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NUCLEAR MANAGEMENT AND RESOURCES COUNCIL

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Robert W. Bishop
Vice President &
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March 19, 1992

OFFICE OF SECRETARY
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BRANCH

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

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ATTENTION: Docketing and Service Branch

RE: Compatibility of Agreement States Programs with
NRC Regulatory Programs
56 Fed. Reg. 66457 (December 23, 1991)
Request for Comments

Dear Mr. Chilk:

These comments are submitted on behalf of the nuclear power industry by the Nuclear Management and Resources Council, Inc. (NUMARC) in response to the request for comments by the U.S. Nuclear Regulatory Commission (NRC) on the compatibility of Agreement States programs with NRC regulatory programs. The Edison Electric Institute will be separately filing comments, concentrating on radioactive waste and transportation issues, and we encourage your favorable consideration of those comments as well.

As we previously described to the Commission in letters dated July 13, 1988, and October 25, 1991, concerning the NRC's policy statement on Cooperation With States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities (53 Fed. Reg. 21981 (June 13, 1988) and 56 Fed. Reg. 41968 (August 26, 1991), respectively), we support the NRC's initiatives to improve the states' knowledge of the NRC's regulatory activities and to clarify the states' authority and responsibility with respect to that of the NRC. The law is clear, and has been confirmed by the U.S. Supreme Court, regarding the NRC's exclusive authority with respect to the design, construction and operation of commercial nuclear power plants, to

NUMARC is the organization of the nuclear power industry that is responsible for coordinating the combined efforts of all utilities licensed by the NRC to construct or operate nuclear power plants, and of other nuclear industry organizations, in all matters involving generic regulatory policy issues and on the regulatory aspects of generic operational and technical issues affecting the nuclear power industry. Every utility responsible for constructing or operating a commercial nuclear power plant in the United States is a member of NUMARC. In addition, NUMARC's members include major architect/engineering firms and all of the major nuclear steam supply system vendors.

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assure adequate protection of public health and safety. However, the states have responsibility for matters that directly affect the utilities that own and operate those plants (e.g., the need for power in that jurisdiction and whether that need has been appropriately satisfied). The subject of this Federal Register notice, the NRC's relationship with Agreement States, is a matter of particular interest to the nuclear power industry.

We believe the NRC can and should improve and clarify its relationships with Agreement States. Our recommendations regarding how the NRC should address the concerns raised by Agreement States and the Organization of Agreement States are included in our answer to the six questions posed in the Federal Register notice. (See attachment A). Briefly, we believe broad opportunities should be provided to Agreement States in NRC rulemaking and policy development proceedings that affect Agreement State responsibilities. The public interest will be best served by improved regulatory stability and certainty, consistent with the NRC's Principles of Good Regulation as adopted in its FY 1991-1995 Five-Year Plan. Better communication and coordination with the states, in recognition of their unique interests and responsibilities, should be among the methods employed to accomplish the goals of the Atomic Energy Act.

Specifically, Section 274 of the Atomic Energy Act (the "Act") provides authority for the NRC to enter into agreements with states for limited purposes, i.e., the regulation of byproduct, source, and special nuclear materials in quantities not sufficient to form a critical mass. Through those agreements, the Commission relinquishes its regulatory authority over the subject materials and the state assumes authority to regulate those materials for the protection of the public health and safety from radiation hazards. The Commission is required by the Act to determine that the state's programs are in accordance with requirements of the Act, compatible with the Commission's regulatory programs, and adequate to protect public health and safety with respect to those materials. The Act further directs the Commission to cooperate with states in the formulation of standards for protection against hazards of radiation to assure that state and Commission programs are compatible. In fact, Section 274j(1) of the Act requires the Commission to periodically review agreements and actions taken by the states under NRC/state agreements to ensure compliance with the statute and gives the Commission the authority to terminate an agreement for not maintaining compatibility. Thus, even though the Act permits the NRC to relinquish its direct regulatory authority and to discontinue its oversight over matters covered by an agreement with a state, the NRC is statutorily obligated to ensure, on a continuing oversight basis, that state programs provide adequate protection to public health and safety and remain compatible with NRC regulations and programs.

