



Organization of Agreement States

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February 27, 2006

Charles Miller, PhD, Director
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Mailstop 8 F5
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Subject: Draft Proposed Rule: 10 CFR Parts 20, 30, 31, 32, 35, 40, "Expanded Definition of Byproduct Material" (STP-06-001)

Dear Dr. Miller:

As Chair of the Organization of Agreement States (OAS), I am writing on behalf of the OAS membership to supplement and revise the comments provided by the OAS Executive Board on February 2, 2006. As you know, the OAS has facilitated participation of State representatives on the Naturally-Occurring & Accelerator-Produced Radioactive Material (NARM) Task Force and NARM Rulemaking Working Group (WG), as well as the joint Steering Committee overseeing both the NARM Task Force and NARM Rulemaking WG. Since the OAS Executive Board comment letter of February 2, 2006, the State representatives on the NARM Task Force, NARM Rulemaking WG and Steering Committee have all expressed very serious concerns to the OAS Executive Board regarding the proposed compatibility/adequacy designation for the definition of "Byproduct Material" (and other definitions included in the subject draft proposed rule). These concerns were passed on to the OAS State Program Directors, and the OAS Executive Board requested comments from the State Program Directors on these matters. This letter is provided to 1) revise the position of the OAS Executive Board, 2) provide justification for the revised position, and 3) transmit specific comments received from the State Program Directors in this regard.

In particular, the concerns of the State representatives on the NARM Task Force, Rulemaking WG and Steering Committee were related to:

- 1) A U.S. Nuclear Regulatory Commission (NRC) staff interpretation of compatibility designation "C" that: a) is not consistent with the definition in the NRC's Management Directive 5.9 Handbook, Part 1 or the NRC's Office of State and Tribal Programs' (STP's) Procedure SA-200, and b) is essentially equivalent to a Compatibility designation of "A" or "B."
- 2) The fact that both the "C" Compatibility designation and the "Health and Safety (H&S) Adequacy designation require the adoption of the "essential objectives" of a given

Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin

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program element means these designations are essentially indistinguishable from the perspective of program implementation (i.e., the difference is only a matter of whether the "essential objectives" must be met for purposes of compatibility or adequacy, and not a matter of how they will be met), so a misinterpretation of the "C" designation implicates a future misinterpretation of an "H&S" designation, which still places the Agreement States in the position of potentially having to amend definitions in both state statute and rule;

- 3) The fact that proposals for these compatibility/adequacy designations were being developed solely by NRC staff, and outside of the NARM Task Force and NARM Rulemaking WG confines, which precluded any opportunity for the State representatives to these groups to object, or to provide formal dissenting opinions before the group recommendations moved forward to the Steering Committee.

In light of these concerns, and the overwhelming support of the Agreement State Program Directors for a "D" Compatibility designation (32 of 33 Agreement States), the OAS Executive Board reconsidered the original opinion expressed in the February 2, 2006 comments on the subject draft proposed rule. That opinion was based on an understanding that a "C" compatibility designation would not result in any requirement for substantive changes to State statutes or rules, since the Agreement States have been meeting the "essential objectives" of the new rules for the past 40 years or more.

In addition, in making the comments transmitted February 2, 2006, the OAS Executive Board had considered the express language of the Energy Policy Act of 2005 (EPAAct) in making its comments. The EPAAct requires that:

"The Commission...to the maximum extent practicable--
 (i) cooperate with States; and
 (ii) use model State standards in existence on the date of enactment of this Act."

The OAS Executive Board took the plain language of the statute as a rather clear indication that the substantive burden would be upon the NRC to bring its regulations into conformance with the Agreement State regulations, since these regulations have, for 40 years or more, already provided for the safe control of the sources that will only now, after the enactment of the EPAAct, come under the jurisdiction of the NRC.

In summary, the OAS Executive Board, and the overwhelming majority of the membership (32 of 33 Agreement States, agree that the appropriate Compatibility/Adequacy designation at this time is a "D" for the definition of "Byproduct Material" (one State recommends a "C" designation, and one pending Agreement State responded supporting the majority). Please also be aware that OAS communications with the States focused specifically on the definition of "Byproduct Material," but that other definitions that arise from the EPAAct (e.g., "Particle Accelerator" and "Discrete") raise similar concerns.

