

July 11, 1997

SECY-97-145

FOR: The Commissioners

FROM: L. Joseph Callan /s/  
Executive Director for Operations

SUBJECT: THE EVALUATION OF CURRENT STATE AGREEMENTS

PURPOSE:

To inform the Commission of the results of the evaluation of the 30 current State Agreement documents and the Standard Agreement in light of recent policy statements affecting the Agreement State Program.

BACKGROUND:

On August 25, 1993, the Commission requested that the NRC staff recommend improvements to the Agreement State Program to assure adequate protection of public health and safety. In a memorandum dated October 17, 1994, to the Commission, the staff transmitted the Programmatic Assessment Group's (PAG) recommendations regarding the fourth area the Commission suggested for consideration. In that memorandum, one of the recommendations the staff included was that NRC should evaluate the need for each current Agreement State to reaffirm or modify its existing Agreement in light of the "Statement of Principles and Policy for the Agreement State Program" and "Policy Statement on Adequacy and Compatibility of Agreement State Programs." By Staff Requirements Memorandum (SRM) dated November 2, 1994, the Commission approved this recommendation. In addition, by SRM dated June 30, 1997, the Commission directed the staff to write the Standard Agreement to ensure that existing Agreements remain valid and that any amendments to the existing Agreements will be limited to those required by a truly compelling legal or policy need. The staff has evaluated the Standard Agreement, 30 current State Agreement documents, and the need for reaffirmation or modification, in light of the two policies and the direction in the June 30, 1997 SRM. The results of the evaluation are presented in this paper.

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DISCUSSION

I. The Evaluation of the Standard Agreement and the 30  
Current Agreement Documents

The staff analyzed the 30 current Agreement documents by comparing each document with the Standard Agreement in SECY-97-054. The results of the analysis are as follows:

A. Provisions Consistent with the Standard Agreement

Preamble of Standard Agreement: The analysis of the preamble, in comparison with the 30 Agreements, revealed that there is consistency in this section between the Standard Agreement and the current Agreements. All the Agreements consistently address the authority of the NRC under Section 274 of the Atomic Energy Act of 1954, as amended, to enter into agreements with the Governor of any State or Commonwealth providing for discontinuance of the regulatory authority over certain materials. All the Agreement documents contain language consistent with the Standard Agreement for providing that the Governor of the State certify that it has a program to protect public health and safety with respect to the materials covered by the Agreement and that the Commission has found that the State's program is compatible with the Commission's program and is adequate to protect public health and safety.

Articles of the Standard Agreement: All of the current Agreements contain provisions consistent with that of the Standard Agreement for the specification of areas of authority assumed by the State and for the specification of areas of authority retained by the Commission, including the Commission's authority to protect common defense and security. Additionally, all the Agreements contain provisions consistent with the Standard Agreement for the reciprocal recognition of licenses, for coordination between the NRC and the Agreement States on the development of rules, regulations and other regulatory areas, for the termination or suspension of the Agreement and for the reassertion of the Commission's authority. In addition, although not identical to the

language in the Standard Agreement, all of the current Agreements provide that the State use its best efforts (undefined) to assure that their program will continue to be compatible with the program of the Commission for the regulation of materials covered by the Agreement.

B. Provisions Different from the Standard Agreement

Preamble of Standard Agreement: Paragraph 1: From the first Agreement signed with the State of Kentucky in 1962 to the 25th Agreement signed in 1974 with New Mexico, all the Agreement documents in paragraph 1 differ slightly from the Standard Agreement. These Agreement documents do not contain the wording "byproduct material as defined by Sections 11e.(1) and (2) of the Act." This change in the Agreement document is a result of the Uranium Mill Tailings Radiation Control Act (UMTRCA) of 1978, which added the authority to regulate the category 11e.(2) byproduct material, "tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." However, this incomplete statement of NRC authority has little consequence since subsequent sections of these early Agreements clearly delineate the division of regulatory authority between NRC and the respective Agreement States.

Preamble of Standard Agreement: Paragraph 5: There are seven Agreements which have language different from Paragraph 5 of the Standard Agreement. These Agreements are Kentucky, California, Mississippi, Texas, Arkansas, North Carolina, and Kansas. These seven Agreements provide:

"WHEREAS, The Commonwealth and the Commission recognize the desirability and importance of maintaining continuing compatibility between its program and the program of the Commission for the control of radiation hazards in the interest of public health and safety;" (Emphasis added)

While the Standard agreement provides:

"WHEREAS, The State/Commonwealth and the Commission recognize the desirability and importance of cooperation between the Commission and the

State/Commonwealth in the formulation of standards for protection against hazards of radiation and in assuring that State/Commonwealth and Commission programs for protection against hazards of radiation will be coordinated and compatible;" (Emphasis added)

It is clear in these seven agreements that the issue of maintaining continuing compatibility after the Agreement was signed was an area of importance. This language was modified to include "cooperation" in the facilitation of compatibility. The importance of cooperation is an integral component of the Agreement State Program and no less cooperation between NRC and these seven Agreement States results from this alternative language.

