

STATE OF COLORADO

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Dedicated to protecting and improving the health and environment of the people of Colorado

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Colorado Department
of Public Health
and Environment

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Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

DOCKET NUMBER
PETITION RULE PRM 150-3
(59FR50706)

ATTENTION: Docketing and Service Branch

RE: Docket No. PRM-150-3, Petition for rulemaking by Measurex Corporation

This letter is in response to the petition for rulemaking by Measurex Corporation (Measurex). Colorado believes that the petition by Measurex should be denied because it is not needed; it imposes unnecessary and unproductive burdens upon both the states and the federal government; and it would transcend the NRC's authority by imposing unprecedented national requirements upon states and elevating state procedural matters to a federal level.

GENERAL COMMENTS:

Petitioner's rule, if adopted, would shift the responsibility of keeping apprised of regulatory changes from Measurex to the state and federal governments. The asserted basis for petitioner's petition is difficulties it has had with notice of regulations in two states. It can be safely assumed that all states have some minimum notice requirements for due process purposes. Therefore, the means to be informed of new regulations already exist. Measurex's problems with two other states do not justify imposing new and additional burdens upon other states nor upon the U.S. Nuclear Regulatory Commission (NRC).

Petitioner's proposal is unprecedented. To the best of our knowledge, at least in the area of health and environmental protection, a similar requirement has never been imposed upon states that are authorized to implement national programs. The same argument could just as easily be made - but apparently has not been - for regulations concerning water quality, air quality, mined land reclamation, and hazardous and solid wastes. The situation Measurex faces is not unusual and not compelling.

It is not clear that procedural problems are the petitioner's motivation for the proposed rule. For example, Measurex wants Agreement States to inform the NRC of the authority under which the regulation is proposed. It also wants for any post-promulgation comments received, the Agreement States to submit a statement to the Secretary, NRC that contains an evaluation of significant comments and revisions of the rule made as a result of the comments and their evaluation. If Measures is simply seeking a mechanism by which it may learn of pending state regulations, these provisions are unnecessary.

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Conspicuously absent from Measurex's petition is any discussion of the cost associated with the proposed new requirements and who will bear those costs. Agreement States and the NRC will incur additional costs in complying with the new rule. Measurex evidently expects the states, the NRC and other radioactive materials licensees to bear the cost of assisting it in the conduct of its business. In an era of shrinking budgets where customers are expected to pay for the service they receive, this proposal is unacceptable.

Measurex states that it has been adversely affected by the current regulations. It has given examples that relate to increased costs for the company in Texas and Oregon. It has not demonstrated that the proposed rules in Texas and Oregon would have changed the economic impact for the company had Measurex provided testimony on them. Further, it has not addressed the merits of the states' proposed rules; whether they were necessary to protect public health and safety, and whether a modification that involved less of an economic burden on Measurex would lessen their health and safety benefit.

SPECIFIC COMMENTS:

1. The Means Already Exist For Measurex To Obtain Information About Proposed State Regulations.

Measurex has chosen to engage in business on a national level. It therefore must assume the burdens of doing so. This includes the burden of keeping itself informed of applicable state requirements. The means already exist for the petitioner to do so. That Measurex has not always been successful does not justify imposing national requirements upon all Agreement States. Measurex's remedy is with state and local officials. If per chance there is a due process problem with a particular state, Measurex's relief lies with that state's officials and the state's legislative/political process. Because of the significant negative implications of petitioner's proposed rule discussed below, seeking local relief is far preferable to a national rule as proposed.

2. The Proposed Regulations Are Inconsistent With The Agreement State Program.

Colorado is not convinced that simply instituting a mechanism to inform companies doing business nationally of proposed state regulations is the true purpose of the petition. Citing two examples, Measurex candidly also expresses concerns about new regulations being "costly and administratively burdensome." It thus appears that Measurex wants to bring substantive state issues to a national forum. This is inconsistent with the Agreement State Program, the very purpose of which is to allow Agreement States, within the confines of the "compatibility" requirement, to tailor programs best suited to their needs.

