



## **POLICY ISSUE** **(Notation Vote)**

December 2, 1999

SECY-99-278

FOR: The Commissioners

FROM: William D. Travers  
Executive Director for Operations

SUBJECT: NRC/AGREEMENT STATE JURISDICTION  
FOR FORMERLY LICENSED SITES

PURPOSE:

To respond to Staff Requirements Memorandum (SRM) SECY-98-273 on options for resolving NRC/Agreement State jurisdictional issues over regulatory responsibility and evaluate possible approaches for returning identified formerly licensed sites (former sites) to NRC jurisdiction.

BACKGROUND:

SECY-99-193, SECY-98-273, SECY-98-011, SECY-97-188 and their associated SRMs provide background on previous actions relating to former sites. SRM-SECY-98-273 approved continued Agreement State jurisdiction over former sites and requested the staff to address eight actions. Seven of these actions were addressed in SECY-99-193. The eighth action is the subject of this paper. The action is:

Seek to resolve NRC/Agreement State jurisdictional issues over regulatory responsibility and evaluate possible approaches for returning identified sites to NRC jurisdiction.

As indicated in earlier papers, it is NRC's position that contamination at former sites falls under the jurisdiction of the Agreement States to the extent that such contamination involves materials covered under the provisions of the Agreements. The Agreement States have expressed disagreement with the Commission determination that the Agreement States have jurisdiction

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over these former sites. The States of Arizona, California, New York (three agencies), Tennessee, and Utah have expressed concerns. In particular, most of these States view the existence of these sites and NRC's jurisdictional position as an undefined, unfunded mandate that has been forced on the States by the NRC. In addition, some States do not accept the assertion that the State is responsible, in any way, for taking action to correct what they view as NRC's/AEC's failure to satisfactorily carry out its regulatory responsibility. Since these former sites were not identified at the time the State entered into its Agreement, these States do not believe that their Agreements cover these sites and, as such, these sites constitute a risk for which the States were not informed at the time they entered into their Agreements. Finally, the States believe that lack of NRC resources was not a justification for transfer to the Agreement States. The States do not want to seek funding from their current licensees for these activities. It would be inappropriate, according to the States, to use fees collected from current Agreement State licensees to conduct the work on NRC former sites. If NRC provides adequate funding, some of the States indicated that they would be willing to undertake the needed file reviews, site inspections, and oversight of remediation. Attachment 1 contains portions of text from letters sent by the Agreement States to NRC on these matters.

#### DISCUSSION:

It is unlikely that NRC or the Agreement States in question (Arizona, California, New York (three agencies), Tennessee, and Utah) will alter their position on the question of jurisdiction over these sites. The staff, however, has continued to discuss these issues with these States and, as discussed in more detail under Option 3 below, has sought means through which the closeout, and remediation, if necessary, of these sites can be accomplished despite the continuing jurisdictional disagreements. In response to the Commission's direction, the staff has identified two basic options to resolve the jurisdictional issue and a third option which provides a pathway for resolution of the core issue. These options are not mutually exclusive.

#### Option 1. Legislation

Under the legislative option, the Commission would propose an amendment to Section 274 of the Atomic Energy Act that would grant NRC jurisdiction over all former sites in all Agreement States that were terminated by the Atomic Energy Commission or the NRC. The amendment would cover all former sites, not just those involving unacceptable levels of radioactive material. This would avoid any implementation problems associated with determining which former sites contain unacceptable levels of radioactive material and which sites have received adequate cleanup. The jurisdictional status of the property would not change based on the amount of residual radioactivity present.

- Pros: ○ A statutory change would provide a final resolution to disagreements between NRC and the Agreement States regarding jurisdiction over former sites.
- Such an amendment would ensure that the Commission would maintain jurisdiction over all sites formerly licensed by the NRC, including reactor sites.



- Cons:
- There may be Agreement States that will oppose an amendment to Section 274 which increases NRC's regulatory presence within their borders. Such States may prefer to regulate these sites themselves.
  - The amendment may raise questions regarding the jurisdictional status of new licensed activities on former sites. It may be unclear whether the State or NRC would license such activities.
  - The amendment would place a burden on NRC resources by increasing the sites over which NRC is responsible.
  - The likelihood of Congress passing such an amendment is uncertain.

