

**DEPARTMENT OF ENERGY****10 CFR Part 820**

[Docket No. EA-RM-16-PRDNA]

RIN 1992-AA52

**Procedural Rules for DOE Nuclear Activities**

**AGENCY:** Office of Enterprise Assessments, Office of Enforcement, Office of Nuclear Safety Enforcement, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) is adopting a final rule to clarify that the Department may assess civil penalties against certain contractors and subcontractors for violations of the prohibition against retaliating against an employee who reports violations of law, mismanagement, waste, abuse, or dangerous/unsafe workplace conditions, among other protected activities, concerning nuclear safety (referred to as “whistleblowers”). Specifically, this rule clarifies the definition of “DOE Nuclear Safety Requirements” and clarifies that the prohibition against whistleblower retaliation is a DOE Nuclear Safety Requirement to the extent that it concerns nuclear safety. This final rule is based on an earlier proposal the Department published on August 12, 2016.

**DATES:** *Effective Date:* The effective date of this rule is January 26, 2017.

**ADDRESSES:** The docket, which includes Federal Register notices and all comments received is available for review at <http://www.regulations.gov>. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. However, some documents listed in the index may not be publicly available, such as those containing information that is exempt from public disclosure. A link to the docket Web page can be found at: <https://www.regulations.gov/docket?D=DOE-HQ-2016-0021>. The [www.regulations.gov](http://www.regulations.gov) Web page contains simple instructions on how to access all documents, including public comments, available in the docket.

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**I. Authority and Background**

Pursuant to the Atomic Energy Act of 1954 (AEA) (42 U.S.C. 2011 *et seq.*), DOE has issued regulations governing nuclear safety management (at 10 CFR part 830) and occupational radiation protection (at 10 CFR part 835). Section 234A of the AEA (42 U.S.C. 2282a) authorizes DOE to impose civil penalties for violations of these regulations. Specifically, section 234A authorizes civil penalties against contractors, subcontractors, and suppliers that are covered by an indemnification agreement under section 170.d. of the AEA (42 U.S.C. 2210(d)) (commonly known as the Price-Anderson Act) that violate DOE rules, regulations, or orders “related to nuclear safety.” DOE has issued Procedural Rules for DOE Nuclear Activities at 10 CFR part 820 (part 820), which establishes a process for imposing civil penalties under section 234A.

Separate from part 820, DOE has also issued regulations at 10 CFR part 708 (part 708) that prohibit DOE contractors or subcontractors from retaliating against employees for reporting violations of law, rule or regulation, fraud, gross mismanagement, waste, abuse; danger to employees or the public; participating in Congressional or administrative proceedings; or refusing to participate in an activity that may constitute a violation of federal health and safety law or cause a reasonable fear of serious injury (referred to as “whistleblowers”). Part 708 establishes an affirmative duty on the part of contractors not to retaliate against whistleblowers, and establishes a process for an employee alleging retaliation to file a claim for reinstatement, transfer-preference, back-pay, legal fees, and other relief.

On August 12, 2016, DOE published a Notice of Proposed rulemaking (NPR) to amend part 820 to clarify the definition of “DOE Nuclear Safety Requirements” and to clarify that DOE may impose civil penalties against a contractor or subcontractor for violating the prohibition against whistleblower retaliation found in part 708, to the extent the violation concerns nuclear safety. 81 FR 53337.

**II. Synopsis of the Final Rule**

This final rule revises the definition for “DOE Nuclear Safety Requirements” found in 10 CFR part 820 to identify the particular rules and regulations that DOE regards as DOE Nuclear Safety Requirements. Under the final rule, the following are enforceable DOE Nuclear Safety Requirements:

10 CFR part 830 (nuclear safety management);

10 CFR part 835 (occupational radiation protection);

10 CFR 820.11 (information accuracy requirements);

Compliance Orders issued pursuant to 10 CFR part 820, subpart C; and

10 CFR 708.43 (duty of contractors not to retaliate against whistleblowers) to the extent that subject activities concern nuclear safety.

