

November 29, 2010

Michelle Beardsley  
Health Physicist  
Division of Materials Safety and State Agreements  
Office of Federal and State Materials and Environmental Programs  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-001

Dear Ms. Beardsley:

Thank you for the opportunity to provide factual comments on the draft Integrated Materials Performance Evaluation Program (IMPEP) report on the Nebraska Agreement State Program. Our comments are listed below:

1. Page 2, Section 3.1 Technical Staffing and Training, Paragraph 2, Line 4: This line should be changed to read “a Health Specialist who performs ~~regulatory compliance~~ regulation development and general license tracking duties and”
2. Page 2, Section 3.1 Technical Staffing and Training, Paragraph 5, Line 5: This line should be changed to read “Inspection Manual Chapter (IMC 1246).
3. Page 3, Section 3.2 Status of Materials Inspection Program, Paragraph 3, Line 4: To be consistent with other IMPEP reports and to give the MRB perspective on the magnitude of the issue, the following sentence should be added following the sentence ending “inspection frequency prescribed by IMC 2800.” “Overall, the review team determined that the program performed less than one percent of all Priority 1, 2 and 3 inspections overdue during the review period.”
4. Page 3, Section 3.2 Status of Materials Inspection Program, Paragraph 4, Line 5: To give the MRB perspective on the magnitude of the issue, the following sentence should be added following the sentence ending “beyond the 30-day goal.” “One finding was issued 1 calendar-day late and the other was issued 4 calendar-days late.”
5. Page 4, Section 3.3 Technical Quality of Inspections, Paragraph 2, Line 3: “Fingerprinting” should be capitalized to be consistent with the other terms in the sentence.
6. Page 4, Section 3.3 Technical Quality of Inspections, Paragraph 3, Lines 2-4: Regarding marking of documents as containing sensitive information, neither the

current procedure SA-102 (dated 7/23/2007) or SA-104 (dated 5/14/2007) addresses the marking of documents. On October 7, 2010 Julia Schmitt was informed by Rob Lewis that marking of documents is considered a “Program Element”. Examples of how program element requirements have been typically communicated to the Agreement States include, RCPD-05-014 (implementation of ICs), RCPD -08-020 (pre-licensing checklist), FSME-08-005 (Fingerprinting) and RCPD-10-007 (maximum possession limits). To date, there have been no FSME or RCPD letters to Agreement States communicating specific required and acceptable document marking practices or the associated compatibility designation as required by Management Directive 5.9.

Current FSME Procedure TI-002 (dated 3/28/2006) directs the reviewer to ensure that “sensitive licensee information maintained or possessed by the Agreement State or NRC Regional Materials Program and their licensees is properly controlled. NRC Regional materials programs and Agreement States are expected to protect sensitive information from unauthorized disclosure in a likewise manner to Increased Control 6 (See Increased Controls for Licensees That Possess Sources Containing Radioactive Material Quantities of Concern).” Increased Control 6 states that licensees must “develop, maintain and implement policies and procedures for controlling access to, and for proper handling and protection against unauthorized disclosure of, its *physical protection information* for radioactive material.” (Emphasis added).

The document entitled “Implementing Guidance for Licensees that Possess Radioactive Material Quantities of Concern” that accompanied the IC orders when they were issued, states “ The information generated by licensees which must be protected is information about its physical protection (security and controls) for radioactive material of concern, and includes but is not limited to: information describing how the radioactive material is secured from unauthorized removal or access when it is in storage; information describing how the licensee controls and maintains constant surveillance of the radioactive material when not in storage; information describing specific policies and procedures for actions taken by the licensee in response to the increased controls; and the details of the enhancements implemented for the radioactive material covered under this requirement. Such information is defined as “sensitive information”.”

However, during the Nebraska IMPEP, the Lead Reviewer identified Regulatory Information Summary (RIS) 2005-31 as the standard to be used when marking documents rather than those identified in FSME Procedure TI-002. It should be noted for the purpose of this IMPEP report, that at the time of the review, the Nebraska Program was already marking and protecting information in its specific license files in the manner described by FSME Procedure TI-002 (in accordance with IC 6 and associated Q & As).

We noted that as a result of an IMPEP review of an NRC Region in 2009 it was recommended by the Review Team that FSME “develop and provide clarification to the NRC Regions on the requirements for marking of inspection and licensing correspondence.” If such clarification was given to the NRC Regions, it was not shared with the Agreement States.

Additionally, we reviewed IMPEP reports for 2006-2010 that are posted on the FSME website to try to get a sense of what was considered by IMPEP review teams as acceptable practice. We found that document marking was not addressed in 16 of the IMPEP reports, including examples as late as 2009. In one recent case, the IMPEP team found that it was acceptable to mark documents only if they were requested for release. Seven IMPEP reports indicated that acceptable marking practices were being used, although the exact practices were not discussed in detail. We found it to be impossible, using the information contained in those reports, to compare our own practices to determine if they would also be found acceptable. Nine other IMPEP reports identified issues with marking of documents; however, we were not able to determine if similar practices were found to be acceptable by other IMPEP teams. Without clear direction from FSME, Agreement States do not know what are considered acceptable marking practices and which standard the IMPEP Review Team assigned to their review will use.

