

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Cooperation With States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Final policy statement.

SUMMARY: The Nuclear Regulatory Commission (NRC) believes that the agency's mission to protect the public health and safety and the environment can best be served by a policy of cooperation with State governments which unites the common goals of the NRC and the States. In accordance with this policy statement, the NRC will keep Governor-appointed State Liaison Officers routinely informed on matters of interest to the States, and NRC will respond in a timely manner to State requests for information and State recommendations concerning matters within NRC's regulatory jurisdiction. If requested, the NRC will routinely inform State Liaison Officers of public meetings between the NRC and its licensees and applicants, in order that State representatives may attend as observers, and NRC will allow State observation of NRC inspection activities. The NRC will consider State proposals to enter into instruments of cooperation for State participation in NRC inspection activities when these programs have provisions to ensure close cooperation with NRC. The NRC will not consider State proposals for instruments of cooperation to conduct inspection programs of NRC-regulated activities without close cooperation with, and oversight by, the NRC. This policy statement is intended to provide a uniform basis for NRC/State cooperation as it relates to the regulatory oversight of commercial nuclear power plants and other nuclear production or utilization facilities. Instruments of cooperation between the NRC and the States, approved prior to the effective date of this policy

statement will continue to be honored by the NRC.

EFFECTIVE DATE: February 22, 1989.

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SUPPLEMENTARY INFORMATION:

I. Background

The Atomic Energy Act of 1954 (the Act) was amended in 1959 to add section 274, "Cooperation With States." Section 274 of the Act provides the statutory basis for NRC/State cooperation in nuclear matters and prescribes the framework for State regulation of certain nuclear materials. The focus of section 274 is primarily on protecting the public from radiological hazards of source, byproduct, and special nuclear materials below critical mass. Under section 274, the Federal Government, primarily NRC, is assigned exclusive authority and responsibility to regulate the radiological and national security aspects of the construction and operation of any nuclear production or utilization facility, except for certain authority over air emissions later granted to States by the Clean Air Act.

The NRC has had extensive formal and informal interaction with the States throughout its history. The Agreement State Program, under section 274b of the Act, is an example of a formal program where the NRC relinquishes its regulatory authority over certain radioactive materials to the States. There are currently 29 Agreement States regulating approximately 65 percent of those licensees nationwide that use or manufacture those types of radioactive material. The Agreement State Program operates under two Commission Policy Statements, one for entering into section 274b agreements and one for periodically reviewing Agreement State radiation control programs for adequacy in protecting public health and safety and for compatibility with NRC programs. This policy statement supports continuation of the Agreement State Program and is not meant to affect it.

This policy statement is not intended to affect rights to notice and to participate in hearings granted to States by statute or NRC regulations.

Under 10 CFR Part 9, Subpart D, the NRC has provided procedures for handling requests for an NRC representative to participate or provide information in judicial or quasi-judicial proceedings conducted by States or other courts and agencies. This policy

statement supports these procedures and does not affect them.

Under 10 CFR 50.55a, the NRC has recognized the role of the States within the American Society of Mechanical Engineers' Boiler and Pressure Vessel Code (ASME Code) System. This policy statement does not affect the State and NRC relationship as laid out in the ASME Code.

The State Liaison Officer Program, established in 1976, provides a focal point in each of the 50 States and the Commonwealth of Puerto Rico for communication between NRC and the States. The Governor-appointed State Liaison Officer is intended to be the principal person in the State to keep the Governor informed of nuclear regulatory matters of interest to the Governor, to keep other State officials informed of these matters, and to respond to NRC inquiries.

Other areas in which NRC and States have worked together include environmental monitoring around the premises of nuclear power plant facilities and participation in the Conference of Radiation Control Program Directors, Inc., which addresses radiological health in areas such as diagnostic and therapeutic X-rays, radioactive materials, and other related activities.

Under subsection 274i of the Act, the Commission is authorized, in carrying out its licensing and regulatory responsibilities to enter into a Memorandum of Understanding (MOU) with any State to perform inspections or other functions on a cooperative basis as the NRC deems appropriate. According to the legislative history of section 274, subsection 274i clarifies the Commission's existing authority under subsection 161f which enables the NRC to obtain the services of State personnel to perform functions on its behalf as may be desirable.

NRC has entered into MOUs with several States under subsection 274i of the Act. MOUs have helped to facilitate environmental review during construction of nuclear power plants. At one point, there was a perceived need to broaden the basis for formal cooperative instruments with States under subsection 274i beyond that of water quality MOUs. As a result, general or "umbrella" MOUs were negotiated, with subagreements on specific issues such as low-level waste package and transport inspections. Two unique agreements were negotiated with Oregon; one concerning the sharing of proprietary information regarding the Trojan facility and the other covering coordination of the State and NRC

resident inspector programs at Trojan. Additionally, the NRC has documented the protocol that States must follow to be permitted to observe certain NRC activities in "letter agreements."

In recent years, States have taken the initiative to monitor more closely commercial nuclear power plants and other nuclear production or utilization facilities within, and adjacent to, their State boundaries by becoming better informed and, in some cases, more involved in activities related to the regulation and operation of those facilities. It was this increased interest by States to become more actively involved in NRC activities that caused the NRC to re-examine those agreements previously negotiated with States and to determine a uniform policy for how further State proposals should be handled. In developing this policy statement to be used to respond to future State proposals, the Commission, recognizing that the regulatory responsibilities assigned exclusively to the NRC by the Act cannot be delegated, has considered: (1) Those activities it deems appropriate for States to conduct on a cooperative basis and are desirable for State personnel to perform on behalf of the NRC; and (2) its oversight responsibility to ensure that NRC standards, regulations, and procedures are met where State representatives carry out NRC functions. Further, it is the Commission's intention to provide uniformity in its handling of State requests.

II. Summary of Comments and NRC Response

On June 13, 1988, the Commission's Policy Statement on Cooperation with States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities was published in the *Federal Register* for public comment (53 FR 21981.) The comment period expired July 13, 1988. In the *Federal Register* notice, the Commission stated that the "proposed policy will be followed in the interim, except for those paragraphs in the policy statement and Implementation section dealing with State proposals for instruments of cooperation for participation in inspections and inspection entrance and exit meetings. The Commission will not act on these specific types of State-proposed instruments of cooperation until the comment period expires and the policy statement is published as a final policy statement."

