

NON-CONCURRENCE PROCESS COVER PAGE

The U.S. Nuclear Regulatory Commission (NRC) strives to establish and maintain an environment that encourages all employees to promptly raise concerns and differing views without fear of reprisal and to promote methods for raising concerns that will enhance a strong safety culture and support the agency's mission.

Employees are expected to discuss their views and concerns with their immediate supervisors on a regular, ongoing basis. If informal discussions do not resolve concerns, employees have various mechanisms for expressing and having their concerns and differing views heard and considered by management.

Management Directive, MD 10.158, "NRC Non-Concurrence Process," describes the Non-Concurrence Process (NCP), <http://nrcweb.nrc.gov:8600/policy/directives/catalog/md10.158.pdf>.

The NCP allows employees to document their differing views and concerns early in the decision-making process, have them responded to (if requested), and attach them to proposed documents moving through the management approval chain to support the decision-making process.

NRC Form 757, "Non-Concurrence Process" is used to document the process.

Section A of the form includes the personal opinions, views, and concerns of a non-concurring NRC employee.

Section B of the form includes the personal opinions and views of the non-concurring employee's immediate supervisor.

Section C of the form includes the agency's evaluation of the concerns and the agency's final position and outcome.

NOTE: Content in Sections A and B reflects personal opinions and views and does not represent official factual representation of the issues, nor official rationale for the agency decision. Section C includes the agency's official position on the facts, issues, and rationale for the final decision.

At the end of the process, the non-concurring employee(s):

- ☐ Concurred
- ☒ Continued to non-concur
- ☐ Agreed with some of the changes to the subject document, but continued to non-concur
- ☐ Requested that the process be discontinued

- ☐ The non-concurring employee(s) requested that the record be non-public.
- ☒ The non-concurring employee(s) requested that the record be public.

- ☐ This record is non-public and for official use only.
- ☒ This record has been reviewed and approved for public dissemination.



NON-CONCURRENCE PROCESS

NCP-2014-012

SECTION A - TO BE COMPLETED BY NON-CONCURRING EMPLOYEE

TITLE OF SUBJECT DOCUMENT

Grant Authorization for Travel/Lodging/Subsistence for Consensus Standard Development, 116-504-77

ADAMS ACCESSION NO.

DOCUMENT SIGNER

Erica Eam

SIGNER TELEPHONE NO

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ADM/AMD/CAB/RGT

NAME OF NON-CONCURRING EMPLOYEE(S)

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Reliability Engineer

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DOCUMENT AUTHOR

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DOCUMENT CONTRIBUTOR

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DOCUMENT REVIEWER

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ON CONCURRENCE

NON-CONCURRING EMPLOYEE'S SUPERVISOR

John Nakoski

TITLE

Branch Chief

ORGANIZATION

RES/DRA/PRB

☒

I WOULD LIKE MY NON-CONCURRENCE CONSIDERED AND WOULD LIKE A WRITTEN EVALUATION IN SECTION B AND C.

☐

I WOULD LIKE MY NON-CONCURRENCE CONSIDERED, BUT A WRITTEN EVALUATION IN SECTIONS B AND C IS NOT NECESSARY.

WHEN THE PROCESS IS COMPLETE, I WOULD LIKE THE NCP FORM:

☒

PUBLIC

☐

NON-PUBLIC

REASONS FOR NON-CONCURRENCE AND PROPOSED ALTERNATIVES (use continuation pages or attach Word document)

See Attached Document

SIGNATURE

Dale E. Yeilding

DATE

11-14-2014

NON-CONCURRENCE STATEMENT

This non-concurrence was revised twice from the initial submittal dated October 21, 2014 to include a background summary of a recent informal meeting summary and additional justification citations.

Dale Yeilding disagrees with the agency's disapproval of the 2014 American Nuclear Society (ANS) grant proposal based upon the agency's interpretation that the use of grant funds for travel expenses is prohibited. The grant was approved by the Office of Nuclear Regulatory Research (RES) senior management and involves the collaborative development of important Probabilistic Risk Assessment (PRA) standards with the industry, in particular the Joint Committee on Nuclear Risk Management (JCNRM), comprised of representatives from the agency, industry, ANS and the American Society of Mechanical Engineers (ASME).

This Non-Concurrence involves the grant proposal evaluation and concurrence process under Management Directive MD 11.6, *"Financial Assistance Program."* The grant concurrence process, after the grant proposal review by the program office, concludes with the approval/disapproval by the Office of Administration's Grant Officer. The process must also obtain a "No Legal Object" statement from the Office of General Council (OGC) following their review and concurrence of the grant proposal. [REDACTED]

[REDACTED] This non-concurrence is associated the MD 11.6 evaluation and concurrence process along with the [REDACTED]

[REDACTED] Dale Yeilding evaluated this proposal for RES, completing the required evaluation/concurrence forms and is authorized to not concur with the position that travel expenses are prohibited. Approximately 70% of the proposed 3-year grant totaling \$225K involves a provision for 16 industry PRA experts, also being members of the JCNRM to meet twice a year to develop consensus standards along with NRC representatives. The travel, lodging and subsistence expenses to attend these meetings are proposed to be reimbursed through this grant as they were previously reimbursed for the past five years under two similar prior grants totaling almost a half million dollars. I disagree with the agency's interpretation that the use of grant funds for travel expenses is prohibited, and request that the grant be approved without modification.

BACKGROUND

The NRC posted a Funding Opportunity Announcement (FOA) NRC-HQ-60-14-FOA-001 in April-2014, requesting proposals for grant funding. The American Nuclear Society (ANS) responded to the NRC Grant FOA with a proposal, (Grant 116-504-77). Dale Yeilding (Non-Concurrence Originator) was assigned to evaluate the grant proposal and together with RES management recommended the grant be approved by the agency through the NRC Office of Administration in June-2014.

