



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 17, 2021

ALL AGREEMENT STATES, CONNECTICUT, NRC REGIONS I, III AND IV

NOTIFICATION OF THE OPPORTUNITY TO COMMENT ON REVISION TO SA-400,
"MANAGEMENT OF AGREEMENT STATE PROGRAM PERFORMANCE CONCERNS
(STC-21-013)

Purpose: This communication serves to inform the National Materials Program (NMP) community that the Office of Nuclear Material Safety and Safeguards (NMSS) State Agreements (SA) procedure SA-400, *Management of Agreement State Performance Concerns* has been revised and to solicit comments from the NMP community prior to SA-400 being issued.

Background: SA-400, "Management of Agreement State Program Performance Concerns" was retitled and revised to update current practices and incorporate lessons learned from the staff's handling of Agreement State program performance concerns. Concerns involving Agreement State licensees were removed from this procedure and are discussed in Management Directive (MD) 8.8, *Management of Allegations*, and associated Handbook 8.8 (ADAMS Accession No. ML15344A045).

Discussion: Enclosed for your review and comment is SA-400, "Management of Agreement State Program Performance Concerns". The revision of SA-400 provides guidance on concerns involving the performance of Agreement State programs or their employees. Comments from the April 2015 draft revision of SA-400 were incorporated into the current proposed revision as applicable. Discussion of Agreement State licensee concerns in SA-400 has been directed to the Office of Enforcement. The comment period for the revision to SA-400 ends on May 17, 2021.¹

¹ This information request has been approved by OMB 3150-0029 expiration 2/28/2022. The estimated burden per response to comply with this voluntary collection is approximately 8 hours. Send comments regarding the burden estimate to the FOIA, Library, and Information Collections Branch (T-6 A10M), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by e-mail to infocollects.resource@nrc.gov, and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202 (3150-0029), Office of Management and Budget, Washington, DC 20503, or by email to oira_submission@omb.eop.gov. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The draft word procedure is attached and can be found on the State Communications Portal. Please e-mail comments to the individual named below. If you have any questions regarding this correspondence, please contact your respective Regional State Agreement Officer, or the individual named below:

POINT OF CONTACT: Joe O'Hara
TELEPHONE: (240) 808-0546

E-MAIL: Joe.Ohara@nrc.gov



Signed by Anderson, Brian
on 03/17/21

Brian C. Anderson, Chief
State Agreement Liaison Programs Branch
Division of Materials Safety, Security, State
and Tribal Programs
Office of Nuclear Material Safety
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Enclosure:
Draft SA-400

SUBJECT: OPPORTUNITY TO COMMENT ON DRAFT REVISION TO SA-400,
"MANAGEMENT OF AGREEMENT STATE PROGRAM PERFORMANCE
CONCERNS" (STC-21-013) DATE March 17, 2021

ADAMS Accession No. ML21060B518 Letter

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DATE	3/17/21	03/17/21

OFFICIAL RECORD COPY



Office of Nuclear Material Safety and Safeguards

Procedure Approval

Management of Agreement State Program Performance Concerns State Agreements (SA) Procedure SA-400

Issue Date: May xx, 2021

Review Date: May xx, 2026

Kevin Williams

Director, NMSS/MSST

Date: 05/xx/21

Brian C. Anderson

Branch Chief, NMSS/MSST/SALB

Date: 05/xx/21

Joe O'Hara

Procedure Contact, NMSS/MSST/SALB

Date: 05/xx/21

ML21060B563

NOTE

Any changes to the procedure will be the responsibility of the NMSS Procedure Contact. Copies of NMSS procedures are available through the NRC Web site at <https://scp.nrc.gov>

I. INTRODUCTION

- A. This document describes the process by which the U.S. Nuclear Regulatory Commission (NRC) Office of Nuclear Material Safety and Safeguards (NMSS) coordinates concerns regarding the performance of State regulatory bodies or their personnel, and concerns regarding potential wrongdoing committed by State regulatory personnel (i.e., Agreement State Program Performance Concerns).
- B. As used in this document, the term “Agreement State Program Performance Concern” (ASPPC) refers to a concern involving State regulatory bodies that oversee the activities of Agreement State licensees and include concerns regarding the performance of such State regulatory personnel. An ASPPC can also include concerns regarding potential wrongdoing committed by State regulatory personnel. The term “wrongdoing” refers to a willful failure to adhere to State regulatory requirements.
- C. As used in this document, the term “concerned individual” refers to the person or organization that submits an ASPPC to the NRC. Anonymous concerns are accepted.
- D. Concerns involving Agreement State licensees were removed from this procedure and are discussed in Management Directive (MD) 8.8, *Management of Allegations*, and associated Handbook 8.8 (ADAMS Accession No. ML15344A045) under Section II, ‘*Allegation Process*’, item D., ‘*Concerns Involving an Agreement State Licensee*’.

