

**POLICY ISSUE
(Notation Vote)**

February 9, 2009

SECY-09-0022

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: SECTION 274b AGREEMENT WITH THE COMMONWEALTH OF
VIRGINIA

PURPOSE:

To request Commission approval of the proposed Agreement with the Commonwealth of Virginia (also referred to as Virginia or the Commonwealth). This paper does not address any new commitments.

SUMMARY:

On June 12, 2008, Governor Timothy M. Kaine of Virginia requested that the Commission enter into an Agreement under Section 274b of the Atomic Energy Act of 1954, as amended (the Act). The Commission, through SECY-08-0154, "Proposed Agreement Between the Commonwealth of Virginia and the Commission Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended," dated October 15, 2008, agreed to publish a notice of the proposed Agreement (Enclosure 1) in the *Federal Register* (FR). The agency published the notice as required by the Act and requested comments. The public comment period ended on December 22, 2008, and the agency received one comment letter.

Based on the staff's review of the proposed Virginia program and analysis of the comment, the staff recommends that the Commission approve the Agreement (Enclosure 1).

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BACKGROUND:

In SECY-08-0154, the staff of the U.S. Nuclear Regulatory Commission (NRC) presented a draft of its assessment and discussed the statutory and policy background of the Virginia Agreement State program. The Commission approved the staff's recommendation to proceed with processing the application for the Virginia Agreement State program in the staff requirements memorandum (SRM) dated November 5, 2008. As required by Section 274e of the Act, the agency published the proposed Agreement in the FR on November 20, 2008 (73 FR 70384), November 26, 2008 (73 FR 72080), December 4, 2008 (73 FR 73961) and December 11, 2008 (73 FR 75470). The NRC made the full text of the staff assessment available through its Agencywide Documents Access and Management System (ADAMS) and Public Electronic Reading Room.

The Agreement will allow Virginia to assume regulatory authority for byproduct materials as defined in Sections 11e.(1), 11e.(3), and 11e.(4) of the Act; source materials; and special nuclear materials not sufficient to form a critical mass. Virginia is not seeking authority to (1) conduct safety evaluations of sealed sources and devices manufactured in Virginia and distributed in interstate commerce, (2) regulate Section 11e.(2) byproduct material resulting from the extraction or concentration of source material from ore processed primarily for its source material content, and its management and disposal, or (3) regulate land disposal of byproduct material or special nuclear material waste received from other persons.

DISCUSSION:

(1) Public Comments

The NRC staff received one comment letter in response to a notice that the Governor of Virginia has proposed to enter into an Agreement with the Commission under Section 274b of the Act. The notice appeared in the FR on November 20, November 26, December 4, and December 11, 2008.

The FR notice requested comments regarding (1) the proposed Agreement, (2) the NRC staff assessment of the Virginia Agreement State program, (3) the adequacy of the Virginia Agreement State program, and (4) the adequacy of the Virginia Agreement State program staff. The comment received strongly supported the proposed Agreement between the NRC and the Commonwealth of Virginia.

In summary, the comment did not provide any new information that would change the conclusions in the staff assessment of the Virginia program, and the staff has not changed the assessment in response to the comment. Enclosure 2 contains the staff analysis of the public comment.

(2) SECY-08-0154

In SECY-08-0154, the NRC staff concluded that based on the draft assessment the Commonwealth satisfied the Commission's policy statement and therefore, met the requirements of Section 274 of the Act. The staff's final assessment (Enclosure 3) of the Virginia program reflects the same conclusion that the Commonwealth satisfies the Commission's policy statement and therefore meets the requirements of Section 274 of the Act.

(3) Transfer of Licenses

Currently, the NRC would transfer approximately 386 NRC licenses, either in whole or in part, to Virginia's jurisdiction.

The NRC staff is continuing to work closely with the Virginia staff to effect a smooth transition. The staff is coordinating with the Virginia staff on current and pending licensing, inspection, and enforcement activities involving the licenses to be transferred to ensure the smooth continuation of regulatory actions after the transfer.

(4) Actions Pending against Licensees To Be Transferred

At the current time, the NRC Office of Investigations has one pending investigation that may result in escalated enforcement actions against an NRC licensee located within the Commonwealth. The NRC Office of Enforcement has one other pending enforcement action against another such licensee. Additionally, no allegations are currently open related to NRC licensees within the Commonwealth. The remaining open actions that the NRC is unable to close between now and the effective date of the Agreement will either continue to be handled by the NRC with the involvement of the Commonwealth or will be transferred to the Commonwealth. The NRC will work closely with the Commonwealth to ensure the smooth transition of authority over these open cases before the effective date of the Agreement.

(5) Outstanding Orders, Confirmatory Action Letters, and 10 CFR 2.206 Petitions against Licensees that Will Transfer

The NRC issued orders and license conditions for Increased Controls (EA-05-090) and Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Certain Radioactive Materials (EA-07-305) to licensees in the Commonwealth of Virginia. Twenty seven licensees are implementing these requirements based on the quantities of regulated materials that they possess. The NRC staff approved regulations implementing the Increased Controls and Fingerprinting and Criminal History Records Check requirements for risk-significant radioactive materials, which the Commonwealth will impose on the same licensees under the proposed Agreement.

(6) Status of Decommissioning Sites and Method for Providing Information on Previously Licensed Sites

The NRC has no decommissioning sites currently located in Virginia.

