

STRATEGIC ASSESSMENT ISSUE PAPER



DSI 4: NRC'S RELATIONSHIP WITH AGREEMENT STATES

INTRODUCTION

In August 1995, the Nuclear Regulatory Commission (NRC) staff initiated a Strategic Assessment and Rebaselining Project. This project was intended to take a new look at the NRC by conducting a reassessment of NRC activities in order to redefine the basic nature of the work of the agency and the means by which that work is accomplished, and to apply to these redefined activities a rigorous screening process to produce (or rebaseline) a new set of assumptions, goals, and strategies for the NRC. The results of this project are intended to provide an agency-wide Strategic Plan which can be developed and implemented to allow the NRC to meet the current and future challenges.

A key aspect of this project was the identification and classification of issues that affect the basic nature of NRC activities and the means by which this work is accomplished. These issues fall into three categories. The first category includes broad issues defined as Direction-Setting Issues (DSIs). DSIs are issues that affect NRC management philosophy and principles. The second category includes subsumed issues. Subsumed issues are those that should be considered along with the DSIs. The third category includes related issues. These are issues that should be considered after the Commission makes a decision on the option(s) for a DSI. Also, as part of the project, other issues of an operational nature were identified. These are not strategic issues and are appropriately resolved by the staff, and are not discussed in the issue papers.

Following the reassessment of NRC activities, issue papers were prepared to provide a discussion of DSIs and subsumed issues, and to obtain a review of these broad, high-level issues. These papers are intended to provide a brief discussion of the options as well as summaries of the consequences of the options related to the DSIs. Final decisions related to the DSIs will influence the related issues which are listed, but not discussed, in each issue paper. As part of the Strategic Assessment and Rebaselining Project, the issue papers are being provided to interested parties and to the public. Following distribution of the issue papers, a series of meetings are planned to provide a forum to discuss and receive comment on the issue papers. After receiving public comment on the issue papers, the Commission will make final decisions concerning the DSIs and options. These decisions will then be used to develop a Strategic Plan for the NRC. In summary, the Strategic Assessment and Rebaselining Project will analyze where the NRC is today, including internal and external factors, and outline a path to provide direction to move forward in a changing environment.

## I. SUMMARY

### A. Direction-Setting Issue

Several times in the past 20 years, the U.S. Nuclear Regulatory Commission (NRC) has considered whether it should encourage States to become Agreement States. In SECY-95-154, the NRC National Performance Review Steering Committee recommended that the NRC establish a policy and program to devolve to States a significant portion of the regulation of certain categories of radioactive material. The Commission deferred decisions regarding the future of the program so that this issue could be evaluated as part of the strategic assessment and rebaselining initiative.

The scope of NRC's future activities with the Agreement States is primarily influenced by two factors. First, the number of licensees regulated by the NRC is expected to decline as a result of more States becoming Agreement States. Second, the Omnibus Budget Reconciliation Act of 1990 requires that NRC programs are to be funded by its licensees. NRC policies to provide this funding may influence whether certain activities can be performed at no cost to Agreement States. With respect to these factors, the direction-setting issue (DSI) to be addressed in this issue paper is as follows:

What should be NRC's strategy regarding States becoming and remaining Agreement States?

The number of Agreement States is expected to increase from 29 today to as many as 33 within the next 5 years, thus potentially reducing the number of licensees regulated by the NRC from about 6,500 to about 4,500. This trend of more States becoming Agreement States could leave NRC with a relatively small fraction of the materials community to regulate. At some point, it may become difficult for NRC to maintain a national program to regulate nuclear materials and to retain sufficient technical staff to respond to a significant materials incident in a non-Agreement State or to take back an Agreement State Program if either NRC or the Agreement State decides to terminate the program. However, this decrease in the number of NRC licenses is not expected to be sufficient to present a problem for the NRC Materials Program within the next 5 to 10 years.

### B. Options

The options in this issue paper present the range of initiatives that NRC could choose to take regarding States becoming Agreement States. These options have been developed and have taken into consideration the projected trend of an increased interest by the States to seek Agreement State status. The applicability of some of the options may change if the scope of NRC's Materials Programs is reduced or eliminated.

**Option 1: Turn the Agreement States Program Over to the Environmental Protection Agency**

Under this option, the Commission would request that Congress amend the Atomic Energy Act (AEA) to have the Environmental Protection Agency (EPA) take over its responsibility for the regulation of Section 274 materials<sup>1</sup>.

**Option 2: Strongly Encourage States To Become Agreement States**

The Commission would provide incentives for States to become Agreement States. The Commission could also seek commitments that all States would become Agreement States or that the Agreement States would assist NRC with technical support in its regulation of nuclear materials in any remaining non-Agreement State.

**Option 3: Continue the Current Agreement States Program, Including Adopting Current Initiatives**

The Commission would finalize initiatives developed in response to the concerns of Agreement States and Congress to improve the Agreement States Program. If the Commission chooses this option, it could approve either all of the initiatives or individual ones. This option is not expected to affect the viability of NRC's Materials Program in the next 5 to 10 years.

**Option 4: Treat Agreement States as Co-Regulators**

Under this option, NRC would treat Agreement States as co-regulators and would have them share the authority and financial responsibility for the program.

**Option 5: Devolve Regulation of Atomic Energy Act Section 274 Materials to the States**

The Commission would request Congress to amend the AEA to withdraw the Federal preemption of AEA materials altogether.

## II. DESCRIPTION OF ISSUES

### A. Background/Bases

In 1959, Congress amended the AEA to recognize the States' interest in atomic energy activities. In Section 274, it clarified the responsibilities of the States and NRC's predecessor, the Atomic Energy Commission (AEC), and provided

---

<sup>1</sup>Section 274 materials are source, byproduct, and limited quantities of special nuclear materials, including uranium mill tailings.

a mechanism by which the AEC could relinquish, and the States could assume, a part of the AEC's regulatory authority. Under Section 274, the NRC is permitted to relinquish to the States, on a State-by-State basis, certain of its authority to regulate the use of reactor-produced isotopes, source materials, special nuclear materials in quantities not sufficient to form a critical mass.<sup>2</sup> Included within the scope of an Agreement State could be the authority to regulate uranium mill tailings, and low-level radioactive waste disposal. The Commission must make findings regarding the adequacy and compatibility of Agreement State Programs or proposed Agreement State Programs that implement the State's assumption of regulatory responsibility and must conduct periodic reviews of the State's program. Although the NRC is authorized to provide technical and training assistance to Agreement States, NRC is not required to provide the assistance at its own expense.

