

**POLICY ISSUE
(Notation Vote)**

April 23, 2009

SECY-09-0065

FOR: The Commissioners
FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: PROPOSED AGREEMENT BETWEEN THE STATE OF NEW JERSEY
AND THE COMMISSION PURSUANT TO SECTION 274 OF THE
ATOMIC ENERGY ACT OF 1954, AS AMENDED

PURPOSE:

To request Commission approval to publish the proposed Agreement with the State of New Jersey (State or New Jersey) and a summary of the draft U.S. Nuclear Regulatory Commission (NRC) staff assessment of the State's regulatory program in the *Federal Register (FR)* for public comment.

BACKGROUND:

Section 274b of the Atomic Energy Act of 1954, as amended (Act) authorizes the Commission to enter into an Agreement with the Governor of a State providing for the discontinuance of the regulatory authority of the Commission with respect to certain materials. In 1981, the Commission adopted the revised policy statement entitled, "Criteria for Guidance of States and Nuclear Regulatory Commission (NRC) in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement" (46 FR 7540; January 23, 1981), as amended by statements published on July 16, 1981 (46 FR 36969), and on July 21, 1983 (48 FR 33376), referred to hereafter as the "policy statement." The Office of Federal and State Materials and Environmental Management Programs (FSME) Procedure SA-700, "Processing an Agreement," was subsequently adopted for applying the policy statement to the processing of a new Agreement. The criteria and approaches in these documents form the basis for the staff's evaluation of the State's request.

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SECY NOTE: THIS SECY PAPER TO BE RELEASED TO THE PUBLIC 5 WORKING DAYS AFTER PUBLICATION OF FEDERAL REGISTER NOTICE

DISCUSSION:

By letter dated October 16, 2008, Governor Jon S. Corzine requested that the Commission enter into an Agreement with the State under Section 274b of the Act. The Governor requested that the Commission discontinue its regulatory authority for 11e.(1); 11e.(3); and 11e.(4) byproduct materials, source materials, special nuclear materials in quantities not sufficient to form a critical mass; and land disposal of byproduct, source, or special nuclear waste materials received from other persons, and to allow New Jersey to assume regulatory authority for such material under the Agreement.

Governor Corzine certified that the State has a program for the control of radiation hazards that is adequate to protect public health and safety within the State with respect to the materials covered by the proposed Agreement. The Governor further certified that the State wishes to assume the regulatory responsibility for those materials. Copies of Governor Corzine's letter and Chairman Klein's response are enclosed (Enclosures 1 and 2, respectively).

The State proposed an effective date of the Agreement of no later than September 30, 2009. Following the public comment period and the resolution of public comments, the NRC staff will be in a better position to make a recommendation regarding the proposed Agreement. The NRC staff will include an updated schedule (including a revised effective date for the Agreement, if appropriate), along with an analysis of the public comments, as part of the final paper to the Commission with the staff's recommendations regarding the New Jersey Agreement request.

As required by Section 274e of the Act, the NRC staff will publish the proposed Agreement for comment in the FR once each week for four consecutive weeks. The FR Notice (Enclosure 3) will include a summary of the staff's draft assessment (Enclosure 4) of the proposed New Jersey regulatory program for regulation of 11e.(1); 11e.(3); and 11e.(4) byproduct materials, source materials, special nuclear materials in quantities not sufficient to form a critical mass; and land disposal of byproduct, source, or special nuclear waste materials received from other persons, in addition to the text of the proposed Agreement. The staff plans to follow the same process for New Jersey as it did for recently approved Agreements, such as Virginia and Pennsylvania. For those Agreements, the NRC staff published the proposed Agreements in the FR for public comment, in parallel with the Commission's review of the staff's draft assessment. If the Commission approves, the final Agreement will be published in the FR within 30 days after signature by the Chairman and the Governor.

The NRC staff's draft assessment of the State's program covered seven subjects: objectives, radiation protection standards, prior evaluation of uses of radioactive material, inspection, enforcement, personnel, and administration. The NRC staff has concluded that the State, as defined by these subjects, is compatible with the program of the NRC and adequate to protect public health and safety with respect to the materials covered by the proposed Agreement.

If the proposed Agreement is approved, NRC would transfer approximately 500 specific licenses currently administered by Region I to the State's jurisdiction. The State already has approximately 500 naturally-occurring and accelerator-produced radioactive materials (NARM) licenses. After combining the common licenses, there will be approximately 700 New Jersey specific licenses in total. New Jersey assesses fees on its licensees. The fees will be a

dedicated fund to the Agreement State program, and, at this time, the fees are sufficient to fund the Agreement State program.

Waiver Termination for NARM Materials

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 materials. Section 651(e) of the EPAAct authorized the NRC to issue a time-limited waiver to allow continued use and possession of NARM while the Commission developed a regulatory framework for the regulation of this byproduct material. A waiver was issued on August 31, 2005 (70 FR 51581), and is effective through August 7, 2009. A plan to facilitate an orderly transition of regulatory authority with respect to the NARM material defined in Sections 11e.(3) and 11e.(4) was noticed in the *Federal Register* on October 19, 2007 (72 FR 59158).

