

# RULEMAKING ISSUE

## (Notation Vote)

October 21, 2004

SECY-04-0195

FOR: The Commissioners

FROM: Luis A. Reyes  
Executive Director for Operations

SUBJECT: RULEMAKING PLAN: CLARIFICATION OF NRC CIVIL  
PENALTY AUTHORITY OVER CONTRACTORS AND  
SUBCONTRACTORS WHO DISCRIMINATE AGAINST  
EMPLOYEES FOR ENGAGING IN PROTECTED ACTIVITIES  
(RM #636)

### PURPOSE:

To obtain Commission approval of the attached Rulemaking Plan 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. The rulemaking would allow the Commission to exercise its authority to impose civil penalties against contractors and subcontractors who violate these regulations.

### BACKGROUND:

On January 15, 1998, the Commission issued Staff Requirements Memorandum (SRM) - SECY-97-281, "Initiation of Enforcement Action Against Construction Products Research, Inc. and Five Star Products, Inc. for Discrimination Against an Employee for Raising Safety Concerns and Cooperating with an NRC Investigation." SRM-SECY-97-281 directed the staff to consider and propose a modification to the Commission's employee protection regulations to allow imposition of civil penalties on non-licensee contractors and subcontractors for discriminating against employees who have engaged in protected activities. The staff deferred further action on this matter pending resolution of action in *Thermal Science, Inc., v. NRC* (Case No. 4:96CV02281-CAS), which included an issue concerning the scope of the Commission's civil penalty authority over contractors and subcontractors. That case was subsequently settled.

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On April 14, 2000, the Executive Director for Operations chartered a Discrimination Task Group (DTG) to evaluate the NRC's handling of discrimination cases. On September 12, 2002, the staff forwarded to the Commission SECY-02-0166, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," which contained the DTG report. Among other recommendations, the DTG recommended that rulemaking be initiated to allow the Commission to impose civil penalties on contractors working for NRC licensees. On March 26, 2003, the Commission issued SRM-SECY-02-0166 approving the recommendations of the DTG as revised by the Senior Management Review Team, subject to certain comments. The Commission approved, without comment, the DTG rulemaking recommendation regarding imposition of civil penalties against contractors.

A copy of the proposed Rulemaking Plan was provided to the Agreement States on July 18, 2004, for a 45-day comment period. The comment period closed on August 2, 2004. One comment was received from the State of Washington.

The staff has developed the attached rulemaking plan in response to the Commission's direction in its SRMs on SECY-97-281 and SECY-02-0166.

#### DISCUSSION:

The Commission's 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 prohibit discrimination by a Commission licensee, applicant for a Commission license, contractor or subcontractor, a holder of or applicant for a certificate of compliance (CoC) or the United States Enrichment Corporation (Corporation) against employees for engaging in certain protected activities.<sup>1</sup> These sections identify certain enforcement actions for violations of the regulations. The enforcement actions are denial, revocation, or suspension of the license; imposition of a civil penalty on the licensee or applicant; or other enforcement action.<sup>2</sup> 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. Since 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 rulemaking plan represents a significant change in the Commission's current policy under which a licensee can receive a civil penalty when its contractor or subcontractor violates the Commission's employee protection regulations while the contractor or subcontractor is not subject to civil penalties.

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<sup>1</sup>10 CFR 19.20 and 150.20 also contain or make reference to employee protection regulations, but do not provide for any enforcement action. Therefore, these regulations will not be amended as part of the proposed rulemaking.

<sup>2</sup>As explained in the Rulemaking Plan, 10 CFR 76.7 currently does not specify the availability of civil penalties as an enforcement action. The plan proposes to amend 10 CFR 76.7 to conform with the other employee protection regulations.

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.

AGREEMENT STATE INTERACTION:

The proposed rulemaking includes revisions to 10 CFR 50.7, 60.9, 63.9, 72.10, and 76.7. In accordance with the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" and its associated implementing procedure, SA-200 "Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements," 10 CFR Parts 50, 60, 63, 72, and 76 address areas of exclusive NRC authority and are designated a Compatibility Category NRC. These provisions can not be adopted by Agreement States.

In addition, the proposed rulemaking addresses revisions to 10 CFR 30.7, 40.7, 61.9, and 70.7. These provisions are currently designated a Compatibility Category D. Agreement States are not required to adopt these provisions.

On June 18, 2004, the staff provided the proposed Rulemaking Plan to the Agreement States for a 45-day comment period, which closed on August 2, 2004. The only Agreement State to provide comments was the State of Washington, which provided the following comment:

The addition of civil penalties, for contractors and subcontractors who discriminate against employees as referenced, appears appropriate. The final wording of this amendment should clearly express that the licensee is still responsible for maintaining control and oversight of contractor and subcontractor activities, and the licensee has a responsibility to investigate and, if necessary, institute enforcement actions against contractors and subcontractors when claims are brought by their employees. The wording must be expanded to ensure that licensees follow through on their responsibility to maintain control and oversight of contractor and subcontractor activities.

Response:

The Rulemaking Plan recognizes that the supplementary information should clarify that the amendments do not diminish the focus on licensee responsibility in the investigative and enforcement process. The staff will address the topic of licensee responsibility in the supplementary information in the Federal Register Notice.

RESOURCES:

The resources estimated to complete this rulemaking and the associated support and guidance documents are 1.5 full-time equivalent (FTE) positions (1.0 FTE in the Office of Enforcement and 0.5 FTE in other offices) over approximately two years. This estimate is based on completion of the rulemaking in FY 2006. OE will accomplish this rulemaking within the existing OE budget by giving it priority over certain other OE work activities.

The Commissioners

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RECOMMENDATION:

The staff recommends that the Commission approve the plan to proceed with a rulemaking to revise 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 72.10, and 76.7.

COORDINATION:

The Office of General Counsel has no legal objection to the rulemaking plan.

**/RA William F. Kane Acting For/**

Luis A. Reyes  
Executive Director  
for Operations

Attachment: Rulemaking Plan

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Attachment: Rulemaking Plan

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