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

October 27, 2006

ALL AGREEMENT STATES
AGREEMENT STATE LIAISON OFFICERS

DRAFT SAMPLE LETTER FOR GOVERNOR'S CERTIFICATION OF ADEQUACY UNDER SECTION 651 OF THE ENERGY POLICY ACT OF 2005 (FSME-06-099)

Purpose: To provide the Agreement States a sample certification letter (enclosure 1) that your Governor could use to meet the certification requirements in Section 651(e) of the Energy Policy Act of 2005 (EPAct). **States are not required to use the sample letter.**

Background: Section 651(e) of the EPAct expanded the definition of byproduct material by adding paragraphs (3) and (4) to Section 11e of the Atomic Energy Act of 1954, as amended. The EPAct authorizes the Commission to discontinue its regulatory authority over the new byproduct material, and an Agreement State to exercise regulatory authority over the new byproduct material under the existing Agreement. To do so, the Governor must certify to the Commission that the State has a program to regulate the new byproduct material that is adequate (as determined by the Commission) to protect public health and safety, and that the State intends to continue to regulate the material. A copy of Section 651(e) of the EPAct is enclosed (enclosure 2).

In order to assure an orderly transition of regulatory authority over the new byproduct material, the EPAct requires the Commission to publish a Transition Plan. A copy of the draft Transition Plan approved by the Commission was provided to you for comment in FSME-06-097 dated October 25, 2006.

Discussion: The enclosed sample certification letter was prepared to assist States in providing certifications that are in accordance with Section 651(e) and NRC's Transition Plan. The letter, as written, would provide the information necessary for the Commission to make the adequacy determination required by the EPAct. No other information from your State would be needed if this letter content is adhered to. Again, States are not required to use the sample letter.

For example, a State may choose to provide the supporting information required in paragraph 3 of the sample letter separately from the Governor's certification. Either way, the information in paragraph 3 still needs to be provided for the State submittal to be considered complete. Further, if the submittal of the supporting information were delayed until well after the Governor's certification, it could delay NRC's adequacy determination, and the transition of authority to the State.

Please note that although NRC has not currently identified any naturally occurring radioactive material that meets the definition of byproduct material in paragraph (4) of Section 11e., this paragraph is included in the certification letter to ensure compliance with the EPAct provision.

Action: Please review the enclosed sample letter and consider submitting it or a comparable certification letter that meets the requirements of Section 651(e) of the EPAct. As a reminder, certifications may be made to the Commission at any time now since the Commission has approved the draft Transition Plan. All Governors' certifications must be submitted by the date of publication of the final Transition Plan. We expect that date to be on or before April 7, 2007.

Finally, it should be noted that a slight modification to the sample letter was necessary for use by the State of Minnesota since that program has not had an IMPEP review since entering into the Agreement on March 31, 2006.

If you have any questions on this correspondence, please contact me at (301) 415-4430 or the individual named below.

POINT OF CONTACT: Richard Blanton INTERNET: RLB@NRC.GOV
TELEPHONE: (301) 415-2322 FAX: (301) 415-3502

/RA/

Janet R. Schlueter, Director
Division of Materials Safety
and State Agreements
Office of Federal and State Materials
and Environmental Management Programs

Enclosures:
As stated

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DATE	10/27/06		10/26/06		10/27/06		10/27/06			

OFFICIAL RECORD COPY

SAMPLE LETTER

Date

The Honorable Dale E. Klein, Ph.D., Chairman
United States Nuclear Regulatory Commission
Washington, DC 20555

Dear Dr. Klein,

The purpose of this letter is to comply with the provisions of Section 651(e) of the Energy Policy Act of 2005, regarding the licensing of certain naturally occurring and accelerator produced radioactive materials now defined as byproduct material in Sections 11e.(3) and 11e.(4) of the Atomic Energy Act of 1954, as amended.

In 19XX, the State (Commonwealth) of _____ entered into an Agreement with the Commission under Section 274b. of the Atomic Energy Act of 1954, as amended. Under that Agreement, the State (Commonwealth) licenses byproduct material as defined in Section 11e.(1) of the Atomic Energy Act. In addition, the State (Commonwealth) licenses the naturally occurring and accelerator produced radioactive materials now defined as byproduct material.

Our program for licensing the new byproduct material is not separate and distinct from the program for licensing 11e.(1) byproduct material, and no changes have been made to the licensing program that would impact the previous IMPEP finding of adequacy. Further, we intend to continue to license the new byproduct material under this same program.