#### Option 2. Amended Agreement

Under the amended Agreement option, Agreement States could seek to amend their existing AEA Section 274 Agreements to return authority over former sites to NRC. In many cases, the Commission has entered into or modified existing Agreements which exclude specific "subcategories" of material or discrete activities from an Agreement State's authority. Most recently, the Commission approved a proposal from Oklahoma to limit the State's authority over source material (see SECY-99-123). With regard to the issue at hand, it may be possible to identify former sites as a discrete subcategory of material. While there is little precedent for such an arrangement in a specific Agreement, it could be viewed as consistent with the factors approved by the Commission in SECY-97-087. Under these factors, requests for limited Agreements must identify discrete categories of material or classes of licensed activity that (1) can be reserved to NRC authority without undue confusion to the regulated community or burden to NRC resources, and (2) can be applied logically, and consistently to existing and future licensees over time.

- Pros:
- This approach would provide Agreement States with the option to return authority over these sites to the NRC.
  - Those States that would like to retain authority may do so
- Cons:
- This option would create an additional type of "limited" Agreement. The resulting patchwork of jurisdiction may threaten the orderly pattern of regulation administered by NRC and the Agreement States.
  - Depending on the number of amendments to existing Agreements, this option may increase the resource burden on the NRC.
  - As with the legislative option, it may be unclear whether NRC or the State would regulate new activities on former sites.

### Option 3. Continue to Provide Technical Assistance to the Agreement States

Under Option 3, the Commission would pursue approaches with the States which would facilitate the remediation of contamination at former sites without resolving the jurisdictional disagreements between NRC and several Agreement States. For example, NRC and the Agreement State could jointly agree, based on Agreement State review of the license and inspection files for a site, that no additional follow-up action is needed and closeout that site. If a current landowner remediates an individual site, NRC would provide technical assistance to the State as the lead agency in determining that the site cleanup is adequate. The technical assistance would be in the form of review and comment provided to the State on characterization/remediation plans and on the verification surveys of the sites. In addition, NRC and the Agreement State could sign a joint letter in which NRC would indicate that, while it does not have jurisdiction at the site, it is the technical opinion of the agency that the site has received adequate cleanup. The Staff has conducted informal discussions with Arizona and California to explore such an approach. Both States supported use of such an approach.

- Pros:
- This option would facilitate the cleanup of former sites without requiring a resolution of the jurisdictional dispute.
  - Remediation and final resolution of problem sites could be achieved on a case-by-case basis.
- Cons:
- Some States may continue to argue that they have no role in this process and, as such, may not be willing to participate in these activities at all.
  - A joint letter signed with the Agreement State could create confusion regarding the jurisdictional issue and generate questions regarding regulatory accountability at a particular site.

### RESOURCES:

The staff estimates the following resources for the three options:

#### Option 1. Pursue Legislation to Give NRC Full Jurisdiction in Agreement States Over Former Sites that Were Terminated by AEC/NRC

If all the currently open sites were to become the responsibility of NRC, there would be no need for the 2-year grant program (currently budgeted at \$1.65M per year beginning in FY 2001) to assist Agreement States in the closeout of former sites as identified in (see SECY-99-193) as this work would be done by the NRC. NRC would need 2 FTE to complete the file review for all remaining sites, and approximately 3 FTE to address the contaminated sites in the Agreement States, either already known or identified by the remaining file reviews. These 5 FTE (about \$0.5M) would be utilized by NMSS and the Regions over the 2-year period (FY 2001-2002).



- Option 2. Allow Individual Agreement States to Amend Their Agreement with NRC to Return the Responsibility for Former Sites to NRC

If only a portion of Agreement States were to return responsibility for former sites to the NRC, NRC would need to address these sites and the resources required to conduct the file review, site characterization, and decommissioning/regulatory oversight. Cost estimates for the additional NRC work would depend on the number of States that returned former sites to NRC control and the number of sites that were found to be contaminated. In addition, NRC would conduct a reduced 2-year grant program to assist Agreement States that chose to retain authority over former sites.

- Option 3. Provide Technical Assistance to Agreement States (in the form of review and comment on characterization/remediation plans and on verification surveys of sites) and Sign Off Together (NRC and Agreement State) that the Site Has Received Adequate Cleanup

While this does not resolve the issue of jurisdiction, joint sign-off does require that NRC allocate additional resources to review the data provided by an Agreement State as a result of State-directed work funded through the NRC's 2-year grant program (\$1.65M per year) in order for NRC to reach its independent conclusion. The additional NRC review effort would require 2 additional FTE (equally split between NMSS and OSP) each year, for a total of 4 FTE (about \$0.4M) for the period FY 2001 - FY 2002.

