee concern and substantiated, and the employee was reinstated.

[62]The whistleblower policy statement says "This policy statement sets forth the general framework through which the U.S. Department of Energy (DOE) will seek to ensure compliance with its enforceable nuclear safety regulations and orders (hereafter collectively referred to as DOE Nuclear Safety Requirements) and, in particular, exercise the civil penalty authority provided to DOE in the Price Anderson Amendments Act of 1988, 42 U.S.C. 2282a (PAAA). The policy set forth herein is applicable to violations of DOE Nuclear Safety Requirements by DOE contractors who are indemnified under the Price Anderson Act, 42 U.S.C. 2210(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to DOE's Nuclear Safety Requirements as specified in the PAAA." 10 C.F.R. part 820, App. A, paragraph I.a.

are important first steps in the rulemaking process. Moreover, DOE did not publicly announce its intent to amend its nuclear safety regulations to codify the activities that would constitute enforceable nuclear safety violations until May 2016—over a month after we asked DOE to verify the accuracy of information we planned to include in this report. Specifically, DOE announced its plans in the May 2016 government-wide semi-annual regulatory agenda.[63] DOE officials told us that the proposed rule, when issued, would codify the relevant language in the enforcement policy statement, thus making nuclear safety-related retaliation an enforceable nuclear safety violation.

Given the potential for confusion regarding the enforceability of DOE's policy, it is incumbent on DOE to act as quickly as possible to codify this policy in regulatory language to ensure that the enforceability of the policy is clearly understood. The federal standards for internal control state that management communicates quality information down and across reporting lines to enable personnel to perform key roles in achieving objectives, addressing risks, and supporting the internal control system.[64] However, the tentative target date for issuance of the proposed rule—a first step in the rulemaking process—is December 2017. Using DOE's existing and tentative time frame for issuing a proposed rule, DOE could take years before issuing a final rule confirming its policy is enforceable.

DOE does not have the same challenges in enforcing prohibitions against retaliation in connection with worker safety and health concerns, and has the authority to take enforcement action against worker safety and health-related retaliation. However, DOE has not routinely leveraged information from the Department of Labor or judicial rulings in order to take enforcement action against contractors for unlawful retaliation. Officials with DOE's Office of Enforcement told us that they can take enforcement action related to whistleblower retaliation cases if such retaliation has been substantiated by an authoritative decision, including decisions coming from DOE's Office of Hearings and Appeals, the Department of Labor, the judicial system, or by contractor self-reported retaliation from

[63]DOE announced its plans in the "long-term actions" section of the regulatory agenda. To keep users better informed of opportunities for participation in the rulemaking process, an agency may list in the "long-term actions" section of its agenda those rules it expects will have the next regulatory action more than 12 months after publication of the agenda.

[64]GAO/AIMD-00-21.3.1 and GAO-14-704G.

DOE's Noncompliance Tracking System. However, DOE enforcement officials told us that they have not routinely asked for information from the Department of Labor on whistleblower retaliation cases filed by DOE contractor employees, and that they are not aware of cases adjudicated in state or federal court. Specifically, in August of 2015, they said that the Department of Labor had recently initiated an effort to provide DOE's office of Enforcement with more regular information about whistleblower cases filed through their whistleblower protection program, and that Department of Labor had committed to providing quarterly updates. Later, in April 2016, when we asked DOE to provide documentation that demonstrated that it was routinely collecting information from the Department of Labor, DOE provide information for the first two quarters of fiscal year 2016. Also, DOE enforcement officials told us that contractor self-reporting of retaliation was uncommon, with a total of three cases reported in the Noncompliance Tracking System, all from the same site, and at least two of the three originating from concerns raised to the same contractor ECP manager at the Savannah River Site. This ECP manager was terminated in 2015 and has alleged in court that her termination was in retaliation for cooperating with GAO during this engagement, among other things.

In addition, DOE does not track or monitor the extent to which contractors settle whistleblower cases and does not have mechanisms in place to provide assurance that contractors are resolving the underlying safety or other issues raised by whistleblowers. Officials with DOE's Office of Enforcement told us that they were aware of some settlement agreements but said that they often have no way of knowing about alleged retaliation if a settlement is reached. DOE site officials at the three sites we visited said that they were aware of settlements involving contractors at their sites and reviewed them in accordance with DOE regulations, which require contractors to seek pre-approval for reimbursement when the settlement total exceeds $25,000.[65] However, DOE's approval and any subsequent review of the settlement are aimed at ensuring that the costs are reasonable and allowable under the contract. We attempted to collect information on settlements at the three sites we visited to determine the extent to which contractors settle whistleblower cases but were unable to verify the completeness or

[65]"The contractor must obtain permission from Department Counsel to enter a settlement agreement if the settlement agreement requires contractor payment of $25,000 or more." 10 C.F.R. § 719.33.

accuracy of the information we received. A recent DOE Inspector General report found that post-settlement reviews were not being conducted as required.[66] The report found three whistleblower settlements totaling over $1.8 million that were reimbursed without evidence of a proper post-settlement review.

Also, depending on the terms of the settlement, some whistleblower cases may not be subject to enforcement action. Settlement agreements may include “no admission” clauses, which state, for example, that the settlement shall not be construed as an admission of any wrongful acts or violation of laws and, in many cases, include “nondisclosure” clauses that prevent the whistleblower from discussing the facts and circumstances surrounding the case. For example, in August 2015, a settlement was reached in a whistleblower case involving the WTP manager who had raised the safety and technical concerns in 2010 that were the basis of the DNFSB investigation and 2011 safety culture report. Under the terms of the settlement, the contractor paid the whistleblower $4.1 million, and the settlement included a “no admission” clause that specified that the contractor admitted to no wrongdoing and stated that the whistleblower agreed to withdraw complaints regarding the alleged retaliation.

Moreover, DOE may have limited ability to obtain information needed for whistleblower-related investigations. DOE uses a standard contract clause that requires the contractors to produce for government audits all documents acquired or generated under the contract, including those for which attorney-client and attorney work product privilege was asserted; however, DOE has been reluctant to enforce this contract requirement. On March 6, 2014, the Office of the Secretary of Energy requested that the Inspector General review the circumstances surrounding the termination of a contractor employee at the Hanford site. However, DOE’s Inspector General was not able to reach a conclusion regarding the termination of the employee because of a material scope limitation.[67] Specifically, two contractors at the Hanford site, including the contractor that terminated the employee in question, did not provide access to

[66]DOE Office of Inspector General, *Audit Report: Follow-up Audit of the Department of Energy’s Management of Contractor Fines, Penalties, and Legal Costs*, DOE-OIG-16-06 (Washington, D.C.: Feb. 5, 2016).

