UNITED STATES NUCLEAR REGULATORY COMMISSION

POLICY ISSUE
(Information)

January 5, 1999

SECY-99-002

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: AGREEMENT STATE COMPATIBILITY DESIGNATION FOR NRC EMPLOYEE PROTECTION REGULATIONS

PURPOSE:

The purpose of this paper is to inform the Commission of Agreement State and public response to NRC's request for comments on the appropriate Agreement State compatibility category designation for NRC's employee protection regulations and to inform the Commission of staff's plans to address employee protection in Agreement States.

BACKGROUND:

In SECY-98-068, "Consideration of Application of Federal Government-Wide Conflict of Interest or Ethics Requirements and NRC Enforcement Policy on Licensee Integrity Issues to Agreement State Programs," the staff informed the Commission of an issue raised by Thomas B. Cochran, Ph.D., Director of the Nuclear Program of the Natural Resources Defense Council (NRDC), in a 10 CFR 2.206 petition dated December 12, 1997. The NRDC 2.206 petition, concerning issues associated with Envirocare of Utah, Inc., identified a question of whether NRC's employee protection regulations should be made a matter of Agreement State compatibility. In a June 12, 1998 staff requirements memorandum (SRM) on SECY-98-068, the Commission directed the staff to survey and discuss the issue with the Agreement States and appropriate organizations and provide an opportunity for public comment of the issue.

DS14 1/1

Contact: Spiros Droggitis, OSP
301-415-2367

L-4-1 PT 50.7
X-L-4-2 States
X 09 M-6 COMMS

The staff requested Agreement State comments on the appropriate compatibility category of NRC employee protection rules (10 CFR 30.7, 40.7, 61.9, 70.7) in a letter to the Agreement States dated July 2, 1998. The Agreement States were informed that currently NRC employee protection requirements are assigned a compatibility category D designation, i.e., the regulations are not required for compatibility purposes. The staff requested Agreement State comments on the proper compatibility category designation for this rule and also whether this rule should be adopted to assure public health and safety. The Agreement States were also informed that the staff intended to discuss this issue with them at the All Agreement States meeting on October 29-31, 1998 in Bedford, New Hampshire. In addition, the staff published a notice in the Federal Register on July 28, 1998 requesting public comment as to whether Agreement States should adopt the equivalent of 10 CFR 30.7, 40.7, 61.9, and 70.7 in accordance with NRC's Policy Statement on Adequacy and Compatibility of Agreement State Programs, and if so, under which compatibility category.

DISCUSSION:

On October 24, 1992, President Bush signed into law the Energy Policy Act of 1992. Section 2902, "Employee Protection for Nuclear Whistleblowers," included provisions amending Section 210 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. 5851.[1] Section 211 of the ERA prohibits any employer, including an NRC or Agreement State licensee, license applicant or a contractor or subcontractor of an NRC or Agreement State licensee or applicant, from discriminating against any employee with respect to his or her compensation, terms, conditions or privileges of employment because the employee assisted or participated, or is about to assist or participate in any manner in any action to carry out the purposes of either the ERA or the Atomic Energy Act of 1954 (AEA), as amended, 42 U.S.C. 2011 *et seq.* Under Section 211 of the ERA, the U.S. Department of Labor (DOL) has the responsibility to investigate employee complaints of discrimination for the purpose of providing a personal remedy and may, after an investigation or hearing, order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her former position with back pay, and award compensatory damages, including attorney fees. DOL issued final regulations (63 FR 6614, February 9, 1998) which govern the employee protection provisions of Section 211 of the ERA, as amended. The rule establishes separate procedures and time frames for the handling of ERA complaints and transfers the responsibility for administration of these statutes from the Administrator of the Wage and Hour Division to the Assistant Secretary for Occupational Safety and Health. The amended regulations also revise the definition of "employer" to extend coverage to employees of Agreement State licensees under Section 274 of the AEA, applicants for such licenses, and their contractors and subcontractors. In addition, the rule requires that the ERA whistleblower provisions be prominently posted in any place of employment to which the Act applies.