Preamble of Standard Agreement: Paragraph 7: The Standard Agreement and 29 of the 30 Agreements provide, "WHEREAS, This Agreement is entered into pursuant to the provisions of the Atomic Energy Act of 1954, as amended." The Kentucky Agreement, which was the first Agreement signed, states, "WHEREAS, This Agreement is entered into pursuant to the provisions of the Atomic Energy Act of 1954, as amended;" and the applicable regulations of the Atomic Energy Commission which may be issued from time to time pursuant thereto." (Emphasis added). This difference between the Kentucky Agreement, and the 29 subsequent Agreements and the Standard Agreement is not substantive. The language used in the Kentucky Agreement does not provide any additional authority to the Commission which is not already invested by Section 274.

Article I of the Standard Agreement: This article differs in some aspects from all 30 of the current Agreements. As stated earlier, all of the 25 Agreements issued before 1978, unless amended, differ from the Standard Agreement because they do not reflect the provisions of UMTRCA. In addition, Article I in these first 25 Agreements, unless amended, does not differentiate low-level waste disposal as a separate category over which authority can be assumed. The eventual NRC practice to separately designate low-level waste disposal as a distinct authority was a result of the Low-Level Radioactive

Waste Policy Act of 1980. Another difference between the Standard Agreement and these Agreements is that none of the current Agreements reflect the Commission's decision on SECY-95-136, which established evaluation of sealed sources and devices as a separate category over which authority could be assumed by a State. Nevertheless, the scope of regulatory authority is currently well understood by each Agreement State and NRC.

Article III of the Standard Agreement: All of the 25 Agreements issued before 1978, unless amended, differ from the Standard Agreement. These Agreements do not reflect the ability of States after 1978 to choose to regulate categories of material, such as 11e.(2) and low-level waste. The remaining five current Agreements differ only slightly from the Standard Agreement language. In the Standard Agreement, the wording, "With the exception of those activities identified in Article II.A.1 through 4," was added at the beginning of the paragraph before "this Agreement may be amended." In addition, in the Standard Agreement, the wording "additional areas" was replaced by "additional activities," and the wording "exert regulatory authority and responsibility with respect to those activities" replaces the wording "control over the materials stated therein." All existing Agreement States and those States seeking an Agreement recognize that Agreement State regulatory authority may include 11e.(2) byproduct material.

Article VI of the Standard Agreement: This article differs in some aspects from all 30 of the current Agreements. In the first three Agreements signed (Kentucky, 3/26/62; Mississippi, 7/1/62; and California, 9/1/62) each State agreed to:

"use its best efforts to maintain continuing compatibility between its program and the program of the Commission for the regulation of like materials. To this end the State will use its best efforts to keep the Commission informed of proposed changes in its rules and regulations, and licensing, inspection, and enforcement policies and criteria, and of proposed requirements for the design and distribution of productions containing source, byproduct, or special nuclear

materials, and to  
obtain the comments and assistance of the Commission thereon;"

and the Commission agreed to:

"use its best efforts to keep the State informed of proposed changes in its rules and regulations, and enforcement policies and criteria and to obtain the comments and assistance of the State thereon."

In these initial Agreements, the emphasis was placed on the States cooperating with the Commission in its formulation of regulations and not both parties working together to establish compatible regulatory programs. However, during the negotiations for the New York Agreement (10/15/62), at the request of the State, this provision was changed to emphasize that States and the Commission should work together in achieving "coordinated and compatible" regulatory programs for radioactive materials. The articles of the 27 remaining Agreements differ slightly from the Standard Agreement. The language of the Standard Agreement is presented below with the language of the 27 Agreements shown in ~~strikeout~~ and any new language in redline.

"The Commission will use its best efforts to cooperate with the State and other agreement states in the formulation of standards and regulatory programs of the State and the Commission for protection against hazards of radiation and to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible. The State agrees will use its best efforts to cooperate with the Commission and other agreement states in the formulation of standards and regulatory programs of the State and the Commission for protection against hazards of radiation and to assure that the State's program will continue to be compatible with the program of the Commission for the regulation of like materials.

The State and the Commission will use their best efforts to keep each other informed of proposed changes in their respective rules and regulations and to provide each other the opportunity for early and substantive

contribution to the  
proposed change licensing, inspection and enforcement policies and  
criteria, and to  
obtain the comments and assistance of the other party thereon."

The State/Commonwealth and the Commission agree to keep each other  
informed  
of events, accidents, and licensee performance that may have generic  
implication or  
otherwise be of regulatory interest.