II. OBJECTIVES

- A. To provide guidance to NMSS staff on the receipt, review, and coordination of ASPPCs.
- B. To provide guidance for use by the Agreement States on the NRC’s process for managing ASPPCs.
- C. To ensure that ASPPCs are handled by an established process.

III. BACKGROUND

Management Directive (MD) 8.8, *Management of Allegations* (ADAMS Accession No. ML15344A045), establishes the NRC’s policies and procedures for handling allegations concerning NRC-regulated activities. MD 8.8 defines an allegation as a declaration, statement, or assertion of impropriety or inadequacy associated with NRC-regulated activities, the validity of which has not been established. Excluded from this definition are: (1) performance or wrongdoing concerns regarding organizations or personnel from State regulatory bodies that oversee Agreement State licensee activities; and (2) concerns related to Agreement State licensee activities.

MD 8.8 directs NRC staff to refer concerns regarding the performance of State regulatory bodies or their personnel and concerns regarding potential wrongdoing committed by State regulatory personnel to NMSS.

On August 11, 1998, the NRC Executive Director for Operations issued a Commission Paper (SECY-98-192, ADAMS Accession No. ML ML992870058) "Resolution of Allegations Concerning the Performance of Agreement State Programs," which recommended that staff handle concerns about Agreement State performance or wrongdoing by transferring, through correspondence to the Agreement State, rather than treating the concerns as allegations. The Commission approved a modified version of the staff's recommendation as noted in a December 8, 1998, Staff Requirements Memorandum for SECY-98-192 (ADAMS Accession No. ML003755405). In the Staff Requirements Memorandum, the Commission stated that, absent a credible health and safety concern, Agreement State program performance concerns or wrongdoing concerns involving a Radiation Control Program Director (RCPD) would be referred to either the Agreement State Inspector General (IG), Attorney General (AG), or Senior Line Management above the RCPD level, as appropriate, based on a decision by staff using criteria to be developed, without convening an Allegation Review Board.

This document provides more specific guidance on handling these matters.

IV. ROLES AND RESPONSIBILITIES

A. Director, Division of Material Safety, Security, State, and Tribal, Programs (MSST):

1. Oversees the management of the ASPPC program in NMSS in accordance with this procedure.
2. Serves as chairperson (or designates an acting chair) of the State Concerns Review Board (hereon referred to as a "review board"), if convened, for complex concerns. As review board chairperson, ensures that safety significance, resolution plan, and review priority are considered.
3. Assigns a staff member to serve as the ASPPC coordinator.
4. Approves and signs all correspondence transferring ASPPCs to the States with concurrence by the cognizant Branch Chief and ASPPC coordinator.
5. Approves and concurs on all closure letters to the concerned individuals for ASPPCs.

B. Branch Chief, State Agreement and Liaison Programs Branch, MSST:

1. Ensures that staff members are familiar with the policies and procedures outlined in this guidance.
2. Assigns a technical staff member as lead technical reviewer for ASPPCs.
3. Ensures that the lead technical reviewer is available to brief the review board, if convened, on the concerns.
4. Approves and concurs on all closure letters to concerned individuals for ASPPCs.