#### COORDINATION:

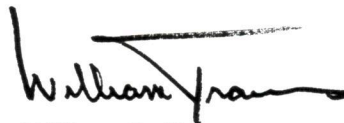
The Office of General Counsel has no legal objection to this paper. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections.

#### RECOMMENDATIONS:

The staff recommends the Commission:

Approve the implementation of Option 3. This would continue Agreement State jurisdiction with NRC assistance in the final approval of site cleanup for contaminated sites.

Note that the Commission has approved funding for assisting the Agreement States in the conduct of the file reviews and initial site surveys; and the funding of characterization/remediation when there is no financially responsible party associated with a contaminated site (SRM SECY-99-193). Also note that additional FTE will be addressed during the development of the FY 2002 budget.



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for Operations

Attachment:

1. Portions of Agreement State Letters

Commissioners' completed vote sheets/comments should be provided directly to the Office of the Secretary by COB Friday, December 17, 1999.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT December 10, 1999, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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## AGREEMENT STATE LETTERS ON JURISDICTION FOR FORMERLY LICENSED SITES

January 5, 1998 letter to Frank A. Wenslawski, NRC, from Aubrey V. Godwin, Arizona

The States who signed an Agreement with the AEC and later the NRC, were induced to do so with the understanding that the health and safety of their citizens had been protected by the respective Federal agencies. Now, without any offer of support, the NRC asks that the Agreement States assume a risk for which we were not informed of at the time we became an Agreement State. In fact, the licenses listed in your letter were not transferred to Arizona. In addition, the NRC has removed the support for training of our personnel so that we can be assured of having competent personnel perform these surveys without incurring additional liability to the State or NRC. Now so 30 years later, NRC comes forward and says we forgot to tell you about this. Since the Federal Government issued the authorizations for these persons to possess and use these hazardous materials, inspected the authorized operations utilizing hazardous materials, approved the termination of such authorizations, failed to inform the State of Arizona of this potential liability, and failed to take any constructive action to correct any potential health and safety documentation problems for 20 years, I believe that this is properly a Federal problem. Our limited resources do not allow us to assume this liability, however, we will contract to be your agent to investigate this matter further. For these reasons, we do not believe that we need invoke Subparagraph 274j.(2) of the Atomic Energy Act, to return these licenses to you.

If you are made aware that a health and safety problem, beyond documentation, exists, please inform us immediately. We would expect you as the responsible Federal agency, to take the necessary actions to protect the health and safety of Arizona citizens.

January 20, 1998 letter to Shirley Ann Jackson, NRC, from S. Kimberly Belshé, California Department of Health Services

The California Department of Health Services has received Mr. Richard L. Bangart's letter of November 14, 1997, regarding sites formerly licensed by the U.S. Atomic Energy Commission (AEC) or the U.S. Nuclear Regulatory Commission (NRC). In that letter, it is stated that radioactive material remaining at a site located within an Agreement State, including material originally licensed by NRC, is the regulatory responsibility of the Agreement State. In a separate letter dated December 5, 1997, there were 133 previously terminated licenses identified. California became an Agreement State in 1962. In that Agreement, California did not accept regulatory authority over 133 sites in California formerly licensed by AEC/NRC. At the present time, 60 of the original 133 California sites licensed by AEC/NRC have been identified by your agency as open due to lack of appropriate documentation of site decontamination.

The NRC states that it is transferring responsibility for the site review and closure to California because of your resource constraints and your position that Agreement States have jurisdiction over these sites. The current California agreement with NRC does not require the State to accept this workload. The Department also has resource constraints and our radiologic health program does not have the staffing or funding to accept your additional workload. The California Radiologic Health Program is supported by fees paid by users of radioactive materials. It would be inappropriate to use those fees to support activities which do not directly benefit those fee payers.



In summary, we deem our Agreement State status as not including regulatory authority or responsibility for regulatory oversight over facilities in the State formerly licensed and released by NRC. In order to properly protect public health, it is requested that your agency take immediate action to notify the present owners of the 60 California license sites which you have identified as open. The Department will assist NRC to the extent possible in closing these sites, but California will not accept responsibility on sites previously licensed and terminated by your agency.

May 15, 1998 letter to Shirley Ann Jackson, NRC, from F. William Valentino, New York State Energy Research and Development Authority

As Governor Pataki's designated NRC Liaison Officer, I am writing to reiterate New York State's position regarding NRC staff's contention that Agreement States are responsible for follow-up investigation of facilities previously licensed by the NRC (or its predecessor).