Enclosed please find a document detailing the justification for the States' position that the definition of "Byproduct Material" (and other definitions arising from the EPAAct) should carry a "D" compatibility designation. Additionally, we are providing a compilation of the comments from each of the States responding to the OAS Executive Board's request for comments on this matter.

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Thank you for the opportunity to provide this additional input to you on this matter. Please contact me at 714-257-2031, or via the additional contact information below if you have any questions regarding this matter.

Sincerely,



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Enclosures: Justification of a "D" Designation for New Definitions Resulting from the Energy Policy Act 2005

State Comments on the Compatibility/Adequacy Designation for New Definitions Resulting from the Energy Policy Act 2005

Cc: Janet Schlueter, Director
Office of State and Tribal Programs
U.S. Nuclear Regulatory Commission

OAS Board (by email)

OAS State Program Directors (by email)

Debra McBaugh, Chair (by email)
Conference of Radiation Control Program Directors

Justification of a "D" Designation for New Definitions Resulting from the Energy Policy Act 2005

The Organization of Agreement States (OAS) Executive Board and 32 Agreement State Programs recommend that the Compatibility/Adequacy designation for definitions arising from the Energy Policy Act of 2005, with respect to the regulation of Naturally-Occurring and Accelerator-Produced Radioactive Material (NARM) in existing Agreement States be a "D;" i.e., not required for purposes of compatibility.

As stated in the Supplementary Information section of the draft Federal Register Notice for the Proposed Rule:

"The regulatory structure used by Agreement States does not distinguish between NARM...and other radioactive material. NARM users in Agreement States are expected to implement all aspects of standards for their radiation protection programs with respect to NARM, including those aspects relating to receipt, possession, use, storage, transfer, transportation, and disposal of NARM. This regulatory structure also subjects NARM users in the Agreement States to the same licensing, inspection, and enforcement policies as those using other byproduct, source, or special nuclear material."

Simply stated, the existing Agreement States already have programs in place to regulate NARM, compatible with the programs implemented pursuant to their agreements with the NRC to regulate other byproduct, source and special nuclear material.

As stated in the September 3, 1997 "Policy Statement on Adequacy and Compatibility of Agreement State Programs":

"An Agreement State radiation control program is compatible with the Commission's regulatory program when its program does not create conflicts, duplications, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis."

The Agreement State programs do not anticipate any "conflicts, duplication, [or] gaps," with respect to the regulation of NARM in the Agreement States, even with no changes to their definitions. The Agreement States will simply continue to regulate these materials as they have for the past 40 years. A requirement to revise the definitions currently in use (which in many cases are in both state statute and regulation) would create an enormous and unnecessary burden upon the Agreement States, potentially cause confusion for Agreement State licensees, and would not provide any measurable improvement to the system of regulation, since these NARM materials are already regulated under a system that, as stated above, is completely compatible with the programs implemented to regulate other byproduct, source and special nuclear material. If an Agreement State is currently compatible with respect to their regulation of other byproduct, source or special nuclear material, they will continue to be compatible with respect to the NRC's addition of NARM, since these sources are all regulated in the same manner. The only gap at issue should be the very sizable gap in the NRC regulations created by the former exclusion of NARM from NRC jurisdiction, which the Agreement States have filled for many years. The NRC needs to work to fill that gap now that they have jurisdiction over these materials, and the Agreement States are willing and able to assist the NRC in this matter, but it is the NRC, in this case, that will need to move toward compatibility with the Agreement States on this issue and not vice versa.

The Energy Policy Act of 2005 includes the following language:

"The Commission shall, to the maximum extent practicable--
(i) cooperate with States; and
(ii) use model State standards in existence on the date of enactment of this Act."

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It is clear from this language that Congress did not intend that this new authority granted to the NRC would or should disrupt the existing State programs already regulating the use of NARM, but that the NRC would "to the maximum extent practicable," conform their program to the State programs.

With respect to Compatibility, the appropriate designation for definitions arising from the Energy Policy Act of 2005 relating to the regulation of NARM, is "D," except that the NRC should to the "maximum extent practicable" provide definitions in their own regulations that are consistent and compatible with the existing State regulations, though they needn't be "essentially identical," since the NRC still does not have jurisdiction over the complete suite of radioactive materials and sources regulated by the States – i.e., the NRC should strive to meet the essential objectives of the existing State regulations.

