

July 21, 1997

SECY-97-156

FOR: The Commissioners

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

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

PURPOSE:

To identify issues for Commission consideration concerning the application of Federal government-wide conflict of interest requirements and NRC's Enforcement Policy on licensee integrity issues to Agreement State Programs.

BACKGROUND:

Allegations of secret cash payments made by the former President of Envirocare of Utah, Inc., to the former Director of the Utah Bureau of Radiation (Bureau) have raised questions concerning Agreement State program consideration of "integrity" issues. For purposes of this paper, integrity issues are a broad category of concerns that includes wrongdoing by Agreement State officials and Agreement State licensees. A Natural Resources Defense Council (NRDC) February 21, 1997 letter to the Commission requested Commission review of the staff's denial of the petition filed by NRDC under 10 CFR 2.206 concerning the appropriateness of the relationship between the two individuals. In its letter, NRDC argued that the actions by the former Director of the Utah Bureau of Radiation violated NRC's 10 CFR Part 0 regulations (Conduct of Employees) and thus the Utah Agreement State program is not compatible with NRC's program. The NRC staff response to NRDC stated that Agreement States are currently not required to have conflict of interest regulations

CONTACT: Spiros Droggitis, OSP
415-2367

equivalent to those in 10 CFR Part 0¹ to be compatible with NRC's program or in order to have an adequate regulatory program. However, NRDC's questions raised the general issues of the appropriate scope of NRC review, if any, of the integrity of Agreement State officials and whether NRC should establish guidance on the handling of integrity concerns associated with Agreement State employees. In addition, the situation in Utah has raised the question of whether Agreement States should be required, as a matter of compatibility, to establish and implement an enforcement policy similar to that of the NRC concerning licensee integrity issues (e.g., licensee wrongdoing).

DISCUSSION:

The controversy surrounding the relationship between the former Envirocare President and the former Bureau Director currently is being investigated by the Federal Bureau of Investigation (FBI). Upon learning of the issue, the staff conducted an evaluation of the previous Utah program review in which Utah was found to be adequate and compatible to determine if the results of that review remained valid in light of the extortion/bribery allegations. Staff concluded that no current adequacy or compatibility concerns have resulted from the alleged conduct of the former Bureau Director. Staff also was informed by the current Director, Division of Radiation Control, Utah Department of Health, that the State was conducting a complete re-evaluation of the Utah Envirocare license as it proceeds with the license renewal review. Thus on this basis, and only with the continued absence of new information identifying adequacy or compatibility concerns, the staff will await the completion of the FBI investigation prior to taking any further special action in reviewing Utah's performance.

However, the situation in Utah has identified some programmatic issues which need to be considered and addressed. As a result, the staff has identified the following issues for Commission consideration:

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?

NRC's ethics requirements are based on government-wide statutes and regulations which apply uniformly to all Federal employees. The Standards of Conduct regulations, which the NRC enforces, are not adopted pursuant to any authority of the AEA, but are executive branch wide standards issued by the Office of Government Ethics on the basis of Executive Order 12731

¹ On April 4, 1997, the NRC amended its regulations to remove the last remaining provisions concerning the "Conduct of Employees" from the Code of Federal Regulations. This part of the Commission's regulations has been superseded by executive branch-wide regulations issued by the Office of Government Ethics (5 CFR Parts 2634-2635).

and such statutes as 18 USC §§202-209 and the Ethics in Government Act of 1978 (5 USC app.).

The Agreement State program is premised on the discontinuance of the Commission's authority in Chapters 6, 7 and 8 and Section 161 of the AEA, and except with respect to 11e.(2) byproduct material which specifically requires certain procedural elements in an Agreement State program, is premised upon a finding that the State's program is adequate to protect the public health and safety with respect to the covered materials and is compatible with the Commission's program for regulation of such materials. Thus, the Commission may only consider matters related to an Agreement State's ethics program or conflict of interest rules where it has found that a nexus exists between such rules and a radiological safety issue being addressed within the authority of Chapters 6, 7, 8 and section 161 of the AEA, which has devolved to the State. The burden on the NRC to demonstrate such a connection would be particularly high if NRC sought to require every Agreement State to adopt particular ethics rules or legal requirements on a generic basis.