The NRC received 28 letters of comment; fourteen from members and representatives of the nuclear power industry, including electric utilities and their counsel, thirteen from various

State offices and one from a public interest group.

State Comments

Most of the State offices expressed support for the NRC's policy "to cooperate fully with State governments as they seek to respond to the expectations of their citizens that their health and safety be protected and that there be minimal impact on the environment as a result of activities licensed by the NRC." In the opinion of these States, the NRC policy statement would, among other things, enable the NRC to maintain uniformity in its relations with all the States, strengthen Federal-State cooperation, reduce duplication of effort, encourage the development of a unified NRC/State position on matters of joint concern, avoid the perception of dual regulation and improve nuclear safety. By giving "host" States, i.e., States in which an NRC licensed facility is located, a greater opportunity to participate with NRC in matters involving the use of radioactive materials, including the use of those materials in nuclear power reactors located within the State, States would become better informed about the day-to-day activities of NRC licensees. With the opening of these avenues of communication, NRC licensees would be made more aware of State concerns in related areas.

Two States stated that they are prepared to enter into a joint inspection program with NRC at this time. One State expressed no immediate interest but indicated that it might wish to participate in such a program in the future. This State was supportive of the six conditions specified in the Policy Statement as prerequisites to State participation in NRC inspections and inspection entrance and exit meetings in accordance with the provisions of an instrument of cooperation entered into with NRC. One State indicated that it would appreciate routine notification of NRC inspection activities and public meetings affecting the State. One State supported, while another State opposed, independent State inspections of federally regulated facilities. The stated reasons for opposing such inspections were that they would confuse the regulated sector and would require the expenditure of scarce State resources in an area in which there is already adequate Federal enforcement. Noting the possible difficulty of securing needed funds for such inspections, one State recommended that the policy statement include suggested means of funding State inspections.

Noting that State needs for interaction with NRC are especially important in

areas which are substantially affected by NRC actions but for which the State has central responsibility (e.g., rate-making,¹ emergency preparedness, environmental protection) several States expressed concern regarding the extent to which their differing needs and responsibilities would be accommodated under the NRC policy. Some States expressed the view that because of differing nature of State responsibilities, States might find it difficult to qualify for a Federal/State instrument of cooperation. One State suggested that the policy statement affirmatively recognize "the value of cooperation between the NRC and the States in areas where there is mutual interest but differing goals and responsibilities." Another State suggested that State representatives should be permitted to participate as observers in NRC enforcement, policy, exit or other meetings whenever the matters addressed involve issues of concern to the State.

Several States objected to that portion of the policy statement which would channel all communication between NRC and a State through the State Liaison Officer on the grounds that this procedure is too restrictive. Noting the needs of various State agencies to maintain a continuing relationship and ongoing dialogue with NRC, these States recommended that the policy statement be modified to allow for more than one State contact.

The comments submitted by the Oregon Department of Energy reflect Oregon's experience in implementing the provisions of a 1979 State law requiring the presence of a State inspector at the site of the Trojan Nuclear Facility in accordance with the provisions of an agreement relating to resident inspectors entered into between NRC and the Oregon Department of Energy (ODOE) in January 1980. Pursuant to these arrangements, ODOE participates in many of NRC's regulatory activities at Trojan. Based on its experience over the past eight years, ODOE is of the opinion that "personal interaction with plant staff is essential in gaining the information needed to accurately assess and influence plant safety." According to ODOE, this experience demonstrates that State and NRC regulatory programs can be complementary without being

¹ For example, for nine years the New York Public Service Commission has had staff located at the Nine Mile Point site and until recently at Shoreham for the purpose of construction monitoring in order to evaluate the reasonableness of construction costs that directly affect base rates as well as operation and maintenance expenses.

duplicative and that State-Federal interaction on plant safety issues has been very productive. In its comments, ODOE also states:

There have been no instances where Oregon has misinterpreted NRC safety requirements. Oregon regulators have never redirected the licensee's attention to areas not consistent with NRC safety priorities. And our agreement with the NRC prevents such problems from occurring. It states: "If ODOE finds it necessary to direct the operators of Trojan to take action, ODOE shall obtain NRC's prior agreement that such action does not have an adverse effect on plant or public safety."

Expressing appreciation of NRC's cooperative approach to Oregon's regulatory program and noting that Oregon has worked hard to build and maintain public confidence that State and Federal regulatory programs assure safe operations at Trojan, ODOE expressed its belief that this relationship has benefited NRC and that dilution of the State's regulatory role to the level in the draft policy statement would not be in the best interest of the public.

Citing concerns relating to the operation of the Peach Bottom nuclear power reactor, located in Pennsylvania only three miles north of the Maryland-Pennsylvania border, Maryland expressed the view that the benefits accorded States under the policy statement should not be limited to "host" States, but should also be extended to all States within ten miles of a nuclear power plant.

One State expressed general concern with the provision in the policy statement which would require States, as a condition of entering into an instrument of cooperation with NRC for the purpose of State participation in inspections and inspection entrance and exit meetings, to recognize "the Federal Government, primarily NRC, as having the exclusive authority and responsibility to regulate the radiological and national security aspects of the construction and operation of nuclear production or utilization facilities, except for certain authority over air emissions granted to States by the Clean Air Act." (53 FR 21982, June 13, 1988.) This State declared that it "will not concede that the federal government has unqualified and unspecified authority over these matters where public health, safety and environmental concerns are at risk." Noting that in 1985 it had entered into an agreement² with NRC Region V which

established a mutually acceptable procedure for the exchange of information concerning maintenance, engineering, quality assurance, security, emergency planning and operation of nuclear power plants located in the State, this State stated that it "will review the final policy statement adopted by the Commission to propose changes in the existing agreement which may be mutually productive."

