

October 25, 2005

MEMORANDUM TO: Martin J. Virgilio  
Deputy Executive Director for Materials, Research,  
State and Compliance Programs  
Office of the Executive Director for Operations

Janet Schlueter, Director  
Office of State and Tribal Programs

Jack R. Strosnider, Director  
Office of Nuclear Material Safety and Safeguards

Karen D. Cyr, General Counsel

FROM: John G. Zabko */RA/*  
Office of State and Tribal Programs

SUBJECT: SPECIAL MANAGEMENT REVIEW BOARD (MRB) MEETING  
FOR DISCUSSION OF THE RESULTS OF PERIODIC MEETING  
WITH THE STATE OF NEW YORK

A Special Management Review Board (MRB) meeting to discuss the results of a periodic meeting with the State of New York has been scheduled for **Thursday, November 3, 2005, from 2:00 p.m. to 4:00 p.m. EST, in One White Flint North, Room O3B4**. The periodic meeting results for the four New York programs will be discussed (ML051310467, ML051250442, ML051310458, ML051390004).

In accordance with Management Directive 5.6, the meeting is open to the public. The agenda for this meeting is attached (Attachment 1). Additional background material is included as Attachment 2.

If you have any questions prior to the meeting, please contact me at 301-415-2308.

Attachments:  
As stated

cc: Richard Ratliff, Texas  
Organization of Agreement  
States Liaison to the MRB

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## PERFORMANCE CONCERNS REGARDING THE NEW YORK AGREEMENT STATE PROGRAM

During the April 2005 periodic management meeting with the four agencies that comprise the New York Agreement State Program, NRC staff identified performance concerns regarding the slow progress in developing regulations or other legally binding requirements compatible with the NRC and not submitting reportable events to the NRC. In accordance with STP Procedure SA-116, "Periodic Meetings with Agreement States Between IMPEP Reviews," these concerns were documented in the periodic meeting summary and presented to the MRB for consideration.

### Background

The New York Agreement State program is administered by four agencies: State Health Department (NYSHD), State Labor Department (DOL), Department of Environmental Conservation (DEC) and New York City Department of Health (NYCDH). During the July 2002 IMPEP review, the team found that New York's performance with respect to the indicators compatibility requirements and response to incidents and allegations both satisfactory, but need improvement. Two periodic meetings were subsequently held with each agency in November 2003 and April 2005 (see ADAMS packages ML032721567 and ML050610445 respectively). Attached is a summary with the status for each agency regarding these two indicators.

As documented in the April 2005 periodic meeting summary, all agencies have a significant number of overdue amendments to adopt in accordance with NRC's policy on adequacy and compatibility. The three State agencies (NYSDH, DOL and DEC) have regulatory adoption processes that take 12 to 18 months and require approval of the Governor's Office of Regulatory Reform. The regulatory adoption process for NYCDH takes between six months and a year depending on the complexity of the regulations. In February 2005, NYCDH submitted a package of draft regulations of overdue NRC amendments for NRC review, but the package was returned since it was incomplete. NYCDH has not resubmitted the package. No other packages for NRC review have been submitted. NRC staff has discussed the importance of submitting regulations or legally binding requirements for NRC review at the last two periodic meetings. Adoption of regulations by the New York agencies has been an ongoing performance issue. The 1998 IMPEP review included similar recommendations on the adoption of NRC amendments.

At the time of the 2002 IMPEP review, event reporting was inconsistent for three of the four agencies. Two of the agencies have demonstrated or indicated improvement in this area. The failure of DOL to report events to the NRC in accordance with the requirements in STP Procedure SA-300 "Reporting of Materials Events" is long standing and is based on the DOL Program Director's legal interpretation of the 1962 Agreement, the 1965 amendment, the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and Congressional reports that support the legislation. NRC staff has discussed the importance of submitting events in accordance with NRC policy with the DOL Program Director and management at the last two periodic meetings.

The Program Director's philosophical differences with the NRC extend beyond event reporting and include the need to maintain compatibility with the NRC and the validity of NRC to conduct periodic reviews of Agreement State programs. These matters have been discussed and documented previously, particularly in the periodic meeting summary for the November 1999 meeting (ML003710985), the May 2, 2002 letter from NRC to the Program Director (ML021220610) and recently in conjunction with the DOL's Program Director's presentation on October 6, 2005 at the Organization of Agreement States meeting.

