Janda, Donna FSME

From: Taylor, Torre
Sent: Tuesday, July 28, 2009 4:56 PM
To: Olmstead, Joan; Janda, Donna
Cc: Sollenberger, Dennis
Subject: SECY and public comment analysis
Attachments: rev 5 july 28 2009 445 pm 2nd secy paper final NJ agreement.doc; rev 3 july 28 2009 445 pm enclosure public comment analysis NJ agreement.doc

Attached.

Note: I will do a read on it for edits. Aaron is reviewing the public comment analysis for edits. I will be sensitive to any changes that might affect your comments/changes we all agreed to - if he wants to reword sentences.

Donna - I'll send the staff assessment as soon as I finish it up - after this. Joan, I'll send you the copy too but I know you didn't think it had legal implications and was more technical.

thank you all for your thorough review - hopefully that will help it go through the management chain quickly and we can get it up to the Commission before August 24!

ok, more tomorrow, I'm sure!

Torre
torre.taylor@nrc.gov
301-415-7900

B/65

Received: from OWMS01.nrc.gov (148.184.100.43) by R1MS01.nrc.gov (148.184.99.10) with Microsoft SMTP Server (TLS) id 8.1.358.0; Tue, 28 Jul 2009 16:55:50 -0400
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Content-Type: application/ms-tnef; name="winmail.dat"
Content-Transfer-Encoding: binary
From: "Taylor, Torre" <Torre.Taylor@nrc.gov>
To: "Olmstead, Joan" <Joan.Olmstead@nrc.gov>, "Janda, Donna"
<Donna.Janda@nrc.gov>
CC: "Sollenberger, Dennis" <Dennis.Sollenberger@nrc.gov>
Date: Tue, 28 Jul 2009 16:55:49 -0400
Subject: SECY and public comment analysis
Thread-Topic: SECY and public comment analysis
Thread-Index: AcoPxcktfOozsDTWRvKv13jQabof/Q==
Message-ID:
<C56E360E9D804F4B95BC673F886381E71FBC6DB015@HQCLSTR02.nrc.gov>
Accept-Language: en-US
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X-MS-Has-Attach: yes
X-MS-Exchange-Organization-SCL: -1
X-MS-TNEF-Correlator:
<C56E360E9D804F4B95BC673F886381E71FBC6DB015@HQCLSTR02.nrc.gov>
MIME-Version: 1.0
Return-Path: Torre.Taylor@nrc.gov

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: SECTION 274b AGREEMENT WITH THE STATE OF NEW JERSEY

PURPOSE:

To request Commission approval of the proposed Agreement with the State of New Jersey. This paper does not address any new commitments.

SUMMARY:

On October 16, 2008, Governor Jon S. Corzine of the State of New Jersey 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 a Staff Requirements Memorandum (SRM) dated May 18, 2009, "SECY-09-0065, Proposed Agreement between the State of New Jersey and the Commission Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended," 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 June 26, 2009, and the U.S. Nuclear Regulatory Commission (NRC) received six comment letters. Based on the staff's review of the proposed New Jersey program and analysis of the comments, the staff recommends that the Commission approve the proposed Agreement (Enclosure 1).

BACKGROUND:

In SECY-09-0065, the staff of the NRC presented a draft of its assessment and discussed the statutory and policy background of the New Jersey Agreement State program.

CONTACT: Torre Taylor, FSME/MSSA
(301) 415-7900

The Commission approved the staff's recommendation to proceed with processing the application for the New Jersey Agreement State program in an SRM dated May 18, 2009. As required by Section 274e of the Act, the agency published the proposed Agreement in the *FR* on May 27, 2009 (74 FR 25283), June 3, 2009 (74 FR 26739), June 10, 2009 (74 FR 27572), and June 17, 2009 (74 FR 28728). The comment period ended on June 26, 2009. The NRC made the full text of the staff assessment available through its Agencywide Documents Access and Management System and Public Electronic Reading Room.

The Agreement will allow New Jersey to assume regulatory authority for byproduct materials as defined in Sections 11e.(1), 11e.(3), and 11e.(4) of the Act; source materials; special nuclear materials not sufficient to form a critical mass, and regulation of land disposal of byproduct material, source material, or special nuclear material waste received from other persons. New Jersey is not seeking authority to (1) conduct safety evaluations of sealed sources and devices manufactured in New Jersey and distributed in interstate commerce, and (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.

DISCUSSION:

(1) Public Comments

The *FR* notice requested comments regarding (1) the proposed Agreement, (2) the NRC staff assessment of the New Jersey Agreement State program, (3) the adequacy of the New Jersey Agreement State program, and (4) the adequacy of the New Jersey Agreement State program staff. The NRC received six comment letters in response to the notice that the Governor of New Jersey has proposed to enter into an Agreement with the Commission under Section 274b of the Act.

The NRC received comments from the Organization of Agreement States; two members of the public; a regulatory and nuclear consultant; and two NRC licensees located within the State of New Jersey. Two commenters support the Agreement, two commenters oppose the Agreement and one commenter did not state either way. The remaining commenter supports the rationale whereby States can assume regulatory authority; however, was not supportive of the difference in fees between New Jersey and NRC. The staff analysis of the public comments is provided in Enclosure 2.

In summary, the comments did not provide any new information that would change the conclusions in the staff assessment of the New Jersey program. The staff has not changed the assessment in response to the comments.