[REDACTED]

[REDACTED]

On September 8, 2014 Dale Yeilding suggested that the grant include a negotiated statement as prescribed in 48 CFR 52.215-23 (b) Alternate 1, *"Limitations on Pass-Through Charges,"* to ensure the value added function was properly addressed by ANS to avoid a "Pass-Through" situation, since the volunteer experts are the recipients of a large percentage of the grant funds.

[REDACTED]

[REDACTED]

On October 6, 2014 a request for an informal discussion was initiated to resolve the issue and satisfy the pre-conditions for a non-concurrence. On October 21, 2014 an informal discussion was held which did not resolve the issue nor provide any assurance the grant would be approved. At that meeting the representative from ADM identified that a non-concurrence could not be filed regarding the Office of Administration (ADM) disapproval of a grant. The ADM representative also mentioned that there may be a possibility of a Conflict of Interest associated with the grant.

Another informal discussion was held on November 12, 2014 with representatives from RES, ADM and OGC to discuss the reasons for the agency's disapproval of travel expenses for the grant proposal.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

JUSTIFICATION

Several approaches will be presented to justify that travel expenses for the grant proposal are appropriate:

- 1) The citation (31 USC 1345) [REDACTED] prohibits travel expenses is overridden by a subsequent law and allowable travel expenses are further substantiated by a Comptroller General decision.
- 2) A public law requiring federal collaboration with the industry for consensus standard development allows for consultation with unpaid volunteer consultants and is further substantiated through an OMB Circular A-119, that travel expenses are allowed.
- 3) This most compelling approach presents that [REDACTED] citation (31 USC 1345) does not even apply, and is substantiated by the General Accounting Office (GAO) OMB Circular A-122 and 2 CFR govern grants making the 31 USC 1345 travel prohibitions only applicable to the private sector, when individuals are not functioning under a grant.

The remaining justifications present laws associated with expenses for agency collaboration (e.g. NRC and DOE) and the specific grant language in the NRC congressional appropriation.

Travel/Lodging/Subsistence Expenses Are Allowed

- 1) 31 U.S.C. 1345, a law in-acted in 1935, received numerous appropriation bill changes and was for this grant case overridden by 5 USC 4110 to permit expenses to attend meetings as long as the meetings contributed to improve the conduct of the activity funded.

31 USC 1345, Expenses of meetings

"Except as specifically provided by law [emphasis added], an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit— (1) An agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty;"

Typical Appropriations Bill - Allowance for Meeting Expenses

PL 102-394, Title V, Sec. 505 (October-1992). Appropriations ...shall be available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriations is made or which will contribute to improved conduct, supervision, or management of those functions or activities. [31 USC 1345 note]

5 USC 4110. Expenses of Attendance at Meetings

*Appropriations available to an agency for travel expenses are available for expenses of attendance at meetings which are **concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities. [emphasis added]***

38 Comp. Gen 800, Hereafter any appropriation available to any department for expenses of travel shall be available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct.

5 USC 5946 Membership fees; expenses of attendance at meetings; limitations

*Except as authorized by a specific appropriation, by express terms in a general appropriation, or by sections 4109 and **4110 [emphasis added]** of this title, appropriated funds may not be used for payment of(2) expenses of attendance of an individual at meetings...*

The Comptroller General report 38 Comp. Gen. 800 substantiates the ability for agency to use appropriated funds for travel to relevant meetings which contribute to improved conduct. Thus grant travel expenses are allowed since the meetings by industry experts contribute to improve the conduct of the activity funded to produce Probabilistic Risk Assessment (PRA) standards.

2a) For this non-concurrence, an alternative approach to satisfy the provisions of 31 USC 1345 would be to understand that a public law permits the agency to consult using unpaid consultants that would be permitted grant payment for expenses under 5 USC 5703. From "Quick Reference to Federal Appropriations Law", by John E. Jensen, Management Concepts:

*Non-Government Personnel – "As noted, 31 USC 1345 prohibits the payment of travel, transportation, or subsistence expenses of private parties at meetings without specific statutory authority... The prohibition of 31 USC 1345 can be overcome by specific statutory authority... 31 USC 1345 does not, however, apply to a private party called upon by the government to confer or advise on government business. The applicable statute in this regard is 5 USC 5703, which provides: "An employee serving intermittently in the Government service as an expert or **consultant [emphasis added]**...or serving without pay or at \$1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service."*

Public Law 104-113, Section 13 Standards Conformity,

(d) Utilization of Consensus Technical Standards by Federal Agencies,

(1) *...all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.*

(2) **Consultation:** *participation in carrying out paragraph (1) of this subsection, Federal agencies and departments shall consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, participate with such bodies in the development of technical standards.*

Thus Public Law 104-113, calls for agencies to consult with the private sector and under 5 USC 5703, as consultants the private sector industry experts and members of the JCNRM would be allowed travel expenses.

*5 USC 5703, Per diem, travel, and transportation expenses; experts and consultants; individuals serving without pay. An employee serving intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis, or serving without pay or at \$1 a year, **may be allowed travel or transportation expenses [emphasis added]**, under this subchapter, while away from his home or regular place of business and at the place of employment or service.*

2b) To further justify the allowable travel expenses under this Public Law, the Office of Management and Budget issued Circular No. A-119, Subject: "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" which permits grants to pay travel costs.

OMB Circular No. A-119: Question and Answer:

7.c What forms of support may my agency provide?

(1) *Direct financial support; e.g., **grants [emphasis added]**, memberships, and contracts.*

(2) *Administrative support, e.g., **travel costs [emphasis added]**, hosting of meetings, and secretarial functions.*

Thus, the agency is required to consult with the private sector to develop consensus standards and the governing OMB circular, justifies the use of a grant allowing for the use of grant funds to pay travel expenses.

3) For this non-concurrence the most compelling approach is to consider the provisions of 31 USC 1345 to only apply to Non-government employees and those not performing services under a grant.

