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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

IN THE MATTER OF	)	Docket Nos. 50-390-CivP;
	)	50-327-CivP; 50-328-CivP;
TENNESSEE VALLEY AUTHORITY	)	50-259-CivP; 50-260-CivP;
	)	50-296-CivP
	)	
(Watts Bar Nuclear Plant, Unit 1;	)	
Sequoyah Nuclear Plant, Units 1 &	)	
2; Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2 & 3)	)	

TENNESSEE VALLEY AUTHORITY'S INITIAL BRIEF

October 2, 2003

Maureen H. Dunn
General Counsel

Thomas F. Fine
Assistant General Counsel

Brent R. Marquand
Senior Litigation Attorney

Of Counsel:
David A. Repka, Esq.
Winston & Strawn
1400 L Street, NW
Washington, D.C. 20005

John E. Slater
Senior Litigation Attorney

Office of the General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone 865-632-4251
Facsimile 865-632-6718

Attorneys for TVA

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STATEMENT OF THE CASE

A. The Proceedings Below

This proceeding arises out of a February 7, 2000, Notice of Violation (NOV) issued by the NRC Staff against the Tennessee Valley Authority (TVA) for allegedly violating 10 C.F.R. § 50.7 (2003).[1] The NOV was premised on the Staff's finding that TVA discriminated against Gary L. Fiser when it did not select him for a position in 1996 for having engaged in protected activities some three years earlier. According to the NOV, those protected activities were the filing of a 1993 complaint with the Department of Labor (DOL) and "his identification" of various chemistry issues "in the 1991 to 1993 time frame."[2] The Staff subsequently issued a May 4, 2001, order imposing a civil monetary penalty of $110,000. TVA then requested an evidentiary hearing before an Atomic Safety and Licensing Board (Board). After TVA and the

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1 Section 50.7(a) prohibits "[d]iscrimination by a Commission licensee . . . against an employee for engaging in certain protected activities." Section 50.7 and the history of the regulation are reproduced in Addendum A.

2 The complaint was filed under Section 211 of the Energy Reorganization Act of 1978 (ERA), 42 U.S.C. § 5851 (2000), which prohibits an NRC-licensed employer from discriminating against an employee for engaging in certain defined protected activities. Section 211 is reproduced in Addendum B.

Staff engaged in extensive discovery, an evidentiary hearing was held before the Board over 25 days from April 23 through September 13, 2002. On June 26, 2003, the Board issued an Initial Decision (ID) in which two members found that TVA, based on the activities of Thomas J. McGrath and Wilson C. McArthur, had violated Section 50.7 "by failing to select Mr. Fiser for a continuing position during the 1996 reorganization" (ID 65).[3] The third member of the Board dissented on the grounds that (1) Fiser's participation in the resolution of certain safety issues was not protected activity; (2) that it was not shown that Fiser engaged in protected activity other than the filing of two DOL complaints and a letter to Senator Sasser; and (3) it was not proven by a preponderance of the evidence that any adverse action incurred by Fiser was taken because of any protected activity. TVA then petitioned the Commission for review. This brief is submitted in accordance with the August 28, 2003, Memorandum and Order granting TVA's petition for review. TVA concludes that the Board's Initial Decision is riddled with factual errors and is based on a deeply flawed legal analysis. As a result, the decision does a grave disservice to TVA and to the two named managers and sets an extremely poor precedent for future NRC investigations and enforcement cases.

B. Statement of the Facts

Fiser's job history. Fiser was hired into the TVA Nuclear (TVAN) organization in 1987. From April 1998 until 1993 his official position was Chemistry Superintendent at TVA's Sequoyah Nuclear Plant (SQN), although he received other temporary assignments (Tr. 991-93 (Fiser)).[4] The Staff's theory of the case, beginning with the NOV itself, and adopted by the Board, is that from 1989 to 1993, Fiser engaged in protected activities that created a retaliatory motive on the part of McGrath and McArthur to later cause them to orchestrate his nonselection for a position in 1996. This theory is not supported by the record. In fact, during

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3 TVA will cite to the hearing transcript as "Tr. __ (witness)"; TVA's Exhibits as "TVAX __"; Staff's Exhibits as "SX__"; Joint Exhibits as "JX __"; TVA's Proposed Findings and Conclusions as "TVA FoF ¶ __"; and Staff's Proposed Findings and Conclusions as "Staff FoF ¶ __."

4 Although Fiser's job title later changed (compare SX44 with JX31), we will refer to his position as Chemistry Superintendent.

this time Fiser engaged in no protected activities as that term is reasonably construed. His performance, and the performance of SQN Chemistry for which he was responsible, were frequently criticized for a lack of effectiveness in resolving concerns. During the hearing, Fiser variously claimed that he was not responsible for the problems with SQN Chemistry, that the ratings he received were unfair, and that his superiors never communicated their dissatisfaction to him. Regardless of the perception of unfairness, management believed that Fiser was not effective as the SQN Chemistry Superintendent.

The Board specifically noted that Fiser's performance evaluations included various criticisms (ID 19-22). In addition, the Institute of Nuclear Power Operations (INPO) found a number of longstanding problems and lack of management attention in SQN Chemistry (TVAX48 at AJ299-301, 303-04, 308-311). The SQN Nuclear Safety Review Board (NSRB) also found a number of problems with SQN Chemistry.[5] For example, in February 1992, the NSRB expressed its frustration over the length of time that issues with the post-accident sampling system (PASS) and unmonitored radioactive release paths, both of which had been identified by NSRB, had been open (Tr. 393, 677-78 (McGrath); JX4 at CC103, 105; JX1 at CC87-88; JX2 at CC90). In addition, TVAN's Quality Assurance and Corporate Chemistry organizations made a number of findings which led to the conclusion in 1991 that the sheer number of problems with SQN Chemistry "could impact plant chemistry control" (JX3 at CC93). Fiser's supervisor in 1991-92, Patrick Lydon, described the SQN "[C]hemistry program as unbelievably bad" with "all kinds of long-standing problems" (TVAX122 at 3).

In 1992, the problems with SQN Chemistry required the Plant Manager Robert J. Beecken to step in with a plan to improve chemistry (JX4 at CC101-102). According to Lydon, as a result of the problems, Joseph Bynum, the Vice President of Nuclear Operations, and Beecken directed that William Jocher, the Corporate Chemistry Manager, replace Fiser as the SQN Chemistry Superintendent (TVAX122 at 3). Beecken asked for a temporary one-year rotation between Fiser and Jocher, in which Fiser would serve as the Acting Corporate

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5 At the time McGrath was the Chairman of the SQN NSRB and McArthur was the Chairman of the NSRB, Radiological Control and Chemistry Subcommittee. Neither was in Fiser's management chain.

Chemistry Manager under McArthur's supervision (Tr. 1410 (McArthur), 4800 (Beecken)). Beecken was not aware that Fiser ever raised any nuclear safety concerns (Tr. 4804 (Beecken)).

The Board found that Fiser's removal as SQN Chemistry Superintendent "was motivated at least in part by Mr. McGrath's objections" (ID 21). This finding was in the teeth of Lydon's evidence and the categorical denials by both Beecken and McGrath (Tr. 918-19 (McGrath), 4829 (Beecken)). It "was not a function of the NSRB" to identify an individual who was at fault, but to instead focus on identifying technical issues and trends in programs (Tr. 4816-19 (Beecken), 1408 (McArthur)). The Board relied on one of Fiser's tape-recorded conversations in which McArthur said that McGrath had commented to him, during an NSRB meeting, that Fiser should not be in the Chemistry SQN Superintendent position (JX27 at 22).[6] That evidence does not support a finding that McGrath caused Fiser's removal from SQN or any finding of retaliatory motive. Moreover, the Board's specific citation to McArthur's statement to the effect that McGrath left a meeting to speak with Beecken (JX24 at 1) does not support the Board's finding. As Chairman of the NSRB, it was McGrath's responsibility to report the findings of the NSRB on the SQN Chemistry program to management (Tr. 386-88 (McGrath)).

The Board acknowledged that, when he was rotated to corporate, "Fiser was not uniformly successful in performing his corporate chemistry assignment" (ID 21). In November 1992 he was removed as the Acting Manager of Corporate Chemistry and reassigned as Acting Program Manager in Corporate Chemistry. The Board stated "[a]ccording to Mr. Fiser, the demotion was directed by Joe Bynum" (ID 23). At the direction of Dan Keuter, McArthur's supervisor, Fiser's September 1992 evaluation rated his performance as merely "adequate" and he was not given a performance increase or bonus (ID 22).

The Board noted (ID 21) that in late 1992 Fiser learned that Beecken and Jack Wilson, the SQN Vice-President, did not want him to return to SQN at the end of his one-year rotational assignment to Corporate Chemistry. However, the Board ignored that the reasons they gave were strictly performance-based (Tr. 4805 (Beecken)). Since Fiser tape-recorded

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6 The Board found that Fiser surreptitiously tape-recorded conversations with co-workers "[i]n support of his 1993 DOL complaint" (ID 27), and he transcribed parts of those tape-recordings into a document entitled "Sequence of Events" (JX27).

those 1992 conversations, their reasons for removing Fiser from SQN Chemistry and for not wanting him to return are not subject to reasonable dispute (JX27 at 35, 50-58). Both the Plant Manager and the Site Vice-President viewed SQN Chemistry as having longstanding problems and held Fiser responsible (*id.*). Neither man expressed any animosity toward Fiser for raising or identifying any issues. On the contrary, both were concerned about the failure to resolve longstanding issues (*id.*). Beecken specifically addressed many of the issues that Fiser later claimed as his own protected activities in his 1993 DOL complaint, and expressed dissatisfaction that they had not been identified and resolved sooner (*id.* at 50-58). Nowhere during the secretly-taped conversation did Beecken indicate that McArthur or McGrath told him to get rid of Fiser (JX27 at 50-58). Thus, rather than showing that McArthur or McGrath were beginning a campaign against Fiser for having engaged in protected activity, the record shows that Beecken and Wilson removed Fiser from SQN and did not allow him to return at the end of the rotational assignment based on their judgment of Fiser's performance problems.

In the spring of 1993, Fiser's position as SQN Chemistry Superintendent was eliminated in a reorganization when SQN Chemistry was combined with the Radiological Control group into a single Radiological and Chemistry Control (RadChem) organization managed by Charles Kent (Tr. 2999 (Kent); JX58). As part of that reorganization, the SQN Chemistry Superintendent position was eliminated (Tr. 3009 (Kent); JX58). At the time, Human Resource (HR) records showed that Fiser's official position was still SQN Chemistry Superintendent, because his stint in Corporate Chemistry had been a temporary rotational assignment (TVA FoF ¶ 3.33). Accordingly, when the position that Fiser officially held, SQN Chemistry Superintendent, was eliminated, he was assigned to TVA's Employee Transition Program (ETP) (JX59).[7] Months later, when Fiser was still assigned to ETP and had not found another TVA job, he received a RIF notice (JX60).

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7 Since TVA is a federal agency (16 U.S.C. §§ 831-831ee (2000)), an employee whose position is eliminated is subject to reduction in force (RIF) in accordance with Office of Personnel Management (OPM) regulations (5 C.F.R. pt. 351 (2003)). To mitigate the impact on an employee of a RIF, TVA adopted an interim step in which employees were assigned to ETP where they would draw a full salary while seeking other TVA jobs (Tr. 771-72 (McGrath); 5446-47 (Fogleman)).

Neither McGrath nor McArthur were responsible for the 1994 decision to reorganize SQN Chemistry, to eliminate the SQN Chemistry Superintendent position, or to RIF Fiser. McGrath was in Corporate TVAN in a different management chain. Further, McArthur pleaded with top management to stretch Corporate Chemistry's authorized headcount to establish a position in order to save a job for Fiser (Tr. 1429-31 (McArthur)). Shortly after making that plea, McArthur was out of the workplace for an extended period for cancer surgery and follow-up treatments (Tr. 1429, 1637 (McArthur)).[8] The record shows that the decision to RIF Fiser was made by Bynum and Keuter (JX24 at 3).

The Board points out (ID 23) that McArthur had offered to help Fiser find a job. The Board relies on Fiser's claim that McArthur "torpedoed" a job offer from Kent by telling Kent that corporate management did not think highly of Fiser's past performance (ID 23).[9] The Board criticizes McArthur for telling Kent of Fiser's past performance problems while he was the SQN Chemistry Superintendent and adopts the Staff's assertion that "McArthur would tell an employee one thing, and then do the opposite behind his back." The Board states that this incident "adversely affects Dr. McArthur's credibility as a witness" (ID 23-24). The Board's finding is grossly unreasonable. While McArthur had offered to help Fiser find a job, he did not tell Fiser that he would avoid the truth or recommend him for a job that was over his head. As the Corporate TVA manager with the responsibility to provide oversight of the SQN Chemistry program, McArthur had a duty not to mislead Kent about Fiser's past performance. Even the Staff recognized that "McArthur had the right to give a negative opinion regarding Fiser to Kent" (Staff FoF ¶ 2.199). This is particularly true since Kent solicited input from McArthur only after Fiser told Kent that upper management did not have confidence in him and that he should check into the Corporate organization's perception of Fiser's abilities (Tr. 3032, 3038-39 (Kent)).

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8 Since 1993, McArthur had recurrent cancer and further treatments. Despite his debilitated condition and the memory problems caused by his treatment (SX134 at 5, 11, 12-18), both the Staff and the Board persist in attacking him as being devious (ID 23-24; Staff FoF ¶ 2.199).

9 Not only did Kent consider Fiser for the newly-created Chemistry Manager position, he also considered him for the Technical Support Manager job in SQN Chemistry, which Fiser turned down (Tr. 2520-21 (Fiser)). That Kent favorably considered Fiser for jobs in 1993 negates any finding that Kent was biased against Fiser in the 1996 selection.

The letter to Senator Sasser. On August 16, 1993, Fiser and two other employees sent a letter to U.S. Senator James Sasser with copies to various NRC officials (SX29) complaining of various matters in TVAN (ID 24). There is no evidence Fiser sent a copy to anyone at TVA. The Board concludes that the letter constituted "protected activity" in which Fiser participated (ID 25). Senator Sasser forwarded the August 16 letter to TVA's Inspector General who, in turn, forwarded a copy to TVAN's Chief Nuclear Officer (CNO). However, the Staff offered no evidence that the letter was brought to the attention of McGrath or McArthur (SX30 at 2, 3). Indeed, McGrath and McArthur were not aware of Fiser's involvement in sending the letter and did not even see the letter before preparing for their depositions in this proceeding (Tr. 415-16 (McGrath), 1445-46 (McArthur)). However, the Board concludes that McGrath must have known of the letter because it contains an allegation that one of the other employees "'identified to NSRB a material false statement made to NRC'" (ID 26). The Board further states that McGrath's denial of knowing of the letter and the material false statement allegation "reflects adversely on his credibility" (ID 26). There is no evidence that McGrath saw the letter and no evidence that the "material false statement" allegation was called to his attention. Further, TVAN's Concerns Resolution Staff, not the NSRB, was responsible for identifying the technical issues in the letter to Senator Sasser and did not identify any issue about a "material false statement" (SX31). Given that the Staff had full discovery of TVA's records on the letter to Senator Sasser, and presented no evidence that an allegation of a "material false statement" was brought to the attention of the NSRB or McGrath, it was entirely suppositional for the Board to make such a conclusion. See *Prebilich-Holland v. Gaylord Entertainment Co.*, 297 F. 3d 438, 443-44 (6th Cir. 2002) (employee must prove alleged discriminating official had "actual knowledge" of plaintiff's protected status). Moreover, the Board fails to point to any evidence that McGrath or McArthur harbored a retaliatory animus towards Fiser for his involvement in the letter to Senator Sasser. As Judge Young pointed out, "it was not proven that Fiser himself was involved" with the letter ***"other than by signing the letter"*** (ID 75; emphasis in original). Since he signed the letter "only *after* he had been given 'surplus' and 'RIF' notices," it gives rise to a "reasonable inference" that he did so "only in order to better his chances of regaining his job" (*id.*)

1993 DOL Complaint. After receiving his RIF notice, but before its effective date, Fiser filed a September 23, 1993, complaint with DOL alleging a violation of Section 211 of the ERA (the complaint, together with its attachments, is Exhibit 2 to SX177). The investigation by the NRC's Office of Investigations (OI) of the complaint found "no evidence of misconduct on the part of TVA management," that the evidence did "not support Fiser's assertion that actions were taken against him due to his raising concerns," and that "there was not sufficient evidence developed during this investigation to substantiate the allegation of discrimination for reporting safety concerns" (SX177 at 1, SX177 at Ex. 17, p. 17). Fiser did not discover, raise, report or document any of the underlying safety matters discussed in his 1993 DOL complaint (ID 35-44). When NRC's Regional Counsel reviewed Fiser's "Sequence of Events" (JX27), which he claimed "provides all of the details of his complaints" (SX177 at Ex. 18), she advised that it did not disclose the pursuit of "an underlying safety issue," did not show that his "demotion and RIF were a consequence of his having engaged in 'protected activity,'" and that it "reflect[s] that there were performance based issues with Mr. Fiser nothing more" (SX177 at ex. 20).

TVA and Fiser settled his 1993 DOL complaint whereby Fiser's RIF was canceled and TVA placed him in a lower-level position in Corporate Chemistry, a Chemistry Program Manager position (ID 27-28). The settlement agreement did not guarantee Fiser continued employment or the continued existence of that position (SX166 at 1-2). As a result of the settlement, McArthur continued to be Fiser's second-level supervisor (ID 27).

The 1994 Reorganization. In the summer of 1994, the Corporate Chemistry and Environmental organizations were combined (ID 28). The position that Fiser held as a result of his April 1994 settlement was eliminated and four new Chemistry and Environmental Program Manager positions were advertised (*id.*). At the time his position was eliminated, Fiser was informed that if he was not selected for a new position, he would be reassigned to TVA's Services organization (the successor to ETP) (*id.*). The selections for the new positions were conducted in accordance with TVAN's written procedure governing selections (JX63). That procedure provides for a vacant job to be advertised by posting a vacant position announcement (VPA) and the establishment of a selection review board (SRB) to interview the

qualified applicants from a list of job-related questions (JX63 at 1; Tr. 5256 (Rogers)). The composition of the SRB is usually three to four persons chosen by the selecting manager and may include peers, customers, supervisors, and subject matter experts (Tr. 2858 (Corey), 1752-53 (Cox), 5256 (Rogers)). Because prospective SRB members have other primary job responsibilities and busy schedules, there are no hard and fast rules on the composition of an SRB (*id.*). The same questions are asked of each candidate, and the SRB members score the candidates based only on their answers, without regard to any past experience (Tr. 1753 (Cox), 2859 (Corey), 525 (Rogers)). The SRB makes a recommendation based on the candidates' scores to the selecting manager (Tr. 2854 (Corey)). The selecting manager then selects the best qualified candidate for the vacant position (*id.*). If the selectee is not the person recommended by the SRB, the selecting manager must provide justification to Human Resources and upper management (Tr. 2962-63 (Corey)). In practice, selecting officials rarely, if ever, reject the recommendation of an SRB (Tr. 5467 (Fogleman)). As a result of the 1994 reorganization, Fiser was selected for one of the Chemistry and Environmental Protection Program Manager positions (SX43; Tr. 2303-04 (Fiser)).

The 1996 Reorganization. In October 1995, McGrath, who had never been in Fiser's management chain, began serving as the Acting General Manager of Nuclear Operations Support (NOS) in which the Corporate Chemistry organization was located (Tr. 429-30 (McGrath)). When McGrath came to NOS, planning for a 1996 TVAN reorganization had already begun (*id.* at 431-32). He received directions from TVAN's CNO to plan for the reorganization by looking at staffing and comparing staffing levels and the functions performed with the staffing and functions at other utilities (Tr. 433, 754 (McGrath)).

In 1996, all of TVAN was reorganized (ID 47-48). With the restart of both SQN units, the restart of two units at Browns Ferry (BFN), and the imminent startup of Watts Bar (WBN), the organization needed to focus on operations and not construction (*id.*). In addition, there was an effort to improve efficiency and to use industry information as a benchmark to become a more effective and competitive organization (*id.*). Finally, the reorganization was driven by targeted budget reductions, with a total reduction of 40 percent by fiscal year 2001 and a minimum reduction of 17 percent the first year (*id.* at 49).

As a result of the 1996 reorganization of TVAN, hundreds of positions were eliminated and many employees in those jobs were surplused or RIFed (TVAX 83-96, 109, 110). More than 30 positions were eliminated in NOS while 20 new positions were created (TVAX56, 55). As the Board found, "this reorganization was motivated by legitimate business reasons and was not *per se* intended to discriminate against any individual, including Mr. Fiser" (ID 48). Although the Board questioned the "details by which this reorganization was carried out," the Board did not make a finding that any given aspect of the reorganization of NOS was done in a manner so as to intentionally disadvantage Fiser (ID 48). For example, the Board found that staff reductions in NOS could have been spread over four years and that Grover proposed that Corporate Chemistry eliminate an already-vacant position with no actual staff reductions in Chemistry the first year (ID 31). Grover also proposed that Corporate Chemistry absorb its budget reductions by cutting out training and travel (Tr. 757-58 (McGrath)). The Board's finding overlooks that upper management had directed that NOS, like the rest of TVAN, be reorganized to realign the Corporate functions to support the sites and to cut staff (Tr. 433-34, 755 (McGrath). Certainly TVAN and NOS could have reorganized in any number of ways, and hypothetically could have made fewer staff reductions the first year. There was no evidence, and the Board did not find, that the staffing levels and organizational structure that were eventually determined were based on a motive to discriminate against Fiser. Absent evidence of a discriminatory motive, it was totally inappropriate for the Board to second-guess management decisions on staffing levels and organizational functions and then infer such motive.

While the reorganization was under discussion, Grover made some efforts to have Sam Harvey transferred to SQN Chemistry. McGrath, upon advice from HR, informed Grover that Harvey could not be "transferred" to SQN without using the competitive selection process (Tr. 828-30 (McGrath)). The Board found that McGrath "blocked Sam Harvey's direct transfer" from Corporate Chemistry to SQN Chemistry, "setting the stage" for Harvey to be selected instead of Fiser for the new position (ID 48-49). This finding is without evidentiary foundation. Under TVA HR rules, if SQN had a vacancy, it could advertise the job on a VPA, and if Harvey was the best qualified applicant, he could be selected (*id.* at 830). McGrath merely communicated HR's position that Harvey could not be transferred consistent

with TVA's written HR procedures (Tr. 830-31 (McGrath)). The Board's conclusion that McGrath "blocked" the transfer as part of a scheme to discriminate against Fiser presumes that McGrath could have disregarded TVA's HR procedures (*id.* at 828-30). No evidence suggests that the rules were disregarded such that other vacancies were filled by transfers rather than competitive selection.

As part of the reorganization of NOS, the environmental functions were removed from the Corporate Chemistry and Environmental organization which was then combined with the Corporate Radiological Control organization into a new Corporate RadChem organization (Tr. 453-56). All of the existing staff positions were eliminated and five new RadChem positions were created (*id.* at 455-56). Thus, the Chemistry and Environmental Protection Program Manager positions were eliminated while a PWR and a BWR Chemistry Program Manager position were created (*id.* at 453).

The Board also found that as part of the reorganization, "Mr. McGrath insisted upon rewriting the existing position descriptions to create new, non-interchangeable positions notwithstanding the virtually identical duties of the existing and new positions" (ID 51). That finding is unsupported by the record. McGrath did insist that position descriptions (PD) with specific duties and accountabilities be written for all of NOS to ensure that the organization was properly aligned to support the site functions (Tr. 466, 471 (McGrath)). He did not insist that the new PDs be "non-interchangeable" with the existing position and he was not involved in writing or even reviewing any of the new PDs (*id.* at 474). In fact, Fiser drafted the new PWR Chemistry Program Manager PD (Tr. 2332, 2767 (Fiser)). Nor did McGrath make the decision whether the new PDs were interchangeable with the existing descriptions. That determination was made by HR in accordance with its own written procedures.[10]

Fiser was not subject to disparate treatment. The Board misunderstood TVA's and OPM's procedures for determining if positions are interchangeable (ID 51, n.29).

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10 If a new PD is interchangeable with an existing PD, the two jobs are on the same competitive level and the incumbent has a right to the new position (SX135 (Boyles) at 32-33). If the PDs are not interchangeable, it is TVA policy to post a VPA to advertise the new, vacant position for competition (*id.*). It is the exclusive province of HR to determine if a new PD and an existing PD are on the same competitive level by determining interchangeability (*id.* at 32; Tr. 5414-15 (Fogleman)).

With respect to the Chemistry and Environmental Protection Program Manager jobs, the Board, citing Grover's testimony, found that the "environmental responsibilities [that were not included in the new PDs] amounted to less than 5% of the duties of the position" (ID 51 at n.29). The Board uses this to suggest that the position did not need to be competed.

The Board's finding reflects a misunderstanding of the procedures. Grover, the Manager of Corporate Chemistry, repeatedly disclaimed any expertise in or responsibility for the application of TVA's HR policies (Tr. 2100-01, 2117, 2121-22 (Grover)). On the other hand, HR officials testified that a determination of interchangeability must be made by comparing the written PDs without resort to the personal qualifications or the performance level of the incumbents (TVA FoF ¶¶ 7.2-.3; 2.17-.18) TVA's written instructions are explicit that the determination is made by comparing only the official PDs and may not be based on the performance levels of individual employees (JX65 at 14-15). When HR compared the existing PDs with the new PDs, it found that they were not interchangeable and therefore that the new PDs should be advertised (SX135 (Boyles) at 32-33; Tr. 5414-15 (Fogleman)). Neither McGrath nor McArthur were involved in that determination (*id.*).

Before any of the new RadChem staff positions were posted for competition, Fiser came to HR and threatened to file a DOL complaint if a VPA was posted for the new PWR Chemistry Program Manager position (SX135 (Boyles) at 71-72). He said that the new position was the one he had been given as a result of the 1994 settlement and that he should not have to compete for the job, despite the fact he no longer occupied that position (*id.*). As a result of Fiser's threat, HR again compared the new and existing PDs and confirmed they were not interchangeable and that the new job should therefore be posted for competition (*id.* at 72-73). The Board did not find that McGrath made this determination, that HR's determination was incorrect, or that HR acted with a discriminatory animus in making that decision. In addition, Labor Relations and TVA's Office of the General Counsel were consulted and advised that Fiser's settlement agreement did not guarantee him the proposed position or even continued employment (Tr. 342-49 (Welch); SX166 at 1-2). Based on that advice and the reevaluation of the PDs, HR posted a VPA for the position (SX135 (Boyles) at 72-73). In addition, four other VPAs were posted for the other four staff positions in the new RadChem organization (JX21

at GG000356, 372, 380, 390). Likewise, VPAs were posted for every new position in NOS which was on a different competitive level (Tr. 4010-12 (Boyles); TVAX55). Thus, Fiser was treated the same as every other employee in the NOS.

The Board found that "TVA did not apply these governing procedures with respect to Dr. McArthur" (ID 51), referring to the OPM and TVA RIF rules and the policy on posting new positions, and concluded that TVA "gave [McArthur] disparate treatment *vis-a-vis* that accorded to the majority of TVA employees" (ID 53). The Board adopted the "'Staff's argument that TVA made an end run around OPM RIF regulations'" and treated McArthur "as one of the 'favored few' that TVA wished to designate for a particular remaining position" (ID 53). That finding is not supported by the record and conflicts with the Board's finding that "McGrath referred the question to HR, which responded that Dr. McArthur had 'rights' to the new position" (ID 52). Although the Staff strongly contested the correctness of HR's decision, the evidence is that HR, using the RIF rules, made the decision that McArthur's existing PD was interchangeable with the new RadChem Manager PD and that as a consequence he had a right to the RadChem Manager position (Tr. 744 (McGrath), 3987-88, 3848-49 (Boyles)). Whether HR made the *correct* decision is irrelevant in this proceeding. What is relevant is that HR made the decision, not McGrath or McArthur.[11] The Board did not find that HR was tainted by a discriminatory animus toward Fiser. Furthermore, Fiser was not subject to disperate treatment. Fiser was subject to the same procedures as similarly situated employees. While HR reached a different conclusion with respect to McArthur, based on the unusual circumstances of his situation, HR applied the same OPM regulations and TVA procedures in making its determination (SX135 (Boyles) at 42-43; Tr. 505-06 (McGrath)).

Composition of the SRB. All five of the new staff positions in the RadChem organization, including the PWR Chemistry Program Manager position, were posted on VPAs for competition (JX21 at GG356, 372, 380, 390). All five were filled using TVAN's SRB process used to make selections for management and specialist positions (JX63). These were the same procedures used in 1994 when Fiser was selected for the Chemistry and Environmental

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11 HR's consultation with Labor Relations and TVA's Office of the General Counsel is further evidence of HR's *bona fides*.

Protection Program manager position (ID 28). That process involved interviews of the qualified candidates by an SRB using job-related questions (Tr. 1493-96 (McArthur)). McArthur as the Corporate RadChem Manager was the selecting manager for all five positions. Initially, McArthur proposed to use an SRB comprised of the three site RadChem managers—Kent from SQN, John Corey from BFN, and Jack Cox from WBN (Tr. 1494 (McArthur)). As the Board found, Cox announced that he had a conflict and withdrew from the SRB (ID 54). When Cox became unavailable to serve on the SRB, McArthur asked Heywood R. Rogers, who TVA believed, as the Board found, had "a long list of qualifications to serve on the SRB" (ID 54-55).

The SRB interview questions. McArthur drafted interview questions for all five of the RadChem positions (Tr. 1499 (McArthur)). For the PWR Chemistry Program Manager position, the SRB unanimously agreed to ask eight of the sixteen questions proposed by McArthur (Tr. 5174 (Rogers)) and added a ninth question proposed by Kent regarding molar ratio control (Tr. 2880 (Corey); JX21 at GG232-33). The Board found that "the particular questions propounded to each candidate for the PWR Chemistry manager position also focused on the expertise of Mr. Harvey rather than that of Mr. Fiser" because "none of the questions relating to technical skills was explicitly directed at problems arising with respect to primary chemistry which was Mr. Fiser's area of greater expertise" rather than secondary chemistry (ID 56). The Board said that "[s]tated another way, the questions themselves predetermined which of the candidates would likely achieve the better scores" (ID 57). The Board did not find that the SRB chose the questions in order to discriminate against Fiser. In fact, the SRB chose two questions on secondary chemistry because it was more difficult to maintain than primary chemistry, was critical to the maintenance of steam generator tube integrity, and at the time was the area presenting TVA with problems. At the same time, TVA had a handle on primary chemistry issues (Tr. 2400 (Fiser), 5108-10, 5079-80 (Goetcheus); TVAX105).[12] Even Cox, who was the most familiar with Fiser and had a favorable impression of his work, agreed that the questions were fair and reasonable (Tr. 1778-80 (Cox)).

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12 In the summer of 1996, secondary chemistry was presenting TVA with significant problems at Watts Bar. Although Fiser was assigned to provide assistance at that plant, he was apparently unable to bring the situation under control, and it was necessary to send Harvey to that plant (JX105; Tr. 5079-80 (Goetcheus)).

Kent's cautionary remark. Just before the SRB interviews, Kent, in the presence of McArthur, Cox, and Corey, mentioned that Fiser had filed a DOL complaint implicating McArthur. He suggested that McArthur should consider not being a voting member of the SRB (SX135 (Kent) at 112-13; Tr. 3154 (Corey), 3154, 3230 (Kent)). McArthur, Cox, and Corey were already aware of Fiser's DOL activity (Tr. 1448-49 (McArthur), 1763 (Cox), 2877-78 (Corey)). Cox said that the comment was made "strictly from the standpoint of making sure that there was nothing even perceived to be inappropriate" (SX135 (Cox) at 138-39). Even the Staff acknowledges that Kent said it "in order to remove a perception of a problem" and that Cox saw it as caution to "be 'sensitive to the fact that Mr. Fiser has filed a DOL case'" (Staff FoF ¶ 2.187-.188). In any event, McArthur did not score the interviews.

SRB Scoring. The SRB members scored each candidate independently on each question on a 1-10 scale, and then the scores for each candidate were totaled – Harvey (235.7) and Chandra (233.5) both scored significantly higher than Fiser (180.8) (ID at 59). Although the Board implied that the scoring was unfair because there was an "overall bias of the questions in favor of persons with a background in secondary chemistry" (ID at 58) only two of the nine questions were specifically about secondary chemistry. The Board ignores the more rational explanation that Fiser did not present himself well, may not have been as well-qualified in the area of most importance for a PWR position, and was *scored lower by all three SRB members on every single question* (TVA FoF ¶ 9.37-.38).

The Board also ignored evidence that Fiser's low scores before the SRB could not have been due to any protected activity. A statistical analysis of the SRB ratings of the three PWR Chemistry Program Manager candidates strongly indicated that Fiser's low ratings were not due to the fact that two of the three SRB members had some awareness of Fiser's DOL activities (TVAX102 at FB9; Tr. 4562-64, 4576-79 (Peters); TVA FoF ¶¶ 9.40-.43).

Selection of Harvey. The Board indicates that it was not "persuaded" by the Staff's contention that Harvey was preselected. The Board specifically notes "Harvey's confidence that he had superior qualifications for the job than did Mr. Fiser" (ID 59). Indeed, the Board recognized that "Mr. Harvey had significant technical qualifications, particularly with respect to Secondary Chemistry" (*id.*). Paradoxically, under the Board's and the Staff's theory,

"the membership on the SRB," the "questions propounded by the SRB," and "the circumstance that Dr. McArthur was the selecting official" assured that Harvey rather than Fiser would be selected (ID 59). It is clearly erroneous for the Board to conclude that discrimination played any part in Fiser's nonselection where neither the Staff nor the Board suggested that he should have been selected, that he was better qualified than Harvey, that the members of the SRB had a discriminatory animus, or that the SRB did not conduct an unbiased interview. The Board's decision does not even begin to suggest that the SRB's relative ratings of Fiser and Harvey were wrong. Further, it does not even address the persuasiveness of the statistical analysis that knowledge of protected activity played no part in Fiser's rating. Indeed, a member of the majority went so far as to tell Dr. Carey Peters, who performed the statistical analysis, that "I find no flaws in your statistics" (Tr. 4614 (Peters)).

McArthur's and McGrath's Lack of Discriminatory Animus for Fiser's Purported "Protected Activities." TVA acknowledges that Fiser's 1993 and 1996 DOL complaints and the 1993 letter to Senator Sasser were "protected activities" under Section 50.7. The Board however looked at Fiser's "technical activities as necessary adjuncts to the Staff's theory" since they "lend[ ] substantive significance" (ID 35).[13] The Board apparently recognized, correctly, that by themselves the DOL complaints and the Sasser letter might not motivate anyone to discriminate against Fiser. As Judge Young points out, without those "'technical protected activities'" "the Staff's case becomes significantly less persuasive" (ID at 73). Regardless of whether Fiser's involvement in certain technical issues was protected activity (discussed below), the real question is whether his actions sparked a discriminatory animus on the part of McGrath and McArthur such that they would act upon it years later.[14]

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13 In the NOV, the Staff asserted that Fiser's protected activity included his 1993 DOL complaint and "the identification of chemistry related nuclear safety concerns in 1991-93" (JX47 at AB26). Neither Fiser's 1996 DOL letter nor the letter to Senator Sasser was cited as a basis for the NOV. On appeal to the Board, the Staff placed "primary reliance" on Fiser's two DOL letters and the letter to Senator Sasser (ID 35).

14 There was no evidence that McGrath or McArthur saw the letter to Senator Sasser prior to preparation for their depositions in this proceeding. Likewise, McGrath did not know of the 1993 DOL complaint until Fiser threatened to file a second complaint in June 1996 (SX133 (McGrath) at 41, 47, 93). Moreover, McGrath did not see the 1993 DOL complaint until preparation for the Predecisional Enforcement Conference in 1999 (*id.* at 81-82; SX135 (Burzynski) at 23-24). While McArthur had seen the 1993 DOL complaint, it would not have

There is no evidence that Fiser identified/raised/documented safety concerns against management's wishes. In his 1993 DOL complaint, Fiser claimed that he was discriminated against for "finding, documenting, reporting and fixing" a problem and because he or people under his "direction had found and/or documented and/or reported and/or corrected problems" (SX34 at AJ134, 136). The Board specifically found that in the 1993 DOL complaint, Fiser did *not* raise or document any of the three issues—radiation monitor setpoints, filter change-out, and PASS—identified in his complaint (ID 37, 38, 39-40). Instead, the Board found that Fiser engaged in protected activity *only* because he participated in the resolution of already-identified issues (ID 37, 40, 43).

In its discussion of the PASS issue, the Board concluded that Fiser's participation "to some extent in resolving the PASS question" was protected activity. In the same paragraph, the Board notes "that McGrath, as Chairman of the NSRB, expressed his dissatisfaction with Sequoyah Chemistry, and specifically Mr. Fiser, for not having resolved the question earlier" (ID 40-41). The Board goes on to state that it "cannot tell from the record whether Mr. McGrath's dissatisfaction was motivated by his perception of a performance deficiency on the part of Mr. Fiser or, instead by Mr. Fiser's having uncovered a safety issue" (*id.*).[15] Thus, the Board's conclusion lends no support to a retaliation theory.

The Board also treated Fiser's participation in the resolution of the issue over the diesel generator fuel oil storage tank as protected activity (ID at 43). Judge Young points out that his "participation" on the "fuel oil storage tank sampling problem was not done, however, against the wishes of the TVA but rather in compliance with specific directions to him" (ID 74). "Fiser claimed to have been a major player in discovering the source of [the] problem," but in fact another person "pointed the way to the source of the problem, and directed Mr. Fiser how to go about resolving it" and "specifically directed Mr. Fiser to look" at how it was missed (ID 73).

(. . . continued) given him any reason to harbor a discriminatory animus since Fiser described McArthur in favorable terms, as an ally (SX177, ex. 2).

15 The latter was not possible since it was INPO and the NSRB that raised the PASS issue. As Judge Young noted, "there is no finding that he did anything against management's wishes other than *not* resolving an issue successfully or adequately, *see, e.g., supra* at 37, 40" (ID 74; emphasis in original).

The Board specifically acknowledged that "Fiser testified that he was threatened with disciplinary action for his role in not identifying this issue earlier. TR. 1147 (Fiser)" (ID 43). Contrary to Fiser's admission, the Board incorrectly viewed it as TVA's "attempt to discipline Mr. Fiser for involvement in this protected activity" (ID 44).

Given Fiser's oft-repeated claim to have identified/raised/documented various issues and the Board's findings that he did not do so, Judge Young was charitable in her statement that "I find especially troubling the absence of any other testimony corroborating Mr. Fiser's own testimony on his asserted participation in addressing safety concerns" (ID 74). It is incredible that the Board would find Fiser credible in the face of his repeated claims to have identified/raised/documented a safety issue. To the extent Fiser had any involvement in safety concerns it was as a participant in resolving them at the "***specific directions***" of others (ID 74).[16] Moreover, there was no evidence in the record that he was involved in raising any safety concerns that would cause McGrath or McArthur to harbor a discriminatory animus for at least four years that would then manifest itself in his 1996 nonselection. The Staff offered no evidence that McGrath or McArthur had any resentment or discomfiture over any of the issues which were claimed to be "protected activities," and never explained why two experienced nuclear professionals would form a discriminatory animus against Fiser which they would then nurse for years.[17]

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16 Emphasis added unless otherwise noted.

17 The Staff's letter notifying TVA of an apparent violation was a result of OI's investigation of Fiser's 1996 DOL complaint. The summary of the OI report identified McGrath and McArthur by position and stated that they "were named as culpable parties in [Fiser's] 1993 DOL complaint" and that they were "named as parties to his discrimination" (JX44 at AB 7). The only protected activity identified in the Staff's letter was Fiser's 1993 DOL complaint. The Staff may have assumed that because Fiser had accused them of discrimination, McArthur and McGrath had formed some animus against Fiser. That assumption would have been incorrect since the OI investigation did not even look at the 1993 DOL complaint and the Staff did not see it until McGrath, McArthur, and TVA provided it at the predecisional enforcement conference (Tr. 316-18 (Luehman)). Faced with the fact that the 1993 DOL complaint did not name either McArthur or McGrath as "culpable parties," the Staff broadened the protected activity in the NOV to include Fiser's identification of chemistry issues in 1991-93. However, apparently the Staff did not conduct a review to determine if Fiser in fact raised any chemistry issues in 1991-93 (Tr. 320 (Luehman)). It is also apparent that the Staff did not review NRC Regional Counsel's legal opinion that Fiser's 1993 demotion and RIF were the result of "performance based issues" and did not disclose his pursuit of a safety issue (SX177 at ex. 20).

The Board adopted the Staff's argument that "it's unlikely that McGrath would admit to something which evidences discriminatory intent'" (ID 21). It is, however, also very likely that a high-level manager who had worked as many years as McGrath in the area of reactor safety would know that discrimination against an employee for raising safety concerns was prohibited. It is also very likely that McGrath would be disinclined to discriminate after being informed of Fiser's June 9, 1996, threat to file a DOL complaint and the fact that he made good on that threat on June 25, 1996, particularly knowing that investigations by DOL and TVA's Inspector General were already underway and that NRC's OI likely would ultimately investigate. As McGrath testified, this is just as implausible as his robbing a bank on the day that "I find out the FBI is going to be there testing out the security system and just to top it off I go tell the local police [to] come and watch me that day" (Tr. 878 (McGrath)). The entire argument for the existence of retaliatory motive is not plausible.

LEGAL ANALYSIS

I

The Majority Used the Wrong Legal Standard to Determine That Discrimination Caused Fiser's Nonselection.

This is a disparate treatment case. "Disparate treatment claims require the plaintiff to prove that the employer acted with ***conscious intent*** to discriminate." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 854 (9th Cir. 2002), *aff'd*, 539 U.S. __, 123 S. Ct. 2148 (2003); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805-06 (1973).[18] The Staff was required to prove that McGrath and McArthur "acted with conscious intent to discriminate." It is well-established discrimination law, that the Staff could do this in one of two ways—either the direct method (also known as the "dual motive" test)—or the indirect method (the *McDonnell Douglas* framework). *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (The Supreme Court

18 When the NRC added Section 50.7 in 1982, it expressly did so "to implement section 210" of the ERA (which was renumbered as Section 211 in 1992). Since the legal paradigms and burdens developed under Title VII have been applied to Section 211, they are also applicable here.

reaffirmed that a plaintiff must prove a discrimination case using either "direct evidence of discrimination" or "the *McDonnell Douglas* framework.").

The majority, without explanation or analysis, held that this was a "dual-motive" case (ID 13). However, the majority totally ignored the evidentiary test to trigger the application of a dual-motive analysis—"'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude [of McGrath or McArthur] and that bear directly on the contested employment decision.'" *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1998); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999). In *Talbert v. Washington Pub. Power Supply Sys.*, No. 93-ERA-35, at 3 (ARB 1996), DOL held in a Section 211 case that a dual motive can be found only where:

> Complainant has produced 'evidence that directly reflects the use of an illegitimate criterion in the challenged decision, [i.e.,] evidence showing a specific link between an improper motive and the challenged employment decision.' Evidence of actions or remarks of an employer tending to reflect a discriminatory attitude may constitute direct evidence. Such evidence does not include stray or random remarks in the workplace, statements by nondecision-makers or statements by decisionmakers unrelated to the decisional process [citations omitted].[19]

The courts have sanctioned the use of this analysis in Section 211 cases. In *Carroll v. DOL*, 78 F.3d 352 (8th Cir. 1996), the Court applied the test for a dual-motive case and held that the complainant had not presented any evidence directly linking his termination and protected activity:

> This type of Mt. Healthy/Price Waterhouse mixed motive analysis, however, applies only in "dual motive" cases where the complainant produces "evidence that directly reflects the use of an illegitimate criterion in the challenged decision." *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 996 F.2d 200, 202 (8th Cir. 1993). Direct evidence means evidence showing a specific link between an improper motive and the challenged employment decision. *Parton v. GTE N., Inc.*, 971 F.2d 150, 153 (8th Cir. 1992). Here the record is bereft of any such direct evidence linking Carroll's release and termination to retaliation for his alleged engagement in protected activity [*id.* at 357].

Compounding its legal error, the majority incorrectly held that § 50.7 is violated based on "any" discriminatory motive without making a quantitative determination as to whether

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19 The majority's reliance on the Staff's assertion of "a work environment hostile toward whistleblowers" (ID at 33) was based on remarks by coemployees not involved in Fiser's nonselection and was thus improper.

that motive caused the adverse action (ID 14-15, 18, 67). If the adverse action was not "caused" by discrimination, there can be no violation. The majority's interpretation is inconsistent with the plain language of § 50.7 which states that the "prohibition applies when the adverse action occurs ***because*** the employee has engaged in protected activities." 10 C.F.R. § 50.7(d). The use of the term "because" is an explicit requirement that discrimination be proven to play a "significant" part in bringing about the adverse action. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 262-69 (1989), the Supreme Court held that the "because of" causal nexus under Title VII requires a specific showing that discriminatory animus was a ***motivating or substantial factor*** in the personnel action at issue. The MIRT Report[20] is in full agreement that discrimination must be proven to be a "contributing factor," *i.e.*, "play a significant part" in the result (an approach that is inherently recognized in the dissent's analysis). It goes on to state that:

> [K]nowledge that an employee has engaged in protected activity by the company official taking the adverse action, standing alone, would not be enough to establish that the protected activity was a "contributing factor." [MIRT report at 8].