The paragraph added to the Standard Agreement clarifies the exchange of  
information  
between the Agreement States and the NRC regarding events and incidents.  
Under the  
new implementing procedures for the Policy Statement on Adequacy and  
Compatibility of  
Agreement State Programs, the reporting of events is identified as a  
program element  
required by Agreement States for the purposes of compatibility. Language  
was added to  
the implementing procedures stating that event reporting by Agreement  
States is  
mandatory as directed by the Commission in the June 30, 1997 SRM.

The New York Agreement contains the following text which is not a part of  
the Standard  
Agreement nor any of the other 29 current Agreements:

NY Agreement Article VII:

"The Commission and the State recognize that the limits on their  
respective rights,  
powers, and responsibilities under the Constitution, with respect to  
protection  
against radiation hazards arising out of the activities licensed by  
the Commission  
within the State, are not precisely clear. The Commission and the  
State agree to  
work together to define, within a reasonable time, the limits of,  
and to provide  
mechanisms for accommodating, such responsibilities of both parties.  
Without  
prejudice to the respective rights, powers and responsibilities of  
Federal and State  
authority, the State undertakes to obtain promptly and to maintain  
in effect while  
such cooperative endeavors are in progress, a modification of the  
Health, Sanitary  
and Industrial Codes which are to become effective within the State  
as of October  
15, 1962, so as to exempt (except for registration; notification;  
inspection, not  
including operational testing but including sampling which would not

substantially  
interfere with or interrupt any Commission licensed activities; and  
routing and  
scheduling of material in transit) licensees of the Commission from  
so much of such  
Codes as pertain to protection against radiation hazards arising out  
of activities  
licensed by the Commission within the State. While such cooperative  
endeavors  
are in progress, the existence or nonexistence of the exercise by  
the Commission or  
the State, in an emergency situation presenting a peril to the  
public health and  
safety, of any constitutional rights and powers the Federal  
Government or the State  
may have now or in the future. If such cooperative endeavors do not  
result in a  
definition, within a reasonable time , of the limits of, and  
provision of mechanisms  
for accommodating, the responsibilities of the Commission and the  
State with  
respect to protection against radiation hazards arising out of the  
activities licensed  
by the Commission within the State, then the existence or  
nonexistence of the  
exemptions and exceptions referred to above shall not prejudice the  
exercise by the  
Commission or the State of any constitutional rights and powers the  
Federal  
Government or the State may have now or in the future."

This paragraph addresses issues associated with the transition of certain  
regulatory  
authority from the Atomic Energy Commission (AEC) to the State of New  
York. Its  
continued existence in the Agreement, which is superfluous, does not  
impact the  
effectiveness of the Agreement.

## II. Conclusion Derived from the Evaluation of the Current Agreements

Although there are differences between the current Agreements and the  
Standard  
Agreement, staff believes that these differences do not result in a need  
for each current  
Agreement to be reaffirmed or modified in light of the new policy  
statements (Response to  
SRM dated November 2, 1994). Existing Agreements also remain valid, as  
directed in the  
June 30, 1997 SRM.

The staff believes that the current 30 Agreements are appropriately  
consistent with regard  
to compatibility, specification of authority, and termination and

suspension of Agreements to fully implement the two new policies. In addition, from the evaluation, the staff does not identify any additional requirements or commitments which need to be included in the Agreements. Staff also believes that while there is the potential for some marginal improvements in the language of the existing Agreements (e.g., clarifying the NRC and Agreement State responsibilities for information exchange), the staff and Agreement States have not identified any significant impacts on Agreement State Program effectiveness caused by their implementation. As such, any benefits gained from making changes to existing Agreements would not be justified by the resources required by the NRC and the States to develop and finalize amendments to the current 30 Agreements.

While a few Agreement States expressed doubt about their willingness to remain an Agreement State while the two new policy statements were in the early stages of development, no recent significant concern has been expressed. More recently, a few Agreement States informally indicated Agreement regulatory authority may be returned to NRC as a result of NRC's policy on the funding of Agreement State training and travel. However, all Agreements contain the provision that upon request of the Governor, an Agreement can be suspended or terminated. For this reason, reaffirmation of Agreements is not necessary to provide an Agreement State the opportunity to return regulatory authority to NRC. The staff discussed the need for Agreement reaffirmation and modification with the Executive Committee of the Organization of Agreement States and provided all Agreement State radiation control program directors an opportunity to comment on the staff's conclusions. The results indicate that the Agreement State radiation control programs agree with the staff's conclusion that reaffirmation or modification of Agreements is not necessary. Thus, the staff has concluded, based upon its evaluation, that no modification or reaffirmation of current Agreements is necessary either to reflect the new Standard Agreement or for implementation of the "Statement of Principles and Policy for the Agreement State Program" and the "Policy Statement on

Adequacy and Compatibility of Agreement State Programs."

COORDINATION:

The Office of the General Counsel has no legal objections.

L. Joseph Callan  
Executive Director  
for Operations

Attachment:  
Standard Agreement

cc: SECY  
OGC  
OCA  
OPA  
CFO  
CIO