

April 3, 1998

FOR: The Commissioners

FROM: L. Joseph Callan /s/
Executive Director for Operations

SUBJECT: CONSIDERATION OF APPLICATION OF FEDERAL GOVERNMENT-WIDE CONFLICT OF INTEREST OR ETHICS REQUIREMENTS AND NRC ENFORCEMENT POLICY ON LICENSEE INTEGRITY ISSUES TO AGREEMENT STATE PROGRAMS

PURPOSE:

To obtain Commission approval of staff recommendations to address issues concerning the consideration of State employee ethics and licensee integrity matters in Agreement States.

BACKGROUND:

In SECY-97-156, "Application of Federal Government-Wide Conflict of Interest Requirements and NRC Enforcement Policy on Licensee Integrity Issues to Agreement State Programs," the NRC staff identified issues for Commission consideration concerning the application of Federal conflict of interest or ethics requirements and NRC's Enforcement Policy on licensee integrity issues to Agreement State Programs. The paper included preliminary staff proposals to address the issues identified in the paper.

On September 3, 1997, the Commission issued a staff requirements memorandum (SRM) which approved the staff's plans to summarize the preliminary recommendations in the paper, transmit the information to the Agreement States, and make the paper available for public review and comment. The Commission further directed that after receipt and resolution of comments, the staff should submit final recommendations to the Commission for approval. The Commission also approved the staff's plans to contact the Agreement States to confirm that conflict of interest requirements are in place in each Agreement State.

CONTACT: Spiros Droggitis, OSP
415-2367

The Commission directed the staff to inform the Commission of the results of the survey and to identify any concerns that result from the survey. In addition, the SRM directed the staff to modify one of the questions posed in the paper and to consider and make a recommendation to the Commission on whether Agreement State conflict of interest rules and their enforcement should be reviewed routinely under IMPEP rather than addressed only "as they arise on a case-by-case basis."

The staff transmitted the discussion of the issues and the preliminary staff proposals to the Agreement States, Ohio, Oklahoma and Pennsylvania on September 10, 1997 and requested written comments by October 31, 1997. A press release was issued on September 12, 1997 announcing the availability of the information for public review and comment. This information was also placed in the Public Document Room. In addition, these issues were discussed and comments received at the All Agreement States meeting on October 17, 1997 in Los Angeles, California.

DISCUSSION:

The NRC staff received written comments from 11 Agreement State agencies. No other comments were received. The staff has reviewed the written comments and the transcript of the comments made at the All Agreement States meeting and proposes the following in addressing the issues identified in SECY-97-156:

ISSUE 1:

- Does the NRC have any authority to require Agreement States to adopt conduct of employee regulations or policies, similar to those applicable to NRC employees? Or, does the NRC have a basis to require an Agreement State to have conflict of interest regulations or policies, without the requirement that those regulations or policies be similar to those of NRC?

The first issue concerned whether NRC should require Agreement States to adopt compatible Federal conflict of interest or ethics regulations. The preliminary staff analysis was that NRC has generally not required State radiation control programs to adopt administrative requirements that are not promulgated pursuant to the Atomic Energy Act of 1954, as amended, and are dictated by the States' own administrative laws. In the staff's preliminary proposal, this position was considered prudent and the staff did not propose to change it. However, the staff did note that in those cases where a nexus between protection of public health and safety and a State's approach to employee standards of conduct exists, the staff proposed to address those conflict of interest issues on a case-by-case basis.

This issue generated the most comments from the Agreement States. None of the Agreement States which provided written comments on the issues in SECY-97-156 supported NRC requiring Agreement States to adopt compatible Federal conflict of interest or ethics regulations. One State commented that the NRC did not have the authority to impose conflict of interest regulations or policies on Agreement State employees and questioned the constitutionality of the Federal government's authority to mandate general ethics standards on State officers and employees. The Organization of Agreement States, at the October All Agreement States meeting, unanimously adopted a resolution recommending to NRC that Agreement States not be

required to adopt compatible conflict of interest/ethics/disclosure requirements. Many of the individual Agreement State comments either endorsed this resolution, took a position similar to the views expressed in the resolution, or identified the existence of applicable ethics laws or regulations in their individual States.