Agreement States are currently not required by NRC to have standards of conduct regulations at all, let alone, equivalent to those required of Federal employees to be compatible with NRC's program. Nor are Agreement States required by NRC to have regulations or policies that address conflict of interest issues. Prior to the initiation of the Integrated Materials Performance Evaluation Program (IMPEP), the staff, using a prescriptive approach to conduct Agreement State program reviews, did evaluate a State's administrative procedures, including conflict of interest. In most cases, the administrative rules (e.g., rulemaking requirements, hearing procedures and conflict of interest requirements) that a radiation control program must follow are dictated by the State's administrative laws applicable to all agencies in that State. Accordingly, as a general matter, NRC has not required an Agreement State radiation control program to adopt administrative requirements that differ from those required by the State's administrative law system.

While no specific evaluation criteria were utilized, NRC did review whether an Agreement State had administrative procedures that addressed employee conflict of interest.² However, the previous Agreement State program review approach would not have found an Agreement State inadequate or incompatible if conflict of interest provisions were not included in an Agreement State program. While no systematic review of Agreement State codes of conduct or ethics regulations is conducted under IMPEP, if the NRC receives information or determines that a particular State's administrative rules (e.g., conflict of interest restrictions) may adversely affect, or are insufficient to assure, radiation safety in that State, NRC will raise such issues with the State and resolve them. For example, during the 1994 review of the Utah radiation control program, NRC conducted an in-depth evaluation of potential conflicts of interest by Utah licensees who are members of the Utah Radiation Control Board (RCB). NRC recommended to the State that it revise the RCB formal conflict of interest procedures in coordination with the State's Attorney General's office concerning membership and participation in Board activities. As a result, the State adopted conflict of interest procedures consistent with those of similar boards within the Utah Department of Environmental Quality.

² See, "NRC Review of Agreement State Radiation Control Programs; Final General Statement of Policy," 57 FR 22495, 22500 (May 28, 1992).

Staff preliminary proposal:

The new "Policy Statement on Adequacy and Compatibility of Agreement State Programs" was approved by the Commission on June 30, 1997 (SECY-97-054). Under that new policy, a State's conflict of interest rules do not implicate any compatibility concerns because they relate solely to issues involving internal personnel matters (which may have regulatory significance, other than program compatibility, in some cases) in an Agreement State. Such rules are unlikely to create gaps, conflicts, or disruptive duplication in the national collective effort to regulate AEA material. As such, the staff views any conflict of interest issues that may arise as relevant to the adequacy of an Agreement State's program rather than compatibility. As stated above, NRC has generally not required a radiation control program to adopt administrative requirements (e.g., rulemaking requirements, hearing procedures and conflict of interest requirements) that are not promulgated pursuant to the Atomic Energy Act and are dictated by the State's own administrative laws. The staff believes this position is prudent and does not propose altering it. However, the staff believes that in appropriate cases the nexus can be drawn between protection of the public health and safety and a State's approach to employee standards of conduct and proposes to continue to address conflict of interest issues as they arise on a case by case basis.

Staff believes that most, if not all, Agreement States are subject to individual State conflict of interest laws and regulations and plans to contact the Agreement State programs to confirm this understanding. If concerns are identified in the future that suggest the need for additional NRC review of Agreement State conflict of interest issues, the staff will raise these matters to the Commission for further consideration.

ISSUE 2:

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

Occasionally, NRC receives allegations involving potential wrongdoing by Agreement State officials. When received, these allegations are entered into the Allegation Tracking System and reviewed by a special Allegations Review Board (ARB) chaired by the Director, Office of State Programs. Actions considered available to the ARB are: no action; referral to Agreement State program upper level management within the State; referral to the State Attorney General or Inspector General; and, after Commission consultation, referral to the Governor of the State or conduct of an investigation by NRC's Office of Investigations. Most such allegations are referred to the State Attorney General or Inspector General. Normally, NRC will request a response addressing the resolution of the matter from the State agency to which the issue was referred.

Staff preliminary proposal:

Staff does have a process that partly addresses handling of allegations concerning potential wrongdoing by Agreement State officials. However, other than to assess the response from State authorities to which NRC has referred potential wrongdoing allegations, there is currently no staff guidance on the subsequent NRC handling of integrity or wrongdoing concerns, once established, associated with Agreement State employees. Except in very infrequent, exceptional cases, the staff does not believe that NRC itself should conduct investigations of Agreement State employee integrity issues nor does it plan to review individual integrity questions under IMPEP. However, if integrity concerns have been identified and established, NRC staff preliminarily recommends that guidance be developed which would ask essentially two questions:

- 1) Does the integrity issue have, or 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?