Several States questioned the need to require State programs carried out under an instrument of cooperation to specify "minimum education, experience, training, and qualification requirements for State representatives which are patterned after those of NRC inspectors." In the opinion of some States, the standard of knowledge and training appropriate for State observers need not be as stringent as that for State inspectors. Other States expressed the view that the training and educational requirements applicable to Federal and State personnel need not be identical but should instead bear some reasonable relationship to the differing jurisdictional responsibilities of the Federal government and the States. One State questioned the provisions of the policy statement characterizing qualified State representatives as those "knowledgeable in radiological health and safety matters." This State pointed out that "[i]f the intent of this definition is to exclude persons from disciplines other than radiological health and safety, it will unreasonably limit state involvement * * *" and that "[t]his narrow a definition would contradict the spirit, if not the intent, of the objective of furthering federal/state cooperation."

In addition, the State commenters recommended that the policy statement be revised in the following respects:

- The policy statement should recognize the unique and diverse communication needs of various State agencies and allow for more than one State contact.

- The policy statement should affirmatively recognize the value of cooperation between NRC and the States in areas where there is mutual interest but differing goals and responsibilities.

- The policy statement should be broadened to recognize the States' needs for interaction with the NRC in areas central to State responsibilities, but substantially affected by NRC actions.

- The second paragraph of the Implementation section should be revised by inserting the following sentence between the fifth and sixth sentences in that paragraph: "After a positive assessment, State inspectors' inspections may be conducted

individually and would be coordinated with the NRC resident inspector."

- The policy statement should be revised to accord all States located within ten miles³ of a commercial nuclear power reactor the same rights and responsibilities accorded to the State in which the reactor is sited.

- The policy statement should include suggested means by which a State could obtain funding for its inspection program.

Public Interest Group Comments

The comments from the public interest group expressed support for the policy statement because it offers some important opportunities for State involvement in the protection of the health and safety of citizens and commended the NRC for taking the initiative in pursuing cooperation with States.

Industry Comments

Fourteen comments were received from representatives of the nuclear power industry, including one from a major industry organization, two from legal counsel on behalf of fifteen electric utilities holding NRC operating licenses for nuclear power plants, and eleven from individual electric utilities holding NRC operating licenses; three of the latter were also included in the group of electric utilities represented by legal counsel.

For the most part, the industry commenters acknowledged the legitimate concerns of the States in being kept well-informed of NRC's activities with respect to the regulation of commercial nuclear power plants. The industry commenters also expressed general support for the Commission's overall goal of promoting and enhancing NRC/State cooperation. One commenter expressed the view that "policies which aid qualified State representatives in improving their understanding of the design and operation of * * * [commercial nuclear power plants] are beneficial to all parties and should be encouraged." One commenter characterized the policy statement as "a timely reaffirmation of federal preemption in the area of nuclear safety, which properly focuses on state observation and participation in NRC meetings and inspections." One commenter expressed affirmation support for the Commission's stated position that in those instances in which inspections were conducted by State representatives, "[a]ll enforcement action will be undertaken by the NRC."

² In accordance with this agreement, State personnel have attended NRC inspector's exit meetings, shared information on environmental monitoring, participated in significant meetings

between plant management personnel and senior representatives of NRC and worked jointly with NRC on emergency response drills and exercises.

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For the most part, the industry commenters acknowledged the legitimate concerns of the States in being kept well-informed of NRC's activities with respect to the regulation of commercial nuclear power plants. The industry commenters also expressed general support for the Commission's overall goal of promoting and enhancing NRC/State cooperation. One commenter expressed the view that "policies which aid qualified State representatives in improving their understanding of the design and operation of * * * [commercial nuclear power plants] are beneficial to all parties and should be encouraged." One commenter characterized the policy statement as "a timely reaffirmation of federal preemption in the area of nuclear safety, which properly focuses on state observation and participation in NRC meetings and inspections." One commenter expressed affirmation support for the Commission's stated position that in those instances in which inspections were conducted by State representatives, "[a]ll enforcement action will be undertaken by the NRC."

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(53 FR 21983, June 13, 1988)

The industry commenters were in substantial disagreement, however, as to how this goal might best be achieved. Two commenters expressed unqualified support for the policy statement as published June 13, 1988, one stating that the policy statement correctly maintains the current balance between Federal and State authority in the field of nuclear regulation, the other urging that the Commission promulgate the policy statement in final form as soon as practicable. Two commenters considered the policy statement's six criteria for an acceptable State proposal for entrance into an NRC/State instrument of cooperation relating to nuclear power plant inspections to be reasonable and appropriate. However, one of these commenters was concerned that the policy statement does not address how the NRC will enforce its authority should a State representative exceed the scope of his/her authority under an instrument of cooperation. In order to assure continuing compliance, the commenter recommended that either the policy statement or the instrument of cooperation provide for some sort of periodic review.

Several commenters expressed contrary views. One commenter did not believe a policy of allowing State participation in routine inspection activities to be necessary or in the best interest of the NRC or its licensees. Another commenter expressed the view that legitimate concerns of States regarding the safety and operation of nuclear power plants could be addressed in the currently prescribed licensing process. However, this commenter was also of the opinion that the NRC should proceed on a case-by-case basis⁴ if it feels State input is

⁴ If the NRC should decide to proceed in this manner, the commenter recommended that the following guidelines should be followed:

The NRC should:

- consider a State's concerns regarding safety of a nuclear power plant responding, when necessary, with an inspection which would include State observers;
- provide a State with timely information regarding its concerns, providing the information is not proprietary or does not pertain to security matters;
- include State representation in public meetings with the licensees;
- obtain State assistance when such assistance would be a benefit to the NRC in its regulatory duties; and
- have complete oversight of State activities regarding nuclear safety.

The NRC should not:

- permit independent State inspection programs or reviews;
- delegate responsibility for performing NRC inspections to State representatives.

essential. The commenter also noted that the policy statement as published for comment is ambiguous and that "[t]his ambiguity can lead to a situation where a State, for whatever reason, could hinder the NRC in its regulation of nuclear power."