(2) SECY-09-0065

In SECY-09-0065, the NRC staff concluded that, based on the draft assessment, New Jersey 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 New Jersey program reflects the same conclusion that the State 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 500 NRC licenses, either in whole or in part, to New Jersey's jurisdiction. The NRC staff is continuing to work closely with the New Jersey staff to effect a smooth transition. The staff is coordinating with the New Jersey 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 two pending investigations that may result in escalated enforcement actions against an NRC licensee located within the State. The NRC Office of Enforcement has one pending enforcement action against another licensee. Additionally, six allegations are currently open related to NRC licensees within the State. 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 State or will be transferred to the State. The NRC will work closely with the State 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 State of New Jersey. Thirty licensees are implementing these requirements based on the quantities of regulated materials that they possess. The NRC staff will incorporate these Orders into the licenses, by license condition, by the effective date of the Agreement. Therefore, these security requirements will transfer with the licenses when the New Jersey Agreement becomes effective.

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

The NRC maintains status summaries for all decommissioning sites on NRC's public web site, including those that are considered complex decommissioning sites. The Commission and the public have access to the site summaries through http://www.nrc.gov/info-finder/decommissioning/complex/. Currently, there are two sites in New Jersey that are considered complex decommissioning sites – Stepan Chemical Company and Shieldalloy Metallurgical Corporation.

Under the Agreement, regulatory authority for Stepan Chemical Company will remain with NRC. The radioactive material at Stepan Chemical Company's site is 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. New Jersey has not requested this class of materials under its Agreement; therefore, the jurisdiction for this site will remain with NRC.

New Jersey has requested regulatory authority over source material. As a result, the regulatory authority for the Shieldalloy Metallurgical Corporation (SMC) site in Newfield, New Jersey, will transfer to the State on the effective date of the Agreement. SMC is a source material licensee and currently has a decommissioning plan under review by NRC. NRC is unable to complete its

review of the decommissioning plan prior to the effective date of the Agreement as NRC is still waiting for additional information from SMC, including results from technical studies.

(7) Naturally-Occurring and Accelerator-Produced Radioactive Materials

The Energy Policy Act of 2005 (EPAct) became effective immediately upon signature by the President on August 8, 2005, and authorized the Commission to regulate naturally-occurring and accelerator-produced radioactive material (NARM) as defined in the amended definition of byproduct material in Section 11e.(3) and (4) of the Atomic Energy Act. Many States regulated this material under their existing State radiation programs. The EPAct, in Section 651(e)(5), authorized the Commission to issue a waiver of the requirements in Section 651(e) to any entity with respect to these NARM materials for specified periods of time if the Commission determined that the waiver was in accordance with the protection of the public health and safety and the promotion of the common defense and security. The EPAct limited the waiver to a time period no longer than 4 years. The Commission determined that there was no basis to conclude that the NARM materials would not continue to be used in a manner that is protective of public health and safety while the waiver is in effect. The Commission then granted a waiver (70 FR 51581; August 31, 2005) from the requirements of Section 651(e) of the EPAct.

Regulations to address the requirements of the EPAct were effective on November 30, 2007, and are referred to as the "NARM rule." As part of the NARM rule, NRC specifically allowed a transition period for licensees/applicants to submit license amendments or new license applications as needed for NARM. A Transition Plan was noticed in the *FR* on October 19, 2007 (72 FR 59157). The purpose of the Transition Plan is to facilitate an orderly transition of regulatory authority with respect to the NARM materials. The NRC recognized that some States may be interested in becoming Agreement States based on the passage of the EPAct. Therefore, the staff indicated in the Transition Plan that, "Every effort will be made to complete an Agreement as soon as practical, without compromising quality and completeness... If any Agreements cannot be completed before the waiver expires on August 7, 2009, the Commission may consider, on a case-by-case basis, options to limit the impact on affected users of 11e.(3) and 11e.(4) byproduct material in the States."

The Agreement for New Jersey will not be effective prior to the expiration of the NARM waiver. Staff believes that there will be a minimal impact on New Jersey licensees because of this interim time period of about 7 weeks between the expiration of the NARM waiver and the effective date of the Agreement. NRC will have jurisdictional authority during this time and there will not be a regulatory gap. NRC and New Jersey have discussed this during numerous meetings to ensure a clear understanding of the jurisdiction during this interim time period, and to ensure an efficient transition. Paul Baldauf, Assistant Director, Radiation Protection and Release Prevention, provided a letter to NRC confirming his understanding of the NARM waiver expiration and the jurisdictional authority by the NRC during this interim time period. This letter, and the NRC response, may be found in Enclosure 4. A summary of the NARM waiver expiration and the impact on the New Jersey Agreement is provided in Enclosure 5.

(8) Effective Date of the Agreement

The Governor of New Jersey requested an effective date for the Agreement of no later than September 30, 2009. Commission direction no later than September 16, 2009, is critical in order to have the Agreement effective by this date. This is necessary to minimize the interim time period between the NARM waiver expiration and the effective date of the Agreement, as well as to allow adequate time for the signing of the Agreement, the orderly transfer of the files,

and the assumption of authority by New Jersey. An effective date of September 30, 2009, will also avoid fiscal year 2010 NRC fees for the licenses transferring to New Jersey in addition to the fees that New Jersey will assess. See Enclosure 6 for a schedule of the remaining steps for processing the Agreement.

