Comment Resolution Document

Summary of Comments Received on
SA-113, Placing an Agreement State Program on Probation

I. Sent to the Agreement States, Non-Agreement States, and State Liaison Officers for Comment: STC-16-052, July 6, 2016 and STC-16-055, July 14, 2016

Comments Received:
a. Organization of Agreement States Letter dated September 16, 2016
b. State of New Jersey e-mail dated July 18, 2016
c. State of Illinois e-mail dated July 13, 2016
d. Commonwealth of Virginia e-mail dated August 8, 2016

Organization of Agreement States (OAS):

Comment 1: Recognizing that the reason for placing an Agreement State (AS) Program on probation may come about from a variety of sources (i.e., IMPEP reviews, special reviews, or other interactions with the AS), the most common avenue will be the results of an IMPEP review. Considering this, the Management Review Board (MRB) routinely meets approximately three months after the review. Other than Section V.A.3., which states that if the MRB determines probationary status is warranted, a meeting with senior State officials may be scheduled prior to declaring probationary status. SA-113 is silent on NRC's requirement to give early notification to an Agreement State program if probation is being considered. The OAS recommends that NRC add the following responsibility of the Regional State Agreements Officer (RSAO) in Section IV.D.:

"Communicate and coordinate early in the process with AS staff on the potential for probation considerations by the MRB."

Response: Comment noted. Probation is a Commission level decision made only after a recommendation from the MRB Chair. If the MRB is considering Probation, those deliberations will take place in a public forum at the MRB and the IMPEP report will reflect a recommendation of probation. The state is invited to monitor the MRB discussions and will be fully aware of the possibility of being placed on Probation. There is no “early” indication that a state will be place on Probation (i.e. a meeting prior to the MRB with decision makers in a private forum.) MSTR staff in coordination with the RSAO will be in contact with the state program if a recommendation for probation is forwarded to the Commission.

Comment 2: One of the criteria for being placed on probation (p. 7/13) is "When a program has repeatedly been late in adopting required compatibility elements and increased oversight by NRC would yield improvements." The OAS recommends that the language be changed from "late in adopting" to "fails to adopt". Understand that states usually cannot control timeliness issues in adopting regulations. If a state is regularly late on adopting rules, as long as it has other means of ensuring compatibility with NRC regulations (such as license conditions), and there is no significant health and safety impact, then they should be not be penalized. Alternately, the OAS recommends that the third criteria be changed to "When a program has repeatedly been late in adopting required compatibility elements which have led to significant decrease in the state's ability to protect public health and safety, and increased oversight by NRC would yield improvements."

Continuing on this topic, the OAS believes that it is highly unlikely that any amount of NRC oversight will improve or change a state's rulemaking process. Instead of oversight, the NRC should at this point write letters to the rulemaking bodies and officials to request support and efficiency in getting these essential rules passed. This alternative approach would not require probationary status, as probation would likely not help as much as a letter from the NRC to a high government official on the seriousness of the situation.

Response: Comment noted. The phrase “fails to adopt” implies a failure or willfulness of the program not to adopt. We believe the phrase “late in adopting” more accurately reflects the program’s circumstances since there is no willful aspect to it. We recognize there are many factors which could affect adoption of regs including staffing vacancies, funding cuts, hiring freeze, and other adverse factors outside the control of the program. Probation can be beneficial in assisting state officials focus on remediating the program’s issues by providing the program the assets (i.e. funding, staffing, etc.) it needs to be successful. In the past, the Chairman has written letters of support to elected officials. In one case, the letter assisted a program in obtaining state permission to hire staff.

State of New Jersey:

Comment 1: Staff of the NJ DEP has reviewed the subject procedure and has no comments. Thank you for the opportunity to comment.

Response: Comment Noted.

State of Illinois:

Comment 1: Is there a mark-up version of this new draft?

Response: Comment Noted. Yes, a redline strikethrough version will be created and will include in the ADAMS package ML# once the original version is approved.

Commonwealth of Virginia:

Comment 1: Virginia's Office of Radiological Health agrees with NMSS Procedure SA-113 as written. Thank you for the opportunity to comment.

Response: Comment Noted.

II. Sent to the U.S. Nuclear Regulatory Commission Offices for Comment by Memorandum dated July 6, 2016

Comments Received:

a. U.S. Regulatory Commission, HQ, NMSS, MSTR hardcopy dated May 9, 2016
b. U.S. Regulatory Commission, Region I, Division of Nuclear Materials Safety; email dated
c. U.S. Regulatory Commission, Region III, Division of Nuclear Materials Safety; email dated July 14, 2016

U.S. Regulatory Commission, HQ, NMSS, MSTR; hardcopy dated May 9, 2016

Comment 1: Page 3 of 9 Section B; "shouldn't this be section A?"

Response: Comment noted. The roles and responsibilities section starts with groups then individual titles as is our format.

Comment 2: Page 4 of 9 Section 6e. "Appendix b sample is for placing a program on probation not for taking a program off.

Response: Comment incorporated. The reference to Appendix B has been deleted in this list but the reference to the Federal Register noticed is retained.

Comment 3: Page 6 of 9 step C.1.b.; "Which managers (NRC or agreement states)?"

Response: Comment incorporated. Both types of managers are spelled out here.

Comment 4: Page 7 of 9 section 4a; When does the clock start for the one year start? Is it the date of on-site review that results in probation, or the date of the MRB….or the date of the Commission decision?

Response: Comment Noted. The one year review will be conducted approximately one year from the previous on-site IMPEP review.

Comment 5: Page 7 of 9 Section 3b. "If getting on probation is a recommendation to the EDO, why is this a recommendation to the Commission? Reasoning not clear."