C. ASPPC Coordinator:

1. Administers the ASPPC review program in NMSS, in accordance with this guidance.
2. Serves as a member of the review board and assists the chair of the review board as necessary and if convened.
3. Maintains the official agency files on ASPPCs, including establishing a file record and assigning a control number. (Similar to allegations, and as specified in MD 8.8., ASPPC documentation shall not be processed or recorded in the ADAMS or any other electronic location with the potential for public access.)
4. Provides advice, guidance, and assistance to NMSS management, review board members, and NMSS staff in implementing the policies and procedures outlined in this guidance.
5. Serves as the central control point for ASPPCs.
6. Reviews and concurs on all NMSS correspondence involving ASPPCs. Ensures the letters do not compromise the identity of the concerned individual.
7. Prepares reports to MSST and NMSS senior management on the status of ASPPCs, as needed.
8. Provides information to concerned individuals regarding ASPPC follow-up and resolution.
9. Approves and signs closure material for ASPPC with concurrence by the cognizant Branch Chief and MSST Division Director.
10. When requested, provides data to the Integrated Materials Performance Evaluation Program (IMPEP) team leader on concerns involving Agreement State licensee(s) that were referred to the States for review under the Common Performance Indicator, *Technical Quality of Incident and Allegation Activities*.
11. Convenes the review board when necessary, including NMSS management and the appropriate RSAO.

D. Lead Technical Staff:

1. Prepares the branch evaluation form, which will include the concerns list and proposed resolution plan.
2. Using the evaluation form, briefs the review board, if convened, on the concerns, the potential safety significance, the proposed resolution plan, and schedule.

3. Provides input to correspondence to concerned individuals.

E. All NMSS Employees:

1. Maintain a working knowledge of the policies and procedures in this guidance.
2. Record the receipt of any ASPPC in as much detail as possible. Provide all information about the concerns directly to the ASPPC coordinator within 5 days of receipt. Record and provide to the ASPPC coordinator all contacts with concerned individuals during and following resolution of the ASPPC.
3. Protect the identity of concerned individuals in accordance with policies and procedures outlined in this guidance. The identity of the concerned individual should only be provided to the ASPPC coordinator.
4. Ensure that ASPPC-related correspondence receives appropriate limited distribution (i.e., is not placed in ADAMS, branch files, or docket files). Copies of ASPPC documents should not be kept by anyone outside the ASPPC coordinator after an ASPPC is completed and the file is closed. All electronic files should then be deleted. Hard copies should be returned to the ASPPC coordinator for inclusion in the official file or disposal.
5. Consult the ASPPC coordinator to determine whether a matter involving Agreement States should be considered as a potential ASPPC.

F. Regional State Agreements Officers

1. Participates in a review board, when convened, to address various ASPPCs.
2. Contacts appropriate Agreement States, when follow-up information is necessary (including lead technical staff as appropriate), to determine the status of concerns forwarded to the Agreement State for review and action.

G. IMPEP Team Leader and Periodic Meeting Leader:

1. Coordinates with the ASPPC coordinator to provide relevant information received during the IMPEP review or periodic meeting that will assist in the update and/or closeout of ASPPC files.

V. GUIDANCE

A. Processing Concerns that Meet the NRC's Definition of an Allegation under NRC's Jurisdiction.

Allegations involving areas of NRC's jurisdiction received by NMSS staff are outside the scope of this procedure and are processed in accordance with MD 8.8.

B. Processing Concerns Involving Agreement State Oversight

1. Concerns involving State regulatory bodies and State employees that oversee the activities of Agreement State licensees (i.e., ASPPCs) received by NMSS staff should be forwarded to the ASPPC coordinator within 5 days of receipt and are not processed as NRC allegations. These include:
 - a. Concerns regarding the performance of such State regulatory bodies or their personnel.
 - b. Concerns regarding interpretation and implementation of the State's regulatory requirements.
 - c. Concerns regarding potential wrongdoing committed by State personnel.
2. An acknowledgement letter is normally sent to the concerned individual within 30 days of receipt. The initial correspondence will either indicate that the State will be responding directly (with no further NRC action) or that the NRC will be responding at a later date with the State's response, depending on whether or not the concerned individual agrees to release his/her identity to the State. If it is anticipated that it will take longer than 30 days to respond to the concerned individual, an initial response (phone or email is acceptable) should be provided to the concerned individual acknowledging the concern and indicating that additional NRC feedback is forthcoming.
3. The SLPB Branch Chief will assign a lead technical reviewer for the concern to determine safety significance and to review the concern against the referral criteria. If additional information is needed from the concerned individual, the lead technical reviewer will coordinate with the ASPPC coordinator to interview the individual.
4. For non-complex concerns, the lead technical reviewer for the concern will document the proposed ASPPC resolution plan for approval (via e-mail) by the SLPB Branch Chief, the appropriate RSAO, and the ASPPC coordinator within 30 calendar days of receipt. Non-complex concerns include:
 - a. Concerns previously referred to the State that were determined be adequately responded to by the State.
 - b. Concerns regarding the independence and qualifications of Agreement State personnel when the safety significance is low.
 - c. Concerns regarding the timeliness of State inspections when the safety significance is low.
 - d. Any other concern related to the performance of the State when the safety significance is low. If there is a concern where the safety significance is unknown, a review board should be convened.
5. For complex concerns, a review board can be convened normally within 30 days of receipt, at the discretion of the Director, MSST (or designee):