The Government Account Office (GAO) supports the position that 31 USC 1345 does not apply to grants: (<http://www.gao.gov/special.pubs/d04261sp.pdf>)

GAO, *Principles of Federal Appropriations Law, 2004*
Chapter 4, *Availability of Appropriations Purpose*
(3) *Use of Grant Funds*

*One of the principles of grant law is that, where a grant is made for an authorized grant purpose, the grant funds in the hands of the grantee are not subject generally to many of the restrictions applicable to the direct expenditure of appropriations, unless there is a special condition of the grant to the contrary. B-153417, Feb. 17, 1964. **One of those restrictions, which does not apply to grant funds in the hands of a grantee, is 31 U.S.C. § 1345. [emphasis added]***

For example, the American Law Institute could use funds provided by the Environmental Protection Agency in the form of a statutorily authorized training grant to defray transportation and subsistence expenses of law students and practicing environmental lawyers at an environmental law seminar. 55 Comp. Gen. 750 (1976). For this result to apply, the grant must be made for an authorized grant purpose and there must be no provision to the contrary in the grant agreement. Once these conditions are met, the grantee's use of the funds is not impaired by 31 U.S.C. § 1345. However, an agency may not use the grant mechanism for the sole purpose of circumventing 31 U.S.C. § 1345, that is, to do indirectly that which it could not do directly. In other words, if an agency makes a grant for an authorized purpose, and the grantee sponsors a meeting or conference as a means of implementing that purpose, the grantee's use of the funds will not be restrained by 31 U.S.C. § 1345. However, unless otherwise authorized, the agency could not make the grant for the purpose of sponsoring the conference and thereby permitting payments it could not make by direct expenditure.

It is standard practice for government contracts to have provisions for a contractor to travel for reporting or for contractual reasons where particular travel regulations apply. For a grant, the travel regulations are identified in 2 CFR, Appendix B and thus govern outside the scope of 31 USC 1345 which applies only to non-government workers and those workers not performing services under grant.

Office of Management and Budget (OMB) issued Circular A-122, "Cost Principles for Non-Profit Organizations" in June-1998. This circular is referenced in the NRC Management Directive 11.6, "Financial Assistance Program", regarding guidance for the cost principles for Grants and Cooperative Agreements. The circular in sections 29, 33 and 51 permit travel, lodging and subsistence expenses. The circular was revised in May-2004. If in fact, 31 USC 1345 applied to travel under a grant, the need for Circular A-122 would be moot and its three sections related to travel expenses would be trumped, which we know is not the case. Title 2 of the CFR applies to grants, and 31 USC 1345 does not apply to grants.

In 2005, the OMB Circular A-122, was codified into regulation 2 CFR 230 with a Federal Register Notice indicating:

SUMMARY: This document and the four Federal Register documents following it in this issue of the Federal Register are related to a broad initiative that established Title 2 of the Code of Federal Regulations (CFR) as the single location where the public can find both OMB guidance for grants and agreements and the associated Federal agency implementing regulations.

2 CFR 230

230.5, This part establishes principles for determining costs of grants, contracts and other agreements with non-profit organizations.

2 CFR 230 Appendix B, Selected Items of Cost

1. Paragraphs 1 through 52 of this appendix provide principles to be applied in establishing the allowability of certain items of cost. These principles apply whether a cost is treated as direct or indirect. Failure to mention a particular item of cost is not intended to imply that it is unallowable; rather, determination as to allowability in each case should be based on the treatment or principles provided for similar or related items of cost.

2. *Advisory Councils.* Costs incurred by advisory councils or committees are allowable as a direct cost where authorized by the Federal awarding agency or as an indirect cost where allocable to Federal awards.

7. *Communication costs.* Costs incurred for telephone services, local and long distance telephone calls, telegrams, postage, messenger, electronic or computer transmittal services and the like are allowable.

12.b. *Donated services received:* (1) Donated or volunteer services may be furnished to an organization by professional and technical personnel, consultants, and other skilled and unskilled labor. The value of these services is not reimbursable either as a direct or indirect cost.

29. *Meetings and conferences.* Costs of meetings and conferences, the primary purpose of which is the dissemination of technical information, are allowable. This includes costs of meals, transportation, rental of facilities, speakers' fees, and other items incidental to such meetings or conferences.

33. *Participant support costs.* Participant support costs are direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with meetings, conferences, symposia, or training projects. These costs are allowable with the prior approval of the awarding agency.

51. *Travel costs.*

a. *General.* Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the non-profit organization. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed in like circumstances in the non-profit organization's non-federally sponsored activities.

b. *Lodging and Subsistence.* Costs incurred by employees and officers for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered reasonable and allowable only to the extent such costs do not exceed charges normally allowed by the non-profit organization in its regular operations as the result of the nonprofit organization's written travel policy. In the absence of an acceptable, written nonprofit organization policy regarding travel costs, the rates and amounts established under subchapter i of Chapter 57, Title 5, United States Code ("Travel and Subsistence Expenses; Mileage Allowances"), or by the Administrator of General Services, or by the President (or his or her designee) pursuant to any provisions of such subchapter shall apply to travel under Federal awards (48 CFR 31.205-46(a)).

It is clearly stated in Circular A-122 and 2 CFR that travel expenses are allowed.

4) The NRC and Department of Energy (DOE) participate together with the American Nuclear Society and the American Society of Mechanical Engineers (ASME) to develop consensus standards. The law permits expenses to be paid for an interagency group.

*31 USC 1346, Commissions, Councils, Boards, and Interagency and Similar Groups
(b) Appropriations of an executive agency are available for the **expenses [emphasis added]**, of an interagency group conducting activities of interest common to executive agencies when the group includes a representative of the agency.*

5) The NRC 2014 Congressional Appropriations act HR 3547 specifies an amount for grants.