Simply stated, the NRC must reject any state program if it provides less protection than that degree of protection which the NRC has determined to be adequate -- all citizens, whether or not they reside in an Agreement State -- deserve adequate protection. Although one could hypothesize that there may be local circumstances or conditions that are unique (e.g., "local politics," as

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described by the Agreement State representatives at the Briefing by Agreement States on Compatibility Issues public meeting held June 11, 1991), the potential existence of such circumstances does not diminish the NRC's or the states' responsibility to assure adequate protection of public health and safety.

In passing the Atomic Energy Act, Congress determined that the utilization of nuclear materials must be regulated in the national interest. In 1959, Congress amended the Atomic Energy Act by adding Section 42 U.S.C. Section 2021(a)(1) (i.e., Section 274) specifically addressing "the issue of cooperation between the federal and state government and delineating the limited instances in which state regulation of nuclear power was proper. Congress intended Section 2021 to confirm a general federal preemption of the regulation of nuclear activities." Jersey Central Power and Light v. Lacey Township (772 F.2d 1103, 1111 (1985)). Congress concluded, in passing the Atomic Energy Act (and the Hazardous Material Transportation Act), that the public interest would be best served from national uniformity in the regulation of these matters and the elimination of unnecessary burdens on NRC licensees operating in more than one state's jurisdiction. Impeding the attainment of these goals should not be permitted by the NRC allowing states to adopt different, even though not conflicting, standards. As the Joint Committee on Atomic Energy observed in its report accompanying the legislation that became Section 274, "[t]he committee recognizes the importance of the testimony before it by numerous witnesses of the dangers of conflicting, overlapping, and inconsistent standards in different jurisdictions, to the hindrance of industry and jeopardy of public safety."

Congress also determined that the appropriate criterion is adequate protection of public health and safety, not absolute protection or zero risk. If state standards were allowed by the NRC to be more stringent than NRC standards, the states would be given implicit veto power through the exercise of their authority under NRC/state agreements. Certainly Congress did not envision providing states with an implicit veto power when it enacted the Atomic Energy Act; in fact Congress sought to prevent precisely that situation from arising. If states are permitted to implement regulatory requirements unfettered from the standard of protection established by Congress and implemented by the NRC (the agency held accountable by Congress to develop the expertise in this area), there would be nothing to prevent a subsequent state political administration from using its regulatory authority as an Agreement State as a tool to effect its own view of nuclear power and the production and utilization of radioactive materials. Further, if an administration is anti-nuclear, it could use its power under an Agreement to make the standards so stringent as to effectively shut down operating nuclear plant(s) or other facilities using radioactive materials within its jurisdiction. This result is not an unrealistic one if the states are permitted to institute a regulatory standard more stringent than the NRC's. Such a result would directly contravene the Congressional purpose of fostering the use of atomic energy in the national interest that underlies the Atomic Energy Act. The provisions of Section 274 requiring Agreement State programs that replace

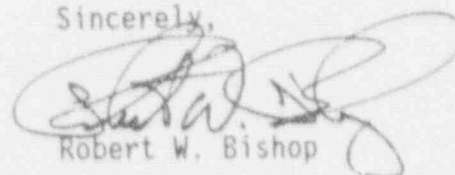
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those of the Commission to be in all respects compatible is consistent with that declared principle.

In summary, we believe the NRC should work closely with the states to clarify the states' responsibilities and to directly involve the states in a participatory role in NRC regulatory activities that affect the responsibilities of the states under Section 274 agreements. However, we believe the NRC's establishment of compatibility categories, as they currently exist, is an appropriate concept, and the questions raised about the NRC/Agreement State relationship do not justify a sweeping overhaul of the current system. We encourage the NRC to undertake increased communication and coordination with the states, thereby improving regulatory stability and certainty, which will benefit the NRC, Agreement States, NRC licensees and the public. For that reason, we recommend that the NRC initiate a rulemaking proceeding, with full Agreement States and public participation, to establish the basic criteria for NRC/Agreement States program compatibility. This initiative would be fully consistent with the declaration of President Bush in his January 28, 1992, State of the Union message to encourage the expedited adoption of "sound regulations that serve the public good." For the NRC inappropriately to relinquish its authority, under the guise of providing states with increased flexibility, it would be not only unlawful, unsound public policy, but could create duplicative regulations with related costs, and generate confusion regarding what is adequate protection.

