Regulatory Analysis for Final Rulemaking - Clarification of NRC Civil Penalty Authority over Contractors and Subcontractors Who Discriminate Against Employees for Engaging in Protected Activities (RIN 3150-AH59)

1. Statement of the Problem and Objective

The 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, or applicant for a Commission license, or holder of, or an applicant for, a Certificate of Compliance (CoC), or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in protected activities. Violation of these regulations may be grounds for enforcement actions that include denial, revocation, or suspension of the license or CoC; imposition of a civil penalty on the licensee or applicant; or other enforcement action. While the employee protection regulations prohibit discrimination by a non-licensee contractor or subcontractor, they do not explicitly provide for imposition of a civil penalty on a non-licensee contractor or subcontractor. The rule will clarify the Commission's authority to impose civil penalties against non-licensee contractors and subcontractors for violation of these regulations by discriminating against an employee for engaging in protected activities. Furthermore, this action supports the Commission's safety strategies in its FY 2004-2009 Strategic Plan to foster an environment in which safety issues can be openly identified without the fear of retribution.

In addition, the NRC is amending its regulations in 10 CFR 76.7 to provide that the Commission may impose a civil penalty on the United States Enrichment Corporation (Corporation) as well as a contractor or subcontractor of the Corporation. This change is to bring this regulation into conformance with the NRC's other employee protection regulations.

2. Identification of Regulatory Alternatives

This regulatory analysis evaluates the values and impacts of two regulatory alternatives. The following subsections describe these two alternatives.

2.1 No Action Alternative

The no action alternative retains the current regulations described above. Non-licensee contractors and subcontractors who violate these regulations by discriminating against an employee for engaging in protected activities would not be considered for imposition of civil penalties by the Commission. The no action alternative serves as the baseline against which the proposed rule alternative (described below) is measured.

2.2 Rule Alternative

Under the rule alternative, the NRC will revise its regulations for employee protection in 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 71.9, 72.10 and 76.7 to clarify the Commission's authority to impose civil penalties against non-licensee contractors and subcontractors who violate these regulations by discriminating against an employee for engaging in protected activities. Additionally, the rule alternative will revise the regulations in 10 CFR 76.7 to provide that the Commission may impose a civil penalty on the Corporation, as well as a contractor or subcontractor of the Corporation. This change will bring this regulation into conformance with the NRC's other employee protection regulations.

3. Analysis of Values and Impacts

The three subsections below describe the analysis conducted to identify and evaluate the values and impacts resulting from the final rule. Subsection 3.1 identifies the attributes that the rule is expected to affect. Subsection 3.2 describes the methodology used to analyze the values and impacts associated with the rule.

3.1 Identification of Affected Attributes

The attributes that the rule could affect were identified using the list of potential attributes provided in Chapter 5 of NUREG/BR-0184, "Regulatory Analysis Technical Evaluation Handbook," dated January 1997. Each attribute listed in Chapter 5 was evaluated. Because the baseline for this analysis assumes full compliance with existing requirements, only three attributes (NRC implementation, regulatory efficiency and other considerations) were affected under the rule.

- *NRC Implementation*. The NRC will incur costs to place the final rule into operation. This will include costs incurred to (1) revise related policy and guidance documents, (2) develop a training course on changes to the employee protection regulations and (3) train NRC staff who need to enforce the regulations.

- *Regulatory Efficiency*. The final rule will enhance regulatory efficiency by clarifying in the 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 that the Commission may also impose a civil penalty on a non-licensee contractor or subcontractor of a licensee or applicant for violating these regulations. In addition, conforming changes are made to 10 CFR 76.7 to specify the availability of civil penalties as an enforcement action against the Corporation as well as a contractor or subcontractor of the Corporation.

- *Other Considerations*. The final rule could increase public and employee confidence in the NRC and NRC licensees and applicants and non-licensee contractors and subcontractors because of a more systematic approach to imposing civil penalties for violation of the employee protection regulations. Also, the direct imposition of civil penalties on contractors and subcontractors will deter contractors and subcontractors from violating the Commission's employee protection regulations and allow their employees to raise regulatory and safety concerns without fear of retaliation. Thus making the workplace safer and adding to the protection of public health and safety.