The staff indicated in SECY-97-156 its belief that most, if not all, Agreement States were subject to individual State conflict of interest laws and regulations and indicated its plans to contact the Agreement States to confirm this understanding. In its September 3, 1997 SRM, the Commission approved the staff's plan and directed the staff to inform the Commission of the results of the survey and to identify any concerns that result from the survey.

In conducting the survey to determine the existence of ethics rules for State employees, the staff reviewed individual State laws and regulations and consulted with various organizations including the National Conference of State Legislatures, the Council of Governmental Ethics Laws, Common Cause and a Council of State Governments/American Society for Public Administration publication on public integrity. In some cases, the staff contacted Agreement State officials to confirm information. Preliminary results of this search were discussed at the All Agreement States meeting. As a result of this survey, the staff has determined that all Agreement States (as well as the States in the process of becoming Agreement States --Ohio, Oklahoma and Pennsylvania) have, to varying degrees, ethics laws or some other State policy, executive order or regulation. All the States included certain financial conflict of interest requirements for State officials. Many States have established State Ethics Commissions or Boards which oversee State ethics issues and enforce ethics laws and regulations. In other States, this responsibility is left to the Secretary of State or Attorney General to oversee and enforce. As a result of this confirmation of the existence of State ethics requirements in Agreement States and comments provided by the Agreement States, the staff recommends that Agreement States not be required to adopt ethics regulations compatible with those of the Federal government.

The Commission, in its SRM, requested that the staff consider and make a recommendation on whether Agreement State conflict of interest or ethics rules and their enforcement should be reviewed routinely under IMPEP rather than addressed only as they arise on a case-by-case basis. Most of the Agreement States that commented agreed that conflict of interest issues should only be addressed as they arise on a case-by-case basis when a nexus can be drawn between protection of public health and safety and a State's standard of conduct. One Agreement State commented that the routine review of States' conflict of interest regulations and their enforcement under IMPEP would be a waste of time. The staff has considered the Commission's request and the State comments and recommends that Agreement State conflict of interest or ethics rules and their enforcement continue to be reviewed on a case-by-case basis as issues arise. There is little likelihood that States will relax or remove existing conflict of interest or ethics rules, and thus, review under IMPEP is not warranted. Further, enforcement is necessary only when a specific violation of these requirements is identified. Thus, staff believes that review of specific conflict of interest issues in Agreement States where a nexus can be drawn between the ethics issue and adequacy of the program, performed on a case-by-case basis, would result in any performance issues in this area being identified and addressed. In addition, as discussed below under Issue 2, staff plans to develop guidance on the actions NRC will take when an integrity issue may have an impact on the program's ability to maintain an adequate program.

An issue which was identified during discussions with the Agreement State officials at the All Agreement States meeting was the potential conflicts of interest with the membership and statutory authority of State radiation control advisory or oversight boards, particularly when Agreement State licensees serve on those boards and those boards have hiring and firing authority of State radiation control program directors. This was an area identified by the Agreement State representatives as one where additional NRC review may be appropriate. Staff believes that board authority to hire and dismiss radiation control program directors is not inherently a conflict of interest. However, potential conflicts could exist if licensee representatives on such a board are not prohibited from decision-making involvement on regulatory issues that could impact licensed operations. Therefore the staff recommends that the membership and statutory responsibilities of State radiation oversight boards and the boards' actions during the review period be examined for the potential of conflict of interest during IMPEP reviews.

To summarize, the staff's recommendations regarding Issue 1 are: 1) NRC should not require Agreement States to adopt conflict of interest or ethics regulations compatible with those of the Federal government; 2) NRC should continue to address on a case-by-case basis those cases where a nexus can be drawn between protection of public health and safety and a State's approach to employee standards of conduct; 3) NRC will, under IMPEP, review the membership, statutory authority, and actions during the IMPEP review period of State radiation control advisory or oversight boards for potential conflict of interest concerns.

ISSUE 2:

- Whether NRC should adopt internal guidance for consideration of integrity concerns in evaluating Agreement State programs.

The second issue identified in SECY-97-156 concerned whether the NRC should adopt internal guidance for consideration of integrity concerns in evaluating Agreement State programs. The staff's preliminary recommendation, as modified by the Commission, was that internal guidance should be developed which would ask two questions:

1. Does the integrity issue have an impact on the adequacy of the current radiation control program, or does it have the potential to have, an impact on the ability of the Agreement State to maintain an adequate and compatible radiation control program?
2. Does the integrity issue create significant doubt about whether NRC can consider the person trustworthy in communicating and coordinating Agreement State program activities with NRC?