We support the NRC's initiative to seek public comment on this important matter, and we appreciate the opportunity this process provides for potentially affected parties to participate. We would be pleased to respond to any questions you might have and to participate in any resulting activities as the NRC may deem appropriate.

Sincerely,



Robert W. Bishop

RWB:bjb

RESPONSES TO QUESTIONS

1. As noted above, Congress established the Agreement State program in part because of the various and conflicting programs being implemented by States. Do you believe that there should be a uniform national approach to radiation safety matters? Should the scope of uniformity be narrowly focused or comprehensive? Please explain the advantages and disadvantages of views expressed.

Yes. We believe that a uniform, comprehensive national approach to radiation standards is needed. The enactment of Section 274 to the Atomic Energy Act evidences Congressional intent that there be a national approach to radiation safety matters. Consistent with that articulated purpose, the NRC's regulatory requirements must be focused on ensuring adequate protection to public health and safety. The presumed advantages of the NRC relinquishing its authority in this area would be to enable states to adopt such standards as they deem appropriate. That has the potential of allowing for the enactment of differing regulations, with an associated administrative and operational burden on NRC licensees or Agreement State licensees to ensure compliance with a multitude of regulations, without any commensurate safety benefit. For example, the Emergency Planning Zone for a nuclear power plant may involve more than one state, and compliance with requirements of different affected states would not be in the public interest. The NRC has the discretion to allow justified exceptions to NRC standards, but regulatory stability and certainty is an independent goal of significant benefit to NRC licensees and their customers/ratepayers that, like the benefits of standardization, should not be lightly dismissed. Thus, of the policy options described in SECY-91-039, we believe Option 1 will best serve the public interest.

2. As indicated in the description of the four Divisions for compatibility decisions on regulations, compatibility can be implemented in a tiered manner, with the ranging from being identical to complete Agreement State Flexibility.

a. Is the tiered approach described in the Divisions a reasonable approach for regulations? For programs as a whole?

No. While the current tiered approach, employing four divisions, provides guidance on making compatibility decisions, the current NRC approach lacks a clear statement of the objective to be achieved in making such determinations and a standard by which the adequacy of the determination may be judged. The beneficial goals of regulatory stability and predictability would be better achieved if the NRC's criteria for compatibility were developed as an NRC rule rather than administered in accordance with an NRC

State Programs Office Internal Procedure. In that rulemaking, the NRC should articulate the criteria it would use to determine what regulations and programs must be substantially the same as NRC regulations and programs. NUMARC suggests that the governing objective for compatibility determinations, and a standard to judge whether the objective is met, should be as follows:

Provisions in NRC regulations that establish standards for adequate protection of public health and safety and the definition of technical terms used in those standards shall be adopted verbatim by the states. These include but are not limited to radiation dose limits for workers and members of the public and effluent release limits; technical definitions such as "Curie," "dose," "rad," and "effective dose equivalent;" calculational methods for determining radiation dose resulting from exposure to radioactive materials; legislated definitions such as "byproduct material;" and basic operational definitions such as "restricted area," and "occupational dose." These provisions are so basic to regulatory programs that their modification by a state would result in numerous and difficult problems and could interfere with interstate commerce and the benefits resulting from standardization. States may adopt regulations that describe procedures for meeting these basic health and safety standards, i.e., regulations of an implementing or programmatic nature, in different form than NRC's to allow for more innovative approaches to implementation of regulatory programs, provided that the level of protection provided is equivalent. States should not be allowed to adopt implementing programs that in effect set more stringent standards unless the NRC determines, in response to an application by an Agreement State, that those more stringent standards are necessitated by local conditions or circumstances to adequately protect public health and safety. However, those regulatory functions reserved to NRC pursuant to the Atomic Energy Act shall remain matters of exclusive federal regulation.

NUMARC believes it would be advantageous to give guidance to states by taking rules currently listed in Appendix A, "Categorization of NRC Rules by Compatibility Type," and listing them under three new categories created pursuant to the policy statement delineated above. Category I, "Verbatim Adoption," would generally correspond with Division 1 of the current guidance. Divisions 2 and 3 of the current guidance should be combined into Category II and retitled "Programmatic Flexibility," and should list examples where states could adopt different regulations, provided the standard contained in the above policy statement were met. Division 4 of the current guidance would become Category III, retitled "Reserved for Federal Regulation," and retain the meaning listed in the current guidance because no Agreement States programs are appropriate in these areas.

b. What areas of Agreement State radiation control and protection should be identical to those of the NRC and why?

