

**Comment Resolution for the November 29, 2010 letter from the Nebraska DHHS (ML103360274) regarding the October 25, 2010 draft IMPEP report.**

- Comment 1: Page 2, Section 3.1, Line 4:

This line should be changed to read “a Health Specialist who performs **regulation development** and general license tracking duties”.

Response 1:

Thank you for the clarification. The sentence will be revised in the report.

- Comment 2: Page 2, Section 3.1, Paragraph 5, Line 5:

This line should be changed to read “Inspection Manual Chapter (IMC 1246)”.

Response 2:

Thank you. The line will be corrected accordingly.

- Comment 3: Page 3, Section 3.2, 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 1 percent of all Priority 1,2 and 3 inspections overdue during the review period.”

Response 3:

We have no objection to this comment. The report will be revised accordingly.

- Comment 4: Page 3, Section 3.2, 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.”

Response 4:

We have no objection to this comment. The report will be revised accordingly.

- Comment 5: Page 4, Section 3.3, Paragraph 2, Line 3:

“Fingerprinting” should be capitalized to be consistent with the other terms in the sentence.

Response 5:

We have no objection to this comment. The report will be revised accordingly.

- Comment 6: Page 4, Section 3.3, 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 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 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. Nine other IMPEP reports identified issues with marking of documents; however, we were not able to determine if similar practices were found 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.

Response 6:

Thank you for this comment. We apologize for any misinformation or misunderstanding that occurred in the team’s explanation or interpretation of this issue. FSME Procedure TI-002 was revised and sent out to the Agreement States in the letter dated March 28, 2006 (we apologize that this letter was inadvertently omitted from the FSME website—it has since been added). The revised procedure included guidance for the reviewer to document and verify that the State or NRC Region is protecting sensitive information in a manner consistent with IC-6, which includes marking of documents containing sensitive information (See TI-002, Section V.C.1.c). As was explained to the Program Manager, RIS-2005-031 contains criteria that can be used to determine when a document would need to be marked as containing sensitive information. While we agree that no specific guidance or criteria is listed for outgoing documents (cover letters, licenses, etc.), the intent of marking those documents is to alert the recipient that the document requires special handling and protection.

Regarding your request to remove statements regarding this issue from the IMPEP report, the team believes that this information needs to remain in the report to inform the

next IMPEP team that this issue was reviewed. The MRB will make the final determination as to any changes, deletions, etc. to be made to the report. The report will not be revised at this time.

Thank you for pointing out that this issue was documented in the 2009 NRC Region IV IMPEP report; we can raise this at Nebraska's MRB meeting and have it officially assigned as an action item to the appropriate FSME branch.

Regarding your question about the posting requirements of 10 CFR 19.11, this question was addressed in the "Supplemental Questions and Answers Regarding Increased Controls (IC) and Implementation for Licensees That Possess Radioactive Material Quantities of Concern" (Version dated 02/21/07), See Question and Answer No. S8-second part. Additionally, this ties into the issue regarding the marking of licenses containing authorization for radionuclides in quantities of concern—if these licenses aren't marked, the licensee may not be aware that these documents would require special posting and handling requirements.

- Comment 7: Page 4, Section 3.3, 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 description 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.

Response 7:

After further review, we agree that current guidance is ambiguous regarding the marking of documents which do not contain sensitive information, but only identify the entity as a recipient of the Increased Controls requirements. The report has been revised to remove Paragraph 4 from the report and the comments referring to this in Appendix C. As stated previously, we will raise this issue to the MRB to be assigned as an action item to the appropriate FSME branch.

- Comment 8: Page 5, Section 3.3, 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.”

Response 8:

We have no objection to this comment. The report will be revised accordingly.

- Comment 9: Page 6, Section 3.3, Paragraph 4, Sentence 3:

Regarding the marking of licenses, see comment #6. Regarding the cover letters see comment #7.

Response 9: See Responses 6 and 7.

- Comment 10: Page 7, Section 3.5, 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.

Response 10:

We apologize for the confusion. The intent of the sentence was that, while the State had reviewed the incident, they had not yet performed an inspection. The report has been revised to state this.

- Comment 11: Page 7, Section 3.5, Paragraph 3, Sentence 2:

A period should be added at the end of the sentence.

Response 11:

A period has been added at the end of this sentence.

- Comment 12: Page 8, Section 4.1.1, Paragraph 1, Sentence 4:

The sentence should be changed to reflect that statutory authorization for fingerprinting was added during the review period.

Response 12:

Thank you for the clarification. The report will be revised accordingly.

- Comment 13: Page 8, Section 4.1.2, 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 been adopted, have been reviewed for compatibility by the NRC and the Program is currently resolving the comments made by NRC".

Response 13:

Thank you for the clarification. The report will be revised accordingly.

- Comment 14: Appendix C, Pages C.1 and C.2:

The files that were overdue as referenced on Page 3, Section 3.2, Paragraph 3 were not identified.

Response 14:

The specific licensee files were pointed out to the Program Manager at the time of the review. Consistent with other IMPEP reports, these files were not identified as there were no recommendations or findings made due to these two overdue reports. The report will not be modified.

- Comment 15: Appendix C, Pages C.1 and C.2:

The comments regarding the cover letter should be removed. See comment #7.

Response 15:

See Response 7.

- Comments 16-20: Appendixes C and D identifying several corrections/omissions.

Response for 16-20:

The identified casework files have been corrected.