

RULEMAKING ISSUE (Affirmation)

September 11, 2007

SECY-07-0158

FOR: The Commissioners

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

SUBJECT: FINAL RULE - 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* the enclosed final rule that amends the Commission's employee protection regulations in Title 10 of the Code of Federal Regulations (CFR) 30.7, 40.7, 50.7, 52.5¹, 60.9, 61.9, 63.9, 70.7, 71.9, 72.10, and 76.7., to approve the Enforcement Policy Revision, and to certify the rule Satisfies the Regulatory Flexibility Act.

BACKGROUND:

10 CFR 30.7, 40.7, 50.7, 52.5, 60.9, 61.9, 63.9, 70.7, 71.9, 72.10 and 76.7 set out the NRC's employee protection requirements. These regulations were promulgated by the Commission to prohibit a Commission licensee, applicant, contractor, or subcontractor of a licensee or applicant (or in 10 CFR 71.9 and 72.10, a holder of a Certificate of Compliance (CoC) and in

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¹ This final rule amends 10 CFR 52.5(c) to conform with the other employee protection regulations regarding civil penalties to contractors and subcontractors. 10 CFR 52.5(c) was not included in the proposed rule submitted to the Commission in SECY-05-0212 because, at that time, 10 CFR Part 52 did not contain employee protection provisions. 10 CFR Part 52 has since been amended (72 FR 49352, in part, to include a new section, 10 CFR 52.5, Employee protection.

10 CFR 76.7, the United States Enrichment Corporation) from discriminating against employees for engaging in protected activities. While the 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, they do not explicitly provide for 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.)

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, 52.5, 60.9, 61.9, 63.9, 70.7, 71.9², 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 a Staff Requirements Memorandum (SRM) dated November 22, 2004, the Commission approved the staff's rulemaking plan set forth in SECY-04-0195.

In SRM to SECY-05-0212, "Proposed Rulemaking - Clarification of NRC Civil Penalty Authority over Contractors and Subcontractors Who Discriminate Against Employees for Engaging in Protected Activities," dated December 21, 2005, the Commission approved publication of a proposed rule to amend the employee protection regulations to exercise NRC's authority to impose civil penalties against contractors and subcontractors. The proposed rule was published in the *Federal Register* on January 31, 2006 (71 FR 5015).

DISCUSSION:

The *Federal Register* Notice gave the public an opportunity to comment on the proposed amendments, the draft environmental assessment, and the draft regulatory analysis. The comment period closed on April 17, 2006. The proposed rule was also sent to all Agreement States and was posted on the NRC's Rulemaking-RuleForum Web site. No comments were received from Agreement States during the public comment period on the proposed rule. The NRC received one email from a private citizen and one letter from Project on Government Oversight (POGO). In general, the comments were supportive of the proposed rule. These comments are discussed in detail in the *Federal Register* Notice (Enclosure 1) for the final rule. In addition, a public meeting was held on March 28, 2006, to discuss the proposed rule and to address any questions on the proposed rule. No major comments were received during the public meeting.

The proposed rule recommended amending the Commission's employee protection regulations to allow the Commission to impose civil penalties on contractors and subcontractors for violations of the requirements in these regulations. The proposed rule also recommended amending 10 CFR 76.7 to bring it into conformance with the provisions of other NRC employee protection regulations by providing that the Commission may impose a civil penalty on the United States Enrichment Corporation or a contractor or subcontractor of the United States

² 10 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 was added to the proposed rule and is also included in this final rule. The proposed rule and amendment were approved by the Commission in SRM-SECY-05-0212.

Enrichment Corporation. The final rule contains the same requirements as the proposed rule. The Enforcement Policy is also being revised to clarify the Commission's civil authority over contractors and subcontractors.

AGREEMENT STATE ISSUES:

The revisions to 10 CFR 50.7, 52.5, 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. Compatibility Category D elements are elements that do not need to be adopted by Agreement States.