IMPLEMENTATION:

Following execution of the Agreement, the staff will continue to interact with the State of New Jersey. This interaction will consist of the exchange of regulatory information, notices of NRC training courses, and conducting periodic onsite reviews of New Jersey'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 New Jersey Department of Environmental Protection, Bureau of Environmental Radiation, 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 New Jersey Agreement State 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 New Jersey.

If approved by the Commission, New Jersey will bring the number of Agreement States to 37.

RESOURCES:

Staff estimates approximately 5 full-time equivalents are required in FY 2009 to perform materials licensing, inspection, decommissioning, enforcement, allegation casework and transition activities related to New Jersey. These resources are included in the FY 2009 budget within the Materials Users subprogram. The Office of Federal and State Materials and Environmental Management Programs anticipates a cost savings due to the transfer of regulatory authority to New Jersey, and has incorporated the resource adjustment in the FY 2010 budget.

CONCLUSION:

The NRC staff concludes that the State of New Jersey 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 New Jersey 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 New Jersey program for the regulation of byproduct material, source material, special nuclear material in quantities not sufficient to form a critical mass, and regulation of land disposal of byproduct material, source material, or special nuclear material waste received from other persons is compatible with the Commission's program for the regulation of like material; and

   b. That the proposed New Jersey program is adequate to protect public health and safety within the State with respect to the materials and uses covered by the proposed Agreement.

2. Approve:

   a. The proposed Agreement between the State of New Jersey 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 State of New Jersey on September 30, 2009.

3. Note:

   a. Approval of the proposed Agreement will result in the State of New Jersey reassuming regulatory authority over NARM which terminated on August 7, 2009 with the termination of the Commission-issued waiver (70 FR 51581).

   b. The Governor of New Jersey does not desire a formal signing ceremony. Therefore, upon approval of the Agreement by the Commission, the NRC staff will prepare the formal documents for the Chairman's signature. After the Chairman signs the Agreement, the staff will deliver the Agreement to New Jersey for the Governor's signature (Enclosure 7).

   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 New Jersey 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 8).

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.

R. W. Borchardt
Executive Director
for Operations

Enclosures:
1. Proposed Agreement
2. Staff Analysis of Public Comments
3. NRC Staff Assessment
4. Letter from P. Baldauf, NJ
   and NRC Response
5. Summary of NARM Waiver expiration
6. Current Milestone Schedule
7. Draft Letter from Chairman Jaczko
   to Governor Corzine
8. Draft *FR* Notice

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OFFICE	FSME/MSSA	FSME/MSSA	FSME/MSSA	OGC	RI	NSIR
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DATE	07 / /09	07 / /09	07 / /09	07 / /09	07 / /09	

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ENCLOSURE 2

STAFF ANALYSIS OF PUBLIC COMMENTS

STAFF ANALYSIS OF PUBLIC COMMENTS

ON THE PROPOSED NEW JERSEY AGREEMENT

Commenter	Affiliation	ADAMs Accession Number
Julia Schmitt, Chair	Organization of Agreement States	ML091680374
Anonymous	No known affiliation	ML091680375
Hoy E. Frakes, Jr	President, Shieldalloy Metallurgical Corporation	ML091700382 and ML091680491
Loretta Williams	No known affiliation	ML091680387
James Lieberman	Regulatory and Nuclear Consultant	ML091810997
Gregory R. Reinhard, MBA, DVM	Merck & Co., Inc.	ML091900370

INTRODUCTION:

The U.S. Nuclear Regulatory Commission (NRC) staff received 6 comment letters in response to a notice that the Governor of New Jersey has proposed to enter into an Agreement with the Commission under Section 274b of the Atomic Energy Act of 1954, as amended. The NRC received comments from the Organization of Agreement States (OAS); two members of the public; a regulatory and nuclear consultant; and two NRC licensees located within the State of New Jersey. Two commenters support the Agreement, two commenters oppose the Agreement and one commenter did not state either way. The remaining commenter supports the rationale whereby States can assume regulatory authority; however, was not supportive of the difference in fees between NJ and NRC. A summary of the comments received and NRC's response is provided below.

The agency published the notice in the *Federal Register* on May 27, 2009, June 3, 10, and 17, 2009. The notice contained a copy of the proposed Agreement and a summary of the NRC staff's draft assessment of the proposed New Jersey Agreement State program. The *Federal Register* Notice requested comments in four categories: (1) the proposed Agreement, (2) the NRC Staff Assessment of the New Jersey Agreement State program, (3) the adequacy of the New Jersey Agreement State program, and (4) the adequacy of the New Jersey Agreement State program staff.

SUMMARY OF COMMENTS ON THE PROPOSED AGREEMENT

Comments Supporting the Agreement

Summary of Comments

1. The Organization of Agreement States (OAS) strongly supports the Agreement between the NRC and the State of New Jersey. The OAS letter stated that "The OAS is committed to the improvement of radiation regulation nationwide, and to fostering a cooperative and productive partnership among Agreement States, with the U.S. Nuclear Regulatory Commission, and with other Federal, State and Local agencies involved in the regulation of radioactive materials."