Most commenters endorsed the second paragraph of the policy statement which provides that the NRC will (1) continue to keep Governor-appointed State Liaison Officers routinely informed on matters of interest to States, (2) respond in a timely manner to a State's requests for information and to its recommendations concerning matters within the NRC's regulatory jurisdiction, (3) upon request, routinely inform State Liaison Officers of public meetings between NRC and its licensees and applicants in order that State representatives may attend as observers, and (4) upon request, permit State representatives to observe but not to participate actively in specific inspections and/or inspection entrance and exit meetings where State representatives are knowledgeable in radiological health and safety matters. In the opinion of the commenters, these provisions constitute both an appropriate and an adequate basis for achieving the desired communication and cooperation between the Commission and the States. Two commenters expressed a willingness to have State representatives present at public meetings with NRC licensees. These same two commenters favored giving States timely information provided the information in question did not relate to proprietary or security matters.

Viewing the observation process as a logical first step to ultimate participation in NRC inspection activities, one commenter expressed concern that State representatives should be allowed to observe NRC inspections and/or NRC inspection entrance and exit meetings solely on the approval of an NRC Regional Administrator. In the opinion of the commenter, observation by State representatives should be delayed until the State and NRC have signed a formal instrument of cooperation.

Most industry commenters, including the respective legal counsel retained by electric utilities holding NRC operating licenses, opposed, in whole or in part, those portions of the policy statement which seek to achieve the goal of NRC/State cooperation by delegating to the States any part of the Commission's authority to conduct inspections at nuclear power plants. In particular, the commenters objected to the provisions of the policy statement which relate to

State proposals to enter into instruments of cooperation for State participation in NRC inspections of commercial nuclear power plants and in NRC inspection entrance and exit meetings, and the types of inspection activities which qualified State representatives may be permitted to perform. Some of the commenters opposed any type of State inspection program, whether conducted independently or under continuing NRC oversight. Other commenters were principally concerned about those passages of the policy statement which, in their opinion, carry "the clear implication * * * that there will be occasions on which State representatives will be allowed to conduct their own inspections at nuclear generating plants 'on behalf of' the NRC, unaccompanied by NRC representatives."⁵ Two commenters who opposed independent State inspection programs indicated a willingness to accept State participation in NRC inspections as long as the State representatives were always accompanied by a qualified NRC inspector. One of these commenters suggested that the role of State representatives at an NRC inspection should be the same as that accorded NRC consultants.

The commenters who opposed any type of State inspection program, whether conducted independently or under continuing NRC oversight, strongly urged the Commission to provide specifically that no State radiological health and safety inspections of NRC-licensed commercial nuclear power reactors will be permitted, independent or otherwise. In their view, the role of State representatives should be strictly limited to observation of, or participation in, entrance and exit meetings. Noting that implementation of this aspect of the policy statement would make the regulatory process unnecessarily complicated and redundant—under the policy NRC staff would be required both to qualify State inspectors and to assume full responsibility for the manner in which State inspectors conduct any subsequent activities—the commenters based their objections on legal, policy and practical grounds.

According to these commenters, the Atomic Energy Act of 1954, as amended, gives the NRC exclusive responsibility

⁵ According to one commenter, " * * * the policy statement completely fails to establish the legal authority of State representatives to alone inspect nuclear safety activities—in the words of the policy statement, 'on behalf of the NRC.' "

for regulating the radiological and national security aspects of the construction and operation of nuclear production and utilization facilities. Therefore, under the doctrine of Federal preemption, States are without legal authority to conduct inspections of nuclear power plants for the purpose of protecting the radiological health and safety of the public. By the same token, NRC is also precluded from delegating to other persons, including States, any of its regulatory responsibilities respecting such facilities, including, among others, the responsibility of inspecting commercial nuclear power reactors. The commenters are also of the view that delegation of inspection authority to State representatives as proposed in the policy statement exceeds the scope and intent of section 274 of the Atomic Energy Act of 1954, as amended. In the opinion of these commenters, section 274i of the Act does not provide an independent legal basis for entering into agreements with States, but must be read in the context of section 274 of which it is a part. Under the provisions of section 274b, States are only authorized to enter into agreements to regulate materials, specifically, source, byproduct, special nuclear material and low-level radioactive waste. Section 274c of the Act, which reserves certain authorities to the Commission, makes clear that the responsibility for regulating nuclear power reactors from the standpoint of radiological health and safety remains with the NRC. In view of these statutory provisions, it is the considered opinion of the commenters that, under existing law, section 274i "should properly be read to permit only inspections related to * * * materials" and to allow "NRC to enter 'instruments of cooperation' only with respect to licensed activities other than commercial nuclear power reactors (e.g., materials licensees) or with respect to matters other than radiological health and safety (e.g., certain environmental matters.)" Section 274i should not be read as authorizing NRC to enter into agreements with States under which States will conduct inspections of commercial nuclear power plants for NRC.

The commenters also viewed the provisions of the policy statement inviting States to enter into instruments of cooperation with NRC for the purpose of participating in NRC inspections and inspection entrance and exit meetings as contrary to law because such arrangements constitute dual or concurrent regulation. As the legislative history of section 274 of the Atomic Energy Act of 1954, as amended, makes

clear, it was the intent of section 274 that regulatory authority either be exercised by the Federal government or by the States, but not by both.

The commenters also objected to the provisions of the NRC policy statement respecting the use of State inspectors at nuclear power plants in accordance with NRC/State instruments of cooperation on the ground that despite these arrangements such activities could have negative implications for public health and safety. According to the commenters, permitting States to participate in NRC inspections would greatly increase the likelihood of divergent Federal and State interpretations of regulatory requirements which would, in turn, create uncertainty and confusion, inject an unsettling and destabilizing element into the regulatory process and result in significant delay in the resolution of specific problems identified during an inspection. In connection with this objection, the commenters noted the parallel concerns expressed by NRC "that independent State inspection programs could direct an applicant's or licensee's attention to areas not consistent with NRC safety priorities, misinterpret NRC safety requirements, or give the perception of dual regulation." (53 FR 21981, June 13, 1988.) As an example of the practical difficulties that might be encountered, the commenters pointed to the Commission's own recent experience with its emergency planning regulations which accorded State and local governments a substantial role. According to the commenters, "history has shown that those regulations have resulted in State-imposed delays on reactor operations, and in one case, a finished power plant apparently will be torn down before it ever operates." The commenters also expressed the view that these difficulties could engender frictions which if left unresolved could defeat the avowed purpose of the Commission's policy to enhance cooperation with the States.