Each Agreement State is expected to manage its Radiation Control Program and issue regulations that are compatible with NRC regulations, evaluate applications and issue licenses, inspect licensee operations, and take enforcement action where necessary. The principal NRC regulations pertaining to the Agreement States Program are given in Part 150 of Title 10 of the Code of Federal Regulations (10 CFR Part 150).

Currently, a total of 29 States have formal agreements with the NRC. These 29 Agreement States regulate approximately 15,000 radioactive materials licenses, representing about 70 percent of all the radioactive materials licenses issued in the United States. The States of Massachusetts, Ohio, Oklahoma, and Pennsylvania are negotiating full Agreement State status with NRC. On March 28, 1996, the Commonwealth of Massachusetts formally requested Agreement State status.

In support of the Agreement States Program, the NRC currently performs the following activities:

- Approves new Agreement States
- Assesses technical adequacy and compatibility of Agreement State Programs using the Integrated Material Performance Evaluation Program (IMPEP), including reviewing new or revised Agreement State regulations

---

<sup>2</sup>For the purposes of this part, special nuclear material in quantities not sufficient to form a critical mass means uranium enriched in the isotope U-235 in quantities not exceeding 350 grams of contained U-235, uranium-233 in quantities not exceeding 200 grams, plutonium in quantities not exceeding 200 grams, or any combination of them in accordance with the formula in 10 CFR 150.11(a).

- Exchanges regulatory and safety information with Agreement States
- Provides technical assistance to Agreement States, without reimbursement, as deemed appropriate
- Trains Agreement State personnel, without reimbursement, as deemed appropriate
- Pays for most Agreement State travel related to programmatic activities

These activities are discussed in more detail in the following paragraphs.

Before the Commission is permitted to relinquish regulatory authority to a State, the Governor must certify that the State has a regulatory program that is adequate to protect the public health and safety. The Commission must find that the State's program is adequate from a health and safety standpoint and that it is compatible with the Commission's program. After the agreement is in force, Section 274 requires the NRC to review Agreement State Radiation Control Programs periodically.

The NRC conducts formal onsite reviews of each Agreement State's Radiation Control Program to affirm its continued adequacy and compatibility. The frequency and method of conducting the periodic, formal Agreement State Program Reviews is determined by IMPEP. The Commission approved involvement of the Agreement States in IMPEP, specifically, by Agreement State participation in the teams that conduct the IMPEP reviews of both NRC regional programs and Agreement State Programs. In addition, an Agreement State liaison representative to the Management Review Board (MRB) participates in the evaluation of NRC regional and Agreement State Programs as part of the IMPEP process.

The exchange of information with Agreement States is continuous, both at NRC Headquarters and at regional levels, through telephone conversations, meetings, and correspondence. In addition, NRC sponsors an annual All Agreement States Meeting with the program directors to address issues of mutual concern, as well as meetings between the Commission and representatives of the Organization of Agreement States (OAS). A second annual meeting is also held to address specific technical issues. When there is a special need, NRC has also sponsored special topic workshops to specifically solicit Agreement State views.

Section 274 authorizes the Commission to give technical assistance to the States, and it is the policy of the NRC to provide such assistance to Agreement States, as appropriate. Technical assistance is of three types: (1) routine technical assistance, which is provided to Agreement States as a normal part of NRC's day-to-day contact with Agreement States; (2) specific

technical assistance, which requires specific assignment of NRC staff or consultants for a specified period and for a specified job; and (3) programmatic technical assistance, which is the assistance provided to an Agreement State that is experiencing problems of a programmatic nature. A commitment from NRC to provide a State with technical assistance is made on a case-by-case basis and is dependent on the availability of NRC resources.

#### B. External Factors

The Agreement States Program is unusual in that NRC relinquishes authority over certain classes of radioactive material. Unlike other laws, such as the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA), which give States the authority to regulate within minimum Federal standards, Section 274 permits NRC to cede its authority to the individual States. However, this permission has not meant that all responsibility has been ceded, since NRC retains oversight authority and in the past, when a serious problem has arisen in an Agreement State, NRC has been held accountable for its obligation under Section 274 to oversee the Agreement States Program. In most instances, this accountability has meant devoting significant NRC staff resources to addressing the incident, responding to congressional and public inquiries, and identifying any underlying problems. Nevertheless, Agreement States consider themselves co-regulators with NRC. To that end, they have strongly requested consultation in advance of NRC's development of criteria, standards, and rulemaking and have challenged NRC's compatibility requirements for their programs.

NRC's decreasing budget is expected to place increasing pressure on the agency to minimize its financial support for Agreement State training and travel, or for giving technical assistance to the Agreement States without reimbursement. Agreement States have strongly recommended that NRC continue to provide resources to support State programs.

Agreement States consider that NRC's payment for their training, for their travel to training courses and meetings, and for technical assistance to their programs is a critically important element to the success of the Agreement States Program. In this regard, some Agreement State representatives have informally indicated they will consider returning regulatory jurisdiction to NRC if the agency seeks reimbursement for training and technical assistance costs and no longer pays for Agreement State travel. It is also possible that other factors particular to a State may play a role in having a State decide to return to NRC the regulation of Section 274 materials.

### III. DISCUSSIONS

#### A. Discussion of Direction-Setting Issue

For many years, NRC policy has been to support States that have expressed an interest in becoming Agreement States. NRC's posture vis-a-vis Agreement States will greatly influence whether other States will become Agreement States. Given Government-wide reinvention initiatives, a strategic look at the direction the Agreement States Program should take is warranted. A Commission decision on the DSI should reflect consideration of three factors: (1) the need for NRC's Materials Program to remain large enough to be viable or for it to be eliminated; (2) NRC's full fee recovery requirements; and (3) a report on Parts Two and Three of the National Performance Review (SECY-95-154) which recommended that NRC establish a policy and program to devolve to the States a significant portion of the regulation of certain categories of radioactive material.