(7) Effective Date of the Agreement

Commission direction by March 1, 2009 would support a March 31, 2009 effective date allowing adequate time for the signing of the Agreement, the orderly transfer of the files, and the assumption of authority by the Commonwealth. (Enclosure 4).

The Commonwealth currently regulates the users of naturally-occurring and accelerator-produced radioactive materials (NARM). The Energy Policy Act of 2005 (EPAAct) expanded the Commission's regulatory authority over byproduct materials as defined in Sections 11e.(3) and 11e.(4) of the Act to include certain NARM. On August 31, 2005, the Commission issued a time-limited waiver (70 FR 51581) of the EPAAct requirements. Under the proposed Agreement, the Commonwealth will assume regulatory authority for these radioactive materials. Therefore, the time-limited waiver in the Commonwealth will terminate on the effective date of the Agreement, March 31, 2009, in accordance with the "Plan for the Transition of Regulatory Authority Resulting from the Expanded Definition of Byproduct Material" (72 FR 59157).

IMPLEMENTATION:

Following execution of the Agreement, the staff will continue to interact with the Commonwealth. This interaction will consist of the exchange of regulatory information, notices of NRC training courses, and conducting periodic onsite reviews of the Commonwealth's program for the regulation of Agreement materials. The regulatory information exchange includes reports of incidents, significant enforcement actions, and amendments to policies, regulations, or guidance. Communications are generally more frequent with a new Agreement State during the first few years after the Agreement is signed.

The staff will tentatively schedule an orientation meeting between NRC and the Virginia Department of Health staff for 9 months after the effective date of the Agreement to discuss the initial program implementation. The first Integrated Materials Performance Evaluation Program (IMPEP) review of the Virginia Agreement program will be tentatively scheduled for 18 months after the effective date of the Agreement. Subsequent routine IMPEP reviews will occur at 4-year intervals. The interval may be shortened if performance weaknesses are identified during routine reviews or other interactions with Virginia.

If approved by the Commission, Virginia will bring the number of Agreement States to 36.

RESOURCES:

Staff estimates approximately 3 full-time equivalents (FTE) are required in Fiscal Year (FY) 2009 to perform materials licensing, inspection, decommissioning, enforcement, allegation casework and transition activities related to Virginia. These resources are included in the FY 2009 budget within the Materials Users subprogram (materials licensing and materials inspection planned activities). The Office of Federal and State Materials and Environmental Management Programs anticipates a cost savings due to the transfer of regulatory authority to Virginia, and has incorporated the resource adjustment in the FY 2010 budget.

CONCLUSION:

The NRC staff concludes that the Commonwealth of Virginia satisfies the criteria in the Commission's policy statement "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement," and therefore meets the requirements of Section 274 of the Act.

The proposed Virginia program to regulate Agreement program materials, comprising statutes, regulations, and procedures, is compatible with the Commission's program and is adequate to protect public health and safety with respect to the materials covered by the proposed Agreement.

RECOMMENDATIONS:

That the Commission:

1. Find:

- a. That the proposed Virginia program for the regulation of byproduct material, source material, and special nuclear material in quantities not sufficient to form a critical mass is compatible with the Commission's program for the regulation of like material; and
- b. That the proposed Virginia program is adequate to protect public health and safety within the Commonwealth with respect to the materials and uses covered by the proposed Agreement.

2. Approve:

- a. The proposed Agreement between the Commonwealth of Virginia and the NRC pursuant to Section 274 of the Act, as set forth in Enclosure 1.
- b. The proposed Agreement allowing adequate time for the signing of the Agreement, the orderly transfer of license files and the assumption of regulatory authority by the Commonwealth of Virginia on March 31, 2009.

3. Note:

- a. Approval of the proposed Agreement will result in the termination of the Commission-issued waiver (70 FR 51581) on the effective date of the Agreement, March 31, 2009. The Commonwealth of Virginia would then assume regulatory authority over NARM.
- b. The Governor of Virginia desires to sign the Agreement in a formal ceremony. Additional details regarding the formal ceremony will be provided, following approval of the proposed Agreement by the Commission (Enclosure 5).
- c. Pursuant to the Act, the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), and Commission guidance, the staff will inform the Speaker of the House of Representatives, the President of the Senate, the Virginia congressional delegation and the Director of the Government Accountability Office of the Commission's decision.
- d. The NRC Office of Public Affairs will issue a press release.

- e. The agency will publish the text of the Agreement in the FR, as required by Section 274e of the Act, within 30 days after the Agreement is signed (Enclosure 6).

COORDINATION:

This paper has been coordinated with the Office of the General Counsel, which has no legal objection. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objection. The staff has obtained concurrence from the Office of Management and Budget that this action does not constitute a "major rule" under SBREFA.

/RA/

R. W. Borchardt
Executive Director
for Operations

Enclosures:

1. Proposed Agreement between the NRC
and the Commonwealth of Virginia
2. Staff Analysis of Public Comments
3. NRC Staff Assessment
of the Virginia Program
4. Current Milestone Schedule for Processing
the Proposed Agreement
5. Draft Letter from Chairman Dale E. Klein
to Governor Timothy M. Kaine
6. Draft *Federal Register* Notice
of Agreement Signing

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EDATS: FSME-2009-0002

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