

March 24, 2008

SUMMARY OF COMMENTS ON SA-107, "REVIEWING NON-COMMON PERFORMANCE INDICATOR COMPATIBILITY REQUIREMENTS"

I. Sent to the Agreement States for Comment: August 3, 2007 (FSME-07-079)

Comments/Dated: Illinois - 9/28/07 (e-mail received)
Organization of Agreement States (OAS) - 10/8/07 (e-mail received)

Illinois:

Comment 1:

Illinois agrees with the comments made by the OAS Executive Board regarding NRC's responsibility to maintain compatibility with the Agreement States as well. This has to be a concept that is mutual to all entities involved in the development of regulations.

Response:

See response to OAS Comment 1. No changes will be made to the procedure based on this comment.

Comment 2:

Likewise, OAS noted that compatibly with items outside of the regulatory process such as IC orders, NMED, incident and allegation investigations also need to be addressed in this document. It is apparent that we have always been evaluated against these and will continue to be so, especially now that IC's are in the forefront of the regulatory process. General licensing is now in the IC limelight as well and how this will be evaluated under IMPEP, especially considering that much of the GL rule is still held in abeyance, must be addressed.

Response:

See response to OAS Comment 5. No changes will be made to the procedure based on this comment.

Comment 3:

In section C.3, 'Findings', States should be found compatible if they have imposed more restrictive requirements in some areas regardless of the compatibility category. If a State feels compelled through a history in their jurisdiction to implement and enforce certain aspects of the rules to a higher standard for health and safety reasons, that practice must certainly be allowed. Many of the current regulations were developed through practices in Agreement States, and this process should not be stifled by SA-107.

Response:

We appreciate the comment, however the final determination of whether an Agreement State's program is compatible and adequate will be a Management Review Board decision per SA-106, *Management Review Board*. Specific requirements that do not meet the compatibility or health and safety designations will be considered and factored into the overall finding for the program. No changes will be made to the procedure based on this comment.

Comment 4:

Finally, the source serialization rules (Rats 2006-2) were not listed in the Appendix. These have been published for some time and should be included since these are critical for source accountability.

Response:

We agreed with this comment, and the procedure was revised accordingly to include all changes current as of February 2008.

Organization of Agreement States (OAS)

Comment 1:

Section II and III and V.A.3.a. seem to present the NRC view that compatibility is a one-way street not just that determination of compatibility is a one-way street. I think our signed Agreements present a two-way street view that must be described in one of these two sections.

Response:

We appreciate the comment, however this procedure contains the guidance for the review of compatibility requirements during IMPEP reviews which occurs after compatibility and health and safety designations for specific program elements have been determined by the Commission in accordance with the Commission Policy Statement on Adequacy and Compatibility. The participation of Agreement States in compatibility and health and safety determinations for program elements is covered by the Management Directive 5.9, *Adequacy and Compatibility of Agreement State Programs* and SA-200, *Compatibility Categories and Health & Safety Identification for NRC Regulations and Other Program Elements*. These two documents are listed as references to this procedure. Therefore, this comment is outside the scope of this procedure. No changes will be made to the procedure based on this comment.

Comment 2:

Section V.A.3.b. uses the word “met” but to have verb tense consistency I think it should use “meet”.

Response:

See response to the Office of the General Counsel (OGC) Comment 2. This section has been revised.

Comment 3:

Appendix A, page 2, second bullet; delete the “m” at the beginning.

Response:

We agreed with this comment, and the procedure was revised accordingly.

Comment 4:

There is not a single word of guidance regarding compatibility items held in abeyance while the NRC is resolving issues where one or more States have disagreed with an NRC interpretation or implementation of a requirement.

Response:

We appreciate the comment, however only three legally binding requirements (quality management program in 1997, general licensing requirements in 2005 and the two person rule in radiography in 2005) have been held in abeyance since the 1997 Commission policy. (By definition, "abeyance" means "the condition of being temporarily set aside or suspended.") In each of these instances, specific guidance was developed and sent to the Agreement States and the IMPEP review teams. We revised Appendix B to include the following additional FAQ to discuss compatibility items held in abeyance, but do not believe it is necessary to include any additional information in the procedure at this time.

- Q. What does it mean for both the Agreement State and the review team when a regulation is being held in abeyance?
- A. If a regulation is being held in abeyance, specific guidance will be provided to both the Agreement States and review teams as to the manner in which the Agreement States' regulations are to be factored into the IMPEP review findings. As of 2008, only three regulations have been held in abeyance, that is temporarily set aside. In these three cases, NRC staff continued to review Agreement State proposed and final rules but held any compatibility determination in abeyance on those rules if the Agreement State's rules meet the essential elements of the NRC's rule, even if the Agreement State's rules were more restrictive than the NRC's rule. For Agreement States without a rule or with a rule less restrictive than the NRC's rules, the staff factored this determination into results of the NRC's review of the State's proposed and final rules and the compatibility findings during IMPEP reviews.

Comment 5:

There is no guidance regarding anything other than NRC statues and regulations although the next to last bullet in Appendix A list a specific Order. We know that Orders are considered by NRC in both adequacy and compatibility for program elements. Also, NMED reporting, IC requirements, fingerprinting, and certain "pre-licensing guidance" items seem to be getting into the realm of compatibility or adequacy. If that is the case, then this document should cover those situations.

