DCD(SP05)

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

VIA EXPRESS MAIL

December 17, 1996

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:

After reviewing this document I could not help but be reminded of phrases from SECY-95-017 "Reinventing NRC Fee Policies." In the SECY paper NRC staff speculated that ceasing NRC financial support for Agreement State training would "likely be perceived...as yet another recent example of a less cooperative, and less supportive, action by the NRC. It could further strain the fragile working relationship that now exists between NRC and a number of Agreement States"; and further: "The legislative history of Section 274 of the Atomic Energy Act could be interpreted to indicate that States should be encouraged to seek Agreements with NRC"; and finally: "It is conceivable that some existing Agreement States would finally be so frustrated with NRC's collective Agreement State program initiatives that they would decide to return their programs to the NRC."

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:

It is the most egregious example yet of a far less cooperative and supportive NRC; it would most definitely strain the fragile working relationship that now exists between NRC and a number of Agreement States if it were proposed that this "Agreement" replace current ones; it continues NRC's recent tendency toward actions that go against the legislative history of Section 274 by actually discouraging States from seeking Agreements; and if the proposed "standard agreement" were to be imposed on existing Agreement States, Agreement programs are likely to be returned to NRC.

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Telephone: 518-457-1202 FAX: 518-457-5545

SP. A-4

Cross-Ref. Copy SP-96-20-3

To begin with, the Directive proposes an even more agonizing process for the transfer of authority to new Agreement States. Even after the exhaustive process of a State's demonstrating that its program is adequate and compatible with that of NRC, and of NRC's making a finding that this is so, a full Agreement will not result. Instead the State (even through its program is adequate to protect health and safety) will only be given regulatory authority over licensees "of lesser complexity". Then, after some period of time, NRC will review the State's program. It is unclear what happens next -- part of this document refers to two phases of licensee transfer, while other parts refer to several "categories." There is also no information on what happens if NRC is not entirely satisfied with the State's performance in regulating licensees "of lesser complexity." It is apparently possible that a State could be a quasi-Agreement State for many years.

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?

In answering these questions, we should keep in mind that non-Agreement States already regulate about 75% of the radiation sources within their borders, and that those sources account for virtually all of the population exposure from radiation sources in a state. If it were made painless for non-Agreement States to add Agreement materials to their regulatory jurisdiction, I believe that they would do so even though it is an unfunded mandate, just to avoid the burden of dual regulation (NRC & State) on radiation users within the State. The goal, therefore, should be to make Agreement State status as achievable as possible. If the program were running properly, each addition of an Agreement State should result in a significant NRC downsizing. This should prompt the federal government to invest significant funds in assisting states to achieve Agreement status. However, the proposed "phased' Agreement seems designed to do the opposite. It denies a State that has an adequate and compatible program the full Agreement which it has earned. After investing considerable resources in satisfying NRC of the adequacy and compatibility of its program, it is put in the position of not being able to support its program from fees for some protracted period; while NRC continues to regulate and obtain revenue from licensees within that State. Adding to this the confusion of having various types of licensees in the Agreement State regulated by two different entities for their use of the same materials, one wonders why a State would even think of pursuing an Agreement. Is this what NRC wants?

This proposal also seems to be contrary to the letter and the spirit of the Atomic Energy Act (the Act), which states that the Commission shall enter into an Agreement if two conditions are met (Governor's certification, and a Commission finding of adequacy and compatibility), and does not provide for any subdivision of "byproduct materials", for example. If this phasing-in concept is to be considered at all, it should only be at the State's request.

Even more distressing, however, are the proposed changes in Agreement language and content, which appear to be an attempt to amend the Atomic Energy Act without Congressional action.

First, and most troubling, are the proposed changes to our Article V. New York's was the first Agreement to contain a mutual commitment on the part of the Commission and the State to use their best efforts to cooperate with each other in the formulation of standards and regulatory programs, and to ensure that State and Commission programs will be coordinated and compatible. This is a clear statement of equality, and reflects the directive in the Act that "the Commission is authorized and directed to cooperate with the State in the formulation of standards...to assure that State and Commission programs...will be coordinated and compatible."

