

POLICY ISSUE
(Notation Vote)

June 19, 2015

SECY-15-0087

FOR: The Commissioners

FROM: Mark A. Satorius
Executive Director for Operations

SUBJECT: AGREEMENT STATE PROGRAM POLICY STATEMENT AND
PROGRAM RECOMMENDATIONS

PURPOSE:

To obtain the Commission's approval to: (1) publish the proposed consolidated Agreement State policy statement for public comment in the *Federal Register* (Enclosure 1); (2) develop a more comprehensive approach to assessing Agreement State compatibility; and (3) improve the Integrated Materials Performance Evaluation Program (IMPEP) by focusing on consistency, flexibility, and IMPEP team training.

SUMMARY:

This paper addresses three actions directed in the Staff Requirements Memoranda (SRM) to COMSECY-14-0028, "Agreement State Program Policy Statements: Update on Recent Activities and Recommendations for Path Forward," (U.S. Nuclear Regulatory Commission (NRC)) Agencywide Documents Access and Management System (ADAMS) Accession No. ML14224A618) dated August 12, 2014, and in the SRM-SECY-12-0112, "Policy Statements on Agreement State Programs," (ADAMS Accession No. ML13148A352) dated May 28, 2013.

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BACKGROUND:

Currently, the Agreement State program is governed by two policy statements. The “Policy Statement on Adequacy and Compatibility of Agreement State Programs” (62 FR 46517) presents the NRC’s policy for determining the adequacy and compatibility of Agreement State programs. The “Statement of Principles and Policy for the Agreement State Program” (62 FR 46517) describes the respective roles and responsibilities of the NRC and the States in the administration of programs carried out under the 274b. State Agreement.¹ The application of these two policy statements has significant influence on the oversight of Agreement State and NRC materials regulatory programs and the regulation of the more than 22,000 materials licensees in the National Materials Program (NMP).

The NRC staff’s efforts to update the Agreement State policy statements began with the Commission’s direction in the SRM-SECY-10-0105, “Final Rule: Limiting the Quantity of Byproduct Material in a Generally Licensed Device,” (ADAMS Accession No. ML103360262) dated December 2, 2010. The SRM-SECY-10-0105 directed the NRC staff to update the Commission’s “Policy Statement on Adequacy and Compatibility of Agreement State Programs” and associated guidance documents to include both safety and source security considerations in the compatibility determination. Because Agreement State adequacy and compatibility are key components of the IMPEP,² the NRC staff revised the Commission’s “Statement of Principles and Policy for the Agreement State Program” concurrently. The revisions to the policy statements added information on security of radioactive materials. The draft updates to the policy statements were provided to the Commission for approval in August 2012 (SECY-12-0112).

The Commission approved publication of the proposed policy statement updates in the SRM-SECY-12-0112. In addition, the Commission directed the NRC staff to solicit comments on the Compatibility Category B designation described in the “Policy Statement on Adequacy and Compatibility of Agreement State Programs.” As a separate matter, the Commission also directed the NRC staff to engage the Agreement States on whether to develop a recommendation for a performance-based approach for assessing compatibility of Agreement State radiation control programs, and whether the NRC staff should develop a recommendation to revise, replace, supplement, or expand the performance metrics used in the IMPEP, including a holistic measurement for adequacy and compatibility.

The NRC staff published the proposed policy statements for comment in the *Federal Register* on June 3, 2013 (78 FR 33122), and solicited comments on the Compatibility Category B designation, a performance-based approach for assessing compatibility, and whether to revise, replace, supplement, or expand the performance metrics used in the IMPEP. The NRC staff also

¹ Section 274 of the Atomic Energy Act of 1954, as amended (Act), provides a statutory basis under which the NRC relinquishes to the States portions of its regulatory authority to license and regulate byproduct materials, source materials, and quantities of special nuclear materials in quantities insufficient to form a critical mass. The mechanism for the transfer of the NRC’s authority to a State is an agreement signed by the Governor of the State and the Chairman of the Commission, in accordance with Section 274b. of the Act.

