

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

**APPENDIX C TO THE
COMMITTEE TO REVIEW GENERIC REQUIREMENTS (CRGR) CHARTER**

- (I) The proposed generic requirement or staff position as it is proposed to be issued for public comments.**

Upon Commission approval, the staff will publish in the Federal Register, with a 75 day public comment period, 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. These regulations will be amended to allow the Commission to exercise its authority to impose civil penalties against contractors and subcontractors who violate these regulations.

- (ii) Draft papers or other documents supporting the requirements or staff positions. (A copy of all materials referenced in the document shall be made available upon request to the CRGR staff. Any Committee member may request the CRGR staff to obtain a copy of any reference material for his or her use.)**

The Discrimination Task Group (DTG) report, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," dated April 2002, was forwarded to the Commission as an attachment to SECY-02-0166, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," dated September 12, 2002. On March 26, 2003, the Commission issued a Staff Requirements Memorandum (SRM) on SECY-02-0166, approving the recommendations of the DTG. The Commission approved, without comment, the DTG rulemaking recommendation regarding civil penalties against contractors.

On January 16, 1998, the NRC issued an enforcement action against Five Star Products, Inc. and Construction Products Research, Inc., contractors to the nuclear industry, for discriminating against one of its employees. Following this enforcement action, the NRC staff considered modifications to the NRC's employee protection regulations that would clearly allow the NRC, within the limits of its jurisdiction, to impose civil penalties on non-licensees for discriminating against employees who have engaged in protected activities. At the time that NRC took the enforcement action against Five Star Products, Inc. and Construction Products Research, Inc., the NRC was engaged in litigation with another non-licensee, Thermal Science, Inc., that included an issue concerning the scope of the Commission's civil penalty authority over non-licensees. Consequently, the staff deferred modifying the NRC's employee protection regulations pending resolution of action in *Thermal Science, Inc., v. NRC* (Case No. 4:96CV02281-CAS). That case was subsequently settled.

- (iii) Each proposed requirement or staff position shall contain the sponsoring office's position as to whether the proposal would modify requirements or staff positions, implement existing requirements or staff positions, or would relax or reduce existing requirements or staff positions.**

The proposed amendments clarify the NRC's authority to impose a civil penalty directly on contractors or subcontractors who violate the NRC's employee protection regulations. This authority derives from section 234 of the Atomic Energy Act, which provides that the Commission may impose civil penalties on any person who violates any rule, regulation, or order issued under any of the enumerated provisions of the Act, or who commits a violation for which a license may be revoked.

- (iv) **The proposed method of implementation and resource implications, along with the concurrence (and any comments) of OGC on the method proposed, and the concurrence of all affected program offices or an explanation of any non-concurrences.**

The method of implementation will be rulemaking. All affected program offices have concurred here in. The NRC's Office of the General Counsel (OGC) has no legal objection to the proposed rulemaking, and the NRC staff incorporated OGC's comments into the proposed rule.

- (v) **Regulatory analyses generally conforming to the directives and guidance of NUREG/BR-0058 and NUREG/BR-0184, as applicable. (This does not apply for backfits that ensure compliance or ensure, define, or re-define adequate protection. For power reactors, a documented evaluation is required as discussed under item (ix) of this Appendix.)**

The staff has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the staff.

- (vi) **Identification of the category of power reactors to which the generic requirement or staff position is to apply (that is, whether it is only applicable to future plants, operating plants, all pressurized water reactors (PWRs), all boiling water reactors (BWRs), specific nuclear steam supply system (NSSS) vendor types, plants of specific vintage, gaseous diffusion plants (GDPs), etc.).**

The proposed rule would allow the Commission to impose civil penalties on any non-licensee employer that discriminates against an employee for engaging in protected activity, if that employer is a contractor or subcontractor of a licensee, holder of a certificate of compliance, applicant for a license or a certificate of compliance, or the Corporation at the time that the employee engaged in the protected activity that resulted in discrimination.

- (vii) **For proposed backfits, other than either the compliance or the adequate protection backfits, a backfit analysis as defined in the Backfit Rule (10 CFR 50.109 for power reactors and 10 CFR 76.76 for the GDPs) should be performed. The backfit analysis shall include, for each category of nuclear power reactor or nuclear materials facility or activity, an evaluation which demonstrates how the proposed action should be prioritized and scheduled in light of other ongoing regulatory activities. The backfit analysis shall document for consideration pertinent information available concerning any of the following factors, as appropriate, and any other information, which is relevant and material to the proposed action:**