2. A member of the public, Loretta Williams, expressed her support for the Agreement between NRC and the State of New Jersey. Ms. Williams indicated that she has been involved as a member of the public related to the decommissioning of an NRC-licensed facility in her community. She believes that the State's regulatory program will protect the health and welfare of the residents of the community by enforcing a complete cleanup of the radioactive waste, off-site, at a licensed waste facility.

   NRC Staff Response:

   The comments support the NRC staff's plan to complete the NRC Staff Assessment documenting that the Commission's criteria for entering into an Agreement are satisfied, and then to request that the Commission to approve the State Agreement with New Jersey. These comments are consistent with the Commission's process for approval of an Agreement.

   No changes were made to the NRC Staff Assessment based on these comments.

Comments Opposing the Agreement

Summary of Comments

1. A member of the public did not approve of the Federal government giving regulatory authority of this Agency to the State of New Jersey for this radioactive material. This individual preferred that the Federal government keep regulatory authority, commenting that while the Federal government is corrupt, New Jersey government is more corrupt.

   NRC Staff Response

   This individual did not provide any specific reasons regarding his/her belief that New Jersey government is corrupt. The individual did not provide any information that caused the staff to reassess the original assessment of the New Jersey regulatory program.

   No changes were made to the NRC Staff Assessment based on this comment.

2. Shieldalloy Metallurgical Corporation (SMC) submitted comments opposing the proposed Agreement with the State of New Jersey (NJ). SMC generally commented that NRC should deny New Jersey's application to become an Agreement State because NJ's regulatory program fails to meet the NRC's compatibility criteria or implementation standards. SMC further commented that if NJ became an Agreement State, NRC should retain authority over SMC's facility in Newfield, New Jersey. NRC addresses SMC's specific comments below.

   A. The New Jersey Program Fails to Meet the NRC's Compatibility Criteria

   General Comment:

   SMC stated it sent NRC their public comments submitted to NJ on July 18, 2008, during the public comment period on the State's proposed regulations. SMC criticized NRC for not referencing or addressing SMC's comments. In these comments, SMC said they pointed out the inconsistency between NJ's regulatory framework and the NRC's. SMC states that the NRC staff's assessment of the New Jersey program application is incomplete and in part erroneous and must be substantially revised to recognize the incompatibility of the NJ Program with NRC's program.

   NRC Response:

   In reviewing a State's proposed regulations, the NRC does not evaluate public comments that a State receives during its public comment period on its proposed regulations. NRC reviews the State's final regulations when it assesses the Agreement State application.

   During the application process, NRC reviews a State's radiological program to ensure that it is compatible with the NRC's regulatory program and adequate to protect public health and safety from radiation hazards. NRC staff reviews the State's application in accordance with (1) Office of Federal and State Materials and Environmental Management Programs (FSME) Procedure, "Processing an Agreement – SA-700," and (2) Statement of Policy, "Discontinuance of NRC Authority and Assumption Thereof by States through Agreement," (46 FR 7540, January 21, 1981; 48 FR 33376, July 21, 1983). This Statement of Policy describes the criteria that a State must meet in order to enter into an Agreement with NRC

(SMC specific comments also refer to the criteria described in this Statement of Policy).

NRC reviewed the NJ's final regulations and found the State's regulatory program adequate to protect public health and safety and compatible with NRC's regulatory program.

No changes were made to the NRC Staff Assessment based on this comment.

Specific Comments

1. The Regulations issued by NJDEP are Invalid

SMC stated that the NJ regulations are invalid because they were not adopted in accordance with the procedural requirements of NJ's Administrative Procedures Act. N.J.S.A. 52:14B-1 *et seq.* (APA). SMC's examples were: (1) NJ failed to conduct a proper Federal Standards Analysis as required by state law; (2) NJ failed to analyze and minimize the adverse economic impacts of its proposal to become an Agreement State as required by NJ's Regulatory Flexibility Act; and (3) NJ's modification of the final rule to apply to "all persons" was a substantial change requiring notice and comment under the State Administrative Procedures Act.

NRC Response

SMC's comments express their concern that NJ failed to comply with State laws when enacting its regulations. NRC does not have the authority to evaluate whether a State complied with its State laws when enacting its regulations. NRC does review the State's statutory authority and administrative procedures for promulgating regulations to ensure there is public participation in the rulemaking process. Questions regarding whether a State complied with State law when promulgating their regulations should be addressed through the State's administrative process.

NRC reviewed NJ's statutory provisions and determined the State had adequate authority to establish a radiation regulatory program and enter into an Agreement. In particular, State statute N.J.S.A. 26:2D-7 provides the New Jersey Department of Environmental Protection (NJDEP) authority for the promulgation of codes, rules or regulations, stating that "[T]he commission shall have the power to formulate, adopt, promulgate, amend and repeal codes, rules and regulations as may be necessary to prohibit and prevent unnecessary radiation in accordance with the provisions of the "Administrative Procedure Act (APA)." NRC further reviewed the APA and found that NJ has extensive requirements under the APA in N.J.S.A. 52:14B-2, B-3, B-4, and B-22, including a public comment process and opportunity for hearing.

No changes were made to the NRC Staff Assessment based on this comment.

