~~STP~~ Federal and State Materials and Environmental Management Programs (FSME) Procedure Approval

Jurisdiction Determinations - SA-500

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NOTE

This procedure was formerly issued by the Office of State and Tribal Programs ~~The~~ (STP) ~~Director's Secretary is responsible for the maintenance of this master copy document as part of the STP Procedure Manual~~. Any changes to the procedure will be the responsibility of the ~~STP~~ Federal and States Materials and Environmental Management Programs (FSME) Procedure Contact as of October 1, 2006. Copies of ~~STP~~ this procedures will be ~~distributed for information~~ available through NRC's website.

I. INTRODUCTION

This procedure describes the process for resolving questions of jurisdiction involving the use of ~~B~~byproduct, ~~S~~source and ~~S~~special ~~N~~nuclear ~~M~~aterial (SNM) within Agreement States; i.e., whether the Nuclear Regulatory Commission (NRC) or an Agreement State is the appropriate licensing agency in certain cases. (NOTE: Federal ownership of land does not necessarily mean that licensees are subject to NRC regulatory control when working on that site).

II. OBJECTIVE

To provide guidance to the Office of Federal and State Materials and Environmental Management ~~Tribal~~ Programs (~~STP~~ FSME) staff on the handling of jurisdiction determinations involving the use of ~~B~~byproduct, ~~S~~source and SNM within Agreement States.

III. BACKGROUND

Private sector licensees performing work on Federally-owned or Federally-controlled lands within Agreement States are covered by one of the following forms of jurisdiction listed in III.A., below.

A. Definitions - Categories of Legislative Jurisdiction[1]

1. Exclusive legislative jurisdiction - only Federal laws are applicable pursuant to the U.S. Constitution or through cession by a State.

2. Concurrent legislative jurisdiction - the State concerned has reserved to itself the right to exercise concurrently with the Federal government all of the same authority.

3. Partial legislative jurisdiction - the State concerned has granted the Federal government certain of the State's authority but has reserved to itself the

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[1] More complete definitions are contained in the background and reference folder for this procedure located in the ~~STP~~ Jurisdiction File formerly maintained by the Office of State and Tribal Programs (STP). On October 1, 2006, STP was reorganized into the Office of Federal and State Materials and Environmental Management Programs (FSME).

right to exercise, by itself or concurrently with the Federal government, other authority.[2]

4. Proprietorial interest - the Federal government has acquired some right or title to an area in a State but has not obtained any measure of the State's authority over the area.

B. Jurisdictional determinations are normally made on a case-by-case basis following the guidance set out in Appendix A.

C. Reservations and General Precedents

1. A Section 274b Agreement, as implemented by 10 CFR Part 150, does not transfer regulatory authority to the States over the following:

   a. Activities of Federal Agencies located in Agreement States;

   b. Activities involving special nuclear material in quantities sufficient to form a critical mass;

   c. Construction and operation of production and utilization facilities, or any uranium enrichment facility;

   d. Disposal of radioactive wastes into the ocean or sea;

   e. Transfer of products to persons exempt from licensing;

   f. Import or export of source, byproduct, and special nuclear material;

   g. Activities aboard commissioned naval vessels (determined by interpretation, see Reference #4).

2. On Indian land, there is a presumption that the Section 274b Agreement, as implemented by 10 CFR Part 150, does not transfer regulatory authority to the States for either:

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[2] When property falls within this category, a determination must be made as to the type of authority reserved to the State (e.g., authority for public health protection).

a. American Indian owned companies operating on American Indian lands; or

b. Private (non-American Indian owned) companies operating on American Indian lands. Consequently, absent NRC written approval, a State may not regulate activities on Indian land. (See V.C. below for guidance on existing licensed facilities.)

D. The State will exercise regulatory jurisdiction over:

1. Non-Federal licensees using Agreement material in areas of non-exclusive Federal jurisdiction;

2. Radiographers on reactor sites in Agreement States (determined by interpretation, see Reference #5);

3. Calibration standards in Agreement States for off-site monitors around reactors;

4. For activities occurring on American Indian Lands after the date of this guidance, if NRC has provided prior approval in writing, determined by the process set out in IV.B. (also see V. C. below for guidance on existing licensed facilities).