Because of the need for national uniformity with respect to the basic principles underlying determinations of adequate protection of public health and safety from radiological hazards, Agreement State programs or regulations in the areas of radiation control and protection must be compatible with those of the NRC. In these areas, compatibility will require verbatim adoption of NRC determinations. In less critical areas, the NRC may determine that state programs or regulations that are substantially the same as NRC programs and regulations satisfy the statutory requirement and are consistent with the Constitutional prohibition against undue burdens on interstate commerce. In addition to the factors listed in SECY-91-039, *Evaluation of Agreement State Compatibility Issues*, that should be considered in evaluating the benefits of national uniformity, the NRC should evaluate the effect of non-uniformity in confusing the public as to what is adequate and thereby erode public confidence in the NRC's ability to effectively regulate. It could also result in a significant resource and economic impact on licensees operating in more than one jurisdiction. Substantial uniformity would also facilitate the training of NRC, state and licensee personnel, and uniform training would be more cost-effective and result in creating improved professional development opportunities for those trained professionals from which the NRC or states can staff their programs. In conclusion, for subject matter regulation wherein no undue burden would result from non-uniform regulation and such regulation would be beneficial, the NRC should provide Agreement States with the opportunity for innovation.

c. What areas of Agreement State radiation control and protection should be allowed to be different from those of the NRC and why? Should the differences include: more stringent standards? less stringent standards? more comprehensive standards? or less comprehensive requirements? Please explain the basis for your views.

As stated above, it would be inappropriate for the NRC to permit Agreement State radiation control and protection programs that differ from NRC standards. The NRC should allow Agreement State program implementation to be innovative, pursuant to the policy proposed above, as long as it does not result in a burden being imposed upon licensees, whether economic or operational. This accommodation should be made whether or not those programs are more or less stringent or more or less comprehensive than comparable NRC programs. However, the NRC must retain the authority to evaluate the benefits and burdens on a case-by-case basis (for example, a state should not be allowed to adopt a program that might provide some incremental exposure reduction to the general public but could substantially increase occupational exposure or otherwise infringe on the NRC's statutory authority).

3. What mechanisms should the NRC use to allow Agreement States to have flexibility to address local needs or conditions? What factors should the Commission consider in balancing local needs or

conditions and interstate or international commerce concerns or other national interests?

In the Briefing by Agreement States on Compatibility Issues public meeting with the NRC held on June 11, 1991, the representatives of the Agreement States who participated stated that "local politics" were the types of local needs or conditions that should be the basis for allowing states to adopt more stringent standards. We strongly disagree. Just as the nuclear industry believes strongly that the NRC should never adopt or amend a regulation without technical justification, so too we believe that states should be held to the same criteria. For the NRC to allow states to adopt programs under the authority of Section 274 on the basis of local politics would be a dereliction of the NRC's responsibilities under the Atomic Energy Act. The NRC's statutory responsibility to determine what degree of compatibility is appropriate is the proper mechanism to ensure compliance with the Atomic Energy Act and that regulation of licensees will be based on technical merit.

The application of the Atomic Energy Act, and the responsibilities of the NRC and the states in accord with the Act, has been subject to extensive litigation since the passage of the Act. The necessary accommodation of federal, state and local needs was addressed in the Act, and subsequent judicial interpretations have evolved over time as issues have arisen and circumstances have changed. The NRC should not now, in response to admittedly political concerns, skew that balance in any way that would allow exception to the fundamental statutory and regulatory principles.

4. Should Agreement States be given a greater degree of flexibility in fashioning their own standards for low-level waste disposal, in view of the States's increased responsibility in this area, according to the Low-Level Radioactive Waste Policy Amendments Act of 1985?

No. With respect to low-level waste disposal, the Congressional intent is clear that states or compact commissions were granted no new authority to regulate low-level radioactive waste in a manner that would be incompatible with NRC regulations (Section 4(b)(3)(A) of the Low-Level Radioactive Waste Policy Amendments Act of 1985. This approach is fully consistent with that established by the Atomic Energy Act and the Hazardous Materials Transportation Act. The same basic principles prevail, and the NRC's responsibilities under Section 274 for assuring adequate protection of public health and safety are no less with respect to low-level radioactive waste than they are with respect to other radioactive materials.

