

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

May 25, 2018

SECY-18-0061

FOR: The Commissioners

FROM: Victor M. McCree  
Executive Director for Operations

SUBJECT: PROPOSED AGREEMENT BETWEEN THE STATE OF WYOMING AND  
THE COMMISSION PURSUANT TO SECTION 274 OF THE ATOMIC  
ENERGY ACT OF 1954, AS AMENDED

PURPOSE:

To request Commission approval to publish the proposed Agreement with the State of Wyoming and a summary of the U.S. Nuclear Regulatory Commission (NRC) staff's draft assessment of the State's regulatory program in the *Federal Register (FR)* for public comment.

BACKGROUND:

Section 274b. of the Atomic Energy Act of 1954, as amended (AEA) authorizes the Commission to enter into an Agreement with the Governor of a State providing for the discontinuance of the regulatory authority of the Commission with respect to certain materials. In 1981, the Commission adopted the revised Policy Statement for new Agreements entitled, "Criteria for Guidance of States and Nuclear Regulatory Commission (NRC) in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement" (46 FR 7540; January 23, 1981), as amended by statements published on July 16, 1981 (46 FR 36969), and on July 21, 1983 (48 FR 33376), referred to hereafter as the "Policy Statement." The Office of Nuclear Material Safety and Safeguards (NMSS) Procedure SA-700, "Processing an Agreement," was subsequently adopted for applying the Policy Statement to the processing of a new Agreement. The criteria and approaches in the Policy Statement and the NMSS Procedure SA-700 form the basis for the staff's evaluation of the State of Wyoming's request.

CONTACT: Stephen Poy, NMSS/MSST  
(301) 415-7135

DISCUSSION:

In a February 27, 2015, letter to then-Chairman Burns, Governor Matthew Mead of the State of Wyoming stated that Wyoming intended to pursue an Agreement with the NRC “to regulate source material and byproduct material (as defined in 11e.(2) of the Act)” (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15062A637).

The State of Wyoming’s proposal is the first time the NRC will consider a State’s request to obtain an Agreement<sup>1</sup> to only regulate uranium and thorium milling facilities and 11e.(2) byproduct material.<sup>2</sup> Such an Agreement would require defining a subcategory of source material for the Agreement. In Staff Requirements Memorandum (SRM)-SECY-16-0084, “Wyoming’s Proposal for a Limited Agreement to only Regulate Milling Facilities’ Source Material and 11e.(2) Byproduct Material” (ADAMS Accession No. ML16216A534), the Commission approved the staff’s proposal for a Section 274b.<sup>3</sup> Agreement with the State of Wyoming that would allow the State to assume, and the NRC to discontinue, regulatory authority over the subcategory of source material involved in the extraction and concentration of uranium and thorium milling<sup>4</sup> and the management and disposal of byproduct material as defined in 11e.(2) of the AEA.<sup>5</sup>

One of the NRC staff’s considerations while preparing this proposed Agreement was whether the NRC or the State of Wyoming would ultimately regulate the two commercial laboratory facilities that are licensed to possess source and 11e.(2) byproduct material and that are not located at uranium mill facilities. Article II.A.13. of the draft Agreement specifies that the Commission will not relinquish regulatory authority over these facilities.

On October 26, 2016, the State of Wyoming submitted a draft application that requested a 274b. Agreement where the NRC would retain regulatory authority for six UMTRCA Title II sites (ADAMS Accession No. ML16300A294) undergoing decommissioning. These sites are: 1) Anadarko Bear Creek, Powder River Basin; 2) Pathfinder, Lucky Mc, Gas Hills; 3) Umetco Minerals Corporation, Gas Hills; 4) Western Nuclear Inc., Split Rock, Jeffrey City; 5) Exxon Mobile, Highlands, Converse County (the five sites); and 6) American Nuclear Corporation (ANC), Gas Hills.

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<sup>1</sup> Some States have requested and entered into agreements wherein the State assumes only a subset of the regulatory authority available under AEA Section 274b. For example, Oklahoma assumed regulatory authority over the subcategory of source material covering depleted uranium. The NRC refers to Agreements involving subcategories of AEA radioactive material classes as “limited Agreements.” However, the term “limited Agreement” is not used in the AEA and will not be used in this SECY paper.