*NRC 2014 Appropriations Language: \$5,000,000 shall be for a Nuclear Science and Engineering **Grant [emphasis added]** Program that will support multiyear projects that do not align with programmatic missions but are critical to maintaining the discipline of nuclear science and engineering.*

Related Policy Examples from other Federal Agencies

Frequently Asked Questions (FAQ) to Assist U.S. Department of Education Grantees To Appropriately Use Federal Funds for Conferences and Meetings

[<https://www2.ed.gov/policy/fund/guid/gposbul/faqs-grantee-conferences-may-2013.doc>]

Department of Education FAQ

14. May grantees use Federal grant funds to pay for the cost of attending a meeting or conference?

If attending a meeting or conference is necessary to achieve the goals and objectives of the grant, and if the expenses are reasonable (based on the grantee's own policies and procedures, and State and local laws), Federal grant funds may be used to pay for travel expenses of grantee employees, consultants, or experts to attend a meeting or conference...

16. What travel expenses may be paid for with Federal grant funds?

Grantees may use Federal grant funds for travel expenses only to the extent such costs are reasonable and necessary and do not exceed charges normally allowed by the grantee in its regular operations consistent with its written travel policies. In the absence of an acceptable written policy regarding travel costs, grantees must follow the Federal travel and subsistence rates established by the General Services Administration, (48 CFR 31.205-46(a), "Costs for Transportation, Lodging, Meals, and Incidental Expenses"). Federal grant funds may be used to pay expenses for transportation, per diem, and lodging if the costs are reasonable and necessary.

National Science Foundation (NSF), 05-131 (July-2005), "Grant Policy Manual, Chapter VI, Allowability of Costs", [http://www.nsf.gov/pubs/manuals/gpm05_131/gpm6.jsp]

National Science Foundation Grant Policy

614. Expenses for transportation, lodging, subsistence and related items incurred by project personnel and by outside consultants employed on the project who are on travel status on business related to an NSF-supported project are allowable as prescribed in the governing cost principles. The requirements for prior approval detailed in the governing cost principles are waived.

Health and Human Services, Acquisition Policies and Guidance, Attachment 1: HHS Policy on Use of Appropriated Funds for Conferences and Meeting Space:

1.6.E Grant Funds: Reasonable and allocable travel costs may be charged to a grant by the grantee. See OMB Circulars A-87, App. B, ¶ 43; A-122, App. B, ¶ 51. Where authority exists, agencies may supplement terms and conditions of the grant to require grantees to use grant funds to travel to events. Sample term and condition: "The [Program] Administrator, or designee from the State or Territory [Program] Lead Agency, must attend and participate in HHS-sponsored national or regional in-person meetings and trainings, as directed by the [OPDIV]. This award may be used for allowable costs associated with travel, lodging, per diem, and other related expenses associated with the grantee meetings and trainings."

Since OMB Memorandum M-12-12 does not require such travel reimbursements to be included in the cost of conferences held by the agency, OPDIVs/STAFFDIVs should exclude allowable travel costs charged to grant funds when determining the cost of an HHS Conference. (Ref. Memorandum M-12-12 footnote 5: "Conference expenses" are defined as all direct and indirect conference costs paid by the Government, whether paid directly by agencies or reimbursed by agencies to travelers or others associated with the conference, but do not include funds paid under Federal grants to grantees. ..."

As presented above, other agencies have interpreted the laws and regulations to permit the use of grant funds for travel and the NRC should approve the American Nuclear Society (ANS) grant proposal.

NO CONFLICT OF INTEREST

[REDACTED]

Grant funds through the prior grant have been typically paid to retirees or those unemployed technical experts for travel expenses to attend working meetings. The grant proposal could be easily modified to assure this past practice to prevent a conflict of interest. It has been the past practice of the grantee to have employed industry experts be reimbursed for their travel expenses by their employer and not use grant funds. Adding this simple stipulation during grant negotiations would ensure that no grant funds were paid to employees of a company regulated by the NRC and eliminate any possibility for a conflict of interest concerning money.

The NRC is required to participate in the development of standards that address a defined regulatory need. This is specified in Public Law, 104-113, and OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities." The agency's own Management Directive 6.5, "NRC participation in the Development and Use of Consensus Standards" delineates the process for employees. Both NRC employees and industry volunteers participating at the standards meeting for this grant, sign a conflict of interest form ensuring the objectives of the grant are upheld. NRC employees representing the agency work alongside the industry experts at these meetings funded under the grant. Government employees do not receive benefit from the grant travel/lodging/subsistence funds. The agency needs for a

consensus standard is similar to that of the industry, with both striving to develop a functional standard that complies with regulatory requirements along with industries need to meet those regulatory requirements. The agency, subsequent to the issue of the consensus standard, can take exceptions to certain provisions of the standard through the standard endorsement process which is typically by a Regulatory Guide. This subsequent endorsement process further separates any concern for conflict of interest. There is no substantiated conflict of interest with the agency's staff meetings with industry experts to develop consensus standards, thus the grant should be approved.

Pass Through with Value Added

[REDACTED]

The value added for ANS to oversee the development of standards by industry experts at meetings twice a year, is well articulated in the grant proposal. The regulations 48 CFR 52.215-23, "Limitations on Pass-Through Charges", permit such expenditures as long as the value added functions are performed.

48 CFR 52.215-23, Alternate I (October 2009)

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer has determined that there will be no excessive pass-through charges, provided the Contractor performs the disclosed value-added functions.

(a) **Added value** means that the Contractor performs subcontract management functions that the Contracting Officer determines are a benefit to the Government, (e.g. ... performing quality assurance functions).

Excessive pass-through charge, with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit/fee on work performed by a subcontractor (other than charges for the costs of managing subcontracts and any applicable indirect costs and associated profit/fee based on such costs).

No or negligible value means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).

