

# United States Senate

WASHINGTON, DC 20510

March 6, 2017

The Honorable Rick Perry  
Secretary  
U.S. Department of Energy  
1000 Independence Ave., SW  
Washington, D.C. 20585

Dear Mr. Secretary,

On January 31, 2017, the Department of Energy (DOE) published a notice that it was issuing a stay on implementation of final rules<sup>1</sup> allowing DOE to hold contractors accountable for retaliation against whistleblowers who reported nuclear safety violations.<sup>2</sup> As you will come to learn, DOE has a long history of failing to protect whistleblowers, a history most recently documented in a Government Accountability Office (GAO) report released last July and prepared at our request.<sup>3</sup> We are writing to request that you immediately reinstate these rules, which have clear impacts on public safety and national security.<sup>4</sup>

The Department has indisputably had the statutory authority to take enforcement action, including the issuance of civil penalties, for nuclear safety violations by its contractors under Section 234A of the Atomic Energy Act.<sup>5</sup> These enforcement actions were based on DOE policy that whistleblower retaliation is itself a nuclear safety violation. However, in 2013, the Department concluded that its regulations did not allow for such enforcement and it ceased doing so.<sup>6</sup> Then in 2015, DOE officials told GAO it would take efforts to revise its regulations to address this issue yet never did so. In its 2016 report, GAO made numerous recommendations, including that DOE rectify this longstanding regulatory delay. DOE finally initiated a rulemaking on August 12, 2016 to address this problem.<sup>7</sup> Final regulations that clearly established that retaliation against whistleblowers for raising nuclear safety concerns was a nuclear safety violation, were issued on December 27, 2016.<sup>8</sup> Regrettably, one of the first actions taken by the incoming administration at DOE was to halt their implementation.

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<sup>1</sup> 82 FR 8807. The notice was published on January 31, 2017, stating that 10 CFR 820.2 820.14, 820.20(a) and (b), and appendix A to part 820, section XIII, are stayed until March 21, 2017. <https://www.gpo.gov/fdsys/pkg/FR-2017-01-31/html/2017-01959.htm>

<sup>2</sup> The Washington Post, "Trump administration halts penalties against firms that punish nuclear whistleblowers," February 8, 2017; [https://www.washingtonpost.com/news/powerpost/wp/2017/02/08/trump-administration-halts-penalties-against-firms-that-punish-nuclear-whistleblowers/?utm\\_term=.bbe2b2c8c349](https://www.washingtonpost.com/news/powerpost/wp/2017/02/08/trump-administration-halts-penalties-against-firms-that-punish-nuclear-whistleblowers/?utm_term=.bbe2b2c8c349)

<sup>3</sup> GAO, *Department of Energy – Whistleblower Protections Need Strengthening*; GAO-16-618; July, 2016; <http://www.gao.gov/assets/680/678332.pdf>

<sup>4</sup> See, 82 FR 8346. The memorandum published by the White House on January 21, 2017, staying certain regulatory action, includes exceptions for matters concerning safety or national security.

<sup>5</sup> 42 U.S.C. 2282a

<sup>6</sup> GAO, p. 40

<sup>7</sup> 81 FR 53337-53342, August 12, 2016

<sup>8</sup> 81 FR 94910-94914, December 27, 2017

Protecting those workers who report fraud, waste, abuse, and nuclear safety violations is crucial to safeguarding the government's interest. Whistleblowers who make appropriate reports to regulators, lawmakers, and even to their own management should be protected from contractors and managers who retaliate against those workers for these reports. The Department needs to send a message to its contractors that such reprisals will carry consequences. As DOE itself noted, "...DOE believes that there may be circumstances where civil penalties under part 820 are appropriate to ensure that future violations of the prohibition against whistleblower retaliation are deterred."<sup>9</sup>

Whistleblowers at DOE have exposed substantial waste, fraud and abuse, as well as prevented serious safety violations across the DOE complex. That DOE contractors have retaliated against these whistleblowers is well documented. What's missing is DOE's willingness to do something to reverse the culture of retaliation among its contractors and to demand accountability. After failing for years to close a regulatory chasm that prevented the DOE from fully using its nuclear safety authority to protect whistleblowers, including the use of civil penalties, DOE finally did so in December, only to then suspend them a month later. We request that you immediately lift this suspension and reinstate these rules.

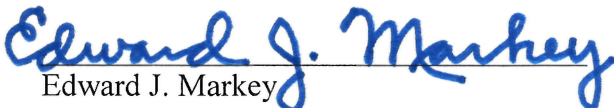
Sincerely,



Ron Wyden  
United States Senator



Claire McCaskill  
United States Senator



Edward J. Markey  
United States Senator

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<sup>9</sup> Ibid, p. 94912