<sup>2</sup> As with any Agreement between the Commission and a State, the regulatory authority of the Commission continues for licensees and licensed activities not covered by the Agreement. Further, the exemptions provided to “persons in Agreement States” in 10 CFR Part 150 do not apply to licensees and licensed activities that remain under the Commission’s regulatory purview. As stated in 10 CFR § 150.1: “The provisions of the [Atomic Energy] Act, and the regulations of the Commission apply to all persons in Agreement States and offshore waters engaging in activities over which the regulatory authority of the Commission continues.”

<sup>3</sup> 42 U.S.C. § 2021(b).

<sup>4</sup> Subsequent to SRM-SECY-16-0084, the staff and the State of Wyoming changed the phrasing to be “extraction or concentration of uranium or thorium” to be consistent with the wording in 11e.(2) and Uranium Mill Tailings Radiation Control Act (UMTRCA). The staff provided comments to the scope of the Agreement that are referenced in the State of Wyoming statutory language for Wyoming Article 20. These comments were provided in a letter to Wyoming Department of Environmental Quality dated October 11, 2016 (ADAMS Accession No. ML16274A240). The revised language will be used throughout the rest of this SECY paper.

<sup>5</sup> 42 U.S.C. § 2014(e).

Excluding the six UMTRCA Title II sites undergoing decommissioning from the Agreement would deviate from the approach approved by the Commission in SRM-SECY-16-0084. The staff and Wyoming negotiated a solution wherein Wyoming would assume regulatory authority over five of the six sites, subject to the development of a Memorandum of Understanding (MOU) between the NRC and the State of Wyoming. The MOU would delineate specific actions that the NRC and the State of Wyoming would take to verify completion of the decommissioning of these sites. The NRC staff has developed a draft MOU and is currently working with the State of Wyoming to delineate how license termination will be addressed for each of the five sites. An assessment of the decommissioning status of the five UMTRCA sites and the activities that need to be completed prior to license termination has been completed (ADAMS Accession No. ML17040A501).

For the remaining site—the ANC site—Wyoming indicated it was opposed to assuming regulatory authority over the ANC site because the licensee is insolvent. To address the State of Wyoming's proposed exclusion of the ANC site from the Agreement, the staff developed SECY-17-0081 "Status and Resolution of Issues Associated with the Transfer of Six Decommissioning Uranium Mill Sites to the State of Wyoming" (ADAMS Accession No. ML17087A355) requesting Commission approval for the NRC to retain regulatory authority over the ANC license. In SRM-SECY-17-0081 (ADAMS Accession No. ML17277A783), the Commission approved the staff's recommendation for the NRC to retain regulatory authority over the ANC site. Article II.A.14. of the proposed Agreement specifies that the Commission would not relinquish regulatory authority over the ANC license.

By letter dated November 14, 2017 (Enclosure 1), Governor Mead certified that the State of Wyoming has a program for the control of radiation hazards that is adequate to protect public health and safety with respect to the materials covered by the proposed Agreement and requested that the Commission enter into an Agreement with the State under Section 274b. of the AEA (ADAMS Accession Nos. ML17319A923 and ML17319A924). The State of Wyoming proposed an effective date of the Agreement no later than September 30, 2018. On November 27, 2017, the Chairman acknowledged receiving the Governor's letter (Enclosure 2, ADAMS Accession No. ML17784A253).

Upon approval by the Commission and as required by Section 274e. of the AEA, the staff will publish the proposed Agreement for comment in the *FR* once a week for four consecutive weeks. The proposed *FR* Notice (Enclosure 3) includes a summary of the draft staff assessment (Enclosure 4) of the proposed Wyoming regulatory program. The staff plans to follow the same process for this Agreement as it did for the last two Agreements involving the Commonwealth of Virginia and State of New Jersey. For those Agreements, the staff published the proposed Agreements in the *FR* for public comment, in parallel with the Commission's review of the draft staff assessment. The staff will include an analysis of the public comments as part of the final paper to the Commission with the staff's recommendations regarding the State of Wyoming's Agreement request.

If the Commission approves, the final Agreement will be published in the *FR* within 30 days after signature by the Chairman and the Governor. Upon the effective date of the Agreement, the NRC would transfer 14 specific licenses currently administered by NMSS to the State of Wyoming's jurisdiction; and the State of Wyoming would begin to assess fees on these licensees. Fees collected by Wyoming will be in a dedicated fund for the State program.

