



UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

December 23, 2005

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-05-0212

TITLE: PROPOSED RULEMAKING - CLARIFICATION OF NRC
CIVIL PENALTY AUTHORITY OVER CONTRACTORS AND
SUBCONTRACTORS WHO DISCRIMINATE AGAINST
EMPLOYEES FOR ENGAGING IN PROTECTED ACTIVITIES
(RIN 3150-AH59)

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of December 23, 2005.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook".

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons
OGC
EDO
PDR

VOTING SUMMARY - SECY-05-0212

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X				X	12/9/05
COMR. McGAFFIGAN	X				X	12/7/05
COMR. MERRIFIELD	X				X	12/14/05
COMR. JACZKO	X				X	12/8/05
COMR. LYONS	X				X	12/12/05

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on December 23, 2005.

NOTATION VOTE
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: CHAIRMAN DIAZ

SUBJECT: **SECY-05-0212 - PROPOSED RULEMAKING -
CLARIFICATION OF NRC CIVIL PENALTY
AUTHORITY OVER CONTRACTORS AND
SUBCONTRACTORS WHO DISCRIMINATE
AGAINST EMPLOYEES FOR ENGAGING IN
PROTECTED ACTIVITIES (RIN 3150-AH59)**

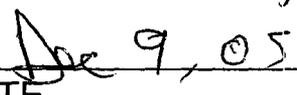
Approved ^{with edits and comments.} Disapproved Abstain
Not Participating

COMMENTS:

See attached edits and comments.



SIGNATURE



DATE

Chairman Diaz' Comments on SECY-05-0212

I approve the proposed rule for publication, subject to the attached edits. In addition, I recommend that the Commission certify that this rule, if promulgated, will not have a negative economic impact on a substantial number of small entities.

With respect to the Agreement State compatibility category of this proposed rule, given the desirability of consistency with other employee protection regulations, and the reasonableness of flexibility for Agreement States in this area, I do not object to the staff's designation of this proposed rule as Compatibility Category D.

A handwritten signature in black ink, appearing to be 'LD', is written over the end of the second paragraph.

Discussion

The proposed amendments would allow the Commission to impose civil penalties on contractors or subcontractors for violations of Commission employee protection requirements. The proposed rule represents a significant change in Commission policy in that, currently, a licensee can receive a civil penalty for the discriminatory activities of its contractor or subcontractor, while the contractor or subcontractor is not subject to civil penalty enforcement action. The proposed amendments would clarify the NRC's authority to impose a civil penalty directly on contractors or subcontractors who violate the NRC's employee protection regulations. This authority derives from section 234 of the Atomic Energy Act, which provides that the Commission may impose civil penalties on any person who violates any rule, regulation, or order issued under any of the enumerated provisions of the Act, or who commits a violation for which a license or license may be revoked. Section 11s of the Atomic Energy Act broadly defines the term "person" to include any individual, corporation, partnership, firm, association, trust, estate, public or private institution group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and any legal successor, representative, agent, or agency of the foregoing.

any term, condition, or limitation of any license or certification issued thereunder, or

In 1991, the Commission amended its regulations to allow it to take enforcement action against unlicensed persons for deliberate misconduct (56 FR 40664; August 15, 1991). In so doing, the Commission emphasized that "any person" as defined in the Atomic Energy Act necessarily encompasses non-licensees, in order to effectuate the purposes of the Act as it applies to licensees. In that rulemaking, the Commission also noted that it may be able to exercise its section 234 authority to impose civil penalties on unlicensed persons who deliberately cause a licensee to be in violation of requirements.

In 1998, the NRC issued a Severity Level I Notice of Violation without a civil penalty to Five Star Products, Inc., and Construction Products Research, Inc., in response to their discrimination against a former employee who raised safety concerns. Five Star Products, Inc., and Construction Products Research, Inc., were not licensees, but supplied safety-related basic components and services associated with those basic components to the nuclear industry at the time of the discrimination.¹

The activities of contractors and subcontractors can clearly affect the safe operation of a licensee's facility so that it is important that contractors and subcontractors abide by the Commission's employee protection regulations to effectuate the purposes of the Act. These amendments would allow the Commission to impose civil penalties on any non-licensee employer that discriminates against an employee for engaging in protected activity, if that employer is a contractor or subcontractor of a licensee, or the Corporation at the time that the employee engaged in the protected activity that resulted in discrimination. These amendments will serve the dual objectives of deterring contractors and subcontractors from violating NRC's employee protection regulations and allowing employees to raise regulatory and safety concerns without fear of retaliation. Both of these objectives are critical to the nuclear industry's ability to carry out licensed activities safely.