If NRC is to retain a Materials Program, the program must be large enough to be viable. Viability implies two requirements: the ability to manage NRC's own program successfully and the ability to review Agreement State Programs consistent with IMPEP. A minimum program probably requires between 500 and 1,000 licensees to address the spectrum of licensee issues likely to be seen nationwide. Without an opportunity to exercise its skills, NRC staff risk losing the experience necessary to fully understand materials regulation and to be able to foresee the breadth of situations Agreement State Programs are likely to encounter. Since there are approximately 400 Federal licensees, it is possible for the NRC to eventually have a nonviable program if all or nearly all States become Agreement States.

Because of the resources that would be required, the NRC can not readily take back Agreement State Programs for some of the largest Agreement States, such as New York or California (which are about one-third the size of the entire NRC Materials Program) without severely impairing the NRC's own regulatory programs for several years while NRC absorbs them. This situation will become more severe as more States become Agreement States.

At the Commission's request, this issue paper also examines funding alternatives for the Agreement States Program and suggests options. These alternatives are discussed in the funding section of this paper.

#### B. Discussion of Subsumed Issues

As part of selecting an option to address the DSI, the following strategic issues should be considered. They are expected to be resolved through the guidance provided by the Commission on the DSI.

1. If the number of Agreement States increases and the number of NRC licenses decreases, what should be NRC's strategy?

If the number of Agreement States increases and the number of NRC licenses decreases, the NRC may need to consider what its strategy should be to retain, fund, and have available a cadre of technical staff in the materials area.

There has been a decline in the number of NRC licenses since 1990 that can be a result primarily of the requirement for full fee recovery. This declining trend will continue if States that are currently negotiating agreements (Massachusetts, Pennsylvania, Ohio, Oklahoma) consummate full agreements and additional States enter and complete negotiations for agreements. The reduced number of NRC licensees will further compound the full-fee-recovery issue. However, interest in negotiating new agreements may be negated by NRC changes in funding for Agreement State training and technical assistance and by NRC materials licensing business process redesign efforts that are expected to reduce licensing fees for some categories of NRC licenses. Furthermore, unless the AEA is amended to allow States to regulate Federal facilities, the NRC will have to maintain a cadre of technical experts in the materials area regardless of the number of Agreement States.

2. Should NRC continue to provide free training, travel, and technical assistance to the Agreement States?

The decision on a strategy regarding States becoming and remaining Agreement States will affect whether NRC continues to provide free training, travel, and technical assistance to Agreement States. (For example, funding for training, travel, and technical assistance is an integral part of one of the options provided.)

NRC has covered the costs for NRC oversight and administration of the Agreement States Program through fees to NRC licensees. NRC has also had to cover the costs for development of NRC regulations, guidance, and research in the materials area through fees paid solely by NRC licensees, even though these activities benefit all Agreement States. Beginning in fiscal year (FY) 97, NRC is considering having the Agreement States reimburse the agency for the cost of travel, training, and technical assistance currently provided to Agreement States at no cost (SECY 95-154 and SECY 95-192). This possible change in policy may affect the interest of some States in continuing in the program and may affect the interest of those States that are negotiating an agreement in continuing active negotiations.

3. What should be NRC's policy with respect to suspension or termination of an Agreement State Program that does not satisfy evaluation criteria?



The decisions made concerning NRC's overall relationship with States will affect implementation of initiatives related to overseeing Agreement States, especially NRC's policy regarding suspension or termination of an Agreement State Program that does not satisfy evaluation criteria.

The Commission has considered major initiatives that will directly affect the Agreement States Program. The "Statement of Principles and Policy for the Agreement State Program" (SECY-95-115) received interim approval by the Commission pending review of concomitant implementing procedures. This policy statement describes the respective roles and responsibilities of the NRC and the States in administration of the program. It addresses Federal-State interaction under the AEA to establish agreements with States, ensure that post-agreement interactions are coordinated and compatible, and that Agreement State Programs continue to protect the public health and safety. The policy includes provisions for phased implementation of new agreements and defines specific actions for NRC program review findings. Most importantly, since it specifically relates to this subsumed issue, the policy statement was accompanied by proposed implementing procedures for suspension or termination of a Section 274b agreement. These procedures, which the Commission will review in final form, along with the establishment under IMPEP of an MRB (and related procedure) will provide a framework for Commission action if it is determined that suspension or termination of an agreement is necessary. A procedure for placing an Agreement State Program on probation is also being developed and will be submitted to the Commission as part of the final package on September 30, 1996.

#### IV. OPTIONS

##### Option 1: Turn the Agreement States Program Over to the Environmental Protection Agency

The basis for proposing this option is the EPA's mandate to set radiation standards applicable to NRC activities and EPA's existing program for "Authorized States," which is similar to NRC's Agreement States Program. EPA does not have a single State program like NRC's Agreement States Program, which is authorized by the AEA, Section 274, but implements multiple programs, (e.g., under the CAA, the RCRA, or the Clean Water Act (CWA)). The States have had experience working with EPA under these programs. As Authorized States, the States regulate "in lieu" of EPA and act as EPA's agents.

It should be noted that EPA's experience is in protecting the environment, not in protecting the health and safety of the public. Therefore, a consequence of this option is that the EPA would have to significantly change a portion of its programs and mission. Moreover, unless all of NRC's responsibility for materials is given to EPA, this option would create two Federal materials safety programs.

If the Commission were to choose this option, it would need to request that Congress amend the AEA to have EPA take over its responsibility for the regulation of Section 274 materials, and a rationale for such a transfer would need to be developed fully. Even though a case can be made that such a transfer would not affect the protection of the public's health and safety, with the anticipated budget cuts at EPA and the relatively small size of this program in comparison to other EPA programs, a consequence of this option could be that regulation of Section 274 materials might diminish.

#### Option 2: Strongly Encourage States To Become Agreement States

Under this option, the Commission would provide incentives for States to become Agreement States. This option is based on the premise that eventually all, or nearly all, States will become Agreement States. Therefore, if the NRC strongly encourages that process it should do so in a way that addresses concerns about the viability of the NRC's Materials Program if it is left with responsibility for regulating only a few licensees.

