RulemakingComments Resource

From: Dan Shrum <dshrum@energysolutions.com>
Sent: Wednesday, August 14, 2013 11:23 AM
To: RulemakingComments Resource
Subject: Docket ID NRC-2013-0081
Attachments: 8-14-2013 Response to NRC Request for Comments.pdf

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTN: Rulemakings and Adjudications Staff

Subject: Response to NRC Request for Comments Regarding Policy Statement on Adequacy and Compatibility of Agreement State Programs; Statement of Principles and Policy for the Agreement State Program

Reference: Docket ID NRC-2013-0081

Dear Secretary:

Energy*Solutions* hereby submits the comments contained in the attachment in response to the subject notice. We appreciate the opportunity to provide comments to consider on proposed revisions to NRC's Policy Statements on Agreement State Programs. Energy*Solutions* believes that the NRC should proceed forward and has provided comments.

Thank you again for this opportunity to comment. Questions regarding these comments may be directed to me at (801) 649-2109 or dshrum@energysolutions.com.

Daniel B. Shrum

ENERGY*SOLUTIONS*

Senior VP, Regulatory Affairs

Office: 801-649-2109

Mobile: 801-580-3201

dshrum@energysolutions.com

ENERGYSOLUTIONS

August 14, 2013 CD13-0231

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTN: Rulemakings and Adjudications Staff

Subject: **Response to NRC Request for Comments Regarding Policy Statement on Adequacy and Compatibility of Agreement State Programs; Statement of Principles and Policy for the Agreement State Program**

Reference: **Docket ID NRC-2013-0081**

Dear Secretary:

Energy*Solutions* hereby submits the comments contained in the attachment in response to the subject notice. We appreciate the opportunity to provide comments to consider on proposed revisions to NRC's Policy Statements on Agreement State Programs. Energy*Solutions* believes that the NRC should proceed forward and has provided comments.

Thank you again for this opportunity to comment. Questions regarding these comments may be directed to me at (801) 649-2109 or dshrum@energysolutions.com.

Sincerely,

Daniel B. Shrum
Senior Vice President
Regulatory Affairs

Attachment

ENERGY*SOLUTIONS*

Comments on Policy Statements Regarding the Agreement State Program

Energy*Solutions* has reviewed the draft revised "Policy Statement on Adequacy and Compatibility of Agreement State Programs" and the "Statement of Principles and Policy for the Agreement State Program" published for comment. In general, we find that both are in need of significant modification in order to effect needed improvements to the Agreement State Program. We have also reviewed the Topics for Additional Comment that the NRC has published. Energy*Solutions* brings to this review the unique perspective of a licensee operating multiple facilities regulated by four Agreement States. We also are an NRC licensee and certificate holder. We hold licenses issued under 10 CFR Parts 30, 40, 50, 61, 70, 71, and 110, among others, issued by the NRC and its Agreement State counterparts where appropriate. Our comments on the two policy statements are informed by our detailed, day-to-day involvement in the nuclear regulatory framework that has been established to implement the *Atomic Energy Act* of 1914 as amended (AEA).

Consistency – Energy*Solutions* believes that as the NRC proceeds with proposed revisions to its policy statements on Agreement State Programs including "Policy Statement on Adequacy and Compatibility of Agreement State Programs" and the "Statement of Principles and Policy for the Agreement State Program," the staff should work to ensure that at a minimum, the two policy statements are consistent. In essence, compatibility entails making sure the right regulations are in place, while adequacy is making sure they are met. As it is impossible to have one without the other, the existence of two separate policy statements distorts the integral relationship between compatibility and adequacy.

Due to the significant level of overlap that exists between the two policy statements, and in the interest of simplicity and consistency, Energy*Solutions* proposes that the Commission combine the two policy statements into one policy statement.

Roles and Responsibilities – Energy*Solutions* believes that the current policy statements do not adequately and specifically define the roles and responsibilities of the NRC and State regulatory agencies. Clearly defined roles and responsibilities are fundamentally important to determining the boundaries of who has ultimate responsibility, especially when Agreement States are found out of compliance with NRC criteria.

Energy*Solutions* proposes that the staff include a "roles and responsibilities" section in the updated policy statements to clearly define the relationship between the NRC and Agreement States.

For example, the existing policy statements do not clearly describe how the NRC may provide program assistance in cases where an Agreement State cannot adequately fulfill its obligations. This has resulted in instances where undue burden has been placed on licensees due to a lack of timeliness in the States' ability to address emerging licensing issues. The updated policy statements should clearly:

- Define the conditions under which program assistance will be provided

- Set this threshold at a level that will ensure resources will be available in a timely manner in order to help States administer their regulatory responsibilities
- Provide specialized technical assistance to Agreement States when addressing unique or complex licensing, inspection, and enforcement issues.