At a hearing held on September 12, 1991, by the Subcommittee on Energy in the Environment of the House Committee on Interior and Insular Affairs, the attorneys general of New York, Vermont and Ohio submitted a statement that "ten states...have passed legislation either requiring that all low-level radioactive materials, despite a designation of BRC [Below Regulatory Concern] by the NRC, be disposed of in specially licensed facilities for

handling low-level radioactive waste, or prohibiting such materials from being disposed of in municipal solid waste landfills." As an example of the adverse impact that could result from different states enacting regulations for low-level waste that differ from NRC's determinations, West Virginia has enacted legislation authorizing state regulation of material where the radioactive component is of such a low level that the NRC is likely to determine it would not justify regulation. Congressman Rahall testified that 30% of the waste going to municipal landfills in West Virginia originates from outside the state. Presumably, some of this waste could be waste from states that had agreed with the NRC's conclusion that such materials should not be regulated and some could be from states that had established levels different from that of the NRC, and one another. Thus, the same waste could be considered low-level radioactive waste in one jurisdiction and non-radioactive in another. The resulting chaos of different states (or localities) adopting different levels would not be in concert with the Atomic Energy Act requirements and also raises significant questions about what transportation regulations would be applicable. This situation would be the antithesis of the Congressional determination that the national interest requires uniform regulation of the use and associated transport of radioactive materials.

Different national and state criteria for waste disposal or the recycling of salvageable materials and equipment imposes added cost without any commensurate benefit to public health and safety throughout the power reactor cycle, but particularly during decommissioning. LLW costs are a large component of decommissioning costs. A significant increase in volumes of LLW will result if there are criteria lower than those established by the NRC for waste disposal or material recycle. Regulatory uncertainty and instability in this area would adversely affect the ability of licensees and responsible regulatory agencies to accurately predict the costs of decommissioning power reactors to ensure that those activities are properly funded. Development of an effective national energy program that includes nuclear power will depend on our ability to standardize the licensing, construction and operation of future nuclear power plants.

Thus, the public interest, and the Atomic Energy Act, require the NRC to ensure that state programs with respect to low-level waste transportation and disposal are compatible with NRC requirements. The NRC statutory mandate, as well as the benefits that will result from regulatory stability and certainty, require that result. If the statement of policy recommended in the answer to question 2a. is adopted, Agreement States would have flexibility in program implementation. Agreement States would also have the ability to request an exemption, in a disciplined process with full public participation, if local circumstances exist that would justify an exemption.

5. Provided the issue of compatibility is fully aired in rulemaking notices, is the current comment process sufficient for continuing dialogue with those persons outside the NRC/Agreement State

regulatory partnership? If not, what alternative would you suggest and why?

Yes. The Administrative Procedure Act mandates public notice and other aspects of public participation in all NRC rulemaking activities. The NRC should encourage participation of the Agreement States, and other interested parties, in those activities that affect Agreement States or low-level radioactive waste compact commissions. The views of the Agreement States, licensees, and other interested parties should be considered in the development of criteria and policy on compatibility and in the Commission's determination of compatibility as new regulations are developed. Although frequent and continuing communication between the NRC and Agreement States and compact commissions is desirable, no need has been identified for any special relationship that should not be subject to proper rulemaking procedures that allow for all interested parties to participate.

6. Should the NRC develop exemption criteria for an Agreement State that does not adopt a rule deemed a matter of compatibility, as described for NRC's Division 1 and 2 rules, if an Agreement State requests such an exemption? What factors should be considered in the criteria to assure that the exemption is justified?

As discussed in the answer to question 2a above, we recommend that the NRC establish the criteria governing its relationship with Agreement States by rulemaking. Such a rulemaking proceeding should also include provisions that would allow for exemptions to be sought upon satisfaction of criteria of special circumstances similar to the provisions of 10 C.F.R. Section 2.758. Such a process would ensure that appropriate public comment was able to be introduced for Commission consideration and provide an opportunity for the Commission to determine whether an exemption from the NRC's compatibility criteria would be in the public interest.