The American Nuclear Society adds value to the work performed by industry experts receiving grant funds, through the certification and publication of the expert's standard development activities. Standards from this ANS group, like all others that have been through the final approval process, as an "American National Standard" meaning that it has been approved by ANSI, the American National Standards Institute. To get a standard approved by ANSI, an organization must be pre-approved as an official Standards Development Organization (SDO). ANS is an officially approved SDOs. An SDO must have strictly defined procedures, which ANSI approves initially and when revised, that are followed in developing, balloting, and publishing any American National Standard. For each such standard, ANSI then audits the SDO to assure that the procedures have been followed. Among the crucial aspects of those procedures are that the SDO must assemble a "balanced" committee of experts (with a "balance of interest" in which no one industrial or other sector dominates) that oversees the standard's development work and ballots on it at the end; that the SDO must assure open access to the standard's development process; that there must be opportunities for any negative

ballot to have been considered by the entire balloting committee so that a previous vote can be changed by any voter; and many others.

ANSI (a private nonprofit organization) has been in existence since 1916, for nearly a century. The ANS was founded in 1954. ANSI's processes are "tried and true" and accepted by the whole of the U.S. economy and by governments at all levels everywhere in the U.S., and in fact everywhere in the world. U.S. legislation recognizes ANSI's role, as do many NRC regulations and rules. When the NRC endorses an American National Standard in its regulations or guidance, that endorsement has considerable stature. There is a lot of staff work at ANS involved in assuring that the JCNRM adheres to the ANSI rules and approaches. There are paper trails to maintain and audits that ANS is subject to. The value added by ANS towards the objectives of this grant are substantial and can easily be documented in the grant agreement to eliminate any "pass-through" concerns.

The proposed budget reflects about 23% of the grant funds for ANS editorial work (type setting) and administrative support, reproduction. The grant proposed budget does not quantify or use funds for the value added activities described above associated with the SDO. The remainder of the grant is proposed for travel/lodging/subsistence and meeting related expenses for the industry experts to meet and develop standards and have been alleged by OGC to possibly relate to the pass-through regulation since the percentage is not greater than 30%. The budget also reflects that ANS plans to contribute an additional \$7500 towards administrative support that is currently not reflected in the budget, where if it was, the ANS 23% would increase above the threshold (30%) delineated in the Pass Through regulation and eliminate the need for further value added justification. Thus, through grant negotiations the budget could be slightly modified to eliminate any "pass-through" concerns.

Conclusion

- 1) 5 USC 4110 overrides 31 USC 1345, permitting grant funds to be used for travel expenses.
- 2a) 5 USC 5703 overrides 31 USC 1345, permitting consultants use of grant funds for travel expenses.
- 2b) OMB Circular A-119, permits the use of grants funds for travel expenses for the agency to develop consensus standards as required by public law.
- 3) 31 USC 1345 does not apply to grants as substantiated by the GAO. Title 2 of the CFR governs grants and permits use of grant funds for travel expenses.
- 4) 31 USC 1346 allows for appropriations for expenses for interagency groups. The NRC and DOE jointly participate in the development of PRA standards.
- 5) Congressional appropriation language specifies agency expenditures towards grants.

Non-Concurrence Section A –

NCP Tracking Number - NCP-2014-012

Reasons for Non-Concurrence and Proposed Alternatives

Title – Grant Authorization for Travel/Lodging/Subsistence for Consensus Standard Development

6) OMB Memorandums M-11-35 and M-12-12 regarding wasteful spending of government appropriations on conference travel do not apply to grants as defined in footnote 5 of M-12-12.

7) There is no existence of a pass-through nor conflict of interest associated with the ANS grant proposal.

The ANS grant proposal should be approved without modification.

PUBLIC RELEASE

This Non-Concurrence should be released to the public.

---Dale Yeilding, November 14, 2014

NRC FORM 757
NRC MD 10-158
(11-2014)

U. S. NUCLEAR REGULATORY COMMISSION

NCP TRACKING NUMBER

NON-CONCURRENCE PROCESS

NCP-2014-012

SECTION B - TO BE COMPLETED BY NON-CONCURRING EMPLOYEE'S SUPERVISOR

TITLE OF SUBJECT DOCUMENT

Grant Authorization for Travel/Lodging/Subsistence for Consensus Standard Development, 116-504-77

ADAMS ACCESSION NO.

NAME

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TITLE

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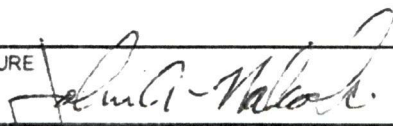
ORGANIZATION

RES/DRA/PRB

COMMENTS FOR THE NCP REVIEWER TO CONSIDER (use continuation pages or attach Word document)

See Attached Document

SIGNATURE



DATE

11/24/2014

Non-Concurrence Process: Section B – First Line Supervisor's Review and Comments

Grant Authorization for Travel/Lodging/Subsistence for Consensus Standard Development

Supervisor's Statement

Dale has developed a position that supports the use of NRC appropriated funds for an ANS grant to pay for the travel expenses of volunteers on the Joint Committee on Nuclear Risk Management (JCNRM). In his non-concurrence submittal, he states early in the package that he is seeking to have the ANS grant approved without change. However, later on in his submittal he indicates where there could be minor changes to the grant proposal that would make it clearer with regard to whom would be eligible to receive reimbursement for travel expenses to participate in JCNRM meetings. Specifically, he points out that a minor change in the grant proposal is appropriate to make it clear that the grant funds would only pay for the travel of volunteers that are not compensated for their time or travel by another organization (i.e., they are not an employee of a licensee, a non-government organization representing licensees, or a vendor providing equipment or services to a licensee). This would avoid any appearance of a conflict of interest.