Response: Comment incorporated. Probation is a Commission level decision made only after a recommendation from the MRB Chair. We have decided not to change that level of decision making but instead pursue streamlining our internal administrative processes in order to make the process more nimble.

Comment 6: Page 8 of 9 section 4b.iii.; "Process not clear why a Commission paper is required just to get recommendations from MRB to EDO."

Response: Comment incorporated. The language has been clarified to delete any reference to a Commission paper and refer to the actual procedure for additional guidance.

Comment 7: Appendix B page 2 top paragraph; "Commission or EDO"

Response: Comment Incorporated. Wording changed to 'Commission'

U.S. Regulatory Commission, HQ, Office of General Counsel; email dated July 13, 2016 and July 28, 2016

Comment 1: One of the purposes of this revision is to the procedure is to change who decides whether to put a state on probation from the Commission to the EDO. Has a formal delegation from the Commission to the EDO been requested?

Response: Comment noted. Probation is a Commission level decision. We are no longer attempting to change the level of decision making from the Commission to the EDO. In order to gain efficiencies, we will streamline our internal administrative process.

Comment 2: Is MD 5.6 being updated? The delegation from the Commission to the EDO should be reflected in the MD, not just the SA procedure.

Response: Comment incorporated. As explained above, no change to the current decision making level will be made. MD 5.6 will be revised according to the Commission's decision of the combined Policy Statement. The tentative month/year for revision of MD 5.6 is June 2018.

Comment 3: Third, does the timeline for finalizing the Agreement State Policy Statement (published for comment in June) line-up with the timeline for updates to MD 5.6 and this procedure?

Response: There isn't a timeliness alignment issue with MD 5.6 and the Policy Statement. MD 5.6 page 92 Section titled "Guidance for MRB Determinations for Agreement State Programs" doesn't direct who takes the action towards an Agreement State Program under Monitoring, Heightened Oversight, Probation, Suspension, or Termination. It simply points to the NMSS procedure which directs the action. For example, under Probation it points to SA-113 that provides all the action steps to be taken.

Comment 4: OGC recommended that an explicit delegation of authority from the Commission to the EDO to place an Agreement State on probation should be obtained. One benefit of an explicit delegation is that if OIG ever does an audit of the Agreement State Program or IMPEP process, the OIG will ask about delegations. It's easier to produce the delegation than argue that you didn't needed it. It has occurred to me that there may be two potential ways to get a clear delegation without sending up a separate SECY, if the timing works. The update to MD 5.6 might provide a vehicle for this explicit delegation. Another avenue might be when the revised Agreement State policy statement goes to the Commission

Response: Comment Incorporated. Probation is a Commission level decision. We are no longer attempting to change the level of decision making from the Commission to the EDO. In order to gain efficiencies, we will streamline our internal administrative process.

Comment 5: If an explicit delegation is not obtained in some way, I strongly encourage staff to

inform the Commission in writing of the planned change to the staff's longstanding practice. The Commission reviewed the original version of SA-113. As recently as 2013, staff sent a SECY seeking Commission approval to put Georgia on probation. In 2014, staff sent the Commission SECY seeking Commission approval to end Georgia's probation.

Response: Comment Noted. Probation is a Commission level decision and will remain so.

U.S. Regulatory Commission, Region III, Division of Nuclear Materials Safety; email dated July 14, 2016

Comment 1: We concur with the major change, allowing the EDO, after consultation with the Commission, to initiate or lift probation for an Agreement State. This will prove to be much more responsive than the current process requiring Commission Papers.

Response: Comment Noted. We have decided to pursue other methods for speeding up the probationary process rather than changing the decision process from the Commission to the EDO.

Comment 2: Section III Background; "We suggest that a paragraph be added to highlight that probation is a formal process, requiring Commission approval, unlike other processes. Explain that this process involves communication between the EDO and the governor, outreach to Congress, and public notice."

Response: Comment incorporated.

Comment 3: Typographical changes; Section IV.E.1.c 'Committees' should not be capitalized

Response: Comment incorporated.

Comment 4: Typographical changes; Section IV.E.1.e 'Notice' should not be italicized, Comma needed at the end

Response: Comment incorporated.

Comment 5: Typographical changes; Section IV.E.3 Period needed at the end

Response: Comment incorporated.

Comment 6: Typographical changes; Section IV.E.6.c ‘Committees’ should not be capitalized

Response: Comment incorporated.

Comment 7: Typographical changes; Section IV.E.6.e Comma needed at the end

Response: Comment incorporated.

Comment 8: Typographical changes; Section IV.E. 7 ‘Appropriate’ should not be capitalized

Response: Comment incorporated.

Comment 9: Typographical changes; Section IV.E.8 Add ‘the’ before ‘Agreement’

Response: Comment incorporated.

Comment 10: Typographical changes; Section V.A.4; Add ‘The’ before ‘EDO’

Response: Comment incorporated.

Comment 11: Typographical changes; Section V.C.4.a; Add the title of SA-119

Response: Comment incorporated.

Comment Resolution
SA-113, *Placing an Agreement State Program on Probation*

Comment 12: Typographical changes; Section V.F.3; Titles of SA-114 and SA-115 are not needed here (stated earlier)

Response: Comment not incorporated. Although not needed editorially, the titles were I included for clarity.

Comment 13: Typographical Errors; Section V.F.5; The reference should be to IV.E.6 not V.C.1-4

Response: Comment incorporated.

Comment 14: Typographical Errors; Section V.F.6; Titles of SA-114 and SA-115 are not needed here (stated earlier)

Response: Comment not incorporated.

Comment 15: Typographical Errors; Section VI; Change “APPENDIXES” to “APPENDICES”

Response: Comment Incorporated.