² The NRC developed the IMPEP to evaluate the adequacy and compatibility of Agreement State programs and the adequacy of the NRC’s nuclear materials program.

held two public meetings and made a presentation to the Organization of Agreement States (OAS) during the comment period. Staff received 112 comments from 13 commenters: 51 comments on the policy statements, 45 comments on Compatibility Category B, 9 comments on performance-based compatibility, and 7 comments on IMPEP metrics.

The commenters provided general remarks and addressed specific sections of the policy statements. The commenters also suggested some terms in the policy statements were used discrepantly (i.e., material versus agreement material, enhanced security measures versus physical protection of agreement material, and relinquishing the NRC's authority versus discontinuing the authority). Regarding Compatibility Category B, the comments received show there is a wide variation on the interpretation of the definition and description of Compatibility Category B. Concerning the feedback on performance-based compatibility and an update to the IMPEP metrics, the need for consistent application and flexible implementation of the NRC's policies was the underlying theme expressed by the Agreement States. Further, the Agreement States regard IMPEP as a robust process that is not in need of change. The NRC staff's proposed disposition of comments is presented in a comment resolution table (ADAMS Accession No. ML14073A549).

In COMSECY-14-0028, staff proposed to consolidate the two policy statements in a single policy statement. Specifically, in developing COMSECY-14-0028, the NRC staff proposed to provide a notation vote paper that includes its recommendations on three actions: (1) a proposed Agreement State program policy statement, (2) a recommendation for a performance-based approach to assessing compatibility, and (3) a revised set of IMPEP performance metrics.

Following Commission approval of staff's proposed path forward (SRM-COMSECY-14-0028), the NRC staff consolidated the policy statements and drafted a White Paper to engage the Agreement States on the topic of a performance-based approach for determining compatibility of a State's radiation control program. The NRC staff also discussed, in the White Paper, the development of a revised set of performance metrics which could replace, supplement, or expand upon the IMPEP program such that both the adequacy and compatibility of the Agreement State's radiation control program could be measured holistically. An NRC-Agreement State working group operating in accordance with the NRC Management Directive (MD) 5.3, "Agreement State Participation in Working Groups," (ADAMS Accession Number ML070940610) was chartered to develop the recommendations presented in the White Paper on "Performance-Based Compatibility and IMPEP Metrics."

The staff solicited Agreement State comments on the proposed policy statement and White Paper in two Agreement State letters: "Opportunity to Comment on the Consolidated Policy Statement that Deals with Agreement State Adequacy and Compatibility (RCPD-14-013)," (ADAMS Accession No. ML14210A465) dated August 15, 2014, and "Opportunity to Comment on the Draft White Paper Discussing Performance-Based Compatibility and Integrated Materials Performance Evaluation Program (IMPEP) Metrics (RCPD-14-014)," (ADAMS Accession No. ML14224A033) dated August 15, 2014 (the White Paper).

DISCUSSION:Proposed Agreement State Policy Statement

The NRC staff has drafted a consolidated policy statement for the Commission's consideration. The NRC staff's draft policy statement addresses the Commission direction in SRM-SECY-10-0105. It also incorporates revisions based on comments received from the *Federal Register* notice (FRN) of June 3, 2013 (78FR 33122), public meetings, OAS topical sessions, and in response to the Agreement State letter (RCPD-14-013) on the proposed policy statement.

In consolidating the policy statements, the NRC staff identified redundant language between the two policy statements and noted that the Statement of Principles and Policy for the Agreement State Program contained detailed information on IMPEP implementation and the Principles of Good Regulation (ADAMS Accession No. ML15083A026) that is not typically included in a high-level policy statement. The staff consolidated the two Agreement State Program policy statements in a single policy statement and removed the IMPEP and Principles of Good Regulation details and redundancies.

As described earlier, the NRC staff provided the draft consolidated policy statement to Agreement States in August 2014, and received feedback from 10 of 37 Agreement States as well as the OAS Board. The comments did not support keeping the policy statements separate. Rather, the Agreement States expressed dissatisfaction over not being more engaged in the decision and process used to propose consolidation of the policy statements. Given this, the NRC staff did not make substantive changes to the policy statements in the consolidation.