In principle, I agree with Dale's assertion that the use of appropriated funds under a grant to pay for the travel expenses of volunteers that are not supported by another organization to participate in consensus standard development is allowed following Management Directive 11.6, "Financial Assistance Program," as outlined below and in Dale's non-concurrence submittal. Further, the subject ANS grant is seeking the continuation of previously approved grants where NRC appropriated funds were used to pay for the travel of volunteers to participate in consensus standard development on the JCNRM, a unique committee where both ANS and ASME work together to establish common consensus standards on the use of probabilistic risk assessment (PRA) methods for risk-informed decision-making.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

However, it seems that 31 U.S.C. 1345 provides clarification when it further states under "Availability of Appropriations for Expenses of Attending Meetings:"

[REDACTED]

Non-Concurrence Process: Section B – First Line Supervisor's Review and Comments

Pub. L. 102-394, title V, § 505, Oct. 6, 1992, 106 Stat. 1825, provided that:

"Appropriations contained in this Act or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts, available for salaries and expenses, shall be available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of those functions or activities."

As outlined in Dale's non-concurrence submittal, the NRC is encouraged to participate in the development of consensus standards for areas it has regulatory oversight responsibilities consistent with its safety mission. The use of consensus standards contributes to the improved conduct, supervision, or management of NRC's safety mission. In the instance case consensus standards provide a foundation upon which PRA can be used to risk-inform NRC's regulatory decision-making process and the industry's operating decision-making to focus limited resources on the most safety significant activities. Consensus standards development for those areas regulated by the NRC are an integral part of NRC's oversight of the nuclear power industry and directly concern the functions for which NRC has received appropriations. It could be suggested that this provision of 31 U.S.C. 1345 applies to the payment of salaries and expenses for government employees, however, 31 U.S.C. 1345 does not state this as the case and it specifically provides for the payment of such expenses for employees carrying out an official duty (see (1) above). As such, it appears that 31 U.S.C 1345 does not preclude the use of appropriated funds to pay for expenses of volunteers (private citizens) attendance at meetings (JCNRM working meetings) where those meetings contribute to the improved conduct, supervision, or management of the NRC's safety mission. On this basis, it does not appear to me as a layperson that the ANS grant proposal is in conflict with the prohibition under 31 U.S.C. 1345 on the use of appropriated funds for travel, transportation, and subsistence expenses for a meeting and should be legally supportable.

In M-11-35, it was stated as a priority to eliminate unnecessary or wasteful spending and that "we cannot afford duplicative programs, out-dated and inefficient processes, or wasteful spending decisions." Considering these points, it would be more appropriate to encourage the type of spending that is being proposed by the ANS grant in that it leverages limited funds (\$75,000 per year for 3 years – a total of \$225,000) to support the participation of volunteer experts to improve the efficiency of NRC and industry decision-making by developing consensus standards on the use of PRA in risk-informed decision-making. The \$75,000/year of NRC funds to support the ANS grant provides a far greater benefit if one were to consider the cost to the NRC of paying for the participation of these experts through an alternative means (i.e., through a contract) or having both the NRC and the industry develop their own standards separately. By providing ANS with this grant, the NRC assures that the experts without financial backing from utilities or other industry groups can volunteer their time so that a wide range of views are considered without undue constraint or influence by financial ties to the nuclear power industry. Also, the consensus standard is to provide an up-to-date process for developing and

Non-Concurrence Process: Section B – First Line Supervisor's Review and Comments

using PRA that meets the needs of both the NRC and the industry as efficiently as practical. On this basis, it appears that the use of NRC funds for the ANS grant is aligned with the goals of executive memorandum M-11-35 in that it is not unnecessary or wasteful; it minimizes the duplication of effort by supporting the development of a consensus standard that can be used by both the NRC and the industry; and its goal is to support the development of an up-to-date and efficient process for using PRA in risk-informed decision-making.

It could be argued that the same results could be achieved through the use of teleconference and video-conference meetings. In the development of the consensus standards, there are already a substantial number of teleconference and video-conference meetings held between various members of the committee and working groups to collect and discuss preliminary views and ideas for inclusion in the consensus standard. Experience has shown however that to resolving differing views, to finalize a standard, or to finalize a portion of a standard, often requires face-to-face discussions and negotiations to assure effective communication between experts with divergent views.

All agencies and departments were directed in M-11-35 to conduct a thorough review of the policies and controls associated with conference-related activities and expenses. In response to this directive, the NRC issued revised guidance on attendance at meetings and conferences (http://www.internal.nrc.gov/ADM/conference_loaner/conferencing.html). This guidance states, "This guidance applies only to Federal employees in connection with meetings and conferences that the NRC sponsors." The ANS grant proposal does not include expenses for NRC employees, nor does it address meetings or conferences that NRC sponsors.

From a review of the information on the website, it seems that the guidance provided is on the responsibilities for planning and holding NRC sponsored meetings or conferences and provides some guidance on assuring NRC sponsored meeting or conferences are appropriate. Some of these could be applied to the ANS grant proposal. Under Planning Guidance it states:

The NRC's participation in conferences presents a unique opportunity to engage the general public and other entities, public and private, in the exchange of information and ideas. However, it can raise legal issues such as the appropriate use of Government funds, the receipt of gifts in the form of meals, the endorsement of private activities by Government officials, and the perception that organizations may have a special relationship with the agency. The primary purpose of this document is to provide guidance for planning a meeting or conference on behalf of the NRC, while focusing on eliminating excess spending and promoting Government efficiency.

In the planning process section of this webpage it states:

ODs and RAs are responsible for and will confirm that the meeting or conference: (1) supports the office's mission and objective, (2) does not needlessly duplicate a meeting or conference by another office, and (3) establishes a reasonable number of attendees deemed necessary to successfully accomplish the mission of the meeting or conference.

Following this guidance, even though it does not apply to non-NRC sponsored meetings, the ANS grant would still be within the policy established. Specifically, it provides for the exchange of information and ideas between the NRC and external stakeholders that volunteer their time and energy without the benefit of an employer's sponsorship through their participation in the

Non-Concurrence Process: Section B – First Line Supervisor's Review and Comments

JCNRM; the staff does not receive any direct, personal benefit (i.e., free meals); and endorsement of the consensus standards developed by the JCNRM follows a well-established and accepted process for government endorsement and use of national consensus standards.