NRC, although without authority to provide a personal remedy to an employee, has independent authority under the AEA to take appropriate enforcement action against Commission applicants and licensees and their contractors and subcontractors who violate the AEA or Commission requirements which prohibit discrimination against employees based on their engaging in protected activities. NRC amended its regulations on November 11, 1993 to conform to the

---

[1] Section 210 was renumbered Section 211 by P.L. 102-486 (106 Stat 3123); October 24, 1992.

nuclear whistleblower protection provisions of the ERA. These provisions are reflected in 10 CFR 19.20, 30.7, 40.7, 61.9 and 70.7 for materials licensees (and in 10 CFR 50.7 for reactor licensees). Currently, these NRC employee protection requirements that relate to Agreement States are compatibility category D, not required for purposes of compatibility. As such, Agreement States have not adopted these provisions as a matter of Agreement State compatibility.[2] The question becomes whether Agreement States should have independent authority to take appropriate enforcement action against Agreement State licensees and applicants, or their contractors and subcontractors, who discriminate against employees based on their engaging in protected activities.

Two comment letters were received in response to NRC's request for comments. The first letter was received from Marvin Cohen, M.D., President of the California Chapter of the American College of Nuclear Physicians. The second letter was from Thomas W. Ortciger, Director of the Illinois Department of Nuclear Safety. Both letters opposed changing the compatibility category and recommended that NRC's employee protection regulations remain designated category D. Dr. Cohen's comments appeared to confuse NRC's employee protection regulations with radiation protection of workers and argued not to impose Federal radiation protection requirements for workers over existing State radiation protection requirements. Dr. Cohen stated that any compatibility category other than D is legally inappropriate, unnecessary, and expensive to implement. Mr. Ortciger stated that there was no justification for the extra expense for both the NRC and the Agreement States to revise the compatibility category to a C designation, i.e., an Agreement State should be allowed the discretion to promulgate a regulation, or other legally binding requirement, that achieves the same essential objectives as NRC's regulations.

The issue of the proper compatibility category for NRC employee protection requirements was discussed at the All Agreement States meeting on October 30, 1998. There was a recognition that the Federal statute provides a remedy through the DOL and that this requirement is necessary for protection of public health and safety. Another view expressed by an Agreement State official was that if Agreement States adopted a certain section of the Conference of Radiation Control Program Directors, Inc. (CRCPD) *Suggested State Regulations for Control of Radiation (SSR),* they should be considered compatible with NRC's regulations.

As mentioned above, NRC's employee protection requirements that relate to Agreement States (i.e., 10 CFR 19.20, 30.7, 40.7, 61.9 and 70.7) are currently designated as compatibility category D. Certain posting and other notification to worker requirements (10 CFR Part 19.11, 19.12, 19.13, 19.14, 19.15, 19.16, 19.17) are designated compatibility category C. The recently promulgated DOL regulations require Agreement State licensees to post information regarding the employee protection provisions of the ERA. As such, while Agreement States are not required to have employee protection regulations which provide for direct regulatory action by the State against the licensee, individual Agreement State employees have a remedy for discrimination under Section 211 and the associated DOL regulations.

Subsequent to the All Agreement States meeting, each Agreement State was surveyed to determine if the State had employee protection requirements similar to NRC's employee

---

[2]Some States have enacted laws to protect whistleblowers. These statutes establish a process for remedy at the State level.

protection requirements. In addition, the Agreement States were asked whether their equivalent to NRC's Form 3, Notice to Employees, included information which advises workers of their employee protection rights.

The results of the survey of the Agreement States indicate that none have adopted regulations similar to 10 CFR 19.20, 30.7, 40.7, 61.9 and 70.7. However, most of the Agreement States have adopted a provision from Part J, "Notices, Instructions, and Reports to Workers; Inspections" of the CRCPD *SSR* which contains a provision equivalent to the 1991 version of NRC's employee protection provision at 10 CFR 19.20. This provision prohibits licensees, registrants, or contractors or subcontractors of a licensee or registrant from discharging or discriminating against any worker because that worker filed any complaint or instituted or caused to be instituted any proceeding, or testified or was about to testify in any proceeding concerning information associated with radiation worker conditions. Nevertheless, this provision does not cover the complete scope of licensed activities nor does it include the more detailed provisions in 10 CFR 30.7, 40.7, 61.9 or 70.7, which further define protected activities and provide a process for remedy at the Federal level.

The staff believes that Agreement States should adopt NRC's substantive employee protection provisions to ensure that all States have the authority to take direct action against licensees who discriminate against employees who engage in protected activities. The lack of such provisions in some States threatens to jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis in accordance with the Commission's Policy Statement on Adequacy and Compatibility of Agreement State Programs (62 FR 46523, September 3, 1997). In the staff's view, the fact that a remedy exists for individual employees in some States does not go far enough in creating a national regulatory framework for ensuring that licensees are subject to direct regulatory action by the appropriate radiation safety agency when discrimination occurs.