- a. A review board consists of a chairperson (Director, MSST, or designee), SLPB Branch Chief, lead technical reviewer, an Office of the General Counsel representative, RSAO, and the ASPPC coordinator.
- b. The review board will determine if a special evaluation or other actions, as deemed appropriate, should be initiated when significant, valid safety concerns have been identified and brought to the attention of the NRC through an external source. NOTE: In the case of an emergency that presents danger to public health and safety, if immediate action appears necessary, the NRC could implement SA-112, *Emergency Suspension of a 274b. Agreement* (ADAMS Accession No. ML20090A370).
- c. A review board does not have to be convened for ASPPCs that have been previously reviewed and no new information is provided, or for non-complex concerns. The appropriate staff should document the proposed resolution plan for approval, as in Step 4.
- d. If there is a concern where the safety significance is unknown, a review board should be convened.

C. Concerned Individual's Identity Protection When Making Referrals to Agreement States

Before making any referrals to an Agreement State, the concerned individual should be informed of the referral. In addition, staff should determine the ability of the State to protect the identity of the concerned individual by contacting the RSAO to make an inquiry with the Agreement State Program. The State Communication portal also has a reference document titled *Ability of Agreement States to Protect Concerned Individual's Identity from Public Disclosure*. When contacting the concerned individual, staff should inform the concerned individual of the NRC's plans to refer the concern(s) to the State, inform the concerned individual of the State's ability to protect his or her identity from public release, and inquire whether the concerned individual wishes for his/her identity to be released to the State.

The staff should also encourage the concerned individual to contact the State directly regarding his/her concern(s). The staff should inform the concerned individual that the Agreement States prefer to be contacted directly, since it allows the State to obtain all the necessary information directly and facilitates its response. In addition, the staff should inform the concerned individual that while the NRC has Agreement State oversight responsibility, NRC has little authority to take independent action or to require action by an Agreement State as a result of performance or wrongdoing concerns in the absence of a credible health and safety concern.

If the concerned individual indicates that he/she would like to contact the State directly, the staff should provide the concerned individual with the State's contact person's name, e-mail, and telephone number. This information can be obtained from the NRC's Directory of Agreement State Directors at <https://scp.nrc.gov/asdirectory.html>. If the concerned individual indicates that he/she would not like to contact the State directly and would like their identity

protected, staff should take all reasonable efforts not to disclose the concerned individual's identity.

D. Referral Criteria for Concerns Involving Agreement State Oversight

1. Referrals to the Radiation Control Program Director (RCPD)

- a. Performance concerns involving the Agreement State program should be initially referred to the RCPD.
- b. Performance or wrongdoing concerns involving Agreement State employees reporting to the RCPD.

2. Referrals to Senior Line Management above the RCPD

- a. Performance or wrongdoing concerns involving the Agreement State RCPD should be referred to Senior Line Management above the RCPD.
- b. Performance or wrongdoing concerns involving the Agreement State program or employees, that were previously referred to the RCPD, and which have not been appropriately addressed (as determined by the review board), should be referred to Senior Line Management above the RCPD. The NRC Regional State Liaison Officer (RSLO) and RSAO should also be notified.

3. Referrals to State Inspector General (IG) or Attorney General (AG)

- a. Alleged employee wrongdoing or performance concerns involving the Agreement State program or employees, that were previously referred to Senior Line Management above the RCPD, and which have not been appropriately addressed (as determined by the review board), should be referred to the State IG, State AG, or equivalent.
- b. Alleged wrongdoing or performance concerns involving Senior Line Management above the RCPD should be referred to the State IG, State AG, or equivalent. The NRC RSLO and RSAO should also be notified.
- c. Concerns regarding employee wrongdoing, or performance involving an Agreement State program that has demonstrated a disregard for investigating and handling referred concerns should be referred to the State IG, AG, or equivalent.