2. The NJ Program Fails to Satisfy Compatibility Criterion 9 in that it sets Release Criteria that Differ from Those in 10 CFR Part 20

SMC commented that the NJ regulations differ from the radiological criteria for license termination in 10 CFR Part 20 in many significant respects, in violation of Compatibility Criterion 9. SMC gave several examples where NJ regulations differ from NRC regulations, such as (1) the maximum allowable total dose to a member of the public of 15 mrem/year versus 25 mrem/year in NRC's regulations; (2) failure to include implementation of the "as

low as reasonably achievable" (ALARA) principle; (3) failure to include provisions for restricted release; (4) allowing calculation of peak dose over 1,000 years; (5) failure to allow for more than 100 mrem total effective dose equivalent under any circumstances; and (6) requiring that the radioactivity releases to ground and surface waters be limited to the levels set by the NJ Ground Water And Surface Water standards.

NRC Response

NRC reviews State regulatory requirements to ensure they are compatible with the NRC regulatory program and adequate to protect public health and safety. NRC establishes the compatibility level for each NRC regulation and program element according to the Office of Federal and State Materials and Environmental Management Programs (FSME) Procedure, "*Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements - SA-200*" and reviews Agreement State program according to Management Directive Handbook 5.9, *Adequacy and Compatibility of Agreement State Programs.* A regulation's compatibility designation determines how much flexibility a State has in adopting a specific regulation and still being found compatible with NRC's regulatory program.

The Statement of Principles and Policy for the Agreement State Program: Policy Statement on Adequacy and Compatibility of Agreement State Programs, Final Policy Statement (62 FR 46517, 46524-46525, September 3, 1997) (Policy Statement) explains that Agreement States have "flexibility in program implementation to accommodate individual State preferences, State legislative direction, and local needs and conditions. ... [T]hat is, a State would have the flexibility to design its own program, including incorporating more stringent, or similar, requirements provided that the requirements for adequacy are still met and compatibility is maintained, and the more stringent requirements do not preclude or effectively preclude a practice in the national interest without an adequate public health and safety or environmental basis related to radiation protection." Policy Statement, at 46520, column 2.

An Agreement State radiation control program is compatible with the NRC's regulatory program when it's "program does not create conflicts, duplications, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis." Policy Statement at 46524. NRC developed Compatibility Categories to designate how much flexibility a State would have when adopting a specific regulatory provision. NRC assigns a Compatibility Category to each NRC regulation. The Compatibility Categories vary from requiring the State standards to be essentially identical to NRC standards to program elements not required, or even prohibited, for State adoption. In particular, Compatibility Category "C" regulations do not require that the State be essentially identical to the NRC standards. Compatibility Category "C" regulations allow more flexibility but require the Agreement State program elements to embody the essential objective of the corresponding NRC program elements.

SMC commented that the NJ program fails to satisfy Criterion 9. While Criterion 9 applies to disposal of low level waste, SMC examples are regulations in the "License Termination Rule (LTR)," in Subpart E of 10 CFR Part 20. The final LTR was noticed in the *Federal Register* on July 21, 1997 (62 FR 39058). The compatibility designation of this rule is addressed in the Statements of Consideration (SOC) for the final rule, in Section F.1, "State and NRC Compatibility," in the comment resolution. NRC originally designated the LTR as a Division 2 Rule. Subsequently, NRC developed the Policy Statement and reclassified the

LTR as Compatibility Category "C." As previously discussed, the Policy Statement explained that Compatibility Category "C" designates program elements "that are important for an Agreement State to have in order to avoid conflicts, duplications, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nation wide basis. Such Agreement State program elements should embody the essential objective of the corresponding Commission program elements."

NRC assigned the LTR as Compatibility Category "C" because the rule addresses basic principles of radiation safety and regulatory functions that allow a State to establish regulations and dose limits for license termination and decommissioning that provide a sufficient and ample margin of safety and to ensure compliance with the public dose limits of 10 CFR Part 20. The Statements of Consideration for the LTR also stated that "[T]he States would be required to adopt the regulation but would have significant flexibility in language, and would be allowed to adopt more stringent requirements." Radiological Criteria for License Termination, Final Rule 62 FR 39058, 39080 (July 21, 1997).

Some of NJ's license termination regulations are more stringent than NRC regulatory requirements. Using the above criteria, NRC's assessment of NJ regulations found the State's license termination and decommissioning regulations compatible since they meet the essential objectives of the NRC program elements and provide a level of protection of public health and safety that is at least equivalent to that afforded by NRC's requirements.

No changes were made to the NRC Staff Assessment based on this comment.

3. <u>The NJ Program fails to Satisfy Compatibility Criterion 12</u>

SMC commented that NJ regulations fail to meet Criterion 12 because the regulations do not provide the State the ability to grant necessary exceptions to the regulatory standards that do not jeopardize health and safety in individual cases. SMC provided four examples in which it states that NJ's regulations fail to comply with Criterion 12: (1) no consideration of alternate remediation standards that would increase the allowed incremental dose criterion of 15 mrem/yr, (2) no consideration of alternate remediation standards if they would result in doses exceeding 100 mrem/yr for an "all controls fail" scenario, (3) NJ regulations require that the calculations of doses from radiological decommissioning use only tables of parameters based on specific exposure scenarios, and (4) NJ regulations allow no credit for any engineering controls when determining if the 100 mrem annual dose is exceeded. SMC stated that NJ regulations provide no justification for requiring stricter remediation standards than those provided by the NRC, or for not allowing licensees to apply the Federal standards when appropriate. For these reasons, SMC believes that NJ regulations are incompatible with the NRC regulatory framework.