In his letter dated November 14, 1997, to "All Agreement States," Richard Bangart of the NRC Office of State Programs advised New York that the NRC has been reviewing previously terminated licenses to determine whether appropriate documentation exists demonstrating that the facilities or sites were properly decontaminated prior to termination of the license and release of the site for unrestricted use. Mr. Bangart goes on to assert that radioactive material remaining at a site previously licensed by the NRC (or its predecessor, the Atomic Energy Commission) in a State which is now an NRC "Agreement" State is the responsibility of that State.

New York entered into a regulatory Agreement with the Atomic Energy Commission on October 15, 1962. At that time, active AEC licenses that fell under New York State's new "agreement" jurisdiction were transferred to the State, along with the associated regulatory files (e.g., licenses, inspections), and became the regulatory responsibility of the State. To the best of our knowledge and belief, however, at no time was it suggested that licenses that were terminated prior to the Agreement became the responsibility of the State, nor were any corresponding files transferred to the State. Now, some 35 years later, NRC presumes to declare that New York is responsible for "conducting detailed license and inspection file reviews, and investigation and remediation of any site, as appropriate, identified through NRC review of previously terminated licenses for which there is insufficient documentation to ensure that the site was properly decommissioned or which has inadequate accounting of sealed sources" (see above cited letter from Richard Bangart). Mr. Bangart further indicates that State efforts to resolve such inadequately documented NRC (AEC) regulatory action will be examined as part of NRC periodic reviews of New York's Agreement program performance.

By letters dated January 14, 1998 and January 20, 1998, respectively, the New York State Departments of Environmental Conservation and Labor, two of the four agencies that share regulatory responsibility under New York's Agreement with NRC, advised Mr. Bangart that they strongly disagreed with the assertion that New York is responsible for necessary follow-up to ensure that NRC (AEC) had satisfactorily met its statutory responsibility, or, finding that NRC (AEC) failed to adequately ensure proper decommissioning of such sites before terminating the licenses, is now responsible for any required remediation. Copies of these letters are enclosed for your information. To date neither agency has received a response, or even an acknowledgment that its letter



was received or in any way considered by the NRC. To the contrary, New York received a follow-up letter from Mr. Paul Lohaus, Mr. Bangart's Deputy, asking for information on the status of the State's follow-up investigations and the State's estimates of costs to remediate the sites. It should be noted that, without agreeing to the NRC alleged State responsibility, the New York State Department of Environmental Conservation specifically requested, in its January 14, 1998, letter, that NRC provide it copies of the files for all previously terminated NRC (AEC)-licensed sites in New York State. That information has not yet been received.

In summary, please be advised that New York State does not accept NRC staff's assertion that the State is responsible, in any way, for taking action to correct NRC's (AEC's) failure to satisfactorily carry out its regulatory responsibilities. Neither the Atomic Energy Act nor the New York State/NRC (AEC) "Agreement" require New York to accept such responsibilities or any associated indeterminate liabilities.

New York strongly believes that NRC should complete its review and, if NRC finds that follow-up investigation is necessary for any sites in New York State previously licensed by NRC (AEC), it should immediately inform the State of the nature of the licensed operation, the location of the site, and the NRC's plans and schedule for such investigations.

January 20, 1998 letter to Richard L. Bangart, NRC, from Rita Aldrich, NY State Department of Labor

... These (former NRC sites) are sites that were never regulated by the States, and for which we have never accepted regulatory responsibility, implicitly or explicitly. Your letter further states that because of "resource constraints," NRC is phasing out detailed reviews of its license files for these formerly-regulated sites and will not do any further follow-up inspections. Instead, you expect the States to be responsible for any necessary remediation of these sites, and for reporting results to NRC. Your responsibility will then be reduced to rating us on how well we resolve the problems you left behind.

We have had this issue reviewed by our Counsel's Office, and have been advised that there appears to be no basis for the NRC's position. When New York State entered into its Agreement with NRC, it accepted responsibility for the NRC-licensed facilities covered by the Agreement which were in operation at the time. The Agreement does not cover all of the radioactive materials regulated by NRC, so regulation of some operating facilities was not transferred to New York, and there was not even a discussion of New York's accepting future responsibility for sites whose licenses had been terminated by NRC before the date of the Agreement. The latter were assumed to have been properly decontaminated and surveyed before NRC had released the regulated companies from responsibility by terminating their licenses.

Now, thirty-five years later, NRC has unilaterally decided that the Agreement States are responsible for these formerly licensed sites, where it now appears, according to NRC, that there is "insufficient documentation to ensure that the site was adequately decommissioned or to account for all sealed (radioactive) sources."