In this proceeding, after stretching the law to find a protected activity, the majority merely assumed that McGrath and McArthur had a discriminatory animus. The Board did not consider whether there was any evidence that Fiser's protected activities gave rise to a retaliatory animus on the part of McArthur or McGrath. There is simply no evidence, much less a preponderance, that animus existed and caused Fiser's nonselection in 1996. In ignoring the evidentiary and causation requirement, the majority fails to provide a meaningful, workable legal and evidentiary standard. Contrary to the majority's perception, TVA is not arguing that "minor" discrimination is not a violation or that Fiser's protected activity should be ignored as "insignificant." Rather, it has always been TVA's position that Fiser's "protected activity" was so "insignificant" and of such a nature (*i.e.*, issues already being pursued by management) that it could not have caused McGrath or McArthur to have a discriminatory animus that would then lead to Fiser's nonselection in 1996. While TVA does not have the burden of proof, a preponderance of the evidence shows that "protected activity" was not a contributing factor in

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20 *See* NRC, Millstone Independent Review Team, *Report of Review* (Mar. 12, 1999).

Fiser's nonselection in 1996. Indeed, the evidence shows that the better candidate was selected for the job, a crucial point which the Staff and the Board do not dispute.

Unlike the plaintiffs in *Costa*, *Thomas*, *Medlock*, and *Talbert*, the Staff did not present, nor did the majority point to, any evidence of discriminatory motive on the part of McGrath or McArthur that "actually relate[s] to the question of discrimination ***in the particular employment decision***, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace" (*Thomas*, 131 F.3d at 204; emphasis in original). In fact, as discussed more fully in argument IV below, the evidence shows that the nine so-called "plethora of career-damaging situations and circumstances" on which the majority relies (at 63) were not the responsibility of McGrath or McArthur, were not in any part motivated by discrimination, or were simply irrelevant to the final selection of Harvey.

Where as here "the plaintiff is unable to produce evidence that directly reflects the use of an illegitimate criterion in the challenged decision, the employee may proceed under the now-familiar three-step analytical framework described in *McDonnell Douglas Corp. v. Green*" (*Stacks v. Southwestern Bell Yellow Pages, Inc.*, 996 F.2d 200, 202 (8th Cir. 1993)). The Board acknowledged (ID 17) that both TVA and the Staff agreed that the *McDonnell Douglas* analysis is the appropriate standard to be used in this case.[21] Under the *McDonnell Douglas* or indirect evidence method, the Staff must first establish a prima facie case of discrimination. *Bartlik v. DOL*, 73 F.3d 100, 103 (6th Cir. 1996). To establish a prima facie case of discrimination, the Staff must prove that (1) Fiser engaged in activity protected by § 50.7; (2) the alleged discriminating official had knowledge of Fiser's protected activity; (3) the alleged discriminating official subsequently took adverse employment action against Fiser; and (4) there is a causal connection between Fiser's protected conduct and the adverse employment action. *Mulhall v. Ashcroft*, 287 F.3d 543, 551 (6th Cir. 2002); *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 831 (6th Cir. 1999); *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir.

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21 With no explanation the Board chose to use the "standard [NRC OE and OGC] currently used to determine when an enforcement case should be instituted" "Report of Review, Millstone Units 1, 2, and 3" at 3 (Mar. 12, 1999). *But see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) ("Because the parties do not dispute the issue [that *McDonnell Douglas* applies], we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here.").

1997); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995). The Staff has the burden to prove a prima facie case by a preponderance of the evidence. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 & n.3 (1993). Here, there was no evidence showing that the Staff proved by a preponderance of evidence that McGrath had knowledge of Fiser's protected activities. Moreover, as shown below, there was no evidence demonstrating by a preponderance of the evidence temporal proximity between Fiser's protected activities and nonselection. Further the Staff failed to present any "other evidence of retaliatory conduct" on the part of McGrath and McArthur. *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000). Thus, the Staff failed to establish the requisite causal connection. *Id.* at 565-67.

If the Staff establishes a prima facie case, the burden of production (but not the burden of persuasion) shifts to TVA to ***articulate*** a nondiscriminatory reason for its adverse employment action. *Burdine*, 450 U.S. at 252-53. If TVA provides such a reason, the Staff then must show by a preponderance of the evidence that the proffered reason for Fiser's nonselection actually is a pretext intended to hide unlawful discrimination. *Id.* at 253. While the burden of production shifts back and forth between the parties under this indirect proof framework, the ultimate burden of proving that TVA discriminated against Fiser because of his protected activity remains at all times with the Staff. *See St. Mary's Honor Ctr.*, 509 U.S. at 511 ("[T]he Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'"); *Burdine*, 450 U.S. at 253.

To show pretext, the Staff must "prove ***by a preponderance of the evidence***" that TVA's proffered legitimate reason for taking the adverse employment action is pretextual. *Burdine*, 450 U.S. at 253. In the Sixth Circuit, the court with jurisdiction to review any decision in this proceeding, a plaintiff may prove pretext in one of three ways—by showing that the proffered reason either (1) had no basis in fact, (2) did not actually motivate its decision, or (3) was insufficient to motivate the decision. *See Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 883 (6th Cir. 1996). In effect, the Staff "must demonstrate that the employer's reasons (*each of them*, if the reasons independently caused [the] employer to take the action it did) are not true." *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998) (*quoting Kariotis v. Navistar Int'l*

Trans. Corp., 131 F.3d 672, 676 (7th Cir. 1997)). Further, where the plaintiff (in this case the Staff) claims that the employer's reason is not the "actual or true reason for the adverse action, the plaintiff cannot rely on evidence used to make a prima facie showing, but must introduce additional evidence of discrimination" (*Lovas v. Huntington Nat'l Bank*, 215 F.3d 1326 (table), No. 99-3213, 2000 WL 712355, at *4 (6th Cir. May 22, 2000)).[22] *See Manzer*, 29 F.3d at 1084. Here, there was no evidence that TVA's reason for selecting Harvey and for Fiser's nonselection was pretextual. The scoring of the candidates by the SRB was not close. Although the Board second-guessed the "fairness" of the SRB membership and interview questions, neither the Board nor the Staff has even suggested that Fiser was better qualified or that he should have been selected.

Under these circumstances, § 50.7 precludes a finding that TVA violated § 50.7 when it selected Harvey instead of Fiser. The prohibition applies only "when the adverse action occurs ***because*** the employee has engaged in protected activities." The regulation further provides that an "employee's engagement in protected activities does not automatically render him or her immune from [nonselection] for legitimate reasons" (§ 50.7(d)). Fiser's nonselection was not pretextual and was not proven to be "***because***" of any protected activities.

II

The Majority Incorrectly Decided That Participation in the Resolution of a Safety Issue Is a "Protected Activity."

Although Fiser asserted in his 1993 ERA complaint, the Sasser letter, and at the hearing that he discovered/identified/raised/documented five nuclear safety-related issues, the Board found that he did *not* discover, identify, raise, or document any of the various technical safety issues that he and Staff claimed that he had raised and identified (ID 37, 38, 40, 43, 45-46, 73-74). Indeed, "there is no finding that [Fiser] did anything against management's wishes, other than *not* resolving an issue successfully or adequately . . . or refusing to initiate a procedure that might, if *not* followed, subject TVA to a finding of a violation of procedures" (*id.* at 74).

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22 Copies of unreported and DOL decisions are reproduced in Addendum C.

In an unprecedented decision, the majority stretches the scope of "protected activities" under § 50.7 to include participation in the resolution of an already-identified safety issue (ID 32). The majority cites to, and relies on, the Secretary of Labor's decision in *Zinn v. Univ. of Missouri*, 93-ERA-34 (ARB 1996), as support for its interpretation of § 50.7, ostensibly because *Zinn* "makes it clear that protected activities are not limited to those initially raised, documented, or identified by the complainant" (ID 32). The majority's reliance on *Zinn* for the proposition that being "actively involved in the resolution of a safety-related issue" is protected activity (ID 32) is clearly erroneous. While Complainant Morris in *Zinn* did not initially raise the issue regarding target composition and certification, the evidence was that at different meetings he "expressed concern," "raised safety concerns," "raised objections," "pursued this subject," and "actively pursued . . . the need for MURR management to directly confront this issue" (at 3, 11, 10 n.10). Unlike Complainant Morris in *Zinn*, Fiser's participation in the resolution of previously-identified safety issues did not entail "actively" pursuing such issues because of TVA's "opposition" to them. To the contrary, Fiser did not do "anything against management's wishes, other than *not* resolving an issue successfully or adequately" (ID 74). *Zinn* is simply inapposite.

In addition, the majority's interpretation is inconsistent with the plain language of § 50.7 which includes in general providing information to the NRC or the employer about violations of the Atomic Energy Act or the ERA or requirements imposed pursuant to those statutes. 10 C.F.R. § 50.7(a)(1)(i).[23] Section 50.7 itself plainly states that the Commission has adopted the "protected activities" enumerated in Section 211 (formerly Section 210) of the

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23 When the NRC added Section 50.7, it stated that it was "extending the current prohibition" of discrimination against employees for providing information concerning radiological working conditions "to include employees ***who provide information*** relating to radiological health protection matters and matters that could affect the public health and safety." 47 Fed. Reg. 30,452 (July 14, 1982). In 1993 the NRC amended § 50.7 stating that the "definition of protected activities is modified to reflect the provisions of the Energy Policy Act of 1992" (58 Fed. Reg. 33,042 (June 15, 1993)) so that ***"[e]mployees who bring or are about to bring concerns directly to their employers"*** would be protected (58 Fed. Reg. 52,406 (Oct. 8, 1993)). The NRC's policy statement makes it clear that the NRC is concerned about "the freedom of employees ***to raise such concerns"*** and to that end the NRC has made "discrimination against an employee ***for raising a potential safety concern"*** unlawful (61 Fed. Reg. 24,336, 24,337 (May 14, 1996)).

ERA into § 50.7. As the regulatory history shows, when Section 211 was amended to add new protected activities, the Commission amended § 50.7 to conform to the ERA.[24] The evidence did not show and the Board did not find that Fiser's activities included "[p]roviding the Commission [TVA] information about alleged violations of either of [the ERA or AEA] or possible violations of requirements imposed under either of those statutes" (10 C.F.R. § 50.7(a)(1)(i)). Similarly, Fiser's participation in the resolution of an already-identified safety concern does not fall within any of the remaining protected activities enumerated in § 50.7(a)(1)(ii)-(v). The majority did not make any such finding. Nothing in Section 211 of the ERA, DOL case law, or § 50.7 regulatory history even remotely suggests that Fiser's participation in the resolution of previously identified safety concerns constitutes a refusal to engage in an unlawful practice that he had identified as illegal (§ 50.7(a)(1)(ii)); request to the NRC to undertake an action against TVA (10 C.F.R. § 50.7(a)(1)(iii)); testimony before the NRC or Congress or in any federal or State proceeding relating to the AEA or the ERA (§ 50.7(a)(1)(iv)); or assistance or participation in any of the above activities (§ 50.7(a)(1)(v)).

The majority's position is also contrary to Section 211 precedent. The claimed protected activity must itself "implicate safety definitively and specifically." *Am. Nuclear Res. v. DOL*, 134 F.3d 1292, 1295 (6th Cir. 1998). Being assigned to work on already-identified safety concerns is not "com[ing] forward with any items of potential significance to safety" and does not "implicate safety" in any fashion, much less "definitively and specifically."

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24 The Board argues in essence that since the NRC has authority under the Atomic Energy Act of 1954 (AEA) to take action against a licensee for discriminating against an employee, § 50.7 need not be construed *in pari materia* with Section 211 of the ERA (ID 12-13). The Board is incorrect. The AEA clearly gives the NRC authority to adopt a scheme different from that of the ERA. But when the NRC added § 50.7, it chose to prohibit the same type of discrimination for engaging in the same protected activities as is prohibited by the ERA. Thus, when the NRC added § 50.7 in 1982, it recognized that "Section 210 identifies specific acts of employees as protected activities." It then stated that the "proposed amendments would announce the statutory prohibition of discrimination of the type described in section 210 above." When the NRC amended § 50.7 in 1993, it stated that the "amendments are intended to conform current NRC regulations to the new nuclear whistleblower protection provisions of the Energy Policy Act of 1992" (58 Fed. Reg. 52406 (Oct. 8, 1993)). Thus, rather than adopting a different legal standard with a different legal analysis and different evidentiary burdens, the NRC has chosen to follow the same legislative scheme established by Congress under Section 211 of the ERA. Indeed, the final rule states that the "protected activities are established in section 211 of the" ERA (10 C.F.R. § 50.7(a)).

Instead, as NRC Region II Counsel stated, in a legal opinion, Fiser was not "pursuing an underlying safety issue or other concern" or "engaged in 'protected activity'" with respect to the technical issues discussed in his 1993 DOL complaint (JX67 at 3) and, management's reaction to him was "performance based" and "nothing more" (*id.*). The majority's failure to point to any evidence in the record that Fiser's participation in the resolution of safety concerns "implicate[d] safety" highlights that its conclusion is erroneous as a matter of law. *Am. Nuclear Res.*, 134 F.3d at 1295.

As correctly pointed out by the dissent, it would not be reasonable to include participation in the resolution of already-identified issues as protected activity since that is not the type of activity likely to be undertaken against the wishes of the employer (ID 72-73). The rationale for the enactment of whistleblower employee protection provisions is to foster an environment in the workplace in which an employee can provide information, free from the fear of retaliation, to his employer and/or regulators about matters relating to safety that might be viewed as negative and/or adverse to his employer's interests and that might engender hostility. The dissent's assessment of the inherent contradiction of including participation in the resolution of a safety concern is supported by the Commission's own comments regarding its 1982 amendment to § 50.7. *See* 47 Fed. Reg. 30,452, 30,453 (July 14, 1982) ("Employees are an important source of such information and should be ***encouraged to come forth*** with any items of potential significance to safety without fear of retribution from their employers."). *See also* Statement of Chairman Meserve at 3 ("Absent freedom of employees ***to discuss*** concerns without the threat of retaliation, an important window into licensee performance might be closed."); Statement of Commission Dicus at 1 ("The ability of workers in the nuclear arena ***to raise nuclear safety issues*** without reprimand, both to their management and to the NRC, is of paramount importance.").[25] Here, Fiser did not engage in any activity against the wishes of TVA to address safety concerns that would otherwise go unaddressed (ID 72-73).

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25 "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," SECY-02-0166 (Mar. 26, 2003).

Redefining the term "protected activities" to include participation in the resolution of safety concerns confuses protected activity with performance. TVA adopts NEI's argument (brief at 14-16, 19-20) that such a definition would effectively preclude TVA from managing performance and undermine TVA's ability to safely operate its nuclear facilities.

III

Staff Failed to Prove That McGrath Was Aware of Fiser's Protected Activities.

TVA presented undisputed evidence that McGrath was not aware of either the 1993 DOL complaint or the Sasser letter prior to Fiser's 1996 nonselection. It was therefore impossible for him to form a retaliatory motive based on these protected activities. In addition, the record is undisputed that it was impossible for McGrath to know that Fiser had raised any of the technical issues identified in the 1993 DOL complaint and Sasser letter because, as both the majority and dissent conclude, Fiser did not discover, identify, raise, or document any of those issues. Lacking evidence that McGrath was aware of these activities, Staff failed, as a matter of law, to prove by a preponderance of the evidence that McGrath retaliated against Fiser for engaging in these activities. *Mulhall*, 287 F.3d at 551-54; *McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 518 (6th Cir. 2000); *Peterson v. Dialysis Clinic, Inc.*, 124 F.3d 199 (table), No. 96-6093, 1997 WL 580771, at **4-5 (6th Cir. Sept. 18, 1997). The majority's speculative assumption that McGrath must have known about the Sasser letter because of his position in 1993 is clearly erroneous in light of the undisputed evidence to the contrary. *Chaney v. New Orleans Pub. Facility Mgmt.*, Inc., 179 F.3d 164, 168-69 (5th Cir. 1999); *Peterson*, 1997 WL 580771, at **4-5.

Moreover, the evidence is undisputed that the decisions to reorganize TVAN, to rewrite job descriptions, and to post the PWR Chemistry Program Manager position all had been made ***prior to Fiser's filing of his 1996 DOL complaint***. Thus, it was impossible for any of those decisions to have been made "because of" his 1996 DOL complaint. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (The Court held no causal connection existed between protected activity and transfer because "there is no indication that Rice even knew about the right-to-sue letter when she proposed transferring respondent."). Although the actual

selection to fill the new positions may have followed the 1996 complaint, McGrath was not involved in that selection. Further, that the reorganization and selection took place following the 1996 DOL complaint is not evidence of discrimination. "Employers need not suspend previously planned [selections] upon discovering that a [DOL complaint] has been filed, and ***their proceeding along lines previously contemplated***, though not yet definitively determined, is no evidence whatever of causality" (*Breeden*, 532 U.S. at 272).[26]

Both the majority and dissent point out that the evidence supports an inference that Fiser was "working the system" to attain a personal advantage when he filed the 1996 DOL complaint ***prior*** to the posting, SRB interviews, and selection for the PWR Chemistry Manager position as well as when he earlier filed the 1993 DOL complaint and signed the Sasser letter ***after*** his 1993 RIF notice (ID 35, 75). Indeed, as to the 1996 DOL complaint, Fiser specifically told Harvey that "the first 3 licks to McGrath were his" and that he "knew how the system worked and that he was going to take advantage of it" (TVAX5 at CC55, ¶ 5; TVAX14). The law, of course, does not allow an employee, like Fiser did here, to "manufacture a claim of retaliation" in anticipation of a possible adverse action. *McFadden v. State Univ. of N.Y.*, 193 F. Supp. 2d 436, 455 (W.D.N.Y. 2002) ("An employee who knows that some adverse action is in the works cannot manufacture a claim for retaliation, based solely on the anticipated adverse action itself, merely by complaining of discrimination before the action is finally taken.").

IV

The Majority Decision Made Numerous Factual Findings Which Are Clearly Erroneous.

The majority's finding of discrimination is premised on the theory that McArthur and McGrath—the two alleged discriminating officials—had the requisite discriminatory intent

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26 As to McArthur, he was unaware of Fiser's alleged protected activities, except for the 1993 DOL complaint. As discussed elsewhere, the NRC Staff has failed to prove by a preponderance of the evidence that either the 1993 complaint or Fiser's "participation" in resolution of issues in 1991-93 could have caused McArthur to retaliate in 1996, especially where Fiser's nonselection was ultimately made based on the views of the SRB.

(ID 65)[27] and is based on inferences drawn from circumstantial evidence as opposed to direct testimony of retaliatory intent (ID 61-62). In coming to that conclusion, the majority erroneously relied (ID 62-63) on circumstances that do not reasonably and fairly give rise to either an inference that McArthur or McGrath had a discriminatory animus or that there was a violation of § 50.7. The record simply does not demonstrate that the Staff proved by a preponderance of the evidence that McArthur or McGrath discriminated against Fiser in his nonselection ***because*** he engaged in protected activities. *See* 10 C.F.R. § 50.7(d).

Instead, the evidence shows that each of the nine so-called "plethora of career-damaging situations and circumstances to which Mr. Fiser was subjected" were either not the responsibility of McGrath or McArthur or were not in any part motivated by discrimination. Further, the majority unreasonably, and with no support in the record, concludes that there was a "pattern of discrimination that was likely orchestrated by [unnamed] persons in authority at TVA to terminate Mr. Fiser's career" (ID 63-64). The majority is clearly erroneous in concluding, based on mere inferences from otherwise innocent and unconnected circumstances, that there was a plot to "terminate Mr. Fiser's career." Viewed in turn, none of the purported "career-damaging situations" was due to discrimination. Instead, the record is clear that each of the events was "predicated upon nondiscriminatory grounds" and "dictated by nonprohibited considerations" (§ 50.7(d)).

1. The majority cites "the disparate treatment accorded to Dr. McArthur and Mr. Fiser in the 1996 reorganization" (ID 63). It was clearly erroneous to infer discrimination here. First, the determinations of the interchangeability of PDs was made using HR's written instructions. Second, it is undisputed that HR, ***not*** McArthur or McGrath, made the decision that McArthur had a right to the RadChem Manager position and that the PWR Chemistry Manager position had to be posted. The law is clear that decisions attributable to others cannot be indicative of animus on the part of the alleged discriminating officials. *See Mitchell v. Iowa Prot. & Advocacy Servs., Inc.*, 325 F.3d 1011, 1014-15 (8th Cir. 2003) ("But this is not such a case, because, as we have said, there is no evidence that Ms. Piper played a part in the decision

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27 The Staff issued NOVs to both Dr. McArthur and Mr. McGrath (JX 48, 49), but despite the stigma to their reputation and the injury to their careers, they were not afforded an opportunity for a hearing to clear their names.

to terminate Ms. Mitchell or that those who made the decision knew of the dispute between her and Ms. Piper."). Third, the majority did not find that either McArthur or McGrath influenced HR's decisions whether the PWR Chemistry Program Manager and the RadChem Manager positions should be advertised. Fourth, there was no evidence that HR's determinations were the result of any discriminatory animus.

Finally, the undisputed evidence shows that the treatment of Fiser was not disparate at all when compared to the other 20 jobs in NOS and the hundreds of other employees in TVAN whose positions were eliminated and who were forced to apply on new positions. (TVAX 83-96, 109-10). In accordance with its published procedures, HR made competitive level determination by reviewing and comparing each of the rewritten PDs to the old PDs, and exercising its independent professional judgment, to determine whether any of them had to be advertised. Fiser was treated the same as every other employee, ***including McArthur***, who had his or her PD rewritten. The law is well settled that no inference of disparate treatment can be inferred where TVA applied its policy equally to all of the employees involved. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583-84 (6th Cir. 1992); *Marshall v. Western Grain Co.*, 838 F.2d 1165, 1167-68 (11th Cir. 1988).

2. The majority cited the makeup of the SRB because Cox—an ally of Fiser—was not a member (ID 63). It is clearly erroneous to infer discrimination from that circumstance. The majority ignores the undisputed evidence that McArthur selected Cox who originally agreed to sit on the SRB. However, it was Cox who informed McArthur shortly before the interviews that he could not serve due to a scheduling conflict involving a personal matter (Tr. 1770-71 (Cox)). There is simply no evidence that either McArthur or McGrath influenced or engineered Cox's unavailability.

The Board states that the reason for using the site RadChem managers was "to have the managers to whom the candidates ***had been*** and would be providing support [to] rate the candidates. Tr. 2916 (Corey)" (ID 54). The Board implies that the SRB had a different function than it actually had. ***If*** the function of the SRB was to rate candidates based on past performance, then it would indeed be desirable to use managers to whom the candidates "***had been***" providing support. However, the SRB's function was not to rate candidates on past performance,

but solely on the responses to job-related questions. McArthur, the selecting manager who was responsible for assembling the SRB, testified that using managers who were "predisposed to the people that were supporting them" "wasn't the concept" he had in mind (Tr. 1498, 1494 (McArthur)). And Cox testified that the SRB members' "prior knowledge" and "past knowledge of performance, past affiliations" were "not the function" of the SRB and did not "play a role in scoring" (Tr. 1755, 1766-67 (Cox)).

The Board's rewriting of the SRB's function to consider a candidate's past performance led it to conclude that Cox's absence caused the SRB to be "'stacked against Fiser in that the RadChem Manager most familiar with his recent work [Mr. Cox] was not included in the process'" (ID 55). Thus, the Board said it was unfair to Fiser not to use an SRB "with whom one of the prospective chemistry managers was or had been working closely in recent years—Jack Cox, with Mr. Fiser; Charles Kent, with Sam Harvey; and John Corey, with Dr. Chandra" (ID at 54). The Board's concept that each candidate should have an advocate on the SRB perverts the notion of using an impartial SRB to evaluate candidates based on their interview answers (Tr. 556-57 (McGrath), 1497 (McArthur)). That concept would be totally unworkable in all but the most unusual situation. For example, the same SRB was used here to interview numerous other candidates for the other four RadChem positions. There was no way for each of those other candidates, with varying backgrounds, to also have a personal advocate on the SRB (Tr. 1493-94 (McArthur)). TVA's selection procedure is an effort to move away from the "good old boy" system and instead use an SRB to evaluate candidates based on the interview without reference to their past relationships. The Board's decision would require TVA to rewrite its procedure to give each candidate, or at least each candidate who had engaged in protected activity, an advocate on the SRB. It is clearly not the intent of Section 50.7 to require employers to give such employees an advantage over other employees without regard to legitimate business reasons.

The majority second-guesses McArthur's business judgment to replace Cox and to proceed with the interviews based solely on the fact that the majority would have made different decisions. To the contrary, the evidence shows that McArthur's decision to replace Cox, rather than reschedule the interviews, was a prudent and reasonable business decision.

Certainly, obtaining the services of a qualified and suitable replacement was less difficult and disruptive than the inconvenience of rescheduling over 15 people, including the candidates for several positions, SRB members, and HR personnel (Tr. 1495-96 (McArthur); 552-56 (McGrath)).

Given the undisputed evidence that the SRB was conducting interviews for five different positions and Cox's testimony that he would have been unable to sit on an SRB judging candidates for all five positions, the majority's finding would require TVA to tailor the composition of the SRB especially for Fiser. To this end, the majority infers discrimination because it believed that McArthur could have rescheduled the SRB meeting to accommodate Cox's schedule (ID 55, n.30), presumably by having Cox sit on the SRB only for the two chemistry positions and replacing him for the other positions; by having one SRB (with Cox, Kent, and Corey) to schedule the interviews for all the candidates over a period of two to three days; or by having a separate SRB (as long as Cox sat on the SRB empanelled for the PWR Chemistry Program Manager position) for each of the five RadChem positions. This is blatant second-guessing of McArthur's business decision to proceed with the interviews with a replacement. The law counsels against such meddling in the business decisions of managers, regardless of whether they are unfair, ill-advised, wrong, or unwise. Reviewing courts in Title VII cases, and the Board in this case, are to decide issues of discrimination, not to sit as super-personnel departments to pass on the wisdom or fairness of business decisions. *See Edmund v. Midamerican Energy Co.*, 299 F.3d 679, 685-86 (8th Cir. 2002). The majority's second-guessing would also accord Fiser special treatment by rescheduling the interviews because of his protected status. That is contrary to the law. *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 266-68 (6th Cir. 1986); *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 610 (11th Cir. 1987); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1083 (11th Cir. 1990).

3. The majority cites the "propounding of technical questions by the SRB" that purportedly favored another candidate (ID 63). The record does not support an inference of discrimination here. The SRB, ***not*** McArthur or McGrath, selected the questions based on their view of the current critical needs of the plants (Tr. 2880 (Corey); 5174 (Rogers)). As

previously stated, decisions attributable to others cannot be indicative of animus on the part of the alleged discriminating officials. *See Mitchell*, 325 F.3d at 1014-15.

The majority does not find fault with the reasonableness or job-relatedness of any of the questions that the SRB asked. In addition to being tied to the current critical needs of the TVA plants, the questions were directly related to the duties and responsibilities as reflected in the position description (TVAX55 at BF1339). It is undisputed that TVA and the rest of the industry were facing major secondary chemistry problems critical to steam generator tube integrity (TVAX 105; Tr. 5079-80, 5108-10 (Goetcheus)). Further, the testimony is undisputed that the questions were fair and that it was reasonable to expect the selectee for the PWR Chemistry Program Manager to know the answers to the technical questions regarding secondary chemistry (Tr. at 5108-10 (Goetcheus), 1778-80 (Cox)). In fact, even the person most familiar and favorably impressed with Fiser's work—Cox—testified that the questions that were asked were fair and reasonable based on the needs of the plants and the current concerns in TVAN and the nuclear industry (Tr. 1778-80 (Cox)). Fiser, as well as others, testified that TVA had a handle on primary chemistry concerns at the time the interviews were held (Tr. at 2400 (Fiser), 5079 (Goetcheus)).

Instead, the majority second-guesses the overall fairness of the questions, insisting that the SRB should have included some primary chemistry questions, "which was Mr. Fiser's area of greater expertise" (ID 57). The majority points out that the PWR Chemistry manager would also have to pay attention to the primary side for corrosion and the containment of radioactivity (ID 57). That argument improperly injects the Board into the realm of management which is ultimately responsible for determining and resolving issues. The SRB ***could have*** chosen to ask questions based on each candidate's experience to give each of them an equal opportunity to shine. The SRB ***could have*** chosen to ask questions which focused on Fiser's claimed area of expertise, primary chemistry, to give him an opportunity to shine. However, while a position description may list a number of job duties and qualifications, it is management's prerogative to determine their relative importance. Thus, a function of the SRB is to determine which candidate has the particularized qualifications that best meet the needs of the organization. The point of the SRB is to differentiate between the candidates' qualifications with respect to

those needs. Further, the majority would require TVA to tailor its interview questions for Fiser's benefit, regardless of the needs of the plant, industry concerns, and actual job duties of the PWR Chemistry Program Manager.[28] Second-guessing that TVA could have changed its normal process to tilt the table in favor of Fiser, but did not do so, is not evidence of a motive to discriminate. The law simply does not sanction the granting of such a special favor to Fiser. *Chappell*, 803 F.2d at 266-68; *Barnes*, 814 F.2d at 610; *Earley*, 907 F.2d at 1083.

4. The majority infers discriminatory intent on the part of McGrath and McArthur from "the virtual preselection of Mr. Harvey by virtue of the personnel makeup of the SRB and the questions asked by the SRB" (ID 63). This is inconsistent with the majority's own finding that the Staff's evidence did not prove that Harvey had been preselected (*id.* at 58-60).[29] How this "circumstance" which the majority found to be unproven supports a finding of discrimination was not explained.

5. The majority cites a "statement by Charles Kent . . . of Mr. Fiser's history of filing DOL complaints" (ID 63). The record is undisputed that Kent's comment concerned only the 1996 complaint, not a "history of filing DOL complaints." In what can only be viewed as an attempt to influence the selection, Fiser himself informed Kent of his 1996 DOL complaint about a week before the interviews (SX135 (Kent) at 115-16).

Kent's comment clearly does not support an inference of discriminatory animus by McArthur or McGrath, since they did not make the statement. Rather than showing discriminatory animus, the evidence is undisputed, as pointed out by the dissent, that Kent's comment was a caution "to *avoid* taking any negative action against Mr. Fiser based on [his] protected activity" (ID 79; emphasis in original). Furthermore, the NRC has previously recognized the appropriateness of taking "'added assurance'" "to ensure that [allegers] had not been targeted specifically for reduction." MIRT Report, at 13. Kent's neutral comment of caution does not

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28 The incumbent in the PWR Chemistry Program Manager position was not intended to be the primary chemistry expert for any of the sites (TVAX55, at BF1339). The majority found, the "emphasis" of the BWR Chemistry Program Manager position would be "on primary chemistry" (ID 56).

29 This fourth "circumstance" cited by the Board is nothing more than a repetition of the Board's second and third circumstances—"the membership makeup of the SRB" and "the propounding of technical questions by the SRB" (ID 63).

support an inference of discrimination. *Staples v. Pepsi-Cola Gen. Bottlers, Inc.*, 312 F.3d 294, 301 (7th Cir. 2002) (holding jury could not reasonably infer discrimination from facially neutral comment). To conclude otherwise would be contrary to common sense and the notion of protecting those who have engaged in protected activity.

6. The majority infers discrimination from "the temporal proximity of Mr. Fiser's non-selection and certain of his protected activities, particularly the 1996 DOL complaint" (ID 63). This finding is erroneous as a matter of law. First, other than Fiser's 1996 DOL complaint, it is undisputed that neither the Staff nor the Board have identified *any* protected activities in which Fiser purportedly engaged after he filed his September 23, 1993, DOL complaint. What other "protected activities" the Board is referring to is a mystery.

Second, Fiser filed the 1996 DOL complaint to protest the posting of the PWR Chemistry Manager position (SX37 at 1). However, as the dissent points out, the majority ignores undisputed evidence that the decisions to reorganize TVAN, to rewrite job descriptions, and to post the PWR Chemistry Manager position all had been made prior to Fiser's filing his 1996 DOL complaint (ID 76). The process for the selection was underway ***before*** the filing of the 1996 complaint. Thus, it was impossible for those decisions to have been made "because of" his 1996 DOL complaint. *Breeden*, 532 U.S. at 273; *Newbold v. Wis. State Pub. Defender*, 310 F.3d 1013, 1017 (7th Cir. 2002) ("Clearly there can be no causal connection between the first WPC charge and the removal of her [Staples'] name because Carla Blum, personnel officer for the WSPD, requested the removal of her name on July 1, 1996, but the WSPD did not learn of Newbold's charge until August 6, 1996.").

7. The majority infers discriminatory intent on the part of McGrath and McArthur because of "the attempted RIF of Mr. Fiser in 199[3]" (ID 63). Such an inference is not supported by the undisputed evidence and therefore is impermissible and unreasonable as a matter of law. The evidence is undisputed that Bynum and Keuter, ***not*** McGrath ***or*** McArthur, made the decision to RIF Fiser in 1993 (JX24 at 3). Under these circumstances, the law is clear that decisions made by Bynum and Keuter cannot be reflective of animus on the part of the alleged discriminating officials. *See, e.g., Mitchell*, 325 F.3d at 1014-15. The record shows that McGrath and McArthur did not play any role in the decision to surplus

Fiser's job in 1993 or to issue the 1993 RIF notice to him. To the contrary, McGrath was on the Corporate Staff, and thus not even in Fiser's organization, and McArthur made an effort to save Fiser's job and later left the workplace in 1993 due to illness. The unreasonableness of this inference is further underscored by the undisputed fact that Fiser did not identify McGrath or McArthur in his 1993 DOL complaint as the officials responsible for his removal (SX34).

8. The majority infers discriminatory intent on the part of McGrath because he ordered "the rewriting of position descriptions in 1996" (ID at 63.). This fact cannot give rise to an inference of discriminatory intent because McGrath made this decision ***before*** he learned of the 1993 DOL complaint, the Sasser letter, or the 1996 DOL complaint (Tr. 415-16, 471-72 (McGrath); SX133 at 41, 47, 93). His lack of knowledge negates any inference of discriminatory intent. *See Breeden*, 532 U.S. at 273; *Mulhall*, 287 F3d at 5554; *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 883-84 (5th Cir. 2003). Moreover, the majority ignores the undisputed evidence that the overwhelming majority of PDs for NOS were rewritten. Thus, Fiser was treated the same as every other employee, ***including McArthur***, who had his or her PD rewritten, and this fact negates any inference of discriminatory intent. *See Manning*, 332 F.3d at 884; *Mitchell*, 964 F.2d at 583-84; *Marshall*, 838 F.2d at 1167-68.

9. The majority infers intent on the part of McArthur because of his "expressed warning . . . to Mr. Fiser (in 1993) to the effect that he should not file a DOL complaint because people 'don't want somebody that is a trouble maker'" (ID 63). The case law is clear "that, in order for comments in the workplace to provide sufficient evidence of discrimination, they must be (1) related to the protected class of which the plaintiff is a member; (2) proximate in time to the employment action; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue." *Manning*, 332 F.3d at 882; *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 222 (5th Cir. 2001). McArthur's purported comment does not meet the second requirement because it allegedly was made some three years before Fiser's 1996 nonselection. *See Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1026 (6th Cir. 1993) (alleged discriminatory remark made "nearly a year before" the challenged employment decision could not support an inference of discrimination); *Hopkins v. Elec. Data Sys. Corp.*, 196 F.3d 655, 662-63 (6th Cir. 1999) (an isolated remark made by plaintiff's supervisor lacked a

sufficient nexus to the plaintiff's termination several months later); *Staples*, 312 F.3d at 301 (comment made two years before termination was too "temporally removed from the employment decision at issue" to support inference of discrimination); *Conley v. Village of Bedford Park*, 215 F.3d 703, 711 (7th Cir. 2000) (comments made two years before the adverse employment action at issue are "too distant" to provide sufficient support for allegation of discrimination).

Further, the comment does not meet the fourth requirement because it does not identify either McGrath or McArthur as one of the "people" to whom the majority refers. Instead, it was in the context of Fiser seeking employment outside of TVA, and does not provide any indicia that it relates in any way to the act at issue—Fiser's nonselection—that occurred three years later. Where, as here, the comment does not relate to the challenged employment action, it is no more than a stray remark that is insufficient to support an inference of discriminatory animus. *See, e.g., Bush v. Dictaphone Corp.*, 161 F.3d 363, 369 (6th Cir. 1998) ("[S]tatements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself [can not] suffice to satisfy plaintiff's burden . . . of demonstrating animus."); *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 324 (7th Cir. 2003) ("A statement of discriminatory animus must be made by [the] decisionmaker *and* relate to the action at issue."); *Sanghvi v. St. Catherine's Hosp. Inc.*, 258 F.3d 570, 574 (7th Cir. 2001).

Thus, it was clearly erroneous for the majority to conclude that any of the nine so-called "plethora of career-damaging situations and circumstances" were evidence that McArthur or McGrath acted with discriminatory animus toward Fiser. Further, the majority's conclusion that those circumstances "present a pattern of discrimination that was likely orchestrated by [unnamed] persons in authority at TVA to terminate Mr. Fiser's career" (ID 63) is unsupported by evidence in the record. The Board's supposition that McGrath, McArthur, or other unnamed persons "orchestrated" a scheme to terminate Fiser's employment is entirely conjectural. There was no evidence that McGrath or McArthur acted with a discriminatory animus to cause Fiser's nonselection or that they acted in collusion with any of the decisionmakers of the nine purportedly "career-damaging situations."

V

The Majority's Decision on a Basis Different than Stated in the NOV Denied TVA Fair Notice and Due Process.

The scope of this proceeding is limited to the charges contained in the NOV. *See* 10 C.F.R. § 2.201(a) (2003) (The NOV "will concisely state the alleged violation."). Consistent with this requirement, the majority declares that "[t]he issues ***relevant*** to this proceeding ***are those raised in the NOV itself***" (ID 15 n.14). Here the NOV unambiguously provides that "[t]he particular violation" charged is that TVA retaliated against Fiser because of his "identification of chemistry related nuclear safety concerns in 1991-1993, and [his] subsequent filing of a DOL complaint in September 1993 based, in part, on these chemistry related nuclear safety concerns" (JX47 at AB26). But the majority decision was based on three matters not identified in the NOV—Fiser's participation in the resolution of already-identified safety issues as "protected activities"; his 1996 DOL complaint; and the Sasser letter. Basing the decision on these three matters to sustain the NOV and impose a civil penalty was prejudicial error.

The NRC's Appeal Board made it unmistakably clear in *Radiation Tech., Inc.*, ALAB-567, 10 NRC 533, 537 (1979), that the "role" of the Director of Enforcement "is akin to that of a prosecutor," and "requires that he give licensees written notice of ***specific*** violations and consider their responses in deciding whether penalties are warranted . . ., the Director may prefer charges, demand the payment of penalties (within statutory limits), and agree to compromise penalty cases without formal litigation—'plea bargain,' in a sense." The requirement in *Radiation Tech.* that the Director give licensees "written notice of specific violations" and then consider their responses ***before*** imposing civil penalties comports with NRC regulations. Specifically, "[b]efore instituting any proceeding to impose a civil penalty," the Director "shall serve a written notice of violation upon the person charged" in which the Director "shall specify the date or dates, facts, and the nature of the alleged act or omission with which the person is charged." 10 C.F.R. § 2.205(a) (2003).

The majority dispensed with the fair notice mandate and procedural safeguards of *Radiation Tech.* and 10 C.F.R. §§ 2.205(a)-(e) that required Staff, before the imposition of a civil penalty, to apprise TVA of the charge and afford it the opportunity to respond. The

Director of Enforcement did not issue to TVA an amended or superseding NOV that included the charge that TVA violated § 50.7 when it purportedly retaliated against Fiser because of his participation in the resolution of already-identified safety issues; filing the 1996 ERA complaint; or coauthoring the Sasser letter. Nor was TVA ever provided the opportunity to respond to these charges *prior* to the imposition of a civil penalty. While the hearing before the Board was *de novo*, the NOV defines the charge in this proceeding (*i.e.*, the Staff has the burden to prove its allegations by a preponderance of the evidence) and the Board was required to determine whether the charge as set out in the NOV should be sustained. *Radiation Tech.*, 10 NRC at 536-37.

The majority's reliance on bases unstated in the NOV also violated TVA's procedural due process rights. As the Supreme Court has made clear, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery*, 318 U.S. 80, 87 (1942). Thus, the controlling authority provides that "[t]he fundamental elements of procedural due process are notice and an opportunity to be heard." *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992), *citing Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case." *Id.*; *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). Moreover, "'an agency may not change theories in midstream without giving respondents reasonable notice of the change.'" *Yellow Freight Sys.*, 954 F.2d at 357. The Staff's actions—the NOV and imposition of civil penalty—were based only on the theory that TVA, in violation of § 50.7, retaliated against Fiser because of his identification of chemistry-related nuclear safety concerns in 1991-1993 and the filing of a 1993 DOL complaint. Therefore, *Chenery* mandates that these were the only "grounds upon which" the NOV and imposition of civil penalties were to be "judged" by the Board (318 U.S. at 87), and the majority's reliance on three other protected activities, in addition to those mentioned in the NOV, was a violation of TVA's due process rights. *See Yellow Freight Sys.*, 954 F.2d at 357-59.

CONCLUSION

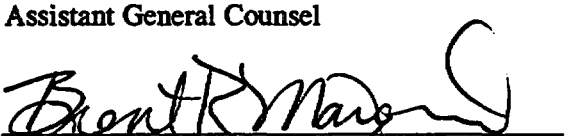
Based on the foregoing reasons and authorities, the Commission should reverse the Board's decision and vacate the NOVs issued by the Staff to TVA, McArthur, and McGrath.

October 2, 2003

Respectfully submitted,

Maureen H. Dunn
General Counsel

Thomas F. Fine
Assistant General Counsel



Brent R. Marquand
Senior Litigation Attorney

John E. Slater
Senior Litigation Attorney

Attorneys for TVA

Office of the General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone 865-632-4251
Facsimile 865-632-6718

Of Counsel:
David A. Repka, Esq.
Winston & Strawn
1400 L Street, NW
Washington, D.C. 20005

003706529

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served by overnight messenger on the persons listed below. Copies of the document have also been sent by e-mail to those persons listed below with e-mail addresses.

Administrative Judge
Charles Bechhoefer, Chairman
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Two White Flint North
11545 Rockville Pike
Rockville, Maryland 20852-2738
e-mail address: cxb2@nrc.gov

Administrative Judge
Richard F. Cole
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Two White Flint North
11545 Rockville Pike
Rockville, Maryland 20852-2738
e-mail address: rfc1@nrc.gov

Administrative Judge
Ann Marshall Young
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Two White Flint North
11545 Rockville Pike
Rockville, Maryland 20852-2738
e-mail address: amy@nrc.gov

Dennis C. Dambly, Esq.
Angela B. Coggins, Esq.
U.S. Nuclear Regulatory Commission
Office of the General Counsel
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738
e-mail address: dcd@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Mr. William D. Travers
Executive Director of Operations
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Nuclear Regulatory Commission
Rockville, Maryland 20852-2738
e-mail: hearingdocket@nrc.gov

Robert W. Bishop, Esq.
Michael A. Bauser, Esq.
Ellen C. Ginsberg, Esq.
Office of the General Counsel
Nuclear Energy Institute
1776 I Street, NW
Washington, D.C. 20006
e-mail address: ecg@nei.org

This 2d day of October, 2003.

Brent R. Marquino
Attorney for TVA

ADDENDUM A

SECTION 50.7 AND REGULATORY HISTORY

Page

10 C.F.R. § 50.7

§ 50.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

(2) Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter or by calling the NRC Information and Records Management Branch at (301) 415-7230.

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

[58 FR 52410, Oct. 8, 1993, as amended at 60 FR 24551, May 9, 1995; 61 FR 6765, Feb. 22, 1996]

8. An estimate of the total number of hours needed annually to complete the requirement or request: 3,519.

9. An indication of whether Section 3507(d), Pub.L. 104–13 applies: Not applicable.

10. Abstract: 10 CFR Part 9 establishes information collection requirements for individuals making requests for records under the Freedom of Information or Privacy Acts. It also contains requests to waive or reduce fees for searching for and reproducing records in response to FOIA requests. The information required from the public is necessary to identify the records they are requesting or to justify requests for waivers or reductions in searching or copying fees.

