

May 2, 2002

Mr. Clayton J. Bradt, CHP
Principal Radiophysicist
Radiological Health Unit
Division of Safety and Health
New York State Department of Labor
NYS Office Campus, Building 12, Room 169
Albany, NY 12240

Dear Mr. Bradt:

This letter is in response to your concerns whether the Nuclear Regulatory Commission has the authority to periodically review Agreement State programs to ensure continuing compatibility and adequacy of the States' programs. In that regard, your November 20, 2001 and December 7, 2001, e-mail inquiries raised a concern that language in Section 274(j), regarding the Commission's duty to conduct periodic reviews, is exclusively applicable to byproduct materials as defined in Section 11e.(2) of the Atomic Energy Act of 1954, as amended, (AEA). In addition, you have questioned the need to provide NRC with complete event report information received by the New York State Department of Labor from State licensees.

Section 274(d) of the AEA has provided, since it was enacted, that for a State to become an Agreement State, it had to have a program that was adequate to protect the public health and safety and that was compatible with the Commission's program for regulation. In addition, Section 274(j) provides that if the State does not maintain an adequate program to protect the public health and safety, the Commission could terminate the agreement. The Commission also recognized the need for continuing compatibility and addressed it in individual agreements. For example, the 1962 Agreement with the State of New York provided in Article V that the State will use its best efforts "to assure that the State's program will continue to be compatible with the program of the Commission for the regulation of like materials." Thus, New York like other Agreement States has agreed to seek continued compatibility.

Furthermore, the Commission has long considered that it was obligated to determine the continued adequacy and compatibility for States' programs and has, at least since 1965, conducted periodic reviews of the regulatory programs of the Agreement States. The Commission over the years has issued various policy statements on evaluating Agreement State programs which addressed periodic reviews. The Integrated Materials Performance Evaluation Program (IMPEP) was adopted to carry out the Commission's obligation to conduct the periodic reviews under Section 274(j).

Any question concerning the Commission's authority to conduct periodic reviews of Agreement State programs under Section 274(b) of the AEA was resolved by the 1978 amendment of

Section 274(j) which specifically addressed the issue of the Commission's authority to periodically review the programs of Agreement States. Section 274(j), as amended, states in relevant part that "[t]he Commission shall periodically review such agreements and actions by the States under the agreements to insure compliance with the provisions of this section." The agreements referred to in the quoted sentence are the agreements entered into under Section 274(b). It is clear from the legislative history that the 1978 amendment addressed agreements as a whole and not just agreements pertaining to 11e.(2) byproduct material. (See H. R. Rep. No. 95-1480, pt. 2, at 44-45 (September 30, 1978).) Thus, the plain meaning of the amended language is that the Commission has the authority and responsibility to periodically review Agreement State programs for the purpose of determining continued compatibility and adequacy. The results of such reviews may form the basis to terminate or suspend a Section 274(b) agreement in accordance with the other provisions in Section 274(j).

Most recently, the Commission again stated, when it issued its 1997 Statement of Principles and Policy for the Agreement State Program; Policy Statement on Adequacy and Compatibility of Agreement State Programs, 62 FR 46517 (September 3, 1997), that it has an obligation pursuant to Section 274(j) to ensure the continued adequacy and compatibility of Agreement State programs. In fact, in that Policy Statement, the Commission expressly rejected the view that the obligation for continued adequacy and compatibility only applied to agreements pertaining to 11e.(2) byproduct material. Among other things, the Commission stated that such a view would render meaningless the initial compatibility determination, as an Agreement State could divert from having a compatible program the day after the agreement is signed with the NRC. Such an approach would also be inconsistent with maintaining a coherent nationwide effort for the control of AEA material.

The reporting by Agreement States of operating experience of their licensees is a matter of compatibility in order to ensure a coherent nationwide effort for the control of AEA material. As noted in Office of State and Tribal Programs Procedure SA-300, *Reporting Material Events*:

The information collected on exposures, medical events, lost material, equipment failures, etc., that have occurred involving the licensed and unlicensed use of nuclear materials is invaluable in assessing trends or patterns, identifying generic issues, and recognizing any inadequacies or unreliability of specific equipment or procedures. The reported information will significantly aid in understanding why the event occurred and identifying any actions necessary to improve the effectiveness of NRC and Agreement State regulatory programs. The information is also used in preparation of NRC's annual performance report to Congress.

The Commission uses the Nuclear Materials Events Database (NMED) for collecting this operating experience information. We consider the collecting and sharing of information in the NMED system to be consistent with our mutual obligations expressed in Section V of the New York State Agreement.

I trust that this resolves your concerns about NRC's authority and responsibility to periodically review Agreement State programs, and the need for States to maintain compatibility including providing operating experience information to the Commission. If New York continues to question these matters, we would be pleased to arrange a meeting between the Commissioner, Department of Labor, and the NRC Deputy Executive Director for Materials, Research and State Programs. If you have any questions, please feel free to contact me at (301) 415-3340, Patricia Larkins at (301) 415-2309, or James Lieberman, Office of the General Counsel, at (301) 415-2746.

Sincerely,

/RA Josephine M. Piccone Acting for/
Paul H. Lohaus, Director
Office of State and Tribal Programs

cc: Linda Angello, Commissioner
Department of Labor

Richard Cucolo, Director
Division of Safety & Health

Kelly McKinney, Associate Commissioner
New York City Department of Health
and Mental Hygiene

Antonia C. Novello, Commissioner
New York State Department of Health

Erin M. Crotty, Commissioner
Department of Environmental Conservation

John Spath, Program Manager
Radioactive Waste and Policy and Nuclear Coordination
NYS Energy Research and Development Authority

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