The New York State Department of Labor does not agree. As stated earlier, New York has never, either implicitly or explicitly, agreed to accept responsibility for sites that it has never regulated, and that may have used radioactive materials over which New York has no regulatory jurisdiction. NRC and its predecessor, the AEC, was the sole regulator of these sites, and was the agency that allowed their licenses to be terminated based on what it now feels is insufficient documentation.

Having now decided that its past actions with regard to these sites were ill-advised, it is clearly the responsibility of NRC, and not the State of New York, to correct NRC's oversights.

January 14, 1998 letter to Richard L. Bangart, NRC, from Paul J. Merges, NY State Department of Environmental Conservation

We agree that the Agreement State regulations, standards, and guidelines are applicable to residual radioactive material at sites that were formerly licensed and released for unrestricted use by the NRC. Any such contamination in the environment in New York State would have to be remediated to meet this Department's guidelines and regulations. However, the fact that Agreement States now have regulatory authority over the remediation does not imply that Agreement States are responsible for, and must devote resources to correcting, the lack of information in the NRC's files. We therefore strongly disagree with the NRC's assertion that Agreement States are responsible for conducting detailed license and inspection file reviews and on-site inspections. The fact that the NRC's files do not contain sufficient information to conclude that the sites were properly decommissioned is the sole responsibility of the agency that created and maintained the files. This Department will assist the NRC if full funding is provided; however, responsibility for (1) decontamination, (2) release under Agreement State or NRC cleanup criteria (whichever is more restrictive), and (3) documentation of these formerly licensed sites is legally that of the NRC.

If the NRC provides adequate funding to this Department, we will undertake for NRC the needed file reviews, site inspections, and oversight of remediations. We cannot, however, estimate the funds needed to perform those tasks at this time. The NRC admits it does not have sufficient information in its files to ensure that these sites were adequately decommissioned. Furthermore, follow-up inspections are apparently needed at some unknown number of sites. It is not clear what basis the NRC expects States to use in estimating the number of sites that may need remediation. Without access to even the limited information in NRC's files, there is no way we can provide a reasonable cost estimate.

Therefore, before we can discuss possible funding for this Department's assistance to NRC, please provide complete copies of all files for the sites in New York State. We will then provide an estimate of the costs to review those files and perform initial investigations in those cases where there is a potential for environmental contamination. The AAS letter also proposes that Agreement States report their progress on these sites, so that NRC can maintain a complete database on their status. This is inconsistent with NRC's position that it can pass these sites on to Agreement States. If, as NRC asserts, Agreement States are fully responsible for these sites (from file reviews to final cleanups), then, unless NRC provides full funding for these activities, the NRC has no authority to monitor Agreement States' progress toward settling these cases. If NRC



continues to claim that Agreement States are responsible, NRC should be fully satisfied that its job is done once it turns over the entire file to the Agreement State. If the NRC forces this program on the Agreement States and does not provide sufficient funding, it will no longer be the NRC's prerogative to set priorities or schedules for addressing the sites.

We look forward to receiving the files and hope we can reach an agreement to fund our assistance to the NRC in performing these reviews. If funding is not provided, however, we expect NRC to assume full responsibility for the review and remediation of environmental contamination at these sites.

December 17, 1997 letter to Richard L. Bangart, NRC, from Michael H. Mobley, Tennessee

I have just now recovered sufficiently from the shock generated by your letter of November 14, 1997, (SP-97-080) regarding sites formerly licensed by the NRC. Your assumption that state radiation control programs will want to ensure the protection of their public is appropriate, but clearly highlights a growing concern of mine. That is, is anyone at the NRC still concerned about exposure of the public?

If resources are the problem why is it more appropriate for State licenses to pay for the past mistakes of the NRC (and its predecessors) than for the current NRC licensees to pay? This appears to be an undefined unfunded mandate being foisted on the States because we do care to protect the public.

In conclusion, Tennessee will do all that is necessary to protect the public and environment in Tennessee, but we will be equally diligent in protecting our resources by pursuing, as necessary, the NRC, its licensees, and others for appropriate funding for this activity.

January 13, 1998 letter to Frank A. Wenslawski, NRC, from William J. Sinclair, Utah

There is no need for an orderly transfer of the necessary files to this office for follow-up actions. In our opinion, it still is the responsibility of the NRC to research and close the site files as necessary. We believe the work has been accomplished. Do not attempt to burden the State with follow-up actions as we intend not to respond unless the NRC can identify significant health and safety concerns associated with the initial closure of these three remaining sites.