Given this position, the staff believes that 10 CFR 19.20, 30.7, 40.7, 61.9 and 70.7 should be designated a compatibility category C program element whose essential objectives should be adopted by the State to avoid this gap. Under compatibility category C, the manner in which the essential objectives are addressed need not be the same as NRC provided the essential objectives are met. The Agreement States would have three years to satisfy this designation either in statutes, regulations or another form of legally binding requirement.

The staff also learned during the survey of the Agreement States that although posting of notices to workers is categorized as compatibility C (a program element whose essential objectives should be adopted by the State to avoid conflicts, duplications or gaps), most Agreement States do not include the more detailed employee protection information on the State form which appears on NRC Form 3 - Notice to Employees. NRC Form 3 was modified after the enactment of Section 211 of the ERA to include information which notifies employees of the provisions of Section 211 of the ERA and the process they are to follow if they believe that they have been discriminated against for bringing violations or safety concerns to the NRC or their employer. The results of the survey conducted by the staff indicate that the State of Colorado's equivalent Notice to Employees includes information on employee protection which references Section 211 of the ERA and informs employees of remedies through DOL. The other Agreement States' Notices to Employees do not include such detailed information.

As mentioned above, the recently adopted DOL regulations require every employer to prominently post and keep posted in any place of employment to which the employee protection provisions apply a fully legible copy of "Your Rights Under the Energy Reorganization Act" prepared by the Occupational Safety and Health Administration (OSHA), attachment to this paper, or a notice approved by the Assistant Secretary for Occupational Safety and Health that contains substantially the same provisions and explains the employee protection provisions. The staff believes that Agreement States and their licensees may not be fully aware of this requirement. As such, the staff intends to inform all Agreement States of this requirement and to request that Agreement States either require their licensees to post the OSHA form or modify their "Notice to Employees" form, in coordination with OSHA, to include the additional employee protection information.

COORDINATION:

The Office of the General Counsel has reviewed this Commission paper and has no legal objection.

CONCLUSION:

To summarize, in order to address the issue of employee protection in Agreement States, this is to inform the Commission that the staff intends to: 1) designate 10 CFR 19.20, 30.7, 40.7, 61.9 and 70.7 as compatibility category C, and 2) to notify the Agreement States of the OSHA form "Your Rights Under the Energy Reorganization Act" posting requirement.

William D. Travers
Executive Director
for Operations

Attachment:
As stated

DISTRIBUTION:
Commissioners
OGC
OCAA
OIG
OPA
OCA
CIO
CFO
EDO
REGIONS
SECY

Appendix A to Part 24—Your Rights Under the Energy Reorganization Act

YOUR RIGHTS UNDER THE ERA

THE ENERGY REORGANIZATION ACT (ERA), MAKES IT ILLEGAL FOR AN EMPLOYER COVERED BY THE ACT – INCLUDING A LICENSEE OF THE NUCLEAR REGULATORY COMMISSION (NRC) OR AN AGREEMENT STATE, AN APPLICANT FOR A LICENSE, A CONTRACTOR OR SUBCONTRACTOR OF A LICENSEE OR APPLICANT AND A CONTRACTOR OR SUBCONTRACTOR OF THE DEPARTMENT OF ENERGY (DOE) UNDER THE ATOMIC ENERGY ACT (AEA) – TO DISCHARGE OR OTHERWISE DISCRIMINATE AGAINST AN EMPLOYEE IN TERMS OF COMPENSATION, CONDITIONS OR PRIVILEGES OF EMPLOYMENT BECAUSE THE EMPLOYEE OR ANY PERSON ACTING AT AN EMPLOYEE'S REQUEST PERFORMS A PROTECTED ACTIVITY.