In SRM-SECY-05-0212, the Commission, in approving publication of the proposed rule, directed that the Statement of Considerations should solicit comments from stakeholders regarding Category D designation of these regulations. In response to the solicitation for comments, the staff received one comment regarding compatibility category designation. The commenter recommended that 10 CFR 30.7, 40.7, 61.9, 70.7, and 71.9 be categorized at Compatibility Category C. Compatibility Category C elements are elements the essential objectives of which an Agreement State should adopt. In addition, this commenter stated that the NRC should issue a policy statement to Agreement States detailing the obligations under Category C. In response to the comment, the staff, in the enclosed *Federal Register* Notice for the final rule, stated that the Commission in SRM to SECY-99-002, "Agreement State Compatibility Designation for NRC Employee Protection Regulations," disapproved the staff's plans to designate 10 CFR 19.20, 30.7, 40.7, 61.9, and 70.7 as compatibility Category C for Agreement States. However, in that SRM the Commission provided direction to the staff that its decision could be revisited if the staff believed at some time in the future that there was a regulatory performance gap that put Agreement State licensee employees at a higher risk than NRC licensee employees as a result of the present compatibility category. The staff is currently reevaluating, under an initiative separate from this rulemaking, the effects of the Category D designation on Agreement State employees. Upon completion of that evaluation, the staff will determine whether additional actions are necessary regarding Agreement State employee protection compatibility categories. That evaluation and any subsequent staff recommendations to the Commission regarding compatibility categories are separate from this rulemaking and are not to be included in this rulemaking.

COMMITMENTS:

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

1. In an initiative separate from this rulemaking, the staff has started a major revision to the Enforcement Policy. Although changes have been made to the Enforcement Policy as a result of this rulemaking (Enclosure 4), during the ongoing major revision the staff will evaluate whether further revision of the Policy is necessary regarding civil penalties to contractors and subcontractors.
2. The staff will revise the NRC Enforcement Manual to incorporate guidance regarding civil penalties against contractors and subcontractors who violate the Commission's employee protection regulations. The Manual revision, in part, will include guidance on

how the base civil penalties in Table 1A of the Enforcement Policy will be extended to contractors and subcontractors.

RECOMMENDATIONS:

That the Commission:

1. Approve the final rule (Enclosure 1) for publication in the *Federal Register* .
2. Approve the Enforcement Policy Revision *Federal Register* Notice (Enclosure 4).
3. To satisfy the requirement of the Regulatory Flexibility Act, 5 U.S.C. 605(b), certify that this rule if promulgated will not have significant impact on a substantial number of small entities. This certification is included in the attached *Federal Register* Notice for the final rule.

Note that:

- a. This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, approval numbers 3150-0017, 3150-0020, 3150-0011, 3150-0127, 3150-0135, 3150-0199, 3150-0009, 3150-0008, 3150-0132 and 3150-0151.
- b. The final Environmental Assessment has been prepared for this rulemaking (Enclosure 2)
- c. The final Regulatory Analysis has been prepared for this rulemaking (Enclosure 3).
- d. 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, 5 U.S.C. 605(b).
- e. The staff has determined that this action is not a “major rule,” as defined in the Congressional Review Act of 1996 [5 U.S.C. 804(2)] and has confirmed this determination with the Office of Management and Budget. The appropriate Congressional and Government Accountability Office contacts will be informed (Enclosure 5).
- f. The Office of Public Affairs will issue a press release when the final rulemaking is filed with the Office of the Federal Register.
- g. Appropriate Congressional Committees will be informed of this action.

RESOURCES:

Resources budgeted for this rulemaking were 0.4 full-time equivalents (FTE) in fiscal year (FY) 2007 (0.2 FTE in the Office of Enforcement, 0.1 FTE in the Office of Nuclear Material Safety

and Safeguards, and 0.1 FTE in the Office of Nuclear Reactor Regulations). These resources were included in the FY 2007 Budget.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections. The Advisory Committee on Reactor Safeguards elected not to review the rulemaking requirements because the rulemaking involves a matter of policy that does not raise technical issues. The Committee to Review Generic Requirements waived review of this final rule because the rulemaking amendments do not include any provisions that would require backfits as defined in 10 CFR Chapter I.

/RA/

Luis A. Reyes
Executive Director
for Operations

Enclosures:

1. *Federal Register* Notice
2. Environmental Assessment
3. Regulatory Analysis
4. Enforcement Policy Revision
5. CRA Forms

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ADAMS Accession No.: ML072200094**200500372/EDATS: SECY-2007-0286**

OFC	OE	OE:SC	OE:DD	OE:D	OGC
NAME	DStarkey	DSolorio	JLuehman	CCarpenter	FCameron
DATE	11/02/06	11/07/06	11/08/06	11/13/0607	12/27/06
OFC	ADM	NMSS	FSME	CFO	NRR
NAME	MLesar	JStrosnider (MP for)	CMiller (GPangburn for)	JFunches (LBarnett for)	JDyer (BBoger for)
DATE	11/21/06	11/17/06	12/08/06	12/07/06	12/05/06
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