Under the preliminary proposal, the guidance would recognize that in most cases, the appropriate action will be referral to an appropriate State agency. It would also identify steps to be taken when, in NRC's judgment, an Agreement State's actions are not sufficient to resolve potential adequacy and compatibility impacts on the radiation control program or to restore NRC's confidence in an Agreement State official.

Most of the Agreement State comment letters did not address this issue. The responses from most of those that did comment were that this was an internal NRC matter and thus up to the NRC to decide because these matters should be handled on a case-by-case basis and in most instances referred to the appropriate State officials. One Agreement State did comment that the first question was more pertinent and important and that it was not comfortable with the subjective nature of the second question of the "trustworthiness" of "communicating" with NRC. A view was expressed at the All Agreement State meeting that it did not much matter what the internal guidance was as long as it was documented for all to be aware and followed consistently by the NRC.

After considering this matter further, the staff suggests eliminating the second question from the guidance because the first question adequately covers all matters relevant to NRC's concerns, including issues raised by the second question. However, overall, the staff continues to believe that developing internal guidance along the lines outlined in SECY-97-156 is appropriate and recommends that such internal guidance be developed and implemented.

ISSUE 3:

- Whether Agreement States should be required to establish and implement a policy that would provide that an Agreement State would take action, similar to the type of action taken by NRC, when integrity issues are identified in a licensee's program or by an individual in a licensee's program.

The final issue identified in SECY-97-156 was whether 10 CFR Parts 30.10, 40.10 and 70.10 (the deliberate misconduct or "wrongdoer" rule) should be a compatibility category C. The deliberate misconduct rule prohibits individuals from engaging in deliberate misconduct that causes or, but for detection, would have caused a licensee to be in violation of an NRC requirement. It also prohibits the submission of false or incomplete information that is in some respect material to the NRC. Under compatibility category C, Agreement States would have to adopt a legal requirement that meets the essential objectives of these NRC provisions. The staff preliminary recommendation was that this should be a compatibility category C because of the potential gap that might be created between NRC and Agreement State programs if deliberate misconduct and wrongdoing issues involving Agreement State licensees were not pursued and closed by Agreement States. To satisfy the category C designation, the Agreement States could address this area either in statutes, regulations, or another form of a legally binding requirement.

This issue generated a mixed reaction from the Agreement States that commented. Two Agreement States supported the adoption of this provision by the Agreement States. One State indicated that it would be an additional enforcement tool available to the State and would prefer to have NRC require it as a compatibility item rather than attempting to have the State adopt it at its own initiative. Five other Agreement States opposed requiring the deliberate misconduct rule as a compatibility category C for a variety of reasons. Several Agreement States indicated that adequate State laws and regulations existed giving them authority to take action against a licensee's program or an individual in a licensee's program when there is a threat to public health and safety and thus additional requirements were not needed. A third Agreement State indicated that while it had provisions similar to the deliberate misconduct rule in either State law or regulation, it was concerned about making it a matter of compatibility because of the difference in the scope between the NRC and the State regulations. Examples of this difference in scope provided by the State were: a violation of the State rule may be limited to a civil penalty whereas it may be a civil or criminal penalty under NRC rules. Under the State regulation, a violator is subject to penalty only if that violation was one for which a license may be revoked. Under the NRC rule, non-licensees are subject to sanctions for causing, or actions which may have caused, but for detection, any violation by a licensee of a rule, regulation, order, or any term, condition, or limitation of any license, issued by the Commission. The State could not guarantee that efforts to obtain legislation to broaden the scope of the State's authority to conform to the NRC requirements would be successful.

Another Agreement State objected to changing the compatibility category for several reasons. The first reason cited was what it termed the imprecision of the NRC deliberate misconduct rule. Specifically, the State claimed that under the deliberate misconduct rule, NRC may take enforcement action regarding matters that raise issues of integrity, competence, fitness-for-duty, or other matters that may not necessarily be a violation of specific NRC requirements.⁽¹⁾ The Agreement State questioned whether it had, or should have, the legal authority to impose sanctions for an activity which does not violate a State statute or rule. The State also noted that the deliberate misconduct rule provides NRC with broad authority to impose sanctions against non-licensed persons. The State commented that while such broad authority may not be feasible in the State, statutory provisions other than Agreement State licensing provisions provide a framework for actions against non-licensed persons who engage in improper conduct related to the use of radiation. The State went on to argue that because it had general authority to impose orders and penalties against licensees and specific authority regarding non-licensed persons, requiring adoption of the deliberate misconduct rule as a matter of compatibility category C was not necessary.

