



[7590-01-P]

## NUCLEAR REGULATORY COMMISSION

[NRC-2016-0094]

### Agreement State Program Policy Statement

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Revision to policy statement.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has revised and consolidated two policy statements on the NRC's Agreement State Programs: the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" and the "Statement of Principles and Policy for the Agreement State Program." The resulting single policy statement has been revised to add that public health and safety includes physical protection of agreement material<sup>1</sup> and to reflect comments received from Agreement States, individuals, and the Organization of Agreement States (OAS).

**DATES:** This policy statement is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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<sup>1</sup> The term "agreement material" means the materials listed in Subsection 274b. of the Atomic Energy Act of 1954, as amended (AEA), over which the States may receive regulatory authority.

**ADDRESSES:** Please refer to Docket ID NRC-2016-0094 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- **Federal Rulemaking Web Site:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2016-0094. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; e-mail: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "[ADAMS Public Documents](#)" and then select "[Begin Web-based ADAMS Search](#)." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The Agreement State Program Policy Statement, in its entirety, is in the attachment to this document.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Lance Rakovan, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2589, e-mail: [Lance.Rakovan@nrc.gov](mailto:Lance.Rakovan@nrc.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The “Policy Statement on Adequacy and Compatibility of Agreement State Programs” (62 FR 46517; September 3, 1997) presented the NRC’s policy for determining the adequacy and compatibility of Agreement State programs. The “Statement of Principles and Policy for the Agreement State Program” (62 FR 46517; September 3, 1997) described the respective roles and responsibilities of the NRC and the States in the administration of programs carried out under the 274b. State Agreement.<sup>2</sup> The application of these two policy statements has significant influence on the safety and security of agreement material and on the regulation of the more than 20,000 Agreement State and NRC materials licensees, commonly referred to as National Materials Program (NMP) licensees.

The NRC staff’s current efforts to update the Agreement State policy statements began with the Commission’s direction provided in the staff requirements memorandum (SRM) to SECY-10-0105, “Final Rule: Limiting the Quantity of Byproduct Material in a Generally Licensed Device (RIN 3150-AI33),” issued on December 2, 2010 (ADAMS Accession No. ML103360262). The Commission directed the NRC staff to update the Commission’s “Policy Statement on Adequacy and Compatibility of Agreement State Programs” and associated guidance documents to include both safety and source security considerations in the compatibility determination process. Because Agreement State adequacy and compatibility are closely

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<sup>2</sup> Section 274 of the AEA provides a statutory basis under which the NRC discontinues portions of its regulatory authority to license and regulate byproduct materials; source materials; and quantities of special nuclear materials under critical mass. The mechanism for the transfer of the NRC’s authority to a State is an agreement signed by the Governor of the State and the Chairman of the Commission, in accordance with Subsection 274b. of the AEA.

linked to the Integrated Materials Performance Evaluation Program (IMPEP)<sup>3</sup>, which is a key component of the Commission's "Statement of Principles and Policy for the Agreement State Program," both policy statements were revised concurrently. Both policy statements were updated to add that public health and safety includes physical protection of agreement material. Two working groups, composed of NRC staff and Agreement State representatives, developed the revisions to the policy statements. The draft revisions to the two policy statements were provided to the Commission on August 14, 2012 (SECY-12-0112, "Policy Statements on Agreement State Programs" (ADAMS Accession No. ML12110A183)).

The Commission approved publication of the draft revisions to the policy statements for public comment in the revised SRM to SECY-12-0112, dated May 28, 2013 (ADAMS Accession No. ML13148A352). The NRC staff published the two proposed policy statements on June 3, 2013 (78 FR 33122), for a 75-day comment period. After receiving requests from the Organization of Agreement States (OAS) and the State of Florida to extend the public comment period, the NRC extended the comment period to September 16, 2013 (78 FR 50118; August 16, 2013). The NRC held two public meetings (July 18 and August 6, 2013) and a topical session during the OAS annual meeting in Reno, Nevada, on August 28, 2013. The NRC staff specifically solicited comment on Compatibility Category B, and whether or not the policy statements should maintain the language from the 1997 "Policy Statement on Adequacy and Compatibility of Agreement State Programs" describing the adoption and number of compatible regulations.

The NRC staff received 13 submissions from commenters including Agreement States, industry organizations, and individuals. These submissions contained 51 comments on the

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<sup>3</sup> The NRC, in cooperation with the Agreement States, developed the IMPEP to evaluate the adequacy and compatibility of Agreement State programs and the adequacy of the NRC's nuclear materials program activities.

policy statements in general and 45 comments on Compatibility Category B. The need for consistent application and flexible implementation of the NRC's policies was the underlying theme expressed by the Agreement States in the written comments as well as during the public meetings and the OAS topical session. Some commenters provided general remarks and addressed specific sections of the policy statements. Some commenters also expressed concern that the inconsistent use of terms (e.g., material versus agreement material, enhanced security measures versus physical protection of agreement material, and relinquishing the NRC's authority versus discontinuing the authority) could cause confusion. Regarding Compatibility Category B, the comments show a wide variation on the interpretation of the definition of Compatibility Category B. The NRC staff considered the written comments, input from attendees at the two public meetings, and comments received at the OAS topical session and made modifications to the policy statements to ensure terms are used appropriately. The NRC staff's disposition of these comments was presented in a comment resolution table (ADAMS Accession No. ML14073A549) associated with the June 3, 2013, *Federal Register* notice (78 FR 33122).