With respect to the proposed "health and safety" designation, the Office of State and Tribal Programs, SA-200, "Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements," states in footnote 5:

"If the essential objectives of the program element were not adopted, it could result directly...in an exposure to an individual in excess of the basic radiation protection standards."

It is inconceivable that the failure of the Agreement States to add or amend the definitions of "byproduct material," "particle accelerator," "discrete," or other terms arising from the NARM provisions in the Energy Policy Act of 2005 could ever result in an "exposure to an individual in excess of the basic radiation protection standards," given that the Agreement States' regulation of NARM, and generic definition of "radioactive material" already extends far beyond the NRC's new jurisdiction with respect to these materials. Simply put, the Agreement States are already far more protective than the NRC in this regard, regulating non-discrete sources of NARM, and all machine-produced radiation, whether or not it is for the purpose of creating radioactive material for extraction. Based on the NRC's written procedures regarding the application of the H&S designation, it appears to be completely inappropriate to designate the new definitions as such.

In conclusion, the Agreement States have long had programs to regulate NARM, which programs are completely integrated into, compatible and consistent with the programs to regulate other byproduct, source, and special nuclear material. At this time, it is the NRC that needs to move to become compatible with the Agreement States with respect to the regulation of NARM; thus, the Agreement States do not need to make any changes with respect to the new definitions arising from the Energy Policy Act of 2005 relating to NARM regulation, for purposes of compatibility; these new definitions should therefore receive a compatibility designation of "D" as applicable to the States. In addition, these new definitions do not, in anyway, meet the express written intent of the H&S designation respecting adequacy, because the Agreement States' regulations and definitions are already far more comprehensive and protective than the NRC's, since the Agreement States have much broader authority to regulate in this area. The OAS Executive Board, and a majority of the Agreement States (32 of 33) recommend that the definitions arising from the Energy Policy Act of 2005 NARM provisions, receive a compatibility designation of "D," and that it be acknowledged, given the Agreement States broad jurisdiction over NARM and machine-produced radiation, they are not required for the purposes of Health and Safety.

The OAS Executive Board polled the Agreement States' Radiation Control Program Directors regarding the proposed compatibility/adequacy designation. Excerpts from their responses are given in the attached document.

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- (1) Alabama:
"[It] is my recommendation that the compatibility designation be no greater than "D."

I had many concerns, and still do, about the NRC take-over of NARM...The states have a wealth of knowledge and experience, especially in NARM that NRC should tap into to make NRC a better agency. States should not be made to reinvent the wheel simply because the wheel now has another spoke - NRC! That "new spoke" should act like the others."
- (2) Arizona:
"AZ suggests th[at] "D" is the proper compatibility class."

"I believe that [other States] have a point in that the changing of the definition [of] "byproduct material" may be a problem if the states are required in any way to adopt exacting wording. The new definition of "C" by staff is a violation of the intent of the "C" category...The need to redefine "byproduct material" is unique to NRC but not the states...when correctly understood, the states have already addressed the issue and no further action is necessary."
- (3) Arkansas:
"Arkansas continues to support the "D" compatibility [designation] for this definition."
- (4) California:
"California still strongly supports a "D" [designation]."
- (5) Colorado:
"As indicated previously to OAS, Colorado prefers compatibility "D" designation for the expanded definition of 'byproduct material'."
- (6) Florida:
"It needs to be a 'D.' There is no need for Florida to make changes to our regulations or our statutes to continue to do what we have always done...[the NRC] should be making the changes to be compatible with us."
- (7) Georgia:
"Georgia recommends the Compatibility D designation."
- (8) Illinois:
"Illinois firmly believes the definition of "Byproduct Material" be designated Compatibility Category D. As previously determined, it does not fit Category C, and it is further not appropriate to classify this definition as having a "health and safety significance" as described in Management Directive 5.9. It is important that the NRC begin to give professional recognition to the excellent regulatory programs that have been developed and administered by state radiation control programs prior to and in the absence of the NRC addressing such important issues as industrial radiography certification, effective general licensing, and NARM regulation."

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(9) Iowa:

"As far as Iowa is concerned "D" is what is necessary at this point in time.