<u>NRC Response</u>

The State regulation, N.J.A.C. 7:28-2.8, allows the Department, upon application and a showing of hardship or compelling need, with the approval of the NJDEP Commission, to grant an exemption from any requirement of the rules should it determine that such exemption will not result in any exposure to radiation in excess of the limits permitted by N.J.A.C. 7:28-6, "Standards for protection against radiation." This regulation fulfills Criterion 12.

SMC's examples are based on the State's regulations that are compatible with

NRC's License Termination Rule. As discussed in the previous response, these regulations are Compatibility Category "C". States have flexibility in meeting the essential objectives of these NRC program elements. NRC's assessment of NJ regulations found the State's license termination and decommissioning regulations compatible by meeting the essential objectives of the NRC program elements. NJ regulations also provide a level of protection of public health and safety that is at least equivalent to that afforded by NRC requirements.

SMC also commented that NJ's regulations are in conflict with NRC guidance. NRC guidance is not a regulatory requirement and is not legally binding. NRC develops guidance documents to assist licensees in meeting regulatory requirements. NRC does not require State regulations to be consistent with NRC guidance documents.

No changes were made to the NRC Staff Assessment based on this comment.

4. The NJ Program Fails to Satisfy Compatibility Criterion 17

SMC commented that the NJ Radiological Program fails to meet NRC's Compatibility Criterion 17 which requires licensees to provide access to inspectors. SMC states that the NJ statute, in the Radiation Protection Act, N.J.S.A. 26:2D-1 *et seq.*, does not authorize inspections without either consent of the licensee or an order and concludes that the NJ regulation purporting to authorize warrantless inspections, in 7:28-4.14, lacks an adequate legal basis in NJ law.

NRC Response

Criterion 17 requires that a State have authority such that licensees shall be under obligation by law to provide access to inspectors. NRC reviewed NJ's regulations and legislative authority to ensure this authority was in place. NJDEP has general authority to "enter and inspect a building or place for the purpose of investigating an actual or suspected source of pollution of the environment and ascertaining compliance and non-compliance with any codes, rules, or regulations of the Department." N.J.S.A. 13:1D-9(d). In addition, the Radiation Protection Act has a similar provision to allow the NJDEP to: "Enter and inspect any building or place for the purpose of investigating an actual or suspected source of radiation and ascertaining compliance with this act or any rule, regulation or order promulgated or issued pursuant thereto and inspect radiation sources, their shielding and immediate surroundings, and records concerning their operation for the determination of any possible radiation hazard." N.J.S.A. 26-2D-9(j).

Based on these legislative provisions, NRC concluded that NJ has adequate legislative authority and can implement regulations to meet Criterion 17.

No changes were made to the NRC Staff Assessment based on this comment.

5. The NJ Program Fails to Satisfy Compatibility Criterion 23

SMC commented that many of the NJ regulations are aimed specifically and uniquely at the SMC Newfield site, and provided several examples to support their comment. The stand-alone limits on radioactive releases to the surface waters affect only "one facility in the State," as NJ acknowledged in their response to SMC public comments on the State's proposed regulations. SMC believes that this response, coupled with the more stringent license termination provisions, demonstrate that NJ regulations qualify as "special

legislation" because it appears to apply only to the SMC facility. SMC claims the regulations are to prevent SMC from disposing of the licensed materials on site for license termination and decommissioning. SMC comments that the State violated the New Jersey State Constitution, art. IV § 7, ¶ 7, which provides that "[n]o general law shall embrace any provision of a private, special or local character," See *also, Phillips v. Curiale, 128 N.J. 608, 627 (1992).* For these reasons, SMC concludes the NJ program fails to meet Compatibility Criterion 23 for fair and impartial administration of regulatory law and particularly does not formulate "rules of general applicability" but its decommissioning rules are, instead, single-purpose legislation aimed exclusively at SMC.

NRC Response

Criterion 23 is related to State practices for assuring the fair and impartial administration of regulatory law, including the provision for public participation where appropriate. The specific requirements under Criterion 23 are that the State incorporates procedures for: 1) formulation of rules of general applicability; 2) approving or denying applications for licenses or authorization to possess and use radioactive materials; and 3) taking disciplinary actions against licensees.

SMC's comments express their concern that NJ failed to comply with State laws when enacting its regulations. As stated in response 1, NRC does not have the authority to evaluate whether a State complied with its State laws when enacting its regulations. NRC does review the State's statutory authority and administrative procedures for promulgating regulations to ensure there is public participation in the rulemaking process. NRC found NJ's statutory authority and regulations provided adequate procedures for the formulation of rules of general applicability. Questions regarding whether a State complied with State law when promulgating their regulations should be addressed through the State's administrative process.

To meet NRC's obligation under the Act, NRC reviews and determines that the State's regulatory program is adequate to protect public health and safety and compatible with the NRC's regulatory program. Agreement States must have a regulatory program in place that will cover all types of uses of the radioactive material or activities that a State assumes regulatory authority over in their Agreement. NRC requires the States to have this regulatory program in place even if there is only one licensee in the State currently licensed for a specific radioactive material or activity.

No changes were made to the NRC Staff Assessment based on this comment.

