

# 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

## Proposed Rulemaking Plan

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

#### REGULATORY PROBLEM

The NRC'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 of a Commission licensee or applicant, 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. These regulations provide for certain enforcement actions for violation of these requirements. These 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>1</sup> While the enforcement actions specify imposition of a civil penalty on the licensee or applicant, they do not specify imposition of a civil penalty on a contractor or subcontractor. Since the activities of these non-licensees can clearly affect the safe operation of a licensee's facility, it is important that these non-licensees abide by NRC's employee protection regulations. Because prohibition of discrimination against employees for engaging in certain protected activities applies directly to contractors and subcontractors of licensees, NRC should be able to bring the full scope of enforcement actions to bear on contractors and subcontractors who violate its employee protection regulations.<sup>2</sup>

The Commission, in its Staff Requirements Memorandum (SRM) on SECY-97-281, dated January 15, 1998, directed the staff to consider and propose modification to NRC's employee protection regulations to allow imposition of civil penalties on contractors and subcontractors for discriminating against employees who have engaged in protected activities. The staff deferred acting 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.

On April 14, 2000, the Executive Director for Operations chartered a Discrimination Task Group (DTG) to evaluate the NRC's handling of discrimination cases. The DTG's report, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," was forwarded to the Commission as an attachment to SECY-02-0166, dated September 12, 2002. Among other recommendations, the DTG recommended that rulemaking be initiated to allow the NRC to impose civil penalties on contractors working for NRC licensees.

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<sup>1</sup>10 CFR 76.7 currently does not specify the availability of civil penalties as an enforcement action. As part of this Rulemaking Plan, the staff will amend 10 CFR 76.7 to bring it into conformance with the other employee protection regulations.

<sup>2</sup>As noted in the OGC Analysis section of this Rulemaking Plan, these amendments do not diminish the focus on licensee responsibility to comply with NRC employee protection regulations, e.g., there may be instances in which the NRC may wish to issue civil penalties to both the responsible contractor and licensee for employee protection violations involving both licensee and contractor culpability.

On March 26, 2003, the Commission issued an SRM on 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 civil penalties against contractors.

The staff is now initiating this rulemaking in response to the Commission's direction in its SRMs on SECY-97-281 and SECY-02-0166.

### EXISTING REGULATORY FRAMEWORK

10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 72.10, and 76.7 set out NRC's employee protection requirements.<sup>3</sup> The following provides a brief outline of sections (a) through (f) of 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 72.10, and 76.7. Paragraph (a) prohibits a Commission licensee, applicant, contractor or subcontractor of a licensee or applicant, (72.10 also includes a holder of, or applicant for, a CoC and in 76.7, the Corporation), from discriminating against employees for engaging in protected activities and defines the protected activities. Paragraph (b) explains that employees have a personal remedy for such discrimination through the Department of Labor (DOL). Paragraph (c) states that discrimination may be grounds for denial, revocation, or suspension of the license (72.10 also includes denial, revocation, or suspension of the CoC and 76.7 includes suspension of the certificate), imposition of a civil penalty<sup>4</sup> on the licensee or applicant, or other enforcement action. Paragraph (d) explains that adverse actions may also be legitimately taken by an employer. Paragraph (e) mandates posting of NRC Form 3. Paragraph (f) prohibits agreements affecting the compensation, terms, conditions, or privileges of employment.

These 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. However, while paragraph (a) prohibits discrimination by a contractor or subcontractor, paragraph (c) does not explicitly provide for the 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. The Supplementary Information that accompanied the promulgation of 10 CFR 76.7 does not indicate that this omission was intentional; in fact, there is an indication that the intent was that the provisions of this section should be the same as the provisions of the other employee protection regulations.

### CONCLUSION

The proposed rule change will enhance the regulatory process by allowing the Commission to exercise its authority to impose a significant enforcement action, i.e., civil penalty, directly on contractors or subcontractors who violate the NRC's employee protection regulations.

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<sup>3</sup>10 CFR 19.20 and 150.20 also contain or make reference to employee protection regulations. However, 10 CFR 19.20 and 150.20 will not be amended as part of this proposed rulemaking and are not discussed further in this Rulemaking Plan.

<sup>4</sup>10 CFR 76.7(c) currently does not specify the availability of civil penalties as an enforcement action.

## HOW THE PROPOSED RULEMAKING WILL RESOLVE THE REGULATORY PROBLEM

10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 63.9, 70.7, 72.10, and 76.7 will be amended to provide that, in addition to imposing a civil penalty against a Commission licensee or applicant for a Commission license or a holder of or applicant for a CoC, the Commission may impose a civil penalty against a contractor or subcontractor of any of these entities for discriminating against an employee for engaging in protected activities. In addition, 10 CFR 76.7 will be further amended to specify the availability of civil penalties as an enforcement action.

## OGC ANALYSIS

The Office of General Counsel (OGC) has reviewed the draft rulemaking plan proposing to amend NRC'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. The purpose of the rulemaking is to enable the Commission to impose civil penalties upon non-licensee contractors and subcontractors engaged in licensed activities who violate provisions of these regulations. The staff believes that this rulemaking is necessary because, while the employee protection regulations prohibit such discrimination by a Commission licensee, applicant, or contractor or subcontractor of a licensee, paragraph (c)(2) of these regulations provides that a violation of certain sections of these regulations may be grounds for imposition of a civil penalty on the licensee or applicant but does not provide that such a violation may also be grounds for imposition of a civil penalty on a contractor or subcontractor.