"[Iowa has a] definition of "byproduct material" in [rule] as a matter of compatibility (Category A). However, this definition does not include all that Iowa law allows us to regulate. Therefore, we define "radioactive material." This definition is all-inclusive, and, when we adopt or amend our rules, as a result of compatibility or otherwise, we substitute this term. Until NRC publishes a new definition, our agreement covers byproduct material and our state law covers NARM and NORM.

"If NRC adopts the definition of byproduct material exactly as it exists in the new Energy Policy Act, the same, but slightly modified situation still exists. The new definition does not include all that our state law allows us to regulate... We will still employ the use of "radioactive material" regardless of what the compatibility category is. However, we do recommend D."

"There is another...possibly larger issue... There is a contradiction in what...the NARM Steering Committee's interpretation of Category C when it comes to the definition of byproduct material. Let me quote removing any extraneous words and adding some emphasis and clarifications:

"...the NARM Steering Committee interpreted that any Compatibility C rating would require States that currently have the definition of 'byproduct material' in statutes or regulations [which is everyone since it's an A], to be essentially the same as the new definition..."

"[Isn't this] just the definition of Category B...? This is a dangerous precedent. Will all C's then be interpreted as B's? Agreement States can not function on interpretations, but must have definite, written criteria, especially when it comes to IMPEP."

(10) Kansas:

"[For the short term] I suggest the following:

"Start with a compatibility of "D" with the intent that the NRC will have a three year period to bring their regulations and programs up to a level that are adequate and compatible with the States' regulations and programs, then change it to a "C," provided "C" really means "C" and not "B," since there are still many radionuclides and forms that do not fall under the new definition of byproduct material. This will give time to "work out the bugs" without putting in jeopardy any of the States' licensees' ability to provide needed radioisotopes and services to the medical community and their patients. I believe it should also alleviate many of the State's concerns about making this transition.

"The idea of this being an H&S category is completely unacceptable. It is the NRC's program that has, with respect to NARM, been inadequate (due to its non-existence) to protect the health and safety of the public not the States. This fact was recognized by Congress in the...EPAct.

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"Bottom line: "D" is the only acceptable compatibility category at this time."

In a separate communication, Kansas also provided the following:

"The compatibility should be "D" in order to avoid conflicts with existing state regulations that would disrupt the various affected industries (i.e. the medical industry and patient care). Perhaps when the NRC reaches the same level the states have in regulating NARM the compatibility could be changed to "C" but it is premature at this time.

The Act required NRC to consider the impact on production and availability of medical isotopes in implementing their regulation of accelerator-produced material. Putting too restrictive a compatibility requirement here would interfere with the ability of states to carry out their existing programs and cause disruption of the ability of medical isotope suppliers to legally produce and distribute their product!

I am very concerned about the "interpretation" of the Steering Committee with regard to the definition of byproduct material. As [Iowa] pointed out this is simply a redefinition of Category C to Category B which is unacceptable and sets a precedent the States cannot live with."

(11) Kentucky:

"Kentucky must vote for D also for the same reasons as Maine."

(12) Louisiana:

"Louisiana, as many other states, defines both byproduct material and radioactive material in legislation (R.S. 30:2103) and regulation. The definition of radioactive material captures NARM and our program appears to accomplish the essential objective of the corresponding (proposed) Commission program elements. Therefore it seems to be an unnecessary burden to change the definition in the Louisiana Revised Statutes and all of our regulations.

"Category C seems to be appropriate (the essential objective of regulating NARM should be met), but if category C compatibility is to be interpreted differently than the plain language, we recommend compatibility category D to ensure that states will not have to change definitions."

(13) Maine:

"Maine has to vote for D due primarily to the fact that I personally can't make sense out of this. The facts as I see them:

1. States (with programs) have regulated all materials for a large number of years.
2. These States have had years of input in the development and review of regulations, their own and the SSR's.
3. The NRC has determined that something they have never regulated (and didn't want to), but we have, is of Health and Safety significance.
4. They will be the ones to tell us if we are doing it right.

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"This is just an idea:

1. Find out what the States all have for definitions, my guess is they are all similar or exactly the same.
2. Make NRC come into compliance with us."