In the NPR, DOE proposed that Compliance Orders issued pursuant to 10 CFR part 820, subpart C and each of the four listed rules and regulations are DOE Nuclear Safety Requirements “to the extent that subject activities concern nuclear safety.” In the final rule, DOE has moved this phrase so that it applies only to 10 CFR 708.43. Under section 234A of the AEA, DOE may impose civil penalties for violations of “any applicable rule, regulation, or order related to nuclear safety.” DOE believes that all of the activities subject to 10 CFR part 830, 10 CFR part 835, 10 CFR 820.11, and Compliance Orders issued pursuant to 10 CFR part 820, subpart C, have a direct connection to nuclear safety. Each of these rules is directed specifically at DOE activities that affect nuclear safety and therefore these rules “concern nuclear safety” in all their applications. By contrast, 10 CFR 708.43 is directed at all DOE activities, including those that have no connection to nuclear safety. Therefore, DOE is amending the definition of “DOE Nuclear Safety Requirements” to include 10 CFR part 830, 10 CFR part 835, 10 CFR 820.11, and Compliance Orders issued pursuant to 10 CFR part 820, subpart C, in all their applications and 10 CFR 708.43 to the extent that activities subject to 10 CFR 708.43 concern nuclear safety.

DOE is also establishing a new section, 10 CFR 820.14, to provide specific requirements that apply to imposing civil penalties for a violation of the prohibition against whistleblower retaliation found in 10 CFR 708.43. For example, the final rule provides that DOE will not initiate an investigation or take action with respect to an alleged act of retaliation by a DOE contractor until 180 days after an alleged violation occurs. The final rule further provides that DOE will suspend an investigation or other proceeding when an

administrative or judicial proceeding commences based on the same alleged act of retaliation until 60 days after a final decision of an agency or court finds that a retaliation occurred, or otherwise makes a final disposition of the matter on procedural grounds without explicitly finding that retaliation did not occur. A final decision of an agency or court includes a final agency decision pursuant to 10 CFR part 708, a final decision or order of the Secretary of Labor pursuant to 29 CFR part 24, a decision by the Secretary of Energy upon a report by the Inspector General, or a decision by a federal or state court. The final rule makes clear that the commencement of an administrative or judicial proceeding shall not affect the Department's authority to take enforcement action for compliance with DOE Nuclear Safety Requirements other than 10 CFR 708.43.

DOE explained in its proposed rule that "it will not take any action under part 820 with respect to alleged retaliation until after the deadlines have passed for filing a claim under part 708 or 29 CFR part 24—*i.e.* 180 days after the alleged violation occurs" and that if "an administrative or judicial proceeding is filed after DOE has already initiated any action under part 820, DOE will immediately suspend its activities under part 820 until the issuance of a final decision in the proceeding—including the exhaustion of appeals." The proposed rule stated that "DOE will not take any action under part 820 until sixty days after a final decision in an administrative or judicial proceeding finds that a retaliation occurred." DOE's intent was to ensure that its investigation did not run concurrent with a judicial or administrative proceeding examining the same facts. A similar situation exists where an administrative or judicial proceeding is dismissed on procedural grounds without an explicit finding whether retaliation in fact occurred. Under this scenario, there would be no risk of conflict with any judicial or administrative proceedings, and DOE would be unable to pursue its interest in preventing whistleblower retaliation even though no judicial or administrative proceeding had fully addressed the question of whether retaliation in fact occurred. Therefore, consistent with DOE's intent, this final rule states that DOE will suspend an investigation or other proceeding when an administrative or judicial proceeding commences based on the same alleged act of retaliation until 60 days after a final decision of an agency or court finds that retaliation occurred, or

otherwise makes a final disposition of the matter on procedural grounds without explicitly finding that retaliation did not occur.

Finally, DOE is revising its Whistleblower Enforcement Policy, found in appendix A to part 820. This appendix is a general statement of policy and is not binding on DOE or its contractors.

### III. Response to Comments

The Department received four comments in response to the proposed rule. After reviewing these comments, DOE has concluded that the rule should be finalized as proposed and without change. DOE's response to the comments is fully explained below.