In COMSECY-14-0028, "Agreement State Program Policy Statements: Update on Recent Activities and Recommendations for Path Forward," dated July 14, 2014 (ADAMS Accession No. ML14156A277), the NRC staff proposed consolidating the two policy statements in a single policy statement. The Commission approved this plan in the SRM to COMSECY-14-0028, dated August 12, 2014 (ADAMS Accession No. ML14224A618). Accordingly, the NRC staff developed a proposed single consolidated policy statement that: identified and eliminated redundant language between the two policy statements, removed detailed information on IMPEP and the "Principles of Good Regulation" (ADAMS Accession No. ML15083A026), added

context to make the proposed policy statement clearer and more consistent with other recent NRC policy statements, and added a description of the NMP.

The Commission approved publication of the proposed consolidated Agreement State Program Policy Statement for public comment in the SRM to SECY-15-0087, dated March 22, 2016 (ADAMS Accession No. ML16082A514). The NRC staff published the proposed Agreement State Program Policy Statement on June 2, 2016 (81 FR 35388), for a 75-day public comment period. The NRC staff also held two public webinars during the comment period. The NRC staff received 31 comments from commenters including Agreement States and the OAS.

The final policy statement is included in its entirety in the attachment to this document.

## **II. Overview of Public Comments**

The 31 comments received in response to the *Federal Register* notice of June 2, 2016 (81 FR 35388), were considered in developing the final policy statement along with 131 comments that were received from the Agreement States when the policy statements were consolidated. The comments generally fell within the following categories: the consolidation of two policy statements and NRC's unilateral decision to consolidate; the definition and description of adequacy and compatibility; the use of "NRC" and "Commission;" the use of the terms "relinquish" authority versus "discontinue" authority; the use of the terms "shall," "will," or "must" versus "should;" the addition of "significant" to "cross jurisdictional;" and deletion of the section on the Principles of Good Regulation. Commenters provided additional comments that did not fall within those categories as well as comments that were out of scope of the Agreement State Program Policy Statement. The NRC staff's disposition of the 162 comments is presented in a comment resolution table (ADAMS Accession No. ML17044A406). The

following sections summarize the comments organized in the categories previously noted, and include the NRC's response to the comments.

A. *Consolidation of two policy statements and the NRC's unilateral decision to consolidate*

*Comment:* Some commenters opposed the consolidation of the two policy statements—the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” and the “Statement of Principles and Policy for the Agreement State Program”—into a single consolidated policy statement citing the following reasons: 1) the statements address unique topics (operational goals of a regulatory program vs. review of a regulatory program); 2) the splitting up and redistribution of the two policy statements' sections result in changes in the emphasis and relationship of both policy statements, both within each policy, and to each other; and 3) there are only five sentences that are common to both policy statements, which is not indicative of a great amount of redundancy. Multiple commenters believed that the NRC made a unilateral decision to combine the two policy statements into a single consolidated policy statement without input from the Agreement State working group members who worked on the individual policies. One commenter stated an expectation for the NRC to involve Agreement State working group members in all aspects of working group projects to ensure that documents adequately address issues of the Agreement States as well as the NRC. Four commenters stated that unilateral action by the NRC damages trust and the relationship between the NRC and the Agreement States. Three of the five commenters cited NRC Management Directive 5.3, “Agreement State Participation in Working Groups” (<https://scp.nrc.gov/procedures.html>) and noted that the combined policy was not cooperatively developed.

*Response:* Two working groups composed of NRC (headquarters and regional) staff and Agreement State representatives developed revisions to these two policy statements. In

COMSECY-14-0028, the NRC staff proposed a plan to consolidate the two policy statements into a single policy statement, while preserving the work already completed by the two working groups to update the separate policy statements. One of the factors leading to the recommendation for a single policy statement was the identification, by the NRC, of redundant language between the two policy statements. The Commission approved this plan in the SRM to COMSECY-14-0028. The NRC staff consolidated the two Agreement State Program policy statements into a single policy statement and removed the IMPEP and Principles of Good Regulation details and redundancies. In 2014, the NRC staff provided the draft consolidated policy statement to Agreement States. Some expressed dissatisfaction over not being more engaged in the decision and process used to propose consolidation of the policy statements. The content revisions that were developed by the two NRC/Agreement State working groups during their work on the two separate policy statements were considered during the development of the consolidated policy statement. Additionally, the final Agreement State Program Policy Statement reflects comments received from the Agreement States subsequent to the consolidation of the two policy statements.