E. Byproduct Material Intimately Mixed with SNM in quantities sufficient to form a critical mass at facilities within Agreement States:

1. If the facility falls under the definition of "production or utilization facility" in 10 CFR 50.2, the NRC license covers all material;

2. If the facility is neither a "production or utilization facility as defined" in 10 CFR 50.2, nor an uranium enrichment facility, separate licenses issued by the Agreement State and by the NRC cover the byproduct material and the SNM in quantities sufficient to form a critical mass, respectively.

F. Offshore Operations Outside the Territorial Waters of a State:

1. Persons using byproduct, source, or SNM in offshore waters are not exempt from NRC regulation (10 CFR 150.7).

IV. ROLES AND RESPONSIBILITIES

A. Procedure for determining jurisdictional status of lands for other than Indian land:

1. NRC staff with questions on determining the jurisdictional status of lands or facilities should refer to the "NRC Procedure for Determining Exclusive Federal Jurisdiction" (see Appendix A).

2. If a determination cannot be made in accordance with paragraph one, the Federal Agency whose facility is involved shall be contacted. Federal Agency contacts and telephone numbers may be obtained by consulting the Federal Executive Directory or the local telephone directory (the White Pages).

3. If a jurisdiction question arises which involves a Federal Agency for which no contact has been established, inquiries should be directed to those offices (normally in Washington, DC) which maintain the real estate for the Federal Agency.

4. Questions involving jurisdiction should be referred to the NRC's Office of the General Counsel (OGC) for assistance.

5. A jurisdiction file containing appropriate supporting information is maintained by ~~STP~~ FSME.

B. Procedure for determining jurisdictional status of activities on Indian land:

1. If a State desires to exercise jurisdiction over activities on Indian lands it must apply in writing to the NRC staff providing the basis that it has the requisite legal authority to regulate Atomic Energy Act materials on Indian Lands. Normally, this would require at least a legal analysis prepared by the State Attorney General's Office explaining the basis for the State's position.

2. The NRC staff would seek input from the affected Tribe and any other interested stakeholder such as the applicant for the license, if other than the Tribe.

3. The NRC staff with the assistance of the OGC will make a jurisdictional decision and therefore notify the State, the Tribe and the other stakeholders.

V. GUIDANCE

A. The NRC staff may receive inquiries or questions from licensees on the jurisdictional status of lands or facilities controlled by a Federal Agency. These licensees should be encouraged to contact the Federal Agency controlling the proposed jobsite and to obtain a jurisdiction determination.

B. Upon obtaining information on the jurisdictional status of the proposed jobsite, the licensee shall be advised to either file for reciprocity to work in NRC Jurisdiction (for Agreement State licensees only) or file for reciprocity with the Agreement State where the work is to be conducted (for NRC licensees or licensees from other Agreement States).

C. The NRC staff may receive inquiries or questions on the jurisdictional status of activities on Indian lands. NRC will entertain requests from States for determinations as to whether the State may regulate such activities. NRC does not intend to revisit State or NRC decisions, made prior to this guidance, on jurisdiction on Indian lands unless a written request is made.

VI. APPENDIX

Appendix A - NRC Procedure for Determining Exclusive Federal Jurisdiction
Attachment 1 - Recommended Procedure for Licensees to Obtain Jurisdiction Determinations

VII. REFERENCES

~~The following documents are located in the background and reference folder for this procedure in the STP Jurisdiction file:~~[3]

~~1. Memorandum Parler to Shapar, Jurisdiction to Regulate Private Licensees Conducting Activities On Federal Enclaves in Agreement States, May 22, 1963;~~

~~2. Guide for handling AEC-Agreement State Jurisdictional Problems, September 25, 1965;~~

[3] Several of these documents are not current. Before using these references, coordinate the review with OGC to assure that aspects of the document to be used are still valid.