E. Follow up and Closure of ASPPCs

- 1. All referral letters to the State, including those in which the concerned individual's identity is released and agrees to be contacted directly by the State, should request a response. After the referral to the State is completed and the State has responded, the lead technical reviewer will review the response and provide documentation to the ASPPC coordinator for closure with a memorandum to file. Upon the discretion of the review board, the IMPEP coordinator and IMPEP team lead, Agreement State program

concerns transferred to the RCPD should be addressed at the time of the next periodic meeting or IMPEP review of the Agreement State.

2. All referrals to the State without the release of the concerned individual's identity should include a request for a response indicating the results or resolution of the matter within 60 days. After the State has responded, the lead technical staff reviewer will review the response and provide documentation to the ASPPC coordinator for closure.

If after 60 days no response is received from the State, periodic follow-up with the State, regarding its response to the referral, should be made by the RSAO. If after 90 days no response is received from the State, a letter should be sent to the State requesting a response within 30 days. If the response has not been received within 30 days, the original request that was made to the RCPD should then be forwarded to the Senior Line Management above the RCPD for action. Alternatively, if the original request was made to the Senior Line Management, it should then be forwarded to the State AG or IG, as appropriate. If the original request was made to the State AG or IG, and there is no response, then the concern should be considered by NMSS management, either individually, or in consultation with the Management Review Board to determine: 1) whether a special IMPEP review of the State should be conducted; or 2) whether a letter to a higher Government official should be sent. The concerned individual should be informed of the status of the referral to the State when exceeding 180 days.

3. Upon the discretion of the review board, the IMPEP coordinator, and IMPEP team lead, the NRC evaluates the State's handling of these referrals during the IMPEP review of the State program under the Common Performance Indicator, *Technical Quality of Incident and Allegation Activities*. NMSS procedure SA-105, *Reviewing the Common Performance Indicator, Technical Quality of Incident and Allegation Activities* (ML20196L417), describes how the NRC evaluates whether Agreement States are properly handling licensee concerns referred to the State from the NRC.

F. Contact Information

The ASPPC program is administered by the ASPPC coordinator located in MSST. The ASPPC Coordinator can be contacted via e-mail at:
AgreementStateConcern.Resource@nrc.gov.

VI. REFERENCES

NMSS SA Procedures are available at: <https://scp.nrc.gov/procedures.html>

Management Directives are available at: <https://scp.nrc.gov/procedures.html>

Sample correspondence, referral letters, and resolution plan is available at:
<https://scp.nrc.gov/>

VII. ADAMS REFERENCE DOCUMENTS

For knowledge management purposes, all previous revisions of this procedure, as well as associated correspondence with stakeholders, that have been entered into ADAMS are listed below.

No.	Date	Document Title/Description	Accession Number
1	06/21/99	SP-99-042: Draft OSP Procedure SA-400, "Management of Allegations"	ML072010241
2	01/22/01	STP Procedure SA-400, Management of Allegations	ML010720480
3	03/11/11	FSME-11-022 - Opportunity to Comment on Draft Revision to FSME Procedure SA-400 "Management of Agreement State Performance Concerns and Allegations."	ML102770172
4	03/11/11	Summary of Comments on SA-400, "Allegations"	ML14203A646
5	04/10/15	STC-15-026 – Opportunity to Comment on Draft Revision to Office of Nuclear Material Safety and Safeguards Procedure SA-400, "Management of Agreement State Program Performance Concerns."	ML14203A643
6	8/11/98	SECY-98-192 – Resolutions of Allegations Concerning the Performance of Agreement State Programs	ML992870058
7	12/8/98	Staff Requirements Memorandum - SECY-98-192 - Resolution of Allegations Concerning the Performance of Agreement State Programs	ML003755405
8	TBD	STC-21-XXX – Opportunity to Comment on Draft Revision to Office of Nuclear Material Safety and Safeguards Procedure SA-400, "Management of Agreement State Program Performance Concerns."	TBD
9	TBD	NMSS SA-400, "Management of Agreement State Program Performance Concerns."	ML16203A470