One commenter stated that the proposed rulemaking would inappropriately narrow DOE's authority to issue civil penalties for retaliation by limiting that authority to retaliation for raising concerns involving only nuclear safety. DOE disagrees that this rule will limit its authority in this manner. This final rule clarifies that DOE may issue civil penalties under part 820 for violations of the prohibition against whistleblower retaliation that concern nuclear safety. DOE's authority to issue civil penalties against contractors that retaliate against employees for reporting non-nuclear safety concerns or refusing to participate in an activity that the employees reasonably believe may cause serious injury to themselves or other employees is covered under a different regulation that is not affected by today's rule. Namely, subpart C to 10 CFR part 851, Worker Safety and Health Program, requires DOE contractors to establish procedures for workers to report job-related hazards, and to permit workers to stop work or decline to perform an assigned task because of a reasonable belief that the task poses an imminent risk of serious physical harm to workers, without fear of reprisal. Subpart E to part 851 establishes the process for taking enforcement actions, including the issuance of civil penalties, against contractors that violate part 851 requirements.

One commenter identified a number of offenses for which DOE contractors should be subject to criminal penalties and questioned the independence of DOE personnel who oversee or may conduct investigations of DOE contractor activities. While these issues are outside the scope of this rulemaking, DOE notes that subpart F of part 820 already establishes provisions for the identification and disposition of potential criminal violations of the Atomic Energy Act or any applicable DOE Nuclear Safety Requirement. With

respect to the independence of personnel handling enforcement functions, § 820.4 requires any DOE official with a financial or personal interest in a matter being addressed pursuant to the provisions of part 820 to withdraw from that action. This section also allows any interested person to request that DOE's General Counsel disqualify a DOE Official from a part 820 matter due to a conflict of interest.

Another commenter agreed with DOE's general approach of deferring any enforcement activity under part 820 with respect to an alleged retaliation until after a final decision has been issued concerning any other proceeding addressing the same alleged act of retaliation. The commenter stated that given that multiple avenues are available for whistleblowers to pursue retaliation complaints and obtain relief, the Department should presume that no retaliation has occurred, and thus enforcement action is not warranted, unless an employee has submitted a retaliation complaint using one of these mechanisms. DOE does not agree that there should be a presumption that no retaliation has taken place unless and until an employee has submitted a complaint. The existence of multiple avenues for aggrieved employees to raise complaints does not guarantee that a complaint will be filed after every instance of retaliation. There could be many reasons an individual employee may choose not to file a complaint through one of these mechanisms, and DOE does not believe it is appropriate to draw conclusions from the mere fact that no complaints have been filed. DOE intends to exercise its enforcement discretion consistent with the final decision of an agency or court on matters of retaliation that concern nuclear safety. However, DOE retains the authority to investigate whether a contractor has violated a DOE Nuclear Safety Requirement in retaliating against an employee for raising a nuclear safety concern under appropriate circumstances, even if no complaint of retaliation has been filed.

The commenter also suggested that DOE consider providing additional clarification regarding the escalation or mitigating factors the Department would consider in determining its enforcement penalties, particularly if this rulemaking is expected to result in an increase in enforcement activities. Based on historical trends in the number of cases of substantiated retaliation against DOE contractor and subcontractor employees who raise nuclear safety concerns, DOE does not expect any increase in enforcement activities. Further, DOE does not expect that this final rule will

directly lead to an increase in enforcement activities. DOE believes that the factors that it considers when determining whether to escalate or mitigate any civil penalty are adequately described in section IX of appendix A to part 820 and in DOE's Enforcement Process Overview document that is available at <http://energy.gov/ea/services/enforcement/enforcement-program-and-process-guidance-and-information>. These same factors would be applied in any enforcement action for nuclear safety-related retaliation under part 820, in addition to those described in amended section XIII of appendix A of this rulemaking.