Because FSME has not identified a single marking standard with an associated compatibility designation, we respectfully request that Paragraph 3 of section 3.3 be reworded to reflect that the Nebraska Program was marking documents in a manner consistent with FSME Procedure TI-002 and IC 6. Additionally, we request that all references to sensitive information not being properly marked by the Program be removed from the report.

Further, we request that when a single marking standard is identified, guidance be provided on how to reconcile handling of sensitive information with the posting requirements of 10 CFR 19.11 (and Agreement State equivalent), since not all workers engaged in regulated activities have a need to know information on the IC licensed activities. We also request that marking of Sealed Source and Device Registry Certificates be addressed in that standard.

7. Page 4, Section 3.3 Technical Quality of Inspections, Paragraph 4, Sentence 2: Additional explanation is necessary to give the MRB a sense of the situation. The Nebraska Program’s practice is that when IC licensees are inspected, two letters are sent to the licensee. One contains the IC findings and the sensitive documents (as defined in IC 6 and the descriptive Q&A’s) are appropriately marked for withholding. The second letter contains the health and safety findings. That cover letter indicates that the IC findings will be provided under separate cover.

It was the IMPEP Team Leader's interpretation that the reference to the existence of an IC letter in the health and safety cover letter represented sensitive information. The Nebraska Program disagrees. Although compliance with NRC RIS 2005-31 has not been identified as a Program Element, Attachment 2 describes screening of documents above the NMSS threshold and advises that documents be withheld that contain descriptions of facilities where licensed material may be located, design information, emergency planning/fire protection information, security program information and vulnerability/security assessments/accident analysis/safety analysis/risk assessments. A reference in a cover letter to a separate letter outlining IC inspection findings does not provide any of the information described in RIS 2005-31.

Additionally, Attachment 1, Page 2 of the RIS provides suggested markings for pages of a document containing security-related information. It states "Note that a cover letter should clearly state that attached documents contain security-related information - - However, this marking is also needed on the cover letter only if it itself contains security-related sensitive information."

Therefore, the health and safety cover letter need not be marked as containing security-related information because it does not itself contain security-related information as defined by RIS 2005-31. We respectfully request that the MRB remove Paragraph 4 from the final IMPEP report and that comments referring to the cover letter also be removed from Appendix C.

8. Page 5, Section 3.3 Technical Quality of Inspections, Paragraph 2: To more accurately reflect the use of the available laboratories the paragraph should be reworded to read "The Program receives laboratory and sample analysis support from the State laboratory, the University of Nebraska and a contract laboratory depending on the type of analysis needed. For example, complex environmental samples are sent to a contract laboratory in Chicago, Illinois."
9. Page 6, Section 3.3 Technical Quality of Inspections, Paragraph 4, Sentence 3: Regarding the marking of licenses, see comment #6. Regarding the cover letters, see comment #7.
10. Page 7, Section 3.5 Technical Quality of Incident and Allegation Activities, Paragraph 1, Sentence 1: The words "by the IMPEP Review Team" should be added to the end of the sentence so that it does not appear that the Nebraska Program has not reviewed the incident.
11. Page 7, Section 3.5 Technical Quality of Incident and Allegation Activities, Paragraph 3, Sentence 2: A period should be added at the end of the sentence.

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12. Page 8, Section 4.1.1 Legislation, Paragraph 1, Sentence 4: The sentence should be changed to reflect that statutory authorization for fingerprinting was added during the review period.
13. Page 8, Section 4.1.2 Program Elements Required for Compatibility, Paragraph 4, Sentence 2: The sentence as written does not accurately reflect the status of those regulations. It should be changed to read "At the time of the review, the following amendments have ~~not~~ been adopted, ~~but~~ have been reviewed for compatibility by the NRC and the Program is currently resolving the comments made by NRC."
14. Appendix C, Pages C.1 and C.2: The files that were overdue as referenced on Page 3, Section 3.2 Status of Materials Inspection Program, Paragraph 3 were not identified.
15. Appendix C, Pages C.1 and C. 2: The comments regarding the cover letter should be removed. See comment #7.
16. Appendix C, Page C.3, File No. 15: The inspector was omitted but should be listed as "BM".
17. Appendix C, Page C.3, File No. 16: The "s" should be omitted after the word "inspector".
18. Appendix C, Page C.3, File No. 20: The inspector is incorrectly listed as "HS". The correct inspector is "JD".
19. Appendix C, Page C.3, File No. 23: The inspector was omitted but should be listed as "Inspector: HS".
20. Appendix D, Page D.2, File No. 18: The License Reviewer should be listed as "HS".

Thank you again for the opportunity to comment on the draft IMPEP report. If you have any questions, please contact Julia Schmitt at 402/471-0528.

Sincerely,



Mary Sue Semerena, Administrator  
Environmental Health  
Division of Public Health  
Department of Health and Human Services