We recognize that to some extent there is a conflict between the concept of the NRC "relinquishing" its regulatory responsibilities and yet providing assistance. Some might even argue that in the event that assistance is needed, an Agreement State is failing an adequacy test. We do not agree with either of these notions. In fact, we believe there clearly are instances where the level of expertise is sufficiently high and the need for resources at the state level is sufficiently rare, that the NRC would be undermining the intent of the *Atomic Energy Act* not to provide assistance.

An example of an instance where an Agreement State specifically requested, and did not receive, NRC's technical assistance is a case involving the State of Utah's request for assistance with evaluations of Performance Assessments (PA) used by the State in licensing low-level waste disposal sites.[1] The State of Utah did not believe they had an adequate level of expertise or availability of resources to review the licensee's PAs in a timely and effective manner. The Performance Assessment Branch in NRC's Office of Federal and State Materials and Environmental Management Programs includes a number of highly qualified and experienced PA practitioners. Conversely, it is difficult if not impossible for any single state to maintain such expertise. If the NRC is going to maintain agreements with states to regulate low-level waste disposal, consistent with the provisions of section 274(i) of the AEA, the NRC should provide be prepared to provide assistance to states in this area. Doing so would leverage the NRC expertise; and consistency in such reviews would clearly be in the nation interest.

Energy*Solutions* recommends that the Commission include within the roles and responsibilities section the circumstances and conditions when the NRC may provide programmatic assistance to an Agreement State, either upon their request or when they cannot adequately fulfill their obligations.

In reviewing the past record of NRC taking enforcement[2] actions against agreement states, it appears such actions are inconsistent and often untimely. An example of NRC's lack of initiative to enforce their state agreements dates back to August 7, 2007 when the NRC informed the State of California of incompatibility issues between 10 CFR 61 and California Health and Safety Code section 115261, regarding the Licensing Requirements for Land Disposal of Radioactive Waste. In the ensuing time period, the Southwestern Low-Level Radioactive Waste Commission has repeatedly asked the NRC to take corrective action in this regard, to no avail.

Energy*Solutions* recommends that the Commission include within the roles and responsibilities section the criteria and standards for taking action where an Agreement State does not meet the compatibility and adequacy requirements.

---

[1] The referenced matter involved the State of Utah's review of EnergySolutions PA for its Clive site that was submitted on June 1, 2011. A substantive review has yet to be initiated by the State due to the lack of qualified resources.

[2] Enforcement as used herein means NRC's actions against agreement states where their programs or implementation of such programs raise compatibility or adequacy issues.

Compatibility – Energy*Solutions* believes that the Compatibility section of the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" is overly complicated, confusing, and in need of significant revision. The policy states that a compatible program should "...meet a larger nationwide interest in promoting an orderly pattern of regulation of radiation protection." We propose, however, that the compatibility categories listed do not support this worthy objective. Rather, the categories are more numerous than necessary, contribute to confusion rather than orderliness, and do not in sum contribute to a policy that meets the nationwide interest.

For Compatibility Categories A and B, the Policy states the Agreement State program elements "should be essentially identical to those of the Commission." The difference between A and B has nothing to do with what is required, but *why* it is required. To create separate categories to address why a standard should be "essentially identical" – whether it be because they address basic radiation protection standards or because of transboundary implications – is not justified. Agreement State programs also are required to adopt regulatory requirements listed as H&S, but not for compatibility (the logic of this exception regarding compatibility is not readily apparent). In essence, the NRC has created three different compatibility categories that all require the same thing, but for different reasons. We do not see any rationale for this approach. We propose that these three compatibility categories be consolidated into one category. While there may be different reasons that a regulatory requirement is required, these reasons could be articulated in support of one compatibility category. This would simplify the system with no loss in effectiveness.

EnergySolutions proposes that the total number of compatibility categories be reduced to three (not including the NRC category). The first would be the same as the current category A. Under this category, states would be required to adopt regulations identical to those promulgated by the NRC. The rationales for requiring that they be adopted could include all of those currently listed under A, B, and H&S, and they could be listed in the Policy.

The second category would be for those regulatory requirements that the states should adopt, but for which the state standard may be more restrictive than the Commission program elements. This is similar to the existing Category C; but with one important distinction. **Energy*Solutions* also proposes that in the event a state wishes to impose a standard that is more restrictive than the comparable NRC standard, it must provide a technical justification for doing so.** This justification would be subject to review and approval by the NRC. NRC review is an important step that should be added to the process; it is important that the NRC confirm that the additional requirements imposed are merely discretionary enhancements and not necessary to protect health and safety. Otherwise, the NRC undermines public confidence that its regulations, as well as those of the Agreement States, are sufficient to protect health and safety. A review process also would reduce the potential for states to adopt overly conservative provisions that makes the beneficial uses of agreement materials prohibitively expensive to discourage their use.