One commenter stated that DOE's authority to issue civil penalties for cases of nuclear safety-related retaliation is inconsistent with the Energy Reorganization Act and 29 CFR part 24, which provide jurisdiction to the Department of Labor to consider complaints of retaliation by DOE contractors against contractor employees. The commenter stated that imposing a civil penalty under part 820 for a retaliation that the Department of Labor has already considered and awarded a remedy to the employee for would constitute a duplicate penalty for the same violation. DOE disagrees that a civil penalty imposed under part 820 for a retaliation that the Department of Labor has substantiated under 29 CFR part 24 constitutes a duplicate penalty. DOE sees these processes as complementary in that each process has a different type of remedy that serves different purposes. The allowable remedies under 29 CFR part 24 are designed to "make the employee whole" by providing reinstatement, transfer-preference, back-pay, and legal fees sufficient to compensate the employee for the harm. By contrast, part 820 provides for civil penalties in order to hold a contractor accountable for violating a DOE Nuclear Safety Requirement and to deter future retaliation. This distinction is also true with respect to the DOE Contractor Employee Protection Program under part 708 and the Pilot Program for Enhancement of Employee Whistleblower Protection (41 U.S.C. 4712), neither of which provide for imposing a civil penalty on a contractor for violating a requirement that prohibits retaliation.

The commenter also stated that DOE has other sufficient mechanisms available, such as contract fee reductions, to address any "chilled workplace" or other leadership concerns. Under this final rule, DOE retains other mechanisms, including contract fee reductions, to respond to

contractor violations of DOE Nuclear Safety Requirements. Although these mechanisms may be sufficient in a particular case to address "chilled workplace" concerns, DOE believes that there may be circumstances where civil penalties under part 820 are appropriate and necessary to ensure that future violations of the prohibition against whistleblower retaliation are deterred.

Finally, the commenter noted that the proposed rule does not address situations in which a DOE federal employee causes, demands or directs a contractor to retaliate against one of its employees for whistleblowing. DOE is not aware of any instance where a DOE employee was found to have caused or contributed to a retaliation by a contractor against a contractor employee. Nonetheless, DOE notes that section IX.8 of appendix A to part 820 already discusses DOE's approach to enforcement for cases wherein DOE may have contributed to a contractor's violation of a DOE Nuclear Safety Requirement. This final rule does not amend or alter this provision.

#### **IV. Procedural Issues and Regulatory Review**

##### *A. Review Under Executive Order 12866*

This final rule has been determined not to be a significant regulatory action under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993). Accordingly, this notice of proposed rulemaking was not subject to review by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

##### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (<http://energy.gov/gc/office-general-counsel>).

DOE has reviewed this rule under the provisions of the Regulatory Flexibility Act and the procedures and policies

published on February 19, 2003. The final rule amends DOE's Procedural Rules for DOE Nuclear Activities to clarify the definition of "DOE Nuclear Safety Requirements" and to clarify that DOE may assess civil penalties against certain contractors and subcontractors for violations of the prohibition against retaliating against whistleblowers. While the amended part 820 would expose small entities that are contractors and subcontractors to potential liability for civil penalties, DOE does not expect that a substantial number of these entities will violate a DOE Nuclear Safety Requirement resulting in the imposition of a civil penalty. On this basis, DOE certifies that this final rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

##### *C. Paperwork Reduction Act*

This rule does not impose new information or record keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

##### *D. National Environmental Policy Act*

DOE has determined that this rule is covered under the Categorical Exclusion in DOE's National Environmental Policy Act regulations at paragraph A.5 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemaking that interprets or amends an existing rule or regulation without changing the environmental effect of the rule or regulation that is being amended. The final rule amends DOE's regulations on civil penalties with respect to certain DOE contractors and subcontractors in order to clarify that civil penalties are available for violations of the prohibition against whistleblower retaliation found in § 708.43 that concern nuclear safety. These amendments are procedural and do not change the environmental effect of part 820. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

