

Orendi, Monica

From: Taylor, Torre *FSME*
Sent: Thursday, July 09, 2009 2:24 PM
To: White, Duncan
Cc: Orendi, Monica
Subject: FW: SMC comment resolution section July 2 2009(Orendi Markup).doc
Attachments: SMC comment resolution section July 2 2009(Orendi Markup).doc

Just wanted to let you know Monica finished her review for us - she had some very good points, comments, and corrections that will be useful in making the comment resolution for SMC more clear.

From: Orendi, Monica
Sent: Thursday, July 09, 2009 11:35 AM
To: Taylor, Torre
Subject: SMC comment resolution section July 2 2009(Orendi Markup).doc

Torre:

Here are my comments. I hope they are somewhat helpful. Let me know if you have any questions.

Good Luck :)
Monica

Comment resolution for SMC comments to put in comment resolution document in SECY paper

Shieldalloy Metallurgical Corporation

Shieldalloy Metallurgical Corporation (SMC) submitted comments strongly opposing the proposed Agreement with the State of New Jersey (NJ). SMC commented on several areas, including their views that NJ fails to meet the NRC's compatibility criteria and that NJ program would be found "not satisfactory" under the NR implementation standards. SMC also commented that if NJ does become an Agreement State, NRC can, and should retain jurisdiction over SMC. Each of these areas is addressed below.

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

SMC presented an overall general comment on the compatibility issue and six specific comments on compatibility in which SMC says that the New Jersey (NJ) program does not meet the NRC's compatibility criteria. These comments are addressed below with the NRC response following.

General Comment:

SMC provided a general comment on the NJ regulations, saying that they had submitted comments to NJ on the then proposed NJ regulations. In these comments, SMC said they pointed out the inconsistency between NJ's regulatory framework and the NRC's. SMC said that NRC staff had SMC's comments well in advance of the issuance of its staff Assessment of the NJ program but that NRC neither references nor addresses those comments. SMC states that the staff's Assessment is incomplete and in part erroneous and must be substantially revised to recognize the incompatibility of the NJ Program with the program of the Commission.

NRC Response:

In reviewing a State's proposed regulations, the NRC does not evaluate public comments that a State receives during its public comment process on regulations. NRC reviews the State's final regulations as part of its Assessment of the program. NRC reviewed NJ's final regulations for adequacy and compatibility with the NRC regulations and found that NJ has adopted an adequate and compatible set of radiation protection regulations which apply to byproduct, source, and special nuclear materials in quantities not sufficient to form a critical mass.

No changes were made to the 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. SMC provided several examples such as (1) NJ's failure to conduct a proper Federal Standards Analysis required by state law; (2) NJ's failure to analyze and minimize the adverse economic impacts of its proposal to become an Agreement State; and (3) NJ

modified the rule upon adoption to apply to "all persons" instead of applying only to licensees and registrants, as provided in the proposed rule.

Comment [M1]: Need to add language regarding interested parties not having notice to provide comments to the rule.

NRC Response

In reviewing a State's request to enter into an Agreement with the Nuclear Regulatory Commission (NRC), NRC staff reviews the 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 (throughout, SMC refers to certain criterion; these criteria are described in this Statement of Policy). A State must have State law that provides for legislative authority for the Agreement, as well as other provisions related to the adequacy and compatibility of such a program. As part of this State law, a State must provide procedures and requirements for adoption of regulations, including public participation.

NRC reviewed NJ's legislative authority in accordance with the above and found that NJ has the legislative authority needed to enter into an Agreement with NRC. In N.J.S.A. 26:2D-7, the statute provides for the promulgation of codes, rules or regulations, stating that "The 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. It also provides for certain State requirements regarding cost reduction and administrative procedures related to State requirements and Federal requirements.

Comment [M2]: How does this support NRC's response to the petitioners comments??? What relevance does this have to support NRC not changing the staff assessment??? Need to add a statement tying together the petitioners comments and the reason for this explanation

Regarding NRC's requirements for a State to enter into an Agreement, NJ has demonstrated that it has the appropriate legislative authority and APA requirements in place regarding the adoption of regulations as discussed above. To the extent that SMC believes that NJ did not adopt their regulations in accordance with NJ APA requirements, this would be a matter for SMC within the legal options available to it within the NJ legal system.

Comment [M3]: Sentence unclear ... may need reordered or reworded.

No changes were made to the 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, 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) not implementing the ALARA principle; (3) not including provisions for restricted release; (4) sets an indefinite, and potentially much longer time limit described as "the time of the peak dose or 1,000 years, whichever is longer; (5) NJ regulations do not allow for more than 100 mrem total effective dose

equivalent under any circumstances; and (6) NJ regulations require that the radioactivity releases to the ground and surface waters be limited to the levels set by the NJ Ground Water And Surface Water standards.

Comment [M4]: Consider adding the relevant 10 CFR section in parentheses at the end of each example for correlation.

