

November 26, 2002

Mr. T. Pearce O'Kelley, Chair  
Organization of Agreement States  
Bureau of Radiological Health  
Department of Health and Environmental Control  
2600 Bull Street  
Columbia, SC 29201

Dear Mr. O'Kelley:

I am responding to the remaining request from William J. Sinclair's July 26, 2002 letter regarding Agreement State Liaisons to the Management Review Board (MRB) voting rights under the Integrated Materials Performance Evaluation Program (IMPEP). As noted in my September 6, 2002 letter to the Organization of Agreement States, we deferred a response to the question at that time until the Office of the General Counsel (OGC) reviewed this issue at the request of the Commission.

Enclosed is OGC's legal analysis. In brief, OGC concluded that the MRB activity involves a statutorily-based oversight and decision-making function, i.e., a Nuclear Regulatory Commission (NRC) determination of the adequacy and compatibility of an Agreement State's program as required by Section 274(j)(1) of the Atomic Energy Act of 1954, as amended. Giving the Agreement State Liaisons voting rights on the MRB would be a delegation of NRC's review and decision-making authority and responsibility to State personnel. When an agency function requires the exercise of discretion, the agency may delegate that function only if the statute granting the authority expressly or impliedly authorizes delegation. The function of the MRB requires the exercise of discretion in determining whether State programs are adequate and compatible, so in order for the NRC to delegate this responsibility it would need the express or implied approval of Congress for such delegation.

Congress did not explicitly authorize such a delegation in the Atomic Energy Act of 1954, as amended. OGC's review did not find any circumstances which would support an implied authority which would enable the NRC to delegate its judgmental functions. Consequently, the NRC has concluded that it would be inappropriate to delegate its review and decision-making function to Agreement State personnel by giving them voting rights on the MRB.

I appreciate your comments on the IMPEP process and look forward to our continuing to work cooperatively with the Organization of Agreement States in the future.

Sincerely,

*/RA/*

Carl J. Paperiello  
Deputy Executive Director  
for Material, Research and State Programs

Enclosure:  
As stated

cc: William Sinclair, UT  
Past-Chair, OAS  
Mr. T. Pearce O'Kelley, Chair  
Organization of Agreement States

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October 17, 2002

MEMORANDUM TO: Chairman Meserve  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield

FROM: Karen D. Cyr **/RA/**  
General Counsel

SUBJECT: RESPONSE TO SRM DATED AUGUST 27, 2002

In an August 27, 2002 Staff Requirements Memorandum (SRM), the Commission requests that the Office of The General Counsel (OGC) perform a legal analysis to determine under what circumstances the Agreement State Liaison (ASL) could have voting rights as a member of the Management Review Board (MRB). The MRB activity involves a statutorily-based oversight and decision-making function, i.e., an NRC determination of the adequacy and compatibility of an Agreement State's program as required by section 274(j)(1)<sup>1</sup> of the Atomic Energy Act of 1954, as amended (AEA). It is OGC's view that it would not be appropriate to delegate this decision-making function, which by statute is to be performed by the NRC itself, to Agreement State personnel by giving voting rights.

### **Background**

Under section 274 of the AEA, the NRC may relinquish regulation of certain AEA materials to the states. Before turning over control to a state, the NRC must make a finding that the state has implemented a regulatory program that is compatible with the NRC's regulatory program and adequate to protect the public health and safety. In addition, after relinquishing regulatory authority to a state, the NRC must review that state's program periodically.

The NRC has established the Integrated Material Performance Evaluation Program (IMPEP) to conduct the required periodic reviews of state regulatory programs. Under IMPEP, the MRB makes a finding regarding whether the state program continues to be adequate and compatible. The MRB is composed of members of the NRC's senior management.<sup>2</sup> The Agreement States have requested that they be permitted to provide input into the IMPEP process, and currently the MRB has an ASL who participates fully in all discussions but does not have voting rights. The Agreement States have

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<sup>1</sup>"The Commission shall periodically review such agreements and actions taken by the States under the agreements to insure compliance with the provisions of this section."

<sup>2</sup>For more information on the MRB see NRC Management Handbook 5.6, "Integrated Materials Performance Evaluation Program (IMPEP)", Part IV, November 5, 1999.

recently requested that this ASL have full membership on the MRB, including voting rights.<sup>3</sup> Since giving the ASL voting rights would confer on the ASL actual review and decision-making authority, this raises a question of when the NRC can legally delegate its statutory authorities or responsibilities to a party who is not an NRC official.

### **Analysis**

In cases of delegated authority involving personal trust or confidence, especially where the exercise of authority is subject to judgment or discretion, the authority cannot be delegated to another unless there is a special power of substitution either express or implied.<sup>4</sup> Whether an agency can delegate without express or implied authority to do so generally depends on the nature of the act. If the act is purely ministerial, it can be delegated; however, if the act is discretionary or quasi-judicial in nature there is generally no authority to delegate.<sup>5</sup> Where the function is discretionary, an agency may delegate only if the statute granting the authority expressly or impliedly authorizes delegation. The function of the MRB requires the exercise of discretion in determining whether state programs are adequate and compatible, so in order for the NRC to delegate this authority it would need the express or implied approval of Congress for such delegation.