The final rule is not expected to affect the following attributes:

- Public Health (Accident)
- Public Health (Routine)
- Occupational Health (Accident)
- Occupational Health (Routine)
- Offsite Property
- Onsite Property
- Industry Implementation
- Industry Operation
- NRC Operation

- Other Government
- General Public
- Improvements in Knowledge
- Antitrust Considerations
- Safeguards and Security Considerations
- Environmental Considerations

3.2 Analysis of Values

Regulatory Efficiency. The final rule represents a significant change in the Commission's current policy under which a licensee can receive a civil penalty for a non-licensee contractor or subcontractor discriminatory activities while the contractor or subcontractor is not subject to civil penalty enforcement action. The amendments will enhance regulatory efficiency by allowing the Commission to exercise its authority to impose a civil penalty (i.e., a significant enforcement action) on contractors or subcontractors who violate the NRC's employee protection regulations. This could reduce the financial and regulatory burden that can unnecessarily be placed on a licensee or applicant because of a non-licensee contractor or subcontractor who violates the employee protection regulations.

The NRC is also amending its regulations in 10 CFR 76.7 to specify that the Commission may impose a civil penalty on the Corporation as well as a contractor or subcontractor of the Corporation. This change is to bring this regulation into conformance with the NRC's other employee protection regulations and would enhance regulatory efficiency.

Other Considerations. 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. Under the rule, the Commission will be able to bring the full scope of enforcement actions to bear on contractors or subcontractors who violate its regulations. Thus, any party engaging in activities with non-licensee contractors or subcontractors can be more confident in using their services knowing that the NRC has codified imposition of a civil penalty on these contractors or subcontractors when they violate the employee protection regulations.

Although licensees are responsible for the actions of their contractors, in some circumstances it may not serve as a desired deterrent to hold the licensee responsible for the actions of its contractors, especially in situations where the licensee takes prompt and comprehensive action to remedy the situation. The rule could also increase public confidence in the NRC and NRC licensees and applicants and non-licensee contractors and subcontractors because there will be a more systematic approach to imposing civil penalties when employee protection regulations are violated.

The direct imposition of civil penalties on non-license contractors and subcontractors will deter contractors and subcontractors from violating the Commission's employee protection regulations and allow their employees to raise regulatory and safety concerns without fear of retaliation. Both of these objectives are critical to the nuclear industry's ability to carry out licensed activities safely.

3.3 Analysis of Impacts

NRC Implementation. Implementation of the final rule will require minor conforming revisions to the NRC Enforcement Policy and the NRC Enforcement Manual. The NRC staff estimates that revising these documents will require about 40 staff-hours. Assuming a conversion factor of $105 per staff-hour, the estimated cost to revise these documents is $4,200 (40 hours x $105/hour). The NRC will also incur costs to develop a training course to provide training to NRC staff on changes to the employee protection regulations. Assuming it takes 16 staff-hours to develop the training course, the estimated cost is $1,680 (16 hours x $105/hour). The cost to train 10 people for two hours, plus the instructor's time of two hours, is estimated to be $2,310 ((10 x 2 hours x $105/hour) + (2 hours x $105/hour)).

The total NRC-staff resources needed to implement the final rule are estimated to be $8,200 (0.05 FTE, based on 1,460 hours/FTE). This estimate has increased from the estimate stated in the proposed rule due to a recalculation of the NRC hourly staff-rates using more recent data.

4. Results and Decision Rationale

As shown above, the total cost to the NRC to implement the final rule is estimated to be $8,200 The NRC expects that there will be no other significant costs associated with this action to the NRC, licensees and applicants, or non-licensee contractors or subcontractors.

The final rule will improve the effectiveness of NRC regulations by clarifying that violation of the employee protection regulations by non-licensee contractors and subcontractors may be grounds for imposition of a civil penalty on a non-licensee contractor or subcontractor. In addition, the final rule brings 10 CFR 76.7 into conformance with the NRC's other employee protection regulations by amending this regulation to provide that the Commission may impose a civil penalty on the Corporation as well as a contractor or subcontractor of the Corporation.

The amendments do not affect the Commission's ability to impose civil penalties against licensees or applicants for discrimination by their contractors or subcontractors against employees for engaging in protected activities, nor do they diminish the focus on licensee responsibility in the investigative and enforcement process. The Commission has long held licensees to be responsible for maintaining control and oversight of contractor and subcontractor activities. There may be instances in which the Commission may wish to issue civil penalties to both the responsible contractor and the licensee; for example, in cases where there are employee protection violations involving both licensee and contractor culpability or situations in which the licensee is aware of discrimination by its contractor and does not take immediate action to remedy the situation.

The final rule is consistent with NRC's strategic objective and performance goals. The final rule will continue to ensure the protection of public health and safety and the environment, as well as providing that the Commission may impose a civil penalty on contractors or subcontractors discriminating against an employee for engaging in protected activities. The ability to impose a significant enforcement action (i.e., civil penalty) directly on non-licensee contractors and subcontractors will result in the Commission's regulations being more effective and efficient.

6. Implementation

The final rule will become effective 30 days after its publication in the *Federal Register*. No impediments to the implementation of the recommended alternative have been identified.

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