RIGHT TO RAISE A SAFETY CONCERN: YOU ARE ENGAGED IN PROTECTED ACTIVITY WHEN YOU:
(1) NOTIFY YOUR EMPLOYER OF AN ALLEGED VIOLATION OF THE ERA OR THE AEA;
(2) REFUSE TO ENGAGE IN ANY PRACTICE MADE UNLAWFUL BY THE ERA OR THE AEA, IF YOU HAVE IDENTIFIED THE ALLEGED ILLEGALITY TO THE EMPLOYER;
(3) TESTIFY BEFORE CONGRESS OR AT ANY FEDERAL OR STATE PROCEEDING REGARDING ANY PROVISION OR PROPOSED PROVISION OF THE ERA OR THE AEA;
(4) COMMENCE OR CAUSE TO BE COMMENCED A PROCEEDING UNDER THE ERA, OR A PROCEEDING FOR THE ADMINISTRATION OR ENFORCEMENT OF ANY REQUIREMENT IMPOSED UNDER THE ERA;
(5) TESTIFY OR ARE ABOUT TO TESTIFY IN ANY SUCH PROCEEDING; OR
(6) ASSIST OR PARTICIPATE IN SUCH A PROCEEDING OR IN ANY OTHER ACTION TO CARRY OUT THE PURPOSES OF THE ERA OR THE AEA.

UNLAWFUL ACTS BY EMPLOYERS: IT IS UNLAWFUL FOR AN EMPLOYER TO INTIMIDATE, THREATEN, RESTRAIN, COERCE, BLACKLIST, DISCHARGE OR IN ANY OTHER MANNER DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE THE EMPLOYEE HAS ENGAGED IN PROTECTED ACTIVITY.

COMPLAINT: AN EMPLOYEE OR EMPLOYEE REPRESENTATIVE MAY FILE A COMPLAINT CHARGING DISCRIMINATION IN VIOLATION OF THE ERA WITHIN 180 DAYS OF THE DISCRIMINATORY ACTION. A COMPLAINT MUST BE IN WRITING AND SHOULD INCLUDE A FULL STATEMENT OF FACTS, INCLUDING THE PROTECTED ACTIVITY ENGAGED IN BY THE EMPLOYEE, KNOWLEDGE BY THE EMPLOYER OF THE PROTECTED ACTIVITY, AND THE BASIS FOR BELIEVING THAT THE ACTIVITY RESULTED IN DISCRIMINATION AGAINST THE EMPLOYEE BY THE EMPLOYER. A COMPLAINT MAY BE FILED IN PERSON OR BY MAIL AT THE NEAREST LOCAL OFFICE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA), U.S. GOVERNMENT, DEPARTMENT OF LABOR, OR WITH THE OFFICE OF THE ASSISTANT SECRETARY, OSHA, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C. 20210.

ENFORCEMENT: OSHA WILL REVIEW THE COMPLAINT TO ENSURE THAT IT MAKES AN INITIAL SHOWING OF DISCRIMINATION. IF NOT, OR IF THE EMPLOYER PROVIDES CLEAR AND CONVINCING EVIDENCE THAT THERE WAS NO DISCRIMINATION, THERE WILL BE NO INVESTIGATION. IF THE REQUIRED SHOWING IS MADE, OSHA WILL NOTIFY THE EMPLOYER AND CONDUCT AN INVESTIGATION TO DETERMINE WHETHER A VIOLATION HAS OCCURRED. EITHER THE EMPLOYEE OR THE EMPLOYER MAY REQUEST A HEARING BEFORE AN ALJ.

RELIEF: IF DISCRIMINATION IS FOUND, THE EMPLOYER WILL BE REQUIRED TO PROVIDE APPROPRIATE RELIEF, INCLUDING REINSTATEMENT (EVEN FOR THE PERIOD BETWEEN THE ALJ DECISION AND APPEAL), BACK WAGES OR COMPENSATION FOR INJURY SUFFERED FROM THE DISCRIMINATION, AND ATTORNEY'S FEES AND COSTS.

CAUTION: THE PRECEDING PROTECTIONS AND REMEDIES ARE NOT AVAILABLE TO EMPLOYEES WHO ENGAGE IN DELIBERATE VIOLATIONS OF THE ERA OR THE AEA.

FOR ADDITIONAL INFORMATION: CONTACT THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. GOVERNMENT, DEPARTMENT OF LABOR (LISTED IN TELEPHONE DIRECTORIES), OR SEE THE DEPARTMENT OF LABOR'S WEB SITE AT: WWW.OSHA.GOV

EMPLOYERS ARE REQUIRED TO DISPLAY THIS POSTER WHERE EMPLOYEES CAN READILY SEE IT.

[FR Doc. 98-2922 Filed 2-6-98; 8:45 am]
BILLING CODE 4510-26-P