A copy of the submittal may be viewed free of charge at the NRC Public Document Room, 2120 L Street NW, (lower level), Washington, DC. Members of the public who are in the Washington, DC, area can access this document via modem on the Public Document Room Bulletin Board (NRC's Advanced Copy Document Library), NRC subsystem at FedWorld, 703–321–3339. Members of the public who are located outside of the Washington, DC, area can dial FedWorld, 1–800–303–9672, or use the FedWorld Internet address: fedworld.gov (Telnet). The document will be available on the bulletin board for 30 days after the signature date of this notice. If assistance is needed in accessing the document, please contact the FedWorld help desk at 703–487–4608. Additional assistance in locating the document is available from the NRC Public Document Room, nationally at 1–800–397–4209, or within the Washington, DC, area at 202–634–3273.

Comments and questions should be directed to the OMB reviewer by June 13, 1996: Peter Francis, Office of Information and Regulatory Affairs (3150–00043), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395–3084.

The NRC Clearance Officer is Brenda Jo. Shelton, (301) 415–7233.

Dated at Rockville, Maryland, this 8th day of May, 1996.

For the Nuclear Regulatory Commission.

Gerald F. Cranford,

Designated Senior Official for Information Resources Management.

[FR Doc. 96–12041 Filed 5–13–96; 8:45 am]

BILLING CODE 7590–01–P

Freedom of Employees in the Nuclear Industry To Raise Safety Concerns Without Fear of Retaliation; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Statement of policy.

SUMMARY: The Nuclear Regulatory Commission (NRC) is issuing this policy statement to set forth its expectation that licensees and other employers subject to NRC authority will establish and maintain safety-conscious environments in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation. The responsibility for maintaining such an environment rests with each NRC licensee, as well as with contractors, subcontractors and employees in the nuclear industry. This policy statement is applicable to NRC regulated activities of all NRC licensees and their contractors and subcontractors.

DATES: May 14, 1996.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, (301) 415–2741.

SUPPLEMENTARY INFORMATION:

Background

NRC licensees have the primary responsibility to ensure the safety of nuclear operations. Identification and communication of potential safety concerns[1] and the freedom of employees to raise such concerns is an integral part of carrying out this responsibility.

In the past, employees have raised important issues and as a result, the public health and safety has benefited. Although the Commission recognizes that not every concern raised by employees is safety significant or, for that matter, is valid, the Commission concludes that it is important that licensees' management establish an environment in which safety issues are promptly identified and effectively resolved and in which employees feel free to raise concerns.

Although hundreds of concerns are raised and resolved daily in the nuclear industry, the Commission, on occasion, receives reports of individuals being retaliated against for raising concerns. This retaliation is unacceptable and unlawful. In addition to the hardship caused to the individual employee, the perception by fellow workers that raising concerns has resulted in retaliation can generate a chilling effect that may discourage other workers from raising concerns. A reluctance on the part of employees to raise concerns is detrimental to nuclear safety.

As a result of questions raised about NRC's efforts to address retaliation against individuals who raise health and safety concerns, the Commission established a review team in 1993 to reassess the NRC's program for protecting allegers against retaliation. In its report (NUREG–1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," January 7, 1994) the review team made numerous recommendations, including several recommendations involving issuing a policy statement to address the need to encourage responsible licensee action with regard to fostering a quality-conscious environment in which employees are free to raise safety concerns without fear of retribution (recommendations II.A–1, II.A–2, and II.A–4). On February 8, 1995, the Commission after considering those recommendations and the bases for them published for comment a proposed policy statement, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation," in the Federal Register (60 FR 7592, February 8, 1995).

The proposed policy statement generated comments from private citizens and representatives of the industry concerning both the policy statement and NRC and Department of Labor (DOL) performance. The more significant comments related to the contents of the policy statement included:

1. The policy statement would discourage employees from bringing their concerns to the NRC because it provided that employees should normally provide concerns to the licensee prior to or contemporaneously with coming to the NRC.

2. The use of a holding period should be at the discretion of the employer and not be considered by the NRC in evaluating the reasonableness of the licensee's action.

3. The policy statement is not needed to establish an environment to raise concerns if NRC uses its authority to enforce existing requirements by pursuing civil and criminal sanctions against those who discriminate.

4. The description of employee concerns programs and the oversight of contractors was too prescriptive; the

[1] Throughout this Policy Statement the terms "concerns," "safety concerns" and "safety problem" refer to potential or actual issues within the Commission's jurisdiction involving operations, radiological releases, safeguards, radiation protection, and other matters relating to NRC-regulated activities.

expectations concerning oversight of contractors were perceived as the imposition of new requirements without adherence to the Administrative Procedure Act and the NRC's Backfit Rule, 10 CFR 50.109.

5. The need for employee concerns programs (ECPs) was questioned, including whether the ECPs fostered the development of a strong safety culture.

6. The suggestion for involvement of senior management in resolving discrimination complaints was too prescriptive and that decisions on senior management involvement should be decided by licensees.

In addition, two public meetings were held with representatives of the Nuclear Energy Institute (NEI) to discuss the proposed policy statement. Summaries of these meetings along with a revised policy statement proposed by NEI were included with the comments to the policy statement filed in the Public Document Room (PDR).

This policy statement is being issued after considering the public comments and coordination with the Department of Labor. The more significant changes included:

1. The policy statement was revised to clarify that senior management is expected to take responsibility for assuring that cases of alleged discrimination are appropriately investigated and resolved as opposed to being personally involved in the resolution of these matters.

2. References to maintenance of a "quality-conscious environment" have been changed to "safety-conscious environment" to put the focus on safety.

3. The policy statement has been revised to emphasize that while alternative programs for raising concerns may be helpful for a safety-conscious environment, the establishment of alternative programs is not a requirement.

4. The policy statement continues to emphasize licensees' responsibility for their contractors. This is not a new requirement. However, the policy statement was revised to provide that enforcement decisions against licensees for discriminatory conduct of their contractors would consider such things as the relationship between the licensee and contractor, the reasonableness of the licensee's oversight of the contractor's actions and its attempts to investigate and resolve the matter.

5. To avoid the possibility suggested by some commenters that the policy statement might discourage employees from raising concerns to the NRC if the employee is concerned about retaliation by the employer, the statement that reporting concerns to the Commission "except in limited fact-specific situations" would not absolve employees of the duty to inform the employer of matters that could bear on public, including worker, health and safety has been deleted. However, the policy statement expresses the Commission's expectation that employees, when coming to the NRC, should normally have provided the concern to the employer prior to or contemporaneously with coming to the NRC.

Statement of Policy

The purpose of this Statement of Policy is to set forth the Nuclear Regulatory Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety-conscious work environment in which employees feel free to raise concerns both to their own management and the NRC without fear of retaliation. A safety-conscious work environment is critical to a licensee's ability to safely carry out licensed activities.

This policy statement and the principles set forth in it are intended to apply to licensed activities of all NRC licensees and their contractors,[2] although it is recognized that some of the suggestions, programs, or steps that might be taken to improve the quality of the work environment (e.g., establishment of a method to raise concerns outside the normal management structure such as an employee concerns program) may not be practical for very small licensees that have only a few employees and a very simple management structure.

The Commission believes that the most effective improvements to the environment for raising concerns will come from within a licensee's organization (or the organization of the licensee's contractor) as communicated and demonstrated by licensee and contractor management. Management should recognize the value of effective processes for problem identification and resolution, understand the negative effect produced by the perception that employee concerns are unwelcome, and appreciate the importance of ensuring that multiple channels exist for raising concerns. As the Commission noted in its 1989 Policy Statement on the Conduct of Nuclear Power Plant Operations (54 FR 3424, January 24, 1989), management must provide the leadership that nurtures and maintains the safety environment.

In developing this policy statement, the Commission considered the need for:

(1) Licensees and their contractors to establish work environments, with effective processes for problem identification and resolution, where employees feel free to raise concerns, both to their management and to the NRC, without fear of retaliation;

(2) Improving contractors' awareness of their responsibilities in this area;

(3) Senior management of licensees and contractors to take the responsibility for assuring that cases of alleged discrimination are appropriately investigated and resolved; and

(4) Employees in the regulated industry to recognize their responsibility to raise safety concerns to licensees and their right to raise concerns to the NRC.

This policy statement is directed to all employers, including licensees and their contractors, subject to NRC authority, and their employees. It is intended to reinforce the principle to all licensees and other employers subject to NRC authority that an act of retaliation or discrimination against an employee for raising a potential safety concern is not only unlawful but may adversely impact safety. The Commission emphasizes that employees who raise concerns serve an important role in addressing potential safety issues. Thus, the NRC cannot and will not tolerate retaliation against employees who attempt to carry out their responsibility to identify potential safety issues.[3]

Under the Atomic Energy Act of 1954, as amended, the NRC has the authority to investigate allegations that employees of licensees or their contractors have been discriminated against for raising concerns and to take enforcement action if discrimination is substantiated. The Commission has promulgated regulations to prohibit discrimination (see, e.g., 10 CFR 30.7 and 50.7). Under Section 211 of the Energy Reorganization Act of 1974, as amended, the Department of Labor also has the authority to investigate complaints of discrimination and to

[2] Throughout this Notice, the term "licensee" includes licensees and applicants for licenses. It also refers to holders of certificates of compliance under 10 CFR Part 76. The term "contractor" includes contractors and subcontractors of NRC licensees and applicants defined as employers by section 211(a)(2) of the Energy Reorganization Act of 1974, as amended.

[3] An employee who believes he or she has been discriminated against for raising concerns may file a complaint with the Department of Labor if the employee seeks a personal remedy for the discrimination. The person may also file an allegation of discrimination with the NRC. The NRC will focus on licensee actions and does not obtain personal remedies for the individual. Instructions for filing complaints with the DOL and submitting allegations can be found on NRC Form 3 which licensees are required to post.

provide a personal remedy to the employee when discrimination is found to have occurred.

The NRC may initiate an investigation even though the matter is also being pursued within the DOL process. However, the NRC's determination of whether to do so is a function of the priority of the case which is based on its potential merits and its significance relative to other ongoing NRC investigations.[4]

Effective Processes for Problem Identification and Resolution

Licensees bear the primary responsibility for the safe use of nuclear materials in their various licensed activities. To carry out that responsibility, licensees need to receive prompt notification of concerns as effective problem identification and resolution processes are essential to ensuring safety. Thus, the Commission expects that each licensee will establish a safety-conscious environment where employees are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees.

A safety-conscious environment is reinforced by a management attitude that promotes employee confidence in raising and resolving concerns. Other attributes of a work place with this type of an environment may include well-developed systems or approaches for prioritizing problems and directing resources accordingly; effective communications among various departments or elements of the licensee's organization for openly sharing information and analyzing the root causes of identified problems; and employees and managers with an open and questioning attitude, a focus on safety, and a positive orientation toward admitting and correcting personnel errors.

Initial and periodic training (including contractor training) for both employees and supervisors may also be an important factor in achieving a work environment in which employees feel free to raise concerns. In addition to communicating management expectations, training can clarify for both supervisors and employees options for problem identification. This would include use of licensee's internal processes as well as providing concerns directly to the NRC.[5] Training of supervisors may also minimize the potential perception that efforts to reduce operating and maintenance costs may cause supervisors to be less receptive to employee concerns if identification and resolution of concerns involve significant costs or schedule delays.

Incentive programs may provide a highly visible method for demonstrating management's commitment to safety, by rewarding ideas not based solely on their cost savings but also on their contribution to safety. Credible self assessments of the environment for raising concerns can contribute to program effectiveness by evaluating the adequacy and timeliness of problem resolution. Self-assessments can also be used to determine whether employees believe their concerns have been adequately addressed and whether employees feel free to raise concerns. When problems are identified through self-assessment, prompt corrective action should be taken.

Licensees and their contractors should clearly identify the processes that employees may use to raise concerns and employees should be encouraged to use them. The NRC appreciates the value of employees using normal processes (e.g., raising issues to the employee supervisors or managers or filing deficiency reports) for problem identification and resolution. However, it is important to recognize that the fact that some employees do not desire to use the normal line management processes does not mean that these employees do not have legitimate concerns that should be captured by the licensee's resolution processes. Nor does it mean that the normal processes are not effective. Even in a generally good environment, some employees may not always be comfortable in raising concerns through the normal channels. From a safety perspective, no method of raising potential safety concerns should be discouraged. Thus, in the interest of having concerns raised, the Commission encourages each licensee to have a dual focus: (1) On achieving and maintaining an environment where employees feel free to raise their concerns directly to their supervisors and to licensee management, and (2) on ensuring that alternate means of raising and addressing concerns are accessible, credible, and effective.

NUREG–1499 may provide some helpful insights on various alternative approaches. The Commission recognizes that what works for one licensee may not be appropriate for another. Licensees have in the past used a variety of different approaches, such as:

(1) An "open-door" policy that allows the employee to bring the concern to a higher-level manager;

(2) A policy that permits employees to raise concerns to the licensee's quality assurance group;

(3) An ombudsman program; or

(4) Some form of an employee concerns program.

The success of a licensee alternative program for concerns may be influenced by how accessible the program is to employees, prioritization processes, independence, provisions to protect the identity of employees including the ability to allow for reporting issues with anonymity, and resources. However, the prime factors in the success of a given program appear to be demonstrated management support and how employees perceive the program. Therefore, timely feedback on the follow-up and resolution of concerns raised by employees may be a necessary element of these programs.

This Policy Statement should not be interpreted as a requirement that every licensee establish alternative programs for raising and addressing concerns. Licensees should determine the need for providing alternative methods for raising concerns that can serve as internal "escape valves" or "safety nets."[6] Considerations might include the number of employees, the complexity of operations, potential hazards, and the history of allegations made to the NRC or licensee. While effective alternative programs for identifying and resolving concerns may assist licensees in maintaining a safety-conscious environment, the Commission, by making the suggestion for establishing alternative programs, is not requiring licensees to have such programs. In the absence of a requirement imposed by the Commission, the establishment and framework of alternative programs are discretionary.

[4] The NRC and DOL have entered into a Memorandum of Understanding to facilitate cooperation between the agencies. (47 FR 54585; December 3, 1982).

[5] Training of supervisors in the value of raising concerns and the use of alternative internal processes may minimize the conflict that can be created when supervisors, especially first line supervisors, perceive employees as "problem employees" if the employees, in raising concerns, bypass the "chain of command."

[6] In developing these programs, it is important for reactor licensees to be able to capture all potential safety concerns, not just concerns related to "safety-related" activities covered by 10 CFR Part 50, Appendix B. For example, concerns relating to environmental, safeguards, and radiation protection issues should also be captured.

Improving Contractors' Awareness of Their Responsibilities

The Commission's long-standing policy has been and continues to be to hold its licensees responsible for compliance with NRC requirements, even if licensees use contractors for products or services related to licensed activities. Thus, licensees are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation.

Nevertheless, certain NRC requirements apply directly to contractors of licensees (see, for example, the rules on deliberate misconduct, such as 10 CFR 30.10 and 50.5 and the rules on reporting of defects and noncompliances in 10 CFR Part 21). In particular, the Commission's prohibition on discriminating against employees for raising safety concerns applies to the contractors of its licensees, as well as to licensees (see, for example, 10 CFR 30.7 and 50.7).

Accordingly, if a licensee contractor discriminates against one of its employees in violation of applicable Commission rules, the Commission intends to consider enforcement action against *both* the licensee, who remains responsible for the environment maintained by its contractors, and the employer who actually discriminated against the employee. In considering whether enforcement actions should be taken against licensees for contractor actions, and the nature of such actions, the NRC intends to consider, among other things, the relationship of the contractor to the particular licensee and its licensed activities; the reasonableness of the licensee's oversight of the contractor environment for raising concerns by methods such as licensee's reviews of contractor policies for raising and resolving concerns and audits of the effectiveness of contractor efforts in carrying out these policies, including procedures and training of employees and supervisors; the licensee's involvement in or opportunity to prevent the discrimination; and the licensee's efforts in responding to the particular allegation of discrimination, including whether the licensee reviewed the contractor's investigation, conducted its own investigation, or took reasonable action to achieve a remedy for any discriminatory action and to reduce potential chilling effects.

Contractors of licensees have been involved in a number of discrimination complaints that are made by employees. In the interest of ensuring that their contractors establish safety-conscious environments, licensees should consider taking action so that:

(1) Each contractor involved in licensed activities is aware of the applicable regulations that prohibit discrimination;

(2) Each contractor is aware of its responsibilities in fostering an environment in which employees feel free to raise concerns related to licensed activities;

(3) The licensee has the ability to oversee the contractor's efforts to encourage employees to raise concerns, prevent discrimination, and resolve allegations of discrimination by obtaining reports of alleged contractor discrimination and associated investigations conducted by or on behalf of its contractors; conducting its own investigations of such discrimination; and, if warranted, by directing that remedial action be undertaken; and

(4) Contractor employees and management are informed of (a) the importance of raising safety concerns and (b) how to raise concerns through normal processes, alternative internal processes, and directly to the NRC.

Adoption of contract provisions covering the matters discussed above may provide additional assurance that contractor employees will be able to raise concerns without fear of retaliation.

Involvement of Senior Management in Cases of Alleged Discrimination

The Commission reminds licensees of their obligation both to ensure that personnel actions against employees, including personnel actions by contractors, who have raised concerns have a well-founded, non-discriminatory basis and to make clear to all employees that any adverse action taken against an employee was for legitimate, non-discriminatory reasons. If employees allege retaliation for engaging in protected activities, senior licensee management should be advised of the matter and assure that the appropriate level of management is involved, reviewing the particular facts and evaluating or reconsidering the action.

The intent of this policy statement is to emphasize the importance of licensee management taking an active role to promptly resolve situations involving alleged discrimination. Because of the complex nature of labor-management relations, any externally-imposed resolution is not as desirable as one achieved internally. The Commission emphasizes that internal resolution is the licensee's responsibility, and that early resolution *without* government involvement is less likely to disrupt the work place and is in the best interests of both the licensee and the employee. For these reasons, the Commission's enforcement policy provides for consideration of the actions taken by licensees in addressing and resolving issues of discrimination when the Commission develops enforcement sanctions for violations involving discrimination. (59 FR 60697; November 28, 1994).

In some cases, management may find it desirable to use a holding period, that is, to maintain or restore the pay and benefits of the employee alleging retaliation, pending reconsideration or resolution of the matter or pending the outcome of an investigation by the Department of Labor (DOL). This holding period may calm feelings on-site and could be used to demonstrate management encouragement of an environment conducive to raising concerns. By this approach, management would be acknowledging that although a dispute exists as to whether discrimination occurred, in the interest of not discouraging other employees from raising concerns, the employee involved in the dispute will not lose pay and benefits while the action is being reconsidered or the dispute is being resolved. However, inclusion of the holding period approach in this policy statement is not intended to alter the existing rights of either the licensee or the employee, or be taken as a direction by, or an expectation of, the Commission, for licensees to adopt the holding period concept. For both the employee and the employer, participation in a holding period under the conditions of a specific case is entirely voluntary.

A licensee may conclude, after a full review, that an adverse action against an employee is warranted.[7] The Commission recognizes the need for licensees to take action when justified. Commission regulations do not render a person who engages in protected activity immune from discharge or discipline stemming from non-prohibited considerations (see, for example, 10 CFR 50.7(d)). The Commission expects licensees to make personnel decisions that are consistent with regulatory requirements and that

[7] When other employees know that the individual who was the recipient of an adverse action may have engaged in protected activities, it may be appropriate for the licensee to let the other employees know, consistent with privacy and legal considerations, that (1) management reviewed the matter and determined that its action was warranted, (2) the action was not in retaliation for engaging in protected activity and the reason why, and (3) licensee management continues to encourage them to raise issues. This may reduce any perception that retaliation occurred.

will enhance the effectiveness and safety of the licensee's operations.

Responsibilities of Employers and Employees

As emphasized above, the responsibility for maintaining a safety-conscious environment rests with licensee management. However, employees in the nuclear industry also have responsibilities in this area. As a general principle, the Commission normally expects employees in the nuclear industry to raise safety and compliance concerns directly to licensees, or indirectly to licensees through contractors, because licensees, and not the Commission, bear the primary responsibility for safe operation of nuclear facilities and safe use of nuclear materials.[8] The licensee, and not the NRC, is usually in the best position and has the detailed knowledge of the specific operations and the resources to deal promptly and effectively with concerns raised by employees. This is another reason why the Commission expects licensees to establish an environment in which employees feel free to raise concerns to the licensees themselves.

Employers have a variety of means to express their expectations that employees raise concerns to them, such as employment contracts, employers' policies and procedures, and certain NRC requirements. In fact, many employees in the nuclear industry have been specifically hired to fulfill NRC requirements that licensees identify deficiencies, violations and safety issues. Examples of these include many employees who conduct surveillance, quality assurance, radiation protection, and security activities. In addition to individuals who specifically perform functions to meet monitoring requirements, the Commission encourages all employees to raise concerns to licensees if they identify safety issues[9] so that licensees can address them before an event with safety consequences occurs.

The Commission's expectation that employees will normally raise safety concerns to their employers does not mean that employees may not come directly to the NRC. The Commission encourages employees to come to the NRC at any time they believe that the Commission should be aware of their concerns.[10] But, while not required, the Commission does expect that employees normally will have raised the issue with the licensee either prior to or contemporaneously with coming to the NRC. The Commission *cautions* licensees that complaints that adverse action was taken against an employee for not bringing a concern to his or her employer, when the employee brought the concern to the NRC, will be closely scrutinized by the NRC to determine if enforcement action is warranted for discrimination.

Retaliation against employees engaged in protected activities, whether they have raised concerns to their employers or to the NRC, will not be tolerated. If adverse action is found to have occurred because the employee raised a concern to either the NRC or the licensee, civil and criminal enforcement action may be taken against the licensee and the person responsible for the discrimination.

Summary

The Commission expects that NRC licensees will establish safety-conscious environments in which employees of licensees and licensee contractors are free, and feel free, to raise concerns to their management and to the NRC without fear of retaliation.

Licensees must ensure that employment actions against employees who have raised concerns have a well-founded, non-discriminatory basis. When allegations of discrimination arise in licensee, contractor, or subcontractor organizations, the Commission expects that senior licensee management will assure that the appropriate level of management is involved to review the particular facts, evaluate or reconsider the action, and, where warranted, remedy the matter.

Employees also have a role in contributing to a safety-conscious environment. Although employees are free to come to the NRC at any time, the Commission expects that employees will normally raise concerns with the involved licensee because the licensee has the primary responsibility for safety and is normally in the best position to promptly and effectively address the matter. The NRC should normally be viewed as a safety valve and not as a substitute forum for raising safety concerns.

This policy statement has been issued to highlight licensees' existing obligation to maintain an environment in which employees are free to raise concerns without retaliation. The expectations and suggestions contained in this policy statement do not establish new requirements. However, if a licensee has not established a safety-conscious environment, as evidenced by retaliation against an individual for engaging in a protected activity, whether the activity involves providing information to the licensee or the NRC, appropriate enforcement action may be taken against the licensee, its contractors, and the involved individual supervisors, for violations of NRC requirements.

The Commission recognizes that the actions discussed in this policy statement will not necessarily insulate an employee from retaliation, nor will they remove all personal cost should the employee seek a personal remedy. However, these measures, if adopted by licensees, should improve the environment for raising concerns.

Dated at Rockville, Maryland, this 8th day of May, 1996.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Secretary of the Commission.

[FR Doc. 96–12028 Filed 5–13–96; 8:45 am]

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[8] The expectation that employees provide safety and compliance concerns to licensees is not applicable to concerns of possible wrongdoing by NRC employees or NRC contractors. Such concerns are subject to investigation by the NRC Office of Inspector General. Concerns related to fraud, waste or abuse in NRC operations or NRC programs including retaliation against a person for raising such issues should be reported directly to the NRC Office of the Inspector General. The Inspector General's toll-free hotline is 800–233–3497.

[9] Except for the reporting of defects under 10 CFR Part 21 and in the area of radiological working conditions, the Commission has not codified this expectation. Licensees are required by 10 CFR 19.12 to train certain employees in their responsibility to raise issues related to radiation safety.

[10] The Commission intends to protect the identity of individuals who come to the NRC to the greatest extent possible. See "Statement of Policy on Protecting the Identity of Allegers and Confidential Sources."

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of May 13, 20, 27, and June 3, 1996.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of May 13

Monday, May 13

2:00 p.m.

Briefing on Commonwealth Edison (Public Meeting)

Wednesday, May 15

2:00 p.m.

Briefing on Performance Assessment Program in HLW, LLW, and SDMP (Public Meeting)

(Contact: Norman Eisenberg, 301–415–7285)

3:30 p.m.

Interested persons were afforded opportunity to file written data, views, and arguments thereon. No comments regarding the proposed suspension were received.

After consideration of all relevant material, including the proposal in the notice and other available information, it is hereby found and determined that for the months of September 1993 through February 1994 the following provisions of the order do not tend to effectuate the declared policy of the Act:

In § 1004.7(e), the word "immediately" and the words "for each of the following months of March through August".

Statement of Consideration

For the months of September 1993 through February 1994, this action suspends provisions of the Middle Atlantic milk order for the purpose of relaxing the limit on the period of automatic pool plant status for supply plants and reserve processing plants.

The suspension was requested by Pennmarva Dairymen's Federation, a federation of cooperative associations representing approximately 90 percent of the market's producer milk. According to Pennmarva, a decline in the percentage of the Middle Atlantic market's producer milk used in Class I and a reduction in products processed at pool distributing plants have made maintaining pool status difficult for producers whose milk historically has been associated with the market.

Two large Order 4 distributing plants with which large volumes of Order 4 diverted milk had been associated recently became regulated under the New York-New Jersey order (Order 2). Under Order 4, diverted milk is included in the receipts of the plant from which the milk is diverted in determining whether such plant meets the minimum Class I use percentage to qualify as a pool plant. This action is necessary to ensure that producers whose milk has been displaced from the plants that have shifted their regulatory status to Order 2 maintain association with the Middle Atlantic marketing order, thus eliminating unnecessary and uneconomical movements of milk to maintain pool status for the purpose of benefiting from pooling and pricing under the order.

No comments supporting or opposing the proposed suspension were filed by interested persons.

It is hereby found and determined that 30 days' notice of the effective date hereof is impractical, unnecessary and contrary to the public interest in that:

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing area, in that such action is necessary to permit the continued pooling of the milk of dairy farmers who have historically supplied the market without the need for costly and inefficient movements of milk;

(b) This suspension does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of proposed rulemaking was given interested parties and they were afforded opportunity to file written data, views or arguments concerning this suspension. No comments were received.

Therefore, good cause exists for making this order effective less than 30 days from the date of publication in the Federal Register.

List of Subjects in 7 CFR Part 1004

Milk marketing orders.

For the reasons set forth in the preamble, the following provisions in Title 7 part 1004 are suspended as follows:

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

1. The authority citation for 7 CFR part 1004 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

§ 1004.7 [Temporarily suspended in part]

2. In § 1004.7(e), the word "immediately" and the words "for each of the following months of March through August" are suspended.

Dated: October 4, 1993.

Patricia Jensen,

Deputy Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 93–24757 Filed 10–7–93; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 19, 30, 40, 50, 60, 61, 70, 72, and 150

RIN 3150–AE50

Whistleblower Protection for Employees of NRC-Licensed Activities

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations regarding the protection of employees who provide information to the NRC or their employers concerning safety issues. The amendments are intended to conform current NRC regulations to the new nuclear whistleblower protection provisions of the Energy Policy Act of 1992, which was enacted on October 24, 1992.

EFFECTIVE DATE: October 8, 1993.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301–504–2741.

SUPPLEMENTARY INFORMATION:

I. Background

On October 24, 1992, the President signed into law the Energy Policy Act of 1992. Section 2902, "Employee Protection for Nuclear Whistleblowers," includes provisions amending Section 210 of the Energy Reorganization Act (ERA) of 1974, as amended. The changes pertinent to this rulemaking include the following:

(1) Because the ERA contained two sections 210, the legislation renumbered the whistleblower protection provisions as section 211.

(2) The new legislation extends the period in which a whistleblower complaint may be filed with the Department of Labor (DOL) from 30 days to 180 days.

(3) The new legislation extends and/or clarifies protection to new classes of employees and employers to include: (a) Employees who bring or are about to bring concerns directly to their employers; (b) employees who have "refused to engage in" an unlawful practice, provided that the employee has identified the illegality to the employer; (c) employees who have testified, or are about to testify, before Congress or in any Federal or State proceeding regarding any provision (or proposed provision) of the ERA or the Atomic Energy Act (AEA).

As a result of these legislative changes, the NRC concluded that its regulations in 10 CFR parts 19, 30, 40, 50, 60, 61, 70, 72, and 150 should be updated to conform to the new legislation. Accordingly, on June 15, 1993 (58 FR 33042), the Commission published in the Federal Register proposed changes to these Parts to reflect the changes in the whistleblower

protection provisions brought about by the Energy Policy Act of 1992.

II. Summary of Proposed Rules

Currently, 10 CFR 19.11(c) requires that the June 1982 version or later revision of the NRC Form 3, "Notice to Employees," be posted. This section is being changed to ensure that the most recent version of NRC Form 3 is posted. The language is modified so that the date of publication for NRC Form 3 is inserted in the revision to 10 CFR part 19. In the future, if NRC Form 3 is changed, 10 CFR part 19 will also be changed. With this rulemaking, 10 CFR part 19 is revised to specify NRC Form 3 (6/93). The revised NRC Form 3, in addition to addressing the 180-day time period that employees have to file a complaint with the Department of Labor, describes protection for employees who: (1) Bring safety complaints to their employers; (2) refuse to engage in an unlawful practice, provided that the employee has identified the illegality to the employer; and (3) have testified or are about to testify before Congress or in any Federal or State proceeding regarding any provision (or proposed provision) of the ERA or the AEA. The June 1993 version of Form 3 was distributed in July 1993. Additional copies are available as specified in 10 CFR 19.11. In addition, 10 CFR parts 30, 40 and 70 are modified to require posting of NRC Form 3 by general licensees subject to 10 CFR part 19.

Section 211 requires that the provisions of that section be posted. The Department of Labor (DOL) is implementing procedures to require all employers to post the provisions of section 211. Accordingly, given that the DOL action will require posting by a class of employers that includes all NRC licensees, the NRC is not separately requiring the posting of the provisions. However, NRC licensees will be subject to the DOL rule implementing the posting provision of section 211 and will also be required by this rule to post NRC Form 3 which summarizes protected activities, defines discrimination, and explains how to file a complaint with the DOL.

In 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, 72.10, and 150.20, the following changes were proposed to reflect the new legislation:

(1) The applicable section 210 is renumbered as section 211.

(2) The definition of protected activities is modified to reflect the provisions of the Energy Policy Act of 1992.

(3) The period in which a complaint can be filed with DOL is changed from 30 days to 180 days.

(4) References in certain sections of the regulations to "compensation, terms, conditions, and privileges of employment" are being changed to "compensation, terms, conditions, or privileges of employment." This change is necessary to correct earlier language to conform to the language in the ERA of 1974, as amended.

(5) The exemption in §§ 30.7, 40.7, and 70.7, formally exempting general licensees from the requirement to post NRC Form 3, is being deleted because some general licensees are subject to part 19.

(6) The part 150 NRC general license, recognizing Agreement State licenses, would be amended to conform to the changes to §§ 30.7, 40.7, and 70.7.

(6) Each applicable regulation would be amended to provide that licensees and applicants are expected to notify their contractors of the prohibition against discrimination for engaging in protected activities.

As provided in 10 CFR 30.7(c), 40.7(c), 50.7(c), 60.9(c), 61.9(c), 70.7(c), and 72.10(c) of these regulations, licensees and applicants may be subject to enforcement action for discrimination caused by their contractors or subcontractors.

III. Public Comments and the Commission's Response

The June 15, 1993 proposed rule resulted in the receipt of comments from the Nuclear Management and Resources Council (NUMARC), the International Union, United Plant Guard Workers of America (UPGWA), and the law firm of Winston & Strawn who commented on behalf of four nuclear utilities. (Copies of the three comment letters are available for inspection in the NRC Public Document Room, 2120 L Street, NW. (Lower Level) Washington, DC).

Two of the comments were similar in nature. NUMARC commented that the NRC's rule changes appear to meet the Commission's intent to conform the regulations to the new statutory requirements. The UPGWA indicated that it enthusiastically supports the rule changes and hopes that the rules will be vigorously and strictly enforced. Both commenters were generally supportive of the proposed rule and provided no comments on specific provisions.

On the other hand, Winston & Strawn, while recognizing that most of the proposed changes are required by the Energy Policy Act of 1992, focused on the proposal in 10 CFR 50.7(e) and the related enforcement provision in § 50.7(c). In particular, the proposed rulemaking would add a subsection in each applicable section, e.g. 50.7(e)(2), that stated NRC's expectation that all licensees will notify their contractors of the prohibition against discrimination for engaging in protected activities. Winston & Strawn commented that there is no need for this provision since, in its view, the existing regulatory framework provides ample incentives for licensees to notify their contractors of the prohibitions on discrimination. Winston & Strawn's basic concern, however, is that these proposed subsections do not specify in any detail the licensee's contractor notification requirements and yet the NRC may seek to take enforcement action against a licensee for violations of the notification provision.

It should be noted that the NRC continues to find instances of contractor discrimination which indicate that there is a continuing need for licensees to work with their contractors to eliminate discrimination. A basic need in this area is for contractors to be fully apprised of their responsibilities and the prohibition on discrimination. The intent of these subsections was to prompt licensees to take whatever actions they believe to be necessary to ensure that their contractors are informed of the prohibitions against discrimination, not to impose rigid or prescriptive requirements as to how, when or how often licensees are to notify their contractors of the prohibitions.

The proposed notification requirement was not expressed in mandatory language, rather the language used provided NRC's expectation. This may make enforcement difficult. Therefore, rather than embark on a new rulemaking at this time to provide more specificity, the language will be deleted. However, the NRC continues to believe that it is in the interest of the public health and safety that each licensee take sufficient steps to assure that its contractors are aware of the prohibitions against discrimination. The need for rulemaking on this notification matter may be revisited following the completion of the staff's report to the Commission on its reassessment of the NRC program for protecting allegers against retaliation. 58 FR 41108 (August 2, 1993). The NRC emphasizes, however, regardless of whether a notification provision is specified in the regulations, licensees will be subject to enforcement actions for discrimination caused by their contractors.

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IV. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for the final rule.

V. Paperwork Reduction Act Statement

The final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget, approval numbers 3150–0044, –0017, –0020, –0011, –0127, –0135, –0009, –0132, and 0032.

VI. Regulatory Analysis

The Commission finds that there is no alternative to amending the regulations because most of the amendments are statutorily mandated as required by the Energy Policy Act of 1992. The final rule is intended to conform the Commission's regulations to the nuclear whistleblower provisions of the Energy Policy Act of 1992. The final rule extends and clarifies protection to new classes of employees and employers and extends the period in which an employee may file a whistleblower complaint. The foregoing constitutes the regulatory analysis for the final rule.

VII. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. The final rule conforms the Commission's regulations to the nuclear whistleblower provisions of the Energy Policy Act of 1992.

VIII. Backfit Analysis

The Nuclear Regulatory Commission has determined that the backfit rule, 10 CFR 50.109, does not apply to the final rule and that a backfit analysis is not required for the final rule because these amendments are required by law and/or do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects

10 CFR Part 19—Criminal penalties, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

10 CFR Part 30—Byproduct material, Criminal penalties, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 40—Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 50—Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 60—Criminal penalties, High-level waste, Nuclear power plants and reactors, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 61—Criminal penalties, Low-level waste, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70—Criminal penalties, Hazardous materials—transportation, Material control and accounting, Nuclear materials, Packing and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 72—Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

10 CFR Part 150—Criminal penalties, Hazardous materials—transportation, Intergovernmental relations, Nuclear materials, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 19, 30, 40, 50, 60, 61, 70, 72, and 150.

PART 19—NOTICES, INSTRUCTIONS, AND REPORTS TO WORKERS: INSPECTION AND INVESTIGATIONS

1. The authority citation for part 19 is revised to read as follows:

Authority: Secs. 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2236, 2282); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841). Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851).

2. In § 19.11, paragraph (c) is revised to read as follows:

§ 19.11 Posting of notices to workers.

* * * * *

(c) Each licensee and each applicant for a specific license shall prominently post NRC Form 3, (Revision dated June 1993), "Notice to Employees."

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

* * * * *

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

3. The authority citation for part 30 is revised to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83, Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201 as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 30.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

4. Section 30.7 is revised to read as follows:

§ 30.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged

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violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraphs (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each specific licensee, each applicant for a specific license, and each general licensee subject to part 19 shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c).

(2) The posting of NRC Form 3 must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

5. The authority citation for part 40 is revised to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95–604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97–415, 96 Stat. 2067 (42 U.S.C. 2022).

Section 40.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

6. Section 40.7 is revised to read as follows:

§ 40.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination

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prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraphs (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each specific licensee, each applicant for a specific license, and each general licensee subject to part 19 shall prominently post the revision of NRC Form 3, "Notice to Employees", referenced in 10 CFR 19.11(c).

(2) The posting of NRC Form 3 must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

7. The authority citation for part 50 is revised to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 is also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 82 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50–81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

8. Section 50.7 is revised to read as follows:

§ 50.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee

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may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

9. The authority citation for part 60 is revised to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97–425, 96 Stat. 2213(g), 2228, as amended (42 U.S.C. 10134, 10141) and Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851).

10. Section 60.9 is revised to read as follows:

§ 60.9 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not

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later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to Part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

11. The authority citation for part 61 is revised to read as follows:

Authority: Secs. 53, 57, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246, (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851) and Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851).

12. Section 61.9 is revised to read as follows:

§ 61.9 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of the section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

13. The authority citation for part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954 as amended, secs. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); Secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246, (42 U.S.C. 5841, 5842, 5845, 5846).

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Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 5–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93–377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

14. Section 70.7 is revised to read as follows:

§ 70.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraphs (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each specific licensee, each applicant for a specific license, and each general licensee subject to part 19 shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c).

(2) The posting of NRC Form 3 must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

15. The authority citation for part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282), sec. 274 Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853) 42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244, (42 U.S.C. 10101, 10137(a), 10161(h). Subparts K and L are also issued under sec. 133, 96 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

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16. Section 72.10 is revised to read as follows:

§ 72.10 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraphs (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission licensee, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

(2) Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

18. The authority citation for part 150 is revised to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C. 2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(2), 81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 Stat. 930, as amended (42 U.S.C. 2073). Section 150.15 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

19. In § 150.20, the introductory text of paragraph (b) is revised to read as follows:

§ 150.20 Recognition of Agreement State licenses.

* * * * *

(b) Notwithstanding any provision to the contrary in any specific license issued by an Agreement State to a person engaging in activities in a non-Agreement State or in offshore waters under the general licenses provided in this section, the general licenses provided in this section are subject to the provisions of §§ 30.7(a) through (f), 30.9, 30.10, 30.14(d), 30.34, 30.41, 30.51 to 30.63, inclusive, of part 30 of this chapter; §§ 40.7(a) through (f), 40.9, 40.10, 40.41, 40.51, 40.61, 40.63 inclusive, 40.71 and 40.81 of part 40 of this chapter; §§ 70.7(a) through (f), 70.9, 70.10, 70.32, 70.42, 70.51 to 70.56, inclusive, 70.60 to 70.62, inclusive, and to the provisions of 10 CFR parts 19, 20 and 71 and subpart B of part 34, §§ 39.15 and 39.31 through 39.77, inclusive, of part 39 of this chapter. In addition, any person engaging in activities in non-Agreement States or in offshore waters under the general licenses provided in this section:

* * * * *

Dated at Rockville, Maryland this 24th day of September, 1993.

12:04 Oct 07, 1993 VerDate 17-SEP-93 Jkt 150257 PO 00000 Frm 00016 Fmt 4700 Sfmt 4700 E:\FR\FM\P08OC0.PT1 pkm03

For the Nuclear Regulatory Commission.
James M. Taylor,
Executive Director for Operations.
[FR Doc. 93–24787 Filed 10–7–93; 8:45 am]
BILLING CODE 7590–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Standards; Environmental Services

AGENCY: Small Business Administration.
ACTION: Final rule.

SUMMARY: On January 13, 1993, the Small Business Administration (SBA) published an interim final rule which established a small business size standard of $18 million for environmental services, an activity designated by the SBA under Standard Industrial Classification code 8744, Facilities Support Management Services (58 FR 4074). This final rule withdraws that size standard. This action is being taken in order to comply with a court decision, dated June 23, 1993, which judicially vacated the environmental services size standard.

DATES: Effective October 8, 1993.

FOR FURTHER INFORMATION CONTACT: Gary M. Jackson, Director, Size Standards Staff, at (202) 205–6618.

SUPPLEMENTARY INFORMATION: On January 13, 1993, the SBA published an interim final rule in the Federal Register, 58 FR 4074, that established a size standard of $18 million in average annual receipts for environmental services. As discussed in the interim rule, SBA believed environmental services to be an emerging industry which the current SIC System and its corresponding size standards did not adequately address. In response to this situation, the SBA promulgated the environmental services size standard rule on an interim final basis, without opportunity for prior public comment, pursuant to the Administrative Procedure Act, 5 U.S.C. 553 (b)(B). SBA sought public comment on the rule as it recognized the desirability of input from the public prior to the Agency's final decision on establishing this size standard.

SBA is hereby withdrawing that interim final rule. This action is being taken as a result of a court decision that judicially vacated the environmental services size standard. As explained in a notice published in the Federal Register on August 9, 1993 (58 FR 42355), the United States District Court for the District of Columbia on June 23, 1993 held that the SBA's publication of that size standard as an interim final rule violated applicable provisions of the Administrative Procedure Act (APA), 5 U.S.C. 553, requiring notice and comment as part of agency rulemaking procedures. *Analysas Corp. v. Bowles*, No. 93–0711, slip. op. (D.D.C. June 23, 1993). Because applicable provisions of the APA were not followed, the Court vacated the $18 million size standard for environmental services under SIC code 8744. *Id.* at 10.

This final rule formally withdraws the environmental services size standard. This allows the SBA to begin a new rulemaking action to reconsider a size standard for environmental services. Published elsewhere in this issue of the Federal Register a size standard for environmental services of $18 million is being proposed for public comment.

Compliance With Regulatory Flexibility Act, Executive Orders 12291, 12612, 12778, and the Paperwork Reduction Act

General

SBA certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) as it is merely withdrawing the interim final rule in compliance with a court order. In addition, this rule will not constitute a major rule for the purpose of Executive Order 12291 for the same reasons.

Further, SBA certifies that this rule will not impose any paperwork or recordkeeping requirements subject to the Paperwork Reduction Act of 1980, 44 U.S.C. chapter 35.

SBA certifies that this rule will not have federalism implications warranting the preparation of a Federalism Assessment in accordance with Executive Order 12612.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in section 2 of that order.

List of Subjects in 13 CFR Part 121

Government procurement, Government property, Grant programs—business, Loan programs—business, Small business.

Accordingly, part 121 of 13 CFR is amended as follows:

PART 121—[AMENDED]

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632(a), and 634(b)(6), 637(a) and 644(c).

2. In § 121.601 Major Group 87, is amended in the table by revising SIC code 8744 to read as follows:

§ 121.601 Standard Industrial classification codes and size standards.

* * * * *

SIZE STANDARDS BY SIC INDUSTRY

SIC (*=new SIC code in 1987, not used in 1972)	Description (N.E.C.=not elsewhere classified)	Size standards in number of employees or millions of dollars
*	*	*
8744*	Facilities Support Management Services [19].	$3.5
	Base Maintenance [20].	13.5

[19] *Facilities Management, a component of SIC code 8744,* has the following definition: Establishments, not elsewhere classified, which provide overall management and the personnel to perform a variety of related support services in operating a complete facility in or around a specific building, or within another business or Government establishment. Facilities arrangement means furnishing three or more personnel supply services which may include, but are not limited to, secretarial services, typists, telephone answering, reproduction or mimeograph service, mailing service, financial or business management, public relations, conference planning, travel arrangements, word processing, maintaining files and/or libraries, switchboard operation, writers, bookkeeping, minor office equipment maintenance and repair, use of information systems (not programming), etc.

[20] SIC code 8744: If one of the activities of *base maintenance,* as defined below, can be identified with a separate industry, and that activity (or industry) accounts for 50 percent or more of the value of an entire contract, then the proper size standard shall be that for the particular industry, and not the base maintenance size standard.

"Base Maintenance" constitutes three or more separate activities. The activities may be either service or special trade construction related activities. As services, these activities must each be in a separate industry. These activities may include, but are not limited to, such separate maintenance activities as Janitorial and Custodial Service, Protective Guard Service, Commissary Service, Fire Prevention Service, Safety Engineering Service, Messenger Service, and Grounds Maintenance and Landscaping Service. If the contract involves the use of special trade contractors (plumbing, painting, plastering, carpentering, etc.), all such specialized special trade construction activities will be considered a single activity, which is Base Housing Maintenance. This is only one activity of base maintenance and two additional activities must be present for the contract to be considered base maintenance. The size standard for Base Housing Maintenance is $7 million, the same size standard as for Special Trade Contractors.