The guidance would recognize that in many cases the appropriate action will be referral to an appropriate State or Federal agency, if that referral has not already been accomplished. The guidance will identify steps to take 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. For such cases, staff plans to include a recommendation that, after consultation with the Commission, the concern be conveyed to a high level Agreement State program departmental manager, or possibly the Governor, in the most significant or sensitive instances.

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.

In 1991, the Commission adopted the "wrongdoer rule" which established regulations to (1) revise procedures for issuing orders to include persons not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction, (2) identify the types of Commission orders to which hearing rights attach, and (3) put licensed and unlicensed persons on notice that they may be subject to enforcement action for deliberate misconduct that causes, or but for detection, would have caused a licensee to be in violation of any of the Commission's requirements, or for deliberately providing, to the NRC, a licensee, or contractor, information which is incomplete or inaccurate in some respect material to the NRC (56 FR 40664). These rules established procedures to be used in issuing orders to licensed and unlicensed persons to

provide reasonable assurance that licensed activities are conducted in a manner that will protect public health and safety.

According to NRC enforcement guidance, NRC also may take enforcement action against a licensee that may impact an individual, where the conduct of the individual places in question the NRC's reasonable assurance that licensed activities will be properly conducted. The NRC may take enforcement action for reasons that would warrant refusal to issue a license requested by an original application. Accordingly, appropriate enforcement actions may be taken regarding matters that raise issues of integrity, competence, fitness-for-duty, or other matters that may not necessarily be a violation of specific Commission requirements.

Staff preliminary proposal:

At the time of adoption, the Commission did not make the wrongdoer rule and the supporting enforcement guidance a matter of Agreement State compatibility. The compatibility category of all NRC regulations has been recently reassessed in accordance with the final Adequacy and Compatibility policy documented in SECY-97-054. This paper endorsed the rule compatibility recommendations of the Adequacy and Compatibility Working Group in its "Supplemental Report of the Joint NRC-Agreement State Working Group for Development of Implementing Procedures for the Final Policy Statement on Adequacy and Compatibility of Agreement State Programs," dated January 29, 1997.

Staff requested re-evaluation of the compatibility category of 10 CFR Parts 30.10, 40.10, and 70.10 by the Working Group.³ The majority of the Working Group members support changing the designation for the wrongdoing requirements from a proposed compatibility category D, not required, to a compatibility category C, and retaining wrongdoing procedures as a compatibility category C. Under Category C, Agreement States would have to adopt a legal requirement and procedures that meet the essential objectives of these NRC provisions. The Working Group concluded that wrongdoing issues should be a matter of compatibility because of its potential transboundary significance and potential gap that might be created between the NRC and Agreement State Programs, if deliberate misconduct and wrongdoing issues involving Agreement State licensees were not pursued and closed. For example, an Agreement State licensee determined to have carried out activities involving misconduct in an Agreement State's jurisdiction, if not properly handled, could potentially carry out the same misconduct in NRC or another Agreement State's jurisdiction under reciprocity without any specific legal prohibition. The staff agrees with the suggested revision to the wrongdoing requirements compatibility categorization.

To satisfy the Category C designation, the State could address this area either in statutes, regulations, or another form of a legally binding requirement (LBR). Therefore, identifying that States need to adopt the essential objectives of the NRC's wrongdoing requirements would assure that each State had a legal requirement giving the program authority to take actions

³ In the staff requirements memorandum dated June 30, 1997, the Commission noted that the compatibility assignments for 10 CFR 30.10, 40.10 and 70.10 in SECY-97-054 were inconsistent.

against licensed and unlicensed persons. This legal requirement would also provide a basis for the implementing procedures. In addition, requiring Agreement States to adopt compatible rules or LBRs would provide greater assurance that States adequately address this area and would help assure greater consistency in the nationwide program for the regulation of Agreement materials.

COORDINATION:

The Office of the General Counsel has no legal objection to this paper.

RECOMMENDATION:

Staff recommends that the preliminary recommendations from this paper be summarized and transmitted to the Agreement States, and be made available to the public for review and comment. After receipt and resolution of comments, staff will submit final recommendations to the Commission for review and approval.

L. Joseph Callan
Executive Director
for Operations