The NRC staff considered the Agreement State input in revising the proposed consolidated policy statement. Some of the Agreement States commented on the use of certain terms (i.e., shall versus should, NRC versus Commission, discontinue authority versus relinquish authority). Staff made modifications to the policy statement to assure terms are used appropriately. A document summarizing the Agreement State comments on the draft consolidated policy statement is provided in ADAMS (Accession No. ML15042A395). Language was added to provide context to make the policy statement more clear and uniform as a result of the feedback from the Agreement States. Staff also added a new paragraph on the NMP to explain how the NRC and Agreement States fulfill their roles and responsibilities to regulate agreement material³ across the nation.

Enclosure 1 contains the FRN for the proposed consolidated policy statement for the Commission's consideration. The staff intends the proposed policy statement, if finalized and approved by the Commission, would supersede the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" and the "Statement of Principles and Policy for the Agreement State Program."

³ The term 'agreement material' means the materials listed in Section 274b. of the Atomic Energy Act of 1954, as amended, over which the States may receive regulatory authority.

Comprehensive Approach for Determining Compatibility

Compatibility is an important consideration in an Agreement State's implementation of its radiation program to ensure the Agreement State program does not create gaps, conflicts, or duplications in the NMP. Specific program elements⁴ are required for both adequacy and compatibility. Program elements include regulations, licensing, inspection, training, and event and allegation reporting and response.

The current evaluation for Agreement State compatibility in the IMPEP process is generally limited to the evaluation of an Agreement State's adoption of NRC regulations that are required for compatibility. The staff noted that the current approach for determining compatibility provides flexibility to the Agreement States by allowing Agreement States to use legally binding requirements (LBRs), such as orders and license conditions in lieu of adopting compatible regulations. Although the NRC regulations required for Agreement State compatibility range in complexity and scope, the IMPEP implementing procedures and requirements do not differentiate the complexity of individual regulations in determining an Agreement State's compatibility. Current NRC policy for timeliness in adopting NRC regulations or LBR's required for compatibility is set at 3 years. This term is based on a "reasonable" amount of time for an Agreement State to adopt the NRC regulation, not the safety and security significance of the regulation.

As indicated earlier, in response to the SRM-SECY-12-0112, staff developed a White Paper to solicit Agreement State input on a more comprehensive approach to compatibility. In the White Paper, the NRC staff proposed developing tiered-time limits for the adoption of final rules and/or LBRs based on the safety and security significance of each rule. The NRC staff suggested that the IMPEP process should be flexible and provide the tools to assess radiation control programs in a risk-informed manner with an emphasis on safety and security of all program elements. Agreement State Program compatibility is more than just the adoption of regulations.

The NRC staff received feedback from 10 of 37 Agreement States and the OAS Board on the White Paper. Overall, the Agreement States who provided feedback were supportive of the NRC staff developing a tiered-time limit for rule adoption and considering program elements in addition to regulations when assessing compatibility. A document summarizing the Agreement State comments on the White Paper is provided in ADAMS (Accession No. ML15042A399). Based on the feedback from the interactions with the Agreement States, the NRC staff is proposing the following two options for assessing Agreement State compatibility.

⁴ Program elements for adequacy focus on the protection of public health and safety within a particular Agreement State while program elements for compatibility focus on the impacts of an Agreement State's regulation of agreement material on a nationwide basis or its potential effects on other jurisdictions. Program elements for compatibility may also impact public health and safety.

Option 1.A: Continue the Current Approach (“status quo”)

Staff would continue its current approach for assessing compatibility of Agreement State programs. If the Commission approves the proposed policy statement, the staff would make conforming revisions to the compatibility guidance documents and implementing procedures. The staff would continue with its assessment of compatibility under IMPEP which includes reviews of Agreement State proposed and final enabling legislation, rules and LBRs, status of overdue rules, and status of enabling legislation.

Pros:

- The current approach to assess compatibility is familiar to Agreement States and other external stakeholders and is a well-regarded model for evaluating program performance.
- No new process training would be required for IMPEP teams, the Agreement States, or the Management Review Board (MRB).