[67]Department of Energy, *Special Review: Issues Pertaining to the Termination of Ms. Donna Busche, a Contractor Employee at the Waste Treatment Plant Project*, DOE/IG-0923 (Washington, D.C.: Oct. 17, 2014).

several thousand contractor-generated e-mails and other documents that the Inspector General believed were necessary to perform the examination. The Inspector General's report notes that both contracts contain a clause that requires the contractors to, among other things, produce for government audit all documents acquired or generated under the contract, including those for which attorney-client and attorney work product privilege were asserted. Nonetheless, on the advice of outside counsel, both contractors took the position that the documents in question were subject to either attorney-client or attorney work product privilege, according to the report. The Inspector General's report also states that one contractor made a unilateral determination that certain documents were not relevant to the examination. According to officials with DOE's Inspector General, DOE had the option of trying to subpoena these documents, but DOE officials ultimately told the Inspector General that they did not think this would be a successful strategy.

DOE Has Taken Limited or No Action against Contractors That Create a Chilled Work Environment and Has Not Developed Effective Policies for Doing So

DOE Integrated Safety Management policy and guidance state that DOE will hold contractors accountable for safety performance—which includes fostering an environment that encourages a questioning attitude by all employees and is free of retribution. The policy states that DOE will hold contractors accountable through codified safety regulations, contract clauses, DOE directives, and the use of contractual and regulatory enforcement tools. Also, DOE contracting officers and other contracting specialists at the sites we visited told us that if there is sufficient evidence that the contractor had created a chilled environment, the contractor could be held accountable. However, it is unclear what would constitute sufficient evidence because DOE's Integrated Safety Management policies and guidance have not clearly articulated a standard. DOE's Integrated Safety Management guidance provides information on attributes associated with fostering an environment that is free of retribution. Attributes include maintaining a high level of trust and encouraging and valuing the reporting of individual errors. However, DOE's policy and guidance do not clearly state under what circumstances a contractor might be held accountable for creating a chilled work environment.

All of the DOE ECP managers we interviewed regarding the issue told us that they were aware of contractors that had created chilled work environments. DOE ECP managers do not have the responsibility or authority to hold contractors accountable for creating a chilled work environment. This responsibility generally rests with DOE contracting officers in coordination with site officials—such as health and safety

officials. Some DOE ECP managers, however, told us that they had doubts about DOE management's commitment to resolving issues related to a chilled work environment. For example, a DOE ECP manager responsible for multiple sites told us that there is widespread mistrust of management in both contractor and federal organizations.

DOE officials at the three sites we visited told us that contracting officers at sites generally do not levy penalties in response to evidence presented by DOE ECP managers regarding a chilled work environment and instead pass concerns back to the contractor. The reasons that site officials gave for not using fee or taking other measures to hold contractors accountable varied, as shown by the following examples:

- At one site, a DOE contracting officer told us that he had not seen any evidence of a chilled work environment. However, a contractor official from that site told us during the same site visit that he had observed a chilled work environment. He said it did not seem to be widespread but occurred within certain pockets of the organization. We also identified situations that could indicate a chilled work environment at this site. Specifically, the contract of a third-tier subcontractor at the site was terminated shortly after safety concerns raised by the subcontractor were substantiated by DOE's ECP. In October 2015, this subcontractor contacted DOE's ECP to report that pressure from the prime contractor at the site to meet unrealistic construction milestones had created an environment that put schedule before safety. [68] The subcontractor in this case did not work directly for the prime contractor and instead performed work for a general contractor under the prime contract. Upon investigation, the federal worker health and safety investigator tasked with investigating the issue substantiated the subcontractor's concern and sent an assessment report and a letter to the prime contractor. The letter recommended that the prime contractor thoroughly review the assessment report and commit to making the necessary changes to improve safety. On the day after the investigation letter was received by the prime contractor, the contract of the subcontractor that raised the safety concern was terminated. A representative from this subcontractor told us that the prime contractor wanted his company removed from the project and

[68]For purposes of this report, a prime contractor is a company or other entity that enters into a contract with a federal agency. A subcontractor is any supplier, distributor, vendor, or firm that furnishes supplies or services to the prime contractor or other subcontractor.

blacklisted from ever working at the site again.[69] The ECP manager and another DOE official told us that the firing of this subcontractor could further contribute to what they characterized as a chilled work environment.

- At another site, a DOE contracting officer said that DOE manages the contractor, not its employees; therefore, until a retaliation issue becomes a lawsuit, DOE relies on the contractor to remedy the issue. However, this runs counter to DOE's Integrated Safety Management policy, which states that contractors will be held accountable for safety performance, to include fostering an environment free of retaliation. At this site, the DOE ECP manager described a situation involving intimidation of contractor employees who used DOE's ECP. He said that one of the site's contractors obtained records of an employee's interactions with DOE's ECP using the Freedom of Information Act and, during an all-hands meeting, warned its employees not to raise concerns with DOE's ECP program. After the incident, officials told us there was a substantial drop in the number of employee concerns received from employees of that contractor. The DOE ECP manager told us that he had tried to raise this issue with DOE general counsel at the site but did not get any help resolving the issue. This ECP manager said that he routinely looks for trends that might indicate reluctance on the part of contractor employees to raise concerns. However, he told us that taking action to investigate suspicious trends requires the support of DOE site management, and that site management has not always been responsive to these issues. The same ECP manager later contacted GAO to seek advice after receiving a concern from a contractor employee that calls into question a contractor's quality assurance program, which is intended to ensure that the contractor's work activities are performed in accordance with nuclear safety requirements. The ECP manager stated that he did not know who to trust. He said that given the importance of the issue reported, he had to tell the DOE site manager but was afraid that in doing so, the whistleblower's identity would be discovered and that the contractor would seek retribution. In discussing issues related to anonymity, he said, "Knowing what I know about the ECP, if I had a concern, I would not use it."

[69]The subcontractor told us that he learned about this situation from the company for which the subcontractor was working at the time.