In April 2005, NRC senior management initiated correspondence with DOL senior management on this issue to reach final resolution. DOL's response in June 2005 and offer to provide annual summary of events is not consistent with NRC policy. To date, the NRC has had no further communication with DOL on this matter.

NRC staff has provided New York State Energy Research and Development Authority (NYSERDA) with various documents related to DOL's Program Director's legal interpretations. These documents have been provided to NYSERDA legal counsel for review. NYSERDA serves a coordination function for radiation matters in the State and the President of NYSERDA is the Governor's State Liaison Officer with the NRC

#### Discussion

As of October 19, 2005, none of the four New York agencies have indicated that additional NRC amendments have been adopted or license conditions used. In addition, DOL's continued resistance to report events to the NRC in a timely manner creates a potential gap for an effective response, particularly if the event has potential security implications (i.e., lost or stolen material is a quantity of concern).

Due to the large number of overdue regulations for an extended period and the inability to verify the compatibility and adequacy of the license conditions, staff recommends that the MRB consider the New York Agreement State Program for heightened oversight. Similar action was taken after periodic management meetings with Texas and Kansas. The New York program is scheduled for an IMPEP review in July 2006. A period of heightened oversight will afford the four agencies the extra level of program visibility to ensure that by the 2006 IMPEP this deficiency can be adequately addressed.

**SUMMARY OF NEW YORK AGREEMENT STATE PROGRAM PERFORMANCE ISSUES**

Agency	Issue	July 2002: IMPEP	November 2003: Periodic Meeting	April 2005: Periodic Meeting
NYSDH	Event Reporting	The team found that State Health's documentation to incidents was missing or incomplete and was inconsistently reported to the NRC.	NRC observed in-house developed database used to track, document and report all types of incidents, included those involving byproduct material. All events reported to NRC.	Database enhanced and expanded. All events reported to NRC.  <u>Recommend verifying and closing at next IMPEP.</u>
	Regulations	Four NRC amendments overdue; three currently due.	No new amendments adopted.	Little progress made in adopting NRC amendments; seven amendments overdue, three currently due.
NYCDH	Event Reporting	The team found that City Health's documentation was inconsistent and lack completeness and depth; inconsistent reporting to the NRC.	Management reported monthly tracking and additional oversight to incident followup. No NRC reportable incidents.	Management continued to report that monthly tracking and additional oversight to incident followup. No NRC reportable incidents.  <u>Recommend verifying and closing at next IMPEP.</u>
	Regulations	Nine NRC amendments overdue; three currently due.	No new amendments adopted.	Package submitted to NRC in February 2005 with nine amendments, subsequently returned as incomplete. Ten amendments overdue; four currently due.
DEC	Event Reporting	No performance issues.	No performance issues.	No performance issues.
	Regulations	Six NRC amendments overdue; one currently due.	One amendment adopted by license condition; not reviewed by NRC.	Little progress made in adopting NRC amendments; nine amendments overdue, one currently due.

**SUMMARY OF NEW YORK AGREEMENT STATE PROGRAM PERFORMANCE ISSUES**

Agency	Issue	July 2002: IMPEP	November 2003: Periodic Meeting	April 2005: Periodic Meeting
DOL	Event Reporting	Lack of consistent event reporting. Program Director did not feel any obligation to report incidents that did not directly impact NRC or other Agreement State licensees.	Program Director chose not to report events on a timely basis to NRC. Program Director repeated that DOL did not feel any obligation to report incidents that did not directly impact NRC or other Agreement State licensees.	No change in DOL position. Prior to meeting, letter dated 4/6/05 from Virgilio to Commissioner Angelo requesting assistance in addressing and resolving issue. Subsequently correspondence dated 6/1/05 from DOL indicated that annual summaries would be provided to NRC.
	Regulations	Three NRC amendments overdue; six amendments due.	No new amendments adopted, but several prepared for legal review.	Little progress made in adopting NRC amendments; eight amendments overdue, five currently due.