

March 12, 1999

COMMISSION VOTING RECORD

DECISION ITEM: SECY-99-002

TITLE: AGREEMENT STATE COMPATIBILITY DESIGNATION FOR NRC EMPLOYEE PROTECTION REGULATIONS

The Commission (with Commissioners Dicus, Diaz, and Merrifield agreeing) disapproved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of March 12, 1999.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commissioners, and the SRM of March 12, 1999.

Annette Vietti-Cook
Secretary of the Commission

Attachments: 1. Voting Summary
2. Commissioner Vote Sheets
3. Final SRM

cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR
DCS

VOTING SUMMARY - SECY-99-002

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACKSON	X				X	2/1/99
COMR. DICUS		X			X	2/17/99
COMR. DIAZ	X	X			X	1/25/99
COMR. MCGAFFIGAN	X				X	2/12/99
COMR. MERRIFIELD	X	X			X	2/11/99

COMMENT RESOLUTION

In their vote sheets, Commissioners Dicus, Diaz, and Merrifield disapproved the staff's recommendation to address employee protection requirements in Agreement States by shifting applicable regulations to compatibility category C. Chairman Jackson and Commissioner McGaffigan approved the staff recommendation to make employee protection requirements a compatibility category C item. The Commission did not object to notifying Agreement States of the OSHA **EXIT** posting requirements. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on March 12, 1999.

Chairman Jackson's Comments on SECY-99-002

I approve the staff's proposed action in [SECY-99-002](#). Designating these regulations as Category C, as proposed by the staff, ensures that the States will have the flexibility to implement the requirements as they see fit. I recognize that most of the Agreement States have adopted a provision from Part J of the CRCPD's suggested State Regulations which contains a provision equivalent to the 1991 version of the NRC's employee protection provisions in [10 CFR 19.20](#). Although this provision does prohibit some discrimination against employees, it does not cover the complete scope of activities nor does it include the more detailed provisions of the other sections of the regulations. In addition, the recently promulgated [Department of Labor **EXIT**](#) regulations require Agreement State licensees to post information regarding the employee protection provisions of the Energy Reorganization Act. Therefore, since these States have chosen to assume the NRC's regulatory authority pursuant to Section 274 of the Atomic Energy Act, they should be required to meet and remain current on all of the NRC's employee protection requirements.

Commissioner Dicus' comments on SECY-99-002

I am not prepared at this time to approve the staff proposal to change the compatibility category for employee protection regulations but may do so in the future if staff can show that a regulatory performance gap exists that puts Agreement State licensee employees at a higher risk than NRC licensee employees.

NRC has made great strides in moving towards a risk informed, performance based regulatory approach. This approach should apply to our Agreement State program as well. NRC adopted the regulations in [10 CFR 19.20](#), [30.7](#), [40.7](#), [61.9](#), and [70.7](#), etc. to enable enforcement action against licensees who violate Commission requirements who discriminate against employees engaged in protected activities. In a supplemental note to my staff, NRC staff asserts that such provisions act as a deterrence, foster a safety conscious work environment and reduces possible chilling effects on employees. NRC's requirements are in addition to the USDOL regulations which provide for sanctions against employees who discriminate against employees.

Staff believes that the lack of Agreement State requirements similar to those of the NRC "threatens to jeopardize" an orderly pattern of regulation on a nationwide basis in accordance with Commission policy.

I do not disagree that NRC's requirements could have some positive effect upon NRC licensees and I recognize the possible application of the Commission's policy to this case. However, the application of this Commission policy should be balanced with a recognition that many of the Agreement States, notwithstanding the flexibility allowed in category C, will need to implement the requirement through rulemaking. Rulemaking is not cost-free. If a risk-informed, performance based regulatory approach is applied to this case, the following question emerges: Is there a regulatory performance gap such that Agreement State licensee employees are at a greater risk than NRC licensee employees, keeping in mind that USDOL requirements already provide for sanctions against employers in all States who discriminate against whistleblowers?

Staff's assertion that the present circumstances "threatens to jeopardize" an orderly regulatory pattern does not answer this question and so there is no basis to make a risk-informed, performance based decision. There, I must disapprove the proposal at this time but leave open the possibility to be persuaded otherwise should staff provide additional information to show that the proposal would be in keeping with our risk-informed performance based regulatory approach.

Commissioner Diaz' Comments on SECY-99-002

In 1992 Congress addressed this issue in the Energy Policy Act. Section 211 of the Energy Reorganization Act of 1974, as amended, and the implementing procedure adopted by DOL make it clear that employees of Agreement State licensees are covered under the same "whistleblower" protection provisions as those employees of NRC licensees. This ensures that employees of individual Agreement State licensees have a specific personal remedy to redress discrimination for engaging in protected activities. I believe that Agreement State authority to take enforcement action against licensees who discriminate against employees that engage in protected activities is a decision best left to the individual State. As such, I believe that NRC employee protection requirements should remain compatibility category D - not required for purposes of compatibility. I do agree, however, that staff should proceed to notify the Agreement States of the OSHA form.

Commissioner McGaffigan's Comments on SECY-99-002

I approve the staff recommendations to designate NRC's employee protection requirements as compatibility category C for Agreement State programs and notify the Agreement States of the Occupational Safety and Health Administration form which includes additional employee protection information. I also agree with the comments of the Chairman on this important issue.

Commissioner Merrifield's Comments on SECY-99-002

SECY-99-002 requests approval for the staff to take two actions. The first action is to change the Agreement State compatibility classification for NRC's employee protection provisions from a category D (not required for compatibility purposes) to category C (Agreement States must have the essential elements of these NRC regulations in their State regulations). The second action is to require the Agreement States to upgrade their Form 3 (employee notification requirements) to the current Department of Labor (DOL) requirements. Subsequent to the SECY paper, the staff offered an alternative to simply notify Agreement States to remind their licensees of the new DOL requirements. As described in the following paragraphs, I disapprove the staff's current plans to change the compatibility requirements to category C and I approve the staff's supplemental request that the Agreement State licensees be reminded of the new DOL wording on the Form 3.

First, both NRC and Agreement States are covered under the Energy Policy Act of 1992 section 2902 requiring employee protection for nuclear

whistleblowers. The DOL has the responsibility to investigate and provide personal remedy in cases of discrimination against personnel who raise safety concerns to regulators. In addition, the NRC has independent authority under the Atomic Energy Act to take enforcement actions against licensees and contractors who violate requirements which prohibit discrimination against employees based on their engaging in protected activities. Until now, the NRC regulations concerning employee protection have not been required for Agreement State compatibility. However, the staff now believes the essential elements of the NRC employee protection regulations should be required of the Agreement States because the lack of such elements, in some States, threatens to jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis. However, the staff offers this conclusion with no demonstrated evidence of actual problems where employees in Agreement States are harmed by a lack of consistent regulations in this area. Absence such data, I do not approve the staff's request. The process of modifying regulations in multiple Agreement States is costly in terms of State resources and should not be taken without ample justification, particularly in an area where protection is already provided by another regulation. However, if the staff believes, either now or at some time in the future, that there is ample evidence of harm to employees of licensees in Agreement States due to a lack of consistent regulations for employee protection, I will be willing revisit my decision.

I agree that there is no harm in notifying Agreement State licensees that they should be aware of new DOL requirements for the wording on the Form 3 which describes employee rights and protection. DOL has the led on the wording of the Form 3 and the Agreement State licensees are already required to conform to DOL regulations in this area.