* * * * *

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FSIS regulations do make provision for the labeling of MS(S) (9 CFR 317.2 (c), (f), and (j)(13), 319.1, and 319.5), a meat food product produced by means similar to the mechanical deboning of poultry. FSIS has recently reaffirmed its policy concerning the labeling of MS(S) in a notice published in the Federal Register on April 16, 1993 (58 FR 19781).

On the question of labeling requirements for poultry product produced by mechanical deboning, FSIS is interested in receiving any available information which might assist the Agency in considering its policy position. Such information may include data and recommendations regarding the manufacture, characteristics, use, and labeling of poultry product produced by mechanical deboning. FSIS also welcomes comments on consumer expectations of products containing poultry product produced by mechanical deboning and on the economic impact of labeling requirements for such products.

The preamble to any proposed regulations which might be issued would include a discussion of the comments received in response to this notice.

Done at Washington, DC, on: June 10, 1993.

Eugene Branstool,

Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 93-14042 Filed 6-14-93; 8:45 am]

BILLING CODE 3410-DM-M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 19, 30, 40, 50, 60, 61, 70, 72, and 150

RIN 3150-AE50

Whistleblower Protection for Nuclear Power Plant Employees

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations regarding the protection of employees who provide information to the NRC or their employers concerning safety issues. The proposed rule would conform current regulations to reflect the new nuclear whistleblower protection provisions of the Energy Policy Act of 1992, which was enacted on October 24, 1992.

DATES: The comment period expires July 15, 1993. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Send comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555. ATTN: Docketing and Services Branch.

Deliver comments to: 11555 Rockville Pike, Rockville, Maryland between 7:45 a.m. and 4:15 p.m. Federal workdays.

Copies of comments received and NRC Form 3 may be examined at the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-504-2741.

SUPPLEMENTARY INFORMATION:

Background

On October 24, 1992, the President signed into law the Energy Policy Act of 1992. Section 2902, "Employee Protection for Nuclear Whistleblowers," includes provisions amending Section 210 of the Energy Reorganization Act (ERA) of 1974, as amended. The changes pertinent to this rulemaking include the following:

(1) Because the ERA contained two Sections 210, the legislation has renumbered the whistleblower protection provisions as Section 211.

(2) The new legislation extends the period in which a whistleblower complaint may be filed with the Department of Labor (DOL) from 30 days to 180 days.

(3) The new legislation extends and/or clarifies protection to new classes of employees and employers to include: (a) employees who bring or are about to bring concerns directly to their employers; (b) employees who have "refused to engage in" an unlawful practice, provided that the employee has identified the illegality to the employer; (c) employees who have testified, or are about to testify, before Congress or in any Federal or State proceeding regarding any provision (or proposed provision) of the ERA or the Atomic Energy Act (AEA).

As a result of these legislative changes, the NRC has concluded that its regulations in 10 CFR parts 19, 30, 40, 50, 60, 61, 70, 72, and 150 should be updated to reflect the changes.

Currently, § 19.11(c) requires that the June 1982 version or later revision of the NRC Form 3, "Notice to Employees," be posted. This section is being changed to eliminate uncertainty and to ensure that the most recent version of NRC Form 3 is posted. The language is modified so that the date of publication for NRC Form 3 is inserted in the revision to 10 CFR part 19. In the future, if NRC Form 3 is changed, 10 CFR part 19 will also be changed. This change to 10 CFR part 19 will revise and reissue NRC Form 3 (6/93). The revised NRC Form 3, in addition to addressing the 180 day time period that employees have to file a complaint, describes protection for employees who: (1) bring safety complaints to their employers; (2) refuse to engage in an unlawful practice, provided that the employee has identified the illegality to the employer; and (3) have testified or are about to testify before Congress or in any Federal or State proceeding regarding any provision (or proposed provision) of the ERA or the AEA. In addition, 10 CFR parts 30, 40 and 70 are modified to require posting of NRC Form 3 by general licensees subject to 10 CFR part 19.

Section 211 requires that the provisions of that section be posted. The Department of Labor (DOL) is implementing procedures to require all employers to post the provisions of Section 211. Accordingly, given that the DOL action will require posting by a class of employers that includes all NRC licensees, the NRC is not separately requiring the posting of the provisions. However, NRC licensees will be subject to the DOL rule of implementing the posting provision of section 211 and will also be required by this rule to post NRC Form 3 which summarizes protected activities, defines discrimination, and explains how to file a complaint with the DOL.

In 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, and 72.10, "Employee Protection," the following changes are being made to reflect the new legislation:

(1) The applicable Section 210 is renumbered as Section 211.

(2) The definition of protected activities is modified to reflect the provisions of the Energy Policy Act of 1992.

(3) The period in which a complaint can be filed with DOL is changed from 30 days to 180 days.

(4) References in certain sections of the regulations to "compensation, terms, conditions, and privileges of employment" are being changed to "compensation, terms, conditions, or privileges of employment." This change is necessary to correct earlier language to conform to the language in the ERA of 1974, as amended.

(5) The exemption in §§ 30.7, 40.7, and 70.7, formally exempting general licensees from the requirement to post NRC Form 3, is being deleted because

some general licensees are subject to part 19.

(6) The Part 150 NRC general license, recognizing Agreement State licenses, would be amended to conform to the changes to §§ 30.7, 40.7, and 70.7.

(7) These sections are being amended to advise licensees and applicants that they are expected to notify their contractors of the prohibition against discrimination for engaging in protected activities. The purpose of this notification is to ensure that contractors understand their obligations under the ERA to avoid discrimination against employees for raising safety issues.

As provided in 10 CFR 30.7(c), 40.7(c), 50.7(c), 60.9(c), 61.9(c), 70.7(c), and 72.10(c) of these regulations, licensees and applicants may be subject to enforcement action for discrimination caused by their contractors or subcontractors.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This proposed rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, approval numbers 3150–0044, –0017, –0020, –0011, –0127, –0135, –0009, and –0132.

Regulatory Analysis

The Commission finds that there is no alternative to amending the regulations because the amendments are statutorily mandated as required by the Energy Policy Act of 1992. The proposed rule is necessary to conform the Commission's regulations to the language of the nuclear whistleblower provisions of the Energy Policy Act of 1992. The proposed rule would extend and clarify protection to new classes of employees and employers and extend the period in which an employee may file a whistleblower complaint. The foregoing constitutes the regulatory analysis for this proposed rule.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. The proposed rule is necessary to conform the Commission's regulations to the language of the nuclear whistleblower provisions of the Energy Policy Act of 1992.

Backfit Analysis

The Nuclear Regulatory Commission has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and that a backfit analysis is not required for this proposed rule because these amendments are required by law and do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects

10 CFR Part 19

Criminal penalties, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

10 CFR Part 30

Byproduct material, Criminal penalties, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials—transportation, Nuclear materials, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 60

Criminal penalties, High-level waste, Nuclear power plants and reactors, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 61

Criminal penalties, Low-level waste, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70

Criminal penalties, Hazardous materials—transportation, Nuclear materials, Packing and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 72

Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

10 CFR Part 150

Criminal penalties, Hazardous materials—transportation, Intergovernmental relations, Nuclear materials, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR parts 19, 30, 40, 50, 60, 61, 70, 72 and 150.

PART 19—NOTICES, INSTRUCTIONS, AND REPORTS TO WORKERS: INSPECTION AND INVESTIGATIONS

1. The authority citation for part 19 is revised to read as follows:

Authority: Secs. 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2236, 2282); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841). Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851).

2. In § 19.11, paragraph (c) is revised to read as follows:

§ 19.11 Posting of notices to workers.

* * * * *

(c) Each licensee and each applicant for a specific license shall prominently post NRC Form 3, (Revision dated [date of latest NRC Form 3 to be inserted]), "Notice to Employees."

Note—Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D to Part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

* * * * *

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PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

3. The authority citation for part 30 is revised to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201 as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 30.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

4. Section 30.7 is revised to read as follows:

§ 30.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the above statutes or possible violations of requirements imposed under either of the above statutes;

(ii) Refusing to engage in any practice made unlawful under either of the above statutes or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the above statutes.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraphs (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) (1) Each specific licensee, each applicant for a specific license, and each general licensee subject to Part 19 shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c).

(2) All licensees and applicants are expected to notify their contractors of the prohibition against discrimination for engaging in protected activities.

(3) The posting of NRC Form 3 must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note.—Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D to Part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

5. The authority citation for part 40 is revised to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95–604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97–415, 96 Stat. 2067 (42 U.S.C. 2022).

Section 40.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234).

Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

6. Section 40.7 is revised to read as follows:

§ 40.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited,

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Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the above statutes or possible violations of requirements imposed under either of the above statutes;

(ii) Refusing to engage in any practice made unlawful under either of the above statutes or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the above statutes.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraphs (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) (1) Each specific licensee, each applicant for a specific license, and each general licensee subject to part 19 shall prominently post the revision of NRC Form 3, "Notice to Employees", referenced in 10 CFR 19.11(c).

(2) All licensees and applicants are expected to notify their contractors of the prohibition against discrimination for engaging in protected activities.

(3) The posting of NRC Form 3 must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note.—Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D to Part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

7. The authority citation for part 50 is revised to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 is also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 82 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50–81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

8. Section 50.7 is revised to read as follows:

§ 50.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the above statutes or possible violations of requirements imposed under either of the above statutes;

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(ii) Refusing to engage in any practice made unlawful under either of the above statutes or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the above statutes.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) (1) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form shall be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

(2) All licensees and applicants are expected to notify their contractors of the prohibition against discrimination for engaging in protected activities.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D to Part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

9. The authority citation for part 60 is revised to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97–425, 96 Stat. 2213(g), 2228 as amended (42 U.S.C. 10134, 10141) and Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851).

10. Section 60.9 is revised to read as follows:

§ 60.9 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the above statutes or possible violations of requirements imposed under either of the above statutes;

(ii) Refusing to engage in any practice made unlawful under either of the above statutes or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the above statutes.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the

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Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) (1) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form shall be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

(2) All licensees and applicants are expected to notify their contractors of the prohibition against discrimination for engaging in protected activities.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D to Part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

11. The authority citation for part 61 is revised to read as follows:

Authority: Secs. 53, 57, 62, 63, 65, 81, 161, 182, 183, 68 ... at. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851) and Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851).

12. Section 61.9 is revised to read as follows:

§ 61.9 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the above statutes or possible violations of requirements imposed under either of the above statutes;

(ii) Refusing to engage in any practice made unlawful under either of the above statutes or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the above statutes.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protecte activities. An employee's engagem . protected activities does not aut.matically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) (1) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form shall be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be

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posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

(2) All licensees and applicants are expected to notify their contractors of the prohibition against discrimination for engaging in protected activities.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D to Part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

13. The authority citation for part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954 as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); secs. 201, as amended., 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C.10155, 10161). Section 70.7 also issued under Pub. L. 5–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93–377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

14. Section 70.7 is revised to read as follows:

§ 70.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the above statutes or possible violations of requirements imposed under either of the above statutes;

(ii) Refusing to engage in any practice made unlawful under either of the above statutes or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the above statutes.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraphs (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) (1) Each specific licensee, each applicant for a specific license, and each general licensee subject to part 19 shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c).

(2) All licensees and applicants are expected to notify their contractors of the prohibition against discrimination for engaging in protected activities.

(3) The posting of NRC Form 3 must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note: Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D to Part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this

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section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

15. The authority citation for part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282), sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148 (c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168 (c), (d). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244 (42 U.S.C. 10101, 10137(a), 10161(h). Subparts K and L are also issued under sec. 133, 96 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

16. Section 72.10 is revised to read as follows:

§ 72.10 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the above statutes or possible violations of requirements imposed under either of the above statutes;

(ii) Refusing to engage in any practice made unlawful under either of the above statutes or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the above statutes.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraphs (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission licensee, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form shall be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

(2) All licensees and applicants are expected to notify their contractors of the prohibition against discrimination for engaging in protected activities.

(3) Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D to Part 20 of this chapter or by contacting the NRC Information and Records Management Branch (telephone no. 301–492–8138).

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

18. The authority citation for part 150 is revised to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C.

2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(2), 81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 Stat. 930, as amended (42 U.S.C. 2073). Section 150.15 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

19. In § 150.20, paragraph (b) introductory text is revised to read as follows:

§ 150.20 Recognition of Agreement State licenses.

* * * * *

(b) Notwithstanding any provision to the contrary in any specific license issued by an Agreement State to a person engaging in activities in a non-Agreement State or in offshore waters under the general licenses provided in this section, the general licenses provided in this section are subject to the provisions of §§ 30.7(a) through (f), 30.9, 30.10, 30.14(d), 30.34, 30.41, 30.51 to 30.63, inclusive, of part 30 of this chapter; §§ 40.7(a) through (f), 40.9, 40.10, 40.41, 40.51, 40.61, 40.63 inclusive, 40.71 and 40.81 of part 40 of this chapter; §§ 70.7(a) through (f), 70.9, 70.10, 70.32, 70.42, 70.51 to 70.56, inclusive, 70.60 to 70.62, inclusive, and to the provisions of 10 CFR parts 19, 20 and 71 and subpart B of part 34, §§ 39.15 and 39.31 through 39.77, inclusive, of part 39 of this chapter. In addition, any person engaging in activities in non-Agreement States or in offshore waters under the general licenses provided in this section:

* * * * *

Dated at Rockville, Maryland, this 4th day of June 1993.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 93-14016 Filed 6-14-93; 8:45 am]

BILLING CODE 7590-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 303

RIN 3064-AA54

Notice of Filing an Application for a Merger Transaction

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed rule.

SUMMARY: The FDIC proposes to amend its regulatory requirements for publishing notice of the filing of an application for a merger transaction under the Bank Merger Act. If an emergency exists requiring expeditious action, the FDIC proposes to require an applicant only to publish twice during the statutory 10 day period instead of daily for 10 days. In non-emergency cases, the FDIC proposes to delete the requirement that notice be published on the same day for each of the five weeks on which notice must be published and on the 30th day from first publication. The proposed amendments would also clarify that the public comment period begins when the first notice is published and is 30 days for non-emergency merger transactions and 10 days for emergency merger transactions. These amendments would bring the FDIC's regulations more into conformance with those of the other federal banking agencies, give applicants more flexibility, and lessen the paperwork and cost burdens imposed by the FDIC's current notice requirements.

DATES: Comments must be received no later than August 16, 1993.

ADDRESSES: Send comments to Hoyle L. Robinson, Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. Comments may be hand delivered to room F-400, 1776 F Street NW., Washington, DC on business days between 8:30 a.m. and 5 p.m. (FAX number: (202) 898-3838.) Comments may also be inspected in room 7118, 550 17th Street NW., Washington, DC between 9 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: A. David Meadows, Associate Director, Operations Branch, Division of Supervision (202) 898-3855; Ann Loikow, Counsel, Legal Division, (202) 898-3796, FDIC, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Background

The Bank Merger Act (12 U.S.C. 1828(c)) ("Act") prohibits any insured depository institution from merging or consolidating with, or directly or indirectly acquiring the assets or assuming the liabilities of, another insured depository institution or any noninsured bank or institution without the prior written approval of the responsible federal banking agency. The Act requires notice of the proposed merger transaction to be published prior to approval of the transaction and at appropriate intervals during a period at least as long as that allowed the Attorney General and other banking agencies to comment on the competitive factors involved (12 U.S.C. 1828(c)(3)).

Except when the responsible agency finds that it must act immediately to prevent the probable failure of a depository institution, in which case no public notice is required, the statutory notice period is 30 days, unless the responsible agency advises the Attorney General and other banking agencies of the existence of an emergency requiring expeditious action, in which case the period is 10 days (12 U.S.C. 1828(c)(4)).

Section 303.6 of the FDIC's regulations (12 CFR 303.6) sets forth the FDIC's notice procedures for applications for merger transactions. Paragraph (f)(1)(i) of that section requires an applicant to publish notice of filing of an application for a merger transaction in a newspaper of general circulation in the community or communities where the main offices of the banks or institutions involved are located at least once a week on the same day for five consecutive weeks and, when published in a daily newspaper, on the thirtieth day from the date of first publication, unless the FDIC's Board of Directors determines it must act immediately to prevent the failure of one of the depository institutions involved. Where the FDIC's Board of Directors determines that an emergency exists requiring expeditious action, paragraph (f)(1)(i) requires notice to be published daily during a period of at least 10 calendar days.

In requiring that the agency responsible for approving a merger transaction request reports on the competitive factors involved from the other banking agencies, as well as the Attorney General, Congress specifically sought to encourage the development of uniform standards in the administration of the Act through consultation among the banking agencies (12 U.S.C. 1828(c)(4)). In fact, the other federal banking agencies responsible for acting on Bank Merger Act applications have adopted less onerous publication requirements than the FDIC has.

The Office of Thrift Supervision requires an applicant to publish no more than three calendar days before or after filing an application and thereafter on a weekly basis during the period allowed for furnishing competitive factors reports (12 CFR 563.22(d)(2)(i)). The same rule applies regardless of whether the required statutory period is 10 or 30 days.

The Board of Governors of the Federal Reserve System requires that notice of proposed merger transactions, whether emergency or non-emergency, be published only once (12 CFR

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preparation of a Federalism Assessment in accordance with E.O. 12612.

The information collection requirements contained in this regulation have been cleared by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act. The Office of Management and Budget control numbers for these collections are contained in 8 CFR 299.5.

List of Subjects in 8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, part 245 of chapter I of title 8, of the Code of Federal Regulations is amended as follows:

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

1. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1154, 1182, 1186a, 1255, and 1257; 8 CFR part 2.

2. In § 245.1, paragraphs (c)(2)(iv) and (d)(3) are added, and paragraph (f)(1) is revised to read as follows:

§ 245.1 Eligibility.

* * * * *

(c) * * *

(2) * * *

(iv) A technical violation resulting from the Service's application of the maximum five/six year period of stay for certain H-1 nurses only if the applicant was subsequently reinstated to H-1 status in accordance with the terms of Public Law 100-658 (Immigration Amendments of 1988).

* * * * *

(d) * * *

(3) *Adjustment of certain nurses admitted in H-1 nonimmigrant status (Public Law 101-238)*—(i) *Eligibility.* Any alien, if otherwise qualified, is eligible for adjustment of status without regard to the numerical limitations of sections 201 and 202 of the Act if:

(A) The applicant had the status of a nonimmigrant under section 101(a)(15)(H)(i) of the Act as of September 1, 1989,

(B) The applicant has been employed in the United States as a registered nurse for a period of three years prior to the date of application for adjustment, and

(C) The applicant's continued employment as a registered nurse meets the standards established for the certification described in section 212(a)(14) of the Act.

(ii) *Application period.* In order to benefit from Public Law 101-238, an applicant must properly file an application for adjustment of status, (Form I-485) on or before March 15, 1995. An applicant must also be the beneficiary of a valid unexpired visa petition, filed in accordance with part 204 of this chapter, according him or her preference status under sections 203(a)(1) through (6) of the Act. This petition may be submitted simultaneously with the application for adjustment of status. An applicant must also submit a request for determination by the district director that the alien is qualified for and will be engaged in an occupation as a registered nurse, as currently listed on Schedule A (20 CFR part 656) simultaneously with the visa petition. To benefit from Public Law 101-238, the applicant must also include evidence of employment as a registered nurse in the U.S. for three years prior to filing the application for adjustment. This evidence is to be in the form of letters from employers stating the beginning and ending dates of periods of employment. The applicant must also submit evidence of licensure as a registered nurse for these periods of employment.

(iii) *Effect of section 245(c)(2).* An applicant for adjustment of status who benefits from the provisions of Public Law 101-238 cannot have engaged in unauthorized employment prior to filing the application for adjustment. An applicant for adjustment of status, who benefits from Public Law 101-238, also must have maintained lawful immigration status (other than through no fault of his or her own or for technical reasons) except for the period from December 31, 1989, to July 16, 1990.

(iv) *Effect of enactment on spouse or child.* The accompanying spouse or child of an applicant for adjustment of status who benefits from Public Law 101-238 may also apply for adjustment of status. All the benefits and limitations of this part apply equally to the principal applicant and his or her accompanying spouse or child.

(v) *Description of qualifying employment.* The employment as a registered nurse, described in paragraph (d)(3)(i)(B) of this section, may occur before, on, or after enactment of Public Law 101-238. The qualifying employment as a registered nurse may occur while the applicant is in any valid nonimmigrant status and is not limited solely to employment while in H-1 status.

* * * * *

(f) * * *

(1) *Availability of immigrant visas under section 245.* An alien is ineligible for the benefits of section 245 of the Act, unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference or nonpreference alien, the current Department of State Visa Office Bulletin on Availability of Immigrant Visa Numbers will be consulted to determine whether an immigrant visa is immediately available. An immigrant visa is considered immediately available if the preference or nonpreference category applicant has a priority date on the waiting list which is no later than the date shown in the Bulletin, or the Bulletin shows that numbers for visa applicants in his or her category are current. An immigrant visa is also considered immediately available if the applicant establishes eligibility for the benefits of Public Law 101-238. Information about the immediate availability of an immigrant visa may be obtained at any Service office.

* * * * *

3. In § 245.2, paragraph (a)(5)(ii) is amended by revising the second sentence to read as follows:

§ 245.2 Application.

(a) * * *

(5) * * *

(ii) *Under section 245.* * * * An application for adjustment of status, as a preference or nonpreference alien, shall not be approved until an immigrant visa number has been allocated by the Department of State, except when the applicant has established eligibility for the benefits of Public Law 101-238. * * *

* * * * *

Dated: March 16, 1990.

Gene McNary,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 90-6516 Filed 3-19-90; 8:43 am]

BILLING CODE 4410-10-M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 40, 50, 60, 61, 70, 72, and 150

RIN 3150-AD21

Preserving the Free Flow of Information to the Commission

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is revising its rules governing the conduct of all Commission licensees and license applicants. The final rule prohibits the imposition of

conditions in settlement agreements under section 210 of the Energy Reorganization Act, or in other agreements affecting employment, that would prohibit, restrict, or otherwise discourage any employee or former employee from providing the Commission with information on potential violations or other hazardous conditions. This rule is necessary to prohibit the use of provisions which would inhibit the free flow of information to the Commission in agreements related to employment.

EFFECTIVE DATE: April 20, 1990.

FOR FURTHER INFORMATION CONTACT: Stuart A. Treby, Assistant General Counsel, Rulemaking and Fuel Cycle Division, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555: Telephone (301) 492-1036.

SUPPLEMENTARY INFORMATION:

Background

Section 210 of the Energy Reorganization Act of 1974, as amended, was added as a new section to that Act in 1978 (Pub. L. 95-601). Section 210 offers protection to employees of a Commission licensee, or of a contractor or a subcontractor of a Commission licensee or applicant. The protection afforded is to those who have been fired or discriminated against as a result of the fact that, among other things, they have testified or given evidence on potential violations, or brought suit under section 210 of the Energy Reorganization Act. Employees who have been discriminated against for raising safety or other issues have the right to file complaints with the Department of Labor for the purpose of obtaining a remedy for the personal harm caused by the discrimination. Following the filing of a complaint, the Department of Labor performs an investigation. If either the employee or the employer is not satisfied with the outcome of the investigation, a hearing can be held before an Administrative Law Judge, with review by the Secretary of Labor. The Secretary of Labor can issue an order for the employee to be rehired, or otherwise compensated if the employee's case is justified.

In many cases, the employee and the employer reach settlement of the issues raised in the Department of Labor proceeding before completion of the formal process and a finding by the Secretary of Labor. In general the Commission supports settlements as they may provide appropriate remedies to employees without the need for litigation. However, a recent case has brought to the Commission's attention the potential for settlement agreements negotiated under section 210 to impose restrictions upon the freedom of employees or former employees protected by section 210 to testify or participate in NRC licensing and regulatory proceedings or to otherwise provide information on potential violations or other hazardous conditions to the Commission or the NRC staff. See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station Units 1 and 2), CLI-88-12, 28 NRC 605 (1988); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station Units 1 and 2), CLI-89-06, 29 NRC 348 (1989). The Commission's follow-up to the above case has confirmed that other instances of questionable restrictions do exist in a variety of settlement agreements, not limited to section 210 proceedings.

The Commission has concluded that a section 210 settlement agreement, or any other agreement affecting employment, which restricts the freedom of an employee or former employee from freely and fully communicating with the Nuclear Regulatory Commission about potential violations or other hazards falling within NRC's regulatory responsibility is unacceptable. These provisions may have a chilling effect on communications about nuclear safety, security, or other matters, and would restrict, impede, or frustrate full and candid disclosure to the Nuclear Regulatory Commission about matters of regulatory significance. Any such agreement under which a person contracts to withhold safety significant information or testimony from the Nuclear Regulatory Commission could itself be a threat to safety and therefore jeopardize the execution of the Agency's overall statutory duties. The same would be true of other information bearing on NRC's regulatory responsibilities, for example information regarding security or safeguards issues.

Accordingly, on July 18, 1989 (54 FR 30049), the Commission published a proposed rule amending its regulations to require licensees and license applicants to ensure that neither they, nor their contractors or subcontractors, impose conditions in settlement agreements under section 210 of the Energy Reorganization Act, or in other agreements affecting employment, that would prohibit, restrict, or otherwise discourage an employee from providing the Commission with information on potential violations or hazardous conditions.

The NRC has received 43 comments on the proposed rule from a variety of Commission licensees, private individuals, and industry organizations. A summary of those comments and the Commission's responses to those comments follows. Before discussing those comments, however, two additional events have occurred which, along with the comments, have resulted in changes in the content of the final rule.

First, on July 18, 1989, the Secretary of Labor issued a decision in a case filed under section 210 of the Energy Reorganization Act which addressed restrictive settlement agreements. See *Pollizi* v. *Gibbs & Hill, Inc.*, 87-ERA-38 (July 18, 1989). In that decision, the Secretary of Labor found unenforceable a clause in a settlement agreement which had the effect of drying-up channels of communication which were essential for Government agencies to carry out their responsibilities. Specifically of significance for this rulemaking, the Secretary found that Department of Labor Administrative Law Judges had a duty to review parties' settlement agreements before dismissing cases and that a restriction on voluntary appearance as a witness in a NRC proceeding was against public policy and, therefore, unenforceable. Particularly notable is the fact that the Secretary found the restrictive provision of the *Pollizi* settlement agreement unenforceable in spite of the fact that the provision in question explicitly stated that, other than appearing voluntarily as a witness in an NRC proceeding, Mr. Pollizi could bring all his safety concerns to the NRC.

The second event of significance to this rulemaking is that the Commission has received the replies of various licensees to the Commission's April 27, 1989, letter to nuclear power plant licensees, their contractors, and major nuclear materials and fuel cycle facility licensees concerning the existence of other settlement agreements with restrictive clauses. Although some licensees were expanding the scope of their reviews and may identify additional agreements in the future, initially more than a dozen agreements were identified that contained either restrictive language or questionable language concerning the provision of information to the NRC. The responses included not only agreements settling section 210 complaints, but also other agreements settling law suits in State and Federal Courts.

As will be discussed in responding to specific comments and suggested changes, the above two events, in combination with the comments received by the Commission, have resulted in modifications to the proposed rule, while at the same time confirming the Commission's view that a

specific rule concerning settlement agreements should be adopted.

Summary of Public Comments

Of the 43 comments received by the Commission on the proposed rule, no one indicated satisfaction with the rule as written. Thirty-six commenters specifically opposed the rule for a variety of reasons. Seven commenters favored the rule subject to certain modifications. It is noteworthy that virtually all commenters indicated their support for the Commission's goal of assuring the free flow of information to the Commission. A summary of comments with the Commission's responses appears below.

1. The Proposed Rule as Drafted Is Much Too Broad in Scope

Almost half the commenters complained that the scope of the rule was much too broad, rendering its implementation both unnecessary and impractical. The two areas most frequently mentioned as being too broadly written were the rule's reference to "contractors and subcontractors" and the application of the rule to "all settlement agreements." Each of those issues is individually addressed below.

a. Application of the Rule to Contractors and Subcontractors

Commenters that exhibited the most concern for the application of the rule to contractors and subcontractors were materials licensees, such as hospitals, whose overall activities involve only a small percentage of licensed activities. Given the extensive use of contractors in the conduct of licensed activities, a rule that applied only to conduct by licensees, and not to licensed activities carried out on their behalf by their contractors or subcontractors, would be of little value. Accordingly, the rule prohibition is broadly worded to cover all persons conducting licensed activities.

A separate but related concern is that, as proposed, the rule would require that licensees have procedures to oversee employee/employer agreements for hundreds of contractors and subcontractors that had nothing to do with their limited licensed activities. It is well established in Commission precedent that an applicant or licensee cannot avoid responsibility for compliance with the Atomic Energy Act or the Commission's regulations by delegation of performance of license related activities to independent agents or contractors. See *Virginia Electric and Power Company* (North Anna Power Station, Units 1 and 2), ALAB-324, 3 NRC 347 (April 15, 1976); *Illinois Power Company* (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735 (December 16, 1981). In fact, the Commission has specifically noted the responsibility of licensees for the conduct of their contractors with respect to cases of harassment by contractors of contractor employees. *Metropolitan Edison Company et al.* (Three Mile Island Station, Unit 1), CLI-85-2, 21 NRC 282, 329 (February 25, 1985).

Therefore, it is not necessary for the Commission to specifically require licensees to have procedures for assuring that their contractors and subcontractors comply with the Commission's regulations. Enforcement actions can be, and have been, taken against licensees for the misconduct of their contractors and subcontractors which results in violations of the Commission's regulations, including violation by contractors of employee discrimination regulations. Thus, the Commission need not require that formal procedures be developed to monitor contractor and subcontractor activity in order for licensees to be responsible for their contractors' and subcontractors' actions.

The Commission did not intend to create an unwieldy system which would require some licensees performing limited licensed activities to establish a system to monitor the employer/employee relations of hundreds of contractors and subcontractors who are not directly involved in licensed activities.

Accordingly, the final rule has been modified to directly prohibit agreements which prohibit, restrict, or otherwise discourage an employee from engaging in protected activity as defined in the Commission's employee protection regulations. Although the final rule requires that licensees notify contractors and subcontractors of this regulation's restrictions, the final rule has not retained the requirement that licensees develop specific procedures to assure compliance by contractors or subcontractors. However, the Commission reemphasizes the precedent noted above with respect to licensees' responsibilities for conduct of licensed activities by their contractors and subcontractors. The Commission will hold licensees responsible for violations of NRC regulatory requirements by contractors and subcontractors performing work related to the activities which are the responsibility of the licensee under the applicable statutes, regulations, orders, or licenses. The selection of means to ensure that violations do not occur, which could include development of written procedures, will be left to licensees.

b. Application of the Rule to All Settlement Agreements

The second area in which commenters were concerned with the scope of the proposed rule was in its application to all "agreements affecting the compensation, terms, conditions and privileges of employment." A number of commenters believe that the rule should be limited to settlement of complaints alleging violations of section 210 of the Energy Reorganization Act. The Commission finds no merit in this criticism of the proposed rule.

On April 27, 1989, the NRC staff requested nuclear power plant licensees and their contractors, and major nuclear materials and fuel cycle facility licensees, to review all settlement agreements or other agreements related to compensation, terms, conditions, and privileges of employment to which they were a party for potentially improper restrictive clauses. Although several of the licensees had not fully completed their review of all such agreements, initial responses to the Commission's inquiry identified more than a dozen agreements that contained language that was either restrictive in nature or was at least questionable concerning the provision of information to the NRC. These agreements were not, in fact, limited to section 210 complaints. They contained several settlements of cases filed on a variety of grounds before State and Federal Courts. The Commission has concluded that these agreements adequately demonstrate the potential for impeding the flow of information to the Commission through avenues other than section 210 agreements. The Commission is, therefore, maintaining in the final rule the application of its prohibition to all agreements affecting the compensation, terms, conditions, and privileges of employment.

2. The Rule Is Unnecessary Because It Is Redundant

Commenters advancing this position generally cited the already existing restrictions in the Commission's regulations concerning section 210 of the Energy Reorganization Act. These include the requirement in 10 CFR part 19 that a "Form 3" be posted at all work sites informing employees of their right to bring safety concerns to the NRC and the requirement in 10 CFR part 21 creating an obligation on directors and responsible officers of licensees and vendors to report defects to the NRC. The commenters believe that it would

be redundant to add a restriction on settlement agreements to the regulations.

The courts have not explicitly addressed the issue of whether section 210 of the Energy Reorganization Act would prohibit restrictive settlement agreements and the Commission's own regulations do not specifically address the issue either. In the *Pollizi* case the Secretary of Labor did not specifically find that the restrictive provisions in the settlement agreements violated section 210. Rather, the Secretary indicated that the agreement's provisions were invalid because the provision was against public policy and was, therefore, unenforceable. See *Pollizi* v. *Gibbs & Hill, Inc.*, 87-ERA-38, Slip Opinion at 7 (July 18, 1989). In addition, based on the number of agreements already identified which contain questionable provisions, it would not appear that current regulations have prevented potentially improper agreements from being executed.

Rather than relying on the judgment of a variety of individuals attempting to determine which clauses might violate public policy, the Commission believes it is prudent to specifically prohibit by regulation all settlement agreements or other agreements affecting the compensation, terms, conditions and privileges of employment from restricting employees from bringing safety concerns to the attention of the NRC.

3. Comments Concerning the Reporting and Monitoring Aspects of the Proposed Rule

A number of commenters raised problems with the requirements in the proposed rule that contractors and subcontractors inform licensees of each section 210 complaint filed against the contractor or subcontractor, and that the licensee or license applicant have prior review of section 210 settlement agreements. Commenters generally felt that this procedure was unnecessary and would make it more difficult to settle cases. Given that settlements are generally encouraged, actions making it more difficult to settle cases would be detrimental to all parties involved in these disputes.

The Commission has determined that, as a result of the Secretary of Labors' decision in the *Pollizi* case, these requirements should be dropped. The reason for the Commission dropping this aspect of the proposed rule primarily results from two parts of the *Pollizi* decision. First, the Secretary in that case reiterated a decision in *Funcko and Yunker* v. *Georgia Power Co.*, 89-ERA-9, 10, (Secretary's Order to Submit Settlement Agreement issued March 23, 1989, at 2), that it was error for an Administrative Law Judge in a Department of Labor case to dismiss a case without reviewing a proposed settlement agreement. *Pollizi* slip op. at 2. In addition, the Secretary found that an agreement that restricted voluntary participation in NRC proceedings, even though it specifically noted that Mr. Pollizi was not in any manner restricted from providing information to the Commission on safety concerns, was against public policy and would not be enforceable. As a result of these two findings it is evident that the Department of Labor will be giving close scrutiny to section 210 settlement agreements. Licensees will be held responsible for contractor violations of the rule. All settlement agreements by contractors will be subject to the restrictions the Commission is adopting today. Licensees may use a variety of methods, such as notification to licensees of all contractor settlement agreements, placing requirements in contracts with individual contractors to prohibit restrictive agreements, or other procedural mechanisms to assure that their contractors comply with this requirement. The Commission is not specifying the method or methods that licensees should use. The Commission emphasizes, however that licensees will be held responsible for violations associated with their licensed activities, whether or not they are specifically aware of a contractor's failure to comply with regulatory requirements. The Commission does not believe that the rule needs to prescribe procedures whereby contractors will report on, and licensees will monitor, the filing and settlement of section 210 cases.

Although the primary motive for these modifications to the proposed rule results from the *Pollizi* decision, a number of commenters identified additional problems created by the proposed requirement which support the modifications to the proposed rule. The Commission is including below a brief summary of those comments.

a. The Administrative Burden To Monitor Hundreds of Contractors and Subcontractors Is Onerous

b. Small Contractors May Cease Nuclear Work Rather Than Taking on the Additional Administrative Burden

The Commission has removed the most burdensome administrative aspects of the proposed rule. Although the Commission does not necessarily agree with some commenters views of the magnitude and affect of the burden that would have been imposed under the proposed rule, the *Pollizi* decision reduces the need to impose a monitoring burden on licensees and license applicants, or a reporting requirement on contractors and subcontractors, with respect to section 210 settlement agreements. However, the Commission reminds licensees and license applicants that the final rule will prohibit all agreements which restrict the bringing of safety or other concerns to the NRC. They are still responsible for assuring that regulated activity is performed in accordance with Commission regulatory requirements. The hiring of contractors or subcontractors to perform work will not relieve licensees or license applicants of that burden.

c. The NRC Is Exceeding Its Authority by Forcing Licensees To Become Involved in Third Party Contracts

d. The Requirement That Licensees and License Applicants Become Involved in Third Party Contracts Will Result in Licensees Fully Litigating Claims Rather Than Settling Claims. This Will Be Detrimental to the Employee

e. It Is Inappropriate To Require Licensees to Intrude Into Contractor Employee Negotiations

The Commission does not agree that it is beyond its authority or it is improper to require licensees to be responsible for the actions of third parties, which they directly or indirectly cause to be involved in licensed activity. As noted previously, it is well established that licensees and license applicants cannot delegate away their responsibility to comply with Commission requirements for performance of licensed activities. The Commission does not believe that the final rule intrudes into third party activities such that it will significantly, if at all, affect the ability of employees to obtain settlements in section 210 or similar cases.

f. Contractors and Subcontractors Who Are Also Licensees Should Not Be Covered by the Rule's Monitoring Requirements Because They Will Already Be Covered by the Principal Licensee

The Commission does not agree that contractors or subcontractors who are also licensees should have a reduced burden by virtue of the fact that they are being employed by another licensee. The final rule has eliminated the requirements for licensees to review settlement agreements in section 210 cases prior to their being executed. Nevertheless, licensees are responsible for assuring that regulated activities they are performing under their license are in accordance with NRC regulatory requirements and this responsibility cannot be delegated away. The fact that several entities within the chain of

responsibility may be licensees does not relieve any of them from the responsibility of assuring that activities performed under their licenses are performed in accordance with NRC regulatory requirements.

g. Contractor Working for Multiple Licensees Might Require Multiple Approvals To Execute a Settlement Agreement

The Commission agrees that, as originally drafted, the proposed rule could have resulted in a contractor having to obtain multiple reviews of proposed settlement agreements. This could have been a hindrance to an employee obtaining a satisfactory settlement. The Commission's desire was not to restrict the ability of employees to reach satisfactory settlement agreements with their employers. The Commission believes the objective of assuring that settlement agreements do not contain improper restrictions on employees bringing information to the NRC can be obtained without the need for multiple entities reviewing section 210 settlement agreements. The final rule has eliminated the requirement that licensees have a prior review of their contractors' section 210 settlement agreements.

4. One Instance Is Not a Sufficient Basis for Adopting a Rule

Several commenters believed that the one instance that was noted by the Commission in the proposed rulemaking was not sufficient to justify modifying the regulations. In fact, at the time the proposed regulation was published, the Commission had already learned that other agreements, apparently containing restrictive clauses, might have been executed. Concurrently with the proposed rulemaking, nuclear power plant licensees, their contractors, and major nuclear materials and fuel cycle licensees were requested pursuant to an April 27, 1989, letter from the NRC staff to review existing agreements to determine if they contained possibly impermissible restrictions. As a result of that review licensees initially identified more than a dozen additional agreements with language which could be interpreted as restricting communications with the NRC.

The Commission believes that the information received as a result of the staff's April 27, 1989, letter confirms the Commission's original belief that the problem of restrictive settlement agreements is serious enough to be directly addressed in our regulations.

5. The Proposed Rule Could Abrogate Proprietary Agreements

The Commission understands this comment to have been concerned with the rule's provisions requiring licensees to review proposed settlement agreements of their contractors and with concerns about employee communications with the NRC. The NRC has regulations to specifically protect proprietary information received by the Commission. See 10 CFR 2.790, 9.17, and 9.104. Thus, the Commission sees little merit to the concern that employees must be made to follow certain procedures before they can bring proprietary information to the Commission. In fact, such a restriction would be likely to inhibit an employee from coming to the NRC. With respect to communications with the NRC, employers should do no more than require employees to inform the NRC that information being provided may be proprietary so that the NRC can appropriately handle the information to prevent any inappropriate public disclosure.

With respect to concern over licensees reviewing contractor/employee settlement agreements that may contain proprietary information, the final rule has eliminated the specific requirement for such reviews. But, to the extent that, in a licensee's judgment, compliance with the rule requires that it obtain access to proprietary information from its contractors, then access must be provided. In NRC's view, assuring free flow of safety information overrides commenters concerns about disclosure of proprietary information to licensees.

6. A Backfit Analysis Is Required

As originally drafted, the proposed rule specifically required that licensees develop procedures to ensure that licensees' contractors and subcontractors did not place in settlement agreements any restrictions on employees coming to the NRC with information. This included specifically requiring that licensees have procedures to require contractors to notify them if a section 210 complaint was filed with the Department of Labor and that any proposed settlement be forwarded to the licensee prior to its execution. Several commenters believed that this requirement for changes in procedures amounted to a backfit requiring a backfit analysis. Given the Secretary of Labor's decision in the *Pollizi* case that such agreements are against public policy, there is some question as to whether the proposed regulation would have imposed a new requirement on licensees or contractors. In any event, the final rule has eliminated any specific requirement for procedural changes.

The final rule declares, consistent with the *Pollizi* decision that agreements which place restrictions on employees communicating information with the NRC are prohibited. Licensees may or may not choose to modify existing procedures to assure compliance with the final rule's requirements. Some licensees may, in fact, already have procedures in place addressing these issues as a result of the staff's April 27, 1989, letter notifying them of the NRC's concerns. It is for licensees themselves to decide how the prohibition on restrictive agreements is to be implemented.

With the requirement to develop procedures removed, the rule merely prohibits potential barriers to communication with NRC. As such it does not fall within the definition of backfit in § 50.109. The backfit rule does not apply to NRC information requests (see § 50.54(f)) and it would be anomalous to apply the backfit rule to similar NRC measures to ensure that information is brought to its attention.

7. The Commission Should Issue a Policy Statement Instead of a Rule

One commenter suggested that a policy statement was sufficient to accomplish the Commission's purposes and that the rule was unnecessary. The Commission does not agree that a policy statement would be appropriate in this instance. This is not an area in which the Commission needs to gain experience with application of a policy statement before a final rule can be developed. The Commission is not aware of any other reason that might make a policy statement preferable to a rule in this case. The Commission concludes that it is appropriate to proceed with formal rulemaking to address this issue.

8. Add Language to the NRC Form 3 Concerning Settlement Agreements

Under 10 CFR part 19, licensees are required to post an NRC Form 3 at all work sites. This form informs employees of their rights and protections in bringing safety information to the NRC. One commenter has suggested that the NRC add language to this form telling workers that settlement agreements may not impose restrictions on their bringing safety information to the NRC. The NRC will consider adding such language to the NRC Form 3 in future revisions of the form to reflect the restrictions contained in this rulemaking.

9. The Proposed Rule Would Interfere With the Duty of Employees To Inform Their Management of Safety Issues

The Commission believes it is preferable for employees to bring safety or other concerns to the attention of their management. It is the employees' management that can most promptly act to address these issues. Thus, if an employee lacks confidence in his management and feels compelled to come to the NRC first, a delay in addressing a safety issue will inevitably result. However, in those cases where employees do not feel that they can talk about a safety problem with their management, they must be free of any restriction which would prevent their raising the issue with the NRC. The proposed rule does not introduce any unwarranted intrusion into the employer/employee relationship. The rule does not prohibit employees from going to management first with their safety concerns. It is up to licensees to create a work atmosphere in which employees feel confident in bringing safety concerns directly to their management.

10. Responses to the Questions in the Proposed Rule

The majority of commenters did not specifically comment on the two questions posed by the Commission in the proposed rule. To a large extent their comments on the proposed rule itself superseded any need to specifically address the questions proposed. The Commission summarizes below the specific comments that were received on the questions presented in the proposed rule.

a. Should the Rule Prohibit All Restrictions on Information to the Commission, or Should Limitations on an Individual Appearing Before a Commission Adjudicatory Board (e.g., Requiring an Individual To Resist a Subpoena) Be Permissible as Long as Other Avenues for Providing Information to the Commission are Available?

Five commenters believed that some restrictions should be allowed if there is at least one avenue open to communicate with the NRC. Four commenters believed that no restrictions on communications should be allowed.

The Commission believes that no restrictions on bringing information to the Commission should be allowed. In the *Pollizi* decision the Secretary of Labor noted that, even when a provision specifically included a statement that safety information could be brought to the NRC's attention, restrictions on voluntarily appearing as a witness in NRC proceedings would be against public policy. Given the numerous possible restrictions that could be put into settlement agreements, it would be difficult, if not impossible, to design guidance which could differentiate between a "good" restriction and a "bad" restriction, even if the Commission were inclined to do so. The Commission has chosen to ban all restrictions on coming to the NRC with information bearing on its regulatory responsibilities rather than engaging in that attempt.

b. Should the Rule Impose an Additional Requirement That Licensees and License Applicants Must Ensure That All Agreements Affecting Employment, Including Those of Their Contractors or Subcontractors, Contain a Provision Stating That the Agreement in No Way Restricts the Employee From Providing Information to the Commission?