The final category would be for program elements that are not required for compatibility and would be the same as the current Category D. We could easily provide justification for the NRC to go even further and eliminate this category. The NRC frequently states that its regulations exist to protect health and safety. Presumably the Commission does not promulgate rules that it considers to be frivolous, so one is left to wonder why it would find it

acceptable for Agreement States to on occasion ignore rules the NRC has determined to be sufficiently important to have promulgated in the first place.

Good Regulation Principles – Energy*Solutions* applauds the NRC for its Principles of Good Regulation. They are sound, reasonable, and provide clear guidance for the regulators. We furthermore agree that it is reasonable for the NRC to encourage states to adopt a similar set of principles; but we are mystified by the inclusion of the following statement:

> Failure to adhere to these principles of good regulation in the conduct of operations should be a sufficient reason for a regulatory program to self-initiate program changes that will result in needed improvements.

It is unclear why the NRC thinks that an Agreement State program that has failed to adhere to principles of good regulation would be sufficiently proactive to recognize this shortcoming or capable of correcting it on its own. We do not believe this statement is appropriate for inclusion in the policy and should be deleted. It is the responsibility of the NRC to recognize and require correction to Agreement State programs that are not performing adequately.

We also believe it insufficient for the NRC to merely encourage states to adopt similar principles. Operating under such principles is an important characteristic of an effective regulatory body. **Consequently, Energy*Solutions* recommends that the Commission stipulate that adopting principles of good regulation is necessary to demonstrate adequacy.** We address the topic of Agreement State program adequacy in more detail below.

NRC response to Review Findings – Under Section 274 of the AEA, as amended, the Commission retains authority for ensuring that Agreement State programs continue to provide adequate protection of public health and safety. In fulfilling this statutory responsibility, the NRC is responsible for evaluating performance indicators of Agreement State radiation control programs through the systematic IMPEP performance evaluation process, to determine whether they are adequate and compatible prior to entrance into a Section 274b agreement, and to ensure they continue to be adequate and compatible after an agreement is effective. Energy*Solutions* believes that any update to the policy statements should include a more rigorous and timely performance evaluation process. Furthermore, the value of identifying areas that need improvement can only be realized through prompt and clearly articulated actions by the NRC. Energy*Solutions* believes the existing policy statement relative to IMPEP review findings is too ambiguous and therefore makes enforcement of the agreement difficult. The NRC states in the existing policy statement that their actions will be based on a well-defined and predictable process and a performance evaluation program that will be consistently and fairly applied. To date, there are few examples where the NRC has taken actionable steps to enforce capability in spite of multiple instances where compatibility has been highly questionable. This again highlights the importance of having clearly articulated roles and responsibilities for the NRC and states relative to enforcement activities within the program.

Compatibility Category B – As described above, Energy*Solutions* believes that there is no logical basis for maintaining Compatibility Category B distinct from A. Because it is important to define what is to be included in each category, we offer our comments on the questions regarding this compatibility category.

Definition of Significant Transboundary Implication – We agree with NRC that the addition of the word particular is vague; however we do not believe that it should be replaced

by "significant and direct." It is the need for uniformity nationwide that makes this definition important. It is important for the purposes of this definition merely that there be some health and safety impact. Each of the alternatives considered by staff serves only to add confusion, not clarity. We believe this definition, much the same as the compatibility categories themselves, are too often the subject of pedantic debates that do nothing to promote health and safety.

Energy*Solutions* proposes the following definition for Significant Transboundary Implication:

> **A significant transboundary implication is one that crosses regulatory jurisdictions, has an impact on health and safety, and needs to be addressed to ensure uniformity of regulation on a nationwide basis.**

Examples – Energy*Solutions* proposes that examples are not necessary and should not be retained in the policy statement. Indeed, it is a significant challenge to identify NRC regulations that 1) cross regulatory jurisdictions, 2) have an impact on health and safety, or 3) ensure uniformity and still should *not* be required of the states. Some might argue that this sets the bar too low, but we believe it serves to illustrate the point that very few NRC regulations should not be imposed by Agreement States. If a regulation is not necessary for health and safety, then it could be argued that it is frivolous. If a state can pose a rationale for a stricter regulation, than it could be argued that the NRC has not taken appropriate measures. The NRC should focus more attention on ensuring that Agreement States effectively implement what the NRC has promulgated and less attention on enabling Agreement States to promulgate less effective radiation protection standards or unjustifiably restrictive standards.

