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Working Group

STATE OF NEW YORK
DEPARTMENT OF LABOR
DIVISION OF SAFETY AND HEALTH
Radiological Health Unit
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November 12, 1996

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OSP

Mr. Richard L. Bangart
Director
Office of State Programs
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Bangart:

During the 1996 U.S. NRC - Agreement States meeting, the Agreement States adopted recommended revisions to NRC's "Final" Policy Statement on Adequacy and Compatibility. The intent of the recommended revisions is to clarify the fact that the Agreement States are co-regulators and partners with NRC - not subordinates. As currently written, the policy statement recasts the relationship between the states and NRC as one in which the states are simply to do the bidding of NRC. NRC will decide what regulations and program "elements" the states must adopt, and the states will be required to do so. Since there is very little difference between NRC's "final" policy statement and draft published in the July 1, 1994 Federal Register notice, we are resubmitting our comments on that draft as comments on the "final" policy.

However, the appointments of four out of five of the current NRC Commissioners post-date the drafting of this policy, and we would strongly recommend that the current Commission reconsider what the direction of the Agreement States program should be, and what policy would best accomplish that. As we have stated in our comments on NRC's DSI's (Direction Setting Issues Papers), the purpose of the Agreement States program should be to eventually turn over all regulation of "Agreement" radioactive materials to the states, which already independently regulate the use of all other sources of radiation. Therefore, NRC's policy on adequacy and compatibility of Agreement State programs should be directed at encouraging independence and minimizing intrusion into the operation of state programs. The proposed policy and associated implementing procedures do just the opposite, and, therefore, set the stage for conflict between the states and NRC.

The states have never objected to adopting radiation protection criteria based on the recommendations of national and international bodies (NCRP, ICRP, IAEA, etc.), and would do so if NRC had never existed. We believe that considerations of compatibility should be limited to these basic criteria (exposure limits, emission limits, etc). Similarly, assessments of

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adequacy should be limited to a review of whether a program (NRC or state) protects health and safety.

NRC seems determined not to acknowledge that the states have much broader and diverse radiation protection responsibilities than just "Agreement" materials. The states also regulate the use of naturally-occurring and accelerator produced radioactive materials, and machine sources of ionizing and non-ionizing radiation. In order to efficiently and effectively manage their broad programs, they must have the flexibility to set priorities according to their assessment of relative needs and hazards. Neither the NRC policy nor its implementing procedures recognize this, and thus are fatally flawed.

Sincerely,

Rita Aldrich

Rita Aldrich
Principal Radiophysicist

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NEW YORK STATE DEPARTMENT OF LABOR

COMMENTS ON: July 1, 1994 Federal Register Notice on "Adequacy and Compatibility for NRC and Agreement State Radiation Control Programs Necessary to Protect Public Health and Safety."

This draft statement of policy begins with a background statement declaring that the terms "compatible" and "adequate" are "core concepts" in the Atomic Energy Act section on Agreement States, but are not defined in the Act. It is further stated that the "guiding concept over the years since the beginning of the Agreement State program in the area of compatibility has been to encourage uniformity to the maximum extent practicable while allowing flexibility, where possible, to accommodate local regulatory concerns." We would take issue with this statement and question its basis. New York State's Agreement with the NRC contains an article pledging the best efforts of both NRC and New York State to maintain compatible programs. Furthermore, when New York State's regulations were assessed by NRC prior to finalizing this Agreement, several differences between State and NRC regulations were noted and accepted. One of these related to the calculation of occupational dose, and not only differed from 10 CFR Part 20, but differed between the regulations of the three New York State agencies that were party to the Agreement. Other instances were noted by NRC where a New York State agency lacked a specific parallel to an NRC regulation, but accomplished the same intent through licensing. The latter was not only accepted by NRC at the time our Agreement was signed, but during subsequent periodic program reviews conducted by NRC staff. Only in the last few years has NRC advanced the concept that the Atomic Energy Act requires "uniformity to the maximum extent practicable" when it states that an Agreement State's program must be "compatible" with the Commission's program at the time a State enters into an Agreement. This concept is not supported by the Act, nor is it supported by the wording in New York's, and the other Agreement States', agreements with NRC.

The approach to defining "adequacy" in this draft policy is similarly flawed. Rather than developing an objective definition based on a program's (NRC's or an Agreement State's) likelihood to protect public health and safety, or its actual performance in doing so, a completely subjective approach is taken. The measure of adequacy is proposed to be the extent to which it contains "elements" considered "necessary" by the Commission.

This draft policy is built on the erroneous concept that the Agreement States are sub-contractors to the NRC, rather than the independent, parallel regulators that Chairman Selin has acknowledged they are. It basically defines adequacy and compatibility as the extent to which a State program is identical to NRC's. This is the antithesis of independence. Rather,

adequacy and compatibility should be defined in terms of objective capability to protect public health and safety in the first instance, and the concordance between NRC and Agreement State requirements (not just regulations) in the second.