*B. Definition and description of adequacy and compatibility*

*Comment:* Several commenters requested that adequacy and compatibility be better defined throughout the Agreement State Program Policy Statement and that a greater emphasis be placed on public health and safety.

*Response:* Corresponding changes were implemented throughout the Agreement State Program Policy Statement, as appropriate, for consistency with the intent of the AEA. These include revisions in Section C., “Statement of Legislative Intent,” of the policy statement.

C. *Use of “NRC” and “Commission”*

*Comment:* Several commenters recommended replacing “NRC” with “Commission” or vice versa in various sections throughout the policy statement.

*Response:* The definition of “Commission” was added as a footnote in the policy statement to mean the five Commissioners, and the “NRC” indicates the U.S. Nuclear Regulatory Commission as an agency. Corresponding changes were implemented throughout the Agreement State Program Policy Statement.

D. *Use of the terms “relinquish” authority versus “discontinue” authority*

*Comment:* Several commenters stated the use of the word “relinquish”—in the context of the NRC’s regulatory authority when entering into an agreement—is not accurate and recommended changing “relinquish” to “discontinue” throughout the policy statement so the wording is consistent with Section 274b. of the AEA.

*Response:* All instances of the word “relinquish” have either been deleted or replaced with the word “discontinue” throughout the Agreement State Program Policy Statement.

E. *Use of the terms “shall,” “will,” or “must” versus “should”*

*Comment:* Multiple commenters suggest that “shall,” “will,” or “must” should replace “should” or vice versa in various sections throughout the Agreement State Program Policy Statement.

*Response:* Corresponding changes were implemented throughout the Agreement State Program Policy Statement, as appropriate, for consistency with language used in Section 274b. of the AEA or other sections of the policy statement.

*F. Add “significant” to “cross jurisdictional”*

*Comment:* Several commenters suggest that the term “significant” should be added before “cross jurisdictional” for Compatibility Category B program elements.

*Response:* The NRC/Agreement State working group for the revision of the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” carefully considered the use of the term “significant” and concluded that the term was ambiguous and should not be included as part of the description of Compatibility Category B. The term “cross jurisdictional program elements” was chosen to make the description of Compatibility Category B concise and well-defined. No change was made to the Agreement State Program Policy Statement as a result of these comments.

*G. Deletion of Principles of Good Regulation*

*Comment:* A number of commenters recommended the deletion of Section D.1.i, “Principles of Good Regulation,” of the policy statement.

*Response:* The Principles of Good Regulation were initially adopted by the Commission in 1991 to serve as a guide to NRC decisionmaking and employee conduct. In 1997, they were included in the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” and the “Statement of Principles and Policy for the Agreement State Program” and were recognized as part of a common culture that the NRC and Agreement States share as co-regulators. These principles have served as a foundation for good regulation in the NMP and are included in the Agreement State Program Policy Statement to indicate their importance and that they should continue to form the basic building blocks for good regulation in the NMP into the future.

No change was made to the Agreement State Program Policy Statement as a result of these comments.

*H. Category Health and Safety*

*Comment:* A number of commenters noted that Category Health and Safety (H&S) was removed from the policy statement and recommended that Category H&S be included.

*Response:* In the proposed policy statement, Category H&S was removed from Section E.2. "Compatibility." This section of the policy describes the program elements required for compatibility. Program elements required for H&S are not required for compatibility. Section E.1. "Adequacy" of the proposed policy statement was made implicit for Category H&S by indicating that an adequate program includes those program elements necessary to maintain an acceptable level of protection of public health and safety. Because Category H&S is one of six categories (A, B, C, D, NRC, and H&S) that forms the basis for evaluating and classifying NRC program elements, a corresponding edit was implemented in Section E.1. "Adequacy" of the policy statement.

### **III. Procedural Requirements**

*Congressional Review Act Statement*

This final Agreement State Program Policy Statement is a rule as defined in the Congressional Review Act (5 U.S.C. 801-808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

*Paperwork Reduction Act Statement*

This Policy Statement contains voluntary guidance for information collections subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et. seq.). These information collections are mandatory for states seeking to assume or maintain independent regulatory authority under Section 274 of the Atomic Energy Act of 1954, as amended. These information collections were approved by the Office of Management and Budget (OMB), under control number 3150-0183. The estimated annual burden for new Agreement State applications is 2,750 hours, to maintain Agreement State status is 7,600 hours, and to participate in IMPEP reviews is 36 hours. Send comments regarding this information collection to the Information Services Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by e-mail to [Infocollects.Resource@nrc.gov](mailto:Infocollects.Resource@nrc.gov), and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202, (3150-0183) Office of Management and Budget, Washington, DC 20503.

*Public Protection Notification*

The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the document requesting or requiring the collection displays a currently valid OMB control number.

Dated at Rockville, Maryland, this 2nd day of October, 2017.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,  
Secretary for the Commission.

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