Cons:

- The current approach does not differentiate between the safety and security significance of each regulation and LBR. Therefore, compatibility decisions are less risk-informed and performance-based.
- With the current approach, some Agreement States would continue to face challenges in adopting NRC regulations in 3 years. Further, the 3-year criteria to adopt regulations is not reflective of the safety and security significance of a rule.
- The continued lack of well-defined evaluation criteria in the handbook of Management Directive (MD) 5.6, “Integrated Materials Performance Evaluation Program (IMPEP),”⁵ would prevent integration of adequacy and compatibility in the assessment of Agreement State performance and fails to enhance consistency, objectivity, and transparency.

Option 1.B: Implement a Comprehensive Approach to Determining Agreement State Compatibility

Staff would update MD 5.6 to improve and expand the evaluation criteria for all program elements required for compatibility. This option would also use the Standing Committee on Compatibility (SCC) to create a tiered-time approach for rule adoption by Agreement States.⁶ Under this option, the SCC would expand its current charter to make recommendations on the period of time required to adopt an NRC proposed rule by the Agreement States. For instance, this tiered-time approach might take into account the safety and security significance of a particular NRC regulation, and the number and type of licensees it impacts. Consistent with the agency rulemaking process, the SCC’s recommended determinations for compatibility designations and time to adopt regulations would be subject to Commission review and approval.

⁵ See http://www.internal.nrc.gov/ADM/DAS/cag/Management_Directives/md5.6.pdf.

⁶ The SCC is an NRC/OAS co-chaired working group that works within the NRC rulemaking process to evaluate and recommend the compatibility categories of all draft and proposed final rules affecting Agreement States.

Under Option 1.B, Agreement States would continue to submit their proposed and final regulations or LBRs for a compatibility review. The comprehensive approach would also include a review of all program elements including the status of regulations and LBRs during the IMPEP review to determine the compatibility of an Agreement State program.

Pros:

- This option would enhance consistency, objectivity, and transparency of the compatibility determination and strengthen their performance basis.
- This option would provide more flexibility in determining the safety and security significance of a particular NRC regulation and other program elements and provide flexibility on the timing to adopt an NRC regulation.
- This option would review adequacy and compatibility in a more balanced manner and recognize other ways that an Agreement State program may be compatible in addition to the adoption of regulations and LBRs.
- This option would take into account the Cumulative Effects of Regulation impacts on the Agreement States and increases their involvement in the rulemaking process.
- The option provides the Agreement States with a more active role in the rulemaking process.

Cons:

- This option would require additional NRC and Agreement State effort for the development of more detailed IMPEP evaluation criteria.
- This option would require retraining for IMPEP teams, the Agreement States, and the MRB.
- This option would require an expansion of the SCC charter to make tier-timed determinations.

The NRC staff is recommending Option 1.B, a Comprehensive Approach for Determining Compatibility. This comprehensive approach uses risk significance to inform the compatibility determination of regulations during the rulemaking process and allows flexibility for a tiered-time approach for rule adoption based on the safety and security significance of the regulation. This approach would review compatibility in a more balanced manner and recognizes that an Agreement State program may achieve compatibility taking into account a broader range of performance besides the timely adoption of regulations. This option is responsive to Agreement State comments and consistent with the White Paper recommendations developed by the NRC-Agreement State working group. The NRC staff will work with the Agreement States in developing the detailed IMPEP evaluation criteria and seek public comment.

IMPEP Findings

The program ratings for adequacy and compatibility under IMPEP are termed findings. Currently, under the existing IMPEP, there are six possible findings for evaluating an Agreement State program: (1) Adequate for the protection of public health and safety, and compatible;

(2) Adequate for the protection of public health and safety, but needs improvement, and compatible; (3) Not Adequate for the protection of public health and safety, but compatible; (4) Adequate for the protection of public health and safety, and not compatible; (5) Adequate for the protection of public health and safety, but needs improvement, and not compatible; (6) Not adequate for the protection of public health and safety, and not compatible.

In the White Paper described earlier, the staff proposed revising the IMPEP findings for Agreement State programs to include one of three possible outcomes: (1) Adequate and compatible for the protection of public health and safety, (2) Adequate and compatible for the protection of public health and safety with required follow-up actions, or (3) Not adequate and not compatible for the protection of public health and safety. These revised findings embody a more holistic assessment of adequacy and compatibility as directed in SRM-SECY-12-0112.