If all, or nearly all, States become Agreement States, NRC's program (which in that case could be limited to regulating about 400 Federal facilities) could become too small to be viable. NRC could seek contractual arrangements so that Agreement States or other contractors could support elements of NRC's regulation of licensees remaining under NRC jurisdiction.

The tangible incentives that the Commission could offer to encourage States to become or remain Agreement States would be funding for training, travel, and technical assistance, dedicated assistance to States interested in becoming Agreement States, that is, "seed money," and grants. Intangible incentives could include explicitly granting Agreement States status as "equal partners" and direct Commission involvement with State Governors. These incentives are discussed more fully below.

The AEA authorizes the Commission to provide training to the States as the Commission deems appropriate. Since the creation of the Agreement States Program in the early 1960s, NRC has assisted the Agreement States by funding training, travel, and technical assistance for their licensing and inspection staffs and management. In 1989, the staff noted that the States view NRC training as essential to their ability to maintain programs that are adequate to protect the public health and safety. NRC funding of travel and per diem costs for State personnel approved to attend NRC training is a critical element in many States for obtaining approval to travel out of State to NRC training. Any change that would reduce or eliminate such NRC funding will, in some States' view, lead to a significant reduction of attendance by State staff members at NRC training, which could affect the ability of the States to adequately protect the public health and safety.

Some States that may be interested in becoming Agreement States may lack the funds to send their staffs to the training courses offered by NRC. Therefore, if the Commission decides to aggressively encourage States to become Agreement States, fully funding Agreement State training, travel, and technical assistance could be a significant incentive.

The Commission could also choose to provide seed money by funding a State's up-front efforts to become an Agreement State or by expanding the NRC grants program. These funding incentives are discussed later more fully in the funding section of this paper.

Another way to provide tangible funding incentives for States to become or remain Agreement States is for the Commission to explore giving credit to States for performing inspections on NRC's behalf. Several Agreement States have suggested performing inspections for the NRC in exchange for, or as a credit toward, continued NRC funding for Agreement State training expenses. These would include inspections of NRC-licensed materials facilities in their States, that is, Federal facilities such as Veterans Affairs hospitals. There is no legal impediment to an agreement between NRC and a State agency to allow the State agency to conduct inspections at Federal facilities on behalf of NRC. Agreement States could also conduct the health physics portions of NRC's inspection program at reactors and fuel cycle facilities.

There are, however, some inherent administrative and procedural differences between NRC's inspection program and that of the State. The costs associated with the proposal are difficult to quantify, although Agreement States with large numbers of NRC licensees may be able to conduct inspections with a net cost savings to NRC. (For a fuller discussion, please see SECY-96-046, "Requests From States To Perform Inspections of NRC-Licensed Facilities," which is currently before the Commission.)

A variant of the above approach would be to encourage Agreement States to provide reimbursable services directly for NRC licensees. This would be a contractual arrangement between the Agreement State and the licensee. NRC could encourage such a program by structuring its inspection program to give credit to licensees for the assessments performed by the Agreement State.

With respect to intangible incentives, Agreement State representatives have strongly expressed the view that the relationship between Agreement States and NRC should be based on their being equal partners with the NRC. The Agreement States believe that Section 274 of the AEA established the basis for a partnership between NRC and the Agreement States and authorized the States significant autonomy and independence in the administration of their Agreement State Programs. They consider themselves part of the Federal regulatory system and would like their partnership status to be acknowledged, for example, by NRC's asking for their concurrence before rules are issued.

Therefore, if the Commission chooses this option, it could adopt policies explicitly offering a partnership and undertaking activities which support this view, such as expanding the role of the Agreement States in appropriate rulemaking. Adoption by the Commission of such a posture vis-a-vis Agreement States would ameliorate the concerns of Agreement States regarding their status. Procedures would have to be in place for cooperatively developing new rules and to leverage NRC technical resources with those of the States. Although NRC would retain authority to issue rules even if full agreement of the States has not been achieved, this could be seen as an abdication by NRC of its responsibility for overall protection of the public's health and safety.

As stated in the background section of this paper, before the Commission is permitted to relinquish regulatory authority to a State, the Governor must certify that the State has a regulatory program that is adequate to protect the public health and safety. Although the NRC maintains a successful State Liaison Program, if the Commission chooses a posture of aggressively encouraging States to become Agreement States, the Commissioners could become advocates for the program by visiting with State Governors. By engendering interest in the program at the highest levels of the State, the visits could expedite the process of seeking Agreement State status.

The resource expenditures for implementing this initiative should be able to be accommodated within existing State Liaison and staff resources.

All of the initiatives offered to implement this option would, if successful, decrease the number of NRC licenses and thus require that the Commission decide what to do about a marginal materials program within the NRC. One way to address this concern could be a planned devolution of the program as more States become Agreement States. Ideally, all States would become Agreement States. Recognizing that this scenario might not happen, NRC could work with individual States or the OAS so that licensees in any remaining non-Agreement States are properly regulated, perhaps by having Agreement States perform certain aspects of NRC's regulatory program under contract to NRC.

#### Option 3: Continue the Current Agreement States Program, Including Adopting Current Initiatives

Under this option, the Commission would decide to finalize initiatives developed in response to concerns of the Agreement States and Congress about improving the Agreement States Program. If the Commission chooses this option, it could approve either all or individual initiatives. This option is not expected to affect the viability of NRC's Materials Program within the next 5 to 10 years.

The "Statement of Principles and Policy for the Agreement State Program" (SECY-95-115) has received interim approval by the Commission pending review of concomitant implementing procedures. This policy statement describes the respective roles and responsibilities of the NRC and the States in administration of the program. The policy addresses Federal-State interaction under the AEA to establish agreements with States, ensure that post-agreement interactions are coordinated and compatible, and ensure that Agreement State Programs continue to protect the public health and safety. The policy includes provisions for phased implementation of new agreements and specific defined actions for NRC program review findings. The policy statement was accompanied by proposed implementing procedures for suspension or termination of a Section 274b agreement. A procedure for placing an Agreement State Program on probation is also being developed and will be submitted to the Commission as part of the final package. The principles policy statement strikes a balance between maintaining the radiation standards that are needed for a coherent national program and allowing Agreement States flexibility to set requirements to accommodate individual State preferences, State legislative direction, and local needs and conditions.