### Draft Staff Assessment of the Wyoming Program

The draft staff assessment of the State of Wyoming's program was performed in accordance with the criteria in the Policy Statement for evaluating new Agreements. The assessment addressed 28 criteria required for all Agreement State programs and an additional 8 criteria for States regulating uranium or thorium processors and 11e.(2) byproduct material. The staff has concluded that the State of Wyoming, as defined by these criteria, is compatible with the NRC's program, contingent on the revision of a State statute discussed below, and adequate to protect public health and safety with respect to the materials covered by the draft Agreement.

The Wyoming Statute § 35-11-2004(c), enacted in anticipation of the State of Wyoming's assumption of regulatory authority for 11e.(2) and source material associated with milling, allows the State of Wyoming to bifurcate the ownership of the byproduct material and its disposal site between the State and Federal government. This provision conflicts with § 83b.(1)(A) of the AEA, which ensures that ownership of the byproduct material is inseparable from the site on which it is disposed. The AEA does not permit a State to bifurcate ownership of the disposed byproduct material and the property rights necessary to ensure its safe disposal. As a result, Wyoming's State Statute § 35-11-2004(c) is not compatible with the NRC's requirements.

To address this compatibility concern, the staff proposed, and the Commission approved, adding a provision to the draft Agreement to clarify that the Commission's finding of compatibility is contingent on the State of Wyoming revising the Wyoming Statute § 35-11-2004(c) during the next legislative session to be compatible with AEA § 83b.(1)(A). This provision would provide that the State of Wyoming has until the end of the 2019 legislative session to amend Wyoming Statute § 35-11-2004(c) to be compatible with AEA § 83b.(1)(A) or the Agreement will terminate without further NRC action. The proposed Agreement also explicitly states that the NRC will reject any State of Wyoming request to terminate a license that would bifurcate the ownership of byproduct material and its disposal site between the State of Wyoming and the Federal government. The staff determined that there is little practical risk that the State of Wyoming's current statutory provisions would result in the bifurcation of the 11e.(2) byproduct material from the land since AEA § 274c.(4) requires the NRC to review and approve any State of Wyoming proposed termination of a uranium or thorium mill 11e.(2) byproduct material license.

### Tribal Outreach Activities

A number of western Native American Tribes are interested in the State of Wyoming's Agreement application. Although the process to enter into an Agreement is not considered an "undertaking" subject to tribal consultation requirements under Section 106 of the National Historic Preservation Act (NHPA)<sup>6</sup> or the National Environmental Policy Act,<sup>7</sup> the staff has conducted a number of outreach activities with two of the tribes located within the State of Wyoming (Arapaho and Shoshone Tribes of the Wind River Reservation) and with approximately 30 other tribes that have previously expressed interest to the NRC regarding the licensing of uranium mills in the State of Wyoming. In April 2017 the staff sent letters and a fact sheet to all the interested tribes on the State of Wyoming's draft Agreement application (ADAMS Accession No. ML16334A403). A webinar was held in May 2017 for 25 interested individuals, including several tribal representatives. The webinar addressed the agreement process,

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<sup>6</sup> 54 U.S.C. 300101 *et seq.*

<sup>7</sup> 42 U.S.C. 4321 *et seq.*

including specifics on Wyoming's application. A second letter on Wyoming's final Agreement application was sent to the tribes in March 2018 (ADAMS Accession No. ML18018A863). The staff also established a website to provide current information on the process and links to various documents related to Wyoming's application. The staff plans further tribal outreach to communicate the opportunity to comment on the proposed Agreement and the draft staff assessment. The staff will provide the Commission with an update on additional tribal outreach activities in the final paper to the Commission.

There are currently three uranium mill licenses in the State of Wyoming that have an active Programmatic Agreement (PA) or Memorandum of Agreement (MOA) to address historic and cultural resources as a result of the NHPA Section 106 process: Strata Ross, Energy Fuels Nichols Ranch, and Cameco Smith Ranch (Gas Hills site). Many tribes have been involved in the Section 106 process during NRC's licensing actions in Wyoming. Upon the effective date of the Agreement, the NRC would no longer have regulatory authority over these facilities and byproduct material, and the NRC's participation in current PAs or MOAs will cease. To provide transparency in the transfer of regulatory responsibility from the NRC to the State of Wyoming, the staff is notifying the other signatories and consulting tribes of the proposed Agreement, which would result in the NRC's cessation of participation in these Section 106 agreements. The staff will provide the Commission with an update on the three Section 106 agreements in the final paper.