NRC Response

Criterion 9 is related to waste disposal. The regulation to which SMC refers is 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. The rule was assigned a compatibility level that is essentially equivalent to the current designation of Compatibility C. 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" establishes the compatibility and health and safety components assigned to NRC regulations and program elements as determined in accordance with Management Directive and Handbook 5.9, *Adequacy and Compatibility of Agreement State Programs*. A compatibility Category C means that the "program element, the essential objectives of which should be adopted by the State to avoid conflicts, duplications or gaps. The manner in which the essential objectives are addressed need not be the same as NRC, provided the essential objectives are met."

Comment [M5]: I think it's a good idea to state that Agreement States may be more restrictive (see Appendix F to SA-201 Question and answer 1. I think that would help tie in your rationale from the third paragraph.

The LTR was assigned this compatibility designation because the rule addresses basic principles of radiation safety and regulatory functions. Agreement States must address these principles in their regulations, but identical language is not required. Additionally, Agreement States could adopt requirements more restrictive than NRC rules. This designation was given because the dose criterion in the rule is not a "standard" in the sense of the public dose limits of 10 CFR Part 20 but is a constraint within the public dose limit that provides a sufficient and ample margin of safety below the limit.

Comment [M6]: Give a reference as to where this is stated to help support the claim.

NRC reviewed NJ's regulations and found that the regulations were compatible with the compatibility designations for the regulations required for an Agreement, including for license termination and decommissioning. NRC recognizes that NJ does have more restrictive requirements for license termination and decommissioning; however, under the compatibility Category C for this rule, NJ is allowed to adopt more restrictive requirements.

Comment [M7]: Possibly add a tie in at the beginning of this paragraph such as "Although SMC lists several areas where NJ regulations differ from NRC regulations NRC reviewed... This will help show you considered all 6 of their examples without having to list each one.

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

3. The NJ Program fails to Satisfy Compatibility Criterion 12

SMC commented that NJ regulations fail to provide for granting necessary exceptions to the regulatory standards that do not jeopardize health and safety. This is contrary to NRC's Criterion 12 in its policy statement, which addresses exemptions. SMC stated that NJ failed to allow the flexibility "to grant necessary exemptions which will not jeopardize health and safety." SMC provided two examples in which it states that NJ's regulations are in conflict with NRC guidance - (1) "alternative exposure scenarios" and (2) engineered structures and institutional controls failing instantaneously. 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

Comment [M8]: IN SMC's letter they provide four instances. What is the reasoning for only listing two?

standards when appropriate. For these reasons, SMC believes that NJ regulations are incompatible with the NRC regulatory framework.

NRC Response

Criterion 12 addresses the need to accommodate special cases or circumstances; the State regulatory authority shall be authorized in individual cases to impose additional requirements to protect health and safety, or to grant necessary exemptions which will not jeopardize health and safety. NRC reviewed NJ's program to ensure that NJ had regulations in place to meet Criterion 12. NJ has a regulation, N.J.A.C. 7:28-2-8, for special exemptions. This regulation allows the Department, upon application and a showing of hardship or compelling need, with the approval of the 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." Therefore, NRC has determined that NJ has met Criterion 12.

Regarding SMC's comment that NJ's regulations are in conflict with NRC guidance, NRC guidance is not a regulatory requirement, and does not have compatibility designations. NRC guidance is not legally binding and is provided to assist licensees in meeting regulatory requirements. Licensees can use other methods to demonstrate compliance with the regulations. NJ regulations are not required to be consistent with NRC guidance. NRC recognizes that NJ regulations have certain requirements related to decommissioning that is different from NRC guidance. However, as addressed previously, NRC has reviewed NJ regulations and found the regulations to be adequate and compatible with NRC regulations.

SMC also commented that NJ regulations do not provide any justification for requiring stricter remediation standards than those provided by the NRC, or for not allowing licensees to apply the Federal standards when appropriate. NJ does not have to provide such justification to NRC for requirements that are more restrictive than NRC regulations.

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

4. The NJ Program Fails to Satisfy Compatibility Criterion 17

SMC commented that NRC's Compatibility Criterion 17 requires licensees to provide access to inspectors. Contrary to this criterion, 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. SMC says that the NJ regulation purporting to authorize warrantless inspections, in 7:28-4.14, lack an adequate legal basis in NJ law and Compatibility Criterion 17 is not met.

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).

Therefore, NRC has determined that NJ has the legislative authority and implementing regulations to enter and inspect, thus meeting Criterion 17.

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

5. The NJ Program Fails to Satisfy Compatibility Criterion 23

SMC commented that 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 affects only “one facility in the State,” as NJ acknowledged in their regulations, and SMC believes that this, coupled with other issues, demonstrates that NJ regulations appear to apply only to the SMC facility and their combined effect if implemented would be to preclude the possibility that the SMC site could be decommissioned in accordance with the permissible standards in 10 CFR Part 20. Additionally, SMC stated that a meeting summary prepared by the NJ Department of Environmental Protection makes it clear that the intent of the NJ program is to force SMC to remove the license materials instead of decommissioning them in place as the NRC regulations allow. For these reasons, the NJ program fails to provide “state practices for assuring the fair and impartial administration of regulatory law.” SMC continued that the NJ program fails to meet Compatibility Criterion 23 for fair and impartial administration of regulatory law and is fundamentally incompatible with the NRC regulatory framework.