The "Policy Statement on Adequacy and Compatibility of Agreement State Programs" (SECY-95-112) also has received interim approval by the Commission pending development of implementation procedures. The policy statement is intended to be applied during reviews of Agreement State Programs to allow the staff to reach decisions on the adequacy and compatibility of State programs. As stated in the policy statement, the Commission has indicated its intention to require States to promulgate and maintain identical regulatory requirements for limited areas of materials regulation under the Commission's compatibility review. In addition, the final policy statement refers specifically to the "Statement of Principles and Policy for the Agreement State Program."

No additional resources will be required for implementation of the two policy statements. Implementation of the policy statements and the principles included therein will be through the evaluation of Radiation Control Programs of States seeking an agreement and through existing Agreement State Program reviews using the IMPEP and associated implementing procedures. Resources required for implementation activities are currently allocated in the budget.

The Commission approved implementation, on an interim basis, of the IMPEP, which uses common performance indicators to assess Materials Programs in both NRC's regional offices and the Agreement States. Agreement State staff are participating as members of the IMPEP review teams for the 11 reviews currently scheduled for 1996. The final determination on the adequacy and compatibility of each Agreement State Program will be made by an MRB based on the review team's report. The MRB is composed of NRC managers and an Agreement State Program Manager serving as liaison to the MRB.

The procedures, as well as the two policy statements, will be submitted to the Commission for final approval on September 30, 1996.

An initiative that could further the goal of achieving a coherent national program is the Nuclear Materials Events Database (NMED). The NRC staff is evaluating the NMED pilot program which establishes and maintains a national database that includes both NRC and Agreement State events. The States are participating voluntarily. This comprehensive database, managed by the Office for Analysis and Evaluation of Operational Data, can be used for event trending, identification of precursor events, and assistance in assessment of the effectiveness of regulatory programs.

Lastly, the Commission should be aware of an initiative proposed May 10, 1995, to the Conference of Radiation Control Program Directors (CRCPD)<sup>3</sup> in a paper entitled "A New Concept for Developing Regulations Relating to the Use of Source of Radiation" authored by recognized Agreement State leaders. The authors propose a new method for development and promulgation of regulations relating to the use of sources of radiation, which would then be adopted by the responsible Federal agencies. The proposal envisions establishment of an entity within the CRCPD to carry out this function. However, according to the authors, for the proposal to be effective, participating agencies (e.g., NRC, the Food and Drug Administration (FDA), or EPA) are to be mandated to participate by statute. Furthermore, the authors acknowledge the need for monetary grants and staff support. If the feasibility study that the authors suggest can be undertaken within the \$110,000 support the NRC provides the CRCPD, and legal questions can be satisfactorily addressed (e.g., the Administrative Procedures Act), the idea may be worth exploring since it may be a time-saving way to develop applicable regulation.

It should be noted that the Commission has recently undertaken a number of initiatives that are designed to improve the NRC's Agreement State Programs, and that it will require long-term commitments for the initiatives to be fully effective.

---

<sup>3</sup>The CRCPD promotes all aspects and phases of radiological health and encourages and promotes cooperative enforcement programs with Federal agencies and between related enforcement agencies within each State. Through its task forces, the conference develops suggested regulations, technical positions, and radiation standards. The NRC is an active participant in the conference and, along with the EPA, the FDA, the Department of Energy, the National Bureau of Standards, and the Federal Emergency Management Agency, provides financial and technical support to the conference.

#### Option 4: Treat Agreement States as Co-Regulators

Under this option, the Commission would recognize the experience that lies within the Agreement States and their expressed desire to be treated as co-regulators. Part of this recognition would include acknowledgement that the programs are self-sustaining and should require minimal support and oversight by the NRC (e.g., in the form of subsidized training).

As discussed in Option 2 above, Agreement State representatives have strongly expressed the view that the relationship between Agreement States and the NRC should be based on their being equal partners. Therefore, if the Commission chooses this option, it may want to explicitly affirm that NRC and Agreement State Radiation Control Programs have shared authority to protect the public health and safety and may wish to expand the role of the Agreement States in appropriate rulemaking.

As stated in the background section of this paper, under Section 274 of the AEA, the Commission must make findings regarding the adequacy and compatibility of Agreement State Programs or proposed Agreement State Programs and must conduct periodic reviews of the NRC Agreement States Program. In addition, the NRC is authorized to provide technical and training assistance to the Agreement States, but not at its own expense. Therefore, this option could include full fee recovery from Agreement States. For example, under this option, the Agreement States might be asked to reimburse NRC or cooperatively fund the development of any regulations affecting Section 274 materials deemed necessary by the co-regulators. (Absent legislative changes, NRC would still retain the authority to adopt regulations without prior agreement by the Agreement State, but the exercise of such authority would be expected to be rare).

If the Commission chooses this option, several initiatives recently undertaken could be reconsidered. Annual All Agreement States Meetings, the Agreement States Technical Meetings, and workshops especially designed to obtain the views of Agreement States would be held only if all participants pay their own expenses. Invitational travel, in accordance with Manual Chapter 1501, could be expected to be severely curtailed. Moreover, the NRC would obtain reimbursement for all training, travel, and technical assistance.

Similarly, if the Commission were to chose this option, the regulatory review of Agreement State proposed regulations could be modified. The NRC could review the status of State activities to adopt new regulations as part of the periodic Agreement State Program reviews NRC must conduct. In this regard, the Commission could consider extending the time between Agreement State reviews or modifying the IMPEP.

Under this option, the functions performed in support of the Agreement States Program would be as follows:

- Approval of new Agreement States
- Assessing the adequacy and compatibility of Agreement State Programs on an extended schedule, which would include review of new or revised Agreement State regulations, or on the current schedule but recovering the costs from the Agreement States
- Providing technical assistance and training to Agreement States on a reimbursable basis

A consequence of fully treating Agreement States as co-regulators could be that relations between NRC and the Agreement States might become more formal and potentially more contentious. This might result in losing the frequent and informal exchanges of information between the Agreement States and the NRC staff, which benefit both programs.