~~3. AEC Jurisdiction Over Nuclear Facilities and Materials Under the Atomic Energy Act, Office of the General Counsel Opinion, March 14, 1969;~~

~~4. All Agreement States - Interpretative Letter No. 76-02, dated October 20, 1976 on commissioned naval vessels;~~

~~5. Radiography operations at reactor sites - Memorandum from R.E. Cunningham to Regional Administrators and Branch Chiefs dated September 16, 1983;~~

~~6. Reciprocity in Areas of Federal Jurisdiction Within Agreement States, memo from S.A. Treby to C. Kammerer and R. E. Cunningham, dated September 10, 1992;~~

~~7~~1. NUREG-1556, Volume 19: "Guidance For Agreement State Licensees about NRC Form 241 "Report of Proposed Activities in Non-Agreement States, Areas of Exclusive Federal Jurisdiction, or Offshore Waters" and Guidance For NRC Licensees Proposing to Work in Agreement States Jurisdiction (Reciprocity) (Final Report) Published: November 2000.

2. Energy Policy Act of 2005.

VIII. ADAMS Reference Documents[4]

Date	Document Tittle/Description	ADAMS ML #
1. 7/8/2002	SA-500: Jurisdiction Determinations	ML020580649
2. 5/22/1963	Memorandum Parler to Shapar, Jurisdiction to Regulate Private Licensees Conducting Activities On Federal Enclaves in Agreement States	ML063410496
3. 9/25/1965	Guide for handling AEC-Agreement State Jurisdictional Problems	ML063410492
4. 3/14/1969	AEC Jurisdiction Over Nuclear Facilities and Materials Under the Atomic Energy Act,	ML063410490

[4] Several of these documents are not current. Before using these references, coordinate the review with OGC to assure that aspects of the document to be used are still valid.

5. 10/20/1976	All Agreement States - Interpretative Letter No. 76-02 on commissioned naval vessels	ML063410484
6. 9/16/1983	Radiography operations at reactor sites Memorandum from R.E. Cunningham to Regional Administrators and Branch Chiefs	ML063410482
7. 9/10/1992	Reciprocity in Areas of Federal Jurisdiction Within Agreement States, memo from S.A. Treby to C. Kammerer and R. E. Cunningham	ML063410487

Appendix A

NRC PROCEDURE FOR DETERMINING EXCLUSIVE FEDERAL JURISDICTION

I. Introduction

This procedure describes the process for resolving questions of jurisdiction over facilities and sites where NRC and Agreement State licensees may propose to operate, which determines whether NRC or an Agreement State is the appropriate licensing agency. (NOTE: Federal ownership of land does not necessarily mean that licensees are subject to NRC regulatory control when working on that site.)

II. Areas of Exclusive Federal Jurisdiction

An area of exclusive Federal jurisdiction is an area over which the Federal government exercises legal control without interference from the jurisdiction and administration of State law. The creation of an area of exclusive Federal jurisdiction occurs as a result of State consent at the time the Federal government acquires control over the land.

The determination of whether a Federal enclave is an area of exclusive Federal jurisdiction must be made on a case-by-case basis since the status of such land is subject to change. The most effective and efficient way to make determinations is to contact the Federal Agency responsible for exercising Federal control over the enclave.

III. Responsibilities and Procedures

Jurisdiction determination requests or questions should be handled utilizing one of the following approaches:

A. In response to inquiries or questions on jurisdictional status, the licensee should be asked to determine, from their Federal Agency contact at the site or the facility where the work is to occur, the jurisdictional status of the areas where the licensee plans to work. See Attachment 1, "Recommended Procedure for Licensees to Obtain Jurisdiction Determinations," for guidance to be followed by licensees proposing to work at Federally-controlled jobsites in Agreement States. If the area is under exclusive Federal jurisdiction, an Agreement State licensee should obtain, if practicable, a written statement from the Federal facility to that effect and submit the statement along with the reciprocity notification or application to the appropriate NRC regional office. An Agreement State licensee may not work in areas of exclusive Federal jurisdiction without either: (1) filing a Form 241 in accordance with 10 CFR 150.20(b), "Recognition of Agreement State Licensees;" or (2) by applying for a specific NRC license.

B. If a licensee has been unable to obtain a jurisdictional determination on a proposed Federally-controlled jobsite or is unable to identify a local or regional Federal Agency representative, the NRC staff (Regional or Headquarters) should direct the licensee to contact the appropriate Federal Agency headquarters contact for assistance in identifying the name of the appropriate local or regional representative the licensee should contact to obtain the determination. Federal Agency headquarters contacts and telephone numbers may be obtained by consulting the Federal Executive Directory or the local telephone directory (the White Pages).

