RulemakingComments Resource

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To: RulemakingComments Resource
Subject: Docket ID NRC–2013–0081

I would like to submit the following comments regarding proposed revisions to the NRC's *Policy Statement on Adequacy and Compatibility of Agreement State Programs* and the *Statement of Principles and Policy for the Agreement State Program.*

Put simply, the NRC has no legal authority to impose continuing compatibility requirements on Agreement States' programs, nor can it require these states to submit to periodic reviews of those aspects of their radiation control programs not directly related to the regulation of 11e.(2) materials as defined under the Atomic Energy Act (AEA).

In its request for comments (78 FR 33122), under section IV. *Proposed Revision to Policy Statement on Adequacy and Compatibility of Agreement State Programs, Purpose* the NRC states in relevant part:

> *" Section 274 […] directs the Commission to periodically review State programs to ensure compliance with the provisions of Section 274."*

And under section V. *Proposed Revisions to Statement of Principles and Policy for the Agreement State Program, Statement of Legislative Intent* the NRC states, likewise in relevant part:

> *"…the Commission has an obligation, pursuant to Section 274j. of the AEA, to review existing Agreement State programs periodically to ensure continued adequacy and compatibility. Section 274j. of the AEA provides that the NRC may terminate or suspend all or part of its agreement with a State if the Commission finds that such termination is necessary to protect public health and safety or that the State has not complied with the provisions of Section 274j."*

These statements are false and are in direct conflict with a previous opinion of NRC Office of General Counsel:

> *"Section 274 contains no requirement that compatibility be maintained by the States. Nor does the statute authorize the AEC to terminate or suspend an agreement on any other ground other than that the action is required to protect the public health and safety. Although it is readily apparent that the turnover of responsibility will work satisfactorily only if Federal and State*

> *regulatory programs are compatible, the section reflects Congressional confidence that such compatibility will be achieved through cooperation. A unilateral power to require compatibility would appear to be inconsistent with both the nature of the program established and the underlying philosophy of the statute."* [Opinion of NRC General Counsel - May 9, 1963. Quoted from SECY 91-039, 2/12/91, page 8. Emphasis added]

NRC has previously argued that a subsequent amendment of Section 274(j) in 1978 made the 1963 opinion quoted above inoperative:

> *"Any question concerning the Commission's authority to conduct periodic reviews of Agreement State programs under Section 274(b) of the AEA was resolved by the 1978 amendment of Section 274(j) which specifically addressed the issue of the Commission's authority to periodically review the programs of Agreement States. Section 274(j), as amended, states in relevant part that "[t]he Commission shall periodically review such agreements and actions by the States under the agreements to insure compliance with the provisions of this section." The agreements referred to in the quoted sentence are the agreements entered into under Section 274(b). It is clear from the legislative history that the 1978 amendment addressed agreements as a whole and not just agreements pertaining to 11e.(2) byproduct material. (See H. R. Rep. No. 95-1480, pt. 2, at 44-45 (September 30, 1978).) Thus, the plain meaning of the amended language is that the Commission has the authority and responsibility to periodically review Agreement State programs for the purpose of determining continued compatibility and adequacy. The results of such reviews may form the basis to terminate or suspend a Section 274(b) agreement in accordance with the other provisions in Section 274(j)*." [Letter dated May 2, 2002 from Paul H. Lohaus, Director Office of State and Tribal Programs, to Clayton J. Bradt, Principal Radiophysicist, NYS Dept. of Labor.]

However, inspection of House Report No. 95-1480 upon which the NRC's argument relies reveals that the intent of congress was contrary to what NRC claimed:

> *"Subsection (g)* [sic. It is actually subsection (d) of PL 95-604, UMTRCA] *requires the Commission to review the regulatory programs of each Agreement State(s), as soon as practicable 3 years after the date of enactment of the act, to determine whether the* ***standards*** *applied by the State are at least equivalent to those of the Commission. If the Commission determines that the State's program does not comply, it* ***may suspend or terminate that part of its agreement with the State under which the State is permitted to license and regulate uranium milling and mill tailings activities.***" [HR 95-1480 -Part I on page 21.HR 95-1480- Part II contains the same language on pp. 44-45. Emphasis added.]

The "standards" referred to in the House Report are the standards specific to the regulation of uranium mill tailing as specified in subsection 274(o) of AEA. The new subsection(o) was also added to Section 274 by UMTRCA. Furthermore, subsection (o) is the only place in all of Section 274 that addresses requirements directly to the States with the words "the State shall…" All other provision in section 274 are requirements specifically directed to the NRC and therefore not obligatory upon the States. A State can neither comply nor fail to comply with a requirement placed upon the NRC.

Clearly, it was the intent of congress that the new language added to 274(j) by UMTRCA applied only to that portion of a State's program related to 11e.(2) material, that is uranium mill tailings. On-going compatibility requirements of all other aspects of the Agreement States' programs is NOT authorized, either in this amendment or in any other subsections.

With the authority neither to impose on-going compatibility requirements nor to review Agreement State programs against them, the *Policy Statement on Adequacy and Compatibility of Agreement State Programs* and the *Statement of Principles and Policy for the Agreement State Program* are completely undermined and must be withdrawn. Furthermore, the NRC's IMPEP program which reviews state programs must be revised *in toto* to reflect the absence of continuing compatibility requirements.

Thank you for this opportunity to comment.

Sincerely,

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