

Recommendation 6: Assess the Agreement State Application Process and Other Related Activities

Background

Section 274 of the Atomic Energy Act (AEA) provides a statutory basis under which the NRC discontinues, and the State assumes regulatory authority over all or some portions of byproduct materials, source materials, and certain quantities of special nuclear materials. After an agreement becomes effective, the State becomes the sole regulatory authority over the radioactive materials and activities covered under the agreement. States are not, however, subject to certain Federal statutes such as the National Environmental Policy Act and the National Historic Preservation Act. While some States do have State laws or regulations requiring environmental reviews, historic preservation reviews, or Tribal consultation, other States do not. The NRC cannot require a State to follow the NRC's environmental regulations in Title 10 *Code of Federal Regulations* (10 C.F.R.) Part 51 nor does it have statutory or regulatory authority to compel Agreement States to implement EJ reviews in their State licensing actions.

The NRC's Tribal Policy Statement (TPS) directs the NRC staff to consult with federally recognized Tribes on regulatory actions that have a substantial direct effect on one or more Indian Tribes, as well as those regulatory actions for which Tribal consultation is required under Federal statutes.¹ The TPS's definition of "regulatory actions with Tribal Implications" includes regulatory actions that change the relationship between the Federal government and Tribes, or the distribution of power and responsibilities between the Federal government and Tribes.² The staff heard, and recognizes, that federally recognized Tribal governments are dependent "domestic sovereign nations," and may also have EJ-related issues. Meaningful government-to-government engagement is critically important for Tribal governments and other Tribal groups (Tribal nations) just as meaningful engagement is important to EJ communities. Accordingly, Tribal input was an important part of and consideration in this EJ review.

Several NRC Policy Statements and guidance documents set forth guidelines for implementing the agency's Agreement State Program and Tribal Program. Some have not been updated for many years, such as the 1983 Commission Policy Statement on "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement."³ Others have been issued or updated more recently, such as the Agreement State Program Policy Statement⁴ and the Tribal Policy Statement, which were issued in 2017.⁵

What the Staff Learned

During its outreach effort for this EJ review, the staff received comments from a variety of stakeholders regarding EJ concerns associated with the process of a State entering into an agreement with the NRC. The staff heard that there is a need for more transparency and

¹ Tribal Policy Statement, 82 Fed. Reg. 2402, 2416 (Jan. 9, 2017) (TPS) (Principle #4 states "The NRC Will Engage in Timely Consultation").

² *Id.* at 2404.

³ 46 Fed. Reg. 7540 (Jan. 23, 1981), as amended by policy statements published at 46 Fed. Reg. 36,969 (July 16, 1981) and 48 Fed. Reg. 33,376 (July 21, 1983).

⁴ Agreement State Program Policy Statement; Correction, 82 Fed. Reg. 48,535 (Oct. 18, 2017).

⁵ TPS, 82 Fed. Reg. at 2402.

opportunity to be involved in certain aspects of the process of a State becoming an Agreement State. This includes the application review process, other processes associated with the NRC discontinuing its authority, as well as engagement after the agreement is established. For example, Tribal nations and the NRC staff noted that the process for reviewing Agreement State applications has historically not included an opportunity for Tribal consultation under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act. Questions were also raised related to the effectiveness of notice of actions associated with Agreement State applications; currently Section 274 of the AEA requires publication in the *Federal Register* for four consecutive weeks, but some commenters expressed that this process is not easily accessible to them. Commenters noted that the question of whether a State will institute a NEPA-like process for their regulatory activities that would provide for Tribal and EJ community input is not part of the Agreement State application review process. The commenters and Tribal representatives also noted a need for clarification of roles and responsibilities in the process of a State becoming an Agreement State.

Tribal nations expressed that there is not an effective means to raise EJ concerns with the NRC or the State regarding radiological safety and security after the NRC discontinues its authority under an agreement. Tribal nations also raised questions about the effectiveness of the Agreement State Program Performance Concerns process. In addition, the staff heard questions about how the NRC is honoring Federal trust responsibility and treaties post-transfer of authority to Agreement States. Tribal nation representatives stated they would support efforts to make legislative changes to address some of these issues. Similarly, State commenters from Agreement States' offices also raised a need to clarify Federal, Agreement State, and Tribal nation responsibilities post-agreement. Also, these commenters noted that a dialogue or training with the NRC and Agreement States could provide clarity in these roles and responsibilities.

