

POLICY ISSUE (Notation Vote)

August 14, 2012

SECY-12-0112

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: POLICY STATEMENTS ON AGREEMENT STATE PROGRAMS

PURPOSE:

The purpose of this paper is to request Commission approval to publish for public comment in the *Federal Register* draft revisions to the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” and the “Statement of Principles and Policy for the Agreement State Program.”

SUMMARY:

The Commission, in Staff Requirements Memorandum (SRM) “SECY-10-0105, Final Rule: Limiting the Quantity of Byproduct Material in a Generally Licensed Device” (U.S. Nuclear Regulatory Commission’s (NRC) Agencywide Documents Access and Management System (ADAMS) Accession No. ML103360262) dated December 2, 2010, directed the NRC staff to update the Commission’s “Policy Statement on Adequacy and Compatibility of Agreement State Programs” and associated guidance documents to include both safety and source security considerations in the determination process. Both the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” and the “Statement of Principles and Policy for the Agreement State Program” have been updated, by two working groups composed of NRC and Agreement State representatives, to include adding information on security of radioactive materials, safety culture, and incorporating changes in the NRC’s policies and procedures since they became effective in 1997.

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BACKGROUND:

On August 25, 1993, the Commission directed the NRC staff to recommend improvements to the NRC's Agreement State Program to assure adequate protection of public health and safety. The policy statements were developed by a working group consisting of Agreement States and the NRC staff and subject to a number of workshops and meetings to gather stakeholder input. The Commission approved both policy statements on June 29, 1995, but deferred their implementation until all implementing procedures were completed and approved by the Commission. These policy statements became effective on September 3, 1997 (62 FR 46517).

The Commission in SRM, "SECY-10-0105, Final Rule: Limiting the Quantity of Byproduct Material in a Generally Licensed Device," dated December 2, 2010, directed the NRC staff to update the Commission's "Policy Statement on Adequacy and Compatibility of Agreement State Programs" and associated guidance documents to include both safety and source security considerations in the determination process. Since Agreement State adequacy and compatibility are key components of the Integrated Materials Performance Evaluation Program (IMPEP) process¹, the Commission's policy statement on the "Statement of Principles and Policy for the Agreement State Program" is being revised concurrently. Two working groups operating in accordance with NRC Management Directive 5.3, "Agreement State Participation in Working Groups," dated August 22, 2007 (ADAMS Accession No. ML070940610), have revised these policy statements. The revisions include adding information on security of radioactive materials, safety culture, and incorporating changes in the NRC's policies and procedures since they became effective in 1997.

DISCUSSION:

The Commission tasked the NRC staff with updating the Commission's "Policy Statement on Adequacy and Compatibility of Agreement State Programs" and associated guidance to include both safety and source security in the determination process. The policy statement as issued in 1997 continues to remain relevant and effectively serves the mission of the agency. However, the NRC staff concluded that the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" and the "Statement of Principles and Policy for the Agreement State Program" both required revision to meet the intent of the SRM by clarifying that security is part of the agency's health and safety mission and updating the policy statements to include current policies, procedures, and practices. Consequently, the NRC staff and the Agreement states convened two working groups to identify appropriate revisions. The two working groups met concurrently and periodically interfaced.

Following the events of September 11, 2001, the NRC's regulatory oversight was enhanced by developing and implementing additional security measures. Although source safety and security have always been inherent to the protection of public health and safety, the working groups recognized that the two policy statements needed to specifically acknowledge that the NRC and Agreement State oversight of these enhanced security measures should not be confused with the NRC's mission to promote the common defense and security. The working groups revised the purpose sections of the policy statements to indicate that public health and safety includes physical protection of agreement material.

¹ The NRC developed the IMPEP process to evaluate the adequacy and compatibility of Agreement State programs and the adequacy of NRC's nuclear materials program activities.

The two working groups also reconciled a difference in terminology in the policy statements as they were originally published. The “Policy Statement on Adequacy and Compatibility of Agreement State Programs” used the term “agreement material” as byproduct, source, and small quantities of special nuclear material as defined in Section 274b. of the Atomic Energy Act (AEA) of 1954, as amended. The “Statement of Principles and Policy for the Agreement State Program” used the term “AEA material” to describe the same material. While the terms “agreement material” and “AEA material” are generally viewed as synonymous, using different terms in the policies may be construed to suggest that the NRC intended the terms to have different meanings. The working groups decided to use the term “agreement material” throughout both policy statements.

