

RULEMAKING ISSUE

(Notation Vote)

November 17, 2005

SECY-05-0212

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations /RA/

SUBJECT: PROPOSED RULEMAKING - CLARIFICATION OF NRC CIVIL PENALTY AUTHORITY OVER CONTRACTORS AND SUBCONTRACTORS WHO DISCRIMINATE AGAINST EMPLOYEES FOR ENGAGING IN PROTECTED ACTIVITIES (RIN 3150-AH59)

PURPOSE:

To obtain Commission approval to publish in the *Federal Register* a proposed rule to amend the Commission's employee protection regulations in 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 71.9, 72.10, and 76.7.¹

BACKGROUND:

In SECY-04-0195, Rulemaking Plan, "Clarification of NRC Civil Penalty Authority over Contractors and Subcontractors Who Discriminate Against Employees for Engaging in Protected Activities (RM #636)," the staff recommended amending the employee protection regulations in 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 72.10 and 76.7 to allow the Commission to exercise its authority to impose civil penalties against contractors and subcontractors who violate these regulations. In an Staff Requirements Memoranda (SRM) dated November 22, 2004, the Commission approved the staff's rulemaking plan set forth in SECY-04-0195.

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¹The changes proposed by this rulemaking are not related to the Energy Policy Act of 2005, Section 629, Whistleblower Protection.

DISCUSSION:

10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 71.9², 72.10, and 76.7 set out NRC's employee protection requirements. The following provides a brief outline of paragraphs (a) through (f) of 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 71.9, 72.10, and 76.7. Paragraph (a) prohibits a Commission licensee, applicant, contractor or subcontractor of a licensee or applicant, (or in 71.9 and 72.10, a holder of a Certificate of Compliance (CoC) and in 76.7, the United States Enrichment Corporation, "the Corporation"), from discriminating against employees for engaging in protected activities and defines the protected activities. Paragraph (b) explains that employees have a personal remedy for such discrimination through the Department of Labor (DOL). Paragraph (c) states that discrimination may be grounds for denial, revocation, or suspension of the license (or in 71.9, 72.10 and 76.7, suspension of the certificate), imposition of a civil penalty³ on the licensee or applicant, or other enforcement action. Paragraph (d) explains that adverse actions may also be legitimately taken by an employer. Paragraph (e) mandates posting of NRC Form 3 by licensees, certificate holders, applicants for licenses or CoCs and the Corporation. Paragraph (f) prohibits agreements affecting the compensation, terms, conditions, or privileges of employment.

These regulations were promulgated by the Commission to implement its authority to assess a civil penalty under Section 234 of the Atomic Energy Act for such violations. However, while paragraph (a) prohibits discrimination by a contractor or subcontractor, paragraph (c) does not explicitly provide for the imposition of a civil penalty on a contractor or subcontractor. In addition, 10 CFR 76.7(c) currently does not specify the availability of civil penalties as an enforcement action. The Supplementary Information that accompanied the promulgation of 10 CFR 76.7 does not indicate that this omission was intentional; in fact, there is an indication that the intent was that the provisions of this section should be the same as the provisions of the other employee protection regulations.

The Rulemaking Plan submitted to the Commission in SECY-04-0195, indicated that 10 CFR 72.10 would be amended to provide imposing a civil penalty against a holder or applicant for a CoC or a contractor or subcontractor of a holder or applicant for a CoC. However, the staff is not proposing to amend 71.9 or 72.10 to provide imposing a civil penalty against a holder or applicant for a CoC, or contractor or subcontractor of a holder or applicant for a CoC.

However, if a holder of a CoC is also a contractor or subcontractor of a licensee, then a civil penalty could be imposed on a contractor or subcontractor in that capacity.

Proposed Rule

²10 CFR 71.9 was inadvertently omitted from the Rulemaking Plan submitted to the Commission in SECY-04-0195. For completeness, an amendment to 10 CFR 71.9 is added to this proposed rule.

³10 CFR 76.7(c) currently does not specify the availability of civil penalties as an enforcement action. The proposed rule will amend 10 CFR 76.7 to conform with the other employee protection regulations.

The Commission's employee protection regulations in 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 71.9, 72.10, and 76.7 prohibit discrimination by a Commission licensee, applicant for a Commission license, contractor or subcontractor, a holder of or applicant for a CoC or the Corporation against employees for engaging in certain protected activities. These sections identify certain enforcement actions for violations of the regulations. The enforcement actions are denial, revocation, or suspension of the license or certificate; imposition of a civil penalty on the licensee or applicant; or other enforcement action. While the employee protection regulations prohibit discrimination by a contractor or subcontractor, they do not explicitly provide for imposition of a civil penalty on a contractor or subcontractor. Because the activities of contractors and subcontractors can clearly affect the safe operation of a licensee's facility, it is important that contractors and subcontractors abide by the Commission's employee protection regulations. The Commission should be able to bring the full scope of enforcement actions to bear on contractors or subcontractors who violate its employee protection regulations. The approach described in the attached proposed rule represents a significant change in the Commission's current policy: currently, a licensee can receive a civil penalty when its contractor or subcontractor violates the Commission's employee protection regulations, but the contractor or subcontractor is not subject to civil penalties.