The staff has reviewed the comments of the Agreement States on this issue. It appears that either the Agreement States endorse requiring the deliberate misconduct rule as a matter of compatibility or oppose it, for the most part, because they believe that existing State laws and regulations give them the sufficient authority to carry out the intent of the rule. In recommending the final deliberate misconduct rule to the Commission in 1991 (SECY-91-183), the staff indicated that it was premature to decide the issue of Agreement State compatibility until the staff had experience in both the implementation and effectiveness of the rule. At that time, the staff stated its intention to distribute copies of the compilation of orders issued under the rule to all Agreement States. This compilation is now available to the Agreement States on the Office of Enforcement site on the NRC Homepage. For the reasons identified in SECY-97-156, because of potential significant safety issues associated with deliberate misconduct and the potential gap which might be created between the NRC and Agreement State programs if deliberate misconduct issues involving Agreement State licensees were not pursued and closed, the staff continues to recommend that the deliberate misconduct rule be required as a compatibility category C rule. Under compatibility category C, an Agreement State must have a requirement which meets the essential objectives of the NRC rule to avoid conflicts, duplication or gaps, but does not need to be identical to that of the NRC. To satisfy this designation, the Agreement State can address this area either in statutes, regulations or another form of legally binding requirement. As such, Agreement States will have a large degree of flexibility in incorporating the deliberate misconduct concept into their program. The staff plans to find an Agreement State's approach to this issue compatible with that of NRC as long as the State indicates it has a legal mechanism in place to take enforcement action against unlicensed persons engaged in deliberate misconduct. For example, the approaches described by Agreement States in their comments (see above) would be acceptable under these criteria. Administrative

remedies may include, as appropriate, the issuance of notices of violation, orders requiring affirmative action or suspension or revocation of the right to possess and use materials, the impounding of materials, injunctive relief and the imposition of civil or criminal penalties. However, the staff strongly recommends that Agreement States have the authority to prohibit unlicensed persons engaged in deliberate misconduct from future involvement in licensed activities within their jurisdiction.

A separate but related issue involves the question as to whether 10 CFR Parts 30.7, 40.7 and 70.7 (Employee Protection) should be designated an Agreement State compatibility category C. Under the current designation, these regulations are compatibility category D - not required for purposes of compatibility. Thomas B. Cochran, Ph.D., Director of the Nuclear Program of the Natural Resources Defense Council, identified the question of whether NRC's whistle-blower protection regulations should be made a matter of Agreement State compatibility in a 10 CFR 2.206 petition dated December 12, 1997. The staff intends to review and assess this matter in detail and will provide the Commission with its assessment and recommendations in a separate paper.

RESOURCES:

Implementation of the recommendations in this paper can be accomplished within budgeted resources for procedures development and IMPEP reviews.

COORDINATION:

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

RECOMMENDATION:

That the Commission approve the staff proposals to:

1. Continue to address on a case-by-case basis those issues where a nexus can be drawn between protection of public health and safety and a State's approach to employee standards of conduct;
2. Review, under IMPEP, the membership, statutory authority, and actions during the review period of State radiation control advisory or oversight boards for potential conflict of interest concerns;
3. Adopt internal guidance for consideration of integrity concerns in evaluating Agreement State programs; and
4. Require the Agreement States to adopt NRC's deliberate misconduct rule as a compatibility category C.

L. Joseph Callan
Executive Director for Operations

1. This comment displayed a misunderstanding about the deliberate misconduct rule. Under the deliberate misconduct rule, a deliberate act is required to have caused a violation, or but for detection would have caused a violation, of NRC's requirements. The Enforcement Policy does address actions against a licensee that may impact a person for actions set forth above that may not be a violation, e.g. a radiographer not being fit for duty. The authority for such action is Section 186 of the Atomic Energy Act of 1954, as amended, which authorizes revocation for reasons the Commission would not issue a license under an original application.