After review of the Atomic Energy Act of 1954 as amended (AEA), we conclude that Sections 161 and 234 provide the Commission with sufficient authority to impose civil penalties against non-licensee contractors and subcontractors. Accordingly, there appears to be no statutory impediment to amending the employee protection regulations to incorporate a civil penalty feature against contractors and subcontractors. However, we believe that there is a policy issue that should be considered in amending these regulations. Specifically, the supplementary information should clarify that the amendments do not diminish the focus on licensee responsibility in the investigative and enforcement process. 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 proposed rule will require the preparation of an environmental assessment, as it appears that there are no categorical exclusions in 10 CFR 51.22(c) which would apply to this rulemaking. The proposed rule is not subject to the backfit considerations of 10 CFR 50.109; therefore, a backfit analysis is not required.

The determination of whether the rule is a major rule (having an impact of over \$100 million) under the Small Business Regulatory Enforcement Fairness Act of 1996 will be made during the development of the regulatory analysis prepared for the proposed rule. If the rule is not a major rule, then the mandated 60-day period before a major rule becomes effective is not applicable.

The proposed rule contains no information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et. seq.)

AGREEMENT STATE IMPLEMENTATION ISSUES

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" which became effective on September 3, 1997 (62 FR 46517), NRC program elements (including regulations) are placed into compatibility categories. In addition, NRC program elements also are identified as having particular health and safety (H&S) significance or as being reserved solely to the NRC. Compatibility Category A includes program elements that are basic radiation protection standards or related definitions, signs, labels or terms necessary for a common understanding of radiation protection principles and should be essentially identical to those of NRC. Compatibility Category B includes program elements that have significant direct transboundary implications and should be essentially identical to those of the NRC. Compatibility Category C are those program elements that do not meet the criteria of Category A or B, but the essential objectives of which an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis. An Agreement State should adopt the essential objectives of the Compatibility Category C program elements. Compatibility Category D are those program elements that do not meet any of the criteria of Category A, B, or C, and do not need to be adopted by Agreement States. Category H&S are program elements that are not required for compatibility, but have a particular health and safety role in the regulation of agreement material. The State should adopt program elements in the H&S category in a manner that embodies the essential objectives of the NRC program elements. Compatibility Category NRC are those program elements that address areas of regulation that cannot be relinquished to Agreement States pursuant to the Atomic Energy Act, as amended, or provisions of Title 10 of the Code of Federal Regulations. These program elements should not be adopted by Agreement States.

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, 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.

#### MAJOR RULE

The determination of whether this is a major rule (having an impact of over \$100 million) under the Small Business Regulatory Enforcement Fairness Act of 1996 will be made during the development of the regulatory analysis prepared for this proposed rule.

#### SUPPORTING DOCUMENTS

This rulemaking would require a regulatory analysis that would estimate the cost impacts on both the NRC and licensees for changes to NRC's employee protection regulations. The information provided in the regulatory analysis concerning the impact on small entities would be

sufficient to support a regulatory flexibility analysis or certification that the proposed rule would not have a significant economic impact on a substantial number of small entities.

An environmental assessment and finding of no significant impact would be needed to show that the revised requirements would not result in a significant adverse impact to public health and safety and the environment.

The proposed rule is not subject to the backfit considerations of 10 CFR 50.109; therefore, a backfit analysis is not required.

In addition, changes will be necessary to NUREG-1600, "General Statement of Policy and Procedures for NRC Enforcement Actions," the NRC Enforcement Manual, and possibly to NRC Form 3.

## 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 2 years. This estimate is based on the rulemaking being completed in FY 2006. OE will accomplish this rulemaking within the existing OE budget by giving it priority over certain other OE work activities.

## STAFFING

### Staff Level Working Group

OE:	Doug Starkey (Staff Lead)
ADM:	Cindy Bladey
NMSS:	James Firth
NRR:	Stewart Schneider
OGC:	Susan Chidakel
STP:	Cardelia Maupin

### Concurring Official

Frank Congel
Michael Lesar
Jack Strosnider
James Dyer
Stuart Treby
Paul Lohaus

## STEERING GROUP

This rulemaking will not use a Steering Group.

## PUBLIC PARTICIPATION

Rulemaking documents will be placed on the NRC's rulemaking web site to enhance public dialogue. The NRC rulemaking web site allows users to review NRC documents, submit comments on the documents, and review comments and questions submitted by others. The rulemaking plan, the proposed rule and associated guidance documents, and the draft final rule and associated guidance documents would all be placed on NRC's rulemaking web site.

To facilitate Agreement State and non-Agreement State review of the rulemaking plan, the Agreement States will be notified of the availability of the plan on the Technical Conference Forum and all States will be able to review the plan on the NRC's web site. Agreement and non-Agreement State comments will be solicited and considered in the development of the final plan. States will be given 45 days to comment.

The staff also plans to have a public meeting(s) on this rulemaking initiative after receiving Commission direction on this plan.

EDO OR COMMISSION ISSUANCE

The staff believes this rulemaking involves a significant change in policy and therefore recommends that the Commission issue the proposed and final rule.

SCHEDULE

Rulemaking package to the Commission requesting approval of rulemaking plan	October 2004
Proposed rule to the Commission	12 months after approval of rulemaking plan
Public Comment Period	75 days
Public Meetings	During public comment period
Final rule to the Commission	10 months after public comment period closes