Of the comments received on this question, four commenters opposed requiring an affirmative statement in all settlement agreements and four commenters favored requiring such a statement. For the most part, those opposing the requirement felt it was unduly burdensome and would unnecessarily interfere with the employee/employer relationship. Those in favor of this requirement felt that it would be beneficial in clarifying for employees what their rights were and it would also remove any ambiguity caused by other parts of the settlement agreement.

The Commission has decided not to require a specific clause in settlement agreements. The utility of such a clause is somewhat suspect given that a clause specifically providing that the employee had the right to bring safety concerns to the NRC was not sufficient to make the restrictive clause in the *Pollizi* case acceptable. In addition, given that the Commission already requires that employees be notified through the posting of an NRC Form 3 that they have the right to come to the NRC, it is not evident that the benefit to be gained by requiring such a clause in settlement agreements would justify this type of intrusion into the employer/employee relationship.

12. Additional Comments and Revisions

One commenter provided a detailed discussion of the Commission's policies with respect to enforcement of the current NRC regulations on employee protection. Those comments, although related, go beyond the scope of the specific action being considered in this rulemaking. However, those specific comments have been forwarded to the NRC Office of Enforcement for its consideration.

In addition, comments included suggestions to file all settlement agreements in the docket for the facility in question; to require that the ban on restrictions apply to communications by an employee with anyone, not just NRC; and to require that all future contracts by a licensee with contractors or subcontractors contain contractual obligations to prohibit restrictive agreements.

The Commission has considered these suggestions and has concluded that the most efficient method of achieving the goal of the rulemaking, which involves the minimum necessary instrusion on the employee/employer relationship and the relationship between licensees and their contractors or subcontractors, is to imply prohibit provisions in a settlement agreement with an employee which would in any way restrict that employee from coming to the NRC with safety information bearing on NRC regulatory responsibilities. The Commission is not convinced that requiring the filing of agreements in the NRC docket files, prohibiting restrictions on communications with entities other than the NRC, or requiring specific clauses in licensee/contractor contracts would significantly improve the Commission's ability to achieve the goals of this rulemaking.

The last line of the first paragraph being added to parts 30, 40, 50, 60, 61, 70, and 72 of the regulations has been modified by referencing the definition of "protected activity" which appears in each part of the regulations. This was done to assure that the employee protection provisions consistently protect the same employee conduct.

Finally, in publishing the proposed rule, comparable revisions to 10 CFR part 61 were inadvertently not included in the proposed rule. Part 61 contains, at § 61.9, comparable restrictions with respect to employee protections as appear in the other parts of the Commission's regulations. Accordingly, the appropriate revisions to part 61 are included in this final rulemaking.

Additional Comments of Commissioner Curtiss

While I am reluctantly supporting the approach adopted in this rule, particularly in view of the fact that the Department of Labor has adopted the argument that the NRC championed in our letter of May 3, 1989, I nevertheless remain concerned about the potential precedential scope of this approach and of the rationale that underpins the final rule. Specifically, I am not persuaded

that a logical case has been—or can be—made to support the distinction between settlement agreements arising out of an employer-employee relationship and settlement agreements where no employer-employee relationship exists. If we are troubled by the imposition of any restriction on an individual's right to communicate with the Commission—even where the individual nevertheless retains the right to communicate in some manner with the Commission—the fact that those restrictions arise out of the settlement of an employer-employee dispute seems to me to be irrelevant to the ultimate objective that we are seeking to accomplish in this rule—preserving the Commission's ability, unencumbered, to obtain information on health and safety matters.[1] Indeed, in view of the decision that the Commission has reached here, I find it most improbable that the Commission would—or could—accept a settlement agreement that restricted in any way an individual's ability to communicate with the Commission, on the ground that the settlement agreement did not involve an employer-employee relationship. In short, the logic of this rule appears to compel the conclusion that any restriction on an individual's right to communicate with the Commission contained in a settlement agreement—whether or not an employer-employee relationship exists—is unacceptable. While this rule, by its terms, does not address this situation, we nevertheless should recognize that our action here moves us in that direction.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule falls within the scope of the actions described in categorical exclusion 10 CFR 51.10(d). This amendment provides the Commission with the ability to take enforcement action for agreements which have already been declared to be against public policy. Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this rule.

[1] If the Commission is seeking to ensure that the channels of communication for health and safety information remain unencumbered, the fact that one individual is an employee and another is not should have no bearing on whether we would countenance any restrictions on the communication of such information to the Commission, even though it may ultimately turn out that the employee's information is more accurate or valuable because of the special access that such an individual might have.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (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, 3150-0009, 3150-0132, and 3150-0032.

Regulatory Analysis

The final rule prohibits provisions in agreements affecting employment that restrict employees from providing information to the Commission. The objectives of the final rule are to ensure that such agreements do not restrict the free flow of safety or other information to the Commission and that the intent of section 210 of the Energy Reorganization Act is not frustrated. The Commission believes that the clearest and most effective method of achieving these objectives, and avoiding potential uncertainty and conflict regarding the interpretation of specific provisions, is to prohibit provisions in these agreements that in any way restrict the flow of information to the Commission, the Commission's adjudicatory boards, or the NRC staff. The alternative of imposing an additional requirement on licensees and license applicants to require any agreement affecting employment to include a provision stating that the agreement in no way restricts the employee from providing information to the Commission was rejected as unnecessary to achieve the objectives of the rule. The final rule will not impose any substantial costs on licensees or license applicants.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. Although the proposed rule would have imposed procedural requirements on a wide range of Commission licensees of varying size, the final rule prohibits agreements that restrict employees who are performing or have performed work related to licensed activities from providing information to the Commission on potential violations or hazards. The final rule does not require licensees to develop detailed procedures for review of all contractor and subcontractor settlement agreements. The Commission believes that the final rule does not impose a significant economic impact on Commission licensees who would be considered "small entities."

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule and, therefore, that a backfit analysis is not required for this final rule because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects

10 CFR Part 30

Byproduct material, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Penalty, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 40

Government contracts, Hazardous materials—transportation, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 60

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 61

Low-level waste, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70

Hazardous materials—transportation, Nuclear materials, Packaging and containers, Penalty, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 72

Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

33

10 CFR Part 150

Hazardous materials—transportation, Intergovernmental relations, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 30, 40, 50, 60, 61, 70, 72 and 150.

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

1. The authority citation for part 30 is revised to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 30.7 also issued under Public Law 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273): §§ 30.3, 30.7(g), 30.34 (b), (c) and (f), 30.41 (a) and (c), and 30.53 are issued under secs. 161b, 161i, and 161o, 68 Stat. 948, 949, and 950 as amended (42 U.S.C. 2201(b), 2201(i), and 2201(o)); and §§ 30.6, 30.9, 30.36, 30.51, 30.52, 30.55, and 30.56 (b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 30.7, the introductory text of paragraph (c) is revised and a new paragraph (g) is added to read as follows:

§ 30.7 Employee protection.

* * * * *

(c) A violation of paragraph (a) or paragraph (g) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

* * * * *

(g) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

3. The authority citation for part 40 is revised to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Public Law 95-604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Public Law 86-373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Public Law 97-415, 96 Stat. 2067 (42 U.S.C. 2022).

Section 40.7 also issued under Public Law 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273): §§ 40.3, 40.7(g), 40.25(d) (1)-(3), 40.35 (a)-(d) and (f), 40.41 (b) and (c), 40.46, 40.51 (a) and (c), and 40.63 are issued under secs. 161b, 161i and 161o, 68 Stat. 948, 949, and 950 as amended (42 U.S.C. 2201(b), 2201(i), and 2201(o)); and §§ 40.5, 40.9, 40.25 (c), (d) (3), and (4), 40.26(c)(2), 40.35(e), 40.42, 40.61, 40.62, 40.64, and 40.65 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

4. In § 40.7, the introductory text of paragraph (c) is revised and a new paragraph (g) is added to read as follows:

§ 40.7 Employee protection.

* * * * *

(c) A violation of paragraph (a) or paragraph (g) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

* * * * *

(g) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

5. The authority citation for part 50 is revised to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd) and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 through 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273): §§ 50.7(f), 50.46 (a) and (b), and 50.54(c) are issued under secs. 161b, 161i, and 161o, 68 Stat. 948, 949, and 950 as amended (42 U.S.C. 2201(b), 2201(i), and 2201(o)); §§ 50.7(a), 50.10 (a)-(c), 50.34 (a) and (e), 50.44 (a)-(c), 50.46 (a) and (b), 50.47(b), 50.48 (a), (c), (d), and (e), 50.49(a), 50.54 (a), (i), (j)(1), (l)-(n), (p), (q), (t), (v), and (y), 50.55(f), 50.55a (a), (c)-(e), (g), and (h), 50.59(c), 50.60(a), 50.62(c), 50.64(b), and 50.80 (a) and (b) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.49 (d), (h), and (j), 50.54 (w), (z), (bb), (cc), and (dd), 50.55(e), 50.59(b), 50.61(b), 50.62(b), 50.70(a), 50.71 (a)-(c) and (e), 50.72(a), 50.73 (a) and (b), 50.74, 50.78, and 50.90 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

6. In § 50.7, the introductory text of paragraph (c) is revised and a new paragraph (f) is added to read as follows:

§ 50.7 Employee protection.

* * * * *

(c) A violation of paragraph (a) or paragraph (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

* * * * *

(f) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

7. The authority citation for part 60 is revised to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2095, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97-425, 96 Stat. 2213g, 2228, as amended (42 U.S.C. 10134, 10141).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 60.9(f), 60.10, 60.71 are issued under secs. 161i and 161o, 68 Stat. 949 and 950, as amended (42 U.S.C. 2201(i) and 2201(o)).

8. In § 60.9, the introductory text of paragraph (c) is revised and a new paragraph (f) is added to read as follows:

§ 60.9 Employee protection.

* * * * *

(c) A violation of paragraph (a) or paragraph (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

* * * * *

(f) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

9. The authority citation for part 61 is revised to read as follows:

Authority: Secs. 53, 57, 62, 63, 65, 81, 161, 182, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273; Tables 1 and 2, §§ 61.3, 61.9(f), 61.24, 61.25, 61.27(a), 61.41 through 61.43, 61.52, 61.53, 61.55, 61.56, and 61.61 through 61.63 are issued under secs. 161b, 161, and 161o, 68 Stat. 948, 949, and 950 as amended (42 U.S.C. 2201(b), 2201(i) and 2201(o)); §§ 61.9a, 61.10 through 61.16, 61.24 and 61.80 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

10. In § 61.9, the introductory text of paragraph (c) is revised and a new paragraph (f) is added to read as follows:

§ 61.9 Employee protection.

* * * * *

(c) A violation of paragraph (a) or paragraph (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

* * * * *

(f) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

11. The authority citation for part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1248 (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93-377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 70.3, 70.7(g), 70.19(c), 70.21(c), 70.22 (a), (b), (d)-(k), 70.24 (a) and (b), 70.32 (a) (3), (5), (6), (d), and (i), 70.36, 70.39 (b) and (c), 70.41(a), 70.42 (a) and (c), 70.56, 70.57 (b), (c), and (d), 70.58 (a)-(g)(3), and (h)-(j) are issued under secs. 161b, 161i, and 161o, 68 Stat. 948, 949, and 950 as amended (42 U.S.C. 2201(b), 2201(i), and 2201(o)); §§ 70.7, 70.20a (a) and (d), 70.20b (c) and (e), 70.21(c), 70.24(b), 70.32 (a)(6), (c), (d), (e), and (g), 70.36, 70.51 (c)-(g), 70.56, 70.57 (b) and (d), and 70.58 (a)-(g)(3) and (h)-(j) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 70.5, 70.9, 70.20b (d) and (e), 70.38, 70.51 (b) and (i), 70.52, 70.53, 70.54, 70.55, 70.58 (g)(4), (k), and (l), 70.59, and 70.60 (b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

12. In § 70.7, the introductory text of paragraph (c) is revised and a new paragraph (g) is added to read as follows:

§ 70.7 Employee protection.

* * * * *

(c) A violation of paragraph (a) or paragraph (g) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

* * * * *

(g) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

13. The authority citation for part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as

amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97-425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10151, 10151, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 149 (c), (d), Pub. L. 100-203, 101 Stat. 1330-232, 1330-236 (42 U.S.C. 10162(b), 10168 (c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97-425, 96 Stat. 2202, 2203, 2204, 2222, 2224, (42 U.S.C. 10101, 10137(a), 10161(h)).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 72.6, 72.10(f), 72.22, 72.24, 72.26, 72.28(d), 72.30, 72.32, 72.44 (a), (b) (1), (4), (5), (c), (d) (1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.72 (b), (c), 72.74 (a), (b), 72.76, 72.78, 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140 (b), (c), 72.148, 72.154, 72.156, 72.160, 72.166, 72.168, 72.170, 72.172, 72.176, 72.180, 72.184, 72.186 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 72.10 (a), (e), 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44 (a), (b) (1), (4), (5), (c), (d) (1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.90 (a)-(d), 72.92, 72.94, 72.98, 72.100, 72.102 (c), (d), (f), 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140 (b), (c), 72.142, 72.144, 72.146, 72.148, 72.150, 72.152, 72.154, 72.156, 72.158, 72.160, 72.162, 72.164, 72.166, 72.168, 72.170, 72.172, 72.176, 72.180, 72.182, 72.184, 72.188, 72.190, 72.192, 72.194 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)) and §§ 72.10(e), 72.11, 72.16, 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44 (b)(3), (c)(5), (d)(3), (e), (f), 72.48 (b), (c), 72.50(b), 72.54 (a), (b), (c), 72.56, 72.70, 72.72, 72.74 (a), (b), 72.76(a), 72.78(a), 72.80, 72.82, 72.92(b), 72.94(b), 72.140 (b), (c), (d), 72.144(a), 72.146, 72.148, 72.150, 72.152, 72.154 (a), (b), 72.156, 72.160, 72.162, 72.168, 72.170, 72.172, 72.174, 72.176, 72.180, 72.184, 72.186, 72.192 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

14. In § 72.10, the introductory text of paragraph (c) is revised and a new paragraph (f) is added to read as follows:

§ 71.10 Employee protection.

* * * * *

(c) A violation of paragraph (a) or paragraph (g) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

* * * * *

(f) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

15. The authority citation for part 150 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C. 2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(2), 81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 Stat. 930, as amended (42 U.S.C. 207 . Section 150.15 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 150.20(b) (2)-(4) and 150.21 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 150.14 is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 150.16-150.19 and 150.20(b)(1) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

16. In § 150.20, the introductory text of paragraph (b) is revised to read as follows:

§ 150.20 Recognition of agreement state licenses.

* * * * *

(b) Notwithstanding any provision to the contrary in any specific license issued by an Agreement State to a person engaging in activities in a non-Agreement State or in offshore waters under the general licenses provided in this section, the general licenses provided in this section are subject to the provisions of §§ 30.7 (a) through (g), 30.9, 30.14(d), 30.34, 30.41, 30.51 to 30.63, inclusive, of part 30 of this chapter; §§ 40.7 (a) through (g), 40.9, 40.41, 40.51, 40.61, 40.63 inclusive, 40.71 and 40.81 of part 40 of this chapter; and §§ 70.7 (a) through (g), 70.9, 70.32, 70.42, 70.51 to 70.56, inclusive, §§ 70.60 to 70.62, inclusive, and § 70.7 of part 70 of this chapter; and to the provisions of 10 CFR part 19, 20 and 71 and subpart B of part 34 of this chapter. In addition, any person engaging in activities in non-Agreement States or in offshore waters under the general licenses provided in this section:

* * * * *

Dated at Rockville, MD, this 15th day of March 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 90-6424 Filed 3-20-90; 8:45 am]

BILLING CODE 7590-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 312

RIN 3064-AA99

Assessment of Fees Upon Entrance to or Exit From the Bank Insurance Fund or the Savings Association Insurance Fund

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Interim rule and request for comments.

SUMMARY: This interim rule prescribes the exit fee, and amends the previously prescribed entrance fee, that must be paid by insured depository institutions participating in "conversion transactions" that result in the transfer of insured deposits from the Savings Association Insurance Fund ("SAIF") to the Bank Insurance Fund ("BIF"). In addition, minor revisions are being made to the entrance and exit fees that must be paid by insured depository institutions participating in conversion transactions that result in the transfer of insured deposits from BIF to SAIF. This interim rule also imposes entrance and exit fees on insured deposit transfers. This interim rule implements provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, authorizing exit and entrance fees for participants in conversion transactions. The fees are being prescribed under an interim rule, with an immediate effective date, in order to permit institutions interested in participating in certain branch sales, thrift resolutions, and other permitted "conversion transactions" to evaluate the potential costs of those transactions and to allow those transactions to go forward without further delay; however, the public is invited to comment on the fee structure set forth in the interim rule, and a final

Citation
54 FR 30049-01
1989 WL 279911 (F.R.)
(Cite as: 54 FR 30049)

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PROPOSED RULES

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 40, 50, 60, 70, 72 and 150

RIN 3150-AD21

Preserving the Free Flow of Information to the Commission

Tuesday, July 18, 1989

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing a revision to its rule: governing the conduct of all Commission licensees and license applicants. The proposed rule would require licensees and license applicants to ensure that neither they, nor their contractors or subcontractors, impose conditions in settlement agreements under section 210 of the Energy Reorganization Act, or ir other agreements affecting employment, that would prohibit, restrict, or otherwise discourage an employee from providing the Commission with informatio on potential safety violations. This proposed rule is necessary to prohibit th use of provisions which would inhibit the free flow of safety information to th Commission in agreements related to employment.

DATES: The comment period expires September 18, 1989. Comments received after this date will be considered if it is practical to do so, but assurance of consideration is given only for comments filed on or before that date.

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Docketing and Service Branch. Deliver comments to One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 5:15 p.m. weekdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street NW., Lower Level, Washington, DC.

FOR FURTHER INFORMATION CONTACT:Stuart A. Treby, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492-1636.

SUPPLEMENTARY INFORMATION: Section 210 of the Energy Reorganization Act of 1974 as amended, was added as a new section to that Act in 1978 (Pub. L. 95- 601). Section 210 offers protection to employees of a Commission licensee, or of a

contractor or a subcontractor of a Commission licensee or applicant. The protection afforded is to those who believe they have been fired or discriminated against as a result of the fact that, among other things, they have testified or given evidence on potential safety violations, or brought su under section 210 of the Energy Reorganization Act. Employees who have been discriminated against for raising safety issues have the right to file complaints with the Department of Labor for the purpose of obtaining a remedy for the personal harm caused by the discrimination. Following the filing of a complaint, the Department of Labor performs an investigation. If either the employee or the employer is not satisfied with the outcome of the investigatic a hearing can be held before an Administrative Law Judge, with review by the Secretary of Labor. The Secretary of Labor can issue an order for the employe to be rehired, or otherwise compensated if the employee's case is justified.

In many cases, the employee and the employer reach settlement of the issues raised in the Department of Labor proceeding before completion of the formal process and a finding by the Secretary of Labor. In general the Commission supports settlements as they provide remedies to employees without the need fc litigation. However, a recent case has brought to the Commission's attention the potential for settlement agreements negotiated under section 210 to impose restrictions upon the freedom of employees or former employees protected by section 210 to testify or participate in NRC licensing and regulatory proceedings, as amended, or to otherwise provide information on potential safe violations to the Commission or the NRC staff. See Texas Utilities Electric Co., Comanche Peak Steam Electric Station (Units 1 and 2), CLI-88-12, 28 NRC 6 (1988); Texas Utilities Electric Co., Comanche Peak Steam Electric Station (Units 1 and 2), CLI-89-06, NRC (1989)).

The Commission believes that a section 210 settlement agreement, or any other agreement affecting employment, which restricts the freedom of an employee or former employee who is subject to its provisions, to freely and fully communicate with the Nuclear Regulatory Commission about nuclear safety matter is incompatible with the objectives of that section. These provisions would have a chilling effect on communications about nuclear safety matters, and wou restrict, impede, or frustrate full and candid disclosure to the Nuclear Regulatory Commission about nuclear safety matters. Any such agreement under which a person contracts to withhold safety-significant information or testimo from the Nuclear Regulatory Commission could itself be a threat to safety and therefore jeopardize the execution of the Agency's overall statutory duties.

Accordingly, the Commission is proposing to amend its regulations to require licensees and license applicants to ensure that neither they, nor their contractors or subcontractors, impose conditions in settlement agreements unde section 210 of the Energy Reorganization Act, or in other agreements affecting employment, that would prohibit, restrict, or otherwise discourage an employee from providing the Commission with information on potential safety violations. The proposed rule would also require licensees and license applicants to establish procedures to ensure that their contractors and subcontractors are informed of the prohibition, that they are notified of any complaints of discrimination by an employee of a contractor or subcontractor for providing such information related to work performed for the licensee or license

applicant, and to require review by the licensee or license applicant of any settlement agreements related to any employee complaints of such discriminatic by a contractor or subcontractor related to work performed for the licensee or license applicant.

The proposed rule would only apply to agreements that relate to the compensation, terms conditions, and privileges of employment, including sectic 210 settlement agreements, and not to agreements in general. The *30050 proposed rule applies to all provisions which might discourage an employee frc providing safety information to the Commission, to Commission adjudicatory boards, or to the NRC staff.

In addition to comments in general on the proposed rule, the Commission would specifically request comments on the following issues--

1. Should the rule prohibit all restrictions on providing information to the Commission, or should limitations on an individual appearing before a Commissi adjudicatory board (e.g., requiring an individual to resist a subpoena) be permissible as long as other avenues for providing information to the Commissi are available

2. Should the rule impose an additional requirement that licensees and licens applicants must ensure that all agreements affecting employment, including thc of their contractors or subcontractors, contain a provision stating that the agreement in no way restricts the employee from providing safety information t the Commission

Finally, the Commission would emphasize that it will not hesitate to take immediate action against a licensee who does not comply with these regulations when effective, notwithstanding the pendency of a Section 210 matter before th Department of Labor.

Separate Views of Commissioner Roberts

I continue to question the need to impose such broad restrictions on employer options in negotiating settlement agreements with their employees. Agreements which do not foreclose a whistleblower's freedom to bring safety information t the Commission are legally permissible in my view. Therefore, I see no public health and safety justification for a rule that would prohibit the bargaining away of any avenues of access to the NRC. Such a rule will tend to promote unnecessary litigation before both NRC and DOL. Moreover, I believe the propos rule constitutes government interference in the contractual relations between licensees and their contractors that is not needed to assure adequate protecti of public health and safety or of whistleblowers' freedom to bring their safet concerns to the NRC.

Should a majority approve issuance of the proposed rule I request that my vie be included for comment also.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule falls within the scope of the actions described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has

been prepared for this proposed rule.

Paperwork Reduction Act Statement

This proposed rule amends information collection requirements that are subjec to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). This rule has been submitted to the Office of Management and Budget fo review and approval of the paperwork requirements.

Regulatory Analysis

The proposed rule requires Commission licensees or license applicants to ensu that they, or their contractors or subcontractors, do not enter into agreement affecting employment that restrict employees from providing information to the Commission on potential safety violations, and to develop procedures to implement this requirement. The objectives of the proposed rule are to ensure that such agreements do not restrict the free flow of safety information to th Commission and that the intent of section 210 of the Energy Reorganization Act is not frustrated. The Commission believes that the clearest and most effecti method of achieving these objectives, and avoiding potential uncertainty and conflict regarding the interpretation of specific provisions, is to prohibit provisions in these agreements that in any way restrict the flow of informatic to the Commission, the Commission's adjudicatory boards, or the NRC staff. Th alternative of imposing an additional requirement on licensees and license applicants to require any agreement affecting employment to include a provisic stating that the agreement in no way restricts the employee from providing information to the Commission was rejected as unnecessary to achieve the objectives of the rule. The rule, as proposed, will not impose any substantial costs on licensees or license applicants.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), t Commission certifies that this rule will not, if promulgated, have a significa economic impact on a substantial number of small entities. Although the propos rule would apply to a wide range of Commission licensees of varying size, the proposed rule requires Commission licensees or license applicants to ensure that, they or their contractors, do not enter into agreements with employees that restrict employees from providing information to the Commission on potential safety violations and to prepare procedures to implement this requirement. The Commission believes that this will not impose a significant economic impact on Commission licensees who would be considered "small entities."

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply t this proposed rule and, therefore, that a backfit analysis is not required for

this proposed rule because these amendments do not involve any provisions whic would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects

10 CFR Part 30

Byproduct material, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Penalty, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 40

Government contracts, Hazardous materials--transportation, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by referenc Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria. Reporting and recordkeeping requirements.

10 CFR Part 60

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Waste treatment and disposa

10 CFR Part 70

Hazardous materials--transportation, Nuclear materials, Packaging and containers, Penalty, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear materia

10 CFR Part 72

Manpower training programs, Nuclear materials, Occupational safety and health Reporting and recordkeeping requirements, Security measures, Spent fuel.

*30051 10 CFR Part 150

Hazardous materials--transportation, Intergovernmental relations, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Security measure: Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is proposing to adopt the following amendments to 10 CFR Parts 30, 40, 50, 60, 70, 72 and 150.

54 FR 30049-01
(Cite as: 54 FR 30049, *30051)

PART 30--RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

1. The authority citation for Part 30 is revised to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955 as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 30.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 30.61 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 30.3, 30.7(g), 30.34 (b), (c) and (f), 30.41 (a) and (c), and 30.53 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 30.6, 30.9, 30.36, 30.51, 30.52, 30.55, and 30.56 (b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 30.7, paragraph (g) is added to read as follows:

§ 30.7 Employee protection.

* * * * *

(g)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to Section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act or the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee and license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (g)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to Secti 210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganizatio Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (g)(1) of this section.

54 FR 30049-01
(Cite as: 54 FR 30049, *30051)

PART 40--DOMESTIC LICENSING OF SOURCE MATERIAL

3. The authority citation for Part 40 is revised to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95-604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, a amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97-415, 96 Stat. 2067 (U.S.C. 2022).

Section 40.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 40.3, 40.7(g), 40.25(d)(1)-(3), 40.35 (a)-(d) and (f), 40.41 (b) and (c), 40.4 40.51 (a) and (c), and 40.63 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 40.5, 40.9, 40.25 (c), (d)(3), and (4), 40.26(c)(2), 40.35(e), 40.42, 40.61, 40.62, 40.64, and 40.65 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

4. In § 40.7, paragraph (g) is added to read as follows:

§ 40.7 Employee protection.

* * * * *

(g)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act of the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (g)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to secti 210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganizati Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (g)(1) of this section.

PART 50--DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

5. The authority citation for Part 50 is revised to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282 secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91-190, 83 Stat. 8 (42 U.S.C. 4332). Sections 50.13 and 50.54(dd) also issued under sec. 108, 6 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91- 190, 83 Stat. 8 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 St 1245 (42 U.S.C. *30052 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issu under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 through 50.81 a issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237.
For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 50.7(f), 50.46 (a) and (b), and 50.54(c) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.7(a), 50.10(a)-(c), 50.34 (a) and (e), 50.44(a)-(c), 50.46 (a) and (b), 50.47(b), 50.48 (a), (c), (d), and (e), 50.49(a), 50.54 (a), (i), (i)(1), (l)-(n), (p), (q), (t), (v), and (y), 50.55(f), 50.55a (a), (c)-(e), (g), and (h), 50.59(c), 50.60(a), 50.62(c), 50.64(b), and 50.80 (a) and (b) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.49 (d), (h), and (j), 50.54 (w), (z), (bb), (cc), and (dd), 50.55(e), 50.59(b), 50.61(b), 50.62(b), 50.70(a), 50.71 (a)-(c) and (e), 50.72(a), 50.73 (a) and (b), 50.74, 50.78, and 50.90 are issu under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).
6. In § 50.7, paragraph (f) is added to read as follows:

§ 50.7 Employee protection.

* * * * *

(f)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of

54 FR 30049-01
(Cite as: 54 FR 30049, *30052)

any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act of the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (f)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to sect: 210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganizatic Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (f)(1) of this section.

PART 60--DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

7. The authority citation for Part 60 is revised to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 9: 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); sec. 121, Pu L. 97-425, 96 Stat. 2228 (42 U.S.C. 10141).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 60.9(f), 60.10, 60.71 to 60.75 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

8. In § 60.9, paragraph (f) is added to read as follows:

§ 60.9 Employee protection

* * * * *

(f)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or

otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act or the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (f)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to Secti 210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganizatic Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (f)(1) of this section.

PART 70--DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

9. The authority citation for Part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93-377, 88 Stat. 475 (42 U.S.C. 2077). Section 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amend (42 U.S.C. 2138).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 70.3, 70.7(g), 70.19(c), 70.21(c), 70.22 (a), (b), (d)-(k), 70.24 (a) and (b), 70.32 (a) (3), (5), (6), (d), and (i), 70.36, 70.39 (b) and (c), 70.41(a), 70. (a) and (c), 70.56, 70.57 (b), (c), and (d), 70.58 (a)-(g)(3) and (h)-(j) are issued under sec. 161b. 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 70.7 70.20a (a) and (d), 70.20b (c) and (e), 70.21(c), 70.24(b), 70.32 (a)(6), (c), (d), (e), and (g), 70.36, 70.51 (c)-(g), 70.56, 70.57 (b) and (d), and 70.58 (a)-(g)(3) and (h)-(j) are issued under sec. 161i, 68 Stat. 949, as amended (4 U.S.C. 2201(i)); and §§ 70.5, 70.9, 70.20b (d) and (e), 70.38, 70.51 (b) and (i), 70.52, 70.53, 70.54, 70.55, 70.58(g)(4), (k), and (l), 70.59, and 70.60 (and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C.

2201(o)).

10. In § 70.7, paragraph (g) is added to read as follows:

§ 70.7 Employee protection.

* * * * *

(g)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to Section 210 of the Energy Reorganization Act of 1974, any *30053 provision which would prohibit, restric or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act or the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (g)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for a licensee or license applicant, file by an employee against the contractor or subcontractor pursuant to Section 210 of the Energy Reorganization Act relating to discrimination from protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganizatio Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (g)(1) of this section.

PART 72--LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

11. The authority citation for Part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); Secs. 131, 132, 133, 135, 137, 141, Pub. L. 97-425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100- 203, 101 Stat. 1330-235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100-

203, 101 Stat. 1330-232, 1330-236 (42 U.S.C. 10162(b), 10168(c), (d)). Sectic 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pu L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued unde sec. 145(g), Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10165(g)). Subpart also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97-425, 9€ Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 72.6, 72.10(f), 72.22, 72.24, 72.26, 72.28(d), 72.30, 72.32, 7244(a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.72(b), (c), 72.74(a), (b), 72.76, 72.78, 72.104, 72.106 72.120, 72.122, 72.124, 72.12 72.128, 72.130, 72.140(b), (c), 72.148, 72.154, 72.156, 72.160, 72.166, 72.168 72.170, 72.172, 72.176, 72.180, 72.184, 72.186 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 72.10(a), (e), 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44(a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.90(a)-(d), 72.92, 72.94, 72.98, 72.100, 72.102(c), (d), (f), 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140(b), (c), 72.142, 72.144, 72.146, 72.148, 72.150, 72.152, 72.154 72.156, 72.158, 72.160, 72.162, 72.164, 72.166, 72.168, 72.170, 72.172, 72.176 72.180, 72.182, 72,184, 72.186, 72.190, 72.192, 72.194 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 72.10(e), 72.11, 72.16, 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44(b)(3), (c)(5), (d)(3), (e), (f), 72.48(b), (c), 72.50(b), 72.54(a), (b), (c), 72.56, 72.70, 72.72, 72.74(a), (b), 72.76(a), 72.78(a), 72.80, 72.82, 72.92(b), 72.94(b), 72.140 (b (c), 72.144(a), 72.146, 72,148, 72.150, 72.152, 72.154 (a), (b), 72.156, 72.16 72.162, 72.168, 72.170, 72.172, 72.174, 72.176, 72.180, 72.184, 72.186, 72.192 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

12. In § 72.10, paragraph (f) is added to read as follows:

§ 72.10 Employee protection

* * * * *

(f)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to Section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act or the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (f)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to Secti

210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganizati Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (f)(1) of this section.

PART 150--EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES A IN OFFSHORE WATERS UNDER SECTION 274

13. The authority citation for Part 150 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C. 2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 St 930, as amended (42 U.S.C. 2073). Section 150.15 also issued under secs. 135 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 150.20(b)(2)-(4) and 150.21 are issued under sec. 161b, 68 Stat. 948, as amen (42 U.S.C. 2201(b)); § 150.14 is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 150.16-150.19 and 150.20(b)(1) are iss under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

14. In § 150.20, the introductory text of paragraph (b) is revised to read follows:

§ 150.20 Recognition of agreement state licenses

* * * * *

(b) Notwithstanding any provision to the contrary in any specific license issued by an Agreement State to a person engaging in activities in a non-Agreement State or in offshore waters under the general licenses provided in this section, the general licenses provided in this section are subject to the provisions of §§ 30.7(a) through (f), 30.9, 30.14(d) and §§ 30.34, 30.41, and 30.51 to 30.63, inclusive, of Part 30 of this chapter; § 40.7(a) throug (f), § 40.9, and §§ 40.41, 40.51, 40.61, 40.63 inclusive, §§ 40.71 and 40. of Part 40 of this *30054 chapter; and § 70.7 (a) through (f), § 70.9, ar §§ 70.32, 70.42, 70.51 to 70.56, inclusive, §§ 70.60 to 70.62, inclusive, ar § 70.7 of Part 70 of this chapter; and to the provisions of Parts 19, 20 ar 71 and Subpart B of Part 34 of this chapter. In addition, any person engaging in activities in non-Agreement States or in offshore waters under the general licenses provided in this section:

* * * * *

54 FR 30049-01
(Cite as: 54 FR 30049, *30054)

Dated at Rockville, MD, this 12th day of July, 1989.
For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 89-16792 Filed 7-17-89; 8:45 am]

BILLING CODE 7590-01-M

54 FR 30049-01, 1989 WL 279911 (F.R.)
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Deputy Administrator, Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities because it would not measurably affect costs for the directly regulated handlers.

The amendments of the rules and regulations are issued under the marketing agreements, as amended, and Order Nos. 916 and 917, as amended (7 CFR Parts 916 and 917), regulating the handling of fresh nectarines, pears, plums and peaches grown in California. The agreements and orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). This action is based upon the recommendations and information submitted by the Nectarine Administrative Committee, Pear Commodity Committee, Peach Commodity Committee and Plum Commodity Committee, and upon other available information. It is hereby found that these actions will tend to effectuate the declared policy of the act.

Currently, §§ 916.110(b), for nectarines, and 917.143(b) for pears, plums and peaches, provide that under certain conditions the commodities may be handled without regard to the marketing order requirements pertaining to handler assessments, reports, requirements for inspection and certification, and the grade, size or other regulations applicable to fruit regulated under the marketing orders. The specific conditions under which such handling can occur includes the requirement that the fruit meet the grade requirements of the Food and Agricultural Code of California, and certain specified minimum size requirements. Also, such pears, plums, peaches and nectarines must be for home use and not for resale, and they must be handled by the person who produced them at a roadside stand, farmers market or other specified sites. Finally, shipments to any one person during any one day cannot exceed 100 pounds of nectarines or plums or 200 pounds of peaches or pears.

The amendment contained herein would eliminate size requirements for such exempted shipments. The amendment would also increase the maximum allowable daily shipment of nectarines and plums to 200 pounds in order to standardize the minimum quantity provisions. The changes also represent relaxations of restrictions.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553), and good cause exists for making these amendments effective as specified in that (1) shipment of the current crop is underway; (2) the amendments to the regulations were recommended by the committee following discussion at public meetings; (3) California handlers have been apprised of these requirements; and (4) the requirements relieve restrictions on handlers.

List of Subjects in 7 CFR Parts 916 and 917

Marketing agreements and orders, Nectarines, Pears, Plums, Peaches, California.

Therefore, §§ 916.110(b) and 917.143(b) are amended as follows:

1. Section 916.110 is amended by removing paragraph (b)(2), renumbering paragraphs (b)(3), (b)(4) and (b)(5) as (b)(2), (b)(3) and (b)(4) respectively, and revising paragraph (b)(3) (as renumbered) to read as follows:

§ 916.110 Exemptions.

* * * * *

(b) *Minimum quantities.* * * *

(3) The net weight of such nectarines to any one person during any one day does not exceed 200 pounds.

* * * * *

2. Section 917.143 is amended by removing paragraph (b)(2), renumbering paragraphs (b)(3), (b)(4) and (b)(5) as paragraphs (b)(2), (b)(3) and (b)(4), respectively, and revising paragraph (b)(3) (as renumbered) to read as follows:

§ 917.143 Exemptions.

* * * * *

(b) *Minimum quantities.* * * *

(3) The shipment does not exceed 200 pounds of pears, plums, and peaches to any one person during any one day.

* * * * *

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674)

Dated: July 8, 1982.

D. S. Kuryloski,

Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 82-19113 Filed 7-13-82; 8:45 am]

BILLING CODE 3410-02-M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 19, 30, 40, 50, 60, 70, 72, and 150

Protection of Employees Who Provide Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The NRC is amending its regulations in regard to job protection for employees who provide information to the Commission. These amendments emphasize to employers—that is, licensees, permittees, applicants, and their contractors and subcontractors—that termination or other acts of job discrimination against employees who engage in activities furthering the purposes of the Atomic Energy Act and the Energy Reorganization Act is prohibited. In addition, these amendments will make the employee aware that if discrimination of this nature is believed to have occurred, a remedy is available through the Wage and Hour Division of the Department of Labor. To ensure that employees of licensees, permittees, and applicants are aware of these amendments, these organizations are required to post their premises with explanatory material related to the prohibition of discrimination and availability of a remedy in the event of discrimination.

EFFECTIVE DATE: October 12, 1982.

FOR FURTHER INFORMATION CONTACT: Mr. A. J. DiPalo, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. (301–443–5981).

SUPPLEMENTARY INFORMATION: On March 10, 1980, NRC published in the Federal Register (45 FR 15184) proposed amendments related to employee protection. Those proposed amendments were intended (1) to implement section 210, "Employee Protection," of the Energy Reorganization Act of 1974, 42 U.S.C. 5851, as amended, (2) to incorporate into the regulations the Commission's authority under Section 161 of the Atomic Energy Act of 1954, as amended, to investigate an alleged unlawful discrimination against an employee and to take appropriate action, and (3) to complement the Department of Labor's program that is related to this matter (29 CFR Part 24). Section 210 identifies specific acts of employees as protected activities and prohibits employers from discriminating against employees who engage in those activities, provides the Department of Labor with new authority to investigate an alleged act of such discrimination, and provides a remedy to the discrimination by means of an administrative proceeding in the Department of Labor.

Those proposed amendments would announce the statutory prohibition of discrimination of the type described in section 210 above, indicate the

availability through the Department of Labor of a remedy for employees who believe they have been unlawfully discriminated against, and also require posting by specific types of licensees, permittees, and applicants of a revised NRC Form 3 that explains the prohibition and remedy. In addition, those amendments would delete 10 CFR 19.16(c) of the Commissions regulations, but at the same time amend Part 19 by the addition of a new § 19.20. This new section, when combined with proposed changes to Parts 30, 40, 50, 60, 70, and 72 of the regulations, would extend the current prohibition of unlawful discrimination against workers who provide information concerning radiological working conditions to NRC to include employees who provide information relating to radiological health protection matters and matters that could affect the public health and safety. The prohibition of unlawful discrimination also extends to information relating to antitrust matters and safeguard matters that could affect the common defense and security if these matters are considered in connection with an application for a license. The amendments continue the exemption from the requirement to post NRC Form 3 for most "general licensees," for example, those granted under § 40.25(e). This exemption is based on the nature of the licensed activity and therefore has not been granted to the general licensee carrier of special nuclear material (10 CFR 70.20(a)).

Comments on the Proposed Rule

The Commission received 26 letters commenting on the proposed rule. Copies of those letters and an analysis of the comments are available for public inspection and copying for a fee at the Commission's Public Document Room at 1717 H Street NW., Washington, D.C.

A number of commenters stated that the proposed rule would extend the NRC activities beyond the regulatory area of radiological working conditions that is applicable to all licensees. The commenters interpreted the rulemaking preamble as a Commission attempt to become involved in antitrust, safety, and security matters of all licensees. This was not the Commission's intent. Matters pertaining to radiological working conditions and radiological safety of all licensees are of concern to the Commission. However, antitrust and security matters are relevant only to certain types of licensees. For example, antitrust information is considered by the Commission only with respect to certain production and utilization facilities (primarily nuclear reactors). This rule is not intended to extend the Commission's involvement with antitrust or security matters to licensees with whom such matters are not presently considered. As noted earlier, the final rule involves the Commission in radiological safety aspects of all licensees (and their contractors and subcontractors) that are beyond the area of radiological working conditions. This involvement is appropriate since an individual fabricating a component that is destined for use in connection with a regulated facility or activity may be fabricating such component in a nonradiological work area but that individual may possess information that indicates the component, when installed at the regulated facility or activity, may contribute to a degradation of public health or safety. At times this information has not been readily available from those responsible for component fabrication, for example, licensees and their subcontractors. The Commission, to effectively fulfill its mandate, requires complete, factual, and current information concerning the regulated activities of its licensees. Employees are an important source of such information and should be encouraged to come forth with any items of potential significance to safety without fear of retribution from their employers. The purpose of the final rule is to ensure that employees are aware that employment discrimination for engaging in a protected activity, for example, contacting the Commission, is illegal and that a remedy exists through the Department of Labor. The organizations subject to the rule should understand that the Commission will not permit any interference with communications between the Commission's representatives and employees of such organization. In addition to redress being available to the individual employee, the Commission may, upon learning of an adverse finding against an employer by the Department of Labor, take enforcement action against the employer because the employer engaged in illegal discrimination.

Based on the comments received, the following substantive changes have been incorporated into the final rule:

(1) The definition of discrimination has been revised to more closely track the statutory language (see § 30.7(a)).[1]

(2) The statute expressly provides that an employee is not protected from actions taken by the employer when the employer's action is in response to the employee's deliberate action to violate the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, as amended. This concept was not included in the proposed rule but has been incorporated in the final rule for completeness (see § 30.7(a)).

(3) The statement of available NRC enforcement actions that are derived from the Atomic Energy Act, as amended, (see § 30.7(c)) has been revised to more clearly state the policy of enforcement in the event of unlawful discrimination.

(4) A new § 30.7(d) has been added to clarify the fact that some actions taken by an employer that adversely affect an employee are not prohibited by the new regulation.

The final rule requires, in a manner similar to the proposed amendments, that the premises of licensees—including permit holders—and applicants be posted, e.g., 10 CFR 50.7(e). In the course of construction of a nuclear facility an organization may transfer administrative control of a portion of its premises to a contractor or subcontractor, e.g., an office or supply trailer or a large area for concrete construction. Such transfer does not eliminate the requirement for posting by the licensee, permit holder or applicant of those premises in a manner adequate to ensure that employees of a contractor or subcontractor are able to observe the posted information on the way to or from their place of work.

In developing the final rule the Commission considered including in its requirements that would, by one of various means, cause information related to employee protection to be posted on the premises of contractors and subcontractors of licensees—including permit holders—and applicants. Based on, among other things, the experience gained in the drafting and implementing of 10 CFR Part 21 the Commission has determined that contractors and subcontractors should be required to post NRC Form 3. Accordingly, the staff has underway a rulemaking proposing an amendment of 10 CFR 50.7(e) to require contractors and subcontractors to post NRC Form 3 on their premises.

Based on NRC staff comments, the Parts of Title 10 that are included in the rulemaking have been revised to delete Part 71, "Packaging of Radioactive Material for Transport and Transportation of Radioactive Material Under Certain Conditions," to add Part

[1] For simplification in the preamble, reference is made only to the changes to Part 30. Conforming changes have also been made to Parts 40, 50, 60, 70 and 72.

60, "Disposal of High Level Radioactive Wastes in Geologic Repositories," and to add Part 72, "Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation (ISFSI)." Part 71 was deleted since all general licensees under Part 71 are also specific licensees under another Part, e.g., Part 50, and are, therefore, included in this rulemaking. Conforming amendments to Parts 60 and 72 are included in this final rulemaking to effectuate the Commission's intent that all specific licensees will have similar responsibilities under the Employee Protection amendments. Parts 60 and 72 were not included in the proposed rulemaking since they had not been codified at that time. Conforming amendments will be made to Part 61, "Licensing Requirements for Land Disposal of Radioactive Waste" when that proposed rule (46 FR 38081, July 24, 1981) becomes final.