The Director of the RES has already approved the awarding of this grant. The ANS grant was determined by those that reviewed it in RES, including the Office Director, to be an effective way to achieve the NRC's objective of having a standard on the use of PRA in regulatory and operational risk-informed decision-making that the NRC could endorse.

Executive memorandum M-12-12 provides guidance on efficient spending to support agency operations with specific information on travel (Section 1) and conferences (Section 2). Under Section 1 – Travel, it required agencies to implement a 30% reduction in travel expenses (as defined under budget object class 21.0 (travel and transportation of persons), but may include travel funded outside this object class). It is not clear that a grant would fall under budget object class 21.0, even if it does cover travel expense to attend a meeting or conference. As stated in footnote 1 of Section 1, OMB was to provide additional guidance to affected agencies on areas outside of this object class [21.0] that should be included in the reductions required. Absent this guidance from OMB, it is unlikely that a grant should be included within the scope of the requirement under Section 1 of M-12-12 for consideration as part of the 30% travel expense reduction.

As pointed out in Dale's non-concurrence submittal, Section 2 – Conferences, of M-12-12, footnote 5 states: *"Conference expenses' are defined as all direct and indirect conference costs paid by the Government, whether paid directly by agencies or reimbursed by agencies to travelers or others associated with the conference, but do not include funds paid under Federal grants to grantees. [emphasis added]"* From this it appears that the guidance provided to Federal agencies in this memorandum as it relates to paying costs associated with conferences do not apply to the use of appropriated funds given to a grantee. Further, it could be inferred that M-12-12 anticipated the use of grant funds to pay for the direct and indirect cost paid to travelers and others associated with conference attendance, including the cost of travel itself.

Additional guidance is provided under Section 2 of M-12-12 on conference sponsorship, hosting, and attendance. The main thrust of this guidance was on the appropriate levels of approval required for the government incurring conference expenses. This guidance was incorporated into NRC revised guidance on attendance at meetings and conferences (http://www.internal.nrc.gov/ADM/conference_loaner/conferencing.html). As noted previously, the NRC guidance developed in response to M-12-12 applies only to those meeting or conferences sponsored or hosted by the NRC. Based on the NRC's response to this guidance and the exception for conference costs under a Federal grant to grantees outlined in M-12-12, it does not appear that these provision, and therefore NRC policy, does not prohibit the use of grant funds to pay travel costs for attendance of volunteer experts at meetings or conferences.

[REDACTED]

With a minor change to the grant proposal, it could be clarified that the grant funds are only to be used to pay for the travel expenses for those volunteers that are not reimbursed travel expenses by, or employed by, a licensee, an NGO representing licensees, or a vendor providing equipment or services to a licensee, thereby effectively making the conflict of interest concern moot. As a layperson, as I have outlined above, it appears to me that the laws related to paying for travel expenses, and the policies that

Non-Concurrence Process: Section B – First Line Supervisor's Review and Comments

have been established, do not prohibit the use of grant funds to pay for the travel of volunteers to participate in meetings. Therefore, it is not clear to me that the use of NRC appropriated funds to fund the ANS grant is illegal.

Considering the importance of using appropriated funds wisely, as directed by M-11-35 and M-12-12, and NRC's implementing guidance, and the position I support that the use of the grant funds to pay for travel is legal, I would argue as a matter of policy that it is more efficient and effective to use grant funds to encourage the participation of experts in the development of consensus standards than to use other means available to the NRC to achieve the same ends.

[REDACTED]

Based on the above, I support Dale's non-concurrence and seek a response that either approves the ANS grant with the modifications suggested or provides a clear basis for its denial as a matter of law.

BACKGROUND

MD 11.6 FINANCIAL ASSISTANCE PROGRAM

Handbook

B. Office of the General Counsel Review

1. For applications valued at greater than the simplified acquisition threshold (currently \$150,000), DC shall forward the applications recommended for award to OGC for review. OGC will review the applications for the following:

- (a) Appropriateness of the subject matter for funding by financial assistance,
- (b) Potential organizational conflicts of interest, and
- (c) Identification of potential budget issues to be further pursued by the grants officer.

2. The purpose of OGC review is as follows:

- (a) To ensure that the subject matter of each application is appropriate for financial assistance as opposed to using a contract;
- (b) To ensure compliance with the Federal Grant and Cooperative Agreement Act of 1977, as amended;
- (c) To review any service agreements, if applicable; and
- (d) To evaluate any potential organizational or other conflicts of interest and issues of impropriety.

3. Once OGC has completed the review, it shall forward its comments and recommendations to DC. The grants officer shall not proceed with an application if it is not legally supportable.

Non-Concurrence Process: Section B – First Line Supervisor's Review and Comments

J. Cost Principles for Grants or Cooperative Agreements 1. The allowability of costs for which NRC funds may be expended under NRC grants or cooperative agreements shall be determined in accordance with the following cost principles:

(a) 2 CFR Part 220 (OMB Circular A-21) provides cost principles and policy guides to be applied by Federal agencies supporting research and development and training and other educational services under grants or cooperative agreements and contracts with educational institutions.

(b) 2 CFR Part 225 (OMB Circular A-87) establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments and federally-recognized Indian tribal governments (governmental units).

(c) 2 CFR Part 230 (OMB Circular A-122) is applicable to nonprofit organizations.

PART 230—COST PRINCIPLES FOR NON-PROFIT ORGANIZATIONS (OMB CIRCULAR A-122)

§ 230.20 Applicability.

(a) These principles shall be used by all Federal agencies in determining the costs of work performed by non-profit organizations under grants, cooperative agreements, cost reimbursement contracts, and other contracts in which costs are used in pricing, administration, or settlement. All of these instruments are hereafter referred to as awards. The principles do not apply to awards under which an organization is not required to account to the Federal Government for actual costs incurred.