The working groups also made a number of editorial changes to both policy statements to improve the flow of the document, remove redundant language, add clarifying language, and use plain language as appropriate. One such change included replacing the word “relinquish” with “discontinue.” Other NRC documents have used the term “relinquish” rather than “discontinue” of regulatory authority which is used in the AEA. Because both terms have essentially the same meaning, either term can be used to describe NRC discontinuance of regulatory authority under a Section 274b. agreement. Key changes to each policy statement are discussed in the following paragraphs. In addition, tracked change versions of the policy statements are provided in Enclosure 1, “Adequacy and Compatibility of Agreement State Programs—redline-strikeout” and Enclosure 2, “Statement of Principles and Policy for the Agreement State Program—redline-strikeout.”

Policy Statement on Adequacy and Compatibility of Agreement State Programs

Several changes were made to the policy statement in addition to addressing security as previously discussed. For the purpose of this policy statement, physical protection of agreement material is part of public health and safety.

The working group revised the Compatibility Category B discussion to better describe “significant transboundary implications.” Program elements with significant transboundary implications were illustrated by examples in the 1997 policy statement. The working group concluded the examples were not all-inclusive and could lead to misinterpretation by stakeholders, Agreement States, and NRC staff. In an attempt to clarify the meaning of a significant transboundary implication, the working group is proposing to define “significant transboundary implication” as one which crosses regulatory jurisdictions, has a particular impact on public health and safety, and needs to be addressed to ensure uniformity of regulation on a nationwide basis. In comments received from Agreement States, the working group realized that the use of the word “particular” can be vague and cause confusion. To help resolve this ambiguity, the NRC staff proposes to highlight this issue in the *Federal Register* notice and specifically ask for public comment on the draft definition of “significant transboundary implication.”

Additional changes in the draft revision to the policy statement were made under the section Compatibility. For Compatibility Category B, the working group added that economic factors should not be considered for program elements with significant transboundary implications. The decision for a compatibility category determination should be based on public health and safety and not financial implications. For Compatibility Category C, the working group concluded it

was important to clarify that program elements and regulations assigned this category of compatibility could be more restrictive than the equivalent NRC program element or regulation.

During the concurrence process, changes to the policy statement were made beyond the proposed edits of the working group. Half of the working group members, including both the Organization of Agreement States (OAS) and Conference of Radiation Control Program Directors representatives, disagreed with two of the changes. To express the working group's dissent, a discussion of the changes is presented in Enclosure 3, "Dissenting Opinion for Changes Made to the Policy Statement on Adequacy and Compatibility." Once the dissention was included, the working group agreed to move the policy statement forward.

Statement of Principles and Policy for the Agreement State Program

Several changes were made throughout the document to demonstrate a clear connection between public health and safety and security. The NRC and Agreement State radiation control programs maintain regulatory oversight for the safe and secure handling of nuclear materials. These programs have always included the security of nuclear materials as an integral part of their health and safety mission as it relates to minimizing the risk of exposure to workers and the public. Throughout the 1997 policy statement, the phrase "safe use" of material was used. To foster security for purposes of public health and safety, the phrase "safe use" of material was replaced with "safe and secure use" of material.

The working group also added that organizations performing regulated activities are encouraged to establish and promote a positive safety culture as described in the Final Safety Culture Policy Statement (76 FR 34773; June 14, 2011). While not incorporated in regulation, many of the traits of a positive safety culture are inherent in existing radiation safety programs. The working group believes organizations overseeing regulated activities involving nuclear material should take steps to promote and maintain a positive safety culture.

Several updates were made to align the policy statement with current practices under IMPEP. The working group expanded the text addressing the actions taken by the NRC as a result of program review findings. Options that can be used to address performance issues include monitoring, heightened oversight, probation, suspension, and termination.

AGREEMENT STATE COMMENTS:

Copies of the draft revisions to the policy statements were provided to the Agreement States for an early opportunity for review and input. Four Agreement States and the OAS provided comments on both policy statements. The following paragraphs present the working group reconciliations of their core issues.