Consideration of Economic Factors – Energy*Solutions* proposes that it is entirely appropriate to consider economic factors in determining if a proposed regulation has significant transboundary implications. Presumably, when the NRC sees fit to promulgate a regulation, it already has made a determination that the new or revised regulation provides a real health and safety benefit. Thus, the question here is not whether or not it does in fact have such a benefit, but whether or not Agreement States should be required to adopt comparable standards.

In the event that the health and safety benefit is minor, the NRC may choose to give the states latitude to adopt or not adopt the regulation. In some instances, NRC may choose to allow states to be more restrictive; although, as we comment above, there should be limits on a state's ability to do so. But for the NRC to require the states to adopt standards that are "essentially identical," one of two standards should be met:

1. The regulation addresses a "basic radiation protection standard" and is important to adopt for the purposes of protecting the health and safety of workers or the public (Compatibility Category A).
2. Adoption of varying versions of the regulation in different states would "jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis."

Since NRC already has created a "health and safety" criterion in Category A, it seems only logical that the second case would be to address other factors, predominantly economic

factors. The most fundamental aspect of the "orderly pattern of regulation" is economic. Transportation regulations that changed at state boundaries would not create unacceptable radiation risks; they would impose unacceptable economic penalties. The main reason for having consistent nationwide transportation regulations is economic. It is important for health and safety reasons to have uniform, recognizable radiation hazard signs, but the burden of complying with signage and other transportation requirements that change from state-to-state clearly would be an unreasonable economic burden. It is reasonable for the NRC to consider economic factors because to do otherwise, the NRC itself would "jeopardize an orderly pattern of regulation."

Limits to Compatibility Category B Program Elements – Energy*Solutions* believes that it is unnecessary for the Commission to limit this category to a specific number of elements. So long as "significant transboundary implication" is clearly defined in the updated policy statement, the number of elements that are included in this definition will be the same regardless of the Commissions preference for a "small number of elements." There is no basis for predicting the outcome to the limits. This should be technically derived based explicitly on the definitions in the rule.

Performance Based Approach for Determining Compatibility – It is not clear to Energy*Solutions* what performance based approach we are being asked to comment on. Without further information regarding the effectiveness of the performance metrics currently used, it is not clear how a performance based approach could be met under the requirements of the Agreement State program. Broadly speaking, Energy*Solutions* believes a performance based approach has the serious potential to create a more complicated review process for the NRC, and therefore, make it more difficult to identify and enforce compatibility issues. Additionally, a performance based approach creates the potential to complicate transboundary issues as the result of each state requiring a different pathway of compliance. Abandoning the 3-year requirement also could introduce delay into the implementation of standards that the NRC has determined to be of health and safety significance.

Energy*Solutions* supports a graded approach for determining compatibility which ensures that states with facilities relevant to specific regulations comply, and excuses states without facilities from having to adopt unneeded regulations. As to whether, the promulgation of requirements should be by regulation, order, or license condition, Energy*Solutions* favors rulemaking as a general rule as it is a tool to obtain widespread stakeholder input. Orders and license conditions could and should be allowed when time is of the essence.

Energy*Solutions* proposes that the NRC hold a workshop with stakeholders to solicit comments on the performance based approach for determining compatibility. Such a workshop should be preceded by the drafting and publication of a specific description of what NRC means by such a performance based approach.

Conclusion – Given the current economic pressures that exist for both regulators and licensees, any resource investment made to improve the Agreement State Program should provide a more efficient pathway to meet health and safety performance goals. Energy*Solutions* believes the best way to achieve this is for the NRC to invest resources in developing a standard set of requirements for all states. This would serve three worthwhile objectives:

- Minimize the burden on licensees due to ambiguity in how each state applies program requirements

- Allow states to focus limited resources on implementation, rather than reconsideration of standards for the control of agreement material
- Reduce the burden on NRC for reviewing a wide variety of approaches that can and do affect both adequacy and compatibility

The requirements should be based on health and safety significant performance measures and any provisions that do not have a health and safety significance should not be promulgated.

This approach requires confidence that the performance measures used to complete IMPEP evaluations are the right ones. Due to the level of variability that currently exists between state programs, this suggests that the best and right measures have not yet been identified. Energy*Solutions* recommends a re-evaluation of the Agreement State program IMPEP performance measures. We believe a workshop would be the most appropriate next step, one that broadly focuses on identifying areas of the Agreement State program that can be improved. The workshop should also specifically address technical aspects of the program such as performance metrics.