

August 11, 1998

FOR: The Commissioners

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

SUBJECT: RESOLUTION OF ALLEGATIONS CONCERNING THE PERFORMANCE OF AGREEMENT STATE PROGRAMS

PURPOSE:

To request Commission guidance on handling allegations concerning the performance of agreement state programs.

BACKGROUND:

Until the early 1990's, NRC handling of agreement state allegations was informal and accomplished by referral to the appropriate state by the NRC Regional State Agreements Officer (RSAO). Until then, limited procedural guidance existed; the allegations were not tracked in the NRC allegation management system (AMS); little emphasis was placed on the evaluation of agreement state handling of allegations referred by NRC; and no distinction was made among the different types of agreement state allegations. As increased formality in the handling of allegations about NRC licensees developed, staff was increasingly concerned in the early and mid-nineties about the less formal handling of agreement state allegations. Attention was also specifically focused on the handling of allegations of wrongdoing by agreement state officials, when the Office of the General Counsel determined in 1993 that the Atomic Energy Act (AEA) authorized the NRC to pursue any concern that raises potential health and safety issues for the nuclear materials and facilities defined in the AEA. Subsequently, direction for the handling of each allegation of wrongdoing by agreement state officials was established by Hugh L. Thompson, Jr., in a July 23, 1993 memorandum to Ben B. Hayes and Carlton C. Kammerer ([Attachment](#)).

Allegations involving agreement states are currently divided into three categories: performance of agreement state licensees (licensee allegations), performance of agreement state programs or employees (performance allegations), and wrongdoing by an agreement state employee (wrongdoing allegations). Concerns expressed in allegations submitted to NRC about the performance of agreement state programs include: dissatisfaction with the agreement state's prior resolution of an alleged's concern, timeliness of state inspections, inspection frequency, inspection quality, enforcement actions, and concerns regarding the independence and qualifications of agreement state personnel. Wrongdoing allegation concerns address such issues as criminal wrongdoing and purposeful failure to adhere to state administrative requirements. An agreement state program employee receiving payment from an agreement state licensee is an example of an agreement state wrongdoing allegation.

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For each agreement state allegation, regional or Office of State Programs (OSP) management initially determines whether any immediate action is necessary to assure continued adequate protection of public health and safety. If immediate action appears necessary, the appropriate Regional Administrator, the Directors of OSP and NMSS, and the EDO are contacted. In addition, the Director of OI is informed of issues involving potential wrongdoing. The EDO would then recommend an appropriate course of action to the Commission. Several actions for consideration include meetings or communications between the Director, OSP, and the agreement state Radiation Control Program (RCP) Director, the state department head and the EDO, or the Chairman and the Governor of the agreement state. Other options for near-term action include an OI investigation, if approved by the Commission, or a special limited-scope agreement state program review conducted by OSP staff and the RSAO. Ultimately and with Commission approval, NRC could implement OSP Internal Procedure D. 13, "Procedure for Emergency Suspension of a Section 274b Agreement," to reassert NRC regulatory authority in an agreement state.

DISCUSSION:

While all three categories of agreement state allegations are currently tracked in the NRC allegation management System (AMS), the method of processing is dependent on the type of agreement state allegation. Performance allegations about an Agreement State program or its employees and allegations involving agreement state licensees are reviewed by the appropriate regional office Allegation Review Board (ARB) and referred to the proper agreement state RCP Director for review and action. Allogers are also informed by NRC that the agreement state's handling of the allegation will be reviewed during the next Integrated Materials Performance Evaluation Program (IMPEP) review or the next annual meeting with the agreement state, whichever occurs first.

Allegations that concern wrongdoing by an agreement state employee are transferred to the OSP. An OSP ARB determines whether NRC should conduct an investigation (only after Commission approval), or if the allegation should be referred to management above the RCP Director in the agreement state; referred to the agreement state's Inspector General (IG), if one exists; or referred to the agreement state Attorney General's (AG) office. The ARB could also determine that no action is appropriate, and inform the allegor of that decision. If the wrongdoing allegation is referred to a state authority, however, a response is requested. Given that sensitive information may be contained in some wrongdoing allegations, IMPEP teams do not review the state's handling of these allegations. That review is conducted by the OSP ARB, based on the state's response.