Comments on specific sections of the draft policy follow:

A. Definitions:

Definition number two defines "An Adequate Agreement State Program" as one containing "elements" considered necessary by the Commission to provide an acceptable level of protection. Definition number five defines "element" as "any aspect of a radiation protection program that is necessary to implement a program that is adequate to protect public health and safety." Furthermore, the term "element" may include "organizational structure, staffing level, inspection frequency, regulations, policies and procedures or any other component or function that the Commission considers necessary."

This is circular reasoning (an "adequate" program contains the "elements" necessary to make it "adequate"), and totally lacking in objectivity (the necessary "elements" include any component or function the Commission considers essential).

Definition number three defines "Compatible" as the consistency needed to assure an orderly and effective regulatory pattern in the administration of the "national radiation protection program." I do not know what the latter is. The States (Agreement or not) regulate non-AEA radioactive materials and machine sources of radiation independent of NRC, and Agreement States regulate AEA materials also. It would be less grandiose and more accurate to refer to the "regulatory program for AEA materials." However, the equating of "compatibility" with "consistency" is a good beginning. Also acceptable are the stated goals that interstate commerce not be impeded, that effective communication in radiation protection is maintained and that dose limits and release limits be consistent. The last goal, ("that information needed for the study of trends in radiation protection and other national needs is obtained") however, seems to have no relationship to compatibility and should be deleted from the definition.

Definition number four unaccountably redefines "compatibility" by stating that a "compatible Agreement State program" is one which contains "elements considered necessary by the Commission." In the discussion of

definition number two, above, we have already remarked upon the lack of objectivity this introduces. Since an element is "any component or function which the Commission considers necessary" we have gone from the reasonable equating of compatibility and consistency in definition number three, to an unreasonable and subjective dictum that the Commission can condition a finding of compatibility on the presence or absence of any "element" it thinks a program should have.

B. Elements of an Adequate Program

Element number two, Regulations, states that except for certain regulations which must be "essentially identical," an Agreement State "shall" adopt regulations "or other legally binding measures," equivalent to, or more stringent than, those designated by the NRC.

The meaning of "other legally binding measures" should be defined. In the absence of a definition telling us what this encompasses, it appears that the Agreement States could be required to adopt <u>every</u> regulation which NRC adopts, either identically or more stringently. There is nothing in this policy to suggest what specific criteria NRC will use to decide which regulations it will require the states to adopt. Definition number three suggests that it would only be those regulations "aimed" at certain stated goals, while definition number four suggests that virtually any regulation could constitute an "element" the Commission thinks is necessary.

Also, the Agreement States would have only two options in adopting regulations: "essentially identical;" or "equivalent to, or more stringent." We need further explanation of the second option in order to comment. What does "equivalent" mean? What about NRC regulations which States feel should not be adopted at all, or that only certain components should be adopted.

Element number three, Inspection, requires Agreement States to adopt NRC inspection frequencies for each type of licensee, as minimum frequencies. This is unacceptable. As independent, parallel regulators, the Agreement States must be accorded more flexibility than this. It is perfectly possible that a State will have more stringent frequencies than NRC for many or most types of licensees, but will decide that some types of licensees need to be inspected less frequently. To require unthinking conformity to NRC frequencies interferes with a State's need and responsibility to use its resources as efficiently as possible to provide maximum protection of public health and safety. It also ignores the reality that a State program

regulates other radiation sources not subject to the AEA, which it may judge should have a higher priority than some AEA materials.

This may be a convenient requirement for NRC to impose, since it eliminates the need for any judgement, but it is inappropriate and counterproductive.

C. Elements of a Compatible Program

Element number four, Event Reporting, states that Agreement States "shall" require licensee reporting of events in a manner consistent with NRC reporting requirements. It further states that "this information shall be provided to the NRC." Does this mean that every report received from licensees must be forwarded to NRC? This makes Agreement States little more than middle-men. It is our understanding that as independent, parallel regulators, we are responsible for receiving and responding to licensee reports, and that only reports with special significance (such as those meeting Abnormal Occurrence criteria) were to be reported to NRC.

D. Compatibility Criteria

This section lists criteria to be applied to program "elements" and regulations to determine whether an Agreement State must adopt them in a manner "essentially identical" to that of NRC.

The criteria re-state the goals of definition number three "compatible", and as discussed above, the fourth goal has no reasonable relationship to compatibility as it is equated with "consistency." In this section the fourth goal is given as assisting the Commission in "evaluating the effectiveness of the overall national program for radiation protection." Please see our discussion of definition number three above; the same comments apply here.

At the end of this section it is stated that "if none of the above criteria is met" the State could "design its own program including incorporating more stringent requirements." This needs to be expanded upon since it again suggests only two choices: adopting everything NRC wants adopted identically, or more stringently. That is not an adequate range of choices.

SUMMARY:

In Part E of the "Discussion" section preceding the draft policy statement, eight specific questions are posed

for public comment. These primarily relate to whether Agreement States should be permitted to adopt more stringent requirements than NRC, or to preclude practices allowed by NRC. In answer to this, we believe that all basic radiation protection definitions should be identical; as should all dose limits, discharge limits and related standards which are based on the recommendations of accepted national and international radiation protection bodies. All other regulations and criteria should be up to the discretion of the States; whether to adopt a regulation or standard at all, or to adopt one in a more or less stringent form.