However, the Commission emphasizes that the proposed amendments do not affect its ability to impose civil penalties against licensees or applicants for discrimination, nor do they diminish the focus on licensee responsibility in the investigative and enforcement process. The Commission has long held licensees to be responsible for maintaining control and oversight of contractor and subcontractor activities. The proposed modifications to the employee protection regulations do not indicate a change in Commission policy in this regard, nor do they diminish

¹In an earlier case, ^{→ CLI-93-23/}38 NRC 169, 178-84 (1993), the Commission held that Five Star Products is a "contractor" and Construction Products Research, Inc., is a "subcontractor" within the meaning of Section 211 of the ERA and 10 CFR 50.7.

NRC's Agency-wide Documents Access and Management System (ADAMS). The NRC's PARS Library is located at <http://www.nrc.gov/readingrm/adams.html>.

Document	PDR	Web	ADAMS
Proposed Rule--Draft Regulatory Analysis	X	X	ML051950431
Proposed Rule--Draft Environmental Analysis	X	X	ML051950438
SECY-02-0166	X	X	ML022120479
SRM in SECY-02-0166	X	X	ML030850783
SECY-04-0195, Rulemaking Plan	X	X	ML042740294

Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. The proposed rule would enable the Commission to impose civil penalties upon non-licensee contractors and subcontractors who discriminate against employees for engaging in certain protected activities. This action does not constitute the establishment of a standard that contains generally applicable requirements.

Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" which became effective on September 3, 1997 (62 FR 46517), NRC program elements (including regulations) are placed into compatibility categories A, B, C, D, NRC or category Health and Safety (H&S). Category A includes program elements that are basic radiation protection standards or related definitions, signs, labels or terms necessary for a

common understanding of radiation protection principles and should be essentially identical to those of the NRC. Category B includes program elements that have significant direct transboundary implications and should be essentially identical to those of the NRC.

Compatibility Category C are those program elements that do not meet the criteria of Category A or B, but the essential objectives of which an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis. Compatibility Category D are those program elements that do not meet any of the criteria of Category A, B, or C, and do not need to be adopted by Agreement States. Compatibility Category NRC are those program elements that address areas of regulation that cannot be relinquished to Agreement States pursuant to the Atomic Energy Act, as amended, or provisions of Title 10 of the Code of Federal Regulations and ~~can~~ not be adopted by Agreement States. Category H&S are program elements that are not required for compatibility, but have a particular health and safety role in the regulation of agreement material and the State and should contain the essential objectives of the NRC program elements. ✓

The revisions to 10 CFR 50.7, 60.9, 63.9, 72.10, and 76.7 are not relevant to Agreement State programs because these NRC regulations address areas of exclusive NRC authority and are designated a Compatibility Category NRC. The revisions to 10 CFR 30.7, 40.7, 61.9, 70.7, and 71.9 are Compatibility Category D elements.

Plain Language

The Presidential memorandum dated June 1, 1998, entitled "Plain Language in Government Writing" directed that the Government's writing be in plain language. This memorandum was published on June 10, 1998 (63 FR 31883). The NRC requests comments on the proposed rule specifically with respect to the clarity and effectiveness of the language

10 CFR Part 61

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

10 CFR Part 63

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

10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 71

Criminal penalties, Hazardous materials transportation, Nuclear materials, Packaging and containers, Reporting and recordkeeping requirements.

10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

10 CFR Part 76

Certification, Criminal penalties, Radiation protection, Reporting and record-keeping requirements, Security measures, Special nuclear material, Uranium enrichment by gaseous diffusion. ✓

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;

PART 71 - PACKAGING AND TRANSPORTATION OF RADIOACTIVE MATERIAL

15. The authority citation for Part 71 is amended to read follows:

Authority: Secs. 53, 57, 62, 63, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2073, 2077, 2092, 2093, 2111, 2201, 2232, 2233, 2297f); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 71.9 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 71.97 also issued under sec. 301, Pub. L. 96-295, 94 Stat. 789-790.