Both agreement state representatives and NRC allegations staff agree that revisions to NRC's handling of agreement state performance and wrongdoing allegations are necessary. For example, agreement state representatives believe allegor identities should always be provided in order to permit the

agreement state to obtain additional information from the allegor about the concern. Currently, if requested by an allegor, his or her identity is withheld from an agreement state. Agreement state representatives have also indicated that all agreement state allegations should be referred only to the RCP Director.

The Agency Allegation Advisor and the regional and NMSS office allegation coordinators (OACs) are concerned that an independent confirmatory review of the resolution of an agreement state performance allegation may not occur for as long as 12 months, in some cases, and believe that this reflects poorly on the allegation process and the NRC. Also of particular concern is the fact that agreement state performance allegations are referred to the agreement state RCP Director, even in those cases where the allegor has previously requested the state RCP Director to take action. The allegations staff noted that if the NRC received such an allegation concerning an NRC licensee, the allegation would be referred to the licensee for resolution only if certain criteria in Management Directive 8.8, "Management of Allegations" (MD 8.8) were satisfied, and in most cases, the NRC would independently determine whether the allegation was valid and the issue would likely be resolved within six months. The allegations staff also understands that the regulatory relationship between NRC and agreement states is clearly different from the relationship between the NRC and its licensees. Nevertheless, the allegations staff believes that allegors have the same expectation concerning the timeliness and independence of NRC's review and resolution of allegations concerning agreement state performance issues. When performance allegations are referred to the state for resolution, allegors may not be aware of the discontinuance of NRC's regulatory authority and the nature of NRC's oversight role. As such, the allegors may consider NRC's programs for oversight of agreement states and resolving allegations to be ineffective. Additionally, during their August 1997 annual counterpart meeting, the OACs noted that while MD 8.8 addresses handling of allegations about agreement state licensees and agreement state employee wrongdoing, it does not specifically address how to handle allegations concerning the performance of agreement state programs or employees. The coordinators also expressed concern that allegations concerning the performance of agreement state programs are handled differently from allegations concerning the performance of NRC licensees.

Because MD 8.8 does not currently provide guidance on how to handle allegations concerning the performance of agreement states, the Agency Allegation Advisor had provided verbal guidance on this topic after consulting with the Director, OSP, and the Deputy Executive Director for Regulatory Programs. Interim written guidance on handling agreement state performance allegations was prepared as an Allegation Guidance Memorandum (AGM) and issued for comment to the regions and cognizant offices on October 1, 1997. Comments received on the draft guidance and staff experience identified policy issues associated with the handling of both agreement state performance and wrongdoing allegations.

This paper was prepared to ensure the Commission is aware of the staff's actions to address allegations involving agreement states and to obtain Commission approval of a method to address agreement state allegations, especially those involving agreement state performance and wrongdoing by agreement state employees. The staff proposes three options for handling such allegations for Commission consideration.

OPTIONS

Option 1:

Continue regional referral of agreement state licensee allegations to agreement state RCP Directors after review by regional ARBs. An OSP ARB will also continue to determine the appropriate method (OI investigation after Commission approval, referral to senior state management, or referral to agreement state IG or AG) to handle agreement state wrongdoing allegations. However, this option would no longer have a regional ARB decide the method of handling agreement state performance allegations. Instead, an OSP ARB would determine the appropriate course of action, including the option of referral to the RCP Director, to senior state management, or to the state IG or AG. The alternative of referral of performance allegations to senior state management is not included in current guidance.

PROS:

Maintains the current successful approach of regional referral of agreement state licensee allegations to state authorities.
Improves consistency in handling of agreement state performance allegations, since a single OSP ARB would be used.
Provides an option to refer performance allegations to state management above the RCP Director level, thus addressing both OACs' and allegors' concerns that an independent assessment does not take place when the performance allegation is referred to the RCP Director.
NRC system of detailed tracking of all types of agreement state allegations is maintained.
IMPEP or annual meeting review of agreement state resolution of allegations referred by NRC (agreement state licensee and performance allegations, only) continues.