A number of comments from licensees and their consultants stated that the proposed rule would allow the individuals to harass the employer with accusations that are false, frivolous, or unwarranted. To prevent this, it was recommended that either civil penalties be imposed on the individual that knowingly supplies false information or that compensation be provided to an employer to defray the cost of defending against the allegations. The Commission has rejected these comments since the statutory authority of the Commission under section 210 neither provides for penalties against individuals or for any reimbursement to an employer. Based on a review of allegations of employment discrimination complaints filed with DOL, it appears that at an early stage, DOL denies complaints that are without merit.

List of Subjects

10 CFR Part 19

Environmental protection, Nuclear materials, nuclear power plants and reactors, Occupational safety and health, Penalty, Radiation protection, Reporting requirements, Sex discrimination.

10 CFR Part 30

Byproduct material, Labeling, Nuclear materials, Packaging and containers, Penalty, Radiation protection, Reporting requirements, Scientific equipment.

10 CFR Part 40

Government contracts, Hazardous materials—transportation, Nuclear materials, Penalty, Reporting requirements, Source material, Uranium.

10 CFR Part 50

Antitrust, Classified information, Fire prevention, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting requirements.

10 CFR Part 60

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting requirements, Waste treatment and disposal.

10 CFR Part 70

Hazardous materials—transportation, Nuclear materials, Packaging and containers, Penalty, Radiation protection, Reporting requirements.

10 CFR Part 72

Manpower training programs, Nuclear materials, Occupational safety and health, Reporting requirements, Security measures, Spent fuel.

10 CFR Part 150

Hazardous materials—transportation, Intergovernmental relations, Nuclear materials, Penalty, Reporting requirements, Security measures, Source material, Special nuclear material.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and sections 552 and 553 of title 5 of the United States Code, notice is hereby given that the following amendments to Title 10, Chapter I, Code of Federal Regulations, are published as a document subject to codification.

PART 19—NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS; INSPECTIONS

1. The authority citation for Part 19 is revised to read as follows:

Authority: Secs. 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2236, 2282); sec. 201, 88 Stat. 1242, as amended by Pub. L. 94-79, 89 Stat. 413 (42 U.S.C. 5841). Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 19.11(a), (c), (d), and (e) and 19.12 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 19.13 and 19.14(a) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

§ 19.13 [Amended]

2. The authority citation following § 19.13 is removed.

3. In § 19.11, paragraph (c) is revised to read as follows:

§ 19.11 Posting of notices to workers.

* * * * *

(c) Each licensee and applicant shall post Form NRC-3, (Revision 6-82 or later) "Notice to Employees," as required by Parts 30, 40, 50, 60, 70, 72, and 150 of this chapter.

* * * * *

§ 19.16 [Amended]

4. In § 19.16, paragraph (c) is removed.

5. A new § 19.20 is added to read as follows:

§ 19.20 Employee protection.

Employment discrimination by a licensee or a contractor or subcontractor of a licensee against an employee for engaging in protected activities under this part or Parts 30, 40, 50, 60, 70, 72, or 150 of this chapter is prohibited.

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

6. The authority citation for Part 30 is revised to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846) unless otherwise noted.

Section 30.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 30.3, 30.34 (b) and (c), 30.41 (a) and (c), and 30.53 issued under sec. 161b, 68 Stat. 948 (42 U.S.C. 2201(b)) and §§ 30.34(f), 30.51, 30.52 and 30.55 issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

7. A new § 30.7 is added under the center heading "General Provisions" to read as follows:

§ 30.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to—

(i) Providing the Commission information about possible violations of

requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 30 days after an alleged violation occurs by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) Each licensee and each applicant shall post Form NRC-3, "Notice to Employees," on its premises. Posting must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note.—Copies of Form NRC-3 may be obtained by writing to the the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D, Part 20 of this chapter or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

(f) The general licenses provided in Parts 31 and 35 of this chapter are exempt from paragraph (e) of this section.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

8. The authority citation for Part 40 is revised to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 83, 84, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846) unless otherwise noted.

Section 40.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 40.3, 40.25(d)(1)-(3), 40.35(a)-(d), § 40.41(b) and (c), 40.46, 40.51(a) and (c) and 40.63 are issued under sec. 161b., 68 Stat. 948 as amended (42 U.S.C. 2201(b)); and §§ 40.25(c) and (d)(3) and (4), 40.26(c)(2), 40.35(e), 40.41(f), 40.61, 40.62, 40.64, and 40.65 are issued under sec. 161o., 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

9. A new § 40.7 is added under the center heading "General Provisions" to read as follows:

§ 40.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in Section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to—

(i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 30 days after an alleged violation occurs by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) Each licensee and each applicant shall post Form NRC-3, "Notice to Employees," on its premises. Posting must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note.—Copies of Form NRC-3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D, Part 20 of this chapter or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

(f) The general licenses provided in §§ 40.21, 40.22, and 40.25 are exempt from paragraph (e) of this section.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

10. The authority citation for Part 50 is revised to read as follows:

Authority: Secs. 103, 104, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2238, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846), unless otherwise noted.

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Sections 50.100–50.102 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 50.10 (a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.10 (b) and (c) and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.55(e), 50.59(b), 50.70, 50.71, 50.72, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

11. A new § 50.7 is added under the center heading "General Provisions" to read as follows:

§ 50.7 Employee protection.

(a) Discrimination by a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee, or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to—

(i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 30 days after an alleged violation occurs by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee, or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) Each licensee, permittee and each applicant shall post Form NRC-3, "Notice to Employees," on its premises. Posting must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note.—Copies of Form NRC-3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D, Part 20 of this chapter or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

PART 60—DISPOSAL OF HIGH LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

12. The authority citation for Part 60 is revised to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); Pub. L. 95-601, secs. 10 and 14, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 60.71 to 60.73 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

13. A new § 60.9 is added to Subpart A to read as follows:

§ 60.9 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to—

(i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no applicaton to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 30 days after an alleged violation occurs by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) Each licensee and each applicant shall post Form NRC-3, "Notice to Employees," on its premises. Posting must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note.—Copies of Form NRC-3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D, Part 20 of this chapter or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

14. The authority citation for Part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846) unless otherwise noted.

Section 70.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 70.3, 70.19(c), 70.21(c), 70.22(a), (b), (d)–(k), 70.24(a) and (b), 70.32(a)(3), (5), and (i), 70.36, 70.39(b), and (c), 70.41(a), 70.42(a) and (c), 70.56, are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 70.7, 70.20a(a) and (d), 70.32(a)(6), (c), (d), (e), and (g), 70.38, 70.51(c)–(g), 70.56, 70.57(b) and (d), 70.58(a)-(g)(3) and (h)–(j) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 70.32(h), 70.51(b) and (i), 70.52, 70.53, 70.54, 70.55, 70.58(g)(4), (k) and (l), 70.59 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

15. A new § 70.7 is added under the center heading "General Provisions" to read as follows:

§ 70.7 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in Section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to—

(i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 30 days after an alleged violation occurs by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from

adverse action dictated by nonprohibited considerations.

(e) Each licensee and each applicant shall post Form NRC-3 "Notice to Employees," on its premises. Posting must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note.—Copies of Form NRC-3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D, Part 20 of this chapter or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

(f) The general licenses provided in §§ 70.19 and 70.20 are exempt from paragraph (e) of this section.

18. Section 70.20a paragraph (a) is revised to read as follows:

§ 70.20a General license to possess special nuclear material for transport.

(a) A general license is hereby issued to any person to possess formula quantities of strategic special nuclear material of the types and quantities subject to the requirements of §§ 73.20, 73.25, 73.26, and 73.27 of this chapter and irradiated reactor fuel containing material of the types and quantities subject to the requirements of § 73.37 of this chapter, in the regular course of carriage for another or storage incident thereto. Carriers generally licensed under § 70.20b are exempt from the requirements of this section. Carriers of irradiated reactor fuel for the United States Department of Energy are also exempt from the requirements of this section. The general license is subject to the applicable provisions of §§ 70.7 (a) through (e); 70.32 (a) and (b), and §§ 70.42, 70.52, 70.55, 70.61, 70.62, and 70.71.

* * * * *

PART 72—LICENSING REQUIREMENTS FOR THE STORAGE OF SPENT FUEL IN AN INDEPENDENT SPENT FUEL STORAGE INSTALLATION (ISFSI)

17. The authority citation for Part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, 202, 206, 88 Stat. 1242, 1243, 1246, as amended (42 U.S.C. 5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332).

18. A new § 72.10 is added to Subpart A to read as follows:

§ 72.10 Employee protection

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to—

(i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately cause a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 30 days after an alleged violation occurs by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e) Each licensee and each applicant shall post Form NRC-3, "Notice to Employees," on its premises: Posting must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

Note.—Copies of Form NRC-3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D, Part 20 of this chapter or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

19. The authority citation for Part 150 is revised to read as follows:

Authority: Sec. 161, 186, 68 Stat. 948, 955, (42 U.S.C. 2201, 2236); sec. 274, Pub. L. 86-373, 73 Stat. 688, as amended (42 U.S.C. 2021) sec. 201, 206, 88 Stat. 1242, 1246, as amended (42 U.S.C. 5841, 5846).

Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152).

For purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), § 150.17a issued under sec. 161b, 68 Stat. 950 (42 U.S.C. 2201(b)).

150.20, the introductory text of (b) is revised to read as

...recognition of agreement state

...withstanding any provision to ...ry in any specific license ...an Agreement State to a ...gaging in activities in a non- ...it State or in offshore waters ...general licenses provided in ...n, the general licenses ...in this section are subject to ...ions of §§ 30.7(a) through (e), ...nd §§ 30.34, 30.41, and 30.51 to ...usive, of Part 30 of this ...paragraphs 40.7(a) through (e) ...41, 40.51, 40.61 to 40.63, ...40.71 and 40.81 of Part 40 of ...ter; and paragraphs 70.7(a) ...e) and §§ 70.32, 70.42, 70.51 to ...lusive, 70.61, 70.62, and 70.71 of ...this chapter; and to the ...s of Parts 19, 20, and 71 and ...3 of Part 34 of this chapter. In ...any person engaging in ...in non-Agreement States or in ...waters under the general ...provided in this section:

...it Washington, D.C. this 9th day of ...

...Nuclear Regulatory Commission. ...Chilk, ...*of the Commission.*

[8024 Filed 7-13-82; 8:45 am]
BE 7590-01-M

Part 50

...nd Standards for Nuclear ...lants

...: Nuclear Regulatory ...sion.

Final rule.

...RY: The Commission is amending ...lations to incorporate by ...e the Summer 1981 Addenda of ...IE Boiler and Pressure Vessel ...he sections of the ASME Code ...corporated provide rules for the ...ction of nuclear power plant ...ents. Adoption of these ...ments will permit the use of ...ed methods for construction.

...VE DATE: August 13, 1982.

...THER INFORMATION CONTACT: ...aker, Office of Nuclear ...tory Research, U.S. Nuclear ...tory Commission, Washington, ...555, Telephone (301) 443-5892.

...MENTARY INFORMATION: On ...ry 3, 1982 the Nuclear Regulatory ...ission published in the Federal Register (47 FR 5010) proposed amendments to its regulation, 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities." The proposed amendments revised § 50.55a to incorporate by reference the Summer 1981 Addenda to Section III of the ASME Boiler and Pressure Vessel Code.

Some of the changes effected in the addenda which are incorporated through the adoption of the amendments are:

1. Article NCA-3000 of Section III was revised to add a requirement that N, NA, and NPT certificate holders be responsible for documentation of the review and approval of materials used by them and the preparation, accumulation, control, and protection of required records while in their custody. Also, the owner must review the materials documentation to verify that the Code Edition, Addenda, and Code Cases used satisfy NCA-1140 and are acceptable to the regulatory and enforcement authorities.

2. Article NCA-8000 of Section III was revised editorially to make it easier to read and understand. Also, two new provisions, NCA-8240(b) and NCA-8430, were added. NCA-8240(b) describes the provisions that must be met if a name plate is to be removed from an item which has been installed in a nuclear power plant system. NCA-8430 describes alternatives for compiling the Code Data Reports so that they can be traced from the Data Report Form.

3. Article NB-3500 of Section III was revised to remove the nomenclatures "normal duty valve," "severe duty valve," "standard valve," and "expected cycle," but there were no technical changes associated with dropping these nomenclatures.

4. Article NB-6000 was given an extensive editorial rewrite which mainly reorganized the paragraphs into a more comprehensive form. Also added were a subarticle on special test procedures and a subparagraph allowing the hydrostatic testing of pump and valve subassemblies.

Interested persons were invited to submit written comments for consideration in connection with the proposed amendement by May 5, 1982. One information/editorial comment on the supplementary information section of the proposed rule was received but no significant comments were received. The necessary editorial corrections were made. The Commission has adopted the proposed amendment with a minor editorial revision to accommodate the incorporation by reference of the ASME Code.

Paperwork Reduction Act Statement

The recordkeeping requirements contained in this Regulation have been approved by the Office of Management and Budget; OMB approval No: 3150-0011.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121. Since these companies are dominant in their service areas, this rule does not fall within the purview of the Act.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire prevention, Intergovernmental relations, Nuclear Power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting requirements.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and sections 552 and 553 of title 5 of the United States Code, the following amendments to Title 10, Chapter 1, Code of Federal Regulations, Part 50 are published as a document subject to codification.

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 103, 104, 161, 182, 183, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2239); secs. 201, 202, 206, 88 Stat. 1243, 1244, 1248 (42 U.S.C. 5841, 5842, 5846), unless otherwise noted.

Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended; (42 U.S.C. 2234). Sections 50.100-50.102 issued under sec. 186, 68 Stat. 955; (42 U.S.C. 2236).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 50.10 (a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.10 (b) and (c) 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.55(e), 50.59(b), 50.70, 50.71, 50.72, and

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 19, 30, 40, 50, 70, 71, 150

Protection of Employees who Provide Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is considering amending its regulations in regard to protection for employees who provide information to the Commission. These amendments would (1) change the types of information to include not only information on radiological working conditions but also information on anti-trust, safety, and security matters, (2) make the employee protection provisions applicable not only to licensees but also to permittees, applicants, and their contractors and subcontractors, (3) make employers aware that discrimination against employees who provide such information to the Commission is prohibited, (4) make employees aware that, if such discrimination is believed to have occurred, a recourse for remedy is available through the Department of Labor, and (5) require posting on premises of licensees, permittees, and applicants of explanatory material relating to the prohibition and remedy.

DATE: Comments should be submitted May 9, 1980.

ADDRESSES: Written comments or suggestions concerning the proposed amendment should be mailed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch. Copies of comments received may be examined at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Mr. W. E. Campbell, Jr., Office of Standards Development, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. (301-443-5913).

SUPPLEMENTARY INFORMATION: Section 10 of Public Law 95-601 amended the Energy Reorganization Act of 1974, as amended, by adding a new § 210, "Employee Protection." This new section identifies specific acts of employees as protected activities and prohibits employers from discriminating against employees who engage in those activities, provides the Department of Labor with new authority to investigate an alleged act of such discrimination, and provides a remedy to the discrimination by means of an administrative proceeding in the Department of Labor. This new authority of the Department does not in any way abridge the Commission's preexisting authority under Section 161 of the Atomic Energy Act to investigate an alleged discrimination and take appropriate action, for example withholding of a license, suspension of a license, or imposing a civil penalty.

The Nuclear Regulatory Commission and its predecessor the Atomic Energy Commission have promulgated some regulations that address the subject of workers who provide information to NRC, e.g., 10 CFR 19.16(c), and posting requirements, e.g., 10 CFR 19.11(c). Paragraph 19.16(c) is of limited scope and since it pertains to radiological working conditions it is applicable only to licensees. Paragraph 19.11(c) is also of limited scope in that it relates the posting requirements to radiation areas. NRC is considering whether a more comprehensive regulatory program for protection should be developed by it to complement the DOL program. DOL noticed effective rules for its program on January 8, 1980 (45 FR 1636).

Accordingly, the Commission proposes to amend the regulations not only to announce the prohibition of discrimination of the type described above and to announce the availability thru the Department of Labor of a remedy for employees who believe they have been discriminated against but also to require posting by specific types of licensees, permittees and applicants of explanatory material concerning the prohibition and remedy.[1] In addition, the Commission proposes to delete 10 CFR 19.16(c) but at the same time to amend Part 19 by the addition of 10 CFR 19.20. This new paragraph, when combined with proposed changes to Parts 30, 40, 50, 70, and 71 will extend the current prohibition of discrimination against workers who provide information concerning radiological working conditions to NRC to include employees who provide information relating to radiological health protection matters, safeguard matters that could affect the public health and safety or common defense and security or anti-trust matters.

Title 10, Chapter I contains provisions in various Parts, for example paragraph 40.25(e), to exempt specific categories of "general licensees" from the requirements of 10 CFR Part 19. This exemption is based on the nature of the licensed activity. On the basis of this exemption these general licensees are not required to post a copy of the current NRC Form 3. The proposed amendments continue this exemption for all general licensees except the general licensee carrier of special nuclear material (10 CFR 70.20a).

Title 10, Chapter I contains provisions, in Parts 30, 40, 50, 70, 71, and 150, for example §§ 30.61 and 30.63, that allow orders to be issued to suspend or revoke a license or to impose a civil penalty for violation of, or failure to observe, the terms and provisions of rules, regulations or orders of the Commission. The amending of the regulations based on the Atomic Energy Act, as amended, to prohibit specific discriminatory acts by licensees, permittees, and applicants will clarify the imposition of various enforcement orders in the event that licensees, permittees, or applicants engage in the specified types of discriminatory acts.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and section 553 of title 5 of the United States Code, notice is hereby given that adoption of the following amendments to 10 CFR Parts 19, 30, 40, 50, 70, 71, and 150, is contemplated. All interested persons who wish to submit comments or suggestions in connection with the proposed amendments should send them to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch by May 9, 1980. Copies of the comments received may be examined in the Commission's Public Document Room at 1717 H Street NW., Washington, D.C.

PART 19—NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS; INSPECTIONS

1. The table of contents for Part 19 is amended to add "19.20 Employee protection," immediately prior to "19.30 Violations.".

§ 19.11 [Amended]

2. 10 CFR 19.11(c) is amended to read as follows: "Form NRC—3, 'Notice to Employees,' shall be posted by each licensee as required by Parts 30, 40, 50, 70, and 71."

§ 19.16 [Amended]

3. In 10 CFR 19.16, paragraph (c) is deleted.

4. A new § 19.20 is added to read as follows:

§ 19.20 Employee protection.

Discrimination by a licensee, or a contractor or subcontractor of a licensee

[1] Copies of the material to be posted, NRC Form 3 (Proposed Revision 8/79) may be obtained by writing the Office of Administration, Document Management Branch, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

against an employee for engaging in certain activities that are protected activities under this part or Parts 30, 40, 50, 70, or 71 is prohibited.

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

5. The table of contents for Part 30 is amended to add "30.7 Employee protection." immediately prior to the heading "Exemptions.".

6. A new § 30.7 is added to read as follows:

§ 30.7 Employee protection.

(a) Discrimination, including discharge of an employee by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant, against an employee for engaging in certain protected activities is prohibited. These protected activities are: (1) providing to the Commission (i) information about possible violations of requirements imposed under the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, as amended; or (ii) information furthering the purposes of such Acts; or (2) requesting the Commission to institute action against his or her employer for the administration or enforcement of such requirements; or (3) testifying in any Commission proceeding. Such activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the above protected activities may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. Such administrative proceeding must be initiated within 30 days after such alleged violation occurs by filing with the Department of Labor a complaint alleging such violation. The Department may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a licensee of the Commission may be grounds for revocation or suspension of the license or imposition of a civil penalty. A violation of paragraph (a) by an applicant for a Commission license may be grounds for denial of the license or imposition of a civil penalty.

(d) Form NRC-3 "Notice to Employees" shall be posted on the premises of each licensee and each applicant to inform employees (1) that certain activities by them are protected activities, (2) that discrimination by employers against individuals who engage in such protected activities is prohibited, and (3) that a remedy is available in the event an employee believes such discrimination has occurred. Posting shall be at locations sufficient to permit employees to observe a copy on the way to or from their place of work. Premises shall be posted not later than 30 days after an application is docketed and shall remain posted while the application is before the Commission and while licensed activities are being conducted.

Note.—Copies of Form NRC-3 may be obtained by writing to the Director of the appropriate U.S. Nuclear Regulatory Commission Inspection and Enforcement Regional Office listed in Appendix D, Part 20 of this chapter, or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

(e) The general licenses provided in Parts 31 and 35 of this chapter are exempt from paragraph (d) of this section.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

7. The table of contents for Part 40 is amended to add "40.7 Employee protection." immediately prior to the heading "Exemptions.".

8. A new § 40.7 is added to read as follows:

§ 40.7 Employee protection.

(a) Discrimination, including discharge of an employee by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant, against an employee for engaging in certain protected activities is prohibited. These protected activities are: (1) providing to the Commission (i) information about possible violations of requirements imposed under the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, as amended; or (ii) information furthering the purposes of such Acts; or (2) requesting the Commission to institute action against his or her employer for the administration or enforcement of such requirements; or (3) testifying in any Commission proceeding. Such activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the above protected activities may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. Such administrative proceeding must be initiated within 30 days after such alleged violation occurs by filing with the Department of Labor a complaint alleging such violation. The Department may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a licensee of the Commission may be grounds for revocation or suspension of the license or imposition of a civil penalty. A violation of paragraph (a) by an applicant for a Commission license may be grounds for denial of the license or imposition of a civil penalty.

(d) Form NRC-3 "Notice to Employees" shall be posted on the premises of each licensee and each applicant to inform employees (1) that certain activities by them are protected activities, (2) that discrimination by employers against individuals who engage in such protected activities is prohibited, and (3) that a remedy is available in the event an employee believes such discrimination has occurred. Posting shall be at locations sufficient to permit employees to observe a copy on the way to or from their place of work. Premises shall be posted not later than 30 days after an application is docketed and shall remain posted while the application is before the Commission and while licensed activities are being conducted.

Note.—Copies of Form NRC-3 may be obtained by writing to the Director of the appropriate U.S. Nuclear Regulatory Commission Inspector and Enforcement Regional Office listed in Appendix D, Part 20 of this chapter, or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

(e) The general licenses provided in §§ 40.21, 40.22, and 40.25 of this chapter are exempt from paragraph (d) of this section.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

9. The table of contents for Part 50 is amended to add "50.7 Employee protection." immediately prior to the heading "Requirement of License, Exceptions.".

10. A new § 50.7 is added to read as follows:

§ 50.7 Employee protection.

(a) Discrimination, including discharge of an employee by a Commission licensee, permittee, an applicant for a Commission license or

permit, or a contractor or subcontractor of a Commission licensee, permittee, or applicant, against an employee for engaging in certain protected activities is prohibited. These protected activities are: (1) providing to the Commission (i) information about possible violations of requirements imposed under the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, as amended; or (ii) information furthering the purposes of such Acts; or (2) requesting the Commission to institute action against his or her employer for the administration or enforcement of such requirements; or (3) testifying in any Commission proceeding. Such activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the above protected activities may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. Such administrative proceeding must be initiated within 30 days after such alleged violation occurs by filing with the Department of Labor a complaint alleging such violation. The Department may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a licensee or permittee of the Commission may be grounds for revocation or suspension of the license or permit or imposition of a civil penalty. A violation of paragraph (a) by an applicant for a Commission license or permit may be grounds for imposition of a civil penalty or for denial of the license or permit.

(d) Form NRC-3 "Notice to Employees" shall be posted on the premises of each licensee, permittee, and each applicant to inform employees (1) that certain activities by them are protected activities, (2) that discrimination by employers against individuals who engage in such protected activities is prohibited, and (3) that a remedy is available in the event an employee believes such discrimination has occurred. Posting shall be at locations sufficient to permit employees to observe a copy on the way to or from their place of work. Premises shall be posted not later than 30 days after an application is docketed and shall remain posted while the application is before the Commission and while licensed activities are being conducted.

Note.—Copies of Form NRC-3 may be obtained by writing to the Director of the appropriate U.S. Nuclear Regulatory Commission Inspection and Enforcement Regional Office listed in Appendix D, Part 20 of this chapter, or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

11. The table of contents for Part 70 is amended to add "70.7 Employee protection." immediately prior to the heading "Exemptions.".

12. A new § 70.7 is added to read as follows:

§ 70.7 Employee protection.

(a) Discrimination, including discharge of an employee by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant, against an employee for engaging in certain protected activities is prohibited. These protected activities are: (1) providing to the Commission (i) information about possible violations of requirements imposed under the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, as amended; or (ii) information furthering the purposes of such Acts; or (2) requesting the Commission to institute action against his or her employer for the administration or enforcement of such requirements; or (3) testifying in any Commission proceeding. Such activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the above protected activities may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. Such administrative proceeding must be initiated within 30 days after such alleged violation occurs by filing with the Department of Labor a complaint alleging such violation. The Department may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a licensee of the Commission may be grounds for revocation or suspension of the license or imposition of a civil penalty. A violation of paragraph (a) by an applicant for a Commission license may be grounds for denial of the license or imposition of a civil penalty.

(d) Form NRC-3 "Notice to Employees" shall be posted on the premises of each licensee and each applicant to inform employees (1) that certain activities by them are protected activities, (2) that discrimination by employers against individuals who engage in such protected activities is prohibited, and (3) that a remedy is available in the event an employee believes such discrimination has occurred. Posting shall be at locations sufficient to permit employees to observe a copy on the way to or from their place of work. Premises shall be posted not later than 30 days after an application is docketed and shall remain posted while the application is before the Commission and while licensed activities are being conducted.

Note.—Copies of Form NRC-3 may be obtained by writing to the Director of the appropriate U.S. Nuclear Regulatory Commission Inspection and Enforcement Regional Office listed in Appendix D, Part 20 of this chapter, or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

(e) The general licenses provided in §§ 70.19 and 70.20 are exempt from paragraph (d) of this section.

13. In § 70.20a(a), the last sentence is revised to read as follows:

§ 70.20a General license to possess special nuclear material for transport.

(a) * * * The general license is subject to the applicable provisions of §§ 70.7 (a), (b), and (c); 70.32 (a) and (b), 70.42, 70.52, 70.55, 70.61, 70.62 and 70.71.

* * * * *

PART 71—PACKAGING OF RADIOACTIVE MATERIAL FOR TRANSPORT AND TRANSPORTATION OF RADIOACTIVE MATERIAL UNDER CERTAIN CONDITIONS

14. The table of contents for Part 71 is amended to add "71.5a Employee protection." immediately prior to the heading "Exemptions."

15. A new § 71.5a is added to read as follows:

§ 71.5a Employee protection.

(a) Discrimination, including discharge of an employee by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant, against an employee for engaging in certain protected activities is prohibited. These protected activities are: (1) Providing to the Commission (i) information about possible violations of requirements imposed under the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, as amended; or (ii) information furthering the purposes of such Acts; or (2)

requesting the Commission to institute action against his or her employer for the administration or enforcement of such requirements; or (3) testifying in any Commission proceeding. Such activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the above protected activities may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. Such administrative proceeding must be initiated within 30 days after such alleged violation occurs by filing with the Department of Labor a complaint alleging such violation. The Department may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) of this section by a licensee of the Commission may be grounds for revocation or suspension of the license or imposition of a civil penalty. A violation of paragraph (a) by an applicant for a Commission license may be grounds for denial of the license or imposition of a civil penalty.

(d) Form NRC-3 "Notice to Employees" shall be posted on the premises of each licensee and each applicant to inform employees (1) that certain activities by them are protected activities, (2) that discrimination by employers against individuals who engage in such protected activities is prohibited, and (3) that a remedy is available in the event an employee believes such discrimination has occurred. Posting shall be at locations sufficient to permit employees to observe a copy on the way to or from their place of work. Premises shall be posted not later than 30 days after an application is docketed and shall remain posted while the application is before the Commission and while licensed activities are being conducted.

Note.—Copies of Form NRC-3 may be obtained by writing to the Director of the appropriate U.S. Nuclear Regulatory Commission Inspection and Enforcement Regional Office listed in Appendix D, Part 20 of this chapter, or the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES UNDER SECTION 274

16. In § 150.20, paragraph (b) is revised to read as follows:

§ 150.20 Recognition of Agreement State licenses.

* * * * *

(b) Notwithstanding any provision to the contrary in any specific license issued by an Agreement State to a person who engages in activities in a non-Agreement State under a general license provided in this section, the general license provided in this section is subject to the provisions of §§ 30.7(a), (b), and (c), 30.14(d), 30.34, 30.41, and 30.51 to 30.63 inclusive of Part 30 of this chapter; §§ 40.7 (a), (b) and (c), 40.41, 40.51, 40.61 to 40.63 inclusive, 40.71, and 40.81 of Part 40 of this chapter; and §§ 70.7 (a), (b), and (c), 70.32, 70.42, 70.51 to 70.58 inclusive, 70.61, 70.62, and 70.71 of Part 70 of this chapter; and to the provisions of Parts 19, 20, and 71 and Subpart B of Part 34 of this chapter. In addition any person who engages in activities in non-Agreement States under a general license provided in this section:

* * * * *

(Secs. 161 and 186, Pub. L. 83-703, 68 Stat. 948, 955 (42 U.S.C. 2201, 2236); sec. 234, Pub. L. 91-161, 83 Stat. 444 (42 U.S.C. 2282); sec. 10, Pub. L. 85-601, 92 Stat. 2921 (42 U.S.C. 5851))

Dated at Washington, D.C. this 3rd day of March, 1980.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 80-7343 Filed 3-7-80; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 80-NE-06]

Designation of Federal Airways, Area Low Routes, Controlled Airspace and Reporting Points; Proposed Designation of Lawrence Municipal Airport, Lawrence, Mass., Control Zone

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking

SUMMARY: This Notice (NPRM) proposes to designate a new control zone at Lawrence Airport, Lawrence, Massachusetts, to coincide with the establishment of a new air traffic control tower at Lawrence Airport on or about June 15, 1980.

DATES: Comments must be received on or before March 31, 1980.

ADDRESS: Send comments to the Federal Aviation Administration, Office of the Regional Counsel, ANE-7, Attention: Rules Docket Clerk, Docket No. 80-NE-06.

A public docket will be available for examination by interested persons in the Office of the Regional Counsel, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts.

FOR FURTHER INFORMATION CONTACT: Richard G. Carlson, Operations Procedures and Airspace Branch, ANE-538, Federal Aviation Administration, Air Traffic Division, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (617) 273-7285.

Comments Invited

Interested persons may participate in the proposed rulemaking process by submitting such written data, views, or arguments as they may desire. Communications should identify the airspace docket number and be submitted to the Office of the Regional Counsel, ANE-7, Attention: Rules Docket Clerk, Docket No. 80-NE-06, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803. All communications received on or before March 31, 1980, will be considered before action is taken on the proposed amendment. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA-430, 800 Independence Avenue, S.W., Washington, D.C. 20591, or by calling (202) 426-8085. Communications must identify the number of this NPRM.

Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11-2 which describes the application procedures.

The Proposal

On or about June 15, 1980, the Federal Aviation Administration (FAA), will commission an air traffic control tower at Lawrence Airport, Lawrence, Massachusetts. In order to provide for the control of air traffic, the FAA proposes to establish a control zone for Lawrence, Massachusetts. The zone will control a portion of airspace approximately 5 miles in radius around

ADDENDUM B

Section 211 of the Energy Reorganization Act of 1978

42 U.S.C. § 5851

Section 5851. Employee protection

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(2) For purposes of this section, the term ''employer'' includes -

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant; and

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to

as the ''Secretary'') alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

(C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

(c) Review

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Jurisdiction

Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(e) Commencement of action

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Enforcement

Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28.

(g) Deliberate violations

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.).

(h) Nonpreemption

This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

(i) Posting requirement

The provisions of this section shall be prominently posted in any place of employment to which this section applies.

(j) Investigation of allegations

(1) The Commission or the Department of Energy shall not delay taking appropriate action with respect to an allegation of a substantial safety hazard on the basis of -

(A) the filing of a complaint under subsection (b)(1) of this section arising from such allegation; or

(B) any investigation by the Secretary, or other action, under this section in response to such complaint.

(2) A determination by the Secretary under this section that a violation of subsection (a) of this section has not occurred shall not be considered by the Commission or the Department of Energy in its determination of whether a substantial safety hazard exists.

ADDENDUM C

UNPUBLISHED AND DOL DECISIONS CITED IN TVA'S INITIAL BRIEF

Cases: **Page**

(Cite as: 215 F.3d 1326, 2000 WL 712355 (6th Cir.(Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Marie A. LOVAS, Plaintiff-Appellant,
v.
HUNTINGTON NATIONAL BANK, Defendant-Appellee.

No. 99-3213.

May 22, 2000.

On Appeal from the United States District Court for the Northern District of Ohio.

Before NORRIS, MOORE, and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge.

**1 Plaintiff, Marie A. Lovas, was terminated in a reduction-in-force by the defendant, Huntington National Bank ("Huntington"). Lovas alleged that Huntington discriminated against her based on age and sex in violation of the Age Discrimination in Employment Act, 29 U.S .C. § 621 *et seq.;* Title VII, 42 U.S.C. § 2000(e) *et seq.;* Ohio Rev.Code § § 4112 and 4101.17 and alleged several breaches of Ohio contract and tort law. The district court granted summary judgment in favor of Huntington, finding that Lovas failed to establish a prima facie case of age or sex discrimination and also failed to show that Huntington's proffered reason for the termination was pretextual. For the following reasons, we AFFIRM the district court's grant of summary judgment in favor of Huntington.

I.

Lovas began working at First National Bank of Burton ("FNB") in the bookkeeping and operations areas on February 12, 1967. In January 1981, FNB merged with Huntington and Lovas was promoted to Operations Manager, an officer position. As Operations Manager, Lovas managed accounting employees and created operational plans and audits. Lovas received consistent performance evaluations of "meets expectations" throughout her employment at Huntington.

Following the 1981 merger, Huntington transferred operations-related functions from the individual bank branches to centralized centers, reducing the need for operations-related staff at each branch. In addition, computer systems reduced the need for processing staff at each branch. By 1991, the necessary operations' staff in the Burton office fell from over a dozen employees to one--Lovas.

In 1991, William Hoag was assigned as City Executive for Huntington in Burton overseeing the five branches within Geauga County. Also in 1991, Hoag installed Charles Bixler as Manager of retail banking operations, supervising operations in the Huntington branches. Although Lovas frequently worked with Hoag, she reported directly to Bixler, who evaluated her performance.

In 1994, due to the reduction in operations-related work, Lovas was assigned the position of City Office Compliance Officer/Operations Specialist in charge of reports for installment loans and the remaining operations' functions in the Burton office. On internal Huntington forms, Bixler designated Lovas's new position as a demotion. Although Lovas's salary remained the same, her salary grade was lowered and she considered the new position a demotion. Hoag considered Lovas's new duties an alternative to eliminating her position.

In 1995, Huntington moved the installment loan compliance process from the Burton branch to a centralized center in Dover, Ohio. Huntington's removal of the compliance process eliminated the "city compliance" portion of Lovas's position, leaving only the "operations specialist" duties. Huntington also instructed Hoag to reduce salary, advertising expenses, and charitable contributions within the Geauga County offices. As part of this reduction, Hoag entirely eliminated Lovas's " operations specialist" position due to a lack of work.

**2 Hoag spoke with Human Resources representative Sandra Clarke about eliminating Lovas's position and indicated that he and Bixler would assume Lovas's remaining operations specialist duties. Although Hoag designated Lovas's position for elimination, the human resources department deemed both Lovas and Bixler as candidates for the reduction-in-force ("RIF") because they were the employees involved in the operations' function of the bank.

Clarke, following the instructions of Huntington's vice-president of Human Resources, Cheri Webb, used Huntington's method of ranking employees competing for a particular position to determine which employee would be terminated in the reduction. Clarke scored Lovas and Bixler in five performance categories, with the scores compiled from their two most recent performance evaluations. The five performance categories were assigned numbers based on information from the performance evaluations. Lovas's performance evaluations used in the analysis had been completed by Bixler prior to the RIF, and no other personnel information was used in the evaluation. After Clark completed the comparison process, Bixler received a score of 22 and Lovas received a score of 18.05.

On September 6, 1995, Clarke presented the results to Hoag, who made the final decision to terminate Lovas and transfer her remaining duties to himself, Bixler, and a temporary employee. Later that day, Hoag and Webb informed Lovas of her termination. Lovas participated in a transition program offered by Huntington, but did not obtain a new position within the transition period. Lovas was officially terminated on March 6, 1995.

On April 4, 1996, Lovas filed a charge of discrimination with the Equal Employment Opportunity Commission. The EEOC issued a notice of right to sue on April 11, 1997. Lovas filed suit in federal court on July 8, 1997, alleging that Huntington: (1) violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.;* (2) discriminated on the basis of sex in violation of Title VII, 42 U.S.C. § 2000(e) *et seq.;* (3) discriminated on the basis of sex and age in violation of Ohio Rev.Code §§ 41001.17, 4112.02 and 4112.99; and (4) violated Ohio law by breach of implied contract, promissory estoppel and infliction of emotional distress.

Huntington moved for summary judgment on July 17, 1998. The district court granted Huntington's motion for summary judgment on January 29, 1999, finding that Lovas failed to establish a prima facie case of age discrimination under the ADEA and Ohio law or sex discrimination under Title VII and Ohio law. Pursuant to 28 U.S.C. § 1367(c)(3), the district court dismissed Lovas's remaining state-law claims without prejudice. Lovas filed a timely notice of appeal.

II.

We review *de novo* a district court's grant of summary judgment, using the same Rule 56(c) standard as the district court. *See Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 370-71 (6th Cir.1999). Under Rule 56(c), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In deciding the motion, a court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the moving party shows this absence, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita*, 475 U.S. at 587. Merely alleging the existence of a factual dispute is insufficient to defeat a summary judgment motion; rather, there must exist in the record a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986).

III.

**3 The *McDonnell Douglas/Burdine* framework is applicable to claims brought under Title VII, the ADEA, and claims of discrimination under Ohio state law, Ohio Rev.Code §§ 4112.02 and 4112.99. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992) (applying *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)); *Little Forrest Med. Ctr. of Akron v. Ohio Civil Rights Comm'n*, 575 N.E.2d 1164, 1167-68 (Ohio 1991) (same). Thus, the plaintiff's ADEA,

Title VII and Ohio state-law discrimination claims all arising from the same set of facts, can be properly analyzed together.

A.

"A plaintiff who brings a claim under the [ADEA] must prove that age was a determining factor in the adverse employment action taken against him or her." *See Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1023 (6th Cir.1993) (citing *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229-30 (6th Cir.1990)). To establish a prima facie case of age discrimination the plaintiff must show by a preponderance of the evidence that (1) she was a member of the protected class, (2) she was subjected to an adverse employment action, (3) she was qualified for a particular position, and (4) she was replaced by a younger person. *See Godfredson*, 173 F.3d at 365; *see also O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 420 (6th Cir.1999). When the employee is discharged in the context of a RIF, however, the final requirement of a prima facie case is modified because the employee is not, in fact, replaced. *See Godfredson*, 173 F.3d at 365 (citing *Scott v. Goodyear Tire & Rubber Co.*, 160 F.2d 1121, 1126 (6th Cir.1991)). Instead, the fourth element of the prima facie case requires that a plaintiff discharged due to a RIF offer some "direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Skalka*, 178 F.3d at 420 (quoting *Barnes v. GenCorp. Inc.*, 896 F.2d 1457, 1465 (6th Cir.1990)).

In the present case, the district court correctly determined that Lovas failed to establish the fourth element of a prima facie case of age discrimination. Lovas contends that as "the only forty-eight year old officer" who was demoted in 1994 and later terminated in 1995, she established the fourth element of the prima facie case. Huntington's evidence, however, shows that five employees older than Lovas in the bank's Geauga County branches were retained in the RIF. Thus, the fact that Lovas was the "only forty-eight year old officer" demoted or terminated does not establish that she was singled out because of her age when placed in context.

Lovas does not dispute that older employees were retained, but contends that the isolated nature of her termination is sufficient to establish a prima facie case. The evidence, however, also shows that the operations' positions within the Geauga County offices were declining. Moreover, Huntington eliminated Lovas's city compliance duties. Lovas's isolated position was due to the reduction in operations-related duties within the Huntington branches. Lovas has offered no evidence showing that the elimination of her operations' duties was motivated in part by age or that she was singled out for impermissible reasons. Although Lovas contends that Hoag made derogatory comments about her age, we find no reference to ageist comments by Hoag in our review of the record. Further, the comments noted by the district court--such as "your pension will be jeopardized if you don't shape up"--do not establish circumstantial evidence that age motivated Lovas's termination or that she was singled out for termination. Accordingly, the district court correctly found that Lovas failed to establish a prima facie case of age discrimination under the ADEA.

B.

**4 Huntington contends that even if Lovas established a prima facie case of age discrimination, she failed to show that Huntington's non-discriminatory reason for the termination was pretextual. We agree. Once a plaintiff has established a prima facie case of age or sex discrimination, the burden of production shifts to the defendant to articulate legitimate, nondiscriminatory reasons for the adverse employment action. *See Kline v. Tennessee Valley Authority*, 128 F.3d 337, 346 (6th Cir.1998). Huntington contends that the employee comparison process administered by the human resources department determined the employee to be terminated after Hoag eliminated Lovas's position. Because Huntington has set forth a legitimate, non-discriminatory reason, Lovas must show that their proffered reasons are pretextual. *See Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). There are three ways a plaintiff may establish that a proffered explanation is pretextual. *See Kline*, 128 F.3d at 346. A plaintiff can establish pretext by showing by a preponderance of the evidence that the given reason is factually false, by showing that the stated reason is insufficient to explain the adverse employment action or finally, by showing that the stated reason was not the actual reason. *See id.* In cases in which the employer's explanation is

challenged as not being the actual or true reason for the adverse action, the plaintiff cannot rely on evidence used to make a prima facie showing, but must introduce additional evidence of discrimination. *See Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir.1994).

Lovas failed to show that Huntington's employee comparison process was not the motivating cause of her termination. Lovas contends that Hoag's alleged derogatory statements and the 1993 memorandum indicate that Huntington's reason was pretextual. Although Hoag's alleged comments are indicative of distinctions on the basis of sex, and the memorandum indicates that Hoag clearly disapproved of Lovas's past performance, the evidence does not support that the comparison process was pretextual. The memorandum did not address Lovas's sex or age and only discussed Lovas's failure to report to work during a 1993 weather-related outage and potential discipline for the infraction. Moreover, the comments and memorandum lack any temporal proximity to the steady reduction in operations' personnel and Huntington's elimination of Lovas's compliance duties. Lovas has not shown that Huntington's elimination of her position and its employee comparison process were false, or motivated by age.

Lovas also contends that Hoag's statements to Clarke that he and Bixler would assume Lovas's duties constituted bias in the RIF comparison process. Lovas argues that her performance evaluations used in the ranking process were conducted by Bixler, her supervisor, and were inherently biased. In addition, the process was tainted because there was no interview or other evaluation of the employees' skills. Although it is troubling that Hoag appears to have assumed that Lovas would be terminated prior to the human resource process of eliminating her position, it remains unchallenged that the decision to eliminate Lovas's compliance officer duties was not made by Hoag.

**5 In addition, Huntington's human resource department determined the candidates for the RIF based upon the position eliminated. Hoag's statements assuming that the position elimination meant that Lovas would be terminated did not alter Huntington's formulaic approach to comparing employees and determining who would be terminated in the RIF. Huntington followed internal procedures to determine the candidates for termination and the comparison of those candidates. Lovas has not shown that the employee comparison process was influenced or controlled by Hoag's input or past disciplinary action. Lovas's evaluations used in the comparison process were completed by Bixler prior to the RIF and no evidence shows that the evaluations were biased. Finally, as the district court noted, interviews are not required in RIF terminations. *See Kline*, 128 F.3d at 351. Huntington has also established that the human resources employee, Clarke, had limited discretion to assign scores based on information in Bixler's and Lovas's employee evaluations. The scores assigned to each employee were determined by current job descriptions and performance evaluations. The employee comparison process has not been shown to be false or tainted.

Without further evidence showing that the RIF was not the true reason for Lovas's termination, the district court correctly determined that Lovas failed to rebut Huntington's proffered reasons for her termination.

C.

Lovas claims that she was terminated because of her sex in violation of Title VII. A prima facie case of sex discrimination under Title VII requires a plaintiff to demonstrate by a preponderance of the evidence that (1) she was a member of a protected class, (2) she was qualified for the position, (3) she suffered an adverse employment action, and (4) she was replaced by a person outside of the protected class. *See Mitchell*, 964 F.2d at 582-83 (citing *McDonnell Douglas*, 411 U.S. at 802). "[A] plaintiff can also make out a prima facie case by showing ... that a comparable non-protected person was treated better," in a claim of disparate treatment. *Mitchell*, 964 F.2d at 582; *see also Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 658 (6th Cir.1999).