Claiming that the policy statement does not appear to address any clear need and that its implementation is unlikely to result in any significant benefits other than greater coordination of Federal/State activities, the commenters pointed out that arrangements for State participation in NRC inspections under instruments of cooperation would be expensive and would likely result in efficient utilization of rate payer resources. For example, NRC personnel would be required to devote time and resources to training, qualifying, managing and

communicating with State personnel and to overseeing the State's program. In addition to paying for time billed by NRC, NRC licensees would likely be called upon to provide on-site facilities and services for State personnel participating in nuclear power plant inspections comparable to those provided to NRC resident inspectors. States would be required to bear the direct costs, e.g., hiring expenses, salaries, employment benefits, of hiring and maintaining a cadre of individuals qualified to conduct inspections of commercial nuclear power plants. In the opinion of one commenter, it would be less wasteful and more cost effective to have a few NRC inspectors with appropriate training and expertise than to have many States acquire these capabilities. In this connection, the commenter questioned whether NRC would be able, in view of continuing budget constraints, to give State inspectors proper training and maintain an appropriate level of oversight of State inspectors and State inspection programs.

Several commenters criticized the policy statement because it failed to address such practical problems as how the NRC will judge the adequacy of a State inspection program and how the NRC will assure the competence of State inspectors and whether these determinations will be made by the Regions or at NRC Headquarters. In the opinion of the commenter, uniform interpretation of the policy statement could best be assured by including a detailed description of an adequate State program and specifying minimum qualifications for State inspectors.

One commenter recommended that the policy statement provide for arbitration as a method of resolving problems in those instances in which a State representative or State inspector is less than fully qualified. Another commenter requested that NRC licensees be informed whenever a State initiatives negotiations with NRC regarding an instrument of cooperation so that the licensees could participate in the process.

One commenter noted that in the case of a particular facility, it might be necessary for the Commission to deal with the concerns of several States, for example, States located within 50 miles of the ingestion pathway, instead of limiting Commission consideration to the concerns of the State within which the facility site is located. Another commenter had no objection to keeping appropriate representatives of neighboring States apprised of regulatory activities at a specific facility

but urged that the on-site presence of State personnel be limited to representatives of the State in which the facility is located.

Three commenters expressed the view that the NRC should closely monitor and periodically evaluate the implementation of whatever policy is finally adopted and any instruments of cooperation executed thereunder to assure that the program is effective, that there is no misapplication of authority, and that the best interests of the Nation are being served.

In addition, the industry commenters recommended that the policy statement be revised in the following respects:

- The policy statement should provide specifically that no State radiological health and safety inspections of NRC-licensed commercial nuclear power reactors will be permitted, independent or otherwise.
- The policy statement should strictly limit the role of State representatives to observation of, or participation in, NRC entrance and exit meetings. The additional qualifications applicable to State representatives as currently incorporated in the policy statement (e.g., that State representatives should be knowledgeable) should be retained.
- The policy statement should provide that State representatives may participate in NRC inspections only as observers, and may not alone inspect NRC-regulated activities (even if those inspections would be conducted with the cooperation of the NRC and in accordance with NRC inspection procedures).
- The policy statement should prohibit State disclosure of inspection findings both before and after release of the NRC inspection report.⁶
- The policy statement should apprise potentially affected licensees and applicants that their State is pursuing an instrument of cooperation with the NRC and provide for these licensees and applicants an opportunity to comment on drafts of instruments of cooperation during negotiations between the NRC and the State.
- The policy statement should specify how the NRC will enforce its authority should a State representative exceed the scope of his/her authority under an instrument of cooperation.
- The policy statement should provide for renegotiation of existing instruments of cooperation between the NRC and the States at the earliest opportunity, to bring the existing agreements into conformance with the policy statement.

⁶ This recommendation was based on the commenter's view that the release by a State of underlying inspection data, notes, observations and findings even after release of an NRC inspection report could be prejudicial to the NRC's inspection and enforcement process, particularly if the information released by the State appeared on its face to be inconsistent in any way with the ultimate findings of the NRC inspection report. Another commenter stated that State observers should be required not to divulge any information obtained without prior clearance by the NRC.

- The policy statement should explicitly limit any "on-site" presence of State personnel to representatives of the State in which the facility is located.

NRC Response

Introduction

As the preceding summary indicates, the commenters offered several suggestions for modifying the policy statement and expressed concerns on a variety of matters, including, among others: legal issues; the effect which implementation of the policy statement could have on NRC licensees; the use of State Liaison Officers as the preferred channel of communication between the States and NRC; the nature of State participation in NRC inspections, including the advisability or inadvisability of State participation, the qualifications of State representatives, the status to be accorded representatives of adjacent States, and the handling and use of information obtained during an NRC inspection. The commenters also expressed concerns regarding the role, if any, to be accorded applicants for or holders of NRC licenses for commercial nuclear power reactors and other nuclear production and utilization facilities during ongoing negotiations between NRC and a State regarding the terms of a NRC/State instrument of cooperation.

Legal Issues

We turn first to the commenters' legal concerns that the portions of the policy statement which provide for State participation in NRC inspections at commercial nuclear power plants and in NRC inspection entrance and exit meetings in accordance with the provisions of an NRC/State instrument of cooperation are contrary to law because such activities are precluded by the doctrine of Federal preemption and beyond the scope of section 274 of the Atomic Energy Act of 1954, as amended.

Section 161 of the Atomic Energy Act of 1954, as amended, sets forth the general powers of the Commission in licensing or regulating any of the activities authorized by the Act, including the licensing and regulation of utilization and production facilities. Section 161f (42 U.S.C. 2201(f)) which is identical to section 12(a) of the Atomic Energy Act of 1946 and has remained unchanged since February 17, 1954 when it was reenacted into public law (Pub. L. 703, 68 Stat. 949) provides:

Sec. 161. General Provisions.—In the performance of its functions the Commission is authorized to—

- f. with the consent of the agency concerned, utilize or employ the services or

personnel of any Government agency or any State or local government, or voluntary or uncompensated personnel, to perform such functions on its behalf as may appear desirable;

This provision, standing alone, gives the Commission broad discretionary authority to enter into arrangements with States respecting inspections at nuclear power plants, including arrangements pursuant to instruments of cooperation as described in the policy statement.

