

POLICY ISSUE **(Notation Vote)**

April 10, 2017

SECY-17-0046

FOR: The Commissioners

FROM: Victor M. McCree
Executive Director for Operations

SUBJECT: AGREEMENT STATE PROGRAM POLICY STATEMENT

PURPOSE:

To request Commission approval to publish the final U.S. Nuclear Regulatory Commission (NRC) Agreement State Program Policy Statement in the *Federal Register* (Enclosure 1).

SUMMARY:

In response to Staff Requirements Memorandum (SRM) to SECY-15-0087, "Agreement State Program Policy Statement and Program Recommendations," (Agencywide Documents Access and Management System (ADAMS) Accession No. ML16082A514), dated March 22, 2016, the NRC staff published the proposed Agreement State Program Policy Statement (81 FR 35388) in the *Federal Register* on June 2, 2016, for a 75-day public comment period. The staff also held two public webinars during the comment period. The staff provides the resulting draft final Agreement State Program Policy Statement for the Commission's consideration.

BACKGROUND:

Currently, the Agreement State program is governed by two policy statements. The "Policy Statement on Adequacy and Compatibility of Agreement State Programs" (62 FR 46517) presents the NRC's policy for determining the adequacy and compatibility of Agreement State programs. The "Statement of Principles and Policy for the Agreement State Program"

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(62 FR 46517) describes the respective roles and responsibilities of the NRC and the Agreement States in the administration of programs carried out under the 274b. State Agreement.¹ The application of these two policy statements has significant influence on the oversight of Agreement State and NRC materials regulatory programs (the National Materials Program (NMP)) and the regulation of the more than 20,000 materials licensees in the NMP.

The NRC staff's current efforts to update the Agreement State policy statements began with the Commission's direction in the SRM to SECY-10-0105, "Final Rule: Limiting the Quantity of Byproduct Material in a Generally Licensed Device (RIN 3150-AI33)" (ADAMS Accession No. ML103360262), issued on December 2, 2010. The Commission 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 compatibility determination process. Because Agreement State adequacy and compatibility are closely linked to the Integrated Materials Performance Evaluation Program (IMPEP)², which is a key component of the Commission's "Statement of Principles and Policy for the Agreement State Program," both policy statements were revised concurrently. Both policy statements were updated to add that public health and safety includes physical protection of agreement material. Two working groups, composed of NRC (headquarters and regional) staff and Agreement State representatives, developed the revisions to the policy statements. The draft revisions to the two policy statements were provided to the Commission on August 14, 2012 (SECY-12-0112, "Policy Statements on Agreement State Programs" (ADAMS Accession No. ML12110A183)).

The Commission approved publication of the draft revisions to the policy statements for public comment in the revised SRM to SECY-12-0112, dated May 28, 2013 (ADAMS Accession No. ML13148A352). The NRC staff published the two proposed policy statements on June 3, 2013 (78 FR 33122), for a 75-day comment period. After receiving requests from the Organization of Agreement States (OAS) and the State of Florida to extend the public comment period, the NRC extended the comment period to September 16, 2013 (78 FR 50118; August 16, 2013). The NRC held two public meetings (July 18 and August 6, 2013), and a topical session during the OAS annual meeting in Reno, Nevada, on August 28, 2013. The NRC staff specifically solicited comment on Compatibility Category B, and whether or not the policy statements should maintain the language from the 1997 "Policy Statement on Adequacy and Compatibility of Agreement State Programs" describing the adoption and number of compatible regulations. The NRC staff received 13 submissions from commenters including Agreement States, industry organizations, and individuals. These submissions contained 51 comments on the policy statements in general and 45 comments on Compatibility Category B. The need for consistent application and flexible implementation of the NRC's policies was the underlying theme expressed by the Agreement States in the written comments as well as during the public meetings and the OAS topical session. Some commenters provided general remarks and addressed specific sections of the policy statements. Some commenters also expressed

¹ Section 274 of the Atomic Energy Act of 1954, as amended (AEA), provides a statutory basis under which the NRC discontinues portions of its regulatory authority to license and regulate byproduct materials; source materials; and quantities of special nuclear materials under a critical mass. The mechanism for the transfer of the NRC's authority to a State is an agreement signed by the Governor of the State and the Chairman of the Commission, in accordance with Section 274b. of the AEA.