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. In order for a State to enter into an Agreement with NRC, it must demonstrate that it has the legislative authority and regulations in place for all categories of materials for which the State is requesting in the Agreement. NJ has requested authority for source material; therefore, NJ must have regulations in place for the possession and use of source material. Additionally, NJ must have regulations in place for license termination and decommissioning of licensed facilities. The number of licensees impacted by a rule does not affect the validity of the rule; other source material facilities could begin operation in NJ and these regulations would also apply to them.

NRC reviewed NJ’s regulations to ensure that they had compatible regulations in place (1) to regulate source material licensees and (2) for license termination and decommissioning. Both would need to be in place before NRC determined that NJ met the requirement to enter into an Agreement. NRC has determined that NJ does have such regulations in place. Additionally, the process for promulgating these regulations was conducted under appropriate APA requirements that NRC evaluates under its

Policy Statement, such as public comment. NRC has not seen any evidence to make it question as to whether NJ would treat licensees fairly and objectively.

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

Comment [M9]: Value??? Also in this sentence missing the word 'in' after 'would'.

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 provided several examples, such as requesting a hearing, currently pending before an Atomic Safety and Licensing Board of the NRC, raising numerous contentions against approval of the decommissioning plan, challenging in court the NRC guidance under which the decommissioning plan would be implemented, and filing a petition with the NRC to rescind the NRC guidance.

Comment [M10]: Add New Jersey, for clarity between as and requesting.

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.

Regarding SMC's comment that NJ has taken action to oppose the decommissioning plan at every opportunity, NRC recognizes that NJ has taken several actions related to SMC's decommissioning plan. NRC is required to meet certain Administrative Procedures Act, including providing for the opportunity for hearings on licensing actions, petitions for rulemaking and other reasons cited with in 10 CFR Part 2. As such, NJ is entitled to take certain actions within the legal avenues open to it as is licensees.

Comment [M11]: Is something missing here ... or should it just say certain Administrative procedures, including.

No changes were made to the 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" under the NRC IMPEP evaluation criteria for inspections of Agreement State programs, for several reasons. There are numerous inconsistencies between the NJ program and the NRC regulations. The NJ regulations are made applicable to "all persons," not just licensees. SMC claims that with this change to cover "all persons" in NJ, once the Agreement is entered into the NJ regulations would cover persons that remain licensed by the NRC, creating duplication with the NRC regulations. SMC claims that NJ regulations would essentially supersede the NRC decommissioning dose limits for the NRC licensees.

Additionally, SMC states that 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 went on to comment 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 Integrated Materials Performance Evaluation Program, known as IMPEP, is the procedure by which NRC evaluates Agreement States. 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 regulations being a part of that evaluation. SMC's comment is that NJ does not have regulations in place that are compatible with the NRC regulatory framework. Compatibility of regulations and the specific compatibility of NJ's regulations were previously discussed in detail in comment A.2, above. Again, NRC has determined that NJ's regulations are adequate and compatible to assume regulatory authority for the category of materials it has requested under its Agreement.

SMC gave specific examples related to NJ's regulations regarding the regulations applying to "all persons" and a duplication of regulations, including at nuclear power plants. Under the Agreement, NJ will not have authority to regulate nuclear reactors, which will remain under the authority of the NRC under the Atomic Energy Act of 1954, as amended. N.J.S.A. 26:2D-91 provides 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 do any cross references include those facilities and/or materials."

As to the differences in definitions that SMC references, States have broader authorities for radiation/radioactive material, such as x-ray machines, diffuse naturally occurring radioactive material, etc., than does NRC under the Atomic Energy Act of 1954, as amended. Therefore a State's definitions will not be exactly the same as NRC's in all cases. NRC reviewed NJ's definitions and determined that NJ has appropriate 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 staff Assessment based on this comment.

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

SMC commented that should the Commission decide to enter into the proposed Agreement with NJ, it 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 provided an example with respect to Kerr McGee's West Chicago's site, in Illinois.

Comment [M12]: Missing the word "to"

NRC Response

Section 274 of the Atomic Energy Act of 1954, as amended, allows the Commission and a State to enter into an Agreement under certain conditions. There are several categories of materials over which NRC may relinquish authority if the State has a program that is found to be adequate and compatible for entering into such an Agreement. If the Agreement is approved by the Commission, upon the effective date of the Agreement, all licensees within the categories of materials for which the State requested authority transfers to the State. NRC cannot retain individual licensees within categories of materials.

As NRC will be relinquishing its authority, NRC would 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; however, this is not an issue with the SMC site.

Comment [M13]: Since you bring up Kerr McGee above in SMC's comment ... does it need to be addressed in the response. It's kind of left out there hanging ... and I think should be mentioned in NRC's response to the comment.

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

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