6. The NJ Program Fails to Satisfy Criterion 25

SMC commented that the NJ program fails to satisfy NRC Criterion 25 in that NJ has not sought to make "appropriate arrangements" with the NRC to ensure there will be no interference with the processing of license applications by reason of the transfer. SMC stated that they filed a proposed decommissioning plan which is currently under review by the NRC, and claims that instead of ensuring the smooth processing of the decommissioning plan, NJ has opposed it at every opportunity. SMC examples of NJ's interference include the State requesting a hearing, and raising numerous contentions against approval of the SMC decommissioning plan at the Newfield, facility. NJ also challenged in court the NRC's decommissioning guidance in NUREG-1757 ["Consolidated

Decommissioning Guidance"] and filed a petition for rulemaking with NRC to rescind the NRC guidance document.

NRC Response

Criterion 25 addresses the transition between NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications by reason of the transfer. The intent of this criterion is to ensure that licensees can continue to operate without interference with or interruption of licensed activities after the effective date of the Agreement.

The NRC's review confirmed that State Statute N.J.S.A. 26:2D-9(k) contains a provision that provides for recognition of existing NRC and Agreement State licenses. NJDEP BER Procedure 3.08, "License Transition from NRC to New Jersey," addresses the transfer of NRC licenses to the State. Upon completion of the Agreement, all active NRC licenses issued to facilities in NJ will be recognized as NJDEP licenses. This will ensure a smooth transition in authority from NRC to NJ so that licensees can continue to operate without interference with or interruption of licensed activities. NJ will continue any licensing actions that are in progress at the time of the Agreement and make the final decision on all pending licensing actions. Furthermore, since NRC will be relinquishing its authority over the materials covered by the NJ Agreement, NRC would not have jurisdiction to continue licensing actions that were in progress at the time the Agreement with NJ goes into effect.

NRC recognizes that NJ has taken several actions to challenge SMC's proposed decommissioning plan and NRC's decommissioning guidance document. NRC regulations at 10 CFR Part 2 provides for the opportunity for hearings on licensing actions and allows petitions for rulemaking. As such, NJ is entitled to take these actions.

No changes were made to the NRC Staff Assessment based on this comment.

B. The New Jersey Radiation Protection Program is not Satisfactory Under the NRC Implementation Standards

SMC commented that the NJ program will not be found to be "satisfactory" in NRC subsequent periodic reviews of the State program. Under the Integrated Materials Performance Evaluation Program (IMPEP), NRC verifies that Agreement State programs continue to be adequate to protect public health and safety and compatible with NRC's regulatory program. SMC commented that NRC would not find the NJ program satisfactory under the NRC IMPEP evaluation criteria because: 1) the numerous existing inconsistencies between NJ and NRC regulation; 2) NJ's regulations being applicable to "all persons" would create duplication with NRC regulations because it would cover persons remaining licensed by the NRC; 3) NJ Regulations would supersede the NRC decommissioning dose limits for NRC reactor licensees; and 4) NJ lacks statutory authority for all elements of its source material program, giving the example of a difference between "radioactive materials," as defined in the NRC regulations, and "sources of radiation" that the NJ statute authorizes the NJDEP to regulate. The NRC definition includes additional safety aspects related to source material that are not covered under the NJ statute.

SMC also commented that while considering a State program against the IMPEP standards prior to entering an agreement is a discretionary adjunct to the evaluation process, there should be no obvious issues at the time the Agreement is implemented that would be found

to lead to program unacceptability when the NRC performs its first inspection. Such obvious issues are well in evidence in the NJ program.

NRC Response

SMC refers to NRC's IMPEP evaluation criteria for inspections of Agreement State programs. The IMPEP procedures are detailed in Management Directive 5.6, "Integrated Materials Performance Evaluation Program." Under the IMPEP program, NRC evaluates many areas of an Agreement State program, with the compatibility of regulations being a part of that evaluation. SMC's comment is that NJ's existing regulations are not compatible with the NRC regulatory framework. Compatibility of regulations and the specific compatibility of NJ's regulations were discussed in detail in comment A.2, above. Again, NRC has determined that NJ's regulations are adequate to protect public health and safety and compatible with NRC's regulatory program.

SMC commented the NJ regulations applying to "all persons" will be duplicative because it will include NRC licensees. Agreements under Section 274 of the Atomic Energy Act do not give States regulatory authority over NRC licensees. States can only assume regulatory authority over radioactive materials or activities specified in their Agreement. For example, under the Agreement, NJ will not have regulatory authority over nuclear reactors. The Atomic Energy Act of 1954, as amended requires that nuclear power reactors to be regulated by NRC. N.J.S.A. 26:2D-91 provides authority for Agreements with Federal government and assumption of regulatory authority by the State, to regulate sources of radiation. NJ regulations, in N.J.A.C. 7:28-6.1(b), specifically states that "The Department does not regulate nuclear reactors... Insofar as the incorporated rules refer to those facilities and/or materials previously referenced, those references are not incorporated nor does any cross references include those facilities and/or materials."

As to the differences in definitions that SMC references, States can regulate non-AEA radioactive material. Examples of these radiation/radioactive materials include x-ray machines and diffuse naturally-occurring radioactive material. A State's definitions for radioactive material covered under the State program may be different than NRC regulatory definitions as a result of this broader regulatory authority. NRC reviewed NJ's definitions and determined that NJ has definitions that are adequate and compatible for the radioactive materials for which it will have authority under the Agreement.