² The NRC, in cooperation with the Agreement States, developed the IMPEP to evaluate the adequacy and compatibility of Agreement State programs and the adequacy of the NRC's nuclear materials program activities.

concern that the inconsistent use of terms (e.g., material versus agreement material, enhanced security measures versus physical protection of agreement material, and relinquishing the NRC's authority versus discontinuing the authority) could cause confusion. Regarding Compatibility Category B, the comments show a wide variation on the interpretation of the definition of Compatibility Category B. The NRC staff considered the Agreement States' written comments, input from attendees at the two public meetings, and comments received at the OAS topical session and made modifications to the policy statements to ensure terms are used appropriately. The NRC staff's disposition of these comments was presented in a comment resolution table (ADAMS Accession No. ML14073A549) associated with the June 3, 2013, *Federal Register* Notice (78 FR 33122).

In COMSECY-14-0028, "Agreement State Program Policy Statements: Update on Recent Activities and Recommendations for Path Forward," dated July 14, 2014 (ADAMS Accession No. ML14156A277), the NRC staff proposed a plan to consolidate the two policy statements into a single policy statement, while preserving the work already completed by the two working groups to update the separate policy statements. The Commission approved this plan in the SRM to COMSECY-14-0028, dated August 12, 2014 (ADAMS Accession No. ML14224A618). Accordingly, the NRC staff developed a proposed single consolidated policy statement that: identified and eliminated redundant language between the two policy statements, removed detailed information on the IMPEP and the "Principles of Good Regulation" (ADAMS Accession No. ML15083A026) (this material is not typically included in a high-level policy statement), added context to make the proposed policy statement clearer and more consistent with other recent NRC policy statements, and added a description of the NMP.

The NRC staff solicited Agreement State comments on the proposed consolidated policy statement in an Agreement State letter "Opportunity to Comment on the Consolidated Policy Statement that Deals with Agreement State Adequacy and Compatibility (RCPD-14-013)," dated August 15, 2014. A document summarizing the 131 Agreement State comments on the draft consolidated policy statement is provided in ADAMS (ADAMS Accession No. ML15042A395).

The proposed consolidated Agreement State Program Policy Statement was provided to the Commission on June 19, 2015 (SECY-15-0087, "Agreement State Program Policy Statement and Program Recommendations" (ADAMS Accession No. ML15002A138)). The Commission approved publication of the proposed consolidated Agreement State Program Policy Statement for public comment in the SRM to SECY-15-0087, dated March 22, 2016 (ADAMS Accession No. ML16082A514). The NRC staff published the proposed Agreement State Program Policy Statement on June 2, 2016 (81 FR 35388), for a 75-day public comment period. The NRC staff also held two public webinars during the comment period. The NRC staff received five submissions from commenters including Agreement States and the OAS. These submissions, combined with input received from participants in the two public webinars, contained 31 comments on the proposed policy statement.

DISCUSSION:

The NRC staff has developed the final Agreement State Program Policy Statement for the Commission's consideration in accordance with Commission direction in the SRMs to SECY-10-0105, and, most recently, SECY-15-0087. The final policy statement incorporates revisions based on comments received from the *Federal Register* notices of June 3, 2013 (78 FR 33122), and June 2, 2016 (81 FR 35388), Agreement State letter (RCPD-14-013), public meetings and webinars, and a topical session on the proposed policy statement during the 2013 annual OAS meeting.

As described above, the NRC staff provided the draft consolidated policy statement to Agreement States in August 2014 and received 131 comments from 10 Agreement States as well as the OAS Board. The comments received did not support consolidating the policy statements. The Agreement States expressed dissatisfaction over not being more engaged in the decision and process used to propose consolidation of the policy statements. The NRC staff addressed Agreement States' comments related to consistent use of terminology prior to publication of the draft statement for public comment in June 2016 (81 FR 35388). The remaining Agreement States' comments not related to terminology were reserved to be addressed with the comments received in response to the June 2016 *Federal Register* notice. The NRC staff's disposition of both sets of comments is presented in a comment resolution table (ADAMS Accession No. ML17044A406).