In 1959, at the time of the enactment of the Federal/State Amendment which added section 274 to the Atomic Energy Act of 1954, Congress clarified this authority in section 161f by providing in the first sentence of section 274i that

The Commission in carrying out its licensing and regulatory responsibilities under this Act is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. (Emphasis supplied.)

The legislative history of section 274⁷ contains no evidence that the first sentence in section 274i was intended to limit the broad scope of the Commission's authority in section 161f to those matters over which the States were authorized to assume regulatory authority in accordance with the provisions of section 274b agreements. The legislative history merely indicates that one permissible way in which the Commission may exercise its authority under section 161f is " * * to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate." For the foregoing reasons, the Commission disagrees with the conclusion of the commenters that section 274i does not provide an independent legal basis for entering into agreements with States.

The commenters' objections that the provisions of the policy statement relating to State participation in NRC inspections at commercial nuclear power plants pursuant to an NRC/State instrument of cooperation are contrary to law by reason of the doctrine of Federal preemption are equally without merit.

Federal preemption, which is based on the Supremacy Clause of the Constitution, resolves controversies which arise as a result of the conflicting demands of Federal and State laws.

⁷ For an account of the legislative history of section 274, see NUREG 0388, Final Task Force Report on the Agreement States Program, December 1977, Appendix A, especially pp. A-3-A-6.

Here there is no conflicting State law. The only document of concern is a policy statement prepared by a Federal agency which states in the clearest possible terms that it will be implemented at both the State and Federal level in strict accordance with applicable law.* Since, as the above analysis shows, the policy statement is within NRC's statutory authority, there is no preemption issue.

A related concern expressed by a State commenter was that any formal acknowledgement by a state of NRC's legal authority, as recited in the first of the six conditions enumerated in the policy statement, might be viewed as a relinquishment by a State of some part of the State's rightful authority to protect the health, welfare and environment of its citizens. It is not the purpose of the policy statement to alter the respective responsibilities of the Federal government and the States or to require the States to concede to the Federal government any areas of the legitimate State responsibility. The only purpose of the policy statement is to describe the ground rules under which representatives of States can participate in NRC inspections and related meetings, a Federal function. Accordingly, it is both reasonable and appropriate that the Commission should identify in the text of the policy statement the legal authority on which its policies and regulatory activities are based, and to ask the States to recognize that the inspections which they will be participating in are Federal, not State, inspections. As further evidence of the fact that it is not the purpose of the policy statement to encroach on the lawful exercise of State prerogatives, the Commission will continue its prior practice of including a general provision in agreements entered into with States under section 274i of the Atomic Energy Act of 1954, as amended, which states that nothing in the agreement is intended to restrict or expand the

statutory authority of either NRC or the State.

Implementation of Policy Statement— Effect on NRC Licensees; Costs

According to industry commenters, implementation of the provisions of the policy statement respecting the use of State inspectors at nuclear power plants in accordance with NRC/State instruments of cooperation is likely to have a negative effect on public health and safety. In the opinion of these commenters, permitting States to participate in NRC inspections would not only create the appearance of dual regulation but would also greatly increase the likelihood of divergent Federal and State interpretations of regulatory requirements. The resulting uncertainty and confusion would inject an unsettling and destabilizing element into the regulatory process and could significantly delay efforts to resolve specific problems identified during an inspection.

State commenters expressed contrary views. In the opinion of these commenters, implementation of the NRC policy statement would foster uniformity, strengthen Federal-State cooperation, reduce duplication of effort, encourage the development of a unified NRC/State position on matters of joint concern, avoid the perception of dual regulation and improve nuclear safety.

Based on its experience with State resident inspectors at the Trojan Nuclear Power Plant in Oregon, which has demonstrated that complementary State-Federal interaction on plant safety issues can be productive, the Commission believes that the concerns expressed by the industry commenters may be unwarranted. The Commission reiterates its commitment, as stated in the Implementation section of the policy statement, to perform a formal review of a memorandum of understanding (MOU) between NRC and a State relating to State involvement in NRC inspections

* * * not less than six months after the effective date [of the MOU] * * * to evaluate implementation of the MOU and resolve any problems identified. Final agreements will be subject to periodic reviews and may be amended or modified upon written agreement by both parties and may be terminated upon 30 days written notice by either party.

In view of this commitment, as well as the Commission's announced intent that activities undertaken to implement the policy statement shall be carried out in close cooperation with and be subject to oversight by the NRC, the Commission has concluded that these provisions in the policy statement address the concerns raised by the industry

commenters and that at this time no change in the policy statement is warranted.

State and industry commenters also expressed concerns regarding the costs of implementing the policy statement. Noting that States might experience difficulty in obtaining needed funds, one State recommended that the policy statement include suggested means of funding State inspections. Industry commenters were concerned that implementation of the policy statement would result in the assessment of higher regulatory fees.

The Commission does not intend to charge licensees additional fees for regulatory activities because those activities are conducted in accordance with the provisions of the policy statement. Nor does the Commission expect or intend any increase in regulatory costs as a result of adopting and promulgating the policy statement. In view of these circumstances, the concerns expressed by the industry commenters do not appear to be well founded.

Although requested to do so, the Commission has declined to revise the policy statement in order to address the topic of possible sources of State funds. This position is consistent with the underlying policy of the 1959 Federal-State amendment to the Atomic Energy Act of 1954, as amended, which makes no provision for the expenditure of Federal funds for the purpose of administering State regulatory programs.

Communication through State Liaison Officers

Several States objected to that portion of the policy statement which would channel all communication between NRC and a State through the State Liaison Officer on the grounds that this procedure is too restrictive. Noting the needs of various State agencies to maintain a continuing relationship and ongoing dialogue with NRC, these States recommended that the policy statement be modified to allow for more than one State contact.