The NRC staff received feedback from 10 of 37 Agreement States and the OAS Board. A document summarizing the Agreement State comments on the White Paper is provided in ADAMS (Accession No. ML15042A399). Overall, the Agreement States who provided feedback were not supportive of the NRC staff's proposed revisions to the IMPEP findings and were not supportive of assessing adequacy and compatibility holistically. Based on discussion with the Agreement States, the IMPEP finding hierarchy proposal described in the White Paper was not well understood and seen as too restrictive, less flexible; whereas, the opposite was the intent of the proposed change. Agreement States comments expressed the need for more consistency in the IMPEP process, teams, team leaders, and MRB. The Agreement States recommended improving training of IMPEP teams, team leaders, and the MRB instead of changing the current IMPEP findings. Based on the feedback from the engagements with the Agreement States and the proposed recommendations in the White Paper, the NRC staff identified the two options discussed below.

Option 2.A: Make no Changes to IMPEP Findings and Improve IMPEP Consistency with Updates to IMPEP Guidance and Training

MD 5.6 would be revised to improve the clarity and adaptability of the IMPEP performance indicator evaluation criteria to promote consistency and flexibility in implementing IMPEP without changing the IMPEP findings. The findings for adequacy and compatibility would be kept separate. The NRC staff would work with the Agreement States in developing the improved IMPEP evaluation criteria and seek public comment. This option would also require an update to the IMPEP team member training and qualification requirements described in MD 5.10, "Formal Qualification of Integrated Materials Performance Evaluation (IMPEP) Team members."⁷ Consistent with agency process, MD 5.6 and 5.10 would be subject to Commission review.

Pros:

- The current IMPEP findings are well understood and accepted by the Agreement States and external stakeholders.
- This option would provide an opportunity to make the evaluation criteria more clear, consistent, and adaptable.

⁷ See http://www.internal.nrc.gov/ADM/DAS/cag/Management_Directives/md5.10.pdf.

- This option would provide an opportunity to update IMPEP team member structure, training and qualification, and provide an opportunity to update IMPEP guidance documents.
- Only minor revisions to MD 5.6 and MD 5.10 are needed to implement this option.

Cons:

- This option would require a 2 year effort to develop a method to enhance the consistency of the IMPEP process, including IMPEP team and MRB performance as well as IMPEP training.

Option 2.B: Develop the New IMPEP Finding Hierarchy

Under this option, NRC staff would develop the IMPEP findings to include three possible outcomes as described in the White Paper. The revised IMPEP findings for assessing adequacy and compatibility would be described in a significant revision to MD 5.6. The evaluation criteria for the IMPEP performance indicators would be developed to align with a holistic assessment of adequacy and compatibility by incorporating aspects of both adequacy and compatibility into each performance indicator. The evaluation criteria in MD 5.6 would be refined for the adequacy and compatibility components of the IMPEP performance indicators in order to promote consistency, objectivity, transparency, and flexibility.

Pros:

- This option would more fully integrate adequacy and compatibility in the assessment of Agreement State program performance.
- This option provides more flexibility for IMPEP teams to evaluate performance because it fully aligns with Option 1.B (comprehensive approach to determining compatibility).

Cons:

- A new IMPEP finding hierarchy is unfamiliar and the Agreement States would have to be educated on the new approach. Significant Agreement State and NRC resources would be needed to effect the change.
- This option would take greater than 3 years to develop, pilot, and implement, and also requires training IMPEP teams, the Agreement States, and the MRB.
- Major revisions to MD 5.6 are needed to implement this option.

The NRC staff is recommending Option 2.A; make no changes to IMPEP findings and improve IMPEP consistency with updates to IMPEP guidance and training. This option is responsive to Agreement State comments. In addition, it is also reflective of the general success of the IMPEP. This option would improve the IMPEP for consistency and flexibility by focusing on more clear and adaptable evaluation criteria, and the training of IMPEP teams on the updated criteria rather than re-structure IMPEP.