Option 5: Devolve Regulation of Atomic Energy Act Section 274 Materials to the States

Under this option, the Commission could request Congress to amend the AEA to withdraw the Federal preemption of AEA materials altogether.

In 1959, the AEA was amended by the addition of Section 274 to allow States to regulate certain types of nuclear materials. Section 274 recognized the interests of the States and their desire to exercise a greater role in the regulation of AEA activities consistent with traditional State roles of ensuring protection of the public health and safety associated with the use of other potentially hazardous materials and other sources of ionizing radiation.

In the interim years, States have been playing a greater role in a growing number of nuclear matters. Besides the Agreement State Program, the role of the States in low-level waste programs and compacts, the high-level waste program, and some aspects of transportation is based on Federal statutory authority.

Although none of the amendments to Section 274 since 1959 have expanded the responsibilities of the Agreement States, after 36 years it may be time to consider whether the States should be given full responsibility for the regulation of Section 274 materials. Today, the experience and capabilities in the Agreement States are much different than in 1959. If this option is adopted, the Commission would request Congress to amend the AEA to withdraw the Federal preemption of AEA materials. Removing NRC from regulating Section 274 materials would mean the end of any Federal control of Section 274



materials, leaving it to the State's discretion whether to even regulate the material. Under this devolution strategy, it would be clear that NRC would have no role to play.

The greater flexibility afforded States might result in inconsistencies among State regulatory programs. Moreover, different levels of regulation may affect interstate commerce. For example, manufacturers of sealed sources and devices and suppliers of radioactive material may have to address and satisfy the regulations of 50 States. However, the States appear to be successful in regulating non-AEA radioactive materials, and this option would permit them to treat Section 274 material in the same way. For example, the regulation of Section 274 material, naturally occurring and accelerator-produced radioactive material (NARM), and x-rays would be based on a State's overall regulatory philosophy.

#### V. FUNDING

This issue paper takes funding into consideration as it relates to the direction of the overall Agreement States Program. The Agreement States Program is affected by NRC's full fee recovery and the decrease in the number of NRC licensees. The Omnibus Budget Reconciliation Act of 1990 (OBRA-90) requires the NRC to recover 100 percent of its budget by charging fees to NRC applicants and licensees, who subsequently have raised some fairness and equity concerns. To address these concerns, the Commission may want to consider requesting that Congress amend OBRA-90 or revisit NRC's implementation of OBRA-90.

In 1994, the Commission recommended that Congress enact legislation to remove from the requirements of OBRA-90 a number of NRC programs, including the costs for international activities and the Agreement States Program. Congress did not act on the Commission's recommendation. Based on this strategic assessment, the Commission may choose to again request that Congress amend OBRA-90 so that the Agreement States Program, as well as any other program identified by the review, is taken off the full-fee-recovery base and funded through appropriated funds. Alternatively, the Commission could recommend that OBRA-90 be modified so that NRC could charge Agreement States to recover its oversight costs, even though Agreement States are not NRC licensees.

Apart from a decision to revisit OBRA-90, the staff notes that the Commission deferred a decision on implementing the new NRC reimbursement policy applicable to Agreement State training and travel so that it could be made in the context of strategic assessment. SECY-95-192, "Agreement State Reimbursement of NRC Costs," evaluated five reimbursement alternatives:

1. Continue with the Commission's new policy that NRC must be reimbursed for Agreement State training and that Agreement States must pay directly for all travel costs. NRC would incur no external costs for this alternative.
2. Return to the prior policy of fully funding the Agreement States Program and have the NRC fund Agreement State training, travel, and limited technical assistance. Historically, NRC's costs associated with this alternative have been on the order of \$1,000,000 annually.
3. NRC would fund tuition costs for "core" training, but the States would fund the travel/per diem expenses. The States would fund any other specialty training needs. The NRC would fund one individual from each State to attend the All Agreement State meeting. Agreement States would pay for travel to other NRC meetings and workshops, except invitational travel. NRC's costs associated with this alternative are anticipated to be on the order of \$500,000 annually.
4. NRC would fund "core" training and associated travel/per diem expense. The States would fund any other specialty training needs for their staffs. The NRC would continue to fund one individual from each State to attend the All Agreement States Meeting. Agreement States would pay for all other travel, except invitational travel. NRC's costs associated with this alternative are anticipated to be on the order of \$900,000 annually.
5. NRC would not fund all "core" training but would fund limited training such as Inspection Procedures, Licensing Practices and Procedures, and the 5-week Applied Health Physics courses. This alternative would provide the NRC-unique courses and the Applied Health Physics courses necessary for most Agreement State staff. The States would fund any other training needs. NRC's costs associated with this alternative are anticipated to be on the order of \$500,000 annually.

In addition to the above, the options addressing the DSI contain funding mechanisms the Commission can consider. Examples of these include giving credit for Agreement States that inspect NRC licensees on the agency's behalf and expanding the NRC's grant program. The Commission may also want to consider asking for the views of the Agreement States on some of the allocation of discretionary Agreement States Program funds (e.g., should the Commission continue the \$110,000 interagency agreement with FDA for funding the CRCPD or should those funds be used to offset Agreement State travel expenses.)

The relationship between the above funding alternatives and the options in this issue paper follows:

**Option 1: Turn the Agreement States Program Over to the Environmental Protection Agency**

This option would eliminate the Agreement States Program so there would be no reimbursement for Agreement State training or travel, and the alternatives contained in SECY-95-192 would not need to be considered further.

**Option 2: Strongly Encourage States To Become Agreement States**

This option would strongly encourage States to become Agreement States. To that end, the Commission could fund a State's up-front efforts to comply with NRC criteria to qualify for Agreement State status under Section 274. States that are considering entering into an agreement with the NRC would like NRC funding for preparing for the Agreement States Program and the initial implementation of the program. Some States do not have adequate funds from either State-appropriated funds or permit fees to cover the costs of preparing for an agreement, which entails drafting and passage of enabling legislation, promulgating regulations, developing procedures, and obtaining requisite technical equipment. The question of the NRC's providing seed money to States has been examined over the years. In SECY-94-088, the staff concluded that it would not be appropriate to consider providing seed money to States as long as the NRC funds are derived from licensee fees. The Commission might wish to have the staff reconsider this view.