#### RESOURCES

Resources included in the fiscal year (FY) 2018 enacted budget and the FY 2019 Congressional Budget Justification sufficiently address activities discussed in this SECY paper. Resource estimates are in Enclosure 5, "Estimated Resources," which is not publicly available.

#### CONCLUSION:

The staff has reviewed the proposed Agreement, the certification of Wyoming Governor Mead, and the supporting information provided by the Uranium Recovery Program of the Wyoming Department of Environmental Quality and Wyoming's Office of the Attorney General as discussed in the enclosed draft staff assessment. Based upon this review, the staff concludes that the State of Wyoming satisfies the criteria in the Commission's Policy Statement "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement." As noted above, the proposed Agreement includes a provision that the State of Wyoming has until the end of the 2019 legislative session to amend Wyoming Statute § 35-11-2004(c) to be compatible with AEA § 83b.(1)(A), or the Agreement will terminate without further NRC action. The proposed Agreement also states that the NRC will reject any State of Wyoming request to terminate a license that proposes to bifurcate the ownership of byproduct material and its disposal site between the State and the Federal government. Pursuant to Commission direction, the staff's finding of compatibility is contingent on the State of Wyoming revising Wyoming Statute § 35-11-2004(c) during the next legislative session to be compatible with AEA § 83b.(1)(A). The proposed State of Wyoming program to regulate Agreement materials, as comprised of statutes, regulations, procedures, and staffing is compatible with the Commission's program and is adequate to protect public health and safety with respect to the materials covered by the draft Agreement. Therefore, the proposed Agreement meets the requirements of Section 274 of the AEA.

RECOMMENDATIONS:

That the Commission:

1. Approve publication of the *FR* Notice (Attachment 3) for 4 consecutive weeks.
2. Review the proposed Agreement between the State of Wyoming and the NRC pursuant to Section 274 of the AEA, and the draft staff assessment of the State of Wyoming regulatory program, in parallel with the publication of the proposed Agreement in the *FR*.

Note:

- a. A copy of the draft staff assessment (summarized in the *FR* Notice) will be placed in the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm/adams.html>, and into ADAMS.
- b. The Office of Congressional Affairs will dispatch a letter to the appropriate Congressional Committees and the Wyoming Congressional Delegation informing them that the Commission is considering entering into a proposed Agreement with the State of Wyoming.
- c. The Office of Public Affairs will issue a press release.
- d. NMSS will dispatch letters to all the States and the following Federal Agencies in accordance with NMSS Procedure SA-700: Occupational Safety and Health Administration, Department of Energy, Council on Environmental Quality, Food and Drug Administration, Environmental Protection Agency and Department of Homeland Security.
- e. The staff will continue working with the State of Wyoming to ensure an efficient transition of the uranium recovery licensees in the State of Wyoming within the legal requirements.

COMMITMENTS:

Listed below are the actions or activities committed to by staff that will be included with the final paper to the Commission, providing a recommendation on the proposed Agreement.

1. The staff will provide an analysis of public comments.
2. The staff will provide an update on the development of the MOU between the NRC and the State of Wyoming to address the remaining steps in the decommissioning process to terminate the licenses for the five UMTRCA sites being transferred to the State of Wyoming.
3. The staff will provide an update on additional tribal outreach activities in support of the State of Wyoming proposed Agreement.
4. The staff will provide an update on the actions taken with the Strata Ross PA, Gas Hills PA, and Nichols Ranch MOA to notify signatories and consulting tribes of the NRC potential discontinuance of regulatory authority to the State of Wyoming.

COORDINATION:

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

***/RA Michael R. Johnson Acting for/***

Victor M. McCree  
Executive Director  
for Operations

Enclosures:

1. Letter from Governor Mead to Chairman Svinicki dated November 14, 2017
2. Acknowledgment Letter from Chairman Svinicki to Governor Mead dated November 27, 2017
3. Draft FRN, including the Summary of the Draft NRC Staff Assessment of the Proposed Wyoming Materials Program
4. Draft NRC Staff Assessment of the Proposed Wyoming Materials Program
5. FY 2018 and 2019 Resources

SUBJECT: PROPOSED AGREEMENT BETWEEN THE STATE OF WYOMING AND THE COMMISSION PURSUANT TO SECTION 274 OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED. DATED: May 25, 2018.

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