- At a third site, DOE's response to evidence of a chilled work environment was to notify the contractor of the problem and continue to monitor the issue. Specifically, the DOE ECP manager at the site told us that he noticed a significant increase in the number of complaints coming from one contractor's employees after the contractor's ECP manager was terminated, allegedly for reasons including sharing information with GAO.[70] After noticing an uptick in complaints, the DOE ECP manager prepared a report to document his analysis of the situation. According to the report, contractor employees said that the contractor's ECP could not be trusted to objectively resolve issues and therefore, they were electing to come to DOE's ECP office to raise their concerns. The report also contains the following comments from contractor employees that illustrate what these employees described as a chilled work environment:
    - "We were told that if you talk to DOE, you will not be considered part of the team."
    - "They fired the [contractor] ECP Manager; what do you think they will do to me?"
    - "They are eventually going to terminate anyone who files a concern with DOE. If they knew that I was talking to DOE, I would get fired."
    - "I would like to remain anonymous please due to the possibility of reprisal by senior management."
    - "Employees are very afraid to raise safety issues at the meetings, because they will be terminated or embarrassed."
    - "General Counsel dictates what the contractor ECP does. Nothing will be done without their approval."
    - "They will make an example of anyone who challenges them."

In addition to the accounts of chilled work environment described above, during the course of our work we directly observed another situation that we believe created a chilled environment. Specifically, one of the contractors with which we met brought outside legal counsel to attend all meetings we had with representatives of the company—including the

[70]The contractor ECP manager alleges she was terminated for sharing information and speaking candidly with GAO about what she characterized as harassment and intimidating treatment by members of the senior staff.

contractors' ECP manager. According to the outside counsel, he was at the meetings to "represent the witnesses." During our meetings, the attorney advised his client not to answer certain questions or, in some cases, provided the answer for the client. The meetings with representatives of these contractors, unlike the meetings we had with other contractors, were extremely tense and did not result in a free exchange of information.

As part of our review, we examined another agency's whistleblower processes—the Nuclear Regulatory Commission's (NRC)—to learn more about how other agencies use employee concerns and allegations of retaliation as barometers for understanding the environment and targeting their enforcement activities. According to NRC officials, the commission uses employee concerns and allegations of retaliation as a basis for potential investigations and subsequent enforcement actions, as well as for monitoring licensees and ensuring they take appropriate actions to foster a workplace environment that encourages employees to raise safety concerns without fear of retaliation. NRC is concerned not only with "substantiated" retaliation but also monitors "alleged" or perceived retaliation because, according to NRC officials, alleged retaliation—even if unsubstantiated—has a similar impact on the workforce's willingness to raise safety concerns and can be an indicator of a chilled work environment. NRC officials told us commission evaluates the number, receipt rate, and nature of concerns alleging retaliation, as well as inspection observations made about the work environment. As a result of its review, NRC may conclude that the work environment is not conducive to raising safety concerns. In such cases, NRC will issue a public letter notifying the licensee of its concerns with the safety conscious working environment, and requesting information on the licensee's own assessment of the environment and proposed corrective actions. The letter is made public to ensure the workforce knows that NRC has engaged the licensee's management on the subject and is monitoring actions to address the concern.

Federal standards for internal control state that management should evaluate performance and hold individuals responsible for their internal control responsibilities.[71] Doing so includes enforcing accountability.

[71]GAO, *Standards for Internal Control in the Federal Government,* GAO-14-704G (Washington, D.C.: September 2014).

However, DOE has not implemented practices that might allow the department to hold contractors accountable for addressing chilled work environments that may exist in pockets of their organizations, before the problems become more pervasive. Moreover, DOE's reluctance to hold contractors accountable for chilled work environments may diminish contractor employee confidence in the mechanisms for raising concerns and seeking whistleblower protection.

Conclusions

DOE has taken steps to evaluate whether its contractors are fostering an environment that encourages a questioning attitude by all employees and is free of retribution—which is an important aspect of DOE's Integrated Safety Management policy. Many of these evaluations, however, were flawed—particularly those evaluations that involved contractor self-assessments. Nonetheless, DOE has chosen to continue to rely on self-assessments. DOE has created a safety culture improvement panel to promote safety culture and develop metrics to monitor its culture, but the panel serves in an advisory role and DOE sites will not be required to follow its recommendations. Consequently, it is not clear whether this effort will address the long-standing challenges related to DOE's and contractors' ability to provide an open environment for raising concerns and adequately protect contractor employees from unlawful retaliation. Moreover, without an independent evaluation process that will allow DOE to routinely and accurately measure the openness of the environment and ensure that appropriate corrective actions are taken in response to evaluation results, DOE has no basis to judge whether its policies or improvement initiatives are effective.

Both DOE and contractor ECPs are to offer independent avenues for resolving employees' concerns, and DOE's ECP may provide an avenue for employees that may fear retribution or are otherwise reluctant to use a contractor-provided ECP. However, DOE's ECP order and guidance do not address how contractor-provided ECPs should be structured or operated to ensure their independence, and do not include provisions for DOE to assess or verify the independence of contractor-provided ECPs. Further, DOE's practice of referring and transferring contractor employee concerns back to the contractor potentially negates the benefit of having an ECP that is independent of the contractor. Without criteria and guidance that specify the appropriate placement of an ECP within an organization and establish protocols for transferring and referring concerns—including clarifying the circumstances under which DOE's ECP is permitted to transfer and refer concerns to contractors and requiring approval of the contractor employee raising the concern—DOE

does not have assurance that contractor employees have an independent avenue for resolving their concerns.

DOE's whistleblower protection program—the 708 program—does not cover employees of DOE grantees and does not specifically cover disclosures made to GAO, Department of Justice officials, courts, or grand juries. In addition, certain procedural aspects of DOE's 708 program may be challenging for some whistleblowers to navigate. For some whistleblowers, the enhanced whistleblower protection pilot program may mitigate some of the challenges that the 708 program presents. However, the pilot program sunsets in January 2017, and DOE has not taken steps to evaluate the program's merits or determine if it might mitigate some of the challenges associated with the 708 program. Moreover, it is not clear that DOE has been timely in implementing the pilot program because DOE does not have complete information on which contractors have adopted the pilot program or when they did so. We have ongoing work evaluating the implementation of the pilot program at 14 federal executive agencies, including DOE. However, without evaluating the extent to which the pilot program has been implemented or whether it might mitigate existing challenges, DOE cannot be assured that contractor employees have an effective means by which to seek remedy for unlawful retaliation, and Congress may not have the information it needs as it considers whether to extend pilot.