CONS:

Since in two agreement states (AZ, IL) the RCP Director reports directly to the Governor, referral of AZ and IL agreement state wrongdoing and performance allegations to higher level state management would have to be made to the Governors of those states.
If the performance or wrongdoing allegations do not identify concerns about adequate protection of public health and safety, NRC expenditure of resources to handle these concerns as allegations may not be justified, given that NRC discontinues regulatory authority in agreement states.
In opposition to the views of agreement state RCP Directors, extends the practice of referring agreement state wrongdoing allegations to state officials other than RCP Directors to include performance allegations in some cases.
NRC tracking of agreement state wrongdoing and performance allegations in the NRC AMS is inconsistent with treatment of allegations received about performance or wrongdoing of NRC employees or employees of other federal agencies, which are referred to the Inspector General or agency management and not tracked in the AMS.
Extends the previously unsuccessful practice of referral of wrongdoing allegations to Attorney Generals and Inspector Generals to include performance allegations. Experience to date with wrongdoing allegation referrals is that AGs and IGs either refer such allegations to the RCP Director or do not respond to NRC.
Handling of agreement state performance and wrongdoing concerns as allegations is not supported by the definition of allegation in MD 8.8, which does not include these concerns as allegations, since NRC has discontinued its authority to regulate in Agreement States.

Option 2:

Identical to Option 1, with the exception that no agreement state performance allegations would be referred to the RCP Director. All agreement state performance allegations would be referred to either agreement state senior line management above the RCP Director, or the agreement state's IG or AG.

PROS:

Avoids allover concern that independent review of a performance allegation is precluded by no longer having the alternative to refer the allegation to the agreement state RCP Director.

The same PROS as in Option 1.

CONS:

For all agreement state performance and wrongdoing allegations, deviates from agreement state RCP Directors recommendation that all allegations be referred to them.

The same CONS as in Option 1.

Based on experience to date with the referral of agreement state wrongdoing allegations in this manner, as described in Option 1, staff notes that the effectiveness of applying this approach to agreement state performance allegations may be limited. Therefore, if the Commission approves Options 1 or 2, staff proposes procedural changes to reduce the unacceptably long periods of time that allegations have remained open after referral to state IGs or AGs. OSP staff will contact, telephonically and by letter, the IG or AG office to which a performance or wrongdoing allegation has been referred, if 90 days has elapsed and no response has been received. If another 90 days elapse with no response, the agreement state IG or AG will be notified in writing by OSP that the NRC will be informing the allover that the state office was unresponsive if no communication is received within another 30 days. Additionally, the agreement state authorities will be informed that the agreement state wrongdoing or performance allegation will again be considered by the NRC staff (i.e., OSP ARB) to determine if a special agreement state program review of the allegation concerns or OI investigation (after Commission approval) should be conducted. However, the staff may decide the allegation should be closed without further action.

If the IG or AG takes no action and NRC also concludes no action is necessary, the allover, if known, would be informed by OSP that referral of the allegation to the agreement state authorities has resulted in no action. NRC would also explain to the allover that there are limits on NRC's authority to take action in the absence of a credible concern that health and safety is not being adequately protected by the agreement state and that the NRC has not determined that the agreement state has failed to protect health and safety in the particular case. For agreement state performance allegations, the allover would also be informed that the concern about performance will be assessed as part of the next IMPEP review or annual meeting that evaluates agreement state adequacy and compatibility.

Option 3:

Continue agreement state licensee allegation entry into the AMS and closure of that allegation after review by regional ARBs and transfer to the appropriate RCP Director. Handle concerns about agreement state performance or wrongdoing by transferring, through correspondence from OSP, rather than treating the concerns as allegations. Absent a credible health and safety concern, and depending on the structure of the state government, the performance or wrongdoing concerns would be referred to either the agreement state IG, the AG, or senior line management above the RCP level, as appropriate, based on a decision by OSP using criteria to be developed, without convening an ARB. The allover would be informed of the referral and told that the Agreement State has the responsibility and authority to address the identified concerns and that any further questions should be addressed to an agreement state contact designated in the letter. NRC action to conduct a special evaluation of the adequacy and compatibility of an agreement state program would be initiated when significant, valid, safety concerns are identified by the allover.