The Commission could also choose to provide seed money by expanding the current NRC grants program. Beginning in FY 81, the NRC established a program of assistance relationships (grants and certain types of cooperative agreements) with educational institutions, nonprofit institutions, State and local governments, and professional societies directed toward the research program. The program includes, but is not limited to, support of professional meetings, symposia, conferences, national and international commissions, and publications. The Commission could expand the program to include Agreement States as recipients of grants.

Since this option would strongly support Agreement State Programs, the reimbursement alternative from SECY-95-192 that would be most appropriate for this option would be Alternative #2, which is to fully fund training, travel, and limited technical assistance for Agreement States.

**Option 3: Continue the Current Agreement States Program, Including Adopting Current Initiatives**

Option 3 would permit use of any of the reimbursement alternatives.

**Option 4: Treat Agreement States as Co-Regulators**

Option 4 would maintain the Agreement States Program with minimal resources since it is based on the tenet that Agreement States can function on their own. The reimbursement alternative that would be most compatible would be Alternative #1, under which Agreement States would reimburse NRC for any training and pay all of their own travel costs directly.

**Option 5: Devolve Regulation of Atomic Energy Act Section 274 Materials to the States**

Option 5 would devolve the entire Section 274 materials program to the States, and the alternative funding options would not apply.

**VI. RELATED ISSUES**

After the Commission has made decisions concerning the Direction-Setting Issue discussed above, additional issue(s) such as those related to implementation details will be addressed as the Strategic Plan is implemented. The related issues are listed in this section to provide a more complete understanding of the higher level Direction-Setting Issue.

**A. To what extent should NRC'S review of an Agreement State's LLW Program address that State's ongoing review of a proposed LLW facility?**

A Commission decision on the NRC's strategy regarding States becoming and remaining Agreement States will of necessity involve consideration of approaches taken to ensure the adequacy and compatibility of an Agreement State Radiation Control Program. The technical review of an Agreement State Low-Level Waste (LLW) Program has the potential for being linked to the merits of the State's LLW disposal facility. However, the NRC Agreement State Program reviews are limited to the State's regulatory program and do not involve review of the technical merits of LLW sites.

Five areas will be evaluated under IMPEP to determine if the Agreement State Low-Level Radioactive Waste Disposal Program is adequate. These areas are status of low-level radioactive waste disposal inspection, technical staffing and training, technical quality of licensing actions, technical quality of inspections, and State response to incidents and allegations. It is not the intention of the IMPEP review of an Agreement State LLW Regulatory Program to be disruptive of the State processes, or to include site review. This issue is related rather than subsumed because its resolution will reflect the Commission's decision on the Low-Level Waste Program, which is addressed in a separate DSI.

B. What is the proper strategy for NRC's independent radiation monitoring program?

In the 1970s, the NRC initiated a Radiation Monitoring Program in which NRC contracted with States to measure radioactive materials released into the environment from NRC-licensed facilities. Most of the facilities that are monitored under this program are nuclear power plants. The Independent Radiation Monitoring Program (IRMP) is a collaborative effort between NRC and the States that provides a comparison to the environmental measurements made by NRC-licensed facilities. It also allows for an independent measurement of the direct radiation levels in the environs around the facility. The program serves as an avenue by which the NRC can assist State Radiological Health Programs to develop their own Environmental Monitoring Programs, but not to fully fund them. Participation by the States is voluntary. There are 27 States participating in the IRMP.

The IRMP contracts provide for two types of monitoring: environmental monitoring and direct radiation measurement. The environmental monitoring portion of the contract requires the State to obtain and analyze environmental samples (air, water, soil, and food products) that duplicate as closely as possible certain parts of licensee Environmental Monitoring Programs. The States send an annual report to NRC noting all analyses they perform and comparing them with similar analyses performed by individual nuclear facilities. NRC regional offices use these data to supplement their assessments of Environmental Monitoring Programs conducted by nuclear power plants. The total cost to NRC for this portion of the contracts for 1995 was \$1 million.

Since Agreement States consider financial support to be critical, support for the NRC's IRMP can play a role in fostering interactions with the States that could have a potential salutary effect in overall NRC Agreement States relations. Not confirming the IRMP could have a deleterious effect on those interactions. However, it should be noted that this program is considered an enhancement, given that the information is routinely available from licensees.

The direct radiation measurement portion of the contracts involves the placement of thermoluminescent dosimeters (TLDs) to continuously measure radiation levels in the air outside the licensee's facility. State personnel place TLDs on poles in specific locations around a nuclear facility. They replace and collect the exposed TLDs quarterly and ship them to NRC's Region I, which performs the analyses and compares TLD data with licensee data. Region I conducts this program nationwide. The total cost to NRC of this portion of the contracts for 1995 was \$195,000.

A total of 17 sets of comments were received on NRC's announcement in the Federal Register (60 FR 18428), April 11, 1995, concerning NRC's intent to eliminate the IRMP. Of the total, 15 sets of comments came from State or local government agencies that were against reducing the program. The other sets of comments came from the nuclear power industry and supported NRC's proposed action.

Comments that opposed reducing the program focused on public perception of nuclear power and the environment. These commenters stated that the public demands that independent environmental monitoring be performed to ensure that nuclear power plants are not causing a long-term change in the environment. Also, some commenters indicated that the public does not trust NRC or the utilities to fully monitor the environment and disclose any problems.

Some States noted that a reduction in NRC funding would likely cause a reduction in personnel who work for State environmental monitoring laboratories. Certain States believe that a reduction in the environmental monitoring performed by the States will send a message to licensees that they can decrease their vigilance. This message, they believe, will cause a long-term degradation of the nuclear power plant Radioactive Effluent Discharge Programs. In the views of some States, the Environmental Monitoring Program ensures that operating monitoring equipment and supporting laboratory capability continue to be available in the State programs in the event of an accident at a nuclear facility.