DOE is unusual among federal agencies in that it regulates and inspects its own facilities to protect the safety and health of its workers and of the communities surrounding its vast complex of research laboratories. However, DOE determined in 2013 that it did not have the authority to enforce its policy stating that nuclear safety-related retaliation constitutes a nuclear safety violation, inhibiting its ability to take enforcement action. Without codifying this policy in regulatory language, DOE is limited in its ability to take enforcement action for unlawful retaliation related to nuclear safety disclosures. It is incumbent on DOE to act as quickly as possible resolve this issue. Given DOE's time frame for issuing a proposed rule in December 2017—itself a tentative date—DOE could take years before issuing a final rule confirming that its policy is enforceable. In addition, DOE has not routinely asked for information from the Department of Labor on whistleblower retaliation cases filed by DOE contractor employees, and DOE is not aware of cases that are adjudicated in state or federal court. Without this information, DOE's ability to take enforcement action against unlawful retaliation is limited.

Moreover, DOE's Integrated Safety Management policy and guidance states that DOE will hold contractors accountable for safety performance—which includes fostering an environment that encourages a questioning attitude by all employees and that is free of retribution; however, DOE has not used this policy to hold contractors accountable when presented with evidence of contractors that have created a chilled work environment. Because DOE's policies and guidance do not clearly articulate what constitutes evidence of a chilled work environment or define the appropriate steps DOE should take to hold accountable contractors that create a chilled work environment, it may be difficult for DOE to effectively carry out its contractor oversight responsibilities.

Recommendations for Executive Action

We are making six recommendations in this report:

To improve DOE's ability to evaluate and monitor the effectiveness of policies that call for all organizations, including contractors, to embrace a strong safety culture and create a work environment that encourages a questioning attitude by all employees, we recommend that the Secretary of Energy develop and implement an independent evaluation process for routinely and accurately measuring contractor employees' willingness to raise safety and other concerns without fear of retaliation. This process should ensure that an independent third party develops, conducts, and consistently applies the evaluation methodology—which should include safeguards that protect anonymity. The process should also enable DOE to oversee and ensure that appropriate corrective actions are taken in response to evaluation results.

To help ensure that the organizational placement and practices of DOE- and contractor- provided Employee Concerns Programs (ECP) do not inhibit contractor employees from raising safety and other concerns, we recommend that the Secretary of Energy revise DOE's ECP order and guidance to (1) require that the organizational placement and practices of contractor ECP's do not compromise or impair their independence, (2) clarify the circumstances under which DOE's ECP is permitted to transfer and refer concerns to contractors, and notify or require approval of the contractor employee raising the concern, and (3) provide criteria for overseeing and evaluating the effectiveness and independence of contractor-provided ECPs.

To help ensure that Congress has the information it needs as it considers whether or not to make permanent the enhanced whistleblower pilot program and that DOE has assurance that contractor employees have an effective mechanism to seek remedy for unlawful retaliation, we

recommend that the Secretary of Energy fully evaluate the extent to which the pilot program has been implemented and whether its provisions will mitigate challenges associated with DOE's 708 program. This evaluation should include, at a minimum, an assessment of (1) contractors that have adopted the pilot program and the date they did so; (2) contractors that have not adopted the pilot program and an explanation of why not; (3) cases filed under the pilot program, if any; and (4) the pilot program's potential for mitigating challenges associated with the 708 program.

To help improve DOE's ability to take enforcement action against unlawful retaliation when appropriate and take action against contractors that create a chilled work environment, we recommend that the Secretary of Energy take the following three actions:

- Expedite the department's time frames for codifying in regulatory language its policy that retaliation for nuclear safety-related disclosures is a nuclear safety violation and develop a specific schedule for issuing the proposed and final rules.
- Direct DOE's Office of Enforcement to routinely collect information from the Department of Labor and other sources regarding substantiated cases of retaliation and take appropriate enforcement action.
- Revise DOE's Integrated Safety Management policy and guidance to clarify what constitutes evidence of a chilled work environment and define the appropriate steps DOE should take to hold contractors accountable for creating a chilled work environment.

Agency Comments and Our Evaluation

We provided DOE with a draft of this report for its review and comment. DOE provided written comments, which are reproduced in appendix III, and technical comments that were incorporated as appropriate. In its written comments, DOE concurred with five of our six recommendations. In its letter, DOE concurred with our second, fourth, and sixth recommendations and included planned actions and estimated completion dates to address them. Specifically, DOE agreed with our second recommendation to revise its ECP order and guidance to help ensure that the organizational placement and practices of DOE- and contractor- provided ECPs do not inhibit contractor employees from raising safety and other concerns. DOE agreed with our fourth recommendation to expedite the department's time frames for codifying in

regulatory language its policy that retaliation for nuclear safety-related disclosures is a nuclear safety violation, and develop a specific schedule for issuing the proposed and final rules. DOE agreed with the sixth recommendation to revise DOE's Integrated Safety Management policy and guidance to clarify what constitutes as evidence of a chilled work environment and define the appropriate steps DOE should take to hold contractors accountable for creating a chilled work environment.

In written comments, DOE agreed with the first recommendation to develop and implement an independent evaluation process for routinely and accurately measuring contractor employees' willingness to raise safety and other concerns without fear of retaliation. Specifically, in the enclosure to DOE's letter, DOE includes information on its planned actions; stating that it would consider both the Nuclear Regulatory Commission's monitoring processes and the Enterprise Assessments' evaluation methodology in developing protocols for independently evaluating contractor employee willingness to raise concerns. However, in its letter, DOE states that it will continue to evaluate safety concerns during "select" independent assessments. Our recommendation is intended to broaden DOE's use of independent assessments, not limit it to selected contractors.

In its letter, DOE agreed with the fifth recommendation to routinely collect information from the Department of Labor and other sources regarding substantiated cases of retaliation and take appropriate enforcement action. However, in its written comments, DOE stated that the department considers this recommendation closed. Specifically, DOE stated that, in 2014, DOE's Office of Enforcement established mechanisms for routinely receiving quarterly information on retaliation claims submitted to and adjudicated by the Department of Labor. However, the recommendation also includes the collection of information from other sources. As noted in our report, this could include claims submitted to and adjudicated in state courts, for which DOE has not established such a mechanism. Moreover, as discussed in our report, in April 2016, when we asked DOE to provide documentation that demonstrated that it was routinely collecting information from the Department of Labor, DOE only provided information for the first two quarters of fiscal year 2016, rather than all quarters since the 2014 establishment of the mechanism. We do not believe that information from the first two quarters of 2016 represents routine collection of information. We reaffirm our position that DOE routinely collect information from the Department of Labor and other sources regarding substantiated cases of retaliation and take appropriate enforcement action.