##### *E. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, requires each Federal agency, to

the extent permitted by law, to prepare a detailed assessment of the effects of any Federal mandate in an agency rule that may result in costs to State, local, or tribal governments, or to the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. 2 U.S.C. 1532. While the final rule may expose DOE contractors and subcontractors to potential liability for civil penalties for retaliating against a whistleblower in connection with a protected activity relating to nuclear safety, DOE does not expect that these civil penalties will approach \$100 million in any single year. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

#### *F. Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999, 5 U.S.C. 601 note, requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family wellbeing. While this final rule would apply to individuals who may be members of a family, the rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### *G. Executive Order 13132*

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this final rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

#### *H. Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting

errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

#### *I. Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001, 44 U.S.C. 3516 note, provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### *J. Executive Order 13211*

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA) a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any

successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action has been determined to not be a significant regulatory action, and it would not have an adverse effect on the supply, distribution, or use of energy. Thus, this action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### *K. Congressional Notification*

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### *L. Approval of the Office of the Secretary*

The Secretary of Energy has approved the publication of this final rule.

#### **List of Subjects in 10 CFR Part 820**

Administrative practice and procedure, Enforcement, Government contracts, Nuclear safety, Penalties, Whistleblowing.

Issued in Washington, DC, on December 19, 2016.

**Glenn S. Podonsky,**

*Director, Office of Enterprise Assessments.*

For the reasons stated in the preamble, DOE hereby amends part 820 of chapter III of title 10 of the Code of Federal Regulations as set forth below:

#### **PART 820—PROCEDURAL RULES FOR DOE NUCLEAR ACTIVITIES**

■ 1. The authority citation for part 820 continues to read as follows:

**Authority:** 42 U.S.C. 2201; 2282(a); 7191; 28 U.S.C. 2461 note; 50 U.S.C. 2410.

■ 2. Section 820.2 is amended by revising the definition for "DOE Nuclear Safety Requirements" to read as follows:

#### **§ 820.2 Definitions.**

\* \* \* \* \*

*DOE Nuclear Safety Requirements* means the set of rules, regulations, orders, and other requirements relating to nuclear safety adopted by DOE to govern the conduct of persons in connection with any DOE nuclear

activity and includes any program, plan, or other provision required to implement these rules, regulations, orders, or other requirements. DOE Nuclear Safety Requirements include the following:

- (i) 10 CFR part 830;
- (ii) 10 CFR part 835;
- (iii) 10 CFR 820.11;
- (iv) Compliance Orders issued pursuant to 10 CFR part 820, subpart C; and
- (v) 10 CFR 708.43, to the extent that subject activities concern nuclear safety.

\* \* \* \* \*

■ 3. Section 820.14 is added to subpart A to read as follows:

**§ 820.14 Whistleblower protection.**

(a) *Covered acts.* An act of retaliation (as defined in 10 CFR 708.2) by a DOE contractor, prohibited by 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a) through (c) may constitute a violation of a DOE Nuclear Safety Requirement if it concerns nuclear safety.

(b) *Commencement of investigation.* The Director may not initiate an investigation or take any other action under this part with respect to an alleged act of retaliation by a DOE contractor until 180 days after an alleged violation of 10 CFR 708.43 occurs.

(c) *Administrative or judicial proceedings.* The Director shall immediately suspend any ongoing activities under this part and suspend any time limits under this part when an administrative or judicial proceeding commences based on the same alleged act of retaliation. While an administrative or judicial proceeding, including appeals, is pending, the Director may not exercise any authority under this part based on an alleged violation of 10 CFR 708.43, including issuing enforcement letters, subpoenas, orders to compel attendance, Consent Orders, Preliminary Notices of Violation, or Final Notices of Violation. Once such a proceeding commences, the Director shall not conduct any activities under this part until sixty days after a final decision of an agency or court finds that a retaliation occurred, or otherwise makes a final disposition of the matter on procedural grounds without explicitly finding that retaliation did not occur.

(d) *Final decision.* For the purposes of this section, a final decision of an agency or court includes any of the following:

- (1) A final agency decision pursuant to 10 CFR part 708;

(2) A final decision or order of the Secretary of Labor pursuant to 29 CFR part 24;

(3) A decision by the Secretary upon a report by the Inspector General;

(4) A decision by a federal or state court.