16. In § 71.9, paragraph (c)(2) is revised to read as follows:

§ 71.9 Employee protection.

(c) ***

(2) Imposition of a civil penalty on the licensee, certificate holder applicant, or a contractor or subcontractor of the licensee, certificate holder or applicant. ✓

PART 72 - LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

17. The authority citation for Part 72 continues 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. 102-485, sec. 7902, 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); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

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, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

18. In § 72.10, paragraph (c)(2) is revised to read as follows:

§ 72.10 Employee protection.

(c) ***

(2) Imposition of a civil penalty on the licensee, applicant, or a contractor or subcontractor of the licensee, or applicant. ✓

NOTATION VOTE
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MCGAFFIGAN

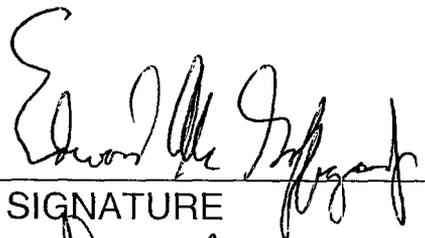
SUBJECT: **SECY-05-0212 - PROPOSED RULEMAKING -
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AGAINST EMPLOYEES FOR ENGAGING IN
PROTECTED ACTIVITIES (RIN 3150-AH59)**

Approved ^{w/comments} Disapproved Abstain

Not Participating

COMMENTS:

See attached comments.



SIGNATURE

December 7, 2005

DATE

Commissioner McGaffigan's Comments on SECY-05-0212

I approve of the staff's plan to publish in the *Federal Register* a proposed rule to amend employee protection regulations to exercise our authority to impose civil penalties against contractors and subcontractors. While the staff is amending several relevant sections at this time, they should ensure that any subsequent rulemakings are consistent with this approach. For instance, the potential revision of Part 52 should be examined to determine whether any regulation concerning employee protection needs to be modified to reflect the imposition of civil penalties against contractors and subcontractors, in addition to licensees, holders of a standard design approval, or applicants.

The staff should modify the proposed language in 10 CFR 71.9 to delete the two references to certificate holders, to make the regulatory provision consistent with the stated aims of the proposed rulemaking.

Finally, the staff has stated that the revisions to 10 CFR 30.7, 40.7, 61.9, 70.7 and 71.9 are designated as Compatibility Category D elements, but without explanation. The Staff should reconsider this designation given that the potential inconsistency in individual state employee protection programs will not further the creation of a national regulatory framework that ensures that licensees are subject to direct regulatory action by the appropriate radiation safety agency should discrimination occur against an employee who engages in protected activities. Furthermore, it is my understanding from the staff that there is evidence of problems in which employees in Agreement States may have been harmed by a lack of consistency in the regulations. Therefore, the Statements of Consideration should solicit comments from stakeholders concerning whether these regulations would more properly be considered Category C in which the essential objectives should be adopted by Agreement States.



Edward McGaffigan, Jr.

12/7/05

(Date)

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MERRIFIELD

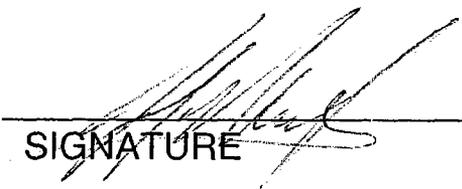
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PROTECTED ACTIVITIES (RIN 3150-AH59)**

Approved Disapproved Abstain

Not Participating

COMMENTS:

See attached comments.



SIGNATURE

12/14/05

DATE

Commissioner Merrifield's Comments on SECY-05-0212

I approve the staff's recommendation to publish the proposed rule in the *Federal Register* for public comment, as well as certification by the Commission that the rule will not have a negative impact on a substantial number of small entities.