DOE stated in its written comments that it did not concur with our third recommendation to fully evaluate the extent to which the whistleblower protection pilot program has been implemented and whether the provisions of the pilot will mitigate challenges associated with DOE's existing whistleblower protection program (the 708 program). In its written comments, DOE stated that the DOE Inspector General has implemented the pilot program in accordance with the National Defense Authorization Act of Fiscal Year 2013 and maintains responsibility for administering the program. DOE also stated that it does not have the authority to evaluate the activities of its Inspector General. As noted in the report, however, DOE, not the Inspector General, is responsible for implementing key elements of the program, including modifying existing contracts to make the pilot available to contractor employees. Therefore, our recommendation is aimed at DOE's responsibility to know the extent to which it has modified existing contracts to make the pilot available to its contractors' employees and to determine whether the provisions of the pilot will mitigate challenges associated with DOE's existing whistleblower protection program. Although DOE did not concur with the recommendation, in its letter, DOE stated that it would, nevertheless, conduct a general comparison between the pilot program and DOE's existing whistleblower program prior to any revisions to the 708 program. This action, if taken, is consistent with one aspect of our recommendation for DOE to assess the pilot's potential for mitigating challenges associated with the 708 program. However, DOE has not indicated whether it has plans to revise the 708 program and, as discussed in the report, DOE does not have information on the extent to which it has implemented the pilot. Such information will help ensure that Congress has the information it needs as it considers whether or not to make permanent the enhanced whistleblower pilot program and that DOE has assurance that contractor employees have an effective mechanism to seek remedy for unlawful retaliation. Therefore, we reaffirm our position that DOE fully implement our recommendation and evaluate the extent to which the whistleblower protection pilot program has been implemented and whether the provisions of the pilot will mitigate challenges associated with DOE's existing whistleblower protection program.

As agreed to with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the appropriate congressional committees, the Secretary of Energy, and other interested parties. In addition, the report will be available at no charge on the GAO website at http://www.gao.gov.

If you or your staff members have any questions about this report, please contact me at (202) 512-3841 or trimbled@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix IV.

David C. Trimble
Director, Natural Resources and Environment

Appendix I: Mechanisms for Reporting Concerns or Seeking a Remedy for Unlawful Retaliation

The Department of Energy (DOE) has recognized disclosures by contractor employees to be a primary source of information on conditions that could negatively affect the quality or safety of operations at its contractor-operated facilities and sites. Federal laws, regulations, and DOE and contractor policies and procedures generally require that DOE contractors (1) maintain an open environment for raising safety concerns without fear of retaliation and (2) provide mechanisms for DOE contractor employees to raise safety or other concerns or seek whistleblower protections—that is, to seek a legal remedy for allegedly unlawful retaliation against employees for their protected disclosures. Table 1, below, describes some of the mechanisms for DOE contractor employees to raise concerns or seek a remedy for unlawful retaliation. Mechanisms in the table may not be available to all DOE contractor employees.

Table 1: Selected Mechanisms Available to DOE Contractor Employees for Raising Concerns or Seeking a Remedy for Unlawful Retaliation

	Mechanism	Who Provides	Authorities	Description
Selected Mechanisms for Raising Concerns	"Open-door" policies	Contractors	Contractor policies and procedures	Policies affirming that contractor employees at any level of the company can raise safety or other concerns directly with the company's Chief Executive Officer.
	Employee safety councils/safety representatives	Contractors and labor unions	Contractor policies and procedures	Employees who help oversee safety at Department of Energy (DOE) sites and represent employee safety concerns to contractor management and DOE.
	Issues tracking/corrective actions systems	DOE or contractors	DOE or contractor policies and procedures	Electronic systems and processes at DOE facilities and sites for identifying, tracking, and resolving issues that could negatively affect the safety or efficiency of DOE's operations. Issues reported into these systems by contractor employees and others may be assigned to an "owner" for potential follow-up and resolution.
	Stop work policies	DOE or contractors	10 C.F.R. Part 851 and DOE and contractor policies and procedures	Policies and procedures authorizing contractor employees and others to stop potentially dangerous work or activities that could harm DOE's operations or the environment.
	Employee Concerns Programs (ECP)	DOE and contractors	DOE Order 442.1A, DOE Guide 442.1A-1, and contractor policies and procedures	A primary mechanism for employees to raise or elevate concerns outside their chain of command. Employees submit safety or other concerns to local DOE or contractor ECP personnel through various means—such as in-person reporting at an ECP office or anonymously through a dedicated telephone hotline. ECP personnel evaluate concerns received and may try to address the concerns within the program or transfer the concerns outside the program for others to address.

	Mechanism	Who Provides	Authorities	Description
	Differing Professional Opinions programs	DOE and contractors	DOE Order 442.2 and DOE or contractor policies and procedures	A formal process for resolving employees' safety concerns that are technical and could not be resolved through other means, such as other mechanisms or interactions with peers and managers. Concerns are reviewed by an ad hoc panel, including technically knowledgeable persons, which recommends an outcome to an appointed decision maker. DOE's order provides an opportunity to appeal the decision and requires concurrence from the applicable Under Secretary or Deputy Secretary if the decision maker does not adopt the panel's recommendation.
Selected Mechanisms for Seeking a Remedy for Unlawful Retaliation	Grievance-arbitration procedures	Contractors and labor unions	Collective bargaining agreements	Collective bargaining agreements may provide for formal grievance processes, such as mediation or arbitration, which covered DOE contractor employees may use in order to obtain a remedy for their employer's alleged whistleblower retaliation.
	American Recovery and Reinvestment Act (Recovery Act)	DOE	Pub. L. No. 111-5	Program authorized under Section 1553 of the Recovery Act for providing whistleblower protections to non-federal employees—including DOE contractor employees—carrying out Recovery Act work. DOE's Office of the Inspector General investigates the reprisal complaints and issues a report to the employee, the contractor, and the head of the agency, who decides the outcome. This agency decision may be challenged in federal court.
	DOE Contractor Employee Protection Program	DOE	10 C.F.R. part 708	DOE's primary whistleblower protection program for contractor employees seeking a remedy for potentially unlawful reprisals. Administrative Judges in DOE's Office of Hearings and Appeals investigate and adjudicate reprisal complaints through a hearings and appeals process. Contractors found to have engaged in unlawful reprisals may be ordered to provide an appropriate remedy, such as rehiring and providing back pay to employees fired for making protected disclosures.
	Pilot program for enhancement of contractor protection from reprisal	DOE	41 U.S.C. § 4712 (National Defense Authorization Act for Fiscal Year 2013, § 828(a)(1))	Four-year pilot program to provide enhanced whistleblower protections for contractor employees at DOE and other agencies. Congress approved the pilot in 2013 in place of the then-existing contractor whistleblower program (at 41 U.S.C. §4705) that it suspended during the pilot. DOE's Inspector General investigates reprisal complaints brought under the pilot and recommends an initial decision. The head of the agency decides the outcome of the complaint and may order the contractor to provide a remedy, which may be challenged in federal court.