(e) *Evidentiary record.* If a final decision of an agency or court finds that retaliation occurred, the Director may obtain and use information collected as part of those proceedings. The Director has discretion to give appropriate weight to information obtained from these proceedings and to initiate and conduct further investigation if the Director deems necessary, particularly with regard to the relationship between the retaliation and nuclear safety.

(f) *Underlying nuclear safety requirements.* Notwithstanding the commencement of an administrative or judicial proceeding based on an alleged act of retaliation, this section shall not prevent the Director from taking any action consistent with this part regarding compliance with DOE Nuclear Safety Requirements other than 10 CFR 708.43.

■ 4. Section 820.20 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 820.20 Purpose and scope.**

(a) *Purpose.* This subpart establishes the procedures for investigating the nature and extent of violations of DOE Nuclear Safety Requirements, for determining whether a violation of DOE Nuclear Safety Requirements has occurred, for imposing an appropriate remedy, and for adjudicating the assessment of a civil penalty.

(b) *Basis for civil penalties.* DOE may assess civil penalties against any person subject to the provisions of this part who has entered into an agreement of indemnification under 42 U.S.C. 2210(d) (or any subcontractor or supplier thereto), unless exempted from civil penalties as provided in paragraph (c) of this section, on the basis of a violation of a DOE Nuclear Safety Requirement.

\* \* \* \* \*

■ 5. Appendix A to part 820 is amended by revising section XIII to read as follows:

**Appendix A to Part 820—General Statement of Enforcement Policy**

\* \* \* \* \*

**XIII. Whistleblower Enforcement Policy**

a. DOE contractors may not retaliate against any employee because the employee has taken any actions listed in 10 CFR 708.5(a) through(c), including disclosing information, participating in proceedings, or

refusing to participate in certain activities. DOE contractor employees may seek relief for allegations of retaliation through one of several mechanisms, including filing a complaint with DOE pursuant to 10 CFR part 708 (part 708), the Department of Labor (DOL) under sec. 211 of the Energy Reorganization Act (sec. 211), implemented in 29 CFR part 24, or the DOE Inspector General (IG).

b. An act of retaliation by a DOE contractor, prohibited by 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a) through (c), may constitute a violation of a DOE Nuclear Safety Requirement under 10 CFR part 820 if it concerns nuclear safety. To avoid the potential for inconsistency with one of the mechanisms available to an aggrieved DOE contractor employee alleging retaliation referenced in section XIII.a, the Director will not take any action under this part with respect to an alleged violation of 10 CFR 708.43 until a request for relief under one of these mechanisms, if any, has been fully adjudicated, including appeals. With respect to an alleged retaliation, the Director will generally only take action that is consistent with the findings of a final decision of an agency or court. If a final decision finds that retaliation occurred, the Department will consider whether that retaliation constitutes a violation of § 708.43, and if so, whether to take action under part 820. If a final decision finds that no retaliation occurred, the Director will generally not take any action under part 820 with respect to the alleged retaliation absent significant new information that was not available in the prior proceeding. If a final decision dismisses a complaint on procedural grounds without explicitly finding that retaliation did not occur, the Director may take further action under part 820 that is not inconsistent with the final decision.

c. DOE encourages its contractors to cooperate in resolving whistleblower complaints raised by contractor employees in a prompt and equitable manner. Accordingly, in considering what remedy is appropriate for an act of retaliation concerning nuclear safety, the Director will take into account the extent to which a contractor cooperated in proceedings for remedial relief.

d. In considering what remedy is appropriate for an act of retaliation concerning nuclear safety, the Director will also consider the egregiousness of the particular case including the level of management involved in the alleged retaliation and the specificity of the acts of retaliation.

e. When the Director undertakes an investigation of an allegation of DOE contractor retaliation against an employee under part 820, the Director will apprise persons interviewed and interested parties that the investigative activity is being taken pursuant to the nuclear safety procedures of part 820 and not pursuant to the procedures of part 708.

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