PROS:

Maintains the current successful approach of regional referral of agreement state licensee allegations to state authorities.

Provides a clear message to allovers regarding NRC discontinued/limited regulatory authority in agreement states. While NRC has agreement state oversight responsibility to assure that programs are adequate and compatible, NRC has little authority to take independent action or require action by an agreement state as a result of performance or wrongdoing allegations in the absence of a valid health and safety concern. Consistent with NRC approach of handling allegations about performance or wrongdoing of NRC employees or other federal agency employees. In such cases, the concern is referred to an agency IG or management and is not entered into the NRC AMS.

Supported by the definition of allegation in MD 8.8, which does not include employee performance or wrongdoing concerns by NRC employees or employees of other federal agencies that are not licensees as allegations.

IMPEP reviews, or annual meetings, can be used to evaluate agreement state handling of agreement state licensee allegations received from NRC regions and the performance concerns referred to an agreement state by correspondence from OSP.

Agreement state performance concerns would be referred to a state authority other than the RCP Director, thus providing an opportunity for independent state evaluation and increasing the credibility of the NRC process for handling such concerns.

Consistency in handling agreement state performance allegations is increased, since only OSP will refer both performance and wrongdoing concerns to agreement states.

CONS:

Some allovers will not recognize or understand NRC's limited authority over agreement state programs and, in the absence of valid adequacy or compatibility concerns, NRC's inability to take independent action to resolve a concern or require an agreement state to take action. Thus, NRC's commitment to address and resolve potential safety concerns may be perceived as ineffective.

An existing tracking system other than AMS must be used, or a new tracking system must be developed, to track agreement state wrongdoing and performance allegations. IMPEP teams will use the tracking system information about performance allegations to evaluate agreement state handling of performance concerns referred to the state by NRC.

Criteria for determining whether letter referral should be directed to agreement state senior management, state AG, or IG would have to be developed.

Since in two agreement states (AZ, IL) the RCP Director reports directly to the Governor, referral of AZ and IL agreement state wrongdoing and performance allegations to higher level state management would have to be made to the Governors of those states

In opposition to the views of agreement state RCP Directors, extends the practice of referring agreement state wrongdoing allegations to state officials other than RCP Directors to include performance allegations in some cases.

NRC would not receive notification of an agreement state's resolution of a wrongdoing concern received by NRC and referred to the state for appropriate action.

RESOURCES:

The required OSP level of effort to conduct allegation coordinator responsibilities using current procedures for agreement state related allegations is about 0.25 FTE. This level of resource expenditure is reprogrammed from other budgeted agreement state activities, such as technical assistance to agreement states and agreement state program policy and procedure development. The approach described in Options 1 and 2, with OSP assuming lead responsibility for processing both agreement state wrongdoing and performance allegations, will likely require another 0.25 FTE of effort by OSP to complete allegation coordinator responsibilities. Resources for this additional effort would also have to be reprogrammed from other agreement state program activities. A correspondingly small reduction in regional allegation workload would result, since regions would no longer handle agreement state performance allegations. Similarly, Option 3 would also reduce the regional level of effort, since regions would refer all agreement state performance allegations to OSP. For OSP, Option 3 would require the same level of resource commitment, about 0.25 FTE, that is currently being expended by that office.

COORDINATION

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

RECOMMENDATION

Because the NRC discontinues its regulatory authority to regulate certain radioactive materials in agreement states, concerns over agreement state performance and wrongdoing do not meet the definition of an allegation contained in Management Directive 8.8, Management of Allegations. Given that the NRC has limited authority to require action by an agreement state in the absence of credible information indicating an agreement state RCP may not be adequately protecting public health and safety and the fiscal reductions that NRC is currently undergoing, the staff recommends the Commission approve Option 3.

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[Attachment](#): As stated