Mechanism	Who Provides	Authorities	Description
Whistleblower Protection Program	Occupational Safety and Health Administration (OSHA)	42 U.S.C. § 5851	OSHA's program to investigate and adjudicate whistleblower retaliation complaints filed by DOE contractor employees under the Energy Reorganization Act.[a] This act gives OSHA 30 days to investigate a complaint. The agency may issue a preliminary order following a hearing before an administrative law judge. If the complaint has not been decided within a year of its filing, the complainant may bring suit in federal district court.

Source: GAO analysis of select DOE and contractor policies and procedures, as well as federal laws and regulations. | GAO-16-618

[a]The Energy Reorganization Act is one of 21 federal statutes that provide whistleblower protections to nonfederal employees through the OSHA Whistleblower Protection Program. See GAO, *Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency*, GAO-09-106 (Washington, D.C.: Jan. 27, 2009).

Appendix II: Laws, Regulations, and Policies Governing Safety and Safety Enforcement at DOE's Sites

Work performed at the Department of Energy's (DOE) contractor-operated facilities and sites can involve potential exposure to highly radioactive wastes and other hazards. Federal laws, regulations, and DOE policies outline requirements for nuclear safety, worker safety and health, and DOE's oversight responsibilities. Because DOE acts as its sites' main safety regulator, these laws, regulations, and policies also govern DOE's regulatory enforcement of its safety requirements. Table 2, below, describes selected laws, regulations, and DOE policies governing safety and safety enforcement at DOE sites.

Table 2: Selected Laws, Regulations, and Policies Governing Safety and Safety Enforcement at DOE Sites

	Name (citation)	Description
Selected Laws, Regulations, and DOE Policies Governing Safety at DOE Sites	Atomic Energy Act of 1947, as amended (42 U.S.C. § 2201(i)(3))	Gives the Department of Energy (DOE) authority to regulate safe and secure handling of nuclear materials at its sites.
	Nuclear Safety Management (10 C.F.R. part 830)	Governs safety of DOE nuclear facilities and sites. Requires DOE contractors to implement safety requirements in a manner that provides the "reasonable assurance" of adequate protection of workers, the public, and the environment from adverse consequences of plutonium and other radioactive materials, taking into account the work to be performed and the associated hazards. Contractors must, with DOE approval, establish safety documents, quality assurance programs, and other procedures for identifying and controlling nuclear hazards.
	Worker Safety and Health Program (10 C.F.R. part 851)	Governs worker safety and health for nonnuclear hazards at most DOE sites—including chemical, biological, and other hazards—with potential to cause illness, injury, or death. Requires DOE contractors to establish programs and procedures for identifying and abating safety and health hazards, as well as mechanisms for employees to raise concerns and stop potentially dangerous work activities. The regulation establishes DOE's process for taking enforcement actions against contractors for failing to comply with the standards. DOE's Chronic Beryllium Disease Prevention Program (10 C.F.R. Part 850) supplements the worker safety and health standards in Part 851 and is one of DOE's main safety regulations, according to DOE officials.
	Integrated Safety Management Policy (DOE Policy 450.4A)	Establishes DOE's expectation that all contractor and DOE organizations will integrate safety into all aspects of their operations and embrace a strong safety culture, including an environment free from retaliation. The policy and associated guidance establish requirements for integrating safety and expectations for contractors to foster open communication and an environment free from retaliation and for DOE managers to evaluate and develop strategies to improve the safety culture

	Name (citation)	Description
Selected Laws, Regulations, and DOE Policies Governing DOE's Safety Enforcement	Price Anderson Amendments Act of 1988 (Pub. L. 100-408)	Provides indemnification for contractors, subcontractors, and suppliers that conduct nuclear activities for DOE. The act also authorizes DOE to assess monetary penalties against such entities that violate nuclear safety requirements.
	Procedural Rules for Nuclear Activities (10 C.F.R. Part 820)	Outlines DOE's enforcement procedures for achieving compliance with nuclear safety requirements, including investigating possible safety violations and assessing monetary penalties, among other things. An appendix to the procedural rules provided a general statement of DOE's enforcement policy, in which DOE outlined the purpose of its enforcement program, such as to ensure safety and encourage prompt reporting and resolution of safety deficiencies. In April 2000, DOE amended this general statement to clarify DOE's intent to consider, as a possible basis for enforcement, evidence from whistleblower proceedings under DOE's Contractor Employee Protection Program and OSHA's whistleblower program.
	DOE Enforcement Process DOE's Safety and Security Enforcement Process Overview and Safety and Security Enforcement Coordinator Handbook (Aug. 2012)	Provide information and guidance for DOE and contractor personnel responsible for safety enforcement. Describe DOE's enforcement program, including expectations for contractors to self-report about their noncompliance with safety requirements and DOE's process for investigating possible safety violations and determining the appropriate enforcement outcome.

Source: GAO analysis of relevant laws, regulations, and policies. | GAO-16-618

Note: GAO selected laws, regulations, and policies governing safety and safety enforcement most relevant to operations at defense nuclear sites.

Appendix III: Comments from the Department of Energy

Department of Energy
Washington, DC 20585

July 1, 2016

Mr. David Trimble
Director
Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Trimble:

Thank you for providing a draft copy of the Government Accountability Office (GAO) report, *Department of Energy: Whistleblower Protections Need Strengthening (GAO-16-618)*. The enclosure to this letter provides the Department's management response to the report's recommendations as well as specific comments on the draft report that the Department believes will enhance its clarity and utility.