No changes were made to the NRC Staff Assessment based on this comment.

C. Even if New Jersey becomes an Agreement State, the NRC Can and Should Retain Jurisdiction Over the Newfield Site and its Decommissioning

SMC commented that should NRC decide to enter into the proposed Agreement with NJ, NRC has the power to exclude the Newfield site from the transfer of authority to the State. SMC stated that "This is explicitly contemplated by the policy embodied in Compatibility Criterion 25, which directs that appropriate arrangements will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications by reason of the transfer." SMC also indicated that exclusion of the Newfield site from the transfer of authority to NJ is also consistent with notions of fundamental fairness and efficiency. SMC commented that this is consistent with an NRC Appeal Board decision regarding Kerr McGee's West Chicago's site, in Illinois.

Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), ALAB-944, 33 N.R.C. 81, 101-02 (1991), *vacated as moot,* CLI-96-2, 43 NRC 13 (1996).

NRC Response

Upon the effective date of a State Agreement authorized under Section 274 of the Atomic Energy Act of 1954, as amended, the NRC relinquishes regulatory authority and the Agreement State assumes regulatory authority over the radioactive materials and activities specified in the Agreement. The legislative history for this Statutory provision specifically states that Congress did not intend to allow concurrent regulatory authority over licensees for public health and safety. If the NJ Agreement is approved by the Commission, upon the effective date of the Agreement, all NRC licensees within the categories of materials for which the State requested authority will transfer to the State. NRC does not retain individual licensees within categories of materials.

As NRC will be relinquishing its authority, NRC will not have jurisdiction to continue licensing actions that were in progress at the time the Agreement with NJ goes into effect. There is authority in Section 274m. of the Atomic Energy Act of 1954, as amended, for NRC to retain authority based on common defense and security; NRC has used this authority to implement increased controls regulatory requirements for certain categories of radioactive material licensees and retain regulatory authority over conversion facilities in Agreement States. However, the SMC site does not raise these common defense and security concerns.

The Kerr-McGee case SMC cited does involve a complex decommissioning site that was affected by the transition of a NRC license to a new Agreement State. However the case does not have precedence in this matter. The Commission terminated the Kerr-McGee proceeding as moot and vacated the previous Licensing and Appeals Boards' decisions after the parties reached a settlement to dispose of the mill tailings material off-site. In vacating the decisions, the Commission eliminated as precedent all three underlying decisions in the proceedings and specifically stated that:

> In these circumstances, and because these unreviewed Board decisions involve complex questions and vigorously disputed interpretations of agency provisions for disposal of byproduct material, the Commission as a policy matter chooses to vacate and thereby eliminate as precedent all three underlying decisions in this proceeding. This will permit any similar questions that may come up to be considered anew, without the binding influence of an apparently controversial Appeal Board decision that the Commission has not had the occasion to review.
>
> By vacating the decisions, the Commission does not intimate any opinion on their soundness. Without engaging in a full inquiry into the merits—which no party any longer requests, and the Commission sees no compelling reason to undertake on its own—the Commission cannot properly evaluate the analyses of the Licensing and Appeal Boards. *In the Matter of Kerr-McGee Chemical Corporation*, CLI-96-2, 43 NRC 13 (1996)

Please see the response to comment A.6, above, for a discussion of Criterion 25.

No changes were made to the NRC Staff Assessment based on this comment.

Miscellaneous Comments

Summary of Comments

1. A regulatory and nuclear consultant, Jim Lieberman, submitted a comment as to whether the State of New Jersey, upon approval of the Agreement, will honor past NRC license terminations at the 25 mrem per year standard without requiring terminated NRC licensees to conduct further remediation to meet the lower standards under New Jersey regulations. Mr. Lieberman suggested that NRC condition the Agreement giving full credit to past NRC license terminations unless there was a significant threat to public health and safety.

   NRC Staff Response

   The New Jersey regulations, N.J.A.C. 7:28-12.4(d), do not allow the imposition of new standards on already approved decommissioning/remediation plans due to a revision to established remediation standards unless the difference between the two standards differs by an order of magnitude. Given that the remediation standard in New Jersey regulations (15 mrem per year) and the NRC regulations (25 mrem per year) do not differ by an order of magnitude, this regulation does not appear to give NJ a basis to revisit prior NRC license terminations under this regulation. However, New Jersey does have the authority to take appropriate regulatory action if the State determines there is a significant threat to public health and safety at a decommissioned site.

   No changes were made to the NRC Staff Assessment or Agreement based on this comment.

2. Gregory R. Reinhard, MBA, DVM, Merck & Co., Inc. commented that the State fees that will be charged to New Jersey licensees are exorbitant at "additional use sites." Merck supports the rationale whereby states can assume regulatory authority from the NRC but feels that the significant increase in fees for "additional use sites" are not justified.

   NRC Staff Response

   In reviewing a State's request to enter into an Agreement, NRC evaluates the proposed program to ensure that the State has the funding and staffing levels to manage an Agreement State program. However, the State licensing fees are not a matter of adequacy and compatibility. The State uses its own methods of funding, and decides the dollar amount of fees charged to licensees.

   No changes were made to the NRC Staff Assessment based on this comment.