Accordingly, I certify to the Commission that the State (Commonwealth) of _____ has a program for licensing byproduct material, as defined in paragraph (3) or (4) of Section 11e. of the Atomic Energy Act of 1954, as amended, that is adequate to protect the public health and safety, and that the State intends to continue to implement our regulatory responsibility with respect to the byproduct material.

This certification is effective on the date of publication of the NRC's "Plan for the Transition of Regulatory Authority Resulting from the Expanded Definition of Byproduct Material."

Respectfully,

_____, Governor,
State (or Commonwealth) of _____

ADDENDUM FOR MINNESOTA ONLY

Since Minnesota is not scheduled for an IMPEP review prior to the expected date of publication of the Transition Plan, you should substitute the following for the third paragraph in the draft sample letter, or provide separately:

Our program for licensing the new byproduct material is not separate and distinct from the program for licensing 11e.(1) byproduct material, and no changes have been made to the licensing program that would impact the Commission's decision to enter into the Agreement. Further, we intend to continue to license the new byproduct material under this same program.

`Energy Policy Act of 2005'

SEC. 651. NUCLEAR FACILITY AND MATERIALS SECURITY.

(e) Treatment of Accelerator-produced and Other Radioactive Material as Byproduct Material-

(1) DEFINITION OF BYPRODUCT MATERIAL- Section 11 e. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)) is amended–

(A) by striking `means (1) any radioactive' and inserting the following: `means–

`(1) any radioactive'.

(B) by striking `material, and (2) the tailings' and inserting the following: `material;

`(2) the tailings'.

(C) by striking `content.' and inserting the following: `content;

`(3)(A) any discrete source of radium-226 that is produced, extracted, or converted after extraction, before, on, or after the date of enactment of this paragraph for use for a commercial, medical, or research activity; or

`(B) any material that–

`(i) has been made radioactive by use of a particle accelerator; and

`(ii) is produced, extracted, or converted after extraction, before, on, or after the date of enactment of this paragraph for use for a commercial, medical, or research activity; and

`(4) any discrete source of naturally occurring radioactive material, other than source material, that–

`(A) the Commission, in consultation with the Administrator of the Environmental Protection Agency, the Secretary of Energy, the Secretary of Homeland Security, and the head of any other appropriate Federal agency, determines would pose a threat similar to the threat posed by a discrete source of radium-226 to the public health and safety or the common defense and security; and

`(B) before, on, or after the date of enactment of this paragraph is extracted or converted after extraction for use in a commercial, medical, or research activity.'.

(2) AGREEMENTS WITH GOVERNORS- Section 274 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2021(b)) is amended by striking `State--' and all that follows through paragraph (4) and inserting the following: `State:

`(1) Byproduct materials (as defined in Section 11 e.).

`(2) Source materials.

`(3) Special nuclear materials in quantities not sufficient to form a critical mass.'.
(3) WASTE DISPOSAL-

(A) DOMESTIC DISTRIBUTION- Section 81 of the Atomic Energy Act of 1954 (42 U.S.C. 2111) is amended–

(i) by striking `No person may' and inserting the following:

`a. In General- No person may'.

(ii) by adding at the end the following:

`b. Requirements-

`(1) IN GENERAL- Except as provided in paragraph (2), byproduct material, as defined in paragraphs (3) and (4) of Section 11 e., may only be transferred to and disposed of in a disposal facility that–

`(A) is adequate to protect public health and safety; and

`(B)(i) is licensed by the Commission; or

`(ii) is licensed by a State that has entered into an agreement with the Commission under Section 274 b., if the licensing requirements of the State are compatible with the licensing requirements of the Commission.

`(2) EFFECT OF SUBSECTION- Nothing in this subsection affects the authority of any entity to dispose of byproduct material, as defined in paragraphs (3) and (4) of Section 11 e., at a disposal facility in accordance with any Federal or State solid or hazardous waste law, including the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

`c. Treatment as Low-level Radioactive Waste- Byproduct material, as defined in paragraphs (3) and (4) of Section 11 e., disposed of under this section shall not be considered to be low-level radioactive waste for the purposes of–

`(1) Section 2 of the Low-Level Radioactive Waste Policy Act (42 U.S.C. 2021b); or

`(2) carrying out a compact that is–

`(A) entered into in accordance with that Act (42 U.S.C. 2021b et seq.); and

`(B) approved by Congress.'.