The Commission is well aware of the varying interests of States in the activities of commercial nuclear power plants and of the number of different State agencies with direct responsibility for various aspects of those activities. It is precisely because this situation exists that the Commission has adopted a policy which requires that all inquiries and requests from States respecting observations and inspections at commercial nuclear power plants and all information from NRC to States respecting these matters be channeled

* For example, the policy statement affirmatively "[r]ecognizes the Federal Government, primarily NRC, as having the exclusive authority and responsibility to regulate the radiological and national security aspects of the construction and operation of nuclear production or utilization facilities, except for certain authority over air emissions granted to States by the Clean Air Act: * * * the policy statement also identifies six elements which must be included in a state proposal for an instrument of cooperation in order to assure the proposal's consistency with the provisions of section 274c of the Atomic Energy Act of 1954, as amended. Section 274c provides in part that "[n]o agreement entered into pursuant to subsection b. shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—(1) the construction and operation of any production or utilization facility. * * *

through a single point, namely the office of the State Liaison Officer. This arrangement not only assures the Commission that NRC information of interest to the States will be sent forward to those State agencies that need to know, it also assures interested State agencies that their requests and inquiries will be handled in a uniform and businesslike manner. Since the primary purpose of the policy statement is to articulate the manner in which the Commission plans to conduct its business in this area and to provide guidance to NRC Regional Offices which will assure that these matters are handled uniformly, it is neither necessary nor appropriate to modify the policy statement to elaborate further on the differing nature or wide variety of State responsibilities.

For the foregoing reasons, the Commission has made no change in the provisions of the policy statement which relate to communication through State Liaison Offices. The Commission has also concluded that the policy statement adequately reflects the complementary interests and responsibilities of the States and that no changes relating to this matter are needed.

State Attendance at and Participation in NRC Inspections

Citing the likelihood of increased complexity, confusion and uncertainty in the regulatory process and the possibility of an attendant reduction in the safety of nuclear power plants, most of the industry commenters opposed allowing State representatives to participate in NRC inspections and stated that in no event should State representatives be allowed to perform independent inspections or reviews.

As noted earlier, the Commission believes that the concerns of the industry commenters regarding a possible decrease in nuclear safety may be unwarranted. At the same time, the Commission wishes to make quite clear that the policy statement does not contemplate and should not be interpreted as authorizing States, using State radiological health and safety standards, to conduct independent health and safety inspections of commercial nuclear power plants.

As explained in the policy statement, the NRC inspections and associated entrance and exit meetings which State representatives will be permitted to attend as observers or as participants, for the purpose of assisting NRC, will be conducted under the close and continuing surveillance of the NRC and in strict accordance with Federal standards and regulations. The presence of the NRC is essential not only because

all communications with the licensee must be made through the NRC but also because the NRC is solely responsible for taking any needed enforcement action. If information relevant to an NRC enforcement matter is obtained by a State representative during an inspection and subsequently made available to the NRC, it is expected that the State representative would be invited to attend the enforcement conference. Moreover, State assistance, including testimony at any enforcement hearing, may be needed to carry out NRC's enforcement program.

A related matter concerns the role to be accorded State representatives who wish to attend or participate in entrance and exit meetings and inspections of nuclear power reactors located in adjacent States. Despite disagreements on the criteria to be used to identify adjacent States, there was a general consensus among commenters who addressed this issue that representatives from adjacent States should be permitted to attend meetings and inspections subject to the same conditions that apply to representatives from the host State.

The Commission believes that interstate cooperation should be encouraged and will endeavor to do so. After the Commission has gained some practical experience in implementing the present policy which is limited to cooperation between NRC and "host" States, i.e., States in which an NRC licensed facility is located, the Commission may reconsider the question of whether and to what extent the policy statement should be broadened to encompass cooperative arrangements between NRC and "adjacent" States.

The policy statement makes clear that State representatives must be properly qualified to undertake their assigned roles, whether as participants or observers. Although State representatives who only observe need not be as knowledgeable technically as State representatives who actively participate in inspections, they must have some general understanding of the nature of nuclear power for the observation to be meaningful. Consistent with those provisions of the policy statement which contemplate that State representatives will be qualified to perform any tasks they may be assigned, it is the expectation of the Commission that, subject to specific guidelines contained in the formal instrument of cooperation entered into between NRC and a particular State, the extent to which State representatives may be permitted to participate in an NRC inspection will be determined in each

instance by the NRC representative authorized to conduct the inspection in light of the particular qualifications of the State representative accompanying the NRC inspection team. While the Commission recognizes the importance of specifying minimum qualifications for State inspectors, as suggested by one of the commenters, it is of the opinion that this matter can best be dealt with in the context of each NRC/State instrument of cooperation when the qualifications of individuals who may be able to perform this function for the State are likely to be better known. In its present form, the policy statement provides adequate general guidance on this matter. For these same reasons, the Commission has also declined to adopt the suggestion of a State commenter to add an additional sentence concerning State inspectors to the second paragraph of the Implementation section. Accordingly, the Commission has made no changes in the policy statement in response to these comments.

Several commenters expressed the view that the policy statement should prohibit State disclosure of inspection findings after as well as before the NRC inspection report is publicly released. Commenters also expressed concern about the disclosure by State representatives of any underlying data obtained or any notes or observations made while attending or participating in an NRC inspection. The Commission is of the opinion that insofar as State representatives are apprised of this information as a result of their involvement in NRC's regulatory activities, that State representatives should be required to meet the same standards as their NRC counterparts regarding information disclosure.

Opportunity for Public Comment on NRC-State Instruments of Cooperation Relating to Inspections at Commercial Nuclear Power Plants

The Commission has given considerable thought to the suggestion of some of the industry commenters that potentially affected applicants for NRC licenses and NRC licensees should be notified that their State is pursuing an instrument of cooperation with NRC and be accorded an opportunity, during ongoing negotiations between NRC and the State, to submit public comments on the draft instrument of cooperation before it is finally agreed to by NRC and the State. The Commission recognizes that the subject matter of these instruments of cooperation is of great interest to nuclear power plant applicants and licensees, who are, of

course, the entities that will be inspected.