C. An NRC licensee planning to conduct operations at a Federal facility, where the Agreement State has jurisdiction (i.e., it is not an area of exclusive Federal jurisdiction), must file for reciprocity with the Agreement State regulatory authority in accordance with the State's regulations or obtain a specific license from that State. Agreement State radiation control program contacts may be accessed on the Office of Federal and State Materials and ~~Tribal~~ Environmental Management Programs (FSME) Web Site. ~~at: http://www.hsrd.ornl.gov/nrc/asframedirectr.htm.~~

D. American Indian owned companies and non-American Indian owned companies proposing to use Agreement materials on American Indian owned (Treaty) lands, should be directed to the appropriate NRC Regional Office as stated in NUREG-1556, Volume 19, Section 2.4. Jurisdictional determinations on questions involving American Indian lands will be reviewed and handled on a case-by-case basis.

E. Naturally Occurring Radioactive Material (NORM), other than discrete sources of radium-226, is not currently regulated by the NRC. ~~and~~ Accelerator Produced Radioactive Material (~~N~~ARM) is not regulated by the NRC unless the material was produced for use in a commercial, medical or research activity. Questions regarding the use of NORM or ARM not regulated by the NRC should be directed to the appropriate Agreement State or non-Agreement State Radiation Control Program Office contacts located at FSME's ~~the~~ Web Site ~~in paragraph C~~.

Attachment 1

RECOMMENDED PROCEDURE FOR LICENSEES TO OBTAIN JURISDICTION DETERMINATIONS

If you intend to conduct licensed activities at a Federally-controlled site (e.g., a Federally-controlled site in an Agreement State), the jurisdictional status of the site should be determined. If you are uncertain regarding the jurisdictional status of a proposed job site, it is recommended that you take the following steps:

A . Obtain specific information regarding the location of the proposed job site (e.g., street address, Range/Township, building or hangar number, distance from a specific intersection, or other identifying details) and identity of the Federal Agency controlling the proposed job site.

B. Call the Federal Agency's local contact (contract officer, base environmental health officer, district office staff, regional office staff, etc.) and request information regarding the jurisdictional status of the proposed job site. We recommend that you request such a statement in writing. Otherwise, you should document, in your records, the name and title of the person at the Federal Agency who provided the determination and the date that it was provided.

1. If the job site is identified as falling under "Exclusive Federal Jurisdiction" and you are an Agreement State licensee, your notification of proposed work (NRC Form 241) and, if available, a copy of the statement of jurisdiction from the agency should be submitted to NRC. In lieu of submitting an NRC Form 241, Agreement State licensees may apply for a specific NRC license to operate in areas under NRC jurisdiction. If you are an NRC licensee, no action is required.

2. If the job site is identified as other than "Exclusive Federal Jurisdiction" you should contact the Agreement State within which the facility exists.

If you are an American Indian owned company or a non-American Indian owned company proposing to work on American Indian owned (Treaty) lands, you should contact the appropriate NRC Regional office as directed in NUREG-1556, Volume 19: “Guidance For Agreement State Licensees about NRC Form 241 “Report of Proposed Activities in Non-Agreement States, Areas of Exclusive Federal Jurisdiction, or Off-Shore Waters” and Guidance For NRC Licensees Proposing to Work in Agreement State Jurisdiction (Reciprocity) (Final Report) Published: November 2000.”

An Agreement State licensee found to be involved in an area of exclusive Federal jurisdiction without a prior NRC license or without prior filing for reciprocity in accordance with 10 CFR 150.20 is potentially subject to escalated enforcement action, including civil penalties and orders. However, NRC will not take enforcement action against an Agreement State licensee for such

violations if the licensee has evidence that it received a determination from the Federal Agency that the area of work is not subject to exclusive Federal jurisdiction. This evidence may be a written statement from the Federal Agency that provided the determination and the date that it was provided or a written statement signed and dated by the licensee documenting the name and title of the person at the Federal Agency who provided the determination that the job site was not in an area of "Exclusive Federal Jurisdiction" and the date the determination was provided.