(14) Maryland:

"The Agreement States have in the term, radioactive material, a definition that encompasses byproduct and NARM. If Section 274b were really being practiced as written, I believe the NRC would be working to gain compatibility with the Agreement States by adopting the definition that the States have used so successfully for so many years.

I believe category D is as close to the original intent of Section 274b of any provision developed and I still support it here. The addition of the health and safety consideration does not strengthen the definition of byproduct material, nor should it be used as an "end around" to coerce Agreement States to accept cumbersome, nondescript and impractical term. What's really obsolete here is the term, "byproduct material".

(15) Massachusetts:

"Massachusetts joins with its state partners in voting 'D'. As [NY-DOL] says, anything else would be a violation of both the text and spirit of the EPAct."

(16) Minnesota:

"I believe that there should be a nationally consistent program at some point but I feel the NRC is going about it backwards. Without federal direction and a framework, D is the most they can ask for at this time."

(17) Mississippi:

"Mississippi votes 'D'."

(18) Nebraska:

"Nebraska still votes for D."

(19) Nevada:

"For many of the reasons [Oklahoma] discusses...Nevada votes for the 'D' designation."

(20) New Hampshire:

"As we stated in our earlier email regarding this subject, NH supports a "D" designation for the revised definitions. In light of this new information, we do not support an H&S designation for the definition of "byproduct" material. NH has been regulating all radioactive material uniformly certainly since entering into the Agreement (April 1966), and was regulating non-AEA material well before that as well. We see no need to now to have to amend our statute, regulations or programs in this regard, which is still what an "H&S" designation would do. We must insist on the "D" designation."

(21) New Mexico:

New Mexico recommends the "D" designation for the same reasons [Oklahoma] so thoroughly discussed.

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(22a) New York – DOL:

“According to the EAct:

“The Commission shall, to the maximum extent practicable--

- (i) cooperate with States; and
- (ii) use model State standards in existence on the date of enactment of this Act.’

“This means that the Commission needs to define “Radioactive material” and “Radiation source” and reword the “scope” sections of its regulations to bring them into compliance with the existing State regulations and the SSRs. The States don't need definitions of byproduct, source and special nuclear material (except for clarification purposes), since their regulations cover all radioactive materials anyway.

“In order to comply with the statute, the maximum burden should be borne by the Commission in bringing their regulations into line with the States, not the other way round. While they are at it, the Commission needs to add another compatibility category:

E - Program element, the essential objectives of which should be adopted by the Commission to avoid conflicts, duplications or gaps.”

(22b) New York – DEC:

“I agree with the points presented [by other States]. NYSDEC votes for “D.”

(22c) New York – DOH:

“New York State Department of Health recommends ‘D’.”

(22d) New York City:

“New York City votes for D.”

23) North Carolina:

“We agree that the definition of “Byproduct Material” should not be required for compatibility; however, NC does not agree with the NRC that H&S is the right fit. This logic of not being required for compatibility seems to be consistent with what the EAct has mandated of the NRC in bringing this material under their jurisdiction (after decades of this material and other material being under AS jurisdiction). It seems to me that a Compatibility D designation is the only logical fit. NC is voting for a D designation. This vote is also a product of the recent NRC's misinterpretation of Compatibility C.”

(24) North Dakota:

“I agree with [Maryland's statements]. Compatibility D is best. Another issue to consider here is the magnitude of changes that can ripple through an entire rule when a definition is changed. NRC should focus more on performance not prescriptive rulemaking.”

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(25) Ohio:

"I believe this should be Compatibility "D." States are already adequately regulating this material, and have been doing so for quite some time. The NRC needs to recognize this and factor this into the appropriate designation."

(26) Oklahoma:

"As I understand it, NRC has directions in the EPAct to ensure that they work cooperatively with states, use existing state standards, and ensure that the production and use of medical isotopes is not disrupted. NRC's creative interpretation of what a "C" compatibility would mean on this issue, followed by a proposed "H&S" compatibility that would mean "states could be the same or more restrictive" causes me concern.

"The new rules on incorporating NARM into Byproduct Material regulation being promulgated under EPAct are to add accelerator-produced material, and a limited number of radium sources. An opening is left to allow regulation of certain other naturally-occurring radioactive materials, but I am unaware of any such sources being seriously considered to be added.