In the draft Article VI (which replaces our Article V) the commitment on the part of NRC is deleted. There is no comment on, or explanation for this in the Directive. The NRC commitment has simply disappeared without a trace.

New York insisted on this mutual commitment, which clearly reflects the wording and the spirit of the Act, and we do not understand how it could be so cavalierly dismissed, or why future Agreements should be different in this respect from New York's and 26 other Agreements.

We do, however, understand what is being done to Agreement State status through this and other proposed changes. States who sign such an Agreement will be reduced to the status of subordinates, with every vestige of independence destroyed. They will accept an unfunded mandate and behave as if they worked for NRC, even though the stated purpose of their Agreement is the discontinuance, not the delegation, of NRC regulatory authority within their borders.

Our current Article V also contains the phrasiology that the State (and NRC) "will use its best efforts" in cooperating, each with the other. Again, the language of equals is used and independence is preserved. This is now to be replaced by the State (and not NRC) "agreeing" to cooperate. This does away with both equality and independence.

Following this, the commitment for the States and NRC to "obtain the comments and assistance of" the other party on proposed changes in rules, regulations, and licensing, inspection and enforcement policies is changed. The new Article states that the State and NRC will provide each other with the opportunity for "early and substantive contribution" to proposed changes instead. The original wording preserves independence, or would if it were respected, since it does not imply any coercive power on the part of NRC -- it is the language of equals. Over recent years, however, NRC has become more and more coercive in insisting that States adopt regulations and other policies or criteria that the States do not want to adopt, despite the current wording of our Agreements. Upon being forced to adopt these changes, the States demanded early and substantive input. This would be desirable if the States had any

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,

Rita Aldrich

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Principal Radiophysicist

RA/fdh

cc: Dr. Nils J. Diaz
Edward McGaffigan, Jr.
Shirley Ann Jackson, NRC Chairman
Kenneth Rogers
Greta J. Dicus

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

PAPER NUMBER: CRC-96-1281 LOGGING DATE: Dec 26 96

ACTION OFFICE: EDO

AUTHOR: RITA ALDRICH
AFFILIATION: NEW YORK

ADDRESSEE: PAUL LOHAUS, OSP

LETTER DATE: Dec 17 96 FILE CODE: ID&R 15

SUBJECT: COMMENTS ON SP-96-117, REQUEST FOR COMMENTS ON PROPOSED MANAGEMENT DIRECTIVE 5.8, "PROPOSED 274 B AGREEMENTS WITH STATES"

ACTION: Appropriate

DISTRIBUTION: CHAIRMAN

SPECIAL HANDLING: NONE

CONSTITUENT:

NOTES:

DATE DUE:

SIGNATURE: DATE SIGNED:
AFFILIATION:

OSP
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SP-A-4
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cc: Dr. Nils J. Diaz
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Shirley Ann Jackson, NRC Chairman
Kenneth Rogers
Greta J. Dicus

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CORRESPONDENCE CONTROL TICKET

PAPER NUMBER: CRC-96-1281 LOGGING DATE: Dec 26 96

ACTION OFFICE: EDO

AUTHOR: RITA ALDRICH
AFFILIATION: NEW YORK

ADDRESSEE: PAUL LOHAUS, OSP

LETTER DATE: Dec 17 96 FILE CODE: ID&R 15

SUBJECT: COMMENTS ON SP-96-117, REQUEST FOR COMMENTS ON PROPOSED MANAGEMENT DIRECTIVE 5.8, "PROPOSED 274 B AGREEMENTS WITH STATES"

ACTION: Appropriate

DISTRIBUTION: CHAIRMAN

SPECIAL HANDLING: NONE

CONSTITUENT:

NOTES:

DATE DUE:

SIGNATURE: DATE SIGNED:
AFFILIATION:

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