- (a) **Statement of the specific objectives that the proposed action is intended to achieve;**
- (b) **General description of the activity that the licensee or applicant would be required to perform in order to complete the action;**
- (c) **Potential change in the risk to the public from the accidental offsite release of radioactive material;**
- (d) **Potential impact on radiological exposure of facility employees and other onsite workers;**
- (e) **Installation and continuing costs associated with the action, including the cost of facility downtime or the cost of construction delay;**
- (f) **The potential safety impact of changes in plant or operational complexity, including the relationship to proposed and existing regulatory requirements and staff positions;**
- (g) **The estimated resource burden on the NRC associated with the proposed action and the availability of such resources;**
- (h) **The potential impact of differences in facility type, design, or age on the relevancy and practicality of the proposed action;**
- (i) **Whether the proposed action is interim or final, and if interim, the justification for imposing the proposed action on an interim basis;**
- (j) **For both rulemaking actions and proposed generic correspondence, staff evaluation of comments received as a result of the notice and comment process;**
- (k) **How the action should be prioritized and scheduled in light of other ongoing regulatory activities. The following information may be appropriate in this regard:**
 - 1. **The proposed priority or schedule,**
 - 2. **A summary of the current backlog of existing requirements awaiting implementation,**
 - 3. **An assessment of whether implementation of existing requirements should be deferred as a result, and**
 - 4. **Any other information that may be considered appropriate with regard to priority, schedule, or cumulative impact. For example, could implementation be delayed pending public comment?**

The Commission has determined that the backfit rule does not apply to this proposed rule because these amendments would not involve any provision that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required for this proposed rule.

- (viii) **For each proposed backfit analyzed pursuant to 10 CFR 50.109(a)(2), 10 CFR 72.62(c), or 10 CFR 76.76(a)(3), (i.e., for backfits other than either adequate protection backfits or compliance backfits), the proposing office director's determination, together with the rationale for the determination based on the consideration of the previous paragraphs (I) through (vii), that**
- (a) **a substantial increase in the overall protection of public health and safety or the common defense and security will be derived from the proposal; and**
 - (b) **the direct and indirect costs of implementation for the facilities affected are justified in view of this increased protection.**

The Commission has determined that the backfit rule does not apply to this proposed rule because these amendments would not involve any provision that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required for this proposed rule.

- (ix) **For adequate protection or compliance backfits affecting power reactors, evaluated pursuant to 10 CFR 50.109(a)(4) (or analogous provisions in 10 CFR 72.62 or 10 CFR 76.76, as appropriate),**
- (a) **A documented evaluation consisting of:**
 - (1) **the objectives of the modification**
 - (2) **the reasons for the modification**
 - (3) **if the compliance exception is invoked,**
 - (A) **the requirements (e.g., Commission regulation, license condition, order) or written licensee commitments, for which compliance is sought.**
 - (B) **an assessment of risk/safety implications of not requiring licensees to immediately restore compliance, and the basis for determination that a reasonable concession could be allowed to defer restoration of compliance at a later time (e.g., next refueling outage).**
 - (C) **demonstrated consideration of other possible alternatives and rationale for rejecting them in favor of compliance backfitting.**
 - (D) **evaluation from cost-benefit considerations (not a full-blown regulatory analysis) and a rationale for compliance exception.**

- (4) **If the adequate protection exception is invoked, the basis for concluding that the matter to be addressed involves adequate protection, and why current requirements (e.g., Commission regulation, license condition, order) or written licensee commitments do not provide adequate protection.**
- (b) **In addition, for actions that were immediately effective (and therefore issued without prior CRGR review as discussed in Section III of the CRGR Charter), the evaluation shall document the safety significance and appropriateness of the action taken and (if applicable) consideration of how costs contributed to selecting the solution among various acceptable alternatives.**

The Commission has determined that the backfit rule does not apply to this proposed rule because these amendments would not involve any provision that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required for this proposed rule.

- (x) **For each request for information from power reactor licensees under 10 CFR 50.54(f), which is for purposes other than to verify compliance with the facility's licensing basis, an evaluation that includes at least the following elements:**
 - (a) **A problem statement that describes the need for the information in terms of potential safety benefit.**
 - (b) **The licensee actions required and the cost to develop a response to the information request.**
 - (c) **An anticipated schedule for NRC use of the information.**
 - (d) **A statement affirming that the request does not impose new requirements on the licensee, other than submittal of the requested the information.**
 - (e) **The proposing office director's determination that the burden to be imposed on the respondents is justified in view of the potential safety significance of the issue to be addressed in the requested information.**

Under the provisions of 10 CFR 50.54(f), unless the request for information is for the purpose of verifying compliance with the licensing basis of a facility, the EDO shall approve the staff's justification. Additional guidance for preparing this evaluation is provided in Section 5.4 of NUREG/BR-0058, Revision 2.

Include an analogous evaluation addressing items (a) through (e) for each information request directed to the licensees of the selected nuclear materials facilities or referred to in Section III of the CRGR Charter.

This item is not applicable under 10 CFR 50.54(f) since it clarifies the NRC's authority to

impose a civil penalty directly on contractors or subcontractors who violate the NRC's employee protection regulations and does not request information from licensees.

- (xi) **For each proposed power reactor backfit analyzed pursuant to 10 CFR 50.109(a)(2) (i.e., backfits other than either adequate protection or compliance backfits), an assessment of how the proposed action relates to the Commission's Safety Goal Policy Statement.**

The Commission has determined that the backfit rule does not apply to this proposed rule because these amendments would not involve any provision that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required for this proposed rule.