Policy Statement on Adequacy and Compatibility of Agreement State Programs

As previously mentioned in the Discussion section, the working group for the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" modified language in the draft revision to define "significant transboundary implication" under Compatibility Category B. The working group defined "significant transboundary implication" as one which crosses regulatory jurisdictions, has a particular impact on public health and safety, and needs to be addressed to ensure uniformity of regulation on a nationwide basis. Two Agreement States and the OAS

expressed concern with the use of the term “particular.” The comments suggested the text be changed to “negative” impact on public health and safety. The working group agreed that the use of the word “particular” in the definition of “significant transboundary implication” can cause confusion. However, the working group as a whole does not agree with the use of the word “negative” as an appropriate replacement and concluded that it is not in the spirit of what the original definition was trying to accomplish. The proposed *Federal Register* notice highlights this concern and specifically invites public comment on the definition of “significant transboundary implication.”

Statement of Principles and Policy for the Agreement State Program

Two Agreement States and the OAS noted an inconsistency between the two policy statements concerning the expanded text on security of agreement material and requested the “Statement of Principles and Policy for the Agreement State Program” be changed from “preventing malevolent uses” to “protection of the public against unauthorized or malicious use” citing that prevention of malevolent use is not achievable. The working group made the suggested change.

The Agreement States expressed concern over the inclusion of the NRC’s Final Safety Culture Policy Statement. Three Agreement States and the OAS shared the opinion that licensees should be able to use any literature regarding safety culture not just that developed by the NRC. The working group concluded that reference to the NRC’s Final Safety Culture Policy Statement should be removed because the Agreement States can use other references to meet the goal of a positive safety culture. The working group further added that organizations should not only promote a positive safety culture but also maintain a positive safety culture.

One Agreement State commented on language in the regulatory development section that was unchanged in the draft, citing that the section limits Agreement State involvement to only development of new policies and procedures. It was not the intent of the original or revision to imply that Agreement States would only have involvement in new regulations, policies, and procedures. The policy statement was revised to clarify that the NRC and Agreement States will cooperate in the development of new and revised regulations, policies, and procedures.

One Agreement State commented that it appears the NRC’s assistance to Agreement States was diminished in the revised draft policy. It was not the intent of the working group to imply that there was a change to the NRC’s current policy to provide assistance for training and other activities. The working group wanted to allow for future circumstances whereby the NRC may not be able to provide this assistance or reduce the assistance due to budgetary constraints. The working group kept the draft language.

One Agreement State and the OAS noted that a follow-up IMPEP meant the same as a routine IMPEP review. This is not correct; the reviews are different. The NRC conducts a follow-up IMPEP review when serious performance concerns are identified in one or more but not all performance indicators identified during a routine IMPEP review. The follow-up review takes place before the next routine IMPEP and concentrates on the indicators found less than fully satisfactory during the previous IMPEP review.

COMMITMENT:

The staff commits to holding at least one public meeting on the policy statements during the public comment period and to reviewing and considering public comment received in developing the draft final policy statements for Commission consideration.

RECOMMENDATION:

The NRC staff recommends that the Commission:

Approve for publication, in the *Federal Register*, the proposed revisions to the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” and the “Statement of Principles and Policy for the Agreement State Program.” (Enclosure 4).

Note:

- a. That the proposed revisions will be published in the *Federal Register*, allowing 75 days for public comment.
- b. The staff has determined that this action is not a “major rule” as defined in the Congressional Review Act of 1996 [5 U.S.C. 804(2)] and will confirm this determination with the Office of Management and Budget.
- c. That appropriate Congressional committees will be informed of this action.
- d. That a press release will be issued by the Office of Public Affairs when the policy statements are filed with the Office of the Federal Register.

RESOURCES:

The resources needed to update the policy statements and associated Management Directives addressed in this paper total about one full-time equivalent over a 2 year period (fiscal year (FY) 2012 and FY 2013). Resources budgeted for Agreement State activities in FY 2012 and FY 2013 are sufficient to cover these updates. No contract dollars are needed for this project and any travel expense will be funded by the NRC staff travel budgets.

COORDINATION:

The Office of the General Counsel has no legal objection to the revised policy statements. The Office of the Chief Financial Officer has reviewed this SECY Paper for resource implications and has no objections.

/RA by MWeber for/

R. W. Borchardt
Executive Director
for Operations

Enclosures:

1. Adequacy and Compatibility of Agreement State Programs, redline-strikeout
2. Statement of Principles and Policy for the Agreement State Program, redline-strikeout.
3. Dissenting Opinion for Changes Made to the Policy Statement on Adequacy and Compatibility
4. *Federal Register* notice

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