In a RIF, this court stated that an employee is not replaced when their duties are assigned to others doing related work in addition to the plaintiff's duties. *See Barnes*, 896 F.2d at 1465. [FN1] In the present case, Lovas contends that no other male was demoted and terminated. "To prevail on a claim of disparate treatment a plaintiff must show that her employer intentionally discriminated against her."

Lynch v. Freeman, 817 F.2d 380 (6th Cir.1987); *see also Huguley v. General Motors Corp.,* 52 F.3d 1364, 1370 (6th Cir.1995). Intent can be established by proof of "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act." ' *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 576 (1978) (quoting *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 (1977)); *see also Shah v. General Elec. Co.,* 816 F.2d 264, 267 (6th Cir.1987) (stating that proof of discriminatory motive can be inferred from differences in treatment). Accordingly, Lovas must show that similarly situated individuals were treated differently, producing evidence that the comparable employees are similarly situated with regard to relevant aspects of employment. *See Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 352 (6th Cir.1998) (discussing similarly situated in context of employment and position).

FN1. In *Barnes,* this court explained:

A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties.

896 F.2d at 1465. The court required direct, circumstantial or statistical evidence in a RIF termination because without such evidence the plaintiff's prima facie case has not raised an inference that the workforce reduction was not the reason for the discharge. *See id.* at 1464-65.

**6 Because Lovas has failed to rebut Huntington's proffered reasons for her termination, however, we need not reach Lovas's prima facie case of sex discrimination. *See Kline,* 128 F.3d at 346. Assuming that Lovas established a prima facie case of sex discrimination, she has failed to show that Huntington's reasons were not the actual or true reasons for her termination. The alleged comments by Hoag--"there's a woman for you" and "what do you expect from a woman"--do not demonstrate that Huntington's reduction of operations' personnel and comparison process were not the reasons for Lovas's termination. In addition, Hoag's memorandum does not refer to Lovas's sex at all, but merely addresses a potential disciplinary action arising from a particular incident three years prior to Lovas's dismissal. Moreover, Hoag's memorandum and comments are not temporally connected to the elimination of Lovas's position in the RIF or Huntington's comparison process. Because Lovas has failed to demonstrate that Huntington's reasons were not the actual or true reasons for the termination, we affirm the district court's grant of summary judgment on Lovas's sex discrimination claim in favor of Huntington.

IV.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of Huntington on Lovas's discrimination claims.

215 F.3d 1326 (Table), 2000 WL 712355 (6th Cir.(Ohio)), Unpublished Disposition

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(Cite as: 124 F.3d 199, 1997 WL 580771 (6th Cir.(Tenn.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Martha J. PETERSON, Plaintiff-Appellant,
v.
DIALYSIS CLINIC, INC., Defendant-Appellee.

No. 96-6093.

Sept. 18, 1997.

On Appeal from the United States District Court for the Eastern District of Tennessee

Before: NELSON and RYAN, Circuit Judges; QUIST, District Judge. [FN*]

FN* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

RYAN, Circuit Judge.

**1 Martha J. Peterson filed suit against Dialysis Clinic, Inc. (DCI), pursuant to 42 U.S.C. §§ 2000e -2000e-17, Title VII of the Civil Rights Act of 1964, alleging that DCI fired her in retaliation for her decision to testify on behalf of a coworker who had filed a charge of race discrimination. DCI moved for and was granted summary judgment. The district court concluded that Peterson could neither establish a *prima facie* case of unlawful retaliation nor prove that DCI's proffered reason for the discharge was a pretext for such retaliation. We agree that Peterson has not produced evidence sufficient to permit a reasonable jury to find the elements of the *prima facie* case. Accordingly, we will affirm.

I.

A.

DCI is a not-for-profit corporation which provides dialysis treatment at multiple locations. Pam Bethune is the administrator of several DCI facilities, including the "Broad Street" facility in Chattanooga, Tennessee. Mickey Chumley is the head nurse at the Broad Street location. As head nurse, Chumley supervises daily operations and reports to Bethune.

Peterson, a registered nurse, was hired by DCI in June 1993. After completing training, Peterson was assigned to the Broad Street facility. According to Peterson, almost immediately after she began working at Broad Street, Chumley made racially hostile remarks regarding a black nurse, Sharon Parks. Peterson stated in her deposition that Chumley indicated that Bethune had "gotten rid of" or "run off" two other black employees.

In October 1993, Parks filed a charge of race discrimination in response to a suspension. According to Parks, she asked Peterson to testify on her behalf several times, beginning in November 1993. Both Peterson and Parks agree that it was sometime in December when Peterson agreed to testify for Parks.

Explaining her decision to testify, Peterson stated that, although she had initially complained to Chumley about Parks's attitude and work ethic, she eventually came to think of Parks as a good worker and a friend. Peterson added that she had been goaded into complaining about Parks by Chumley. According to Peterson, Chumley was aware that Peterson and Parks became friends, and Chumley was "furious" about the friendship.

On January 21, 1994, Peterson was permitted to take time off from work in order to attend a meeting regarding Peterson's plan to donate a kidney to her sister. After returning to work that same day, Peterson told Chumley that she had a second appointment with a transplant coordinator at 1:00 p.m., on February 23, 1994. Peterson asked Chumley for permission to attend the appointment, and offered to give up one of her vacation days, scheduled for February 18-22, 1994. According to Peterson, Chumley told her that she did not need to give up a day of vacation, and that they would "work it out" so that Peterson could keep the appointment.

Chumley testified, however, that she subsequently told Peterson that, although Peterson could keep her scheduled vacation, she would have to reschedule her February 23, appointment because the Broad Street facility was experiencing unexpected staffing shortages. Peterson does not dispute that Chumley made some statement to this effect, but Peterson contends that, in context, Chumley appeared to be joking.

**2 Peterson and Chumley apparently continued to have difficulty communicating about the February 23 appointment. According to Peterson, although Chumley made vague statements suggesting that Peterson's appointment was an inconvenience, Chumley never told Peterson that she could not keep her appointment or that she would be fired if she did so. Chumley testified in her deposition, however, that she made it clear to Peterson that Peterson did not have permission to leave, and that, if Peterson left, she would not have a job when she returned. Peterson left for her appointment sometime shortly before 1:00 p.m. After consulting with Bethune, Chumley fired Peterson when Peterson returned to work later that afternoon.

Peterson went immediately to Bethune's office to dispute her termination. Bethune agreed to place Peterson on suspension and conduct an investigation. Upon review, however, Bethune concluded that Peterson had left work without permission and she informed Peterson that her termination would not be rescinded.

Louise Roberson, a nurse who works at the DCI facility where Bethune's office is located, testified in her deposition that she was asked at 8:40 a.m., on February 23, 1994, by the head nurse at her facility, if she would be able to fill in at the Broad Street facility the following week. Roberson explained that she asked, "Who's quit now?" because Broad Street "has had a bad reputation for many years of not being able to keep staff." Roberson was told that "Martha [Peterson]" had quit. When Peterson arrived to speak to Bethune later that afternoon, Roberson told Peterson that she was sorry to hear that Peterson had quit. Roberson testified that Peterson told her that she had not quit, but, rather, had been fired.

B.

On July 12, 1995, Peterson filed a complaint, pursuant to 42 U.S.C. §§ 2000e-2000e-17, alleging that she had been discharged in retaliation for agreeing to testify on behalf of Parks. On April 22, 1996, DCI moved for summary judgment, arguing that Peterson could neither establish a *prima facie* case nor prove that DCI's reason for firing Peterson was a pretext for unlawful retaliation. With specific regard to the *prima facie* case, DCI argued that Peterson could not prove that DCI knew of Peterson's intent to testify for Parks, or that there was a connection between Peterson's protected activity and her discharge.

Both Bethune and Chumley denied having knowledge of Peterson's decision to testify on behalf of Parks. Peterson herself acknowledged that she had not shared her decision with any representative of DCI, because she "did not think that [it] was in [her] best interests" to do so. Parks likewise testified that she did not tell anyone about Peterson's decision.

However, both Parks and Peterson submitted affidavits in which they averred that they had discussed Peterson's decision to testify "on several occasions in the breakroom at DCI's Broad Street facility." They explained that the employees at Broad Street were prone to gossip, and that "[o]nce one employee learned information about another employee, it was repeated until all of the employees knew about it." Another nurse, Connie Bedwell, who was herself discharged for excessive absenteeism, submitted an affidavit in which she averred that she overheard two other employees discussing the fact "that Martha Peterson was going to support [Parks's] complaint with her testimony."

**3 On May 16, 1996, the district court concluded that Peterson had failed to establish a *prima facie* case of unlawful retaliation under Title VII, and it granted DCI's motion for summary judgment. Specifically, the district court concluded that Peterson had failed to submit evidence sufficient to establish either that DCI knew she had engaged in protected activity or that there was a causal connection between her protected activity and her discharge. The district court also concluded that Peterson could not succeed at the pretext stage because "[s]he has utterly failed to produce evidence that DCI was motivated to fire her for her involvement with Parks rather than because of her leaving the facility without permission."

Peterson filed a motion for reconsideration, relying heavily on Roberson's testimony, which the district court had not discussed in its opinion. The district court denied Peterson's motion, stating that she had failed to present any evidence, direct or indirect, that DCI knew that she had agreed to testify on Parks's behalf.

II.

Peterson argues that the district court erred when it granted DCI's motion for summary judgment. Specifically, Peterson argues that the totality of the circumstances, including: the "gossipy" work environment; Bedwell's testimony; Chumley's hostility to Peterson's friendship with Parks; Chumley's awareness that Peterson knew of racial hostility directed at Parks; Peterson's otherwise unblemished work record; the timing of Peterson's discharge; and Roberson's testimony, is sufficient to permit a reasonable jury to conclude that DCI knew of Peterson's decision to testify and that DCI discharged Peterson because of this knowledge. We disagree.

This court "review[s] a district court's grant of summary judgment *de novo,* examining the record and drawing all inferences in the light most favorable to the nonmoving party." *Woythal v. Tex-Tenn Corp.*, 112 F.3d 243, 245-46 (6th Cir.1997).

In order to establish a *prima facie* case of unlawful retaliation under Title VII, a plaintiff must prove, by a preponderance of the evidence that: 1) she engaged in a protected activity; 2) this protected activity was known to defendant; 3) she was thereafter subjected to an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir.1990). The "central inquiry in evaluating whether the plaintiff has met [her] initial burden is whether the circumstantial evidence presented is sufficient to create an inference" of unlawful retaliation. *Shah v. General Elec. Co.*, 816 F.2d 264, 268 (6th Cir.1987); *see EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir.1997).

Once the plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506-07 (1993). The plaintiff then has the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for" unlawful retaliation. *Id.* at 515 (quoting *Texas Dep't of Community Affairs v. Burdine* 450 U.S. 248, 253 (1981)). Evidence sufficient to permit a reasonable jury to conclude that the defendant's proffered reasons were not its true reasons, together with evidence sufficient to establish the elements of the *prima facie* case, is sufficient to create a jury question as to the "ultimate fact" of unlawful retaliation. *Id.* at 511; *EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 834 (6th Cir.1997).

**4 In the light most favorable to Peterson, Roberson's testimony that she was told that Peterson had quit several hours before Peterson committed the act which allegedly led to her discharge, and Peterson's testimony that she was led to believe that she had permission to attend her appointment, could permit a reasonable jury to conclude that DCI manipulated Peterson so that it would have an excuse to fire her. In other words, this testimony could support the conclusion that DCI's proffered reason for discharging Peterson was a pretext-- the critical question being: "a pretext for what?" If Peterson has produced sufficient evidence to prove the elements of the *prima facie* case, a reasonable jury could conclude that DCI's proffered reason was a pretext for unlawful retaliation.

After a careful and thorough consideration of all the evidence in the record, however, we find that we are in agreement with the district court's conclusion that Peterson has not produced evidence sufficient to establish the third or fourth elements of a *prima facie* case of unlawful retaliation. On the record before us, we simply cannot conclude that it would be reasonable, as distinguished from speculative, for a jury to conclude that DCI knew of Peterson's protected activity and that this knowledge was causally connected to Peterson's discharge.

Although the paradigm established by *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973), was designed to accommodate discrimination claims based on circumstantial evidence, *see Burns v. City of Columbus. Dep't of Pub. Safety. Div. of Police,* 91 F.3d 836, 843 (6th Cir.1996), a plaintiff relying on this paradigm to prove unlawful retaliation typically has direct evidence that the

defendant was aware of the plaintiffs protected activity. *See, e.g., Harrison v. Metropolitan Gov't of Nashville and Davidson County, Tenn.*, 80 F.3d 1107, 1118 (6th Cir.), *cert. denied*, 117 S.Ct. 169 (1996); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 377 n. 3 (6th Cir.1984). In such cases, the difficult question is whether the defendant's knowledge of the plaintiff's protected activity motivated the adverse employment action.

Here, however, there is no direct evidence that DCI knew that Peterson had agreed to testify on behalf of Parks. Although we do not intend to suggest that such direct evidence is always necessary, this case highlights how difficult it is to create an inference of unlawful retaliation where the basic question of knowledge is itself in doubt.

Both Peterson and Parks indicated that they endeavored to keep their arrangement secret, and both Bethune and Chumley denied that they were aware of Peterson's decision to testify. Although Bedwell's testimony might establish that Peterson's decision became grist for the office rumor mill, and Peterson's testimony might establish that Chumley was aware of and hostile to Peterson's friendship with Parks, there is nothing in these circumstances which suggests that DCI actually learned of and acted on the basis of Peterson's protected activity.

**5 Any inference of unlawful intent which might arise from the timing of Peterson's discharge, an inference which is of questionable strength to begin with, *see. e.g., Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272-73 (6th Cir.1986), is significantly blunted by the fact that there is no evidence that DCI knew of Peterson's protected activity, *cf. Polk v. Yellow Freight Sys.*, 876 F.2d 527, 531 (6th Cir.1989). The fact that Peterson was discharged roughly two months after deciding to testify is hardly sufficient to reasonably raise both an inference that DCI knew of Peterson's decision to testify and an inference that there was a causal connection between such knowledge and Peterson's discharge.

In the end, then, although we accept that Roberson's testimony may suggest that something was afoul, we cannot conclude that the evidence permits the reasonable inference that this something was DCI's knowledge of Peterson's decision to testify on Parks's behalf.

III.

Accordingly, we AFFIRM the judgment of the district court.

124 F.3d 199 (Table), 1997 WL 580771 (6th Cir.(Tenn.)), Unpublished Disposition

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U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 96-023
ALJ CASE NO. 93-ERA-35
DATE: September 27, 1996

In the Matter of:

ROBERT TALBERT,
COMPLAINANT,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

FINAL DECISION AND ORDER

This case arises under section 211 (employee protection provision) of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1994).[2] Before the Board for review is the Recommended Decision and Order (R. D. and O.) issued on October 20, 1995, by the Administrative Law Judge (ALJ). The ALJ recommended, on several alternative bases, that the complaint should be dismissed.[3] We agree and adopt that portion of the ALJ's analysis described below.

BACKGROUND

Respondent Washington Public Power Supply System (the Supply System), an electrical utility, operates a boiling water nuclear reactor (WNP-2) at the Hanford Site in southeastern Washington state. Complainant Robert Talbert was employed by Respondent as a senior nuclear engineer and supervisor from April 1981 until his resignation in November 1992.[4] On May 16, 1991, at a meeting convened to

liscuss emergency operating procedures (EOPs),[5] Talbert engaged in activity protected under the ERA when he questioned the safety of an EOP governing an Anticipated Transient Without SCRAM (ATWS).[6] A SCRAM is a sudden insertion of all control rods to shut down a nuclear reactor quickly. An ATWS exists when the reactor equires shutdown following an abnormal event or planned evolution and, because of hydraulic or electric failure, automatic or manual attempts to insert the control rods to shut down the reactor (SCRAM) are unsuccessful.[7] In these circumstances, other means must be employed immediately to decrease reactor power. The EOP in effect equired that the re-circulation pumps be tripped if a turbine remained available. Talbert considered this procedure to be hazardous and instead advocated flow control valve closure. Talbert pursued the issue in the months following the May 16 meeting, and Respondent's management repeatedly referred to the incident in criticizing Talbert.

In October 1991, Talbert requested that he be relieved of supervisory duties temporarily in order to facilitate studying for a professional engineers examination. Respondent agreed to the arrangement for a period of one ear. At the conclusion of the "sabbatical" year, however, Respondent declined to restore Talbert to his former position as supervisor of the Reactor Engineering Group and informed him that he would be removed from the group altogether. Talbert understood that he "was out of Reactor Engineering, could not return in the future, and could never work in Fuels. This basically eliminated [him] from practicing [his] profession, Reactor Engineer, in the Supply System." Complainant's Exhibit (CX) 4 at 2. J. W. Baker, Respondent's power plant manager, made clear that he "could not support [Talbert] in jobs that require[d] him to have principal interface with regulators and senior people in terms of being a principal spokesman for the Supply System." Hearing Transcript (T.) 232-233. *See* Respondent's Exhibit (RX) RLW-1 at 11-12. Talbert also was advised that in the future he would not be eligible for management positions. Confronted with what he considered to be career-ending action, Talbert resigned his employment on November 30, 1992.[8]

Transfer to a less desirable job may constitute adverse action. *Deford v. Secretary of Labor,* 700 F.2d 281, 283, 287 (6th Cir. 1983) (although rate of compensation not changed, transferred employee "found he was not welcome, that he was no longer a supervisor and that his job was by no means secure"); *Jenkins v. U.S. Environmental Protection Agency,* Case No. 92-CAA-6, Sec. Dec., May 18,1994, slip op. at 14-16 (employee transferred from challenging, technical position that utilized her qualifications fully and required community interaction to isolated, administrative position). Here, Talbert alleges that under the decisions to transfer him and to impose future job restrictions, he was constructively discharged, *i.e.,* that working conditions were rendered so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign. *Johnson v. Old Dominion Security,* Case No. 86-CAA-3/4/5, Sec. Dec., May 29, 1991, slip op. at 19-20 (objective "reasonable person" standard adopted for use in whistleblower cases). *Cf. Hopkins v. Price Waterhouse,* 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd on other grounds,* 109 S.Ct. 1775 (1989) (under Title

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VII of the Civil Rights Act, constructive discharge occurred where the employee was subjected to what any reasonable senior manager in her position would have viewed as "career-ending action").

DISCUSSION

The ALJ found that Complainant failed to prevail under both the "pretext" and "dual motive" analyses commonly applied in discrimination cases. *Compare St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742, 2747 (1993); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 255 (1981); *and McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-803 (1973) (pretext cases) *with Price Waterhouse v. Hopkins,* 490 U.S. 228, 258 1989) *and Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle,* 429 U.S. 274, 287 (1977) (dual motive cases). We disagree with the ALJ's use of the pretext analysis. Rather, we employ the dual motive analysis because Complainant has produced " evidence that directly reflects the use of an illegitimate criterion in the challenged decision,' [*i.e.,*] evidence showing a specific link between an improper motive and the challenged employment decision." *Carroll v. United States Department of Labor and Bechtel Power Corp.,* No. 95-1729, 1996 U.S. App. LEXIS 3813, at *9 (8th Cir. Mar. 5, 1996), *quoting Stacks v. Southwestern Bell Yellow Pages, Inc.* 996 F.2d 200, 202 (8th Cir. 1993). Evidence of actions or remarks of an employer tending to reflect a discriminatory attitude may constitute direct evidence. *Beshears v. Asbill,* 930 F.2d 1348, 1354 (8th Cir. 1991). Such evidence does not include stray or random remarks in the workplace, statements by nondecisionmakers or statements by

decisionmakers unrelated to the decisional process. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). We agree with and adopt the ALJ's findings that the veto of Talbert's transfer to the megawatt improvement program, the alleged refusal to transfer Talbert to Engineering, the initial refusal to run the computer study on Talbert's hypotheticals, the apparent miscommunications, the editing of the May 16, 1991 videotape and the two instances of drug testing were not discriminatory. R. D. and O. at 15-22.

In dual motive cases under the ERA, a complainant must demonstrate by a preponderance of the evidence that the respondent took adverse action, at least in part, because he engaged in protected activity. If the complainant successfully proves illegal motive, the burden shifts to the respondent to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. 42 U.S.C. § 5851(b)(3)(D); *Yule v. Burns International Security Service,* Case No. 93-ERA-12, Sec. Dec., May 24, 1995, slip op. at 7-8 and n.7 (courts characterize clear and convincing evidence as more than a preponderance of the evidence but less than evidence meeting the "beyond a reasonable doubt" standard).

I. *Illegal motive*

Complainant Talbert's chain-of-command included the following managers. Rod Webring, the technical services manager, was Talbert's immediate supervisor. Webring reported to Jack Baker, the power plant manager, who in turn reported to Lee Oxsen, the deputy managing

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[Page 4

director and chief operating officer. Don Mazur, the managing director and chief executive officer, was superior to Oxsen.

The ALJ found that Webring, alone, made the decision to transfer Talbert out of the Reactor Engineering Group. R. D. and O. at 10. Baker's testimony suggests broader management involvement in the transfer decision as well as the decision to impose job restrictions. Baker testified: "All along I had decided that there was not a job that I thought was a good match for [Respondent] and [Talbert] within the groups that I controlled, and so that's why we made the management decision that the most likely location for [Talbert] to contribute . . . would be in one of the [other] engineering functions . . . ." T. 249. In addition, Oxsen and Baker were superior in Webring's and Talbert's chain-of-command. It follows that their opinions would influence Webring to some degree. As noted above, the constructive discharge emanated from the transfer *and* the imposition of job restrictions. Baker admittedly communicated the job restrictions, T. 232-233, and Talbert submitted his resignation on "the day he learned that Mazur left the company and that Oxsen, whom Talbert perceived

to be his nemesis, took over." R. D. and O. at 5. For these reasons, we consider the motivations of Oxsen, Baker and Webring.

On May 16, 1991, Oxsen and Baker convened a meeting of approximately 80 employee operators, trainers and shift technical advisors. R. D. and O. at 3. At that time, the WNP-2 plant had shut down for its annual two-month refueling and maintenance outage. Oxsen was concerned with re-licensing the operators so that they could re-start the reactor in mid-June. Failure to meet this schedule would result in a financial penalty.[2] T. 203. Oxsen testified that the purpose of the May 16 meeting was to make clear to the operators that the EOPs were mandatory, rather than advisory as some of the operators apparently believed. Oxsen testified:

> I called that meeting out of a sense of frustration. The Supply System was having an inordinate amount of difficulty getting its reactor operators qualified, and it had been identified by the Nuclear Regulatory Commission that a major contributor to that was a reluctance on the part of [the operators] to follow their procedures. Some of our people had told the NRC that the procedures were only guidelines and that they were free to use their own technical judgment. This was clearly contrary to our corporate policy, so I called that meeting to restate to the operators and training personnel . . . what the corporate policy was, and why, and to emphasize how important it was that we rigidly follow our procedures, or change them if appropriate.

T. 202-203. After completing his presentation, Oxsen turned the meeting over to Baker, who "opened it up for

questions from the audience . . . ." T. 204. In response to one of Talbert's questions, Baker stated:

[Page 5]

> Strict adherence means that you will follow your EOPs, you know, 99 and 1/2 percent of the time. Verbatim compliance says you'll follow them 100 percent. Neither us nor the Commission want to close the door that says . . . you follow EOPs at all costs, because we know that you're talented people, you have lots of experience . . . . We just need to make sure that the threshold in terms of the strict adherence of the procedure, is not down at the 70 percent level, that . . . it has to be an exception . . . in the name of protecting the health and safety of the public. We want you to follow the EOPs and not deviate . . . to protect against commercial risk. . . . I . . . right now, quite frankly, I can't think of any time that we would deviate from our EOPs.

CX 1 (videotape transcription). Talbert responded, "I can think of one." Baker asked: "When's that?" The exhibit 1 transcription continues as follows:

> Talbert: "To trip into region A' with the turbine available ATWS is not only wrong, it is very dangerous . . . ."
>
> Baker: "Then we need to change that in our EOPs, and exercise that in the form of EOP revision and not exercise that in the form of simulator performance."
>
> Talbert: "I'm in complete agreement and clearly we will follow the EOPs verbatim. We have a hook in the EOPs currently that is dangerous germane to reactor safety."
>
> Baker: "But that's an issue that's being pursued by the Owners Group, and the product of that will come out of that."
>
> Talbert: "That's true."

Baker's testimony is consistent. T. 225-226. Baker also testified that Talbert "did not take the stance that he would deviate from the [ATWS] EOP." T. 235.

Baker expressed irritation at Talbert's participation, particularly as to its timing. T. 235-237. As the ALJ noted, "Oxsen admittedly resented Talbert's comments." R. D. and O. at 4. Oxsen testified:

> From my perspective, Mr. Talbert stood up and offered another example of using his own technical judgment to say that it wasn't always necessary to follow our procedures. From the senior management perspective, after I had spent a considerable amount of time -- and the plant manager, Jack Baker, had reinforced that message -- emphasizing that we had to follow our procedures . . . to have someone stand up then in the aftermath of that and say "not in all cases," I felt I was really, really disappointed that that happened.
>
> * * * *

[Page 6]

> The frustration was that I had personally been dealing with an extremely angry regulatory agency that was threatening to wreak havoc on our company and keep it down indefinitely while we beat the operators into submission over this issue of procedure compliance. I had just received feedback from a member of that regulatory body that said, well, hell, one of your people told me today that those procedures are guidelines -- we don't have to follow them, we can use our own technical judgment. On that basis I called the meeting . . . and tried to deliver a message that, by God, this is the way it's going to be . . . . And I was emotional about it because there was so much at stake. So, I think it would be understandable that I would

> be frustrated after delivering this message, and then someone steps up and says that it doesn't apply in all cases.

T. 204, 216-217. *See* T. 212. Talbert was not the employee mentioned by Oxsen who caused him to call the meeting. T. 218.

In examining Respondent's reasons for transferring Talbert out of the Reactor Engineering Group, the ALJ first identified the "controlling question" as being whether the decision was motivated, "in whole or in part, by his protected conduct." R. D. and O. at 8. The ALJ "accept[ed] Talbert's testimony that the May 16 episode was repeatedly mentioned by his superiors when explaining his demotion." *Id.* In mid-October 1992, Talbert began documenting conversations with various managers directly after they occurred. The resulting journal reflects that during five separate conversations over a two-month period, on November 3, 4 and 19 and on December 12, Baker and Webring cited Talbert's participation in the May 16 meeting as a reason for the transfer and imposition of job restrictions. *See* CX 3. For example, on the morning of November 3, Baker reiterated that Talbert would not be eligible for any "manager slot" or any jobs that "interfaced" with the NRC, the Institute for Nuclear Power Operators (INPO), the Executive Board, Owners' Groups or Upper Level Management for "fear that during technical interfaces [he] would let something slip that may harm the Supply System's image.'" Talbert's entry continues: "I asked for an example of inappropriate interfacing. [Baker] cited the meeting on the EOPs and my concern on the unstable ATWS." *Id.* at 4.

The ALJ also pointed to Webring's testimony "that Talbert's conduct at the May 16 meeting was an example of his poor selection of timing when he brings up issues, how he addresses issues, and how he relates to people,' but was not a major consideration' which led to his termination." R. D. and O. at 8. In particular, when asked whether Talbert's participation in the May 16 meeting was "considered at all" in the employment actions, Webring responded, "I don't believe that it was of any major consideration." T. 261. In a similar vein, Baker testified that Talbert's participation may "have been a factor, it was certainly one of the many data points in [Talbert's] history, but I think the overriding factor clearly rests with the relationship between fuels and the reactor engineering group [a legitimate, nondiscriminatory reason]." T. 229. Baker testified that Webring consulted him about the decision to transfer Talbert out of the Reactor Engineering Group and that he (Baker) concurred. RXJWB-1 at 6.

The ALJ attempted to distinguish Respondent's various concerns:

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> The employer contends that on May 16 Talbert raised a proper question, but before the wrong audience, at the wrong time, and in a wrong way. It argues that if Talbert was really concerned about the ATWS problem, he should have asked for an EOPs amendment by filing a so-called PER (Problem Evaluation Report) which every employee had a right to initiate. As Talbert's superiors saw it, Talbert's raising of the ATWS issue on May 16th showed poor judgment because it was obviously at cross purposes with the management's attempt to persuade the crews to follow EOPs.

Id. In this regard, Talbert's journal reflects that "Webring told Talbert that he should have raised the ATWS issue not at the meeting called to demand compliance, but do it at an opportune time, quietly and privately." *Id.* at 4. Webring made the statement in discussing the reasons for Talbert's transfer. CX 3 at 5. This entry, for the afternoon of November 4, also documents Webring as stating that the May 16 incident "played heavily in [Talbert's] situation" and that Talbert "must have been way out of line." *Id.* When Talbert objected that he "was being punished for raising a safety concern in [an] open forum," Webring responded that Talbert "shouldn't have raised the safety concern," that he "should have sat mute, said nothing, let it go." *Id.*

The ALJ then discussed myriad other reasons cited by Respondent for transferring Talbert out of the Reactor Engineering Group. R. D. and O. at 8-15. The ALJ also identified management's "concern that Talbert, who had nc political bone in his body,' was so frank and outspoken . . . and so focused on technical issues . . . that he might press his view of EOPs when dealing with the NRC and thus bring on more troubles for the company." *Id.* at 14-15. The ALJ then found that "the decision to remove Talbert from the Reactor Group was not related to his May 16 comments, or his later pursuit of the ATWS problem . . . ." *Id.* at 15.

Many of the ALJ's previous findings contradict this final finding. They establish that the transfer and job restrictions which caused Talbert to understand that his "nuclear engineering career was over," CX 3, were motivated, at least in some part, by the timing and venue of Talbert's complaint that the ATWS EOP was unsafe. According to Webring, the May 16 meeting exemplified Talbert's "poor timing" in raising issues -- in this instance a safety issue. Baker agreed that Talbert had exhibited a "poor sense of timing." T. 248. Oxsen was angered at the substance of a complaint about the safety of a procedure in a setting where the message was compliance with the procedure. The testimony of Webring and Baker supports a finding that while Talbert's participation in the May 16 meeting may not have been a "major consideration" in Respondent's decision to transfer him and to impose job restrictions, it was a consideration nonetheless.

An employer may not, with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels or circumventing a superior, when the employee raises a health or safety issue. *Pogue v. United States Dep't of Labor,* 940 F.2d 1287, 1290 (9th Cir. 1991) (respondent retaliated because employee bypassed her superior in order to make protected complaint; "chain-of-command" rationale was found to be

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pretextual); *Ellis Fischel State Cancer Hospital v. Marshall,* 629 F.2d 563, 565-566 (8th Cir. 1980), *cert. denied,* 450 U.S. 1040 (1981) (complainant condemned for "failing to follow normal procedures in bringing problems to the attention of those persons ultimately responsible for the operation of the [defendant and] for making his report to the [NRC] without first formally reporting [the violation] internally"); *Leveille v. New York Air National Guard,* Case Nos. 94-TSC-3/4, Sec. Dec., Dec. 11, 1995, slip op. at 15-17; *Saporito v. Florida Power and Light Company,* Case Nos. 89-ERA-7/17, Sec. Ord., Feb. 16, 1995, slip op. at 5-7; *Pillow v. Bechtel Construction Company,* Case No. 87-ERA-35, Sec. Rem. Dec., Jul. 19, 1993, slip op. at 22-23, *appeal docketed,* No. 94-5061 (11th Cir. Oct. 13, 1994); *McMahan v. California Water Quality Control Board, San Diego Region,* Case No. 90-WPC-1, Sec. Dec., Jul. 16, 1993, slip op. at 4-5; *Nichols v. Bechtel Construction Co.,* Case No. 89-ERA-44, Sec. Rem. Dec., Oct. 26, 1992, slip op. at 17, *aff'd,* 50 F.3d 926 (11th Cir. 1995). Such restrictions on communication would seriously undermine the purpose of whistleblower laws to protect public health and safety. Here, Respondent contends that Talbert should have raised the safety concern through proper channels by filing a Problem Evaluation Report or by bringing it to management's attention "at an opportune time, quietly and privately," rather than by speaking out publicly at a meeting of employees. This rationale does not support discipline for protected activity under the ERA.

We also find that the manner in which Talbert raised the safety concern was not so "disruptive" as to be "indefensible under the circumstances," and, accordingly, that Talbert did not lose protection under the ERA. *See Martin v. The Department of the Army,* Case No. 93-SDW-1, Sec. Rem. Ord., Jul. 13, 1995, slip op. at 5 (standard for addressing behavior associated with exercise of whistleblower rights). Talbert raised the concern during a "question and answer" period in which Respondent elicited audience participation. The concern was germane to the issue under discussion. Oxsen had advocated verbatim (100%) compliance with all EOPs, and Baker had stated that he could not "think of any time that [they] would deviate from [their] EOPs." CX 1. Talbert simply responded that he could "think of one" -- a specific instance where compliance could compromise safety. Talbert was not abrasive, he did not incite any disobedience on the part of others, nor did he "take the stance that he would deviate from the EOP." T. 235 (Baker). When Baker responded that the issue was being addressed in another forum, Talbert agreed without argument and did not pursue the concern further at the meeting. We find nothing objectively disruptive about Talbert's participation. That Oxsen perceived it as an attempt to subvert his message, T. 204, 216-217, serves rather as a measure of his frustration at being unable to satisfy the NRC in the matter of operator recertification.

Complainant thus proved that Respondent's adverse action was motivated at least in part by an impermissible criterion, namely his participation in the May 16, 1991, meeting.

II. *Legitimate motivation*

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The ALJ found that Respondent demonstrated by clear and convincing evidence that it would have taken the same action *even if* Complainant had not engaged in protected activity. We agree with regard to the decision to transfer Complainant out of the Reactor Engineering Group. Accordingly, Respondent avoids liability for this adverse action because it would have taken the same action absent illegal motivation.

On August 15, 1992, WNP-2 experienced reactor core flow oscillations, the power began to fluctuate and the operators immediately initiated a manual SCRAM. The plant was shut down for several weeks pending NRC investigation. Talbert's decisions about rod pattern distribution and rod withdrawal sequences contributed to the oscillation event. T. 120-121. The event was particularly alarming because WNP-2 had operated without oscillations during the preceding seven cycles.[10]

Following the oscillation event, Respondent examined the manner in which the Fuels Engineering Group and the Reactor Engineering Group discharged their responsibilities for the reactor core. An inherent tension exists between the groups because of their competing purposes. Fuels Engineering designs the reactor core, whereas Reactor Engineering operates the reactor within the operating margins of the core design. Economical core designs reduce operating margins. In evaluating the oscillation event, Respondent determined a need for closer cooperation between the groups. As supervisor of the Reactor Engineering Group, Talbert had alienated key Fuels Engineering managers by repeatedly discovering mistakes for which they were responsible. T. 108-111 (Talbert). According to Webring, "[t]here was simply too much history between [Talbert] and Fuels Engineering" which the oscillation event served to exacerbate, the question being whether the event resulted from operator error or from limited operating margins due to core design. RX RLW-1 at 8-9. These considerations motivated Webring to remove Talbert from the Reactor Engineering Group. While recognizing that Talbert was not solely responsible for the "strained relationship" between the groups, Webring was not authorized to make changes in Fuels Engineering "and determined that it was appropriate to take action within [his] area of responsibility to effect a necessary change." *Id.* We agree with the ALJ that the oscillation event was extremely serious and that in its aftermath, Respondent's "need to satisfy the NRC was so compelling that it would have removed Talbert from the Reactor Group even if he had never raised the ATWS issue on May 16 or later." R. D. and O. at 25. *See id.* at 10-13.

III. *Constructive discharge*

The remaining issue is whether Respondent rendered continued employment so unpleasant or unattractive that a reasonable person would have been compelled to resign. Unless constructively discharged, a complainant is not eligible for post-resignation damages and back pay or for reinstatement.

The ALJ discusses many of the facts bearing on this issue in a somewhat different context. *See* R. D. and O. at 15-18 (alleged adverse action of refusing to transfer Talbert to Engineering Department). Following Webring's transfer decision, Talbert was approached by Chris Powers, the director of engineering, who offered him three "key" positions in

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the Engineering Department. Powers considered the work to be "meaningful and important," and Talbert expressed interest. T. 276-277. Powers testified:

> At the same time that I was preparing to talk with Mr. Talbert about opportunities in my organization, Mr. Baker and Mr. Webring were scheduled to meet with him regarding his accountability for the power oscillations event. Their meeting occurred before I could speak with Mr. Talbert and when I met with him thereafter . . . he was very upset and fairly difficult to talk with. . . . The first job that I outlined was developing a staff to support the new WNP-2 simulator. I then went on to describe a second position . . . which was needed to adopt our Probablistic Risk Assessment (PRA) capabilities to an in-line operations decision-support function and to generally assist in the completion of the PRA program. Finally, I discussed a third . . . position . . . as a fuel cycle analyst. . . . Mr. Talbert was excited about the PRA and simulator positions, but was less enthused about the fuel management position.

RX CMP-1 at 3-4. Talbert's journal reflects that this conversation occurred on November 2. Talbert also

documented discussions with Baker and Webring about job limitations which occurred on November 3. Ensuing journal entries show a deteriorating relationship with these two managers. CX 3 at 6-9.

Baker and Webring had no jurisdiction over the Engineering Department. According to Webring, neither he nor Baker "had veto power over the jobs that Chris [Powers] offered Bob [Talbert]. Chris could use Bob in any capacity, or under any terms Chris deemed appropriate." RX RLW-1 at 12 (Webring). At Talbert's request, Powers discussed the possibility of job limitations with Oxsen and Baker and received "a reaffirmation that [Talbert's] interface skills needed some development work, but that there were no limitations" within the Engineering Department.[11] T. 279. When he attempted "to close with [Talbert] on that point," however, he learned that Talbert had resigned. *Id.* Later attempts to contact Talbert were unavailing. He testified: "I had heard that [Talbert] wasn't in town, that he was in an emotional situation . . . . He had left me a note, a rather long note as I recall, indicating the circumstances, and basically said my mind is made up,' and so I did not proceed." T. 286. *See* R. D. and O. at 17-18.

Talbert's resignation was premature. Respondent wished to retain him and was in the process of finding him suitable employment within the Supply System. Indeed, Powers "recognized that [he] had a number of needs in [his] organization that would match up very closely with [Talbert's] capabilities" and he "was dead set on attracting Mr. Talbert." T. 275, 285. We adopt the ALJ's finding that "because the company believed that Talbert was a gifted engineer who was valuable to it, it decided to relocate him to another job in the Engineering Department which appeared to be acceptable to Talbert." R. D. and O. at 19. We find that in these circumstances the resignation was not "coerced." Talbert thus was not constructively discharged but, rather, quit his employment voluntarily.

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In so finding, we recognize that Talbert's journal portrays Baker as being adamant that the job limitations would be imposed and Webring as being "tight lipped" about who in the chain-of-command had mandated the limitations. Eventually, in the November 3 discussion, Baker revealed that "Upper Management" would not allow Talbert to take two of the positions offered by Powers. When Talbert raised the possibility that Baker's job limitations might apply in the Engineering Department, however, Powers responded that he was unaware of any such limitations. Powers testified: "I told Bob that I was running an organization irrespective of whether limitations were or were not created, he was really going to answerable and accountable to me, and I would lay out the ground rules on which I would judge success or failure." T. 278-279. Nevertheless, Powers "committed to' Talbert that he would clarify with his peers and superiors "whether there was any concern on anybody's part involved in Supply System management . . . as to whether there were any limitations." T. 279. Powers further represented that he would get back to Talbert with a response. Given that Powers and Talbert were engaged in employment negotiations, we believe that Talbert's unwillingness to await Powers's response further supports the finding that his resignation was voluntary.

CONCLUSION

While the decision to transfer Complainant was motivated in part by protected activity, Respondent has demonstrated by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. In addition, while certain of Respondent's managers imposed job limitations in part because of the protected activity, the limitations were not universal and did not constitute "career-ending action." Complainant was not constructively discharged when he resigned his employment. Accordingly, the complaint IS DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[ENDNOTES]

[1] On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia,* the Energy Reorganization Act and the implementing regulations, to the Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Administrative Review Board now issues final agency decisions. *See* 61 Fed. Reg. 19982 for the final procedural revisions to the regulations implementing this reorganization.

[2] Section 211 of the ERA formerly was designated section 210, but was redesignated pursuant to section 2902(b) of the Comprehensive National Energy Policy Act (CNEPA) of 1992, Pub. L. No. 102-486, 106 Stat. 2776, which amended the ERA effective October 24, 1992.

[3] The ALJ found that Complainant failed to make a *prima facie* showing of unlawful discrimination and, even if he did, "he did not carry his ultimate burden of persuasion that his termination was due to his protected conduct." R. D. and O. at 15. Alternatively, the ALJ found that even if Complainant was terminated in part because of protected conduct, Respondent "has shown by clear and convincing evidence that it would have acted the same way in the absence of that consideration." *Id.* at 25.

[4] Talbert also served as a Shift Technical Advisor (STA) responsible for providing guidance to licensed operators in the reactor control room.

[5] The Boiling Water Reactor Owners Group (BWROG), an international consortium of nuclear utilities, promulgates EOPs for the industry. The Nuclear Regulatory Commission (NRC) requires that EOPs be followed in emergencies.

[6] Respondent conceded that the May 16 activity was protected. R. D. and O. at 7; Respondent's Post Hearing Brief at 3, 5 n.5. *See* 42 U.S.C. § 5851(a)(1)(A)-(F) (protected "participation" activities include notifying employer of alleged violation, giving testimony, commencing a proceeding, assisting or participating in a proceeding); *Bechtel Const. Co. v. Secretary of Labor,* 50 F.3d 926, 931-932 (11th Cir. 1995) (employee raising concerns about safety procedures protected under ERA).

[7] An ATWS can cause damage to the reactor core and, if unmitigated, can lead to containment failure and radioactive release. In the event of core instability, a degree of damage can occur within one or two minutes.

[8] Prior to conclusion of the sabbatical year, WNP-2 experienced a reactor core oscillation. Talbert's participation in the event and interaction with managers in the counterpart Fuels Engineering Group provided legitimate, nondiscriminatory reasons for the transfer decision. The oscillation is discussed *infra.*

[9] In February 1991, while the plant was still operating, one of Respondent's crews failed NRC licensed operator requalification examinations because operators did not trip both recirculation pumps during an ATWS simulation as mandated by the applicable EOP. After this failure, the NRC questioned the qualifications of all crews and decided to evaluate additional operators in March. Because another crew failed these examinations, Respondent was required to obtain special NRC approval to continue in operation until the scheduled outage which commenced in April. A third failure occurred in June. As a result, Respondent lacked sufficient operators to re-start the reactor following completion of the outage. WNP-2 remained shut down for the ensuing three months.

[10] Cycles last about a year. Between cycles, fuel bundles, *i.e.,* groupings of rods filled with uranium, are removed and replaced. During this reloading, new fuel bundles are scattered throughout the core and remaining bundles are shuffled to produce a design that is economical and provides maximum operating flexibility. In 1990, Respondent introduced a new bundle design. The mixed fuel types elevated the likelihood of core oscillation. If a plant remains shut down for an extended period, the loaded fuel is not used correctly. In this case, the abbreviated length of the preceding cycle (due to operator training difficulties) also contributed to the instability.

[11] Powers testified:

> Mr. Talbert related to me that he felt he had been told he would not be allowed to interface with the NRC in the future and that he would be severely constrained in his activities, especially as an official representative of Supply System policy. I had never considered limiting Mr. Talbert's interfaces in this fashion. . . . I felt that Mr. Talbert's image problem was simply involved with how he delivered his message and I was going tc work with him on that delivery.

RX CMP-1 at 4-5. To that end, Powers intended to establish a contract with Talbert regarding acceptable behavior. "This contract, however, would have only addressed proper behavior and not have placed any limit on who [Talbert] interfaced with; there would have been no need to restrict him from speaking with the NRC." *Id.* at 4. *See* CX 3 at 3 (discussion about contract documented in Talbert's journal).

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Zinn v. University of Missouri, 93-ERA-34 (Sec'y Jan. 18, 1996)

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DATE: January 18, 1996
CASE NOS. 93-ERA-34
93-ERA-36

IN THE MATTER OF

KURT R. ZINN,

COMPLAINANT,

v.

UNIVERSITY OF MISSOURI,

RESPONDENT,

and

J. STEVEN MORRIS,

COMPLAINANT,

v.