(B) DEFINITION OF LOW-LEVEL RADIOACTIVE WASTE- Section 2(9) of the Low-Level Radioactive Waste Policy Act (42 U.S.C. 2021b(9)) is amended–

(i) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively, and indenting the clauses appropriately;
(ii) in the matter preceding clause (i) (as redesignated by subparagraph (A)) by striking `The term' and inserting the following:

`(A) IN GENERAL- The term'; and

(iii) by adding at the end the following:

`(B) EXCLUSION- The term `low-level radioactive waste' does not include byproduct material (as defined in paragraphs (3) and (4) of Section 11 e. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)).'.

(4) FINAL REGULATIONS-

(A) REGULATIONS-

(i) IN GENERAL- Not later than 18 months after the date of enactment of this Act, the Commission, after consultation with States and other stakeholders, shall issue final regulations establishing such requirements as the Commission determines to be necessary to carry out this section and the amendments made by this section.

(ii) INCLUSIONS- The regulations shall include a definition of the term `discrete source' for purposes of paragraphs (3) and (4) of Section 11 e. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)) (as amended by paragraph (1)).

(B) COOPERATION- In promulgating regulations under paragraph (1), the Commission shall, to the maximum extent practicable–

(i) cooperate with States; and

(ii) use model State standards in existence on the date of enactment of this Act.

(C) TRANSITION PLAN-

(i) DEFINITION OF BYPRODUCT MATERIAL- In this paragraph, the term `byproduct material' has the meaning given the term in paragraphs (3) and (4) of Section 11 e. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)) (as amended by paragraph (1)).

(ii) PREPARATION AND PUBLICATION- To facilitate an orderly transition of regulatory authority with respect to byproduct material, the Commission, in issuing regulations under subparagraph (A), shall prepare and publish a transition plan for–

(I) States that have not, before the date on which the plan is published, entered into an agreement with the Commission under Section 274 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2021(b)); and

(II) States that have entered into an agreement with the Commission under that section before the date on which the plan is published.
(iii) INCLUSIONS- The transition plan under clause (ii) shall include–

(I) a description of the conditions under which a State may exercise authority over byproduct material; and

(II) a statement of the Commission that any agreement covering byproduct material, as defined in paragraph (1) or (2) of Section 11e. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)), entered into between the Commission and a State under Section 274 b. of that Act (42 U.S.C. 2021(b)) before the date of publication of the transition plan shall be considered to include byproduct material, as defined in paragraph (3) or (4) of Section 11e. of that Act (42 U.S.C. 2014(e)) (as amended by paragraph (1)), if the Governor of the State certifies to the Commission on the date of publication of the transition plan that--

(aa) the State has a program for licensing byproduct material, as defined in paragraph (3) or (4) of Section 11e. of the Atomic Energy Act of 1954, that is adequate to protect the public health and safety, as determined by the Commission; and

(bb) the State intends to continue to implement the regulatory responsibility of the State with respect to the byproduct material.

(D) AVAILABILITY OF RADIOPHARMACEUTICALS- In promulgating regulations under subparagraph (A), the Commission shall consider the impact on the availability of radiopharmaceuticals to–

(i) physicians; and

(ii) patients the medical treatment of which relies on radiopharmaceuticals.

(5) WAIVERS-

(A) IN GENERAL- Except as provided in subparagraph (B), the Commission may grant a waiver to any entity of any requirement under this section or an amendment made by this section with respect to a matter relating to byproduct material (as defined in paragraphs (3) and (4) of Section 11 e. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)) (as amended by paragraph (1))) if the Commission determines that the waiver is in accordance with the protection of the public health and safety and the promotion of the common defense and security.

(B) EXCEPTIONS-

(i) IN GENERAL- The Commission may not grant a waiver under subparagraph (A) with respect to–

(I) any requirement under the amendments made by subsection (c)(1);

(II) a matter relating to an importation into, or exportation from, the United States for a period ending after the date that is 1 year after the date of enactment of this Act; or
(III) any other matter for a period ending after the date that is 4 years after the date of enactment of this Act.

(ii) WAIVERS TO STATES- The Commission shall terminate any waiver granted to a State under subparagraph (A) if the Commission determines that–

(I) the State has entered into an agreement with the Commission under Section 274 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2021(b));

(II) the agreement described in subclause (I) covers byproduct material (as described in paragraph (3) or (4) of Section 11 e. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)) (as amended by paragraph (1))); and

(III) the program of the State for licensing such byproduct material is adequate to protect the public health and safety.

(C) PUBLICATION- The Commission shall publish in the Federal Register a notice of any waiver granted under this subsection.