In addition, I believe that Agreement State Compatibility Category D is the appropriate designation for the relevant portions of this proposed rule. It is my opinion that the NRC should not force sovereign states to have a whistleblower program comparable with the NRC's without express direction from the Congress. Although there may be a handful of examples where state incompatibility in the employee protection area has raised concerns, these should serve as a call to action for the states to improve their programs rather than the NRC to force them to it. If Congress chooses to have us apply this requirement to the Agreement program, so be it. Until they do, however, I do not believe a change in the compatibility requirements for employee protection regulations is appropriate.



12/14/05

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER LYONS

SUBJECT: **SECY-05-0212 - PROPOSED RULEMAKING -
CLARIFICATION OF NRC CIVIL PENALTY
AUTHORITY OVER CONTRACTORS AND
SUBCONTRACTORS WHO DISCRIMINATE
AGAINST EMPLOYEES FOR ENGAGING IN
PROTECTED ACTIVITIES (RIN 3150-AH59)**

with comments
Approved X Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.



SIGNATURE

12/12/05

DATE

Commissioner Lyons' Comments on SECY-05-0212
Proposed Rulemaking - Clarification of
NRC Civil Penalty Authority Over Contractors and Subcontractors

I approve the publication in the Federal Register a proposed rule to amend the Commission's employee protection regulations in 10 CFR 30.7, 40.7, 50.7, 60.9, 61.0, 63.9, 70.7, 71.9, 72.10, and 76.7 to allow the Commission to exercise its authority to impose civil penalties against contractors and subcontractors who violate these regulations. It is important that contractors and subcontractors abide by the Commission's employee protection regulations, and enabling the imposition of civil penalty enforcement actions on these entities will help deter violations of NRC's employee protection provisions.

I agree with the staff that for those provisions in the regulations that are relevant to Agreement State programs, Compatibility Category D be designated. Category D program elements do not need to be adopted by Agreement States because they do not meet the criteria of Categories A through C. I do not believe that it would jeopardize an orderly pattern in the regulation of agreement material nationally if the Agreement States do not adopt these provisions.


12/12/05

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

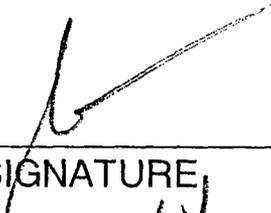
FROM: COMMISSIONER JACZKO

SUBJECT: **SECY-05-0212 - PROPOSED RULEMAKING -
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AGAINST EMPLOYEES FOR ENGAGING IN
PROTECTED ACTIVITIES (RIN 3150-AH59)**

Approved Disapproved Abstain

Not Participating

COMMENTS: See attached comments and edits.



SIGNATURE

12/8/25

DATE

the ability of the NRC to impose civil penalties against licensees. There may be instances in which the Commission may wish to issue civil penalties to the responsible contractor or subcontractor, or both, and the licensee; ~~for example, in cases where there are employee protection violations involving both licensee and contractor culpability or situations in which the licensee is aware of discrimination by its contractor or subcontractor and does not take immediate action to remedy the situation.~~ Although ^Tthe Commission is maintaining its policy of emphasizing licensee responsibilities for the actions of their contractors and subcontractors, ^{after addition} the Commission believes that these amendments are necessary and will enhance the regulatory process by allowing the Commission to exercise its authority to impose a significant enforcement action (i.e., civil penalty) directly on contractors or subcontractors who violate the NRC's employee protection regulations.

The NRC is not proposing to amend 71.9 and 72.10 to provide imposing a civil penalty against a holder or applicant for a CoC, or contractor or subcontractor of a holder or applicant for a CoC. However, if a CoC is also a contractor or subcontractor of a licensee, then a civil penalty could be imposed on a contractor or subcontractor in that capacity.

In addition, in drafting this proposed rule, the NRC identified that 10 CFR 76.7 does not specify the availability of civil penalties as an enforcement action. The Supplementary Information that accompanied the promulgation of 10 CFR 76.7 does not indicate that this omission was intentional.² Therefore, the NRC is proposing to amend 10 CFR 76.7 to bring it into conformance with the provisions of the other NRC's employee protection regulations by providing that the Commission may impose a civil penalty on the Corporation or a contractor or subcontractor of the Corporation.

²The Supplementary Information states that Part 76 is based upon comparable requirements; in particular, 10 CFR Part 70, as modified for the certification process. There is no indication that the omission of civil penalties was intended as such a modification (59 FR 48944; September 23, 1994).