



STATE OF NEW YORK
DEPARTMENT OF LABOR
DIVISION OF SAFETY AND HEALTH
Radiological Health Unit
Building #12, Room 457
State Office Building Campus
Albany, NY 12240

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VIA EXPRESS MAIL

December 17, 1996

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OSP

Mr. Paul Lohaus
Deputy Director
Office of State Programs
11555 Rockville Pike
Rockville, MD 20852

Subject: Comments on SP-96-117, Request for Comments on Proposed Management Directive 5.8, "Proposed 274 b Agreements with States"

Dear Mr. Lohaus:

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All of the above comments would be quite appropriate with respect to the Proposed Management Directive (hereafter referred to as "the Directive") referenced above, and the revised "Agreement" which it contains, for the following reasons:

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How is a State that plans to support its new program with licensing fees supposed to finance itself during what amounts to an extended trial period? What kind of confusion is this arrangement likely to cause among licensees already located in the State, and persons who might apply for a license? How will making the achievement of Agreement State status even more protracted and chaotic, attract non-Agreement States?

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Finally, the new Article VIII. adds a coda that stamps out whatever shreds of independence remain after the proposed changes already discussed. The Act provides that NRC may unilaterally terminate or suspend an Agreement for one reason only: "if the Commission finds that such termination or suspension is required to protect the public health and safety." NRC now proposes to add other grounds for such unilateral action -- but no to the Act. They propose to add these new grounds for suspension or termination to the Agreement, even though they are not authorized by the Act. This is to be accomplished by adding a provision in the Agreement that it may be suspended or terminated if the Commission finds that the State "has not complied with one or more of the requirements of Section 274 of the Act", which is the section that pertains to the Agreement State program and is ironically (in the current context) titled "Cooperation With States."

Now, in addition to failure to protect public health and safety as a grounds for suspension or termination, NRC proposes such extreme action if a state program is found not to be adequate or compatible with NRC's program, as through ongoing compatibility were specifically required by Section 274. However, compatibility is only mentioned in Section 274 in terms of a finding that NRC must make before an Agreement is entered into, and there is no further mention of it as a continuing requirement. It is certainly conspicuously absent from the Section's paragraph relating to grounds for suspension or termination.

Two of the stated purposes of Section 274 of the 1954 Act are particularly relevant to this discussion, and they are:

"to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials"; and

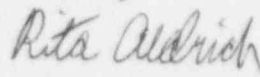
"to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable."

The first purpose acknowledges the need for Agreement State programs, and the second acknowledges that further legislation was envisioned as State programs matured, assuredly to make the programs completely independent. Therefore, the Agreement State program should be designed to attract States to enter Agreements, and to encourage, to the maximum extent possible, professional, competent and independent programs for the regulation of Atomic Energy Act (AEA) materials in every State. NRC should be actively planning for the complete discontinuance of regulation of AEA materials, and the complete return of such regulation to the States, where it resided prior to the AEA.

The changes proposed in SP-96-117, and the proposed revised agreement, are not consistent with these goals. Instead of actively attracting States to accept this unfunded mandate it erects more barriers; instead of fostering independence, it erodes it; and instead of reducing burdens on the States who voluntarily undertake Agreement programs it adds reporting burdens.

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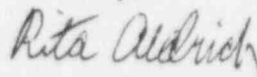
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Telephone: 518-457-1202

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power to change or influence NRC's actions, but they do not and State input has had little impact on proposed NRC actions. Revising the wording, therefore, gives the appearance that the States will receive something they have asked for, but the net effect will be that instead of being obliged only to obtain NRC's comments and assistance, States must provide NRC the opportunity for "early and substantive contribution." Also, even though this is presented as a mutual obligation the power is solely on NRC's side. A State can provide early and substantive input to NRC and have it ignored, but the State can and will be forced to accept NRC's input or be found inadequate and/or incompatible.

The new Article VI goes on to impose a new requirement that States keep NRC informed of "events, accidents and licensee performance that may have generic implication(s) or otherwise be of regulatory interest." Furthermore, the States must report to NRC any event that a licensee is required to report to the State. This just about completes the transformation from the Act's assertion that "During the duration of...an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety", and the Agreement's assertion that its purpose is the discontinuance of NRC's regulatory authority, to a situation where the State acts merely as an agent for NRC -- albeit without recompense. There is not only no foundation in the Act for any of these requirements, they are clearly in direct contradiction to its spirit and letter. They also raise constitutional concerns about requirements placed on the States by a federal agency in the performance of an unfunded mandate.

Finally, the new Article VIII. adds a coda that stamps out whatever shreds of independence remain after the proposed changes already discussed. The Act provides that NRC may unilaterally terminate or suspend an Agreement for one reason only: "if the Commission finds that such termination or suspension is required to protect the public health and safety." NRC now proposes to add other grounds for such unilateral action -- but not to the Act. They propose to add these new grounds for suspension or termination to the Agreement, even though they are not authorized by the Act. This is to be accomplished by adding a provision in the Agreement that it may be suspended or terminated if the Commission finds that the State "has not complied with one or more of the requirements of Section 274 of the Act", which is the section that pertains to the Agreement State program and is ironically (in the current context) titled "Cooperation With States."

Now, in addition to failure to protect public health and safety as a grounds for suspension or termination, NRC proposes such extreme action if a state program is found not to be adequate or compatible with NRC's program, as through ongoing compatibility were specifically required by Section 274. However, compatibility is only mentioned in Section 274 in terms of a finding that NRC must make before an Agreement is entered into, and there is no further mention of it as a continuing requirement. It is certainly conspicuously absent from the Section's paragraph relating to grounds for suspension or termination.

Two of the stated purposes of Section 274 of the 1954 Act are particularly relevant to this discussion, and they are:

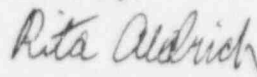
- "to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials"; and
- "to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable."

The first purpose acknowledges the need for Agreement State programs, and the second acknowledges that further legislation was envisioned as State programs matured, assuredly to make the programs completely independent. Therefore, the Agreement State program should be designed to attract States to enter Agreements, and to encourage, to the maximum extent possible, professional, competent and independent programs for the regulation of Atomic Energy Act (AEA) materials in every State. NRC should be actively planning for the complete discontinuance of regulation of AEA materials, and the complete return of such regulation to the States, where it resided prior to the AEA.

The changes proposed in SP-96-117, and the proposed revised agreement, are not consistent with these goals. Instead of actively attracting States to accept this unfunded mandate it erects more barriers; instead of fostering independence, it erodes it; and instead of reducing burdens on the States who voluntarily undertake Agreement programs it adds reporting burdens.

These changes should not be adopted.

Sincerely,



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RA/fdh

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