The Secretary of Energy and the Department's senior leaders have repeatedly articulated their commitment to fostering a work environment that encourages open communication, a questioning attitude, and an organizational culture that promotes the free and open expression of concerns by employees and swift resolution of those concerns by managers. In the past four years, the Department has made significant strides in increasing awareness about the importance of a healthy safety culture, including having trained more than 2,000 DOE Federal and contractor managers in leadership for a safety conscious work environment. DOE Headquarters and field elements have also made significant progress in evaluating safety culture and institutionalizing the methods and practices used to evaluate organizational culture and its impact on the workforce.

The Department acknowledges that work remains to improve DOE's safety culture as evidenced by the ongoing efforts of our Safety Culture Improvement Panel. DOE also recognizes that sustainment of a healthy safety culture is an endeavor that should never be deemed "complete." Thus, DOE concurs with five of the six recommendations in the report, and will use these recommendations to supplement its ongoing initiatives to update the employee concerns and integrated safety management program directives and guidance, and codify its enforcement authorities related to worker retaliation. In addition, DOE will continue to evaluate employee willingness to raise safety concerns without fear of retaliation during select independent assessments.

Because (1) DOE's Office of the Inspector General has implemented the enhanced whistleblower protection pilot program established by Congress in the 2013 National Defense Authorization Act, (2) the Secretary of Energy does not have oversight responsibilities for the pilot program or the activities of its Inspector General, and (3) the

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GAO is already evaluating implementation of the pilot program at 14 Federal agencies, including DOE, DOE considers recommendation 3 to have already been implemented. Nevertheless, DOE will use publicly-available information to conduct a general comparison between the pilot program and 10 C.F.R. Part 708, *DOE Contractor Employee Protection Program*, to determine whether certain aspects of the pilot program should be considered for implementation during future revisions of Part 708. DOE will conduct such a comparison prior to any revisions to Part 708. DOE also considers actions fulfilling recommendation 5 to be complete given that, since 2014, DOE's Office of Enforcement has routinely received and evaluated information from the Department of Labor on retaliation complaints submitted to that agency by DOE contractor employees.

The enclosure to this letter identifies specific actions that DOE will take to further strengthen its safety culture, mechanisms for employees to report and managers to resolve employee concerns, and provisions for taking action against contractors that violate prohibitions against retaliation. As with all GAO reports, we will track the progress and completion of actions items using the Departmental Audit Report Tracking System and the actions will be monitored by the DOE Office of the Chief Financial Officer.

If you have any questions, please contact me or Barbara Pruitt of my staff, who may be reached at (301) 903-5981.

Sincerely,

Glenn S. Podonsky
Director
Office of Enterprise Assessments

Enclosures

Enclosure A: Management Response to DRAFT GAO Audit Report: *Department of Energy Whistleblower Protections Need Strengthening (GAO-16-618)*

Enclosure B: DOE Comments on DRAFT GAO Audit Report: *Department of Energy Whistleblower Protections Need Strengthening (GAO-16-618)*

Enclosure A

Management Response to DRAFT GAO Audit Report:
Department of Energy Whistleblower Protections Need Strengthening (GAO-16-618)

Recommendation 1 (EA): Develop and implement an independent evaluation process for routinely and accurately measuring contractor employees' willingness to raise safety and other concerns without fear of retaliation.

Management Response: **Concur**.

The Department's Office of Enterprise Assessments will establish and implement a protocol for independently monitoring and evaluating contractor employee willingness to raise safety and other concerns without fear of retaliation. Development of the protocol will consider both the Nuclear Regulatory Commission's monitoring processes and Enterprise Assessments' evaluation methodology.

Estimated Completion Date: Establishment and initial implementation of the protocol for high hazard sites is tentatively scheduled for January 2017.

Recommendation 2 (AU): Revise DOE's ECP order and guidance to:

(1) Require that organizational placement and practices of contractor ECP's do not compromise or impair their independence,
(2) Clarify the circumstances under which DOE's ECP is permitted to transfer and refer concerns to contractors and notify or require approval of the contractor's employee raising the concern, and
(3) Provide criteria for overseeing and evaluating the effectiveness and independence of contractor-provided ECPs.

Management Response: **Concur.**

DOE Order 442.1A, *Department of Energy Employee Concerns Program*, is currently under revision. Specifically, this revision will: 1) address the potential for conflicts of interest that could affect the independence of contractor ECPs, 2) clarify the circumstances under which an employee concern can be referred or transferred from a DOE ECP to a contractor ECP, and 3) specify that the processes already identified in DOE Order 226.1B, *Implementation of Department of Energy Oversight Policy*, be used as part of the oversight processes for contractor-provided ECPs, to include evaluation of their effectiveness and independence. The revised draft Order will be submitted for DOE-wide review in 2016 with a planned approval in the third quarter of fiscal year 2017.

Estimated Completion Date: June 30, 2017

Recommendation 3 (HG and IG): Fully evaluate the extent to which the pilot has been implemented and whether the provisions of the pilot will mitigate challenges associated with DOE's 708 program.

Management Response: **Non-concur.**

The draft report states that any evaluation of the pilot should include, at a minimum, an assessment of:

(1) Contractors that have adopted the pilot and the date it was adopted;
(2) Contractors that have not adopted the pilot and an explanation as to why they have not adopted the pilot;
(3) Cases filed under the pilot, if any; and
(4) The pilot's potential for mitigating challenges associated with the 708 program.

DOE's Office of the Inspector General (IG) has implemented the pilot program in accordance with the 2013 National Defense Authorization Act and maintains responsibility for administering that program. DOE does not have authority to evaluate the activities of its Inspector General. In addition, because one complaint has been submitted to the DOE IG to date under the pilot program, there is currently insufficient evidence to compare the effectiveness of that program to DOE's longstanding program under 10 C.F.R. Part 708. DOE's Office of Hearing and Appeals will conduct a general comparison between the pilot program and the Part 708 program prior to any future revisions to Part 708.

Estimated Completion Date: The Department considers this recommendation closed.

Recommendation 4 (EA and GC): Expedite the department's timeframes for codifying in regulatory language its policy that retaliation for nuclear safety-related disclosures is a nuclear safety violation and develop a specific schedule for issuing the proposed and final rules.

Management Response: **Concur**.