The proposed rulemaking will enhance the regulatory process by enabling the Commission to exercise its authority to impose civil penalties directly on contractors or subcontractors who violate the Commission's employee protection regulations. By implementing its authority to impose civil penalties on contractors and subcontractors of a licensee, applicant for a license, or the Corporation who discriminate against employees who engage in protected activity, the Commission will further its efforts to foster an environment in which safety issues can be openly identified without fear of retribution. This supports the following safety strategies: (1) developing, maintaining, and implementing licensing and regulatory programs for reactors, fuel facilities, materials users, spent fuel management, decommissioning sites, and waste-related activities to protect public health, safety, and the environment and (2) conducting NRC safety oversight programs, including inspections and enforcement activities to monitor licensee performance by improving the framework used to deter discrimination by non-licensees.

Enforcement Considerations

To fully implement the Commission-approved final rule, the staff will revise the NRC Enforcement Policy and the NRC Enforcement Manual.

Contents of the Proposed-Rulemaking Package

This rulemaking package provides a comprehensive set of documents for Commission consideration. It consists of the *Federal Register* Notice (Attachment 1), the draft Environmental Assessment (Attachment 2), and the draft Regulatory Analysis (Attachment 3).

RESOURCES:

The resources estimated to complete this rulemaking and the associated training and support and guidance documents are 1.2 full-time equivalent (FTE) positions (0.8 FTE in the Office of Enforcement and 0.4 FTE in other offices) over FY 2006-2007. This estimate is based on completion of the rulemaking early in FY 2007. The budget includes sufficient resources to complete the rulemaking in FY 2006 and FY 2007. The information on resources and schedule reflect the current environment and if a significant amount of time (greater than 30 days) passes or the Commission provides the staff direction that differs from or adds to the staff's recommended action(s), this section of the paper would need to be reconsidered after issuance of the draft SRM.

COMMITMENTS:

Listed below are the actions or activities committed to by the staff in this paper.

- The staff will revise the NRC Enforcement Policy to incorporate the changes to the employee protection regulations
- The staff will revise the NRC Enforcement Manual to incorporate the changes to the employee protection regulations
- The staff will hold a public meeting to provide stakeholders the opportunity to comment on the proposed rule.

AGREEMENT STATE ISSUES

The revisions to 10 CFR 50.7, 60.9, 63.9, 72.10, and 76.7 are not relevant to Agreement State programs because these NRC regulations address areas of exclusive NRC authority and are designated a Compatibility Category NRC. The revisions to 10 CFR 30.7, 40.7, 61.9, 70.7, and 71.9 are Compatibility Category D elements. Agreement States will be offered the opportunity to comment on the proposed rule during the 75 public comment period.

RECOMMENDATIONS:

That the Commission:

1. *Approve* the proposed rule for publication.
2. *Certify* that this rule, if promulgated, will not have a negative economic impact on a substantial number of small entities. This action is needed to satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b).
3. Notes:
 - a. The proposed rule will be published in the *Federal Register*, allowing 75 days for public comment.

- b. The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification regarding economic impact on small entities and the basis for it, as required by the Regulatory Flexibility Act.
- c. A draft Environmental Assessment and finding of no significant impact has been prepared (Attachment 2)
- d. A draft Regulatory Analysis has been prepared for this rulemaking (Attachment 3)
- e. A public announcement will be issued.
- f. Appropriate Congressional Committees will be informed of this action.

COORDINATION:

The Office of the General Counsel has no legal objection to this paper. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections. The Advisory Committee on Reactor Safeguards elected not to review the proposed rule requirements because the proposed rulemaking involves a matter of policy that does not raise technical issues. The Committee to Review Generic Requirements has deferred its review of the rule until after the public comment period has ended and the staff has considered any public comments received.

/RA W Kane Acting for/

Luis A. Reyes
Executive Director
for Operations

Attachments:

1. *Federal Register* Notice
2. Draft Environmental Assessment
3. Draft Regulatory Analysis

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OFC	OE		OE:SC		OE:DD		OE:D		OGC	
NAME	DStarkey		CNolan (JLuehman for)		JLuehman		MJohnson		STreby	
DATE	11/08/05		11/08/05		11/08/05		11/10/05		10/7/05	
OFC	ADM		NMSS		STP				CFO	
NAME	MLesar		JStrosnider		PLohaus				JFunches	
DATE	9/12/05		9/21/05		9/21/05				9/15/05	
OFC	NRR		D:NSIR		DEDMRS				EDO	
NAME	JDyer		RZimmerman		MVirgilio				LReyes/w Kane for	
DATE	9/19/05		9/13/05		11/17/05				11/17/05	

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