The confidence that has been gained in licensee programs through the routine reactor inspection program was used as the basis for the Office of Nuclear Reactor Regulation to consider eliminating the environmental monitoring portion of the State contracts. The decision will be made following Commission guidance on the DSI.

- C. Should NRC define its Indian trust responsibilities and relationships with Indian Nations by a statement of policy?

NRC's interactions with Indian Tribes are growing in number and nature. The issue for the Commission is whether a policy statement is necessary or desirable to ensure consistent interactions with Indian Tribes across all NRC activities. In assessing the need for developing such a policy, the Commission would need to consider to what extent these interactions should be guided by the framework of its interactions with Agreement States and other States. Likewise, development of a policy for NRC Indian trust responsibility could produce a need for revised liaison activities and increased resource expenditures.

The NRC staff has had interactions with national Native American Tribal organizations such as the National Congress of American Indians and the Council of Energy Resource Tribes and has dealt with certain Tribes on specific issues on a case-by-case basis. In addition, Commission regulations for the licensing of a high-level radioactive waste repository (Part 60), a low-level radioactive waste disposal facility (Part 61), and a monitored retrievable storage installation (Part 72) have provisions for Indian Tribe participation. Although the NRC has had these interactions and provisions for Indian Tribe participation, the NRC has no formal policy or guidance for staff interactions with Native American Tribal governments. NRC has, however, developed policy and programs for intergovernmental relations, particularly with State governments. These policies and programs could be used as a framework if the Commission decides that no NRC formal policy with Indian Tribes is warranted.

A related question is whether the NRC would be willing to extend the Commission's "Policy on Cooperation With States at Commercial Nuclear Power Plants and Other Utilization and Production Facilities" to Indian Tribes that request it for the purpose of observing NRC inspections or performing inspections for NRC. The policy on cooperation with the States was adopted in 1989 and amended in 1992 to include adjacent States (neighboring States located within the 10-mile emergency planning zone of the plant). The policy sets out the general framework for cooperating with States concerning NRC-licensed production and utilization facilities by routinely providing information, such as discussed above, to the Governor-appointed State Liaison Officers and responding to requests from States in a timely manner. In addition, this policy establishes the ground rules for State representatives to observe NRC inspections and lays out the general guidance for negotiating a memorandum of understanding, which would allow States to perform inspections for and on behalf of the NRC.

As currently written, the Commission policy does not extend to Indian Tribes. The language of the policy itself is limited to cooperation with States. There is no mention of other entities such as Indian Tribes or local governments in the policy. In addition, the background discussion published with the policy statement indicates that the statutory basis for the policy stems, in part, from Section 274i of the AEA, as amended. Section 274 of the AEA contains provisions regarding NRC interactions with State governments such as the Agreement States Program.

Section 274 does not contain any reference to NRC's activities with Indian Tribes. Accordingly, because of its plain language and its grounding in Section 274, the policy, as written, can only apply to activities with States. Despite the limited applicability of the current policy, NRC has legal authority pursuant to Section 161f of the AEA to enter into cooperative agreements with entities such as Indian Tribes. There is no requirement that

the Commission enter into such agreements, and the Commission may decline to create such agreements if warranted by policy considerations. However, extending the Commission policy to Indian Tribes would provide a framework to guide NRC/Indian Tribe interactions, which enumerates the rights and responsibilities of all parties.

#### VII. COMMISSION'S PRELIMINARY VIEWS

Staff actions regarding the various options should be held in abeyance pending the Commission's final decision on this issue paper. The Commission's preliminary views are:

The Commission preliminarily favors Option 3 (Continue the Current Agreement States Program, Including Adopting Current Initiatives). At the same time, the Commission is preliminarily in favor of encouraging more States to become Agreement States. However, the Commission believes this should be accomplished primarily through intangible incentives to States as opposed to tangible incentives. While tangible incentives (i.e., funding) would be an effective mechanism for encouraging more States to become Agreement States, the Commission is concerned that the funding constraints imposed by the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) would have an inequitable impact on NRC licensees in States that decide not to become Agreement States. However, the Commission believes that the staff should explore the feasibility and desirability of providing "seed money" and/or financial grants, within the funding constraints of OBRA-90, to encourage States to apply for Agreement State status.

While the Commission has not made a final decision on this matter, a majority of the Commission is preliminarily in favor of a compromise position in which the NRC would provide training to Agreement States without charge on a "space available" basis. Funding for travel and technical assistance would be borne by the Agreement States.

The NRC particularly solicits comments on whether NRC should fund Agreement State training, travel, and technical assistance. Comments are especially sought from Agreement States, non-Agreement States, fee-paying NRC licensees and Agreement State licensees.



REFERENCES

A list of Commission papers related to the DSI of this paper follows:

SECY-96-046 - Requests From States To Perform Inspections of NRC-Licensed Facilities

SECY-95-192 - Agreement State Reimbursement of NRC Costs

SECY-95-112 - Final Policy Statement on Adequacy and Compatibility of Agreement State Programs

SECY-95-115 - Final "Statement of Principles and Policy for the Agreement State Program" and "Procedures for Suspension and Termination of an Agreement State Program"

SECY-95-017 - Reinventing NRC Fee Policies

SECY-94-088 - Request for Seed Money for State Seeking 274b Agreement

## ACRONYMS

AEA	Atomic Energy Act
AEC	Atomic Energy Commission
CAA	Clean Air Act
CFR	<u>Code of Federal Regulations</u>
CRCPD	Conference of Radiation Control Program Directors
CWA	Clean Water Act
DSI	direction-setting issue
EPA	Environmental Protection Agency
FDA	Food and Drug Administration
FY	fiscal year
IMPEP	Integrated Material Performance Evaluation Program
IRMP	Independent Radiation Monitoring Program
MRB	Management Review Board
NARM	naturally occurring and accelerator-produced radioactive material
NMED	Nuclear Materials Events Database
NRC	U.S. Nuclear Regulatory Commission
OAS	Organization of Agreement States
RCRA	Resource Conservation and Recovery Act
TLDS	thermoluminescent dosimeters