DOE announced in the Unified Agenda of Regulatory and Deregulatory Actions in May 2016 its intent to amend its regulations at 10 C.F.R. Part 820 to clarify which DOE regulations constitute DOE Nuclear Safety Requirements. DOE will expedite the schedule for this rulemaking proceeding and will update the entry for this item in the Fall 2016 Unified Agenda.

Estimated Completion Date: Date of publication of the Fall 2016 Unified Agenda.

Recommendation 5 (EA): Direct DOE's Office of Enforcement to routinely collect information from the Department of Labor and other sources regarding substantiated cases of retaliation and take appropriate enforcement action.

Management Response: **Concur**.

In 2014, DOE's Office of Enforcement established mechanisms for routinely receiving information on retaliation claims submitted to and adjudicated by the Department of Labor (DOL) under the Energy Reorganization Act. Since the implementation of this process, DOL has transmitted to the Office of Enforcement information about complaints when they are filed with DOL, quarterly status updates on all open cases, and documentation of the final decision on each case. DOL and DOE have also convened annual coordination meetings to discuss process improvements and program updates.

Since the inception of 10 C.F.R. Part 851 in 2007, DOE's Office of Enforcement has monitored whistleblower cases adjudicated by DOE's Office of Hearings and Appeals under 10 C.F.R. Part 708. The Office of Enforcement evaluates each claim to determine if an underlying safety issue warrants further enforcement investigation; if a respondent who is a DOE contractor covered by Part 851 is determined to have retaliated against a worker for reporting a safety concern, the Office of Enforcement is authorized to take appropriate enforcement action.

Estimated Completion Date: The Department considers this recommendation closed.

Recommendation 6 (AU): Revise DOE's Integrated Safety Management policy and guidance to clarify what constitutes evidence of a chilled work environment and define the appropriate steps DOE should take to hold contractors accountable for creating a chilled work environment.

Management Response: **Concur.**

DOE continues to be committed to a safety conscious work environment in which employees feel free to raise safety concerns (to management or a regulator) without fear of retaliation. DOE has institutionalized that commitment in DOE Policy 450.4A, *Integrated Safety Management Policy*; DOE Order 450.2, *Integrated Safety Management*; and DOE Guide 450.4-1C, *Integrated Safety Management System Guide*.

There has been considerable management emphasis on mandatory training and awareness for senior leaders, front line supervisors, and workers on safety culture focus areas and associated attributes. DOE Guide 450.4-1C, attachment 10, is based on extensive literature review of national and international safety and organizational culture approaches. The integrated safety management (ISM) set of directives have been extensively tested and utilized to drive DOE's expectations and requirements for a work environment in which employees feel free to raise safety concerns without fear of retaliation.

As part of ongoing process improvement, the Department plans to review and revise the ISM set of directives in 2017 and will address the concerns expressed in the GAO report.

Estimated Date of Completion: December 30, 2017

Appendix IV: GAO Contact and Staff Acknowledgments

GAO Contact

David C. Trimble, (202) 512-3841 or trimbled@gao.gov

Staff Acknowledgments

In addition to the contact named above, Diane LoFaro (Assistant Director), Rich Johnson, Emily Norman, Alison O'Neill, Kelly Rubin, and Jeff Rueckhaus made key contributions to this report.

Appendix V: Accessible Data

Agency Comment Letter

Text of Appendix III: Comments from the Department of Energy

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Department of Energy

Washington, DC 20585

July 1, 2016

Mr. David Trimble

Director

Natural Resources and Environment

U.S. Government Accountability Office

441 G Street, N.W.

Washington, D.C. 20548

Dear Mr. Trimble:

Thank you for providing a draft copy of the Government Accountability Office (GAO) report, Department of Energy: Whistleblower Protections Need Strengthening (GA0-16- 618). The enclosure to this letter provides the Department's management response to the report's recommendations as well as specific comments on the draft report that the Department believes will enhance its clarity and utility.

The Secretary of Energy and the Department's senior leaders have repeatedly articulated their commitment to fostering a work environment that encourages open communication, a questioning attitude, and an organizational culture that promotes the free and open expression of concerns by employees and swift resolution of those concerns by managers. In the past four years, the Department has made significant

strides in increasing awareness about the importance of a healthy safety culture, including having trained more than 2,000 DOE Federal and contractor managers in leadership for a safety conscious work environment. DOE Headquarters and field elements have also made significant progress in evaluating safety culture and institutionalizing the methods and practices used to evaluate organizational culture and its impact on the workforce.

The Department acknowledges that work remains to improve DOE's safety culture as evidenced by the ongoing efforts of our Safety Culture Improvement Panel. DOE also recognizes that sustainment of a healthy safety culture is an endeavor that should never be deemed "complete." Thus, DOE concurs with five of the six recommendations in the report, and will use these recommendations to supplement its ongoing initiatives to update the employee concerns and integrated safety management program directives and guidance, and codify its enforcement authorities related to worker retaliation. In addition, DOE will continue to evaluate employee willingness to raise safety concerns without fear of retaliation during select independent assessments.

Because (1) DOE's Office of the Inspector General has implemented the enhanced whistleblower protection pilot program established by Congress in the 2013 National Defense Authorization Act, (2) the Secretary of Energy does not have oversight responsibilities for the pilot program or the activities of its Inspector General, and (3) the

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GAO is already evaluating implementation of the pilot program at 14 Federal agencies, including DOE, DOE considers recommendation 3 to have already been implemented. Nevertheless, DOE will use publicly-available information to conduct a general comparison between the pilot program and 10 C.F.R. Part 708, DOE Contractor Employee Protection Program, to determine whether certain aspects of the pilot program should be considered for implementation during future revisions of Part 708. DOE will conduct such a comparison prior to any revisions to Part 708. DOE also considers actions fulfilling recommendation 5 to be complete given that, since 2014, DOE's Office of Enforcement has routinely received and evaluated information from the Department of Labor on retaliation complaints submitted to that agency by DOE contractor employees.

The enclosure to this letter identifies specific actions that DOE will take to further strengthen its safety culture, mechanisms for employees to report and managers to resolve employee concerns, and provisions for taking

action against contractors that violate prohibitions against retaliation. As with all GAO reports, we will track the progress and completion of actions items using the Departmental Audit Report Tracking System and the actions will be monitored by the DOE Office of the Chief Financial Officer.

If you have any questions, please contact me or Barbara Pruitt of my staff, who may be reached at (301) 903-5981.

Sincerely,

Glenn S. Podonsky

Director

Office of Enterprise Assessments

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