Enclosure 1 contains the draft final *Federal Register* notice for publication of the Agreement State Program Policy Statement for the Commission's consideration. The Agreement State Program Policy Statement, if approved by the Commission, would supersede the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" and the "Statement of Principles and Policy for the Agreement State Program."

Enclosure 2 provides, in red-line strikeout, the revisions to the proposed Agreement State Program Policy Statement to address the comments that were received in response to the Agreement State letter (RCPD-14-013) and the *Federal Register* notice of June 2, 2016 (81 FR 35388).

CONCLUSION:

The NRC staff worked closely with the Agreement States to address Commission direction in the SRMs to:

- SECY-15-0087, "Agreement State Program Policy Statement and Program Recommendations;"
- COMSECY-14-0028, "Agreement State Program Policy Statements: Update on Recent Activities and Recommendations for Path Forward;"
- SECY-12-0112, "Policy Statements on Agreement State Programs;" and
- SECY-10-0105, "Final Rule: Limiting the Quantity of Byproduct Material in a Generally Licensed Device (RIN 3150-AI33)."

By consolidating the “Policy Statement on Adequacy and Compatibility of Agreement State Programs,” and the “Statement of Principles and Policy for the Agreement State Program,” the NRC’s and the Agreement States’ activities carried out in the NMP will be described in one high-level policy statement.

COMMITMENT:

The NRC staff will continue to seek ways to engage with the Agreement States as part of the implementation of the Agreement State Program Policy Statement. Staff plans to begin this engagement early in the implementation process for the policy statement.

The Agreement State Program Policy Statement directly impacts the content in Management Directives 5.6, “Integrated Materials Performance Evaluation Program (IMPEP),” and 5.9, “Adequacy and Compatibility of Agreement State Programs.” The management directives can be accessed at <https://scp.nrc.gov/procedures.html>. The staff will update Management Directives 5.6, 5.9, and associated supporting guidance documents to reflect the final Policy Statement.

RECOMMENDATION:

The NRC staff recommends that the Commission:

Approve the final Agreement State Program Policy Statement for publication in the *Federal Register*.

Note:

- a. The NRC staff has determined that this action is a “rule,” as defined in the Congressional Review Act of 1996 (5 U.S.C. 804(2)), and is coordinating review with the Office of Management and Budget. The appropriate Congressional and Government Accountability Office contacts will be informed.
- b. The appropriate Congressional committees will be informed of this action.
- c. A press release will be issued by the Office of Public Affairs when the final policy statement is filed with the Office of the Federal Register.

RESOURCES:

The resources to finalize the policy statement as addressed in this paper are under the Nuclear Material Users’ Business Line/State, Tribal and Federal Programs Product Line/Agreement States Product in the Fiscal Year (FY) 2017 Re-baselined Budget and the FY 2018 Budget Request. The Office of Nuclear Material Safety and Safeguards Agreement State Program staff, as well as staff in Regions I, III, and IV who support agency-related Agreement State Program activities, will continue to lead implementation efforts related to the Agreement State Program Policy Statement. If any additional resources are needed past FY 2018, they will be included in the Planning, Budgeting, and Performance Management process.

COORDINATION:

The Office of the General Counsel has no legal objection to the final Agreement State Program Policy Statement.

/RA by Frederick D. Brown for/

Victor M. McCree
Executive Director
for Operations

Enclosures:

1. *Federal Register* Notice
2. Agreement State Program Policy Statement, red-line strikeout

SECY PAPER - AGREEMENT STATE PROGRAM POLICY STATEMENT DATE April 10, 2017

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OFC	MSTR	MSTR	MSTR	RI/RA	RIII/RA	RIV/RA
NAME	CFlannery	PMichalak	DCollins	JNick for DDorman with comments	DRoberts for CPederson per email	MShaffer for KKennedy with comments
DATE	2/09/17	2/13/17	3/15/17	2/17/17	2/13/17	2/22/17
OFC	ADM	OGC	Tech Ed	NMSS	EDO	
NAME	CBladey	TCampbell	WMoore	MDapas	VMcCree FBrown for	
DATE	3/3/17	3/9/17	3/20/17	3/31/17	4/10/17	

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