UNIVERSITY OF MISSOURI,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under Section 211, the employee protection provision, of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. □ 5851 (1988 & Supp. V 1993).[1] Before me for review is the Recommended Decision and Order (R. D. and O.) issued on May 23, 1994, by the Administrative Law Judge (ALJ). The ALJ concluded that Respondent, University of Missouri (the University), had violated the ERA by taking adverse action

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against Complainants Kurt R. Zinn (Zinn) and J. Steven Morris[2] (Morris) in retaliation for engaging in activity protected under the ERA. The ALJ also recommended that the University be ordered to take appropriate action to remedy its demotion of Morris and its refusal to initiate the process for formal consideration of Zinn for promotion. By Preliminary Order issued June 20, 1994,

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and pursuant to Section 211(b)(2)(A) of the ERA, I ordered the University to comply with the ALJ's recommended order of relief for the Complainants, and to do so immediately, rather than ten days following issuance of the Secretary's final order, as had been provided by the R. D. and O.[3]

Following a thorough review of the record and the arguments of the parties, I basically agree with the findings of fact and the ultimate conclusions of the ALJ. However, the following discussion does clarify and supplement the ALJ's analysis of the issue of discriminatory intent as it pertains to the Zinn complaint, and the analysis of the issues of knowledge of protected activity and discriminatory intent as it pertains to the Morris complaint.

DISCUSSION

A. Factual background

Without exception, the findings of fact rendered by the ALJ reflect a thorough review of the record and careful evaluation of the evidence. R. D. and O at 2-31; *see N.L.R.B. v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983); *Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981); *Dobrowlosky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979). I therefore adopt those findings of fact.

As background for the analysis to follow, I note the following points. At the time the events giving rise to these complaints occurred, both Morris and Zinn were scientists at the Missouri University Research Reactor (MURR). R. D. and O. at 2-3. In addition to being the largest research reactor in the United States, MURR engages in the commercial irradiation of targets, an enterprise that generates approximately $6 million annually. R. D. and O. at 2. An error made in the course of shipping radioactive materials from the reactor in July 1992 gave rise to an investigation by the Nuclear Regulatory Commission (NRC) and an enforcement conference was held in October 1992. R. D. and O. at 6. In August 1992, a Shipping Task Force was established to undertake a "global review" of shipping procedures at the reactor in order to pursue, in connection with MURR committees and subcommittees already in place, remedial steps to prevent such shipping errors in the future. *Id.* The July 1992 shipping error had involved reversing the addresses for two shipments, so that one of the addressees received a shipment containing materials having greater radioactivity than was expected. *Id.*

Over the next few months, a controversy developed between Zinn and MURR managers concerning whether the "global review" should address not only the issue of accuracy in addressing shipments but also another issue related to the amount of radioactivity in each shipment leaving the reactor, *viz.*, the accurate description of the targets submitted for irradiation, including any trace elements. R. D. and O. at 6-7,

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32-38. Although he met with resistance on this issue, Zinn was persistent and succeeded in ensuring that the issue of accurately determining target composition was addressed by MURR management in its responses to the NRC in January and March 1993. R. D. and O. at 7-12; 32-38. During this period, Morris not only privately encouraged Zinn in his efforts regarding the target composition issue but also actively pursued, in committee meetings and otherwise, the need for MURR management to directly confront the issue. He argued that the issue should be addressed fully in the status report filed with the NRC in January 1993 and in the presentations to the NRC investigators during their on-site investigation of March 9 through 11, 1993. R. D. and O. at 11, 13; *see* R. D. and O. at 40-43; n.11, *infra*.

At the close of the on-site investigation, the NRC investigators commended MURR staff for the steps that had been taken toward remedial action concerning the accurate determination of the composition of irradiation targets shipped from the reactor. R. D. and O. at 12. Furthermore, the investigators indicated that such efforts had prevented the reactor from committing very serious, Level 1, violations of the NRC regulations. *Id.*

In February 1993, the MURR Director advised Morris that he would not go forward with the initiation of formal committee consideration of Morris' recommendation of Zinn for promotion from the position of Research Scientist to that of Senior Research Scientist. R. D. and O. at 20-21. On the afternoon of the day that the NRC on-site investigation ended, March 11, 1993, the MURR Director advised Morris that he was being demoted from his position of Nuclear Analysis Program Coordinator and Group Leader of the Nutrition, Epidemiology and Immunology Group. R. D. and O. at 28; MX 31.[4] Zinn had been advised by Morris on February 7 or 8, 1993, of the Director's refusal to initiate Zinn's formal candidacy for promotion. R. D. and O. at 35. Upon being advised of the decision to demote Morris, an action which Zinn felt also adversely affected him, as a scientist within the Nutrition, Epidemiology and Immunology Group headed by Morris, Zinn initiated this complaint under the ERA. ZX 25; T. 215; *see* R. D. and O. at 12, 31. On April 27, 1993, Morris filed his ERA complaint. MX 93; *see* R. D. and O. at 29.

B. The Zinn complaint

The University contends that the ALJ improperly analyzed the issue of discriminatory intent by placing the burden of persuasion on the University. Respondent's Brief at 2-7. Under the burdens of proof and production in "whistleblower" proceedings, a complainant who seeks to rely on circumstantial

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evidence of intentional discriminatory conduct must first make a *prima facie* case of retaliatory action by the respondent, by establishing that he engaged in protected activity, that he was subjected to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 6-9 (citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). Additionally, a complainant must present evidence

sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id.* If a complainant succeeds in establishing the foregoing, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. *Dartey*, slip op. at 8.

The complainant bears the ultimate burden of persuading that the respondent's proffered reasons are not the true basis for the adverse action, but are a pretext for discrimination. *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 20 (citing *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993)); *see Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994), *aff'g Smith v. Yellow Freight System, Inc.*, Case No. 91-STA-45, Sec. Dec., Mar. 10, 1993. The complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for protected activity. *Thomas*, slip op. at 20; *see Yellow Freight System, Inc.*, 27 F.3d at 1139. Pursuant to Section 211(b)(3) of the ERA, however, if it has been established that the protected activity contributed to the adverse action, the employer must demonstrate by "clear and convincing evidence" that it would have taken the adverse action in the absence of the protected activity. *Dysert v. Florida Power Corp.*, Case No. 93-ERA-21, Sec. Dec., Aug. 7, 1995 (construing Section 211(b) of the ERA, as amended by Section 2902(d) of the Comprehensive National Energy Policy Act of 1992, codified at 42 U.S.C. § 5851(b)(3)), *appeal docketed Dysert v. Sec'y of Labor*, No. 95-3298 (11th Cir. Sept. 28, 1995); *see Johnson v. Bechtel Construction Co.*, Case No. 95-ERA-11, Sec. Dec., Sept. 28, 1995, slip op. at 2.

The ALJ properly concluded that Zinn had established the requisite elements of protected activity, knowledge and adverse action. R. D. and O. at 31-32, 36-37, 40; *see Simon*, 49 F.3d at 389; *Dartey*, slip op. at 7-8. The ALJ also properly concluded that the temporal proximity between Zinn's protected activity, beginning in August 1992 and continuing through the time of the University's refusal in February 1993 to

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initiate formal consideration of Zinn for promotion to the position of Senior Research Scientist, which is the adverse action at issue here, was adequate to support an inference of a causal link between the protected activity and the University's adverse action. R. D. and O. at 40; *see* R. D. and O. at 32-35, 39; *Simon*, 49 F.3d at 389 (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)), 390; *Kahn v. Commonwealth Edison Co.*, Case No. 92-ERA-58, Sec. Dec., Oct. 3, 1994, slip op. at 5-6, *aff'd*, 64 F.3d 271 (7th Cir. 1995).□ At hearing, the University offered the testimony of James J. Rhyne (Rhyne), the Director of MURR, in support of its contention that Rhyne's failure to establish a committee to consider Zinn's qualifications for promotion was based on Rhyne's decision that Zinn had failed to meet objective promotion criteria rather than Rhyne's intention to retaliate against Zinn for his protected activity. T. 1034-38, 1056-71; *see* R. D. and O. at 20-25. As the University thus met its burden of articulating a legitimate, nondiscriminatory basis for its action, the analysis shifts to the issue of whether Zinn has demonstrated that such

basis is merely pretextual and that the University's action was actually based on a discriminatory motive. *See Yellow Freight System, Inc.*, 27 F.3d at 1139-40; *Pillow v. Bechtel Construction, Inc.*, Case No. 87-ERA-35, Sec. Dec., July 19, 1993, slip op. at 13 (citing *St. Mary's Honor Center*, 113 S.Ct. at 2749, 125 L.Ed. 2d at 419); *Dartey*, slip op. at 6-9.

Zinn may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. *Pillow*, slip op. at 14; *Dartey*, slip op. at 8. In order to determine that Zinn has established discriminatory intent in regard to this adverse action by the University, however, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center*, 113 S.Ct. at 2749, 125 L.Ed. 2d at 424; *see Yellow Freight System, Inc.*, 27 F.3d at 1139; *Pillow*, slip op. at 14-15. Although found to be pretextual, an employer's stated reasons may nonetheless be found to be a pretext for action other than prohibited discrimination. *See Galbraith v. Northern Telecom*, 944 F.2d 275, 282-83

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(6th Cir. 1991). The ultimate inquiry is thus whether Zinn has demonstrated that Rhyne decided not to initiate the formal consideration of Zinn as a candidate for promotion because of Zinn's protected activity regarding safety issues related to shipments to and from the reactor.

Contrary to the University's argument, the ALJ, in analyzing the issue of discriminatory intent toward Zinn, did not improperly shift the burden of persuasion to the University. The ALJ concluded that the promotion criteria cited by Rhyne at hearing were not formally in effect in January and February 1993, "when critical decisions were being made" that culminated in the promotion of another research scientist, Hector Neff (Neff), but not Zinn. R. D. and O. at 39. The ALJ also concluded that "the criteria were more rigorously applied to Dr. Zinn than to Dr. Neff." R. D. and O. at 40. The ALJ thus effectively found the University's contention, that Rhyne based his decision not to initiate the formal consideration of Zinn as a candidate for promotion on objective criteria, to be "not worthy of credence," *see Pillow*, slip op. at 14; *Dartey*, slip op. at 8. This conclusion is fully supported by the record evidence and is therefore accepted. □ Furthermore, consistent with the holding of the United States Supreme Court in *St. Mary's Honor Center*, having found the reason articulated by the University to be pretextual, the ALJ proceeded to complete the analysis of the complainant's case by evaluating the evidence of retaliatory animus toward Zinn.[5] R. D. and O. at 40; *see Yellow Freight System, Inc.*, 27 F.3d at 1139; *Thomas*, slip op. at 20. As indicated *supra*, the ALJ also properly considered the temporal proximity between Zinn's raising of concerns about the composition of targets shipped to the reactor for irradiation and Rhyne's decision regarding the question of Zinn's candidacy for promotion. R. D. and O. at 40; *see Simon*, 49 F.3d at 389, 390; *Kahn*, slip op. at 5-6. As indicated by the ALJ, Zinn's pursuit of the target composition concerns became particularly significant in January 1993, when MURR management

was preparing a status report for the NRC and there was heated debate among staff members concerning how much

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information should be included regarding the target composition issue. R. D. and O. at 11-12, 13-14, 34-36, 40-41, 42.

I reject the University's contention that, in determining Rhyne's intent, the ALJ erroneously relied on evidence concerning Rhyne's hostility towards Zinn that was manifested after February 1993, when Rhyne made the decision not to initiate formal consideration of Zinn as a candidate for promotion. I further reject the University's contention that hostility towards Zinn that was demonstrated by the Associate Director of MURR, Charles McKibben (McKibben), and the Assistant Director, William Reilly (Reilly), and the services engineer for the reactor, Steve Gunn (Gunn), should not have been relied upon by the ALJ because only Rhyne was responsible for consideration of Zinn's promotion. Respondent's Brief at 8-9. Particularly in view of the close working relationship of the foregoing officers with Rhyne, their superior, *see* R. D. and O. at 36, as well as the evidence of a *pattern* of hostility toward individuals engaged in protected activity that is presented in the record of these consolidated complaints, *see* R. D. and O. at 6-13, 15-20, 34-38, 40, the foregoing evidence further supports the conclusion that the likely cause of Rhyne's refusal to initiate the formal consideration of Zinn for promotion was Zinn's protected activity.

I also reject the University's contention that the ALJ failed to consider "other possible causes" for comments made by Rhyne in his August 1993 personnel evaluation of Zinn, which were found by the ALJ to indicate hostility toward Zinn for his protected activity. In support of this contention, the University cites a legal action filed by Zinn and his wife that did not arise under the ERA and urges that the ALJ should have considered whether the filing of such action in August 1993 contributed to the tone of Rhyne's comments in Zinn's personnel evaluation. Respondent's Brief at 9-10; *see* n.3, *supra*. The ALJ carefully considered Rhyne's admonition to Zinn, in the August 1993 evaluation, regarding Zinn's "antagonistic" and "adversarial" approach to interaction with the "MURR and University administration and to some degree" Zinn's colleagues. R. D. and O. at 35-36, *see* R. D. and O. at 17-18; RX 38. The ALJ then concluded that these comments "echoed McKibben's complaints pertaining to Zinn's pursuit of the target composition issue" in the August 1992 through March 1993 period. R. D. and O. at 35-36. The inference that Rhyne's comments in the August 1993 evaluation reflect a continuation of the hostility toward Zinn's protected activity prior to February 1993 is reasonable and I adopt it. *See Simon*, 49 F.3d at 390.

Also, as noted by the ALJ, R. D. and O. at 38, Zinn's filing of his complaint under the ERA in April 1993 constitutes

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protected activity. 42 U.S.C. § 5851(a)(1)(D)(1988 & Supp. V 1993). Documentary evidence, as well as testimony at hearing, demonstrates explicit hostility toward Zinn because of the filing of his ERA complaint on the part of at least one member of Rhyne's immediate staff, the Assistant Director, Reilly. ZX 6;

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T. 876-78; *see* R. D. and O. at 15-17. Such evidence also supports the conclusion that Zinn was subjected to a pattern of hostility by the management at the reactor resulting from his protected activity.

Also contrary to the University's contention, Respondent's Brief at 11-12, the ALJ properly concluded that Rhyne's initiation of the formal promotion process for Neff, in comparison with his contemporaneous adverse decision concerning Zinn's candidacy for promotion, supports the conclusion that Rhyne intentionally discriminated against Zinn. The ALJ credited the testimony of Michael D. Glascock (Glascock), a MURR Senior Research Scientist and Group Leader who had recommended Neff for promotion and who was familiar with the work of both Neff and Zinn, that he considered Zinn to have been as "equally qualified" to be a candidate for promotion as was Neff, T. 76-77; *see* T. 68-75, 79-81, 137-49, 153-58. R. D. and O. at 23. Glascock also discussed the relative qualifications of Neff and Zinn under the requirements contained in the promotion guidelines relied on by the University at hearing, and discussed how Zinn actually met one area of the criteria, the service requirement, that was not met by Neff. T. 72-76.

As noted by the University in its response brief, at 11, Judson D. Sheridan (Sheridan), Vice-Provost and Research Dean for the graduate school at the University of Missouri at Columbia, testified, based on a review at hearing of Zinn's curriculum vitae and June 1992 personnel evaluation, that he did not believe that Zinn met the promotion guidelines. T. 962-70. Sheridan also testified that he had approved Neff's promotion and that he believed that Neff had been qualified under those guidelines, T. 960-63; however, on cross-examination, Sheridan failed to explain that conclusion in view of Neff's failure to meet the service requirement contained in the guidelines, T. 974-75, 978-80. *See also* T. 1066-67, 1097-99 (testimony of Rhyne acknowledging Neff's shortcomings under the promotion guidelines).[6] The record thus supports the ALJ's reliance on the testimony of Glascock to conclude that Rhyne's failure to initiate formal promotion consideration of Zinn was discriminatory.

I also reject the University's contention that the ALJ engaged in a flawed analysis under the "dual motive" doctrine. Under the dual, or mixed, motive doctrine, when the evidence establishes that discriminatory intent played a role in an adverse action, the employer may avoid liability only by

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demonstrating that the action would have been taken on the basis of a legitimate motive alone. *Yellow Freight System, Inc.*, 27 F.3d at 1137, 1140 (holding that *St. Mary's Honor Center* did not disturb mixed motive doctrine); *Mackowiak*, 735 F.2d at 1163-64 (citing *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977)[further citations omitted]). Under the dual motive analysis, the employer "bears the risk that 'the influence of legal and illegal motives cannot be separated . . . .'" *Mackowiak*, 735 F.2d at 1164 (quoting *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983)); *see Harrison v. Stone & Webster Engineering Group*, Case No. 93-ERA-44, Sec. Dec., Aug. 22, 1995, slip op. at 9-10; *Pillow*, slip op. at 14-15. Furthermore, as discussed in the Secretary's decision in

Dysert, supra, the 1992 Amendments to the ERA provide that an employer can escape liability under the dual or mixed motive analysis only by presenting clear and convincing evidence that the adverse action would have been taken in the absence of the protected activity. Section 211(b)(3)(D) of the ERA, codified at 42 U.S.C. § 5851(b)(3)(D); *Dysert*, slip op. at 3-6.

The ALJ found that Rhyne had not acted on a legitimate motive in deciding not to initiate Zinn's formal candidacy for promotion. R. D. and O. at 40. He then concluded by finding that, even if the evidence had established that Rhyne was motivated in part by legitimate factors, the evidence did not establish that Rhyne would have taken the action against Zinn in the absence of Zinn's protected activity. *Id.; see* R. D. and O. at 31-32. Thus, and contrary to the University's contention, the ALJ did not find that the evidence established that Rhyne was motivated even in part by nondiscriminatory factors, *viz.*, the promotion criteria, in taking the adverse personnel action against Zinn.[7] Assuming, *arguendo*, that the dual motive analysis were reached, I agree with the ultimate conclusion of the ALJ and find that clear and convincing evidence does not support a conclusion that Rhyne would have taken the challenged personnel action in the absence of Zinn's protected activity.[8] *See* 42 U.S.C. § 5851(b)(3)(D); *Dysert*, slip op. at 3-6; *see also Grogan v. Garner*, 498 U.S. 279 (1991)(discussing higher clear and convincing evidence standard in comparison with preponderance of the evidence standard within context of Section 523(a) of the Bankruptcy Code, 11 U.S.C. § 523(a)); *see generally Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994)(addressing requirement under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

I agree with the ALJ's conclusion that the record establishes that Rhyne's decision not to initiate the formal

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candidacy of Zinn for promotion was motivated by retaliatory intent against Zinn for his protected activity. Zinn has therefore established that the University violated the ERA that regard.[9]

C. The Morris complaint

The ALJ properly concluded that Morris had established the requisite elements of protected activity, knowledge and adverse action. R. D. and O. at 28-29, 31-32; *see Simon*, 49 F.3d at 389; *Dartey*, slip op. at 7-8. The ALJ also properly concluded that the temporal proximity between the protected activity engaged in by Morris during January and February 1993 and the decision to demote Morris, which was ultimately reached in February 1993, was adequate to support an inference of a causal link between the protected activity and the University's adverse action. R. D. and O. at 42-43; *see* R. D. and O. at 11, 13, 27, 28; *Simon*, 49 F.3d at 389 (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)), 390; *Kahn*, slip op. at 5-6.

Contrary to the University's contention, Respondent's Brief at 13, the record provides ample support for the ALJ's conclusion that Rhyne possessed the requisite knowledge of Morris' protected

activity. McKibben testified that he kept Rhyne informed regarding developments on the Shipping Task Force in a "general" manner. T. 848; *see* R. D. and O. at 6. Although Rhyne's hearing testimony contains neither a denial nor an express acknowledgement that Rhyne was aware of Morris' role in pursuing the target composition concerns that had initially been raised by Zinn,[10] Rhyne did acknowledge that he was kept informed, in a "cursory" manner, of the work of the reactor committees concerning these safety concerns. T. 1116; *see* T. 1050, 1073-78.[11] Rhyne also testified that, although he ordinarily did not become involved in decisions concerning technical NRC licensing matters, he would become involved if there were an "impasse" among specific members of his supervisory staff ordinarily responsible for such matters. T. 1049, 1076-77.

As found by the ALJ, the record indicates that, following the October 1992 NRC enforcement conference, Rhyne and the MURR staff were aware of the potential for loss of the reactor's NRC license and the consequent closing of the reactor. T. 177 (Zinn), 661-63 (Gunn), 722 (Ernst), 843-44 (McKibben), 872, 887-88 (Reilly), 1073 (Rhyne); *see* R. D. and O. at 6. There was extensive discussion concerning the best course to follow to alleviate the NRC concerns that prompted the enforcement conference. T. 180-88, 197 (Zinn), 401-05, 408, 410-11, 445-454, 481-84, (Morris), 561-67 (Meyer), 635-41, 658-59, 675-76 (Gunn), 807-10 (McKibben), 874-76, 883-901 (Reilly); *see* R. D. and O. at 6-13. With regard to Rhyne's knowledge of Zinn's protected activity, the ALJ expressly found that "it is inconceivable" that

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members of Rhyne's immediate staff did not contemporaneously apprise Rhyne of the developments pertaining to Zinn's pursuit of his concerns about target composition. R. D. and O. at 36; *see Simon,* 49 F.3d at 390. The record supports a similar conclusion in regard to Morris' protected activity regarding safety concerns pertaining to shipments to and from the reactor beginning in August 1992. In addition, Morris testified that Rhyne, McKibben and Reilly were present at a meeting of the Reactor Services Subcommittee on February 1, 1993, at which he expressed concern regarding the target composition issue. T. 446-451; *see* MX 93; n.11, *supra*. I therefore reject the University's contention that Morris failed to establish that Rhyne was aware of Morris' protected activity when Rhyne demoted Morris.

The University also contends that the demotion of Morris was a legitimately motivated personnel action based on the conclusion of Rhyne and other University and MURR officials that the reactor operation was "out of control." Respondent's Brief at 16-17; *see* R. D. and O. at 27-28. The University asserts that the ALJ improperly shifted the burden of persuasion to the University by requiring the University to demonstrate that it was not motivated by retaliatory intent, rather than requiring Morris to establish that the legitimate basis advanced by the University was pretextual. Respondent's Brief at 14-16. The ALJ concluded, in effect, that the record established that the University was motivated in part by retaliatory animus toward Morris for his protected activity and that the University had failed to demonstrate that it would have demoted Morris in the absence of such protected activity. R. D. and O. at 41-43. Although I

agree with the foregoing conclusions, it is necessary to supplement and clarify the ALJ's analysis of the issue of retaliatory intent regarding Morris.

As discussed *supra* in the analysis of the Zinn complaint, a complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. *Pillow*, slip op. at 14; *Dartey*, slip op. at 8. The ALJ did not find that the basis presented by the University for its demotion action was merely pretextual, however, and the evidence of record does not support such conclusion. Rather, and as found by the ALJ, R. D. and O. at 25-28, 41-42, the record indicates that Morris and Rhyne had experienced increasing friction over various issues concerning the administration of the reactor for more than a year prior to Morris's demotion in March 1993, and that Morris had not established that Rhyne's decision to relieve Morris of his group leader status was not motivated, at least to some degree, by Rhyne's interest in regaining control of administrative matters

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at the reactor.

As the ALJ further concluded, however, the record establishes that Rhyne was also motivated by retaliatory intent against Morris for his protected activity. This conclusion is supported by the sequence of events preceding Rhyne's decision regarding demotion, the evidence of hostility generated by the protected activity engaged in by Morris and Zinn beginning in August 1992, and the evidence indicating that other members of the MURR staff who also actively opposed Rhyne in regard to various administrative matters did not suffer adverse consequences. The foregoing evidence also supports the further conclusion that, under a dual motive analysis, the University has failed to refute Morris' case by establishing by clear and convincing evidence that it would have taken the demotion action in the absence of Morris' protected activity. *See Johnson*, slip op. at 2; *Dysert*, slip op. at 3-6.

Specifically, the record indicates that, although Rhyne had felt an increasing distance developing between himself and Morris since only a few months after Rhyne became Director of the reactor in December 1990, and Rhyne had been concerned for "about a year" regarding Morris' involvement in opposing Rhyne on several administrative issues, Rhyne determined to take adverse action against Morris "around January" or "early February" of 1993. T. 1002, 1009-11, 1041; *see* R. D. and O. at 3, 25-29, 41-42. At that time, Rhyne testified, he had received comments that MURR was "out of control," that "Morris and his group were running the center," and that "there was a lot of dissension going on primarily led by [the] Morris group. . . ." T. 1042-43. As indicated *supra*, Zinn was a member of the Nutrition, Epidemiology and Immunology Group headed by Morris. R. D. and O. at 3. In February 1993, Rhyne discriminatorily decided that he would not initiate Zinn's formal candidacy for promotion. R. D. and O. at 20. This sequence of events supports the inference of a causal connection between Morris' protected activity that began in August 1992 and the February 1993 demotion decision. *See Simon*, 49 F.3d at 389, 390; *Kahn*, slip op. at 5-6. Morris and Zinn engaged in a course of protected activity that began in August 1992 and

which was of particular importance in January 1993. Rhyne's reference to the "Morris group," coupled with the temporal proximity between such protected activity and Rhyne's February 1993 decision to demote Morris, further supports the conclusion that retaliatory intent contributed to Rhyne's motivation in demoting Morris. *See generally Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *quoted in Mackowiak*, 735 F.2d at 1162 (addressing the significance of circumstantial evidence in establishing the presence or absence of retaliatory motive).

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I also reject the University's argument, Respondent's Brief at 20, that the record does not provide support for the ALJ's finding, R. D. and O. at 43, that the hostility towards Zinn beginning in August 1992 due to his protected activity "spilled over" to Morris. First, it is important to recognize the very close professional association between Zinn and Morris. Morris had been associated with Zinn, academically and professionally, for approximately ten years at the time the protected activity took place. T. 165-171 (Zinn), 368-70 (Morris). Morris had initially acted as Zinn's academic advisor while Zinn completed a Master's Degree and later served as Zinn's Group Leader. *See id.* As noted by the ALJ, R. D. and O. at 3, Zinn considered Morris to be his mentor. T. 355-56.

As found by the ALJ, the record demonstrates that a considerable degree of hostility was generated among members of Rhyne's immediate staff flowing from the controversy over the target composition safety concerns raised by Zinn and supported by Morris. *See* R. D. and O. at 6-13, 17-20, 32-38. As also found by the ALJ, the effort spearheaded by Zinn forced MURR management "to come to grips with the target composition issue. . . ." R. D. and O. at 38; *see* R. D. and O. at 19 n.5. Some of the opposition to that effort was based on the belief that drawing the NRC's attention to further safety problems related to the shipping of irradiation targets to and from the reactor would further jeopardize the reactor's NRC license. *See* R. D. and O. at 18-19, 32; T. 722 (Ernst), 843-44 (McKibben), 872, 887-88 (Reilly), 1073 (Rhyne).

Reilly's letter of April 30, 1993, which was circulated at the reactor after the filing of Zinn's ERA complaint, reflects a view of Zinn's whistleblower activity as "traitorous." ZX 6; *see* R. D. and O. at 15-17; *see also* T. 84-86 (Glascock), 215-16, 218-19 (Zinn); R. D. and O. at 18-20. Furthermore, the corroborated testimony of Zinn and Morris indicates that, with the exception of Walter Meyer (Meyer), Acting Reactor Manager, Morris alone provided support for Zinn's pursuit of the target composition issue in the committee proceedings taking place at the reactor during the August 1992 through January 1993 timeframe.[12] T. 441-42 (Morris), 232-34 (Zinn), 637-38 (Gunn); *see* T. 566 (Meyer), 807-10 (McKibben), 883-84, 893-94 (Reilly acknowledging Meyer's role in decision to voluntarily provide certain documentation to NRC investigators during March 1993 on-site investigation); R. D. and O. at 11-12. Contrary to the University's argument, Respondent's Brief at 20, the record thus provides ample support for the ALJ's conclusion that the hostility towards the protected activity engaged in by Zinn beginning in August 1992 "spilled over" to

Morris. *See Simon,* 49 F.3d at 390.

Finally, the evidence of record indicates that various other

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staff members at MURR had opposed Rhyne's administrative policies and had actually taken leading roles in doing so. *See, e.g.,* T. 109-21 (Glascock), 745-46 (Erhardt); MX 25 (memorandum of Dr. W. B. Yelon, MURR scientist); *see also* R. D. and O. at 29-31; T. 135-36 (Glascock). Nonetheless, the record does not indicate that any of those individuals were subjected to adverse action; rather, as found by the ALJ, Rhyne offered Glascock the position of Program Coordinator and Group Leader from which Morris had been demoted. T. 121 (Glascock); R. D. and O. at 31-32. In support of its position that Rhyne was not motivated by retaliatory animus against whistleblower activity, the University notes that Meyer had supported pursuit of the target composition issue but suffered no adverse consequences as a result. Respondent's Brief at 18-19; *see* T. 567 (Meyer). This factor does not undermine the well-supported conclusion that Rhyne's demotion decision was motivated, at least in part, by retaliatory animus toward Morris for engaging in protected activity. *See DeFord v. Secy. of Labor,* 700 F.2d 281, 286 (6th Cir. 1983).

Morris thus established by a preponderance of the evidence that the demotion action was in retaliation for protected activity, *Thomas,* slip op. at 20; *see Yellow Freight System, Inc.,* 27 F.3d at 1139; and, the University failed to demonstrate, under Section 211(b)(3) of the ERA, by "clear and convincing evidence" that it would have taken the adverse action in the absence of the protected activity, *see Johnson,* slip op. at 2; Dysert, slip op. at 3-6; *see also Yellow Freight System, Inc.,* 27 F.3d at 1137, 1140 (holding that *St. Mary's Honor Center* did not disturb mixed motive doctrine).

E. Attorneys' fees

Pursuant to the ERA, the Complainants are entitled to payment of attorneys' fees and costs reasonably incurred in bringing the complaint. 42 U.S.C. § 5851(b)(2)(B)(1988 & Supp. V 1993). In a Recommended Decision and Order on Attorney Fees issued October 24, 1994, the ALJ awarded a total of $35,797.71 for attorney's fees and costs to Complainant Zinn and a total of $5,089.22 for attorney's fees and costs to Complainant Morris. In so doing, the ALJ rejected the University's objections to the number of hours and the hourly rate requested by counsel to Complainant Zinn. The ALJ noted that the Univers object to the fees and costs requested by Complainant Morris.

The ALJ's award of costs and fees to Complainant Zinn was comprised of 196 hours of attorney services at $150.00 per hour, plus 6 hours at lesser hourly rates for services rendered by legal staff affiliated with the counsel's firm, and $6,165.46 for litigation costs. The award of costs and fees to Complainant Morris was comprised of 62 hours of attorney services at $85.00 per hour, and $2,089.22 for litigation costs. A review of the

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record indicates that the ALJ's decision awarding attorneys' fees and costs is in accordance with pertinent law. As found by the ALJ, the larger award to Complainant Zinn's counsel as the lead counsel in the case is appropriate. *See Hensley v. Eckerhart,*

461 U.S. 424 (1983); *see generally Goldstein v. Ebasco Constructors, Inc.*, Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992, slip op. at 17-28 (addressing various factors to be considered in setting hourly rate and allowing attorneys' fees for services claimed under the ERA). Furthermore, in support of the fee petition, Zinn's counsel provided documentation of the prevailing market rates in the relevant community. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984). The award to Complainant Morris' counsel is also supported by appropriate documentation and in accord with pertinent law. *See Hensley*, 461 U.S. at 433. I therefore adopt the recommended decision of the ALJ concerning attorneys' fees and costs.

ORDER

I affirm the preliminary order for immediate relief that I issued on June 20, 1994,[13] and order additional appropriate relief, *to wit*:

1)The Respondent is ordered to establish a committee to consider Complainant Zinn's suitability for promotion to Senior Research Scientist in accordance with the terms and conditions set forth in the ALJ's Recommended Decision and Order, at 43.

2)If Complainant Zinn is recommended for promotion by such committee, the Respondent is ordered to promote Complainant Zinn in accordance with that recommendation and to reimburse Complainant Zinn in the amount of the differential between the salary of a Research Scientist and that of a Senior Research Scientist for the period from February 4, 1993 to the date of the promotion. Respondent is also ordered to pay Complainant Zinn interest on this back pay award, to be calculated at the rate provided at 26 U.S.C. § 6621 (1988).[14]

3)The Respondent is ordered to reinstate Complainant Morris as Nuclear Analysis Program Coordinator.

4)The Respondent is ordered to reinstate Complainant Morris as the Group Leader of the Nutrition, Epidemiology and Immunology Group or its equivalent.

5)The Respondent is ordered to post on all bulletin boards of the Missouri University Research Reactor, where Respondent's official documents are posted, a copy of this Decision and Order for a period of 60 days, ensuring that it is not altered, defaced or covered by any other material.

6)The Respondent is ordered to pay $40,886.93 in attorneys' fees and litigation costs awarded in this case pursuant to the ALJ's Recommended Decision and Order on Attorney Fees of October 24,

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1994 and to assume liability for any additional attorneys' fees and costs reasonably incurred to date.

7)Complainants Zinn and Morris are granted a period of 30 days from the date of this order to submit petitions for costs and expenses, including attorneys' fees, not covered by the ALJ's October 24, 1994 Recommended Decision and Order on Attorney Fees.

The Respondent may file a response to such petitions within 60 days of the date of this order.

SO ORDERED.

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ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]
Section 211 of the ERA was formerly designated Section 210, but was redesignated pursuant to Section 2902(b) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, which amended the ERA effective October 24, 1992.

[2]
The caption reflects the correction of Complainant Morris' name from Steven J. Morris as it appeared on the ALJ's R. D. and O. and on orders issued by the Office of Administrative Appeals. *See* Complainant Morris' Brief at 15; R. D. and O. at 31.

[3]
In response to the Order issued May 4, 1995 by the Director of the Office of Administrative Appeals, the parties have filed a Joint Status Report addressing the impact on these consolidated complaints of an agreement entered into on January 18, 1995, by Zinn and his wife, Dr. Tandra Chaudhuri, with the University. Although that agreement formed the basis for the settlement and dismissal of a complaint filed by Dr. Chaudhuri, *see Chaudhuri v. The Curators of the University of Missouri,* Case No. 94-ERA-42, Sec. Order Approving Settlement and Dismissing Complaint, May 1, 1995, and provides for a limit on the amount of damages recoverable by Zinn in this case, the parties in these consolidated complaints have indicated that they wish to proceed with the adjudication of these claims filed by Zinn and Morris. Joint Status Report at 2. As the parties have not sought disposition of the Zinn and Morris complaints based on the January 18, 1995 agreement, such agreement is not before me for review in this case. *See* 42 U.S.C. □ 5851(b)(2)(A) (Secretary may not terminate a proceeding on the basis of a settlement without the participation and consent of the complainant); *see generally Macktal v. Secy. of Labor,* 923 F.2d 1150 (5th Cir. 1991)(holding that Secretary erred in modifying settlement agreement); *Thompson v. United States Dept. of Labor,* 885 F.2d 551 (9th Cir. 1989)(holding that Secretary's addition of "with prejudice" to the dismissal condition agreed to by the parties was error). I therefore render no ruling on the adequacy of such agreement with regard to Zinn and Morris, *see generally Fuchko and Yunker v. Georgia Power Co.,* Case Nos. 89-ERA-9, 89-ERA-10, Sec. Ord., Mar. 23, 1989, slip op. at 1-2 (addressing standard under which settlements submitted for approval will be reviewed by the

Secretary), and consider the January 18, 1995 agreement germane to these consolidated complaints only to the extent that it indicates compliance with the preliminary order for relief issued on June 20, 1994.

[4]
The following abbreviations are used herein for references to the record: Hearing Transcript, T.; Zinn Exhibit, ZX; Morris Exhibit, MX; Respondent's Exhibit, RX.

[5]
When read in context, the ALJ's statement that "The University has not made a convincing case that Zinn was denied promotion consideration for legitimate reasons," R. D. and O. at 40, clearly does not indicate that he placed the burden of persuasion on the University. *See* R. D. and O. at 31-32.

[6]
The University also urges that the ALJ erred in disregarding Rhyne's testimony "that there were other scientists who were at least as qualified for promotion as Zinn" who had also not been promoted. Respondent's Brief at 12. Rhyne's testimony on this point, however, is cursory and merely cites some specific factors that would support the formal candidacy for promotion of each of the other three scientists that are referred to; Rhyne does not provide an overall assessment of any of the scientists under the promotion guidelines. T. 1067-68. Furthermore, documentation to support the University's contention, in the form of the curricula vitae and personnel assessments of such scientists, was not offered in evidence.

[7]
Consequently, the University's contention that, under the court's decision in *Mackowiak,* the ALJ erroneously failed to "sort out the motives" in Zinn's case is wholly without merit.

[8]
The University suggests that a legitimate basis for the University's adverse action toward Zinn would be hostility resulting from "Zinn's method of presentation" of his safety concerns. Respondent's Brief at 8. The facts in this case are clearly distinguishable from those in which the complainant has engaged in disruptive conduct such that a legitimate basis for adverse action exists. *Cf. Gibson v. Arizona Public Service Co.,* Case No. 90-ERA-29, Sec. Dec., Sept. 18, 1995 (complainant participated in "shop bickering" and harassed another employee); *Rainey v. Wayne State Univ.,* Case No. 89-ERA-48, Sec. Dec., Apr. 21, 1994 (complainant created turmoil and disruption unrelated to protected activity and harassed co-workers, who asked for his termination); *see generally Dunham v. Brock,* 794 F.2d 1037 (5th Cir. 1986) and cases cited therein; *Lajoie v. Environmental Management Systems, Inc.,* Case No. 90-STA-31, Sec. Dec., Oct. 27, 1992, slip op. at 10-14, and cases cited therein.

[9]
The University also contends that the ALJ committed reversible

error in failing to admit the report, proferred by the University at hearing, *see* T. 956-59, of a task force of three tenured professors from the University faculty who investigated the question of whether Zinn and Morris had been discriminated against by the University. Respondent's Brief at 10-11; *see* [Rejected] RX 17. As indicated by the ALJ at hearing, T. 959, the University's willingness to convene a task force for this purpose, in response to the Complainants' requests, does not provide probative evidence of the University's motivation at the time of the adverse actions here at issue. Furthermore, the questionable reliability of a report authored by the Respondent's employees and the potential for undue prejudice to the Complainants is evident. *Cf. Roadway Express, Inc. v. Brock,* 830 F.2d 179, 181 (11th Cir. 1987)(addressing role of arbitration decisions rendered under collective bargaining agreements as evidence in administrative proceedings). Although, as a general rule, the ALJ should admit such evidence for whatever probative value it does have, *see Fugate v. Tennessee Valley Authority,* Case No. 93-ERA-0009, Sec. Dec., Sept. 6, 1995, slip op. at 3-4 (citing *Builders Steel Co. v. Commissioner of Internal Rev.,* 179 F.2d 377 (8th Cir. 1950)(addressing lessened significance of technical rulings on admissibility of evidence in non-jury trials)), any error by the ALJ in failing to do so in this instance is harmless.

[10]
In addition to Morris' protected activity in January regarding pursuit of the target composition concerns that is referred to by the ALJ, R. D. and O. at 11, 13; T. 409-11, Morris also testified that he raised safety concerns in a meeting of the Shipping Task Force that was held in August 1992, T. 400-01; *see* T. 653-54 (Gunn), and participated in a meeting of the Reactor Services Subcommittee on February 1, 1993, at which he raised objections concerning the issue of irradiation target certification by reactor customers, and also pursued this issue after that meeting, T. 446-54. Furthermore, Morris testified that, once he was aware of the opposition that Zinn was encountering in the Shipping Task Force, he pursued this subject in meetings of the Reactor Services Subcommittee and the Reactor Safety Subcommittee, of which Morris was a member. T. 442-43. The raising of these concerns would also constitute protected activity under the ERA although, as was found by the ALJ, Morris' activity in regard to the exempt license controversy, R. D. and O. at 14-15, would not be protected under the Act.

[11]
Although evasive on this point, Rhyne's testimony on cross-examination indicates that he was aware of Zinn's disputes with others on the Shipping Task Force and the Irradiation Sub-committee. T. 1073-74; *see also* T. 1070 (Rhyne's statement that he "barely knew about" Zinn's activity on the task force and sub-committee).

[12]
Although Glascock testified in support of the view that the target composition concerns pursued by Zinn and Morris were of considerable significance, T. 86-91, he was apparently not a member of the Shipping Task Force or the Irradiation Subcommittee, T. 81-91.

[13]
As indicated in n.3, *supra*, the settlement agreement dated January 18, 1995 indicates compliance with some of the provisions of the Preliminary Order of June 20, 1994 with regard to Complainant Zinn.

[14]
See Johnson v. Bechtel Construction Co., Case No. 95-ERA-0011, Sec. Dec. (Sept. 28, 1995), slip op. at 2-3.

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TTY: 1-877-889-5627
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ADDENDUM D

LIST OF ACRONYMS AND ABBREVIATIONS

BFN	Browns Ferry Nuclear Plant
Board	Atomic Safety and Licensing Board (NRC)
BWR	Boiling Water Reactor
CNO	Chief Nuclear Officer (TVA)
DOL	Department of Labor
ERA	Energy Reorganization Act of 1978
ETP	Employee Transition Program (TVA)
HR	Human Resources
ID	Initial Decision, June 26, 2003
INPO	Institute of Nuclear Power Operations
MIRT Report	Millstone Independent Review Team, Report of Review (NRC)
NOS	Nuclear Operations Support (TVA)
NOV	Notice of Violation
NRC OE	Nuclear Regulatory Commission, Office of Enforcement
NRC OGC	Nuclear Regulatory Commission, Office of General Counsel
NRC	Nuclear Regulatory Commission
NSRB	Nuclear Safety Review Board (TVA)
OI	Office of Investigations (NRC)
OPM	Office of Personnel Management
PASS	Post-Accident Sampling System
PD	Position Description
PWR	Pressurized Water Reactor
RadChem organization	Radiological and Chemistry Control organization (TVA)
RIF	Reduction in Force
SQN	Sequoyah Nuclear Plant (TVA)
SRB	Selection Review Board (TVA)
TVA	Tennessee Valley Authority
TVAN	Tennessee Valley Authority Nuclear group
VPA	Vacant Position Announcement
WBN	Watts Bar Nuclear Plant (TVA)

ADDENDUM E

CAST OF CHARACTERS MENTIONED IN TVA'S INITIAL BRIEF

Identified by position at pertinent time

Beecken, Robert J.	SQN Plant Manager
Bynum, Joseph R.	Vice-President, Nuclear Operations
Chandrasekaran, "Chandra"	Candidate for PWR Chemistry Program Manager
Corey, John	BFN RadChem Manager and SRB member
Cox, Jack	WBN RadChem Manager
Fiser, Gary L.	Filed 1993 and 1996 DOL complaints
Grover, Ron	Manager, Corporate Chemistry (1994-96)
Harvey, Sam	Candidate for PWR Chemistry Program Manager
Jocher, William F.	Manager, Corporate Chemistry (1993-96)
Kent, Charles	SQN RadChem Manager and SRB member
Keuter, Dan	Vice-President, Nuclear Operations Support (1992-93)
Lydon, Patrick	SQN Operations Manager
McArthur, Dr. Wilson C.	Manager, Technical Programs and Chairman, NSRB Radiological Control and Chemistry Subcommittee
McGrath, Thomas L.	Acting Manager, Nuclear Operations Support (1995-96) and NSRB Chairman
Peters, Dr. Carey	Performed statistical analysis of SRB scores
Rogers, Heyward "Rick" R.	Manager, Corporate Maintenance Support, former Manager SQN and Corporate Technical Support and SRB member
Sasser, U.S. Senator James	Addressee of letter from Fiser
Wilson, Jack	SQN Vice President

Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902-1401

October 2, 2003

OVERNIGHT MESSENGER

Office of the Secretary
Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Sixteenth Floor
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Re: In the Matter of Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3) - ASLBP No. 01-791-01-CivP - EA 99-234

Dear Office of the Secretary:

We are enclosing for filing the original and two copies of the following document which has been served on all appropriate parties as evidenced by the certificate of service:

TENNESSEE VALLEY AUTHORITY'S INITIAL BRIEF

Please complete the receipt form below on the enclosed copy of this letter and return the completed receipt form to us in the enclosed preaddressed envelope.

Thank you for your assistance.

Sincerely yours,

Brent R. Marquand
Senior Litigation Attorney

Telephone 865-632-4251
Facsimile 865-632-6718

The document listed above was received on October 3rd, 2003.

By: Emilee L. Jolen

Enclosures
cc: See page 2

cc (Enclosure/Overnight Messenger):

Administrative Judge
Charles Bechhoefer, Chairman
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Two White Flint North
11545 Rockville Pike
Rockville, Maryland 20852-2738

Administrative Judge
Richard F. Cole
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Two White Flint North
11545 Rockville Pike
Rockville, Maryland 20852-2738

Administrative Judge
Ann Marshall Young
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Two White Flint North
11545 Rockville Pike
Rockville, Maryland 20852-2738

Dennis C. Dambly, Esq.
Angela B. Coggins, Esq.
U.S. Nuclear Regulatory Commission
Office of the General Counsel
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Mr. John F. Cordes, Jr.
Director
Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Mr. William D. Travers
Executive Director of Operations
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Robert W. Bishop, Esq.
Michael A. Bauser, Esq.
Ellen C. Ginsberg, Esq.
Office of the General Counsel
Nuclear Energy Institute
1776 I Street, NW
Washington, D.C. 20006

003700735