Based upon the comments received and analysis conducted, the staff determined that, currently EJ is not addressed in the process of reviewing Agreement State applications or transferring authority to the State.⁶ The NRC does not have authority to require Agreement States to implement EJ reviews and not all Agreement States have a process for considering EJ in their regulatory activities. While any member of the public can comment on the draft agreement and the NRC assessment during the public comment period, the NRC did not reach out specifically to EJ communities or Tribal nations during the Agreement State application process for the current 39 Agreement States. Similarly, historically, the NRC has not offered an opportunity for federally recognized tribes to consult on the transfer of authority before approving an agreement. The NRC staff, however, is offering consultation under the Tribal Policy Statement for the Connecticut and Indiana Agreement State applications, and plans to continue to consider additional means of Tribal engagement before and after an agreement is signed.⁷ After the NRC discontinues its authority and the State assumes regulatory authority, EJ issues are only

⁶ Under 10 C.F.R. § 51.22(c)(4), entrance into an agreement with a State under section 274 of the AEA is categorically excluded from NRC's environmental review provisions implementing NEPA requirements. Because there is no NEPA review required, there is currently no EJ consideration during the Agreement State application process.

⁷ See Letter Offering Tribal Consultation Concerning Indiana's Request for an Agreement Under Section 274 of the Atomic Energy Act, dated Feb. 14, 2022 (ADAMS Accession No. [ML22046A305](#)); Letter Offering Tribal Consultation Concerning Connecticut's Request for an Agreement Under Section 274 of the Atomic Energy Act, dated Feb. 16, 2022 ([ML22047A177](#)).

addressed if State statutes, regulations, or policies require an EJ review. Thus, Tribal nations and EJ communities that were not a part of early engagement on the review of the Agreement State application may be unaware of the changes that occur once a State assumes authority, such as a change in environmental reviews, including EJ reviews.

While the agency has and will continue to seek improvements to these processes surrounding Agreement State applications as issues arise,⁸ a comprehensive assessment of potential improvements to the process of a State becoming an Agreement State and other related activities (e.g., the Agreement State Program Performance Concerns process) would provide the agency an opportunity to consider and potentially address issues more consistently and effectively.

Recommendations

After careful consideration of the issues raised by commenters and discussions with representatives of some Tribal nations and State representatives in Agreement States, the staff developed two recommendations in this area. The first is captured elsewhere in this paper, as part of the staff's recommendation to revise the EJ Policy Statement (Enclosure 2). There, the staff recommends several revisions to the EJ Policy Statement. One of the potential revisions relates to Agreement State activities. As noted above, the NRC has no authority to require implementation of EJ in Agreement States' regulatory programs. The staff recommends that an EJ Policy Statement revision include language encouraging Agreement States to implement EJ in their regulatory activities, as appropriate.

Second, the staff carefully considered written comments, feedback from consultation meetings the staff had as part of this EJ effort with Tribal nations, and discussions with State representatives in Agreement States. This included comments and feedback regarding the need for clarity, transparency, and engagement in the Agreement State application process, as well as concerns regarding post-application processes and activities. Issues in this area raise complex questions for which detailed consideration would require time and resources beyond those allotted for this EJ review. This includes the statutory construct of the Agreement State Program, the interrelationship of the NRC, State governments, Tribal nations, and the NRC's inability to require an EJ analysis at the State level. Accordingly, the staff recommends that the agency undertake a separate assessment of the Agreement State application process and other related NRC activities (e.g., the Agreement State Program Performance Concerns process) to identify whether there are potential improvements or modifications that could prove beneficial to EJ communities and Tribal nations, and report back to the Commission with any recommendations, as appropriate. While recognizing the current statutory limitations of the program and limitations on licensing and regulatory activities, the assessment could include EJ concerns related to (1) issues regarding notification, communication, and additional engagement of stakeholders and Tribal nations during review of Agreement State applications and (2) issues that arise after the NRC discontinues its authority and the State assumes regulatory authority.

⁸ For example, the NRC staff has already taken steps to revise its current process to initiate actions to engage federally recognized and state recognized tribes early in the Agreement State application process by updating State Agreement (SA) procedure, SA-700, "Processing an Agreement." "Handbook for Processing an Agreement Interim Procedure SA-700," (April 1, 2021) ([ML21082A081](#)). This Handbook is currently undergoing revision.

Exploration of these issues in a comprehensive assessment could help demonstrate the agency's commitment to addressing EJ in its programs, policies, and activities, consistent with the spirit of Executive Orders that address EJ. Such an assessment could also provide an opportunity to review roles and responsibilities of the NRC, States, and Tribal nations; enhance clarity and transparency; and better understand potential impacts of a State becoming an Agreement State on EJ communities and Tribal nations. Finally, this recommendation also could support the agency's Strategic Goal to "inspire stakeholder confidence in the NRC" and the Principles of Good Regulation.⁹ For resource information related to this recommendation, see Enclosure 13.

⁹ Strategic Plan, Fiscal Years 2022-2026, NUREG-1614, Vol. 8 (draft report for comment), at 11 ([ML21260A054](#)) ("To be successful, the NRC must not only excel in carrying out its mission but must do so in a manner that inspires confidence."). The final Strategic Plan, Fiscal Years 2022-2026, NUREG-1614, Vol. 8 will be published in April 2022 and will be available at <https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1614/index.html> (last visited March 16, 2022).