New Jersey has been regulating the uses of NARM prior to the EPAAct, and continues to do so under the time-limited waiver. The State has proposed an effective date for the Agreement of no later than September 30, 2009. If the proposed Agreement is approved before August 7, 2009, the Commission would terminate the time-limited waiver in the State coincident with the effective date of the Agreement. However, if the Agreement is not approved prior to this date, NRC would have jurisdictional authority over all uses of byproduct material within the State. These licensees would have to meet NRC regulatory requirements and would have: (a) 6 months to apply for any necessary amendments to an NRC license they already possess, or (b) 12 months to apply for a new NRC license, if needed.

With the effective date of the New Jersey Agreement having the potential to occur after the expiration of the time-limited waiver, staff is working with New Jersey to ensure an efficient transition of NARM licensees in the State within the legal requirements. The staff's objective is to minimize the impact to NARM licensees in New Jersey during the transition to NRC and then back to New Jersey's regulatory authority, within a short time frame (i.e., about seven weeks).

Resolution of Apparent Differences in the Standard Agreement

In Staff Requirements Memorandum, 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 November 5, 2008, the Commission directed the staff to include, as part of the New Jersey Agreement evaluation, its evaluation and recommendations for resolution of the apparent differences of the standard Agreement between a State and the NRC providing for discontinuance of the NRC's regulatory program in relation to Section 274c of the Atomic Energy Act and 10 CFR 150.15(a)(6).

The issue in question is the language in Article IV of the standard Agreement versus Section 274c of the Act and the requirements in 10 CFR 150.15(a)(6). Section 274c lists those areas for which the Commission will retain authority and responsibility. Within this Section is a condition that states that the Commission is authorized to limit manufacturers, processors, or producers of products containing source, byproduct, or special nuclear material from transferring such products except pursuant to a license issued by the Commission. The Commission implements this Section of the Act by regulation in 10 CFR 150.15(a)(6), with the only limitation being the distribution of products to persons exempt from regulatory requirements.

After further evaluation, the staff determined that the standard Agreement should include only those areas of authority for which the Commission shall retain authority and responsibility, as specified in Section 274c of the Act. Articles II and IV of the standard Agreement are the provisions for this Section of the Act. The staff has concluded that the language in the standard Agreement is consistent with Section 274c and that no changes are necessary to the language of the existing standard Agreement. In the future, the Commission could choose to further regulate the distribution of products containing source, byproduct, or special nuclear materials in Agreement States beyond that currently in 10 CFR 150.15(a)(6). Article IV correctly notes that the Commission retains the option to issue further requirements.

RESOURCES:

The State has requested a proposed effective date for the Agreement of no later than September 30, 2009. NRC Region I has adequate resources budgeted within the Materials Users subprogram (Materials Licensing and Materials Inspection planned activities) to perform materials licensing, inspection, decommissioning, enforcement, allegation casework and transition activities related to the State during Fiscal Year (FY) 2009. The FY 2010 proposed budget does not include resources for these activities in New Jersey.

CONCLUSION:

The NRC staff concludes that, based on the draft assessment, the State satisfies the criteria in the Commission's policy statement, and; therefore, would meet the requirements of Section 274 of the Act. The proposed State program to regulate Agreement materials, as comprised of statutes, regulations, and procedures, is compatible with the program of the Commission and is adequate to protect public health and safety with respect to the materials covered by the proposed Agreement.

COMMITMENTS:

Listed below are the actions or activities committed to by the staff in this paper.

1. The staff will provide an updated schedule and an analysis of public comments along with the final paper to the Commission, providing a recommendation on the proposed Agreement.

RECOMMENDATIONS:

That the Commission:

1. Approve:

Publication of the *FR* Notice once each week for four consecutive weeks, as required by the Act.

2. Review:

The proposed Agreement between the State and the NRC pursuant to Section 274 of the Act, and the NRC staff draft assessment of the State regulatory program, in parallel with the publication of the proposed Agreement in the *FR*.

3. Note:

- a. The staff will place a copy of the NRC Staff Draft Assessment (summarized in the *FR* Notice) in the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm/adams.html>, and into the Agencywide Documents Access and Management System.
- b. The Office of Congressional Affairs will dispatch a letter to the knowledgeable Congressional Committees informing them that the Commission is considering entering into an Agreement with the State.
- c. The Office of Public Affairs will issue a press release.
- d. FSME will dispatch a letter to the Federal Agencies listed in FSME Procedure SA-700 and all of the States.
- e. The staff will continue working with New Jersey to ensure an efficient transition of NARM licensees in New Jersey within the legal requirements.

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.

/RA/

R. W. Borchardt
Executive Director
for Operations

Enclosures:

1. Letter from Governor Corzine to Chairman Klein dtd 10/16/2008
2. Letter from Chairman Klein to Governor Corzine dtd 3/19/2009
3. Draft *Federal Register* Notice
4. Draft NRC Staff Assessment

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WITS200800432/EDATS SECY-2008-0647/FSME200900158

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OFC	MSSA:ASPB	MSSA:ASPB	DD:MSSA	D:MSSA	OGC	RI
NAME	TTaylor cat3	DWhite	TReis	RLewis	BJones	SCollins
DATE	3/20/09	3/24/09	3/24/09	4/08/09	4/1/09	4/3/09
OFC	NSIR	CFO	TECH ED	FSME	EDO	
NAME	RZimmerman	JDyer	CPoland (PTressler)	CMiller (GPangburn for)	RWBorchardt	
DATE	3/31/09	4/2/09	4/13 /09	4/15/09	4/23/09	