(b) All cost reimbursement subawards (subgrants, subcontracts, etc.) are subject to those Federal cost principles applicable to the particular organization concerned. Thus, if a subaward is to a non-profit organization, this part shall apply; if a subaward is to a commercial organization, the cost principles applicable to commercial concerns shall apply; if a subaward is to a college or university, 2 CFR part 220 shall apply; if a subaward is to a State, local, or federally-recognized Indian tribal government, 2 CFR part 225 shall apply.

(c) Exclusion of some non-profit organizations. Some non-profit organizations, because of their size and nature of operations, can be considered to be similar to commercial concerns for purpose of applicability of cost principles. Such non-profit organizations shall operate under Federal cost principles applicable to commercial concerns. A listing of these organizations is contained in appendix C to this part. Other organizations may be added from time to time.

APPENDIX A TO PART 230—GENERAL PRINCIPLES

2. Factors affecting allowability of costs. To be allowable under an award, costs must meet the following general criteria:

a. Be reasonable for the performance of the award and be allocable thereto under these principles.

b. Conform to any limitations or exclusions set forth in these principles or in the award as to types or amount of cost items.

Non-Concurrence Process: Section B – First Line Supervisor's Review and Comments

- c. Be consistent with policies and procedures that apply uniformly to both federally financed and other activities of the organization.
- d. Be accorded consistent treatment.
- e. Be determined in accordance with generally accepted accounting principles (GAAP).
- f. Not be included as a cost or used to meet cost sharing or matching requirements of any other federally-financed program in either the current or a prior period.
- g. Be adequately documented.

APPENDIX B TO PART 230—SELECTED ITEMS OF COST

2. Advisory Councils. Costs incurred by advisory councils or committees are allowable as a direct cost where authorized by the Federal awarding agency or as an indirect cost where allocable to Federal awards.

29. Meetings and conferences. Costs of meetings and conferences, the primary purpose of which is the dissemination of technical information, are allowable. This includes costs of meals, transportation, rental of facilities, speakers' fees, and other items incidental to such meetings or conferences. But see paragraphs 14., Entertainment costs, and 33., Participant support costs of this appendix.

14. Entertainment costs. Costs of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities) are unallowable.

33. Participant support costs. Participant support costs are direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with meetings, conferences, symposia, or training projects. These costs are allowable with the prior approval of the awarding agency.

51. Travel costs.

a. General. Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the non-profit organization. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed in like circumstances in the non-profit organization's non-federally sponsored activities.

b. Lodging and subsistence. Costs incurred by employees and officers for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered reasonable and allowable only to the extent such costs do not exceed charges normally allowed by the non-profit organization in its regular operations as the result of the nonprofit organization's written travel policy. In the absence of an acceptable, written nonprofit organization policy

Non-Concurrence Process: Section B – First Line Supervisor's Review and Comments

regarding travel costs, the rates and amounts established under subchapter I of Chapter 57, Title 5, United States Code ("Travel and Subsistence Expenses; Mileage Allowances"), or by the Administrator of General Services, or by the President (or his or her designee) pursuant to any provisions of such subchapter shall apply to travel under Federal awards (48 CFR 31.205-46(a)).

c. Commercial air travel. (1) Airfare costs in excess of the customary standard commercial airfare (coach or equivalent), Federal Government contract airfare (where authorized and available), or the lowest commercial discount airfare are unallowable except when such accommodations would: require circuitous routing; require travel during unreasonable hours; excessively prolong travel; result in additional costs that would offset the transportation savings; or offer accommodations not reasonably adequate for the traveler's medical needs. The non-profit organization must justify and document these conditions on a case-by-case basis in order for the use of first-class airfare to be allowable in such cases. (2) Unless a pattern of avoidance is detected, the Federal Government will generally not question a non-profit organization's determinations that customary standard airfare or other discount airfare is unavailable for specific trips if the non-profit organization can demonstrate either of the following: that such airfare was not available in the specific case; or that it is the non-profit organization's overall practice to make routine use of such airfare.

d. Air travel by other than commercial carrier. Costs of travel by non-profit organization- owned, -leased, or -chartered aircraft include the cost of lease, charter, operation (including personnel costs), maintenance, depreciation, insurance, and other related costs. The portion of such costs that exceeds the cost of allowable commercial air travel, as provided for in subparagraph] c., is unallowable.

e. Foreign travel. Direct charges for foreign travel costs are allowable only when the travel has received prior approval of the awarding agency. Each separate foreign trip must receive such approval. For purposes of this provision, "foreign travel" includes any travel outside Canada, Mexico, the United States, and any United States territories and possessions. However, the term "foreign travel" for a non-profit organization located in a foreign country means travel outside that country.

NON-CONCURRENCE PROCESS

NCP-2014-012

SECTION C - TO BE COMPLETED BY NCP COORDINATOR

TITLE OF SUBJECT DOCUMENT

Grant Authorization for Travel/Lodging/Subsistence for Consensus Standard Development, 116-504-77

ADAMS ACCESSION NO.

NAME

Sharon Stewart

TITLE

Deputy Director, Office of Administration

TELEPHONE NUMBER

(301) 287-0863

ORGANIZATION

ADM

AGREED UPON SUMMARY OF ISSUES (use continuation pages or attach Word document)

Summary of Issues:

Whether the subject ANS grant proposal is legal and appropriate.

EVALUATION OF NON-CONCURRENCE AND RATIONALE FOR DECISION (use continuation pages or attach Word document)

ADM reviewed the issues presented in this Non-Concurrence and initiated additional dialogue with the grant applicant, ANS. At the request of ADM, the grant applicant submitted a revised grant proposal. As a result, conflict of interest issues have been resolved, and ADM will make the grant award. The grantee may distribute grant funds for travel and subsistence to members who do not have a conflict of interest.

TYPED NAME OF NCP COORDINATOR

Lori Konovitz

TITLE

Procurement Policy Analyst

ORGANIZATION

AMD/ADM

SIGNATURE--NCP COORDINATOR

DATE

2/4/15

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DATE

2/4/15