Consistent with Commission practice respecting other types of Federal/State agreements, any proposed agreement negotiated by NRC and a State under the provisions of this policy statement will be published in the Federal Register for public comment. At that time, licensees and other interested persons will have an opportunity to comment on the proposed Memorandum of Understanding or Subagreement before it is executed by NRC and the State in final form.

Conclusion

For the foregoing reasons and after careful consideration of the comments submitted, the Commission has concluded not to change the text of the policy statement as published for comment on June 13, 1988 (53 FR 21981). Accordingly, the Commission hereby adopts and republishes that policy statement as a final statement of policy. The Commission further declares that the final statement of policy in its entirety is effective immediately.

III. Statement of Policy

It is the NRC's policy to cooperate fully with State governments as they seek to respond to the expectations of their citizens that their health and safety be protected and that there be minimal impact on the environment as a result of activities licensed by the NRC. The NRC and the States have complementary responsibilities in protecting public health and safety and the environment. Furthermore, the NRC is committed to the full and timely disclosure of matters affecting the public and to the fair and uniform handling of all agency interactions with the States, the public, and NRC licensees.

Accordingly, the NRC will continue to keep Governor-appointed State Liaison Officers routinely informed on matters of interest to the States. The NRC will respond in a timely manner to a State's requests for information and its recommendations concerning matter within the NRC's regulatory jurisdiction. If requested, the NRC will routinely inform State Liaison Officers of public meetings between NRC and its licensees and applicants in order that State representatives may attend as observers. Additionally, at the State's request, State representatives will be able to observe specific inspections and/or inspection entrance and exit meetings where State representatives are knowledgeable in radiological health and safety matters.

The Commission recognizes that the involvement of qualified State

representatives in NRC radiological health and safety programs has the potential for providing additional safety benefit. Therefore, the NRC will consider State proposals to enter into instruments of cooperation for State participation in inspections and inspection entrance and exit meetings. State participation in NRC programs would allow qualified State representatives, either individually or as a member of a team, to conduct specific inspection activities in accordance with NRC standards, regulations, and procedures in close cooperation with the NRC. State activities will normally be conducted under the oversight of an authorized NRC representative with the degree of oversight dependent upon the activity involved. In the proposal to enter into an instrument of cooperation, the State must identify those activities for which cooperation with the NRC is desired. The State must propose a program that: (1) Recognizes the Federal Government, primarily NRC, as having the exclusive authority and responsibility to regulate the radiological and national security aspects of the construction and operation of nuclear production or utilization facilities, except for certain authority over air emissions granted to States by the Clean Air Act; (2) is in accordance with Federal standards and regulations; (3) specifies minimum education, experience, training, and qualifications requirements for State representatives which are patterned after those of NRC inspectors; (4) contains provisions for the findings of State representatives to be transmitted to NRC for disposition; (5) would not impose an undue burden on the NRC and its licensees and applicants; and (6) abides by NRC protocol not to publicly disclose inspection findings prior to the release of the NRC inspection report.

Consistent with section 274c of the Act, the NRC will not consider State proposals for instruments of cooperation that do not include the elements listed above, which are designed to ensure close cooperation and consistency with the NRC inspection program. As a practical matter, the NRC is concerned that independent State inspection programs could direct an applicant's or licensee's attention to areas not consistent with NRC safety priorities, misinterpret NRC safety requirements, or give the perception of dual regulation. For purposes of this policy statement, an independent State inspection program is one in which State representatives would conduct inspections and assess NRC-regulated activities on a State's own initiative and authority without

close cooperation with, and oversight by, an authorized NRC representative.

Instruments of cooperation between the NRC and the States, approved prior to the date of this policy statement will continue to be honored by the NRC. The NRC strongly encourages those States holding these agreements to consider modifying them, if necessary, to bring them into conformance with the provisions of this policy statement.

IV. Implementation

As provided in the policy statement the NRC will routinely keep State Liaison Officers informed on matters of interest to the States. In general, all State requests should come from the State Liaison Officer to the appropriate NRC Regional Office. The NRC will make every effort to respond as fully as possible to all requests from States for information on matters concerning nuclear production or utilization facility safety within 30 days. The NRC will work to achieve a timely response to State recommendations relating to the safe operation of nuclear production or utilization facilities. State representatives are free to attend as observers any public meeting between the NRC and its applicant and licensees. The appropriate Regional Office will routinely inform State Liaison Officers of the scheduling of public meetings upon request. State requests to observe inspections and/or inspection entrance and exit meetings conducted by the NRC require the approval of the appropriate Regional Administrator.

NRC will consider State participation in inspections and the inspection entrance and exit meetings, where the State-proposed agreement identifies the specific inspections they wish to assist NRC with an provides a program containing those elements as described in the policy statement. NRC may develop inspection plans along with qualified State representatives using applicable procedures in the NRC Inspection Manual. Qualified State representatives may be permitted to perform inspections in cooperation with, and on behalf of, the NRC under the oversight of an authorized NRC representative. The degree of oversight provided would depend on the activity. For instance, State representatives may be accompanied by an NRC representative initially, in order to assess the State inspectors' preparedness to conduct the inspection individually. Other activities may be conducted as a team with NRC taking the lead. All enforcement action will be undertaken by the NRC.

The Commission will decide policy matters related to agreements proposed under this policy statement. Once the Commission has decided the policy on a specific type of agreement, similar State-proposed agreements may be approved, consistent with Commission policy, by the Executive Director for Operations in coordination with the Office of Governmental and Public Affairs. A State-proposed instrument of cooperation will be documented in a formal MOU signed by NRC and the State.

Once the NRC has decided to enter into an MOU for State involvement in NRC inspections, a formal review, not less than six months after the effective date, will be performed by the NRC to evaluate implementation of the MOU and resolve any problems identified. Final agreements will be subject to periodic reviews and may be amended or modified upon written agreement by both parties and may be terminated upon 30 days written notice by either party.

Additionally, once State involvement in NRC activities at a nuclear production or utilization facility is approved by the NRC, the State is responsible for meeting all requirements of an NRC licensee and applicant related to personal safety and unescorted access of State representatives at the site.

Dated at Rockville, Maryland, this 15th day of February 1989.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission,

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