CONCLUSION:

The NRC staff worked closely with the Agreement States to address Commission direction in the SRM-COMSECY-14-0028, "Agreement State Program Policy Statements: Update on Recent Activities and Recommendations for Path Forward," and the SRM-SECY-12-0112, "Policy Statements on Agreement State Programs." By consolidating the "Policy Statement on Adequacy and Compatibility of Agreement State Programs," and the "Statement of Principles and Policy for the Agreement State Program," the NRC's and the Agreement States' activities carried out in the NMP will be described in one high level policy statement.

The NRC staff engagement with the Agreement States, industry, and public indicates that improvements in determining compatibility are warranted to enhance consistency and flexibility in carrying out the NRC's oversight program. The NRC staff proposes to revise its approach to determining Agreement State compatibility by allowing Agreement States to play a more active role in determining how soon and in what form new Federal regulations must be incorporated into their programs.

In addition, a revised set of IMPEP findings is not warranted. IMPEP has delivered expected outcomes. The NRC staff proposes to update MD 5.6, to more clearly identify what is already the practice in providing for flexibility in implementing the NMP, and at the same time include clearer expectations for team member and team leader qualifications and training.

RECOMMENDATION:

The NRC staff recommends that the Commission:

Approve for publication, in the *Federal Register*, the proposed policy statement for comment (Enclosure);

Approve (Option 1.B) to implement a more comprehensive approach to determining Agreement State Compatibility; and

Approve (Option 2.A) to improve IMPEP consistency with updates to IMPEP guidance and training.

Note:

- a. The proposed policy statement would be published in the *Federal Register*, allowing 75 days for public comment.
- b. That a press release would be issued by the Office of Public Affairs when the proposed policy statement is filed with the Office of the Federal Register.

RESOURCES:

The resources needed to finalize the policy statement and associated MDs addressed in this paper are currently within the Nuclear Material Users' business line.

The FY 2016 resources to complete Options 1.A, 1.B, or 2.A are included in the FY 2016 Request for the Nuclear Material Users' business line. If approved, resources to complete Option 2.B during FY 2016 would be reallocated from within the Nuclear Users business line. The resources for FY 2017 and subsequent years would be addressed through the Planning, Budgeting, and Performance Management process.

A more detailed breakdown of estimated resources for current and future years by Business Line/Product Line/Product and Office by FY are in Enclosure 2, "Resource Estimates."

In support of the policy statement and options addressed in this SECY, the Agreement States will be a party to developing updated guidance on a voluntary basis. Further, the implementation of the options and training on updated guidance for the NRC and Agreement States will be ongoing and staff will reallocate resources to meet implementation and training needs.

COORDINATION:

The Office of the General Counsel has no legal objection to the proposed policy statement. The Office of the Chief Financial Officer has reviewed this SECY Paper for resource implications and has no objections.

/RA Michael Weber for/

Mark A. Satorius
Executive Director
for Operations

Enclosures:

1. *Federal Register* notice
2. Resource Estimates

The FY 2016 resources to complete Options 1.A, 1.B, or 2.A are included in the FY 2016 Request for the Nuclear Material Users' business line. If approved, resources to complete Option 2.B during FY 2016 would be reallocated from within the Nuclear Users business line. The resources for FY 2017 and subsequent years would be addressed through the Planning, Budgeting, and Performance Management process.

A more detailed breakdown of estimated resources for current and future years by Business Line/Product Line/Product and Office by FY are in Enclosure 2, "Resource Estimates."

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Mark A. Satorius
Executive Director
for Operations

Enclosures:

1. *Federal Register* Notice
2. Resource Estimates

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OFC	MSTR	MSTR	MSTR	RI/RA	RIII/RA	RIV/RA	CFO	ADM
NAME	LDimmick	DWhite	PHenderson for LDudes	DLew	CPederson	MDapas	RAIweing with comments	CBladey with comments
DATE	1/06/15	1/07/15	1/09/15	1/15/15	1/22/15	1/21/15	5/20/15	3/10/15
OFC	OGC	Tech Ed	NMSS	EDO				
NAME	MSpencer with comments	CPoland PTressler with edits	CHaney Chaney with comments	MSatorius (MWeber for)				
DATE	3/17/2015	3/25/15	3/29/15	06/19/15				