The criteria for maintaining an Agreement State program is that the program be "compatible" and adequate to protect the health and safety of the citizens within that state. Maintaining economic viability of a company outside the state is not a requirement.

3. The Proposed Rule Imposes New and Additional Procedural Requirements Upon States, Thus Creating Conflicts.

Measurex's proposed rule would impose new and different procedural requirements upon Agreement States such as Colorado. For example, the proposed rule requires a 30 day post-promulgation period if the federal requirements are deviated from (proposed rule § 150.31(c)(2)(v)). Since no such requirement exists in Colorado, is the action challengeable if not complied with, even though state requirements are satisfied? Does this challenge occur at the state or federal level? Clearly, this situation threatens an unwarranted injection of the federal government into a purely state procedural matter.

Similarly, the proposed rule creates a new federal procedural criteria such as the requirement that a state have "good cause" to deviate from the requirements of the rule (proposed rule § 150.31(c)(2)(iv)). Is the state's determination of "good cause" reviewable? By NRC? If not by NRC, what is the authority of a state agency or court to determine compliance with a federal requirement? Once again, the situation is ripe for conflict and threatens an unnecessary, unwarranted and burdensome injection of federal authority into state procedural matters and may even create litigation.

More fundamentally, however, if the proposal is merely to give Measurex notice and opportunity to participate in the promulgation of state regulations, what purpose is served by requiring the state to inform NRC of the authority under which the state is promulgating the rules? Measurex can easily obtain this information from the appropriate state agency, and NRC already periodically reviews state programs for "compatibility." The rule proposed by Measurex raises the specter of Measurex challenging state authority before the NRC. Since an Agreement State by definition must have sufficient authority to implement a "compatible" program, such issues are properly raised at the state, not federal level. Whether the state has sufficient authority is between the state and NRC; whether the state has authority to promulgate the regulations is between the state and interested persons such as Measurex.

4. The Proposed Regulation Would Not Solve the Problem To Which Measurex Speaks.

Not all States that promulgate regulations pertaining to radiation control are Agreement States. Non-Agreement States propose rules that relate to Naturally-Occurring and Accelerator Produced Materials (NARM). Because NARM is outside the authority of the NRC, the NRC could not publish these regulations. Measurex would still be affected by these regulations without their having been published in the federal register.

Moreover, it is not clear that notice in the federal register as proposed will rectify any state due process deficiencies that may exist.

5. The Proposed Regulation Would Increase The Costs To The State And Federal Governments And To Their Licensees Without A Commensurate Benefit.

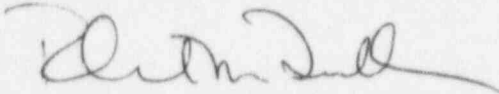
As noted above, the proposed rule would not solve the problem identified by Measurex, and attempting to solve it as proposed would increase costs to state and federal governments, and to those whom they regulate. Because Agreement States and the NRC obtain revenues from fees and/or general fund monies, the cost of promulgating proposed state regulations in the federal register will

ultimately be born by all radioactive materials licensees and by the general public. But this expenditure of funds will only benefit a few companies that distribute generally licensed devices. If such manufacturers requested copies of applicable state regulations from the states directly, it would be more economical for the regulated community and tax payers, and the manufacturers would have all the information they need.

CONCLUSION:

The means for Measurex to appraise itself of changes in applicable state regulations already exists. The problems perceived by Measurex can be solved without imposing additional burdens and costs upon the state and federal governments by Measurex exercising more diligence and by asserting its rights in states where due process problems exist, if any. The solution does not lie with the unprecedented step of imposing national requirements upon Agreement States and elevating state procedural matters to a federal level.

If you have any questions or require additional information, please don't hesitate to contact me at (303) 692-3030.



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cf: Richard Bangart
Agreement States