"The definition of accelerator-produced material is not in dispute or doubt, and to my knowledge, states are already largely or perhaps unanimously using the same standards to define what accelerator-produced materials are regulated.

Defining which radium (or other naturally occurring) sources is much less clear, and it appears there is some variance among states. Most of the variance occurs among things like aircraft instruments with radium paint, or old Revigators that pose extremely limited radiation threat, and are definitely of no use to an adversary for malevolent purposes.

Oklahoma does not believe that variations in how Revigators and old artificial horizons are regulated is a matter of health and safety significance. The H&S designation is not justified for this rule. More powerful sealed radium sources are definitely of H&S significance, but there is no controversy over regulating them. Conceivably there are a handful of radioactive sources in existence in the country that are in a gray area, but capturing them does not justify the disruption it would cause.

NRC seems intent on ensuring through one means or another, that all states adopt the exact or nearly exact wording of the proposed NRC definition of byproduct material, one that to my knowledge had no existence until developed under the EPAct. Their proposed compatibility definitions have repeatedly come back to this, even warping the established meaning of a "C" compatibility to accomplish it. This intent is inconsistent with the clear direction given under the EPAct that NRC respect state standards to the greatest extent possible, and that they avoid disruption of the provision of medical isotopes.

Oklahoma is concerned that if this approach is pursued to a conclusion, states will have to expend significant amounts of resources in rulemaking and legislative changes to change a definition that has very little real-world radiation safety importance. This would be unfortunate, given the large burden the states are under in carrying out the Increased Controls

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as we are now. It would detract from the successful implementation of the Increased Controls inspections by drawing away staff time and management attention.

Similarly, implementation of this standard will create confusion over who has regulatory authority over many areas of accelerator-produced materials, some of which are critical for medical use. This confusion would persist until all states adopted the NRC wording. This is contrary to the intent of the EPAct, which specified that disruptions in production of these isotopes should be avoided.

Before the current discussions started, a "C" compatibility designation, using the traditional definition of "C" might have been acceptable. After seeing how this is going, I am concerned that NRC staff would misapply "C" compatibility, even if NRC now abandoned their flawed attempt to redefine "C". In short, Oklahoma believes that a "D" compatibility is the appropriate designation for the new definition."

(27) Oregon:

"Oregon agrees with a compatibility D designation for the byproduct material definition."

(28) Rhode Island:

"Rhode Island response- as before I feel that "D" is the proper response. I agree with [Texas] re: [a] need for better qualifiers on part of NRC if another compatibility is chosen, to avoid [problems] that could present...due to interpretation[s] on part of NRC staff."

(29) South Carolina:

"Call it anything you want to but the bottom line is the states must ensure and demand that NRC accept current state designations without undue and unnecessary burden to the States. We must insist on D. That's my vote."

(30) Tennessee:

"It is unfortunate that...NRC seem[s] unable to accept that the Agreement States got it right the first time, and that no further modification of either our enabling legislation or rules are necessary to accommodate whatever definition of byproduct material they may come up with. What we regulate is any "radiation source", which we define, and which includes "radioactive material", which we also define, and which includes as a subset whatever NRC might define as byproduct material. We really don't have a need for a definition of "byproduct material". Tennessee continues to advocate for Category 'D'."

(31) Texas

"The states developed the first well logging rules and when NRC adopted theirs years later, they required the states to fit into their "new mold" even though many states had adopted the well logging rules much earlier. The same thing happened with the Industrial Radiographer two-person rule. NRC's entry into NARM regulation should not supplant the state's efforts that have been in effect in many states prior to the Atomic Energy Act and Commission. The designation must be D or a very qualified C that future NRC staff will not try to interpret as B."

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(32) Utah

"[Utah] believe[s] that category "C" is most applicable recognizing the definition changes to rules and statute that may be necessary."

(33) Washington:

"As we previously indicated, the only satisfactory category is D.

"There seems to be valid concern about additional work the states might be required to do if the compatibility rating for the expanded definition of "Byproduct Material" becomes a category C; therefore, we recommend compatibility category D."

(34) Wisconsin:

"[Wisconsin] also believe[s] that a 'D' compatibility rating may be the best option. Although a 'C' compatibility could work, an initial 'D' rating provides the best assurance that states (during this transition) won't be ratcheted into something that causes us problems."