The NRC authority to review state programs comes from section 274(j)(1) of the AEA. This section textually commits the task to the NRC alone, and there is no implication that Congress intended that the states have any authority in this determination. The Reorganization Plan No. 1 of 1980 (RP 1980)<sup>6</sup> does speak more generally to delegation of NRC authority, but it does not authorize delegation of NRC authority or responsibilities to States.

Even without express statutory authority, some courts have been willing to find that Congress has implied the authority for an agency to delegate within their organization. The question seems to be whether a delegation is necessary for the efficient functioning of the agency. Generally, delegations have been upheld when agencies, in view of the magnitude of their tasks, were deemed not to have

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<sup>3</sup>It should be noted that in the past NRC staff has suggested that requirements under the Federal Advisory Committee Act (FACA) would come into play if a state employee was a voting member of the MRB. New GSA regulations on implementing FACA would appear to permit a state employee to be a member of the MRB without implicating FACA.

<sup>4</sup>Shreveport Engraving Co. v. United States, 143 F.2d 222, 226 (5<sup>th</sup> Cir. 1944) (upholding delegation by the President of his authority under the War Powers Act to the Chairman of the War Production Board and the further delegation of this authority from the Chairman to a subordinate).

<sup>5</sup>See id. at 226-228 and Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5<sup>th</sup> Cir. 1957) (affirming the decision in Shreveport Engraving and noting that “while an administrative body cannot delegate quasi-judicial functions, it can delegate the performance of ministerial and administrative duties . . .”).

<sup>6</sup>Codified at 5 U.S.C. Appendix I.

been intended to exercise their discretion personally.<sup>7</sup> This is often applied to allow agencies to delegate down to their own staff under statutes that do not expressly authorize delegation<sup>8</sup> and to allow delegations by the President of authority that is impractical for him to implement alone.<sup>9</sup> The NRC has express authority to delegate to staff and has done so by delegating IMPEP review decisions to the MRB. There is no indication that it is not efficient or practical for the NRC to exercise its authority through its staff in an MRB as currently composed, and there is no reason to believe that allowing the ASL to have voting rights will in any way reduce the burden on the MRB or make the process more efficient.<sup>10</sup>

Another argument against the implied authority for the NRC to delegate its responsibility under section 274(j)(1) of the AEA is the comprehensive way that NRC delegation is addressed in the RP 1980. The RP 1980 includes several sections with detailed provisions on when and to whom NRC functions can be delegated. This undercuts any argument that Congress just failed to address the delegation question and would have been in favor of allowing delegation had it been considered. Given the lack of administrative necessity and the fact that NRC delegation of authority has been addressed in a detailed statutory scheme, there is little support for a finding that Congress impliedly intended to allow the NRC to delegate its authority under section 274(j)(1) of the AEA to Agreement State personnel.

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<sup>7</sup>See Fleming, Temporary Controls Administrator v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 122 (1947) (upholding delegation of the authority to sign and issue subpoenas from the Administrator of the Office of Price Administration to regional administrators and district directors based on the “overwhelming nature” of the price control program).

<sup>8</sup>See Shreveport Engraving, *supra* note 3, at 224-228 and United States ex. rel. Knauff v. Shaughnessy, Acting District Director of Immigration and Naturalization, 338 U.S. 537, 542-544 (1950) (upholding delegation by President to Attorney General of the authority to restrict alien entry into the United States).

<sup>9</sup>See Mohawk Wrecking, *Supra* note 7, at 120-123 and Papagianakis et al. v. The Samos et al., 186 F.2d 257, 259 (4<sup>th</sup> Cir. 1950) (upholding delegation from immigration officer to immigration inspectors where it was impractical for immigration officer to perform all inspections at a busy port himself).

<sup>10</sup>Also, at least one court has invalidated a delegation of federal agency authority to an entity that was not an employee of the federal government, particularly to entities whose objectivity may be questioned on grounds of a potential conflict of interest. See Pistachio Group of the Association of Food Industries, Inc., et al., Plaintiffs v. United States, Defendant, and California Pistachio Commission, et al., Defendant-Intervenors, 671 F. Supp. 31, 35 (Ct. Intl. Trade 1987), where the court held that use by the International Trade Administration in the Department of Commerce of exchange rates set by the NY Fed was an improper delegation of authority. The NY Fed was owned by member banks, and the court found that it was “not difficult to imagine” a situation where the member’s interests might conflict with the responsibility to set accurate exchange rates.

**Conclusion**

Giving the ASL voting rights on the MRB would be a delegation of review and decision-making authority and responsibility to State personnel. Congress has not explicitly authorized such a delegation. Nor do we find any circumstances which support implying authority for the NRC to delegate its judgmental functions. Consequently, we conclude it would be inappropriate to delegate the NRC's review and decision-making function to Agreement State personnel by giving them voting rights on the MRB.

cc: EDO  
SECY  
OSTP  
CFO  
CIO  
OCA