Response:

We appreciate the comment, however this procedure specifies in Section IV that the principal reviewer reviews State legislation and regulations, program elements and other generic legally binding requirements (including orders and license conditions). Program elements are discussed and specifically listed in SA-200, *Compatibility Categories and Health & Safety Identification for NRC Regulations and Other Program Elements* as referenced in SA-107. We believe that it is unnecessary to include additional discussion since these elements are included in the SA-107 procedure. As new program items are identified, these items will be included in the revisions to SA-200. No changes will be made to the procedure based on this comment.

II. Sent to the NRC Offices for Comment: August 3, 2007

Comments/Dated: Region I - 8/20/07 (e-mail)

Region IV - 8/23/07 (e-mail - no comments)
OGC - 9/21/06 (mark-up)
DILR, FSME - 8/27/07 (mark-up - edits)
DWMEP, FSME - 8/13/07 (e-mail)

Region 1:

Comment 1:

We have no comments on the subject revision, only editorial. Appendix A, page 4, needs a page no. and a header, Appendix A (Continued). Also page 2 of Appendix B needs a page no. and a header, Appendix B (Continued).

Response:

We agreed with this comment, and the procedure was revised accordingly.

Office of the General Counsel (OGC):

Comment 1:

Page 2. Section IV.B.1. Insert "orders and" after the "including" in the phrase (including license conditions).

Response:

We agreed with this comment, and the procedure was revised accordingly.

Comment 2:

Page 3. Section V.A.3.a. The following sentence is incorrect and should be deleted:

Because each Agreement State possesses detailed knowledge of its own requirements, Agreement States are best able to determine that their regulations or other generic legally binding requirements are compatible with NRC regulations and where there are significant differences that could affect compatibility.

The staff should insert the following sentence:

Regulations will be reviewed by NRC in accordance with FSME Procedure SA-201, *Review of State Regulatory Requirements*.

Response:

We agreed with this comment, and the procedure was revised accordingly.

Comment 3:

Page 3. Section V.A.3.b. The paragraph is incorrect and should be deleted. The following paragraph should be inserted:

Regulations designated as necessary for health and safety will be reviewed by NRC in accordance with FSME Procedure SA-201, *Review of State Regulatory Requirements*.

Response:

We agreed with this comment, and the procedure was revised accordingly.

Comment 4:

Page 4. Section V.C.2. Insert “legally binding requirements” after “regulations” in the first line.

Response:

We agreed with this comment, and the procedure was revised accordingly.

Comment 5:

Page 5. Section V.C.3.a.ii. Move the explanation for “essential regulations” from Section V.C.3.b.iii. into Section V.C.3.a.ii. where is first mentioned and delete Section V.C.3.b.iii.

Response:

We agreed with this comment, and the procedure was revised accordingly.

Comment 6:

Page 5. Section V.C.3.a.ii. 1. Suggest the following clarifying point:

For example, the adoption of the “Transportation Requirements,” Part 71 is more significant than “Minor Corrections, Clarifying Changes, and a Minor Policy Change,” 10 CFR Parts 20, 32, 35, 36, and 39 amendments. ~~and the~~ **The State has postponed adoption of the less significant rule in order to speed adoption of the more significant regulation.**

Response:

We agreed with this comment, and the procedure was revised accordingly.

Comment 7:

Page 6. Section V.C.3.b.i. 1. Consider using different examples, such as the IC requirements and the Medical rules than those in Section V.C.3.a.ii. 1.

Response:

We agreed with this comment, and the procedure was revised accordingly.

Comment 8:

Page 7. Section V.C.3.c.i. Consider the following language to be added to this paragraph for those instances where there are less than ten regulations overdue:

There may be some circumstances that the review team will recommend an unsatisfactory finding for the State’s failure to adopt fewer than 10 regulations.

Response:

We appreciate the comment, however we believe that the existing discussion has the flexibility for the review team to take into account special circumstances under which the failure to adopt a smaller number off significant legally binding requirements could lead to a finding of unsatisfactory. No changes will be made to the procedure based on this comment.

Comment 9:

Page 8. Section V.D.4. Make the following changes:

The State has existing legally enforceable measures in place such as ~~generally~~ applicable rules, license provisions, **orders**, or other appropriate measures, necessary to allow the State to ensure adequate protection of public health and safety in the regulation of agreement material.

Response:

We agreed with this comment, and the procedure was revised accordingly.

Comment 10:

Last page of FAQs. In the following sentence, replace “revision” with “adoption.”

Minor revisions and clarifications to Category A or B regulations are normally not considered as critical as the initial **adoption**~~revision~~ to the regulations.

Response:

We appreciate the comment, however we believe that the word “adoption” changes the original meaning of the sentence. No changes will be made to the procedure based on this comment.

Division of Waste Management and Environmental Protection (DWMEP), FSME

Comment 1:

DWMEP reviewed the draft revised FSME Procedure SA-107, "Reviewing Non-Common Performance Indicator Compatibility Requirements", dated 08/03/07. DWMEP has the following comments:

- (1) Appendix A, page 2, second item from the top - recommend that you delete 'm'
- (2) Appendix B, page 2 - recommend that you number the page and replace 'had promulgate' to 'promulgated'

Response:

We agreed with this comment, and the procedure was revised accordingly.

Division of Intergovernmental Liaison and Rulemaking (DILR), FSME

Comment 1:

DILR provided several edits to the procedure.

Response:

We agreed with the